

REDACTED

PROPRIETARY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs and for investigation of BellSouth's promotional pricing and marketing practices, by Florida Digital Network, Inc.) Docket No. 020119-TP

In Re: Petition of for expedited review and cancellation of BellSouth Telecommunications Inc.'s Key Customer Promotional Tariffs by the Florida Competitive Carriers Association) Docket No. 020578-TP

In Re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer Promotional Tariffs) Docket No. 021252-TP Filed: April 1, 2003

POST-HEARING BRIEF OF BELL SOUTH TELECOMMUNICATIONS, INC.

I. INTRODUCTION

Florida Digital Network, Inc. ("FDN") initiated this docket when it filed a petition in February 2002 objecting to BellSouth Telecommunications, Inc.'s ("BellSouth") Key Customer promotional offering. FDN contends that BellSouth's promotional offerings are discriminatory and that it and other alternative local exchange carriers ("ALECs") will suffer "irreparable competitive harm" with Key Customer in place. Data reflected in this Commission's Year 2002 Report on Competition ("Report;" Hearing Exh. 8) demonstrates otherwise, however, as the overall ALEC market share and numbers of lines served by ALECs have increased from 2001 to 2002

1 FDN initially objected to BellSouth's Key Customer promotional tariff filed in January 2002, which objection was consolidated with a petition of the Florida Competitive Carriers Association ("FCCA") for review of BellSouth's Key Customer promotional tariff filed in June 2002, and was also consolidated with FDN's petition for review of BellSouth's Key Customer promotional tariff filed in December 2002. All three promotional tariffs will be interchangeably referred to herein as "Key Customer" or "promotions."

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while the numbers of lines served by incumbent local exchange carriers have decreased over the same timeframe.

This Commission is now faced with a matter of first impression and with a matter of vital importance to competition policy – does the Florida regulatory framework allow BellSouth to continue to respond to competitive pressure by meeting the offerings of ALECs with promotional tariffs that benefit small business customers, or will BellSouth be restricted in a manner that benefits an ALEC instead of Florida small business customers? This Commission should allow BellSouth the regulatory freedom to squarely meet competitive challenges and should reject any proposed restrictions on competition, which, although framed as benefiting the Florida public, would in reality serve the interests of FDN alone.

II. FACTUAL BACKGROUND

FDN’S Petition

On February 14, 2002, FDN filed its Petition for Expedited Review and Cancellation of BellSouth’s Key Customer Promotional tariffs (“Petition”). In its Petition, FDN claimed that it suffered and would continue to suffer irreparable competitive harm as a result of Key Customer. FDN included the affidavit of Michael P. Gallagher, its Chief Executive Officer, to support its contentions. According to Mr. Gallagher, BellSouth’s offerings impaired FDN’s “ability to compete to the point of jeopardizing [FDN’s] viability as an on-going business concern.” Gallagher Affidavit, Petition - Exh. H, ¶ 6. FDN also claimed that it “has and will continue to lose market share due to” Key Customer. Petition, ¶ 31.

After FDN filed its petition, several other ALECs intervened; including, US LEC of Florida, Inc. (“US LEC”), XO Florida, Inc. (“XO”), Time Warner Telecom of Florida, LP (“Time Warner”), ACCESS Integrated Networks, Inc. (“AIN”), ITC^DeltaCom Communications, Inc. (“DeltaCom”),

the FCCA,² and Mpower Communications Corporation. The intervenors generally alleged that as BellSouth competitors each had a substantial interest in this proceeding; US LEC, Time Warner, and XO specifically alleged that Key Customer impaired their ability to provide competitive telecommunications services.

Procedural Background

The Commission staff addressed the substantive matters raised in FDN's Petition in June 2002 and made a recommendation concerning: (1) whether the January 2002 Key Customer tariff filing should be cancelled; and (2) whether any restrictions should be placed on BellSouth's marketing practices. The Commission considered Staff's recommendation at its June 18, 2002 agenda conference. At that time, representatives from FDN, AIN, the FCCA, and Network Telephone Corporation made presentations in which each party voiced various concerns with Key Customer.

On June 28, 2002, this Commission issued Order No. PSC-02-0875-PAA-TP ("Key Customer Order"). In the Key Customer Order, the Commission addressed many of the issues raised by the ALECs. In relevant part, the Commission: (1) ruled that BellSouth's geographic targeting and volume and term discounts are permissible under Section 364.051(5)(a); (2) ruled that neither Key Customer nor BellSouth's unrelated tariff rate increases are unduly discriminatory; (3) found that the termination liability provisions in Key Customer tariff are not unduly discriminatory; (4) found that the rates for services purchased under Key Customer are compensatory; (5) rejected the notion that the rates for the 2002 Key Customer program are less than wholesale ALEC costs; (6) acknowledged BellSouth's region-wide, 10-day waiting period after conversion to an ALEC before initiating winback activities, but rejected the imposition of an arbitrary waiting period; (7)

² In response to discovery, the FCCA indicated that its members consist of the following companies: AIN, AT&T Communications of the Southern States, Inc., BTI Corporation, e.spire Communications, Inc., ICG Telecom Group, ITC^Deltacom, KMC Telecom, MCI Worldcom, Mpower, Network Telephone Corporation, NuVox Communications, Inc., Supra Telecom, and Z-Tel Communications, Inc.

prohibited the inclusion of marketing information in final bills to customers that have switched service; and (8) prohibited BellSouth's wholesale division from sharing information with its retail division. *See* Key Customer Order, pp. 7, 9, 10, 13, 15, 21-22.

After the Commission issued its Key Customer Order, a procedural order was issued in September 2002. In October 2002, BellSouth filed discovery requests on all parties, seeking information necessary to present its defenses. Among other things, BellSouth sought information relating to line growth in the wire centers eligible for Key Customer. Shortly after BellSouth filed its discovery requests, an ALEC exodus began. Mpower withdrew on October 22, 2002, followed by AIN on October 30, 2002, and DeltaCom on November 5, 2002.³ The FCCA withdrew on January 31, 2003, and finally, US LEC, XO, and Time Warner withdrew on February 17, 2003. Thus, despite the initial protests to Key Customer, by the time of the hearing only FDN maintained formal opposition to BellSouth's promotions.

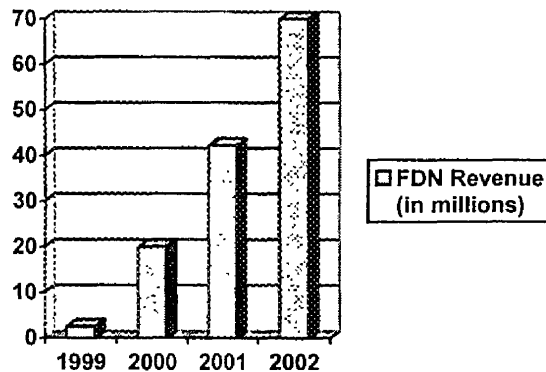
FDN's opposition to Key Customer, as articulated in its prehearing statement, is somewhat vague. FDN claims that BellSouth's promotions are unfair, anticompetitive, and discriminatory because, in FDN's view, BellSouth uses market power to subdue competition. *See* FDN's Prehearing Statement, Summary of Basic Position, pp. 2-3. FDN's proposed solution is that BellSouth should be required to offer discounts "across-the-board, to all BellSouth customers." *Id.* FDN repeats its basic position that the Commission should compare BellSouth's market position to that of individual ALECs in response to many of the issues, without defining precisely how such consideration would occur. To the extent that FDN believes, however, that the Commission should consider BellSouth's "power and position relative to that of individual ALECs," such a comparison would necessitate a review of FDN's history. This review demonstrates that despite FDN's

³ On January 18, 2003, this Commission issued Order No. PSC-03-0148-PAA-TP ("Second Key Customer Order"), allowing BellSouth's Key Customer promotional tariff filed in December 2002 to remain in effect.

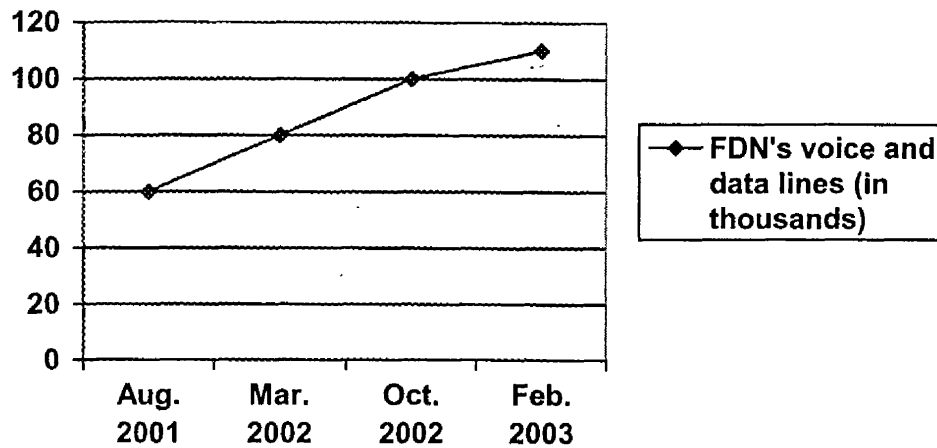
complaints about the alleged problems that BellSouth's competition has caused it, FDN has proposed and experienced line growth during the time that BellSouth offered Key Customer, or similar promotional offerings.

FDN's History

FDN began offering services in Florida in April 1999, approximately one year *after* BellSouth first began offering any form of Key Customer promotion. (Tr. at 103). By the end of 1999, FDN had \$2.5 million in revenue. (*Id.*). By the end of 2000, FDN's revenue had grown to \$20 million. (Tr. at 103-104). From 2000 to 2001, FDN continued to experience revenue growth, reaching \$42.2 million in revenue by the end of 2001. (Tr. at 104). In October 2002, FDN announced that it was on track to exceed \$70 million in revenue for the year. (Tr. at 105). The following graph illustrates FDN's revenue growth:



FDN's lines have also grown over time. In August 2001, FDN had 60,000 voice and data lines in Florida. (Tr. at 105). By March 2002, FDN was serving 80,000 voice and data customers. (Tr. at 105). By the end of October 2002, FDN announced that it had exceeded 100,000 voice and data lines. (Tr. at 106). In early February 2003, FDN had reached 110,000 voice and data lines. (Tr. at 111-112; Exh. 10). FDN's line growth is depicted below:



In addition to overall revenue and line growth information, more granular data likewise demonstrates that any FDN contention of “irreparable harm” is simply without basis. For example, in January 2002 – the first month Key Customer offering was in effect -- FDN gained 1,695 customers representing approximating 6,609 lines. (Hearing Exh. 5 - FDN’s Response to Staff’s Interrogatory 4). During the same timeframe, FDN lost 228 customers representing approximately 770 lines.⁴ (*Id.*; FDN’s Response to Staff’s Interrogatory 2). FDN’s net line growth during this period equals 1,467 customers with 5,839 lines; this growth negates any claim of irreparable harm.

More recent line growth also belies FDN’s concern. As of July 31, 2002, FDN had a total of [REDACTED] facility-based access lines in BellSouth territory, which grew to a total of [REDACTED] facility-based access lines in BellSouth territory as of February 7, 2003. (Exh. 22). This is an overall gain of [REDACTED] facility-based access lines. (*Id.*). Over the course of an approximate six-month time period, FDN thus experienced a [REDACTED] growth rate in BellSouth territory. (*Id.*). Significantly, FDN experienced this growth in the geographic areas in which Key Customer was and is available. FDN

⁴ FDN’s initial discovery response stated its total line loss was 624; FDN later modified this number to 770.

concedes that it has not lost lines overall; instead, its concern is that its line growth is less rapid. (Tr. at 110, 112).

A close review of FDN's line information demonstrates also that in the areas of Florida that FDN serves, the numbers of ALEC business providers and the percentage of business lines served by ALECs grew from 2001 to 2002. (Exh. 8). For example, FDN provides service in Cocoa Beach (referred to by FDN as "Space Coast"), Daytona, Fort Lauderdale, Jacksonville, Miami, Orlando, and West Palm Beach. Data from Appendices B and C of the Report, which data has been consolidated into the following table, illustrates the growth trends of ALECs in these specific geographic areas:

| Florida Public Service Com'n Exchange Name | Total ALEC Business Providers – 2001 | Total ALEC Business Providers – 2002 | % of Business Access Lines – 2001 | % of Business Access Lines – 2002 |
|--|--------------------------------------|--------------------------------------|-----------------------------------|-----------------------------------|
| Cocoa Beach | 7 | 13 | > 0 to 1% | 20% to 25% |
| Daytona Beach | 7 | 19 | 15% to 20% | 25% to 30% |
| Ft. Lauderdale | 18 | 31 | 15% to 20% | 35% to 40% |
| Jacksonville | 20 | 32 | 20% to 25% | 35% to 40% |
| Miami | 26 | 38 | 15% to 20% | 40% to 45% |
| Orlando | 28 | 36 | 25% to 30% | 45% to 50% |
| West Palm Beach | 15 | 24 | 5% to 10% | 25% to 30% |

As the Report demonstrates, it is clear that overall ALEC growth from 2001 to 2002 grew significantly in the precise geographic areas in which FDN provides service.⁵

BellSouth's Promotional Offerings

In 2001 and 2002 BellSouth offered customers various promotions, including the Key Customer promotional tariffs at issue here. (Tr. at 318-319). Key Customer is a volume and term promotion that provides small business customers located in certain geographic areas with rewards, or discounts, based on tariff rates for services so long as the customer commits to purchasing

⁵ This contradicts any FDN claim that it loses the majority of customers to BellSouth.

services from BellSouth for a specified time. (Exh. 20). The current rewards range from 10% to 20% of total billed revenue, plus a 50% to 100% hunting reward for a customer that elects a 24 month or 36 month contract. (*Id.*) The January 2002 Key Customer promotional tariff offered discounts of 10% to 25%, also with a 50% to 100% hunting discount for customers electing 18 month or 36 month contracts. (*Id.*) Key Customer includes reasonable termination liability provisions. (Tr. at 300). Termination liability under Key Customer is only imposed when a customer disconnects all its services with BellSouth. (Tr. at 302-303).

BellSouth has offered promotions similar to Key Customer for several years. (Tr. at 318). For example, prior Key Customer promotions provided discounts ranging from 5% to 16% of total billed revenue when a customer elected a 12-month to 36-month contract. (Exh. 11). Likewise, BellSouth's Full Circle Program, offered from January 2001 to July 2001, provided discounts ranging from 10% to 20% for contracts from 18 to 36 months. (Exh. 11).

BellSouth's Key Customer offering is a direct response to the increased competition in Florida. (Tr. at 158). As a result of that competition, BellSouth has lost a significant share of the small business market to ALECs, particularly in the wire centers in which Key Customer is available. (Tr. at 319). Data obtained from BellSouth's retail records demonstrates that BellSouth's small business access lines have decreased from approximately 90% at the end of 1999 to approximately 71.5% in September 2002. (Tr. at 395). This is consistent with this Commission's findings, which estimated that ALECs served 33.1% of the business market in BellSouth territory as of June 30, 2002. (Exh. 8, p. 22). Likewise, this Commission found that ALECs had made substantial gains in business access lines from June 2001 to June 2002, gaining 10% market share (from 16% to 26% in a one year period). (*Id.*, p. 24). BellSouth estimates that it loses between

0.3% and 0.4% of the small business market monthly, which equates to roughly 3.6% to 4.8% annually. (Tr. at 396).⁶

Key Customer, and promotional offerings generally, are an appropriate response to ALEC competition in Florida. (Tr. at 158). ALECs in Florida offer prices that undercut BellSouth's standard tariff rates by at least 20% to 30% and such offers are typically extended to customers served in the geographic areas eligible for Key Customer. (Tr. at 320). FDN acknowledges that its primary strategy is to compete against BellSouth by offering rates that are 20 to 40 percent lower than BellSouth's rates. (Tr. at 77-78). Other ALECs routinely offer free hunting, rates up to 40% lower than BellSouth's tariff rates, and term contracts. (Tr. at 334-335; *also* Exhs. 20 and 21). BellSouth is simply trying to compete with these ALECs. From a competition policy perspective, Key Customer is both proconsumer and procompetitive. (Tr. at 408).

Not only is Key Customer consistent with competition policy, the rates for Key Customer clearly exceed BellSouth's applicable costs. (Tr. at 359). BellSouth conducted an extensive analysis, which evaluated the typical business service line, the subscriber line charge, the rate elements producing 99.9% of the revenue from retail customers, and the typical customer configurations in concluding the rates for Key Customer exceed the associated costs. (Tr. at 360-361 *and* 388-391). BellSouth also updated this analysis to take into account any changes resulting from this Commission's Order No. PSC-02-1311-FOF-TP in Docket No. 990649, which analysis also demonstrated Key Customer exceeds applicable costs. (Tr. at 378-379; Exhs. 24 and 25). Because Key Customer recovers BellSouth's costs and is a direct response to ALEC competition, this Commission should affirm the findings and conclusions from its prior Key Customer Order and should continue to allow BellSouth to respond to competition with promotional offerings.

⁶ FDN may claim Exh. 27 shows BellSouth has gained more lines through winback efforts than it has lost due to competition. Any such claim disregards BellSouth's overall market share loss and disregards also that from 2001 to 2002, ALECs generally experienced line growth and ILECs generally experienced line loss. During this time period when ALECs gained lines, the entire industry lost lines overall. (*See* Exh. 8, p.3).

III. ISSUES AND POSITIONS

Issue A: What is the Commission's jurisdiction in this matter?

SUMMARY OF BELL SOUTH'S POSITION

*** The Commission has jurisdiction to review tariff filings for compliance with Florida law. ***

DISCUSSION

There is no dispute between the parties that this Commission has the regulatory authority to review the promotional offerings at issue here. (*See* Order No. PSC-03-0065-PHO-TP (“Prehearing Order”), Jan. 8, 2003, p. 10). Instead, the dispute centers on how such authority should be exercised. FDN contends this Commission should either stop or severely restrict BellSouth’s promotional offerings in a manner that would ultimately benefit FDN (and other ALECs), rather than competition. In contrast, BellSouth asks that it be allowed to continue to respond to competition by having the regulatory flexibility to offer promotions that cover its costs, to offer targeted promotions that meet competitive offers of ALECs, and to offer targeted promotions to similarly situated customers (such as customers that are served in geographic areas subject to more intense competition, which customers are not similarly situated to customers located in geographic areas that are not subject to competition).

ISSUE 1: How should Section 364.01, Florida Statutes, be interpreted in evaluating a BellSouth promotional tariff for compliance with Chapter 364, Florida Statutes?

SUMMARY OF BELL SOUTH'S POSITION

*** Section 364.01 gives guidance to the Commission as to how to exercise its existing jurisdiction. This guidance focuses on promoting competition, which is what BellSouth’s promotions have done. BellSouth has been offering promotions for years, during which time ALECs have gained over 33% of the business lines within BellSouth’s territory. ***

DISCUSSION

Section 364.01 sets forth the powers of this Commission. This Section includes, in relevant part, the following legislative directives that require this Commission to exercise its jurisdiction to:

- Encourage competition through flexible regulatory treatment among providers of telecommunications services in order to ensure the availability of the widest possible range of consumer choice (See Section 364.01 (4)(b); Tr. at 169).
- Encourage all providers of telecommunications services to introduce new or experimental telecommunications services free of unnecessary regulatory restraints. (See Section 364.01 (4)(e)).
- Eliminate any rules and/or regulations which will delay or impair the transition to competition. (See Section 364.01 (4)(f)).
- Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint. (See Section 364.01 (4)(g); Tr. at 169).

In considering how to apply the principles of Chapter 364.01, Chairman Jaber framed the issue as follows: “does the tariff, the promotional tariff create an environment that doesn’t let competition occur in the local market. That’s the test I’ve used for myself, is that tariff prohibiting the ALECs to compete adequately in the local market.” (Tr. June 18, 2002, Agenda Conference, Item No. 11 at 119). Stated succinctly, “is that tariff prohibiting the ALECs to compete adequately in the local market.” (*Id.*). Chairman Jaber’s articulation appropriately focuses on how, if at all, a promotional tariff impacts competition.

FDN apparently agrees that this Commission’s evaluation must focus on “the Legislature’s overriding intent to promote and preserve competition for all telecommunications customers over the long term, not to benefit just some over the short term to the detriment of the larger goal.” (Prehearing Order, p. 11). Nonetheless, FDN’s proposed solutions – limit the terms, discounts, and length of promotions, for example – would have an immediate negative impact on telecommunications customers that would be denied the benefits of such promotions. (Tr. at 170).

Moreover, without the pressure of Key Customer, ALECs will be insulated from competition. (*Id.*). Rather than impose arbitrary, capricious, or discriminatory regulation on BellSouth alone, which would impede competition, this Commission should acknowledge that ALECs freely compete in Florida with Key Customer in place.

ISSUE 2: What criteria, if any, should be established to determine whether the pricing of a BellSouth promotional tariff offering is unfair, anticompetitive, or discriminatory?

- i) Pursuant to the cost standard identified in Sections 364.051(5) and 364.3381, Florida Statutes.
- ii) Pursuant to any other provisions of Chapter 364, Florida Statutes.
- iii) How should the appropriate criteria identified in Issues 2(i) and 2(ii) be applied to a tariff under which varying customer configurations are possible?
- iv) Is the BellSouth Key Customer tariff filing (Tariff Number T-020035) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to Issues 2(i), 2(ii) and 2(iii)?
- v) Is the BellSouth Key Customer tariff filing (Tariff Number T-020595 or a subsequent tariff filing that extends the expiration date thereof) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to Issues 2(i), 2(ii) and 2(iii)?

SUMMARY OF BELLSOUTH'S POSITION

*** The criteria set forth in the Florida Statutes are sufficient.

- i) Section 364.3381 does not apply to price regulated companies like BellSouth thus no criteria other than contained in Section 364.051(5) is necessary. Key Customer complies with Section 364.051(5). Notwithstanding that Section 364.3381 does not apply to BellSouth, Key Customer complies also with Section 364.3381.
- ii) No other criteria is necessary or appropriate.
- iii) Key Customer clearly complies with the criteria set forth in the Florida statutes when: (a) after applying the deepest discounts, the rates cover the relevant costs of each service; or (b) BellSouth is meeting competitive offerings.
- iv) No.

v) No. ***

DISCUSSION

The Cost Standard in Section 364.051(5) Applies to Key Customer (Issues 2(i) and (ii))

Section 364.051 sets forth the pricing standard applicable to a BellSouth promotional tariff. This section specifically applies to local exchange companies, like BellSouth, that have elected to operate under price regulation. *See* Order No. PSC-96-0036-FOF-TL. Section 364.3381 applies to local exchange companies generally. (*Compare* Section 364.3381 *and* Section 364.051) (Section 364.3381 refers to prices provided by local exchange companies; Section 364.051 states that local exchange companies *shall* become subject to the price regulation described in this section). Section 364.051 was enacted in 1995, when the Florida legislature enacted comprehensive amendments to Chapter 364, finding “the competitive provision of telecommunications services, including local exchange telecommunications service is in the public interest.” (*See* Section 364.01(3); 1995 Fla. Laws ch. 95-403). Section 364.3381 was originally enacted in 1990, and was amended in 1995.

Section 364.051 divides telecommunications services into two categories, basic and non-basic services. Key Customer, a promotional volume and term discount or reward program, is not an actual service; however, for the purposes of a cost analysis the cost standard related to non-basic services provided by companies operating under price regulation applies. (*See generally* Key Customer Order, pp. 7, 12) (citing to pricing standards applicable to non-basic services).

The specific pricing standard contained in Section 364.051(5) is as follows:

(b) The commission shall have continuing regulatory oversight of nonbasic services for purposes of ensuring resolution of service complaints, preventing cross-subsidization of nonbasic services with revenues from basic services, and ensuring that all providers are treated fairly in the telecommunications market. The cost standard for determining cross-subsidization is whether the total revenue from a nonbasic service is less than the total long-run incremental cost of the service. Total long-run incremental cost means service-specific volume and nonvolume sensitive costs.

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

Stated simply, pursuant to the pricing standard in 364.051(5) the Commission must consider (1) whether revenue exceeds total long-run incremental costs; and (2) whether imputation of additional costs is required.⁷

Section 364.3381(2) mirrors the pricing standard of Section 364.051(5)(b). Section 364.3381 varies slightly, however. The variation is that Section 364.3381 does not include the imputation language of Section 364.051(5)(c). Instead Section 364.3381(3) contains language providing the Commission with continuing oversight jurisdiction over cross-subsidization, predatory pricing, or other anticompetitive behavior.

At a high level, the difference in statutory language as applied to Key Customer is insignificant. As Dr. Taylor testified, from an economic perspective Key Customer satisfies both Florida statutes, and is fair to both competitors and consumers. (Tr. at 512, 515). Similarly, Professor Pitofsky explained that from a competition policy perspective, Key Customer is both proconsumer and procompetitive. (Tr. at 408). Notwithstanding the testimony of Dr. Taylor and Professor Pitofsky, however, FDN has claimed that neither Section 364.051(5) nor Section 364.3381 obviate the need for a price squeeze analysis. (Tr. at 71). To illustrate the fallacy of FDN's claim, it is necessary to undertake a more detailed analysis of the pricing standards contained in Sections 364.051 and 364.3381, the relevant legislative history, and telecommunications policy at both a state and federal level.

⁷ Notwithstanding this two-part cost standard, the Florida legislature allows companies to meet competitive offerings without engaging in an extensive pricing analysis consistent with the language in subsection (a) of Section 364.051(5), which provides that “[n]othing contained in this section shall prevent the local exchange telecommunications company from meeting offerings by any competitive provider of the same, or functionally equivalent, nonbasic services” This statutory language will be addressed in response to Issue 3D.

The first part of the pricing standard contained in both Sections 364.051(5)(b) and 364.3381(2) considers total long-run incremental costs. This cost standard is frequently called total service long-run incremental cost (“TSLRIC”). (Tr. at 460). As Dr. Taylor explained, in telecommunications the appropriate cost standard considers “the incremental cost including capacity costs, including capital costs for network which is long-run incremental cost.” (Tr. at 518). A long-run incremental cost standard is not the same as a total element long-run incremental cost (“TELRIC”) standard; moreover TELRIC is not the cost standard set forth in Chapter 364.051(2), which specifically refers to *service-specific* volume and nonvolume sensitive costs. (See Tr. at 370, 518 and Chapter 364.041(2)(b)). If TELRIC, which includes an allocation of shared and common costs, were applied to Key Customer, such costs would be greater than TSLRIC. (Tr. at 370). Key Customer results in rates that are at or above TSLRIC. (Tr. at 359). In addition, BellSouth analyzed applicable TELRIC results, and the rates charged for Key Customer exceed TELRIC also (although TELRIC is clearly not the applicable pricing standard for Key Customer). (Tr. at 370).

From an economic standpoint, the price floor that protects against predatory pricing generally is long run incremental cost (“LRIC”), while courts have used short run marginal cost (or short run average variable cost). (Tr. at 461-462; 516-517). As Professor Pitofsky testified, from an antitrust perspective, the pricing standard or floor is average variable cost. (Tr. at 433). Regardless of which test one uses, as long as the price for a service is above the appropriate measure of cost, there is no predatory pricing concern. Further, as Dr. Taylor explained even pricing below cost may not be a concern if there is a legitimate reason for the pricing that does not depend on driving competitors out of the market. For example, when a company offers a “free” service in the short run, to make more money in the long run, pricing the service below cost in the short run would not be a concern. Because Key Customer is priced above BellSouth’s TSLRIC

cost, it is consistent with antitrust and economic principles as well as the price floors, and it clearly meets the first part of the pricing standard set forth in the Florida statutes. (*See* Tr. at 359).

The second part of the pricing standard considers imputation, and, as Dr. Taylor explained, addresses the possibility of a price squeeze. (Tr. at 461-462). Imputation results from the language in subsection 364.051(5)(c) – “to the extent a cost is not included in the direct cost, include as an imputed cost the price charged by the company to competitors for any monopoly component used by a competitor in the provision of its same or functionally equivalent service.” This statutory language implies that in some circumstances an additional cost should be added to the TSLRIC for a service, with the resulting rates for that service set above the TSLRIC *plus* the imputed cost. Because BellSouth offers Key Customer for resale, however, no additional imputed cost is required to comply with Florida law.

Significantly, imputation under the statute is required only when ALECs must buy a “monopoly component” also known as an essential facility from BellSouth. (Tr. at 463). If there are competitive alternatives for that essential facility, then the facility is not a “monopoly component” and no imputation is required. (*Id.*). Because Key Customer is available for resale, at the applicable wholesale discount that deducts avoided costs, an ALEC always has the ability and opportunity to offer services at rates below BellSouth’s and no further imputation is required. (Tr. at 512; 463-464; *see In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, Memorandum Opinion and Order, May 15, 2002, ¶ 287). Resale is a competitive alternative for ALECs.

FDN erroneously discounts the resale option. (Tr. at 71-72). That FDN has chosen not to widely utilize the resale mode of entry, however, disregards the resale *opportunity* available. FDN is fully aware that it can resell Key Customer if it chooses to do so, and FDN has previously

provided resale. (Tr. at 82). Likewise, FDN's claim that its margins are too small using resale does not change the pricing standard contained in Chapter 364. The resale discount was calculated to give a provider that is at least as efficient in retailing as BellSouth the same margin that BellSouth has between its retail price and its incremental cost; not to provide a crutch to less efficient ALECs. (Tr. at 487). Further, the fact that FDN voluntarily chooses an option other than resale demonstrates that FDN believes it is better off under the option it chooses. Because the availability of resale means there can be no price squeeze, the availability of an option that FDN considers preferable to resale means *a fortiori* that there can be no price squeeze, and that it is not being squeezed.

The timing of the enactment of the telecommunications statutes demonstrates the significance of the resale opportunity in any price squeeze analysis. In July 1995, the legislature modified Section 364.3381, which was originally enacted in 1990.⁸ At the same time that the revisions to Section 364.3381 were enacted, the legislature enacted the price regulation statute, Section 364.051, as well as Section 364.161, which set forth the resale obligation. The resale requirement contained in section 364.161 requires local exchange companies to make

⁸ The actual amendments are shown with revision marks:

(1) The price of a ~~non-basic~~competitive telecommunications service provided by a local exchange telecommunications company shall not be below its cost by use of subsidization from rates paid by customers of ~~basic~~monopoly services ~~subject to the jurisdiction of the commission.~~

(2) A local exchange telecommunications company which offers both ~~basic and non-basic~~monopoly and competitive telecommunications services shall establish prices for ~~such services that segregate its intrastate investments and expenses in accordance with allocation methodologies as prescribed by the commission to~~ ensure that ~~non-basic~~competitive telecommunications services are not subsidized by ~~basic~~monopoly telecommunications services. The cost standard for determining cross-subsidization is whether the total revenue from a non-basic service is less than the total long-run incremental cost of the service. Total long-run incremental cost means service-specific volume and non-volume sensitive costs.

(3) The commission shall have continuing oversight jurisdiction over cross-subsidization, predatory pricing, or other similar anticompetitive behavior and may investigate, upon complaint or on its own motion, allegations of such practices. ~~Except where doing so offsets the benefits accruing to ratepayers by virtue of such sharing, the commission shall ensure that no expenses associated with the allocation of costs between regulated and nonregulated services or activities of any kind, or auditing or otherwise supervising those allocations, are included in the regulated rates or charges of a telecommunications company.~~

telecommunications features, functions, or capabilities available for resale upon request. Significantly, the statute prohibits pricing any service provided for resale below cost. (Section 364.161(2)).

In 1995 only, prior to the Telecommunications Act of 1996 (“the Act”), the prohibition against pricing resale below cost, combined with the requirement to impute additional costs, could hypothetically result in the following price squeeze analysis: BellSouth files a promotional tariff that is available at a price of \$25.10. The TSLRIC of the service is \$25, thus the promotional price exceeds cost. The 16.81% wholesale discount amount is \$4.22. Application of the wholesale discount, however, would mean the resale rate of the promotional tariff would result in a price of \$20.88 (\$25.10 promotional price less \$4.22 wholesale discount equals \$20.88), which price would be below BellSouth’s costs and precluded by Section 364.161(2). Presumably, an ALEC would only be permitted to resell the promotion at the actual cost of \$25.00. If BellSouth priced the promotion at a rate slightly above its costs, then hypothetically an ALEC might have been subject to a price squeeze.

The reality, however, is very different due to the Act. Pursuant to the Act, there is no limitation on the resale obligation. In fact, the resale obligation applies to *any* telecommunications service. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), ¶ 923 (“First Report and Order”). The resale obligation extends to below-cost services, and the FCC expressly recognized that even below-cost services could be resold at wholesale rates. (First Report and Order, ¶ 957). The Act preempts conflicting state laws. (*See* Section 253). Thus, less than one year after the Florida legislature enacted the amendments to Chapter 364, the Act became effective and preempted Florida law to the extent that it would have prohibited an ILEC from making a telecommunications service available for resale at a price below cost. Thus, consistent with the Act,

a company is required to provide *any telecommunications service* at the wholesale discount, even if the result is that the resold service is priced below cost.

The interplay between the Act and Chapter 364 means that the resale opportunity has a direct impact on the imputation test of Section 364.051(5)(3). Using the illustration set forth above, the resale rate of the promotional tariff is available to FDN or any other ALEC at a price of \$20.88, which, for the purposes of illustration only, is below TSLRIC. FDN, or any other ALEC, is not caught in a price squeeze because FDN is provided the opportunity to resell the tariffed service at the wholesale discount. (*See* Tr. at 463-464). FDN is provided the opportunity to obtain the appropriate discount under federal and state law.

FDN may argue that because amended Section 364.3381, with its language of broad regulatory oversight, follows Sections 364.051(5) and 364.161 and is “last in time” that somehow the Commission has unfettered discretion to restrict promotional pricing. Any such argument is without basis and disregards three fundamental rules of statutory construction.

First, a specific statute controls over a general statute. *Adams v. Culver*, 111 So.2d 665, 667 (Fla. 1959). Because Section 364.051(5) applies specifically to price regulated companies such as BellSouth and not to all local exchange carriers generally, it contains the appropriate cost standard and controls over the more general language of Section 364.3381. Notably, subsection (5)(b)(2) also contains language that provides this Commission with “continuing regulatory oversight.” However, subsection 5(b)(2) charges the Commission to ensure “that all providers are treated fairly in the telecommunications market.”

Second, provisions in statutes should be read in *pari materia*, or in harmony with one another. *Ivester v. State*, 398 So.2d 926, 930 (Fla. 1st DCA 1981), *rev. denied*, 412 So.2d 470 (Fla. 1982). Here, Section 364.051(5), Section 364.3381, and Section 364.161 can be read in harmony. Section 364.051(5) sets forth the pricing standard and cross-subsidization test applicable to

companies operating under price regulation. Section 364.161 contains an affirmative resale obligation, which ensures that monopoly components used by competitors must be resold. Section 364.3381 sets forth the cross-subsidization standard and pricing standard applicable to local exchange companies that are not operating under price regulation.

Third, and finally, construction of a statute that would lead to an absurd result should be avoided. *Wakulla County v. Davis*, 395 So.2d 540, 543 (Fla. 1981). FDN's suggestion that the resale opportunity is meaningless is fundamentally absurd, and disregards completely the regulatory framework of the Act and Chapter 364. For example, FDN's arguments that the resale opportunity negatively impacts facilities-based carriers was previously considered and rejected by the FCC. (See First Report and Order, ¶ 923). Specifically, the FCC rejected a proposal from facilities-based carriers setting the maximum wholesale discount at 10% because any greater discount would unduly discourage facilities-based competition. *Id.* The FCC likewise rejected arguments that sought wholesale discounts at rates that would ensure that resale would be a viable business. *Id.* It would be absurd for this Commission to impose or impute an additional cost on top of the TSLRIC cost of a service with resulting rates higher than both the TSLRIC and imputed cost. Such a result would serve only to provide an unnecessary umbrella to competitors rather than benefiting the customers that would otherwise receive lower prices. (Tr. at 411).

The Cost Standard in Section 364.051(5) Applies to Packages of Services (Issue 2 (iii))

When considering the applicable cost standard (which is the TSLRIC or average variable cost) of a given service, a potential issue arises when application of the promotion produces results that vary between customers. For example, under Key Customer the rewards or discounts apply based on a total billed revenue threshold of certain services, meaning that one small business customer may elect to receive a package of services that varies as compared to a different customer. Application of the cost standard to such a tariff appropriately considers the price of the package.

(Tr. at 471). As long as the price of the package covers the incremental cost of the package, competitive fairness is met. (Tr. at 471-472).

Prior to offering Key Customer, BellSouth first identified the individual rate elements that produced 99.9% of the total revenue. (Tr. at 388, 390). Next, BellSouth analyzed each individual rate element to ensure that it adequately covered cost. (Tr. at 389). If an individual rate element was a component of a larger service, then a representative system configuration or minimum service arrangement was evaluated to ensure that revenues covered costs. (*Id.*). This analysis is consistent with the appropriate economic considerations and the provisions of Chapter 364. (Tr. at 472).⁹

Key Customer Complies Fully with the Cost Standards in Florida Law (Issues 2(iv), (v))

As set forth in detail above, Key Customer covers fully the costs of the services provided, and is available to ALECs at the wholesale discount. As such, Key Customer complies with the applicable cost standard in Section 364.051(5). Notwithstanding that Key Customer is available for resale and is offered at rates that exceed applicable costs, FDN alleges that Key Customer is anticompetitive. FDN's proposed cure to BellSouth's alleged anticompetitive behavior is that promotional discounts should be offered to *all* BellSouth customers. FDN also contends that BellSouth should be barred from offering discounts of more than 10% off total basic and nonbasic services, including hunting and all features. (Tr. at 48). Both proposals should be summarily rejected.

As a preliminary matter, this Commission has previously rejected FDN's argument that Key Customer is discriminatory because it is offered only in certain areas. (Key Customer Order, pp. 7-8). FDN has not proffered any compelling evidence that would result in a reversal of the Key Customer order. More fundamentally, though, FDN's argument is simply flawed, and adoption of FDN's proposals would significantly diminish competition to serve small business customers in

⁹ FDN has no position on this Issue. See Tr. at 76; Prehearing Order p. 14.

Florida. To illustrate FDN's flawed reasoning, BellSouth outlined a scenario demonstrating the revenue loss associated with offering discounted rates to customers in non-competitive service areas. (Tr. at 89-90). FDN agreed that, from a business perspective, it is simply uneconomic to forego revenue. (Tr. at 90). With such a revenue loss, BellSouth would find it uneconomic to pursue with a discount or reward the customers that FDN competes for. FDN agreed also that its rationale, in part, for requiring BellSouth to provide like discounts to all customers was to benefit BellSouth's competitors. (Tr. at 91). Of course consumers would be worse off. BellSouth will not have competed for their business, and, FDN realizing that BellSouth will find it uneconomic to compete for their business, will compete less aggressively.

Professor Pitofsky addressed FDN's rationale and explained that requiring across the board discounts is nonsensical:

[T]he most perplexing of the issues that I have seen addressed here is the argument that if BellSouth offers this discount to small business customers anywhere in its territory, it must offer it everywhere. That is certainly not an acceptable interpretation of antitrust policy today. Because it doesn't stand to reason. Why would you lower your prices in an area where you don't have any competitors? Of course your prices are going to be lower where you face vigorous competition, and that is what these hot wire centers are. The theory that you must offer it everywhere has been rejected because of a notion that if you are required to offer it everywhere you may not offer it at all. It will be uneconomic to offer it all. And your rivals, knowing that to offer it anywhere you must offer it everywhere, themselves will be less vigorous in their own competition.

* * * *

[T]he irony here is if BellSouth did what the complainant wants and offered the discount in all parts of the state, I don't know, my take on that is that that is so uneconomic the discount wouldn't happen in the first place.

I can't help asking the question, why does the complainant want the discount in all parts of the state? After all, it doesn't help the complainant. If the discount is 5 percent or 10 percent lower where it is competing, but also 10 percent lower elsewhere, it doesn't make any difference to the complainant. So that leads me to suspect, I'm not certain, but it leads me to suspect that the reason that request is introduced is because of a hope that if it has to be offered in all of the state it won't be offered at all.

(Tr. at 422-423, 442-443). Additionally, as Commissioner Deason recognized, if ALECs cannot presently compete in certain geographic areas with BellSouth's existing retail prices, then *lowering* the retail prices in these areas would do nothing to facilitate competition. (See Tr. at 444).

Notably, in both its prefiled testimony and during redirect, FDN's witness explained that it was not proposing that BellSouth should provide Key Customer discounts to all customers; instead, some other discount should be provided to all customers. (Tr. at 127). Apparently, FDN's proposal would be either: (1) a 10% maximum discount on all services (including hunting), which discounts should be available to all customers until ALECs gain a 40% share of the small business market; or (2) some unknown discount, also available to all customers, when ALECs have 40% of the small business market. (See Tr. at 48; 127). FDN's proposal cannot withstand scrutiny.

FDN's proposal lacks a reasonable basis for the following reasons. First, nothing in the record would suggest that adopting FDN's proposal would benefit consumers or promote competition. To the contrary, it would simply reduce BellSouth's competitiveness and give ALECs guaranteed protection from competition. Nothing could be more antithetical to promoting competition. Second, other than a passing historical reference to how AT&T was apparently regulated when the long distance market first became competitive, FDN has no basis to support its 40% ALEC market share limitation. (Tr. at 79). Third, FDN's rationale for its 10% limitation on discounts is based solely on conversations between FDN's CEO and his colleagues. (Tr. at 116).¹⁰ Fourth, based on the Report, there are only ten exchanges in Florida that would meet FDN's 40% ALEC market share restriction, and FDN doesn't even compete in two of the ten exchanges. (Tr. at 81-82; *also* Exh. 8, pp. 69-74). Thus, even if the Commission even adopted FDN's proposal (which

¹⁰ On cross-examination, Mr. Gallagher testified as follows:

Q: Can you just elaborate what's the rationale for the ten percent?

A: I had just talked to some colleagues of mine around the country and had seen what is available and what's not available and where it seems to be, there seems to be thriving competition. And it seems, it seems to me that, you know, that seemed like a reasonable number. There's no, you know, detailed math behind that other than that seemed to be a threshold. (Tr. at 116).

it should not), customers that are currently eligible for Key Customer would be restricted in some manner from benefiting from BellSouth's promotional tariff. Because FDN unabashedly competes with BellSouth by offering prices 20% to 40% lower than BellSouth's rates, the inescapable conclusion is that a smaller Key Customer discount will allow FDN (and other ALECS) to offer less generous discounts as well. This will increase FDN's profitability and reduce the competitive pressures it feels, but that is not a legitimate regulatory goal. Florida small business customers will be worse off.

As a final matter, FDN has repeatedly attempted to link BellSouth's authorized price adjustments to Key Customer. (*See* Tr. 11, 68). FDN disregards completely that, consistent with price regulation, BellSouth is authorized to file certain price increases. (*See* Section 364.051). In the Key Customer Order, this Commission determined that any rate increases were in compliance with applicable statutes and that Key Customer did not conflict with any unrelated rate increases. (*See* Key Customer Order, p. 9). Rather, as Mr. Ruscilli testified, any rate increases apply to customers that have elected to sign a Key Customer contract: "the Key Customer is a discount program. It is not a discount program and a rate increase for other customers. So rate increases can or cannot occur independent of Key Customer." (Tr. at 236; *also* Exh. 8 - BellSouth's Response to Staff's Interrogatory 56). Both Key Customer and BellSouth's unrelated price increases are fully consistent with the applicable price regulation statutory provisions, and FDN's argument to the contrary is simply incorrect.

Issue 3A: What criteria, if any, should be established to determine whether the termination liability terms and conditions of a BellSouth promotional tariff offering are unfair, anticompetitive, or discriminatory?

- i) Is the BellSouth Key Customer tariff filing (Tariff Number T-020035) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?**
- (ii) Is the BellSouth Key Customer tariff filing (Tariff Number T-020595 or a subsequent tariff filing that extends the expiration date thereof) unfair,**

anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?

SUMMARY OF BELLSOUTH'S POSITION

*** Existing Florida law addressing liquidated damages, along with competitive market forces, is sufficient to ensure that termination liability terms and conditions are fair, competitive, and nondiscriminatory.

- (i) No.
- (ii) No. ***

DISCUSSION

This Commission has addressed termination liability previously, finding:

[T]ermination liability is commonplace in many types of contracts, not just contracts signed in conjunction with a promotional offering. We do not agree with FDN's characterization that a termination liability is a "poison pill," inasmuch as the customer is making a tradeoff – lower rates in return for a commitment period. We find that such tradeoffs are a common business practice, and that BellSouth's 2002 Key Customer Program tariff is not unduly discriminatory.

(Key Customer Order, p. 10). The evidence in this case relating to termination liability is entirely consistent with this Commission's prior ruling, which ruling should be upheld.

The reason BellSouth has included termination liability provisions in its promotional tariff is simple – when a customer executes a volume and term agreement, BellSouth can neither predict the benefits that the customer will receive over the life of the agreement nor can BellSouth predict the damages it will incur if the contract is ultimately breached. (Tr. at 300).¹¹ Accordingly, BellSouth developed a reasonable means to address termination based on a backward-looking methodology

¹¹ Termination liability is analogous to liquidated damages, and it is well settled in Florida that parties to a contract may stipulate in advance to an amount to be paid or retained as liquidated damages in the event of a breach. *Lefemine v. Baron*, 573 So. 2d 326 (Fla. 1991), *Poinsettia Dairy Prods. v. Wessel Co.*, 166 So. 306 (Fla. 1936); *Southern Menhaden Co. v. How*, 70 So. 1000 (Fla. 1916). To determine whether a liquidated damages provision will be upheld and not stricken as a penalty the damages upon breach must not be readily ascertainable and the agreed upon amount of damages must not be so grossly disproportionate to any damages that might reasonably be expected to follow from a breach that the parties could have intended only to induce full performance, rather than to liquidate their damages. *Lefemine v. Baron*, 573 So. 2d 326 (Fla. 1991). FDN does not contend that the termination liability provisions in Key Customer are an unlawful penalty instead of valid liquidated damages; rather, FDN alleges the termination liability provisions are anticompetitive (Tr. at 70), which BellSouth disputes.

under the January 2002 tariff filing, and a forward-looking methodology beginning with the June 2002 tariff filing. (*Id.*). While the methodologies are different, both approaches are reasonable. (*Id.*).

It is readily apparent that telecommunications carriers in Florida have the regulatory authority to assess termination liability. Mr. Ruscilli identified tariffs from a number of ALECs, including FDN, which tariffs contain termination liability. (Tr. at 172-173). Moreover, many ALECs have the authority to impose “full-buyout” termination charges, which means that ALECs can require customers to pay all the charges remaining on a term contract. (Tr. at 173).

Despite the fact that BellSouth and other ALECs have long had the regulatory authority to impose termination liability, FDN suggests that Key Customer somehow “locks up” the small business market. FDN’s remedy for this alleged problem is to limit termination liability to retail line installation rates. (Tr. at 51). Not only is the charge that BellSouth imposes reasonable, but customers are not “locked up.” FDN disregards completely that Key Customer is not an exclusive contract. Customers do not commit to any particular volume of business and are free to reduce the amount of service they take from BellSouth without paying any termination charge as long as they continue to purchase at least some telecommunications service from BellSouth. For example, a customer with five lines can migrate four of the five lines to any ALEC without being assessed termination liability. (Tr. at 302-303; Exh. 19). Under such circumstances, FDN’s contention that BellSouth is somehow “locking up” customers is factually inaccurate. Because small business customers can freely migrate services without incurring termination liability and because the termination liability provisions in Key Customer are reasonable, this Commission should reject FDN’s unnecessary termination liability restrictions.

Issue 3B: What criteria, if any, should be established to determine whether the duration (term of individual contracts, length and succession of promotions) of a Bellsouth promotional tariff offering is unfair, anticompetitive, or discriminatory?

- i) **Is the BellSouth Key Customer tariff filing (Tariff Number T-020035) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?**
- ii) **Is the BellSouth Key Customer tariff filing (Tariff Number T-025095 or a subsequent tariff filing that extends the expiration date thereof) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?**

SUMMARY OF BELLSOUTH'S POSITION

*** No new criteria should be established. The duration of a promotion depends on the offering and the market.

- i) No. The offering is available for resale and is a competitive response to other offerings.
- ii) No. The offering is available for resale, and is a competitive response to other offerings. ***

DISCUSSION

The testimony and exhibits of Mr. Ruscilli and Mr. Garcia demonstrate clearly the fierce competition in Florida. (Tr. at 158-159; 320-326; Exhs. 20, 21). In response to this competition, the Commission should refrain from adopting any unwarranted restrictions on the duration of promotions – there is simply no need to establish any new criteria. (Tr. at 179). Instead, the competitive market will best determine the optimum promotion duration. (*Id.*). In this competitive market, the Commission must also recognize that ALECs offer long-term pricing, with term contracts ranging from one year up to five years. (Tr. at 180, Exh. 12, Tr. at 339, Exh. 21). Because BellSouth has the statutory authority to meet competitive offers, the Commission should not limit the length of time that BellSouth makes competitive offers available because any such limitation would frustrate, rather than encourage competition. (Tr. at 339).

Competition would be especially frustrated if this Commission adopted the severe limitations proposed by FDN. FDN proposes limiting the timeframe when customers can sign up for promotional offers to 120 days (4 months) and limiting the actual rewards received under the

promotional contract to one year, followed by a one-year period during which the customer would be precluded from accepting a subsequent BellSouth promotion. (Tr. at 120).¹² Because BellSouth has the authority to sign customers up for Key Customer for approximately 180 days or six months, with contract rewards available for 24 to 36 months (2 to 3 years), FDN's proposal would result in significant changes and limitations on BellSouth's ability to respond to competitive market conditions. (See Exh. 20) (outlining Key Customer terms and conditions). FDN's proposal would also significantly curtail BellSouth's ability to offer successive promotions – currently, following a Key Customer contract expiration, a customer may evaluate the range of competitive alternatives and select a BellSouth promotional offering if available and deemed desirable by the customer. (Tr. at 179). FDN, however contends without justification that a BellSouth customer should be barred from accepting a subsequent BellSouth contract for a year after contract expiration. (Tr. at 51).

The end result of any of FDN's proposed restrictions would be reduced competition, which would not be in the interests of Florida consumers. (Tr. at 410). The immediate effect of these proposed restrictions would be to deny customers low prices, and to provide ALECs a protective umbrella, which would reduce any ALEC incentive to lower prices. (Tr. at 411). In reality, FDN is asking the Commission to guarantee it higher prices and higher profits, which would be especially inappropriate given the significant growth of ALEC market share – FDN in particular -- in Florida over the past year. (*Id.*). BellSouth's Key Customer offerings are entirely consistent with competition policy and benefit Florida consumers, and the Commission should reject FDN's proposed limitations on promotional duration that are inconsistent with competition policy and would benefit only FDN.

¹² FDN first proposed limitations whereby promotional offers could be made to customers for 3 months (90 days) with rewards limited to 2 to 4 months (60 to 120 days). (Tr. at 51). FDN next suggested that both promotional offers and promotional rewards should be limited to one year. (Tr. at 67).

Issue 3C: What criteria, if any, should be established to determine whether the billing conditions or restrictions of a BellSouth promotional tariff offering are unfair, anticompetitive, or discriminatory?

- i) Is the BellSouth Key Customer tariff filing (Tariff Number T-020035) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?**
- ii) Is the BellSouth Key Customer tariff filing (Tariff Number T-020595 or a subsequent tariff filing that extends the expiration date thereof) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?**

SUMMARY OF BELLSOUTH'S POSITION

*** No new criteria should be established. BellSouth has offered various promotions for years, and these promotions have not inhibited the ALEC's ability to compete for and win approximately one-third of the small business access lines that are being served in BellSouth's territory.

- i) No.
- ii) No. ***

DISCUSSION

The billing provisions and options available with Key Customer are reasonable and consumer-friendly. (Tr. at 183). The billing options allow BellSouth customers using either the Customized Large User Bill ("CLUB") billing option or secondary location address ("SLA") option to receive Key Customer benefits as long as one of their business locations is located in an eligible wire center. (Tr. at 182-183). Further, customers receiving Key Customer benefits that move outside of a hot wire center continue to receive promotional benefits throughout the contract term. (Tr. at 183). These terms and conditions are designed to meet customer need. (*Id.*). Because BellSouth cannot adjust CLUB billing on a location specific basis - (Exh. 25) - without such pro-customer terms, customers could be forced to choose between the conveniences of various billing options or receiving Key Customer. (Tr. at 182). Because BellSouth's billing options are reasonable and are designed and intended to meet customer need, the Commission should support

these pro-consumer options.

FDN contends that CLUB and/or SLA rewards or discounts should not be available to different locations “unless competitors can also make the same multi-location offer.” (Tr. at 53). This contention ignores that in December 2002 FDN amended its price list and now has the regulatory authority to meet any offering in the marketplace. (Tr. at 78). Thus, FDN has the ability to make any “multi-location offer” it deems necessary to respond to competition. FDN also suggests that “other businesses . . . will claim discrimination.” (Tr. at 53). At the hearing in this case, other than FDN no other company or business came forward to the Commission to lodge any claim of discrimination. It seems that, contrary to FDN’s contentions, businesses simply prefer to have convenient billing options.

Issue 3D: **What criteria, if any, should be established to determine whether geographic targeting in a BellSouth promotional tariff is unfair, anticompetitive or discriminatory?**

- i) Pursuant to Section 364.051(5)(a), Florida Statutes, how should "meeting offerings by any competitive provider" be interpreted?**
- ii) Pursuant to Section 364.051(5)(a), Florida Statutes, how should "specific geographic market" be interpreted?**
- iii) Pursuant to Section 364.051(5)(a), and 364.08, Florida Statutes, how should "similarly situated" or "substantially similar" be interpreted?**
- iv) Is the BellSouth Key Customer tariff filing (Tariff Number T-020035) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?**
- v) Is the BellSouth Key Customer tariff filing (Tariff Number T-020595 or a subsequent tariff filing that extends the expiration date thereof) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?**

SUMMARY OF BELLSOUTH’S POSITION

*** Section 364.051(5)(a) permits geographic targeting; no additional criteria should be established.

- i) This language means that, where competition exists, BellSouth can adjust its prices to compete.
- ii) This language depends on what the competition is doing. It can mean a different wire center, a subset of a wire center, a grouping of wire centers, or something else.
- iii) How this language should be interpreted depends on the specific circumstances. The heightened competition in BellSouth's Key Customer "hot" wire centers means customers served out of those wire centers are not "similarly situated" or "substantially similar" to other customers.
- iv) No.
- v) No. ***

DISCUSSION

This Commission has already reviewed the language in Section 364.051(5)(a), finding that the statutory language does not prohibit or restrict BellSouth from targeting specific geographic markets and offering volume and term discounts. (Key Customer Order, p. 7). The Commission expressly acknowledged that Key Customer is only available in certain wire centers. (*Id.*, p. 8). The Commission's acknowledgment is consistent with the realities of the telecommunications market in Florida, which market consists of multiple providers with some overlapping service areas. FDN, for example, serves only a portion of Florida, and sets prices differently to customers located in Sprint, Verizon, and BellSouth territory. (Tr. at 86). This is consistent with established rate groups in Florida, whereby the retail rates for services in rate group 12 vary from the retail rates for services in rate group 1. (Tr. at 86-87, 338).

In considering the actual statutory language, "meeting offerings by any competitive provider" should mean that, where competition exists, BellSouth can adjust its prices to compete effectively. (Tr. at 186). Similarly, "specific geographic market" may vary based on marketplace factors, however, it is certainly reasonable to consider a wire center a "specific geographic market." (Tr. at 187). With respect to "similarly situated" it is clear that customers in certain geographic

areas – subject to more intense competition – are not similarly situated to other customers not subject to competition. (Tr. at 188).

FDN may claim that BellSouth must demonstrate a specific offer from an ALEC on a wire center basis to prove that Key Customer meets competition. Any such claim is without basis in reality. While FDN may consider it somehow relevant that BellSouth’s witnesses did point to a competitive offer relating specifically to Brooksville, Deland, or Lake City (*see* Tr. at 54, 345), appendices B and C of this Commission’s Report show the following:

| Florida Public Service Com’n Exchange Name | Total ALEC Business Providers – 2001 | Total ALEC Business Providers – 2002 | % of Business Access Lines – 2001 | % of Business Access Lines – 2002 |
|--|--------------------------------------|--------------------------------------|-----------------------------------|-----------------------------------|
| Brooksville | 7 | 13 | 1% to 5% | 10% to 15% |
| Deland | 3 | 11 | > 0% to 1% | 5% to 10% |
| Lake City | 8 | 12 | 1% to 5% | 15% to 20% |

The aggregate ALEC information contained in the Report coupled with the voluminous examples of ALEC offerings in Exhibits 12, 20, and 21 clearly establish that Key Customer meets competitive offers from carriers that self-select the most attractive geographic areas in which to offer service. Key Customer is an appropriate competitive response, reasonably focused upon small business customers located in certain geographic areas subject to the fiercest competition, and complies fully with applicable Florida law.

Issue 3E: What criteria, if any, should be established to determine whether any other terms or conditions of a BellSouth promotional tariff offering are unfair, anticompetitive, or discriminatory?

- i) Is the BellSouth Key Customer tariff filing (Tariff Number T-020035) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?
- ii) Is the BellSouth Key Customer tariff filing (Tariff Number T-020595 or a subsequent tariff filing that extends the expiration date thereof) unfair, anticompetitive, or discriminatory under the criteria, if any, established pursuant to this issue?

SUMMARY OF BELLSOUTH'S POSITION

*** It is not necessary to establish any new criteria.

- i) No.
- ii) No. ***

DISCUSSION

There is no need for this Commission to consider establishing any criteria beyond the criteria contained in the current statutory language. (Tr. at 190-191). As set forth in detail throughout this post-hearing brief, Key Customer complies with Chapter 364 of the Florida statutes in all respects and is a pro-competitive, pro-consumer offering that results from extensive competition. Each of BellSouth's filed Key Customer tariffs benefit end user customers and the Commission should reject implementing new criteria. To the extent the Commission considers (and it should not) adopting other criteria, however, such consideration should factor in the need for carriers to quickly respond to the market, that the legislature has established the presumptive validity of tariffs, and that rules applicable to promotional offerings should apply to all telecommunications service providers in the same manner. (Tr. at 197).

Issue 4A: Under what terms and conditions should BellSouth promotional tariff offerings be made available for ALEC resale?

- i) Does the BellSouth Key Customer tariff filing (Tariff Number T-020035) meet the resale terms and conditions established pursuant to this issue?**
- ii) Does the BellSouth Key Customer tariff filing (Tariff Number T-020595 or a subsequent tariff filing that extends the expiration date thereof) meet the resale terms and conditions established pursuant to this issue?**

SUMMARY OF BELLSOUTH'S POSITION

*** Retail promotions offered for 90 days or less are not discounted while promotions of more than 90 days are available for resale at the promotional rate minus the wholesale discount.

- i) Yes. This tariff is available for resale.
- ii) Yes. This tariff is available for resale. ***

DISCUSSION

There is no dispute about whether Key Customer is available for resale – it is, consistent with the Act, which requires the resale of telecommunications services that are provided at retail, and with this Commission’s rules. (Tr. at 191). Although FDN has acknowledged that Key Customer is available for resale, FDN has chosen not to avail itself of this opportunity. Thus, FDN’s complaint concerning the requirement that ALECs calculate Key Customer discounts and subsequently apply for credits, as well as FDN’s complaint about termination liability associated with resale should be summarily dismissed. (See Tr. at 54). Unless and until FDN actually takes advantage of the resale opportunity, FDN has no basis to lodge complaints about terms and conditions with which it has no personal experience. Because BellSouth offers Key Customer pursuant to federal and state requirements, there is no need for Commission action on this issue.

Issue 4B: What is the competitive impact, if any, of the resale of BellSouth promotional tariff offerings?

SUMMARY OF BELLSOUTH’S POSITION

*** The fact that the January and June Key Customer offerings are available for resale has a favorable impact on competition. Among other things, it eliminates the possibility of an anti-competitive price squeeze. ***

DISCUSSION

As set forth more fully in response to Issue 2, because Key Customer is available for resale, ALECs in Florida have an existing opportunity to provide the promotion at the 16.81% wholesale discount. FDN’s arguments to the contrary have been expressly rejected by the FCC and should be rejected by this Commission as well. Because Key Customer is available for resale, any ALEC that is at least as efficient as BellSouth in marketing and sales will be able to compete using the resale opportunity. Conversely, FDN suggests that facilities-based carriers should receive special treatment, which is flatly contradicted by Florida law. (See Section 364.01(4)(g). Moreover,

utilizing resale to serve some customers does not mean that FDN has to forego its pursuit of serving customers using its own facilities. Instead, FDN can (as other carriers choose to) utilize more than one mode of serving customers.

Issue 5A: **In the context of marketing promotional tariffs, what waiting period or other restrictions, if any, should be applicable to BellSouth?**

SUMMARY OF BELLSOUTH'S POSITION

*** No waiting periods or other restrictions should be placed on BellSouth's ability to market its promotional offerings. ***

DISCUSSION

As this Commission previously recognized, BellSouth voluntarily implemented a ten-day waiting period after a customer disconnects service prior to initiating marketing activities. (Tr. at 281). FDN suggests that a thirty-day waiting period is needed:

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

(Tr. at 121). It is clear that FDN's rationale for additional restrictions is not based on any actual problem – instead, FDN refers to events that “could” happen and refers to what customers “might” be feeling. The Commission should reject FDN's “what if” rationale and decline to impose any marketing restrictions.

In considering marketing restrictions, it is important to recognize that the effect of any waiting period is to limit customer choice for some period of time. (See Tr. at 410-411). If customer choice is limited, the basis for such limitations should be clearly articulated and based on sound evidence. When the Commission first considered Key Customer, the Commission staff explained that the basis for their 30-day waiting period stemmed from potential double billing issues. (See Tr. June 18, 2002 Agenda Conference, Item 11 at 75). Mr. Gallagher explained “with

FDN, the way we do our facilities-based, we don't have a problem with double billing." (*Id.* at 83). Based on Mr. Gallagher's explanation, staff's prior concern has been fully addressed.

FDN may claim that because BellSouth waits three to seven weeks prior to engaging in marketing activities, that a 30-day waiting period would have a limited impact on BellSouth. Any such argument presupposes that BellSouth will be unable to prospectively develop the means to more rapidly implement marketing activities, which activities seek to provide customers with competitive offers. As Mr. Ruscilli explained, it takes time to develop marketing lists of former customers from retail data. (Tr. at 281). This delay occurs because BellSouth analyzes its data to eliminate from marketing lists customers that have left BellSouth for reasons other than to transfer service to competitors. (*Id.*) This Commission should decline from imposing a restriction on customer choice based on operational impediments that may be overcome in the future. To the extent the Commission is interested in examining restrictions at all, the proper course would be to initiate a generic proceeding to consider marketing practices in the entire industry with any waiting periods applicable to all carriers. (*See e.g.*, Docket No. 14232-U; *Code of Conduct for Winback Activities*) (On March 24, 2003 the Georgia Public Service Commission adopted a seven-day waiting period restricting winback activities; the waiting period applies equally to all carriers and does not apply to inbound customer calls).

Issue 5B: **In the context of marketing promotional tariffs, what restrictions, if any, should be placed on the sharing of information between BellSouth's wholesale and retail divisions?**

SUMMARY OF BELLSOUTH'S POSITION

*** It is BellSouth's policy to treat all Customer Proprietary Network Information and Wholesale Information in a confidential manner, and to limit the disclosure and use of CPNI and Wholesale Information consistent with the requirements of the Act, and applicable FCC and Commission orders. No additional restrictions should be imposed. ***

DISCUSSION

It is BellSouth's policy to treat all Customer Proprietary Network Information ("CPNI") and Wholesale Information in a confidential manner. (Tr. at 195).¹³ BellSouth also takes steps to limit disclosure and the use of CPNI and Wholesale Information consistent with all federal and state requirements. (*Id.*). It is against BellSouth policy for any employee or authorized representative to misuse Wholesale Information. (*Id.*). BellSouth's policy complies fully with this Commission's ruling in the Key Customer order, which ruling prohibits BellSouth from sharing Wholesale Information with the retail division. (Key Customer Order, p. 21).

FDN suggests that the Commission should impose even more stringent requirements on BellSouth; specifically FDN contends no BellSouth retail employee should have access to any Wholesale Information. (Tr. at 58). The Commission should refrain from adopting this restriction. Currently, retail sales personnel can only access a local service request ("LSR") submitted by a competing carrier on an account-by-account basis to respond to a specific customer request. (Exh. 18; Tr. at 269). BellSouth policy precludes the use of this information for retention and winback activities. (*Id.*). Because the use of LSRs by retail personnel relates only to actual customer requests, adopting FDN's restriction would result in BellSouth's employees not having information necessary to provide customer service, which result potentially harms consumers.

FDN suggests also that the Commission should impose restrictions on in-bound customer calls. As a preliminary matter, there is a distinction between in-bound customer calls to lift a local service freeze and in-bound customer calls for other purposes. Mr. Ruscilli explained that current BellSouth policy prohibits retention efforts when a customer calls to lift a local service freeze. (Tr. at 264). BellSouth's policy is fully consistent with Commission staff's understanding that retention

¹³ By "Wholesale Information" BellSouth means proprietary information of carriers, carrier information and CPNI generated in the provision of telecommunications services to carrier customers. (Exh. 2; BellSouth's Response to Staff Interrogatory 30, p. 17).

marketing is prohibited when “a customer calls up to notify them to lift a PIC freeze . . .” (Tr. June 18, 2002 Agenda Conference, Item 11 at 74). There is no need for this Commission to impose additional restrictions on inbound calls to lift a PIC freeze because BellSouth policy precludes retention efforts during such calls.

FDN’s request to impose restrictions on other inbound calls, specifically calls relating to DSL service, should be rejected.¹⁴ FDN and BellSouth have previously litigated the provision of FastAccess service in another proceeding, and there is no need for additional Commission action here. *See* Docket No. 010098-TP. In Docket No. 010098-TP the parties reached agreement on many issues, including a provisioning process to implement prior Commission orders relating to FastAccess service. This provisioning process is detailed in the interconnection agreement that was executed by the parties and filed with this Commission on February 5, 2003. Notably, BellSouth and FDN have agreed that during the specific provisioning process relating to FastAccess, which process involves a standalone or second loop, when customer contact takes place “BellSouth will not engage in any winback or retention efforts, and BellSouth will refer the end user to FDN to answer any questions regarding the end user’s services.” (*See* Order No. PSC-03-0395-FOF-TP, p. 10-11; Docket No. 010098-TP).

To the extent that FDN seeks to expand BellSouth’s obligations beyond the parties’ interconnection agreement, this Commission should reject any such expansion. BellSouth should not be restricted from responding to inbound customer calls relating to FastAccess with the

¹⁴ The Commission staff has previously recognized FCC guidelines allow retention marketing on inbound calls. (Tr. June 18, 2002 Agenda Conference, Item 11 at 74). Mr. Ruscilli explained, for example, that BellSouth responds to inbound customer requests seeking pricing information. (Tr. at 269). To limit BellSouth’s ability to respond to such customer calls contradicts current FCC guidelines and would serve only to limit customers’ ability to shop competitive offers seeking the best price for telecommunications service. (*See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information; Implementation of the Non-Accounting safeguards of Sections 271 and 272 of the Communications Act of 1934, As amended*, CC Docket No. 96-115 and 96-149, Order on Reconsideration and Petitions for Forbearance, 14 FCC Rcd 14490 (1999))

retention and marketing efforts it deems appropriate. FDN should not be permitted to bootstrap additional FastAccess issues into this proceeding.

Issue 6: If the Commission determines that a BellSouth promotional tariff is unlawful, what effect, if any, should this decision have on customers who have already contracted for service under the promotional tariff?

SUMMARY OF BELLSOUTH'S POSITION

*** BellSouth's promotions comply with Florida law and the Commission's rules as they existed at the time BellSouth filed the offerings. If the Commission finds that these offerings do not comply with criteria established here (and it should not), customers with contracts should be allowed to continue the contract. ***

DISCUSSION

BellSouth offered, and continues to offer, Key Customer in a manner consistent with Florida law. (Tr. at 196). The Commission staff did not process Key Customer administratively until *after* conducting a meeting with BellSouth to discuss concerns about the initial tariff filing and after BellSouth supplied cost data, wire center information, and substitute tariff pages. (Key Customer Order, p. 5). This Commission allowed Key Customer to remain in effect pending the hearing in this case and also allowed BellSouth's December 2002 Key Customer promotional tariff to become effective. (*See* Order Nos. PSC-02-1248-FOF-TP and PSC-03-0148-PAA-TP). Because this Commission addressed Key Customer and allowed it to remain effective and available to customers, any changes to promotional tariffs should apply on a prospective basis and all current customers receiving the benefits of Key Customer should be permitted to continue to enjoy the benefits they bargained for. (*See* Tr. at 196).¹⁵

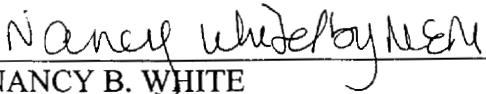
¹⁵ FDN has no position on this issue. (Tr. at 76; and Prehearing Order p. 28).

V. CONCLUSION

For the reasons set forth herein, BellSouth requests that the Commission adopt BellSouth's position on each issue enumerated above.

Respectfully submitted this 1st day of April, 2003.

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