

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs and for investigation of BellSouth's promotional pricing and marketing practices, by Florida Digital Network, Inc.

DOCKET NO. 020119-TP

In re: Petition for expedited review and cancellation of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs by Florida Competitive Carriers Association.

DOCKET NO. 020578-TP
ORDER NO. PSC-03-0065-PHO-TP
ISSUED: January 8, 2003

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on December 16, 2002, in Tallahassee, Florida, before Commissioner Braulio L. Baez, as Prehearing Officer.

APPEARANCES:

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On behalf of the Commission Staff.

PREHEARING ORDER AND SECOND ORDER MODIFYING PROCEDURE

I. CONDUCT OF PROCEEDINGS

Pursuant to Rule 28-106.211, Florida Administrative Code, this
Order is issued to prevent delay and to promote the just, speedy,
and inexpensive determination of all aspects of this case.

II. CASE BACKGROUND

On February 14, 2002, Florida Digital Network, Inc. (FDN)
filed a Petition for Expedited Review and Cancellation of BellSouth
Telecommunications, Inc.'s Key Customer Promotional Tariffs and For
An Investigation of BellSouth Telecommunications, Inc.'s
Promotional Pricing and Marketing Practices (January tariff
filing). On March 5, 2002, BellSouth filed its Response and Answer
to FDN's Petition.

On June 25, 2002, the Florida Competitive Carriers Association
(FCCA) filed a Petition for Expedited Review and Cancellation Of
BellSouth's Key Customer Promotional Tariffs (June tariff filing)
in Docket No. 020578-TP. On June 28, 2002, Order No. PSC-02-0875-
PAA-TP, was issued in Docket No. 020119-TP and it provided that
BellSouth's 2002 Key Customer Program tariff was not unduly
discriminatory.

On July 15, 2002, BellSouth filed a Motion to Dismiss or, in the alternative, Response to the "Petition of the Florida Competitive Carriers Association (FCCA) for Expedited Review and Cancellation of BellSouth Telecommunications Inc.'s Key Customer Promotional Tariffs" in Docket No. 020578-TP.

On July 19, 2002, FDN and the FCCA filed separate protests of Order No. PSC-02-0875-PAA-TP, each requesting an administrative hearing be convened in Docket No. 020119-TP. On July 22, 2002, the FCCA filed a Response to BellSouth's Motion to Dismiss in Docket No. 020578-TP. By Order No. PSC-02-1237-FOF-TP, issued September 9, 2002, BellSouth's Motion to Dismiss FCCA's complaint was denied and Docket Nos. 020119-TP and 020578-TP were consolidated for purposes of hearing. By Order No. PSC-02-1295-PCO-TP, issued September 23, 2002, the procedural and hearing dates were set for these dockets. The administrative hearing set in these dockets is scheduled for February 19-20, 2003.

III. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 364.183, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

1. Any party intending to utilize confidential documents at hearing for which no ruling has been made, must be prepared to present their justifications at hearing, so that a ruling can be made at hearing.

2. In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- a) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.
- b) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- c) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- d) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be

presented by written exhibit when reasonably possible to do so.

- e) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Division of the Commission Clerk and Administrative Services's confidential files.

IV. POST-HEARING PROCEDURES

Each party shall file a post-hearing statement of issues and positions. A summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than 50 words, it must be reduced to no more than 50 words. If a party fails to file a post-hearing statement, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages, and shall be filed at the same time.

V. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the parties has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Summaries of testimony shall be limited to five minutes. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the

exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

VI. ORDER OF WITNESSES

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
<u>*Direct</u>		
Joseph P. Gillan	FCCA	1,2(i), 2(iii), 3a, 3b, 3d, 4b and 5a
Danyelle Kennedy	FCCA	2(iv), 3a, 3e(i), 3e(ii) and 4b
Michael P. Gallagher	FDN	2, 2(i), 2(iv), 2(v), 3a, 3a(i), 3a(ii), 3b, 3b(i), 3b(ii), 3c, 3c(i), 3c(ii), 3d, 3d(iv), 3d(v), 3e, 3e(i), 3e(ii), 4a, 4b, 5a and 5b
John Ruscilli	BellSouth	1,3,4a,5 and 6
John P. Casey	BellSouth	3a
Carlos Garcia	BellSouth	1,2(iv),2(v), 3b, 3d(i), 3d(ii), 3d(iii) and 3e
W. Bernard Shell	BellSouth	2(iv) and 2(v)
E. Steven Bigelow	BellSouth	2(iv) and 2(v)

<u>Witness</u>	<u>Proffered By</u>	<u>Issues #</u>
William E. Taylor	BellSouth	2, 3d and 4b
 <u>*Rebuttal</u>		
Michael P. Gallagher	FDN	2, 2(i), 2(iv), 2(v), 3a, 3a(i), 3a(ii), 3b, 3b(i), 3b(ii), 3c, 3c(i), 3c(ii), 3d, 3d(iv),3d(v), 3e, 3e(i) 3e(ii) and 4b
John Ruscilli	BellSouth	1,3,4a, 5 and 6
Carlos Garcia	BellSouth	1,2(iv),2(v), 3b, 3d(i), 3d(ii), 3d(iii) and 3e
Robert Pitofsky	BellSouth	2,3a,3b,3d,3e and 5a
W. Bernard Shell	BellSouth	2(iv) and 2(v)
Samuel G. Massey	BellSouth	3a(i), 3a(ii) and 3d(ii)
William E. Taylor	BellSouth	2,3d and 4b

* Direct and Rebuttal Testimony will be taken up together.

VII. BASIC POSITIONS

BELLSOUTH:

BellSouth's Key Customer tariff filings T-020035 ("the January Key Customer offering") and T-020595 ("the June Key Customer offering") are fair, competitive, and nondiscriminatory. These offerings do not violate any provision of Florida law. These offerings are responsive to the intense local service competition for small business customers in Florida, which has resulted in ALECs serving approximately one-third of the small business access lines in BellSouth's service territory in

Florida. BellSouth needs the flexibility to offer new services and competitive rates as quickly as possible, thereby allowing customers to receive the maximum benefits of competition as quickly as possible. The Commission should find that the January and June Key Customer offerings comply with all requirements currently set forth in Florida and federal law. Moreover, the Commission should find that BellSouth's Key Customer tariff filings are appropriate, fair, competitive, and nondiscriminatory.

FCCA:

To comply with the requirements of Section 364.01 (which directs the Commission to prohibit anticompetitive conduct) and Section 364.051, Florida Statutes (which delineates the standard the Commission is to use in prohibiting cross-subsidization), BellSouth's tariffs for nonbasic services must exceed an imputed floor comprised of pertinent network-related costs, represented by the UNE prices applicable to UNES involved in providing the service, and non-network-related costs, represented by the wholesale discount. In addition, in order to determine whether BellSouth's nonbasic services recover, in the aggregate, all costs associated with furnishing such services, BellSouth should be directed to file a comprehensive cost study that attributes all costs to either basic or nonbasic services. To the extent that BellSouth believes a cost cannot be assigned between these categories, BellSouth should be required to identify the cost and provide an explanation as to why it is unable to assign it to either of these categories. Further, because of BellSouth's dominant position, in order to provide an opportunity for competition to take hold in the local exchange, the Commission should restrict BellSouth's contract terms and winback activities. The Commission should limit BellSouth's termination provisions to a maximum of three months of discounts. The duration of contracts for standard, analog-provided services should not exceed one year. The maximum duration applicable to more complex digital services should be three years. Finally, the Commission should prohibit BellSouth from contacting customers who

choose competitive alternatives for 30 days following the date they disconnect from BellSouth.

FDN: BellSouth's promotional discounts are unfair, anticompetitive and discriminatory. BellSouth has dominant market power and position in its incumbent territory in the State of Florida, and BellSouth uses that status to stifle competition through promotional pricing and discounts. BellSouth has offered promotional discounts of up to 40% off its regular prices only in specific geographic areas where Florida's new competitors operate. Thus, BellSouth is using its market power to subdue competition and fix competitor market share where, when and how BellSouth deems fit, while BellSouth customers without competitive choices feel the full brunt of rate increases. If BellSouth is permitted to offer discounts, those discounts should apply across-the-board, to all BellSouth customers. In this way, all BellSouth customers can benefit from competition, no BellSouth customer is unduly discriminated against, and the competitors are not as drastically disadvantaged. Further, BellSouth should not be permitted to structure discount duration, eligibility duration or termination liability so as to "lock up" customers and foreclose future competitive opportunity. If the Commission does not stop BellSouth promotions and discounts outright, the Commission must at least impose restrictions on promotional tariff duration, eligibility duration, and termination liability or the Commission may be left with no meaningful opportunity to correct the course of stagnating or (worse still) reversing levels of competition caused by BellSouth conduct.

JOINT ALECS:

BellSouth's key customer promotion targets only existing ALEC customers and potential ALEC customers. Through this promotional pricing program, BellSouth has used, and intends to continue to use, its dominant market status to selectively eliminate its business market competitors, causing substantial and irreparable harm to Florida's ALECs and Florida's customers. BellSouth's key customer

promotional tariff is unlawful and anticompetitive and should be cancelled by the Commission.

STAFF: Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

VIII. ISSUES AND POSITIONS

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

POSITIONS

BELLSOUTH:

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

FCCA: FCCA has not stated a position on this issue.

FDN: The Commission has jurisdiction to determine whether BellSouth's promotions and discounts comport with Chapter 364, Florida Statutes.

JOINT ALECS:

Joint ALECs adopt the position of Florida Digital Network.

STAFF: Staff has no position at this time.

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

BELLSOUTH:

Nothing in Section 364.01, Florida Statutes, alters or expands the Commission's jurisdiction. Instead, Section 364.01 gives guidance to the Commission as to the appropriate exercise of the jurisdiction that already has

been granted to it. Most of this guidance focuses on promoting competition, which is exactly what the January and June Key Customer offerings have done. BellSouth has been offering promotions like the January and June Key Customer offerings for years, and during that time, ALECs have gained a significant share of the business market in Florida. The Commission's 2002 Draft Competition Report, for example, reflects that ALECs serve over 33% of the business lines within BellSouth's territory.

FCCA: The Commission should interpret Section 365.01(4)(d) as mandating the Commission to affirmatively promote competition and to prohibit anticompetitive practices. The Commission should recognize this will require the Commission to differentiate its regulatory oversight of incumbent local exchange companies relative to that of new entrants. In the present context, implementing Section 364.01 would include reviewing tariffs of BellSouth to ensure compliance with applicable thresholds, and placing reasonable restrictions on efforts by BellSouth to embed within the tariff terms and conditions which would impede nascent competition.

FDN: Section 364.01 should be interpreted as an expression of 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. BellSouth's promotional discounts are not consistent with this intent in either purpose or effect.

JOINT ALECS: Joint ALECs adopt the position of Florida Digital Network.

STAFF: Staff has no position at this time.

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)?

BELLSOUTH:

The criteria set forth in the Florida Statutes is sufficient to determine whether the pricing of a promotional tariff offering is appropriate.

i) Section 364.3381, Florida Statutes does not apply to price regulated companies such as BellSouth, and no criteria beyond the provisions of Section 364.051(5) Florida Statutes, are necessary or appropriate. The January and June Key Customer offerings comply with these provisions.

ii) No other criteria is necessary or appropriate.

iii) Offerings like the January and June Key Customer offerings clearly comply with such criteria when either:
(a) after applying the deepest discounts available under the offering, the rates for each service available under the offering covers the relevant costs of the service; or

(b) BellSouth is "meeting offerings by any competitive provider" as permitted by Section 364.051(5)(a).

iv) No.

v) No.

FCCA:

(i) The Commission should devise an imputation test that will implement the statutory standard. Under the test the recurring price under a BellSouth promotion must meet or exceed the sum of the recurring network-related costs, represented by the recurring Commission - established rate for each UNE used in the provision of the service and non-network-related costs, in the form of the wholesale discount.

With respect to non-recurring charges under a BellSouth promotion, the test should be that the non-recurring charge must exceed the non-recurring charges associated with each of the UNES that underlie the service.

Finally, in order to determine whether BellSouth's nonbasic services recover, in the aggregate, all costs associated with furnishing such services, BellSouth should be directed to file a comprehensive cost study that attributes all costs to either basic or nonbasic services. To the extent that BellSouth believes a cost cannot be attributed between these categories, BellSouth should be required to identify the cost and provide an explanation as to why it is unable to assign it to either of these categories.

(ii) No position.

(iii) All customer configurations which reasonably can be foreseen must meet all of the appropriate criteria.

(iv) Based upon a comparison and analysis derived from calculations contained in the testimony of FCCA witness Danyelle Kennedy, which examined the discounted price applicable to a 4-line business service, the answer is yes.

(v) The FCCA has not made this comparison; however, based upon the degree to which the January tariff fails the criterion, and the relationship between the January and June discounts, it appears that the June tariff would also violate the standard.

FDN: The Commission must consider, at a minimum, BellSouth's dominant market power and position relative to that of individual ALECs, the level and availability of the BellSouth discounts, the duration of the discounts, UNE costs, and the impacts on customers, competition and competitors over time. (Gallagher)

i) Neither section should be read to obviate a price squeeze analysis simply because the non-viable option of resale is available for some promotions. (Gallagher) Neither Section 364.051(5) nor 364.3381 should be interpreted so as to sanction discounts of the nature that BellSouth has offered.

ii) See FDN's position on the above and subsequent issues. BellSouth's geographic targeting of customers for discounts is discriminatory, as well as unfair and anticompetitive, since all BellSouth customers do not receive or benefit from BellSouth's discounts.

iii) No position at this time.

iv) Yes. Any BellSouth discounts should be offered to all BellSouth customers. (Gallagher)

v) Yes. Any BellSouth discounts should be offered to all BellSouth customers (Gallagher)

JOINT ALECS:

Joint ALECs adopt the position of Florida Digital Network.

STAFF: Staff has no position at this time.

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?

BELLSOUTH:

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. The termination liability provisions in the January Key Customer offering are appropriate because damages from a breach of a January Key Customer contract are not readily ascertainable at the time such a contract is executed and the applicable charges are proportionate to the reasonably anticipated damages.

(ii) No. The termination liability provisions in the June Key Customer offering are appropriate because damages from a breach of a June Key Customer contract are not readily ascertainable at the time such a contract is executed and the applicable charges are proportionate to the reasonably anticipated damages.

FCCA:

Given the status of the introduction of competition, the Commission should limit BellSouth's termination liability provisions to a maximum of three months' discounts.

i) The answer to this subissue would vary depending on the amount of time an individual customer has taken service under the contract.

ii) See response to (i) above.

FDN:

The Commission must consider, at a minimum, BellSouth's dominant market power and position relative to that of individual ALECs, the level and availability of the BellSouth discounts, the duration of the discounts, UNE costs, the level and effect of the termination liability, and the impacts on customers, competition and competitors over time. (Gallagher)

i) Yes. Early termination liability should not exceed BellSouth's retail line installation rates. (Gallagher)

ii) Yes. Early termination liability should not exceed BellSouth's retail line installation rates. (Gallagher)

JOINT ALECS:

Joint ALECs adopt the position of Florida Digital Network.

i) Yes. Because of this tariff's impact on customers, competitors, and competition, its early termination liability should not exceed BellSouth's retail line installation rates.

ii) Yes. Because of this tariff's impact on customers, competitors, and competition, its early termination liability should not exceed BellSouth's retail line installation rates.

STAFF:

Staff has no position at this time.

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-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?

BELLSOUTH:

No new criteria should be established. The duration of a promotional tariff offering is dependant on the offering itself and the market to which it is offered.

i) No. The offering is available for resale, and it is a competitive response to offerings of other competitors.

ii) No. The offering is available for resale, and it is a competitive response to offerings of other competitors.

FCCA:

Given the state of competition in the local exchange market, FCCA recommends that the Commission limit BellSouth from offering contracts for standard services (traditional, single or multi-lines pots services provisioned as an analog voice service) of more than twelve months, or contracts for complex digital services of greater than three years.

i) Yes.

ii) Yes.

FDN:

The Commission must consider, at a minimum, BellSouth's dominant market power and position relative to that of individual ALECs, the level and availability of the BellSouth discounts, the duration of the discounts, UNE costs, the level and effect of the termination liability, and the impacts on customers, competition and competitors over time. (Gallagher)

i) Yes. The Commission must limit the duration of promotional tariffs, eligibility and contracts before it is too late for the Commission to correct stagnating or reversing competitive trends. If the Commission does not stop BellSouth promotions and discounts outright, the Commission must at least impose restrictions on promotional tariff duration and eligibility duration or the Commission may be left with no meaningful opportunity to correct the course of stagnating or (worse still) reversing levels of competition caused by BellSouth conduct. (Gallagher)

ii) Yes. The Commission must limit the duration of promotional tariffs, eligibility and contracts before it is too late for the Commission to correct stagnating or reversing competitive trends. If the Commission does not stop BellSouth promotions and discounts outright, the Commission must at least impose restrictions on promotional tariff duration and eligibility duration or the Commission may be left with no meaningful opportunity to correct the course of stagnating or (worse still) reversing levels of competition caused by BellSouth conduct. (Gallagher)

JOINT ALECS:

Joint ALECs adopt the position of Florida Digital Network.

STAFF: Staff has no position at this time.

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?

BELLSOUTH:

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.

FCCA: No position.

FDN: The Commission must consider, at a minimum, BellSouth's dominant market power and position relative to that of individual ALECs, the level and availability of the BellSouth discounts, the duration of the discounts, UNE costs, the level and effect of the termination liability, and the impacts on customers, competition and competitors over time. (Gallagher)

i) Yes. Any BellSouth discounts should be offered to all BellSouth customers. (Gallagher)

ii) Yes. Any BellSouth discounts should be offered to all BellSouth customers. (Gallagher)

JOINT ALECS:

Joint ALECs adopt the position of Florida Digital Network.

STAFF: Staff has no position at this time.

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?

BELLSOUTH:

Section 364.051(5) (a), Florida Statutes, allows for geographic targeting in response to offerings by competitive providers. No additional criteria should be established.

i) The phrase "meeting offerings by any competitive provider" means that, where competition exists, BellSouth can adjust its prices in order to compete effectively.

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

iii) How the phrases "similarly situated" and "substantially similar" are to be interpreted can vary depending on the specific circumstances. In the context of the January and June Key Customer offerings, the

heightened level of competition in the "hot" wire centers means that customers that are served out of those wire centers are not "similarly situated" or "substantially similar" to other customers.

iv) No.

v) No.

FCCA: BellSouth should not be permitted to market the promotion only to customers who have chosen an alternative. More importantly, structural separation is needed to ensure that BellSouth does not exploit its access to information unavailable to other market participants.

i) Any promotion would have to meet the imputation standard identified above. In the aggregate, all of BellSouth's nonbasic services must cover the total cost to provide nonbasic services.

ii) BellSouth should be prohibited from differentiating between its existing customers and customers who have chosen competing services. This would include both the determination of the customers applicable for a discount and the manner in which BellSouth markets the discount to its customers.

iii) See (ii) above.

iv) Yes. Evidence indicates that BellSouth does not market the discounts to existing customers to the extent it markets the same discount to customers who have elected to leave BellSouth. (Kennedy)

v) Yes. See response to (iv) above.

FDN: The Commission must consider, at a minimum, BellSouth's dominant market power and position relative to that of individual ALECs, the level and availability of the BellSouth discounts, the duration of the discounts, UNE costs, the level and effect of the termination liability,

and the impacts on customers, competition and competitors over time. (Gallagher)

i) Any permitted discounts should be narrowly tailored to meet specific competitor offerings, and BellSouth should have the ultimate burden of proof on this question.

ii) If the Commission permits BellSouth to offer discounts to specific geographic areas, the Commission should not permit BellSouth to apply discounts to different locations of the same business entity or to customers who have moved to a new location unless BellSouth can show that it is meeting a competitor's offering for all locations. (Gallagher)

iii) The issue of undue discrimination has historically hinged on cost differences inherent in serving groupings of customers in the same class or different classes. Here, BellSouth has not alleged that any cost differences among customers in the same class arise by virtue of a competitor's presence in a hot wire center. Further, BellSouth's position should be rejected since BellSouth has not shown that customers not receiving discounts benefit from the discounts.

iv) Yes. Any BellSouth discounts should be offered to all BellSouth customers. (Gallagher)

v) Yes. Any BellSouth discounts should be offered to all BellSouth customers. (Gallagher)

JOINT ALECS:

Joint ALECs adopt the position of Florida Digital Network.

STAFF:

Staff has no position at this time.

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?

BELLSOUTH:

It is not necessary to establish any new criteria.

i) No.

ii) No.

FCCA:

The Commission should prohibit BellSouth from applying separate discounts to the price that a customer pays if the effect would be to violate the imputation standard.

i) It appears that BellSouth's "select points" promotion, which was introduced without being tariffed, if permitted to be applicable to the Key Customers, would have the effect of exacerbating the extent to which the Key Customer tariffs violate the imputation standard.

ii) It appears that BellSouth's "select points" promotion, which was introduced without being tariffed, if permitted to be applicable to the Key Customers, would have the effect of exacerbating the extent to which the Key Customer tariffs violate the imputation standard.

FDN:

The Commission must consider, at a minimum, BellSouth's dominant market power and position relative to that of individual ALECs, the level and availability of the BellSouth discounts, the duration of the discounts, UNE costs, the level and effect of the termination liability,

and the impacts on customers, competition and competitors over time. (Gallagher)

i) Yes. Any BellSouth discounts should be offered to all BellSouth customers. (Gallagher)

ii) Yes. Any BellSouth discounts should be offered to all BellSouth customers. (Gallagher)

JOINT ALECS:

Joint ALECs adopt the position of Florida Digital Network.

STAFF: Staff has no position at this time.

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) Is 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?

BELLSOUTH:

The federal Telecommunications Act of 1996 ("the Act") and orders of this Commission and the Federal Communications Commission ("FCC") govern BellSouth's requirements for the resale of promotional offerings. Specifically, retail promotions offered for 90 days or less are not discounted, and promotions of more than 90 days are available for resale at the promotional rate minus the applicable wholesale discount.

i) Yes. The January Key Customer offering is available for resale consistent with the resale obligations of the Act, this Commission, and the FCC.

ii) Yes. The June Key Customer offering is available for resale consistent with the resale obligations of the Act, this Commission, and the FCC.

FCCA: No position.

FDN: Although resale is a non-viable option for competition, resale terms and conditions should be fair and reasonable. It is unreasonable for BellSouth to bill ALEC customers for the resale of promotions without automatically applying the wholesale and promotion discounts. Further, making the ALEC responsible for the full termination liability in the event the customer departs ALEC service is unfair, particularly when the customer ports back to BellSouth. (Gallagher)

i) No.

ii) No.

JOINT ALECS:

Joint ALECs adopt the position of Florida Digital Network.

STAFF: Staff has no position at this time.

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

BELLSOUTH:

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.

FCCA: The technical ability of an ALEC to resell the promotional tariff does not mitigate its anticompetitive effect, due to the inadequacy of the resale entry mechanism.

FDN: The resale of BellSouth's promotional discounts is completely at odds with this Commission's and the FCC's announced goals of promoting facilities-based competition. Resale of promotions leads to the erosion/abandonment of facilities-based infrastructure. Moreover, resale is an unfinanciable, non-viable business option. (Gallagher)

JOINT ALECS:

Joint ALECS adopt the position of Florida Digital Network.

STAFF: Staff has no position at this time.

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

BELLSOUTH:

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

FCCA: The Commission should prohibit BellSouth from contacting customers who chose alternatives for minimum of thirty days after the customer has been disconnected from BellSouth.

FDN: Any marketing of promotional discounts should be by the same means, materials and methods to all eligible customers so the promotion does not discriminate in effect. (Gallagher)

JOINT ALECS:

Joint ALECS adopt the position of Florida Digital Network.

STAFF: Staff has no position at this time.

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?

BELLSOUTH:

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 in a manner consistent with the requirements of the Act, applicable FCC orders, and applicable Commission orders. No additional restrictions should be imposed.

FCCA:

Corporate restructuring should be required. Until that is done, the Commission should prohibit "geographical targeting." Moreover, BellSouth retail should not have access to any information that is not available to all ALECs at no more than a TELRIC-based, Commission-approved rate.

FDN:

No BellSouth retail employee or agent should have access to any wholesale information. Further, the Commission should forbid BellSouth from attempting to retain or winback a customer during retail customer contacts initiated for the purpose of account activity predicate to a change in carrier, such as moving or removing xDSL, lifting a freeze, etc. (Gallagher)

JOINT ALECS:

Joint ALECs adopt the position of Florida Digital Network.

STAFF:

Staff has no position at this time.

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?

BELLSOUTH:

BellSouth's Key Customer offerings comply with Florida law and the Commission's rules as they existed and were

interpreted at the time BellSouth filed the offerings. If the Commission finds that these offerings do not comply with criteria established in this proceeding (and it should not), customers who have contracted for service under the offerings should be allowed to continue the contract.

FCCA: Does not contend that customers who have already signed up for "key customer" promotional service should be removed from the tariff. The FCCA favors implementation of the criteria developed in these dockets on a going forward basis.

FDN: No position at this time.

JOINT ALECS: No position at this time.

STAFF: Staff has no position at this time.

ISSUE 7 [NEW]: Should any discounts, rebates, points or other promotions applicable to regulated BellSouth services through a BellSouth affiliate or third party be tariffed and subject to the criteria the Commission establishes in this case?

FDN: Yes.

FDN and BellSouth have agreed on a stipulation to this issue which is referenced herein. As a consequence, FDN has withdrawn this issue.

IX. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
John A. Ruscilli	BellSouth	_____ (JAR-1)	Affidavit of Elizabeth A. Stockdale

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
John A. Ruscilli	BellSouth	_____	Local Exchange
		(JAR-2)	Tariffs of
			various ALECs
		_____	Promotional
		(JAR-3)	offerings by
			various
			entities
		_____	Stockdale
(JAR-4)	FL/TN Reply		
	Affidavit		
_____	FDN's 11/6/02		
(JAR-5)	Response to		
	BellSouth's		
	First Set of		
	Request for		
	Production,		
	Item No. 31		
_____	FDN's Rate		
(JAR-6)	Changes and		
	Growth in		
	Access Lines		
_____	Margin		
(JAR-7)	Analysis UNE-P		
	vs. 3-Line		
	Business		
	Customers		
_____	Network		
(JAR-8)	Telephone's		
	May 20, 2002		
	Letter to		
	Florida Public		
	Service		
	Commission		
	BellSouth's		
	June 19, 2002		
	Response		

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
John P. Casey	BellSouth	_____	BellSouth Key
		(JPC-1)	C u s t o m e r P r o g r a m S u b s c r i b e r E l e c t i o n F o r m - G e o r g i a a n d F l o r i d a
Carlos Garcia	BellSouth	_____	BellSouth Key
		(JPC-2)	C u s t o m e r P r o g r a m S u b s c r i b e r E l e c t i o n F o r m - F l o r i d a
		_____	January 15,
		(CG-1)	2 0 0 2 , l e t t e r / t a r i f f f i l i n g f r o m C r i s e r t o D ' H a e s e l e e r
		_____	June 11, 2002,
		(CG-2)	l e t t e r / t a r i f f f i l i n g f r o m C r i s e r t o D ' H a e s e l e e r
		_____	A d v e r t i s i n g a n d m e d i a M a t e r i a l s
		_____	C o m p e t i t i v e P r o p o s a l s
		(CG-4)	

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Carlos Garcia	BellSouth	_____	BellSouth's
		(CG-5)	Response to
			FCCA and
			Power
			Communication Corporation's
		First Set of	
		Interrogatori	
		es Item No.	
		8(a)	
		_____	Sampling of
		(CG-6)	ALEC offers,
			advertisements
			and bills
		_____	FDN's Press
		(CG-7)	Release
		_____	BellSouth's
		(CG-8)	page by page
			Pamphlets
			reflecting
			actual size of
			advertisement
		_____	Copies of
		(CG-9)	advertisement
			sent to
			existing
			BellSouth
			customer
Robert Pitofsky	BellSouth	_____	Curriculum
		(RP-1)	Vitae
W. Bernard Shell	BellSouth	_____	1FB Analysis
		(WBS-1)	

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
W. Bernard Shell	BellSouth	_____	Comparison of discounted prices with costs of rate elements.
		(WBS-2)	
Samuel G. Massey	BellSouth	_____	Rates for BellSouth's Key Customers
		(WBS-3)	
Samuel G. Massey	BellSouth	_____	BellSouth's estimated Share in each Wire Center as of September 2002 for January Key Customers
		(SGM-1)	
William E. Taylor	BellSouth	_____	BellSouth's estimated Share in each Wire Center as of September 2002 for June Key Customer
		(SGM-2)	
William E. Taylor	BellSouth	_____	Curriculum Vitae
Danyelle Kennedy	FCCA	_____	Comparison of wholesale cost and retail rate, 4-line service
		(DK-1)	
		_____	Excerpt, Copy of Key Customer contract
		(DK-2)	

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>		
Danyelle Kennedy	FCCA	(DK-3)	Advertisement related to BellSouth "Winback" activity		
		(DK-4)	Advertisement directed to existing BellSouth customer		
		(DK-5)	Excerpt, BellSouth response		
		(DK-6)	"Select Points" promotion		
		(DK-7)	Tariff notification		
		Michael P. Gallagher	FDN	(MPG-1)	Wholesale Retail Rates Comparison
				(MPG-2)	BellSouth LSOs by Zone
(MPG-3)	Missouri Comm'n Order				
(MPG-4)	Texas Comm'n Staff Proposal				
<u>Rebuttal</u>					
Michael P. Gallagher	FDN	(MPG-1)	BellSouth Rate Increases		

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

X. STIPULATIONS

FDN and BellSouth have agreed to the following stipulation on Issue 7:

If BellSouth, its affiliates, or a third party through agreement with BellSouth offers discounts, points, rebates, or cashback coupons (collectively rewards), which rewards must be redeemed for regulated BellSouth services, then BellSouth will file tariffs or applicable regulatory filings with the Florida Public Service Commission for such program.

XI. PENDING MOTIONS

On November 21, 2002, BellSouth filed a Motion to Compel XO, US LEC and Time Warner to respond fully and completely to BellSouth's First Set of Interrogatories. On December 5, 2002, XO, US LEC and Time Warner filed a Joint Response to BellSouth's Motion to Compel.

On December 3, 2002, BellSouth filed a Motion to Compel FCCA to respond fully and completely to BellSouth's First Request for Production of Documents. FCCA filed its Response to BellSouth's Motion to Compel on December 10, 2002.

Separate orders will be issued on pending Motions prior to the hearing.

XII. PENDING CONFIDENTIALITY MATTERS

Separate orders will be issued on the pending confidentiality requests prior to the hearing.

BellSouth has filed several Notices of Intent to Request Confidential Classification: November 25, 2002, Document No. 12953-02, Exhibit JAR-8 to witness John Ruscilli's Rebuttal Testimony, Exhibit WBS-3 to the Rebuttal Testimony to witness W. Bernard Shell and Exhibits SGM-1 and SGM-2 to the Rebuttal Testimony of witness Samuel G. Massey; November 25, 2002, Document No. 12955-02, Exhibits JAR-5 and JAR-6 to the Rebuttal Testimony of witness W. Bernard Shell; December 4, 2002, Document No. 13259-02, Attachment

to Response to Staff's Seventh Set of Interrogatories Nos. 49 and 50.

On December 12, 2002, FDN filed a request for confidential classification of Document No. 12955-02, Exhibits JAR-5 and JAR-6 to the rebuttal testimony of BellSouth's witness John Ruscilli.

XIII. DECISIONS THAT MAY IMPACT COMMISSION'S RESOLUTION OF ISSUES

To date, no decisions have been identified.

XIV. RULINGS

On December 13, 2002, FCCA, US LEC, Time Warner and XO (Movants) filed a Motion to Continue the Hearing and Hold Case Activities In Abeyance. In their Motion, Movants assert that additional time is needed to seek a possible settlement in this proceeding. Movants further request that all case activities be held in abeyance for 45 days, including discovery and motions. At the prehearing conference, the Movants stated that a continuance would afford parties an opportunity to streamline issues and possibly reach a settlement in this proceeding. Movants state that possible settlement negotiations could be hamstrung by active motion practice if a continuance is not granted. Further, Movants indicate that the holiday schedule poses to limit resources during that period of time which may hamper efforts in preparing for hearing and negotiating and the same time. Movants note that FDN supports the Motion.

In its Response to the FCCA's Motion at the prehearing conference, BellSouth states that it objects to the FCCA's Motion. BellSouth asserts that if a continuance is granted it believes that a compromise or settlement is less likely to be reached. BellSouth explains that at the agenda conference in this docket, BellSouth committed that it would not file any tariffs that were similar to those at issue during this proceeding. However, BellSouth contends that a continuance in this proceeding will hinder its flexibility to file other tariffs that may be similar to the tariffs in this proceeding.

Having considered FCCA's Motion and parties response, it appears reasonable to grant a continuance. Although, BellSouth objects to FCCA's Motion to Continue, it appears that if the

parties are afforded additional time to discuss settlement, it could result in a settlement of this case or possibility of issues being stipulated. In light of this continuance, I note that BellSouth's voluntary agreement to not file similar tariffs to those at issue in this proceeding should be relaxed. I note also that Commission staff has indicated that a continuance will not unduly burden staff's schedule regarding this proceeding. Because the parties have indicated that a possible settlement exists, the hearing shall be continued until February 19-20, 2003. Parties shall apprise Commission staff when a settlement is reached or when an impasse results. Further, on or before January 28, 2003, parties shall provide staff with a status update on settlement negotiations. If parties have not reached a settlement by January 28, 2003, all pending discovery shall be due on February 5, 2003. If a hearing is conducted, briefs will be due on April 1, 2003.

Opening statements, if any, shall not exceed ten minutes per party.

It is therefore,

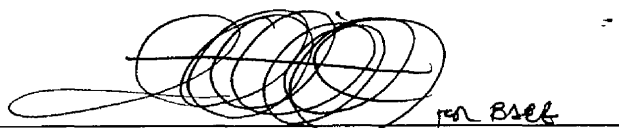
ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

ORDERED that hearing has been continued and will be held February 19-20, 2003. It is further

ORDERED that the hearing procedure set forth in Order Nos. PSC-02-1295-PCO-TP and PSC-02-1602-PCO-TP is hereby affirmed in all other respects.

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By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 8th Day of January, 2003.

A handwritten signature in black ink, appearing to read 'Braulio L. Baez', is written over a horizontal line.

BRAULIO L. BAEZ
Commissioner and Prehearing Officer

(S E A L)

FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

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

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for

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reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.