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September 6, 2002

VIA HAND DELIVERY

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Re: Docket Nos.: 020119-TP and 020578-TP

Dear Ms. Bayo:

On behalf of the Florida Competitive Carriers Association (FCCA) and Mpower Communications Corp (Mpower), enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ The Florida Competitive Carriers Association and Mpower Communications Corp.'s Brief on Issue 3(f).

Please acknowledge receipt of the above on the extra copy and return the stamped copy to me. Thank you for your assistance.

Sincerely,

Joseph A. McGlothlin

JAM/mls
 Enclosure
 Teach dkt

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Florida Digital Network,)
 Inc., for Expedited Review and Cancellation)
 of BellSouth Telecommunication Inc.'s)
 Key Customer Promotional Tariffs)
 and for an Investigation of BellSouth)
 Telecommunication Inc.'s Promotional)
 Pricing and Marketing Practices.)
)
 In Re: Petition of Florida Competitive,)
 Carriers Association, for Expedited Review)
 and Cancellation Of BellSouth)
 Telecommunications, Inc.'s Key Customer)
 Promotional Tariffs.)
)
 _____/

Docket No.: 020119-TP

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Docket No.: 020578-TP

Filed: September 6, 2002

**BRIEF OF FLORIDA COMPETITIVE CARRIERS ASSOCIATION AND
 MPOWER COMMUNICATIONS CORP. ON ISSUE 3(F)**

Pursuant to Commission Staff's Memorandum dated August 29, 2002, the Florida Competitive Carriers Association ("FCCA") and Mpower Communications Corp. ("Mpower") file this brief on proposed Issue 3(f).

INTRODUCTION

1. On August 29, 2002, Staff held an issue identification meeting in this docket. At the meeting, FCCA and Mpower proposed Issue 3(f), which reads:

What additional filing requirements, if any, should be established for BellSouth promotional tariffs?

BellSouth objected to Issue 3(f). The Prehearing Officer, upon being apprised of the dispute, directed the parties to prepare briefs in support of their positions. FCCA and Mpower submit their brief in support of including Issue 3(f).

DISCUSSION

2. In this case, the Commission will consider whether certain BellSouth promotional offerings, constituting the "Key Customer Program," are anticompetitive. Among other issues of concern to the FCCA and Mpower is the "revolving door" nature of such filings. The "revolving

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door” effect is created by the interplay of certain timing considerations: (i) the short duration of the tariffs; (ii) the length of time required to process a challenge to the tariff; and (iii) BellSouth’s practice of filing a series of “end to end” tariffs. These timing aspects work in concert to create an absurd situation in which affected parties receive rulings on challenges after the challenged tariffs have expired. An example of the revolving door effect can be illustrated by examining the history of these two combined proceedings.

3. On January 31, 2002, BellSouth’s “first” Key Customer tariff became effective and was to remain effective for six months. Shortly thereafter, on February 14, 2002, FDN filed its petition seeking cancellation of the first Key Customer tariff (Docket 020119). During the time FDN’s petition was pending, the Key Customer tariff was effective and available to customers. Under the terms of the Key Customer program, these customers must remain with BellSouth for as long as three years. (If a customer were to terminate the contract early, the customer would face a heavy termination penalty.) As a result, these customers have effectively been removed from the competitive marketplace for periods of up to three years. On June 25, 2002, the first Key Customer tariff expired prior to the Commission issuing a decision in Docket 020119, thus rendering the ALECs’ challenges moot for all intents and purposes. FDN cannot receive the relief it requested in its petition. If it is ultimately determined that ALECs’ position is correct, the BellSouth tariff can’t be canceled (because it has expired), and BellSouth can’t be prevented from acquiring customers and offering the plan (because it has already done so successfully).

4. On June 26, 2002, a day after the first Key Customer program ended, by design a “successor” BellSouth Key Customer program became active. This second program is similar to the first Key Customer offering. FCCA filed a petition requesting the cancellation of the second

program (Docket No. 020578). As in Docket 020119, the Commission declined to suspend the tariff. If Docket No. 020578 runs its course on the existing schedule, BellSouth will be able to acquire and lock in customers for long periods, the tariff will expire in December 2002, and the Commission will conduct a hearing on the ALECs' challenges in January 2003.

5. This case illustrates well the adage that "justice delayed is justice denied." The cycle cannot be allowed to continue. Issue 3(f) is designed to break the revolving door cycle in a manner efficient for BellSouth, the Commission and affected parties. Currently, Staff and Intervenors must submit discovery requests and receive responses from BellSouth in order to obtain data needed to present an analysis of the tariff. Given the limited duration of the promotions, once the information is received in response to discovery requests Staff and parties are already permanently "behind the curve." The approval of appropriate filing requirements would require BellSouth to file supporting documentation at the same time it files the tariff with the Commission. This requirement would present no hardship to BellSouth; BellSouth acknowledges that it must develop the information before filing the tariff. The supporting data is therefore readily available to BellSouth. The filing requirement contemplated by Issue 3(f) would help eliminate the delay that contributes to the injustice of the situation by allowing third parties and Commission staff to evaluate the validity of a tariff at a much earlier point in time. Any proceeding on a challenge to the tariff will then be expedited accordingly.

6. As FCCA and Mpower understand BellSouth's objection, BellSouth claims that Issue 3(f) would violate a statutory "presumption of validity." FCCA and Mpower presume BellSouth is referring to Section 364.051(5)(a), Florida Statutes. If our "presumption" is "valid," then the Prehearing Officer should note the section applies specifically to *increases* in non-basic rates. The Key Customer Tariffs are promotional discounts.


7. BellSouth's argument is misplaced for other reasons. The "presumption," (assuming for the moment it is applicable for the sake of additional argument) goes to BellSouth's ability to place a tariff into effect in the absence of administrative action to cancel or suspend it. The presumption does not prohibit the Commission from requiring information with which to determine ultimately whether the statutory "presumption" is warranted or unwarranted in a given case. If, in the case of Key Customer tariffs, the Commission can obtain information "after the fact" through discovery without disturbing any applicable statutory "presumption," then the Commission also can take the *procedural* step of requiring the same information to be provided earlier without disturbing the presumption. The "presumption" was not intended to have the effect of making it virtually impossible for the Commission to assess a tariff in time for its decision to have any meaning.

8. BellSouth also contends that Issue 3(f) conflicts with the recent legislative trend towards reduced regulatory oversight. However, the Legislature cannot have intended that "oversight" be "reduced" at the expense of impairing the Commission's ability to carry out the explicit functions delineated in Chapter 364, Florida Statutes. The Commission is tasked by the Legislature with promoting and encouraging competition and with prohibiting anticompetitive behavior. *See* Section 364.01(4), Florida Statutes (2001). The approval of appropriate filing requirements would help accomplish the goal of promoting and protecting competition by providing better and earlier information to the Commission and affected parties regarding whether BellSouth promotional filings are anticompetitive.

9. Finally, FCCA and Mpower point out that this case has reached only the stage of *issue identification*. BellSouth has offered an *interpretation* of "presumptively valid" that FCCA and Mpower dispute. Parties whose substantial interests are affected have a right to

present evidence and argument on all issues involved. See Section 120,57, Florida Statutes. Certainly "all issues involved" means all relevant issues. FCCA and Mpower have demonstrated that Issue 3(f) is relevant and germane. With its arguments, BellSouth has merely *joined the issue*; it has not demonstrated a reason for keeping the issue out the case.

WHEREFORE the FCCA and Mpower request the Prehearing Office to include Issue 3(f) among the issues to be considered by the Commission in these dockets.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Florida Competitive Carriers Association and Mpower Communications Corp.'s Brief on Issue 3(F) has been furnished by (*) hand delivery or by U. S. Mail on this 6th day of September 2002 to the following:

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