

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

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

PREHEARING STATEMENT OF FLORIDA DIGITAL NETWORK, INC.

Pursuant to Order No. PSC-02-1295-PCO-TP, issued September 23, 2002, as amended ("Order on Procedure"), Florida Digital Network, Inc., ("FDN") hereby files its Prehearing Statement in the captioned dockets as follows:

A. Known Witnesses

FDN intends to call as a witness Michael P. Gallagher, FDN's CEO. FDN has prefiled the direct and rebuttal testimony of Mr. Gallagher. At this time, FDN does not intend to call any other witnesses, but does reserve the right to call agents, officers and employees of BellSouth Telecommunications, Inc., ("BellSouth") as adverse party witnesses, pending review of the parties' prehearing statements, rebuttal testimony and depositions, if any.

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B. Known Exhibits

FDN intends to introduce into evidence the exhibit(s) attached to the prefiled testimony of Mr. Michael P. Gallagher as follows:

<u>Exhibit Identification</u>	<u>Exhibit Description</u>
<u>Direct Prefiled</u>	
MPG-1	Wholesale-Retail Rates Comparison ¹
MPG-2	BellSouth LSOs by Zone
MPG-3	Missouri Comm'n Order
MPG-4	Texas Comm'n Staff Proposal
<u>Rebuttal Prefiled</u>	
MPG-5	BellSouth Rate Increases

FDN reserves the right to identify and introduce additional exhibits during cross-examination of other parties' witnesses and re-direct of its own and, to the extent permitted by Commission rules and the Florida Rules of Civil Procedure, to identify and introduce the depositions of other parties' agents, officers and employees.

C. Statement of Basic Position

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

¹ By letter dated November 6, 2002, FDN filed a substitute Exhibit No. ___ (MPG-1) to replace the exhibit originally filed with Mr. Gallagher's direct testimony on October 23, 2002.

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's 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 little or no opportunity to correct the course of stagnating or reversing competitive trends.

D – F. Statement of Issues and Positions

Below is a list of issues, as identified in the Commission's Order on Procedure and FDN's positions on those issues:

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

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.

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?

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) Pursuant to the cost standard identified in Sections 364.051(5) and 364.3381, Florida Statutes.

FDN: Neither section should be read to obviate a price squeeze analysis of retail and wholesale rates 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) Pursuant to any other provisions of Chapter 364, Florida Statutes.

FDN: 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) 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?

FDN: No position at this time.

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)?

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

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)?

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

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?

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) 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?

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

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?

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

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?

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) 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?

FDN: 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. FDN recommends a maximum of 120 day tariff duration, and a maximum of one year discount eligibility, with a requirement of at least one year off discount period per customer. (Gallagher)

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?

FDN: 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. FDN recommends a maximum of 120 day tariff duration, and a maximum of one year discount eligibility, with a requirement of at least one year off discount period per customer. (Gallagher)

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?

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) 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?

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

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?

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

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

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) Pursuant to Section 364.051(5)(a), Florida Statutes, how should "meeting offerings by any competitive provider" be interpreted?

FDN: 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) Pursuant to Section 364.051(5)(a), Florida Statutes, how should "specific geographic market" be interpreted?

FDN: 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.

iii) Pursuant to Section 364.051(5)(a), and 364.08, Florida Statutes, how should "similarly situated" or "substantially similar" be interpreted?

FDN: 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) 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?

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

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?

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

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?

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) 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?

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

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?

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

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

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) Does the BellSouth Key Customer tariff filing (Tariff Number T-020035) meet the resale terms and conditions established pursuant to this issue?

FDN: No.

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?

FDN: No.

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

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, and resale of promotions leads to the erosion/abandonment of facilities-based infrastructure. Moreover, resale is an unfinanciable, non-viable business option. (Gallagher)

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

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?

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)

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?

FDN: 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.

G. Stipulated Issues

FDN is unaware of any stipulated issues at the time of serving this filing.

H. Pending Motions

On October 23, 2002, FDN filed a Motion to Compel BellSouth to file certain discovery responses and for remedies. Since BellSouth provided the responses that were past due, and FDN may address the information contained therein in FDN's rebuttal testimony, FDN withdraws the motion.

I. Pending Confidentiality Issues

BellSouth's counsel has suggested BellSouth may include in its rebuttal testimony information the FDN may consider confidential. If BellSouth's rebuttal testimony does contain such information, FDN may file a motion for confidential treatment of that information. Otherwise, FDN is not aware of any pending confidentiality issues raised by FDN at the time of serving this filing.

J. Order Establishing Procedure Requirements

To FDN's knowledge, at the time of serving this filing, there are no requirements of the Order on Procedure that cannot be complied with.

K. Decisions or Pending Decisions

At the time of serving this filing, FDN is not aware of any decision or pending FCC or court decision that has or may preempt or otherwise impact the Commission's ability to resolve any of the above issues.

L. Objections to Expert Qualifications

A number of witnesses in this proceeding render opinions on what may be considered legal issues. In the past, the Commission has permitted non-lawyers to render opinions on legal matters, but the Commission has typically not accepted such opinions as those of legal experts. If the Commission accepts the legal opinions of these non-lawyers as expert legal opinions, then FDN would reserve its right to conduct voir dire of those witnesses as to those legal opinions. Otherwise, FDN would reserve its right to conduct cross examination of the witnesses on their opinions.

RESPECTFULLY SUBMITTED, this 25 day of November, 2002.


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by e-mail and regular mail to the persons listed below, other than those marked with an (*) who have been sent a copy via overnight mail, this 25th day of November, 2002.

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