BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of

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

PETITION FOR EXPEDITED REVIEW AND CANCELLATION OF BELLSOUTH TELECOMMUNICATIONS, INC.'S KEY CUSTOMER PROMOTIONAL TARIFFS BY FLORIDA COMPETITIVE CARRIERS ASSOCIATION — DOCKET NO. 020578-TP

PETITION FOR EXPEDITED REVIEW AND CANCELLATION OR SUSPENSION OF BELLSOUTH TELECOMMUNICATIONS, INC.'S KEY CUSTOMER TARIFF FILED 12/16/02 BY FLORIDA DIGITAL NETWORK, INC. / — DOCKET NO. 021252-TP

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VOLUME 2

PAGES 142 THROUGH 228

PROCEEDINGS: HEARING

BEFORE: CHAIRMAN LILA A. JABER
COMMISSIONER J. TERRY DEASON
COMMISSIONER BRAULIO L. BAEZ
COMMISSIONER CHARLES M. DAVIDSON
COMMISSIONER RUDOLPH "RUDY" BRADLEY

DATE: Wednesday, February 19, 2003

TIME: Commenced at 9:35 a.m.

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: LINDA BOLES, RPR
Official FPSC Reporter
(850) 413-6734

APPEARANCES: (As heretofore noted.)

I N D E X

WITNESSES

EXHIBITS

NUMBER:		ID.	ADMTD.
12	JAR-1 through JAR 3	151	
13	JAR-4 through JAR-7	153	

PROCEEDINGS

(Transcript follows in sequence from Volume 1.)

CHAIRMAN JABER: BellSouth, let's put your witness up on the stand, get started with the testimony and the exhibits, and then we'll probably break for lunch. Is it Mr. Ruscilli?

MS. WHITE: BellSouth would call John Ruscilli to the stand.

CHAIRMAN JABER: Ms. White, was Mr. Ruscilli in the room when we swore in witnesses?

MS. WHITE: He was. And because of the fact that Ms. Kennedy and Mr. Gillan are no longer in the case, there have been some changes to all of BellSouth's testimony, some that needs to be withdrawn. So for the ease of the Commission and the parties, what we've done is when we put up each witness, we'll hand out like a little summary of what those changes are. And that's what Ms. Mays is doing now for Mr. Ruscilli.

CHAIRMAN JABER: This will be primarily on rebuttal, I assume?

MS. WHITE: Yes, it is.

CHAIRMAN JABER: Okay.

MS. WHITE: I think just about all of it will be on rebuttal.

CHAIRMAN JABER: Okay. Thank you.

MS. WHITE: So I'm not quite sure whether you would prefer this to be put in as an exhibit or just a reference or however you desire.

CHAIRMAN JABER: You know, that's probably the most efficient way of doing it, but let's, let's do it the tedious way. So let's get started with the direct testimony and we'll go from there.

JOHN A. RUSCILLI

was called as a witness on behalf of BellSouth Telecommunications, Inc., and, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. WHITE:

Q Mr. Ruscilli, would you please state your name and address for the record.

A My name is John Ruscilli. I work at 675 West Peachtree, Atlanta, Georgia.

Q By whom are you employed and in what capacity?

A I'm employed by BellSouth Telecommunications. I'm Senior Director of Policy Implementation and Regulatory Compliance.

Q Have you caused to be prefiled in this case direct testimony consisting of 45 pages?

A Yes, ma'am.

Q Do you have any changes to that testimony?

A Yes, ma'am.

Q Could you let me know about those changes, please?
A Yes, ma'am, I will.
On Page 7 on Line 3. I'll wait on you, Mr. Feil. It's just a number change.
Change Page 20 to Page 21.
Q I'm sorry. What page are you on?
A I'm on Page 7 on Line 3. Change the number 20 to 21.
Q Thank you. Apparently your lawyer can't look at the right page number, so that's the problem I was having.
A That's okay.
Q Do you have any other --
A She's still a fine lawyer.
Q Do -- and I'll give you the $5 I owe you for that.
Do you have any other changes?
CHAIRMAN JABER: She's also cheap.
MS. WHITE: That's true. Very cheap.
THE WITNESS: No, ma'am.
BY MS. WHITE:
Q Okay. If I were to ask you the questions contained in your direct testimony today, would your answers be the same?
A Yes, they would.
Q And attached to your direct testimony did you have three exhibits labeled JAR-1, JAR-2 and JAR-3?
A Yes, ma'am.
Q And do you have any changes to those exhibits at this

time?

A No, ma'am.

MS. WHITE: Madam Chairman, I'd ask that the testimony, the direct testimony be entered into the record as though read from the stand.

CHAIRMAN JABER: The direct testimony of John A. Ruscilli shall be inserted into the record as though read.

MR. FEIL: Madam Chair, may I ask one clarification in that regard?

CHAIRMAN JABER: Sure.

MR. FEIL: In his testimony he does refer to the draft of the report. We've entered or stipulated the final version of the report. I don't know whether or not there are any changes necessary as a result of going from draft to final. I don't know if the page change he made is a result of going from draft to final.

CHAIRMAN JABER: Yeah. That's a very good question.

THE WITNESS: Good point.

CHAIRMAN JABER: Let me ask Ms. White first. Did you -- you meant to include the final report.

MS. WHITE: That's correct. That is another change that Mr. Ruscilli should probably make to Page 7, Line 2 of his direct testimony, to delete the word "draft."

THE WITNESS: Yes. That's fine.

MR. FEIL: Excuse me.

THE WITNESS: But I'm not sure about the page number. I've just looked at the draft here. Excuse me, Mr. Feil.

MS. WHITE: Maybe if we could look that up at the break and then we'll confirm that the page number, Page 7, Line 3 should still be 21. I'm sorry. It is. I've been informed by Ms. Mays that it is. But you should look at that yourself, Mr. Ruscilli.

THE WITNESS: Yes, ma'am.

CHAIRMAN JABER: Mr. Feil, does that satisfy your concern?

MR. FEIL: Well, the word "draft" appears throughout. I'm not all that worried about that. I'm more worried about whether or not there are any substantive changes that were made as a result of going from draft to final.

CHAIRMAN JABER: I understand.

MR. FEIL: And if that's something that he needs to do later at a break or as a late-filed exhibit or whatever, that's fine.

CHAIRMAN JABER: I understand. Ms. White, the concern is -- it sounds like a legitimate concern. If the test -- if the witness relied on a draft that no longer contains text in the final --

MS. WHITE: It's my understanding there were no substantive changes between -- in the areas that Mr. Ruscilli cited "draft" versus the final. But we will be happy to take a look at that on the break and confirm that for you.

CHAIRMAN JABER: Sounds good. We are taking a lunch break before cross-examination, Mr. Feil.

MR. FEIL: Thank you.

MS. WHITE: Now I think the testimony has been entered into the record. Did I ask for the exhibits of the direct testimony to be identified?

CHAIRMAN JABER: No.

MS. WHITE: I would so ask, please.

CHAIRMAN JABER: Okay. JAR-1 through JAR-3 are identified as a composite Exhibit 12.

(Exhibit Number 12 marked for identification.)

MS. WHITE: Okay. And do you have any changes to those exhibits, Mr. Ruscilli?

THE WITNESS: No, ma'am.

MS. WHITE: Okay. Now you -- did you also cause to be filed in this case rebuttal testimony consisting of 26 pages?

THE WITNESS: Yes, ma'am.

MS. WHITE: Do you have any changes to that rebuttal testimony at this time?

THE WITNESS: I have the sections that were stricken from my testimony because of the withdrawal of the other players.

MS. WHITE: All right. Would you please read those into the record, please?

THE WITNESS: Yes, ma'am. On Page 2, Line 4 through Page 3, Line 7. The next one is on Page 7, Line 5 through Page 9, Line 9. The next is Page 14, Line 20 through Page 19, Line 13. And then Page 21, Line 19 through Page 22, Line 6. And then continuing, Page 22, Line 23 through Page 25, Line 21.

Q What was the -- what was the reason why you've withdrawn those pieces of the testimony?

A Those questions were directed at the testimonies of Mr. Gillan and Ms. Kennedy representing FCCA, who have withdrawn from this case.

Q If I were to ask you the questions that are contained in your rebuttal testimony today with the changes that you've just read into the record, would your answers be the same?

A Yes, ma'am.

MS. WHITE: I would ask that Mr. Ruscilli's rebuttal testimony be entered into the record with the changes that he's made on the stand.

CHAIRMAN JABER: Prefiled rebuttal testimony of John A. Ruscilli as modified to delete portions indicated already in the record shall be inserted into the record as though read.

MS. WHITE: Thank you.

BY MS. WHITE:

Q And did you have five exhibits attached to your rebuttal testimony labeled JAR-4, JAR-5, JAR-6, JAR-7 and

JAR-8?

A Yes, ma'am, I did.

Q Do you have any changes to those exhibits?

A Yes, ma'am. JAR-8 was responsive to Ms. Kennedy, and that should be stricken, also.

Q All right. With the changes to those exhibits, do you have any other changes?

A No, ma'am.

MS. WHITE: I would ask that the exhibits, with the exception of JAR-8, attached to Mr. Ruscilli's rebuttal testimony be identified for the record.

CHAIRMAN JABER: JAR-4 through JAR-7 are identified as composite Exhibit 13.

(Exhibit Number 13 marked for identification.)

BELLSOUTH TELECOMMUNICATIONS, INC.

DIRECT TESTIMONY OF JOHN A. RUSCILLI

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NOS. 020119-TP AND 020578-TP

OCTOBER 23, 2002

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH") AND YOUR BUSINESS ADDRESS.

A. My name is John A. Ruscilli. I am employed by BellSouth as Senior Director for Regulatory and External Affairs for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. PLEASE PROVIDE A BRIEF DESCRIPTION OF YOUR BACKGROUND AND EXPERIENCE.

A. I attended the University of Alabama in Birmingham where I earned a Bachelor of Science Degree in 1979 and a Master of Business Administration in 1982. After graduation I began employment with South Central Bell as an Account Executive in Marketing, transferring to AT&T in 1983. I joined BellSouth in late 1984 as an analyst in Market Research, and in late 1985 moved into the Pricing and Economics organization with various responsibilities for business case analysis, tariffing, demand analysis and price regulation. In July 1997, I became Director of Regulatory and Legislative Affairs for BellSouth Long Distance, Inc., with responsibilities that included obtaining the necessary certificates of public convenience and necessity, testifying, Federal Communications Commission ("FCC") and state regulatory support, federal and state compliance reporting and tariffing for all 50 states and the FCC. I assumed my current position in July 2000.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to provide BellSouth's policy positions pertaining to the appropriateness of BellSouth's Key Customer offerings. Specifically, I address issues 1, 3A, 3A(i), 3A(ii), 3B, 3B(i), 3B(ii), 3C, 3C(i), 3C(ii), 3D, 3D(i), 3D(ii), 3D(iii), 3D(iv), 3D(v), 3E, 3E(i), 3E(ii), 4A(i), 4A(ii), 5A, 5B, and 6 as set forth in the Commission's Order Establishing Procedure issued September 23, 2002 (see Order No. PSC-02-1295-PCO-TP).

Q. DO YOU HAVE ANY GENERAL COMMENTS REGARDING THE APPROPRIATENESS OF PROMOTIONAL OFFERINGS?

A. Yes. Promotional offerings are the result of a high level of local service competition in Florida. Given that Florida customers can choose from a growing array of telecommunications services offered by numerous providers, each provider needs maximum flexibility to offer new services and competitive rates as quickly as possible. This flexibility allows Florida customers to receive the maximum benefits of competition as quickly as possible.

Furthermore, from a public policy standpoint, promotions are a natural outgrowth of the market development contemplated by the Telecommunications Act of 1996 ("the Act") and supported by both this Commission's and the FCC's rules and requirements. Specifically, the FCC discussed efforts by incumbent local exchange carriers ("ILECs") to win customers from Alternative Local Exchange Carriers ("ALECs") in its September 3, 1999 Order on Reconsideration and Petitions for Forbearance, CC Docket No. 96-149 (Order 99-223). In its Order, the FCC noted that restrictions on such efforts "may deprive customers of the benefits of a competitive market," explaining that:

> Winback facilitates direct competition on price and other terms, for example, by encouraging carriers to "out bid" each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs. (¶69).
>
> Some commenters argue that ILECs should be restricted from engaging in winback campaigns, as a matter of policy, because of the ILEC's unique historic position as regulated monopolies. Several commenters are concerned that the vast stores of CPNI gathered by the ILECs will chill potential local entrants and thwart competition in the bcal exchange. We believe that such action by an ILEC is a significant concern during the time subsequent to the customer's placement of an order to change carriers and prior to the change actually taking place. Therefore, we have addressed that situation in Part V.C.3, infra. However, once a customer is no longer obtaining service from the ILEC, the ILEC must compete with the new service provider to obtain the customer's business. We believe that such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this practice. (¶70).

In addition, the FCC has long used the *competitive necessity* doctrine in weighing whether price differences may be justified when carriers seek to apply particular rates in particular situations or for particular customers or groups of customers.[1] The FCC has repeatedly ruled that carriers may respond to specific competitive threats with rates or offerings designed to meet those threats. Moreover, the competitive necessity doctrine has been widely applied in similar situations by other agencies to allow regulated companies to meet specific competitive threats with offerings targeted to win back or retain customers. Furthermore, promotional offerings have also been endorsed as competitively desirable and even exempted from general costing rules.[2] Promotions that are commensurate with the threat that ILECs face from rival carriers are an example of offerings to targeted groups of customers that are justified under the competitive necessity doctrine.

Finally, the Florida legislature expressly recognized and condoned efforts by price-regulated companies like Bellsouth to retain their customers and win customers from ALECs when it enacted the following language in Section 364.051(5): "Nothing 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 in a specific geographic market or to a specific customer by deaveraging the price of any nonbasic service, packaging

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[1] *See inter alia, American Telephone & Telegraph Co. Charges, Regulations, Classifications, and Practices for Voice Grade/Private Line Service (High Density—Low Density) Filed with Transmittal No. 11891*, Interim Decision and Memorandum Opinion and Order, Docket No. 19919, 55 F.C.C. 2d 224 (1975); and *in the matter of American Telephone and Telegraph Co., Revisions of Tariff FCC No. 260 private Line Services, Series 5000 (Telpak)*, Memorandum Opinion and Order, Docket No. 18128, 61 F.C.C. 2d 587 (1976).

[2] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Order and Notice of Proposed Rulemaking, 8 FCC Rcd at 3717 (1993).

nonbasic services together or with basic services, using volume and term discounts, and offering individual contracts."

Q. DOES THE COMMISSION NEED TO CONSIDER THE LEVEL OF LOCAL SERVICE COMPETITION IN FLORIDA WHEN DETERMINING WHETHER PROMOTIONAL OFFERINGS ARE APPROPRIATE?

Absolutely. Promotional offerings, such as BellSouth's January and June Key Customer offerings, are an appropriate competitive response brought about by the high level of local service competition that exists in Florida. And there clearly is a high (and growing) level of local service competition in Florida today.

The information that BellSouth recently presented to the FCC in support of its request for interLATA long distance authority in Florida and Tennessee, for instance, shows that local competition is a reality in Florida. (*See* Affidavit of Elizabeth A. Stockdale filed in WC Docket No. 02-307, dated September 20, 2002). A copy of Ms. Stockdale's affidavit is attached as Exhibit JAR-1 to my testimony. As discussed in Ms. Stockdale's affidavit, BellSouth estimates that ALECs were serving almost 31% of the business lines in Florida as of July 2002 (*See* Stockdale Affidavit, Table 1). Among other things, the competitive data contained in Ms. Stockdale's affidavit shows that as of July 2002:

- over 105 ALECs were serving approximately 1,300,00 access lines, which is at least 17.7% of the total access lines in BellSouth's service area.

- at least 51 of the ALEC providers in Florida are facilities-based providers.
- BellSouth has over 350 approved Interconnection, Collocation, and/or Resale agreements with ALECs in Florida.
- BellSouth has completed 1,371 collocation requests for ALECs in 130 of BellSouth's 201 Florida wire centers.
- From these 130 wire centers, ALECs' collocation arrangements enable facilities-based ALECs to address approximately 92% of BellSouth's total access lines.

(Stockdale Affidavit at ¶5a.).

Like the information in Ms. Stockdale's Affidavit, the information in the Commission's own draft report to the legislature (entitled "Competition in Telecommunications Markets in Florida" and issued October 9, 2002)("2002 Draft Competition Report") squarely addresses the level of local service competition in Florida. According to the 2002 Draft Competition Report, ALEC and ILEC responses to data requests indicate that as of June 30, 2002:

- Competitors in Florida have obtained a 13% market share, up from 8% in 2001.
- ALECs have made impressive gains in the business market, increasing their share of business access lines to 26%, up from last year's share of 16%. (This represents an increase of 62.5%.).

(2002 Draft Competition Report at p. 3) Table 3 of the Commission's 2002 Draft Competition Report reflects that ALECs serve over 33% of the business lines within

BellSouth's territory, clearly supporting the Commission's finding that "ALECs show the heaviest presence in BellSouth's territory." (*See* 2002 ~~Draft~~ Competition Report at p.~~20~~21).

Q. HAVE BELLSOUTH'S PROMOTIONS HINDERED THE GROWTH OF LOCAL SERVICE COMPETITION IN FLORIDA?

A. No. As I have just explained, there has been tremendous growth in local service competition in Florida. Significantly, this growth has occurred *during periods in which BellSouth promotions similar to the January and June Key Customer offerings have been in effect.* This fact alone completely eviscerates any claims that BellSouth's promotional offerings are somehow anticompetitive.

In fact, a significant amount of this growth has occurred in the very wire centers in which BellSouth has made the January and June Key Customer offerings available. The January Key Customer offering, for instance, went into effect in January of 2002. The Commission's draft 2002 Competition Report reflects data that was available several months later – in June 2002. Based on the information set forth in the Commission's draft 2002 Competition Report,

> approximately 97% of the January hot wire centers are located in exchanges in which ALECs are serving at least 10% of the business lines[3];

> approximately 85% of the January hot wire centers are located in exchanges in which ALECs are serving at least 15% of the business lines;

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[3] This is the percentage of lines ALECs were serving within a given exchange as of June 2002.

approximately 79% of the January hot wire centers are located in exchanges in which ALECs are serving at least 20% of the business lines;

approximately 72% of the January hot wire centers are located in exchanges in which ALECs are serving at least 25% of the business lines;

approximately 53% of the January hot wire centers are located in exchanges in which ALECs are serving at least 30% of the business lines;

approximately 46% of the January hot wire centers are located in exchanges in which ALECs are serving at least 35% of the business lines;

approximately 24% of the January hot wire centers are located in exchanges in which ALECs are serving at least 40% of the business lines; and

approximately 5% of the January hot wire centers are located in exchanges in which ALECs are serving at least 45% of the business lines.

In most instances, the percentage of lines ALECs were serving in these exchanges as of June 2002 represents a significant increase over the percentage of lines ALECs were serving in the same exchanges as of June 2001. This further demonstrates that: (1) competition has grown significantly despite BellSouth's promotional offerings; and (2) BellSouth chose the wire centers in which ALECs were aggressively winning growing numbers of business lines for inclusion in the January 2002 Key Customer offering.

Similarly, based on data set forth in the Commission's 2002 Draft Competition Report:

approximately 98% of the June hot wire centers are located in exchanges in which ALECs are serving at least 10% of the business lines[4];

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[4] This is the percentage of lines ALECs were serving within a given exchange as of June 2002.

> approximately 88% of the June hot wire centers are located in exchanges in which ALECs are serving at least 15% of the business lines;
>
> approximately 83% of the June hot wire centers are located in exchanges in which ALECs are serving at least 20% of the business lines;
>
> approximately 75% of the June hot wire centers are located in exchanges in which ALECs are serving at least 25% of the business lines;
>
> approximately 55% of the June hot wire centers are located in exchanges in which ALECs are serving at least 30% of the business lines;
>
> approximately 48% of the June hot wire centers are located in exchanges in which ALECs are serving at least 35% of the business lines;
>
> approximately 24% of the June hot wire centers are located in exchanges in which ALECs are serving at least 40% of the business lines; and
>
> approximately 6% of the June hot wire centers are located in exchanges in which ALECs are serving at least 45% of the business lines.

Again, it is evident that BellSouth chose the wire centers in which ALECs were aggressively winning growing numbers of business lines for inclusion in the January 2002 Key Customer offering.

Q. DO ALECS OFFER PROMOTIONS IN FLORIDA?

A. Yes. Telecommunications service providers other than BellSouth are offering numerous promotions in Florida. Exhibit JAR-2 attached to my testimony is a composite exhibit that consists of copies of several promotional offerings that ALECs have filed with the Commission. This exhibit demonstrates some of the ways ALECs are using promotions to compete with BellSouth and each other.

Given the fact that ALECs are not required to file their promotional offerings with the Commission, ALECs may be offering other promotions in Florida as well.

Q. ARE ANY OF THE PROMOTIONS ATTACHED AS EXHIBIT JAR-2 AVAILABLE ONLY TO NEW CUSTOMERS?

A. Yes, several of the promotions are offered to new customers only. For example, MCImetro Access Transmission Services, Inc.'s "Install Waiver Promotion" tariff states, "Beginning April 5, 2000 and ending September 30, 2002, the Company will offer the following promotion to all new business facilities based customers who convert existing local exchange service from another local exchange carrier to MCImetro Local Services." (FPSC Price List No. 2, 15^{th} Revised Sheet No. 89.17, Section 4.9). (Emphasis added)

Choctaw Communications, Inc. d/b/a Smoke Signal Communications' New Customer Promotion tariff offering states that "Beginning June 1, 2002, Choctaw will offer the following promotions to new customers only." (2^{nd} Revised Sheet 40, effective June 1, 2002) (Emphasis added)

Business Telecom, Inc. d/b/a BTI's "Bundle Up Local Promotion", which is described in their Florida Price List No. 1, 2^{nd} Revised Page 108, states that "the Bundle Up Promotion is available to new and existing Customers of Business Telecom, Inc. who do not currently have any local service provided by BTI. Based on the term agreement signed by the Customer, the Customer can receive up to 5 months of local line charges free." (Emphasis added)

NOS Communications, Inc.'s "Customer 6th, 10th, and 14th Invoice Advantage Plan" states that "Customers who qualify as a new customer or as either a 'save' or a 'winback' and who meet the eligibility requirements set forth below will receive a credit on their 6th, 10th, and 14th invoices as provided following." (Florida Price List Tariff No. 1, Original Page No. 186) (Emphasis added)

Q. ARE ANY OF THE PROMOTIONS ATTACHED AS EXHIBIT JAR-2 ASSOCIATED WITH LOCAL EXCHANGE SERVICE?

A. Yes. Both in the testimony above and in the testimony that follows, by underlining, I have attempted to highlight promotions offered by BellSouth's competitors that apply to or are associated with local exchange service.

Q. DO ANY OF THESE PROMOTIONS REQUIRE THE CUSTOMER TO SIGN A TERM CONTRACT IN ORDER TO RECEIVE THE BENEFITS OF THE PROMOTION?

A. Yes, several of them do. As I stated above, BTI's "Bundle Up Local Promotion" provides additional free months of local line charges based on the length of the term agreement. For example, a one-year term agreement provides one free month of local line charges, a two-year term agreement provides three free months of local line charges, and a three-year term agreement provides five free months of local line charges.

Similar to BTI's offering, several of MCImetro Access Transmission Services, Inc.'s promotional offerings state, "Eligible customers enrolled in this promotion will receive a credit applied to each invoice month specified in the schedule below based on the customer's selected length of term commitment." (FPSC Price List No. 2, Sections 4.11, 4.12, 4.13) (Emphasis added)

Nuvox Communications, Inc.'s Service Rebate Voucher Promotion also ties the eligibility for customers to receive credit vouchers to the term of the agreement. Specifically, "customers signing 2 year contracts will receive two vouchers, each valued at $300.00, and redeemable in the 6th and 18th month of the contract. Customers signing 3-year contracts will receive three voucher, each valued at $500.00, and redeemable in the 6th, 18th and 30th months of the contract." (Florida Price List No. 1, Original Sheet 47.1). The Nuvox offering also states "customers signing new service contracts between July 17 and September 14, 2001 will receive a 'free month' of service credit for each year of the applicable contract term." (*Id.* 2nd Revised Sheet 47.2)

A review of the sample of promotional offerings included in Exhibit JAR-2 will reveal that many of these offerings require the customer to sign a term contract in order to receive the benefits of the promotion.

Q. DO ANY OF THE PROMOTIONS ATTACHED AS EXHIBIT JAR-2 PROVIDE BENEFITS THAT EXTEND BEYOND THE TERM OF THE PROMOTION ITSELF?

A. Yes. Most of the promotions I just discussed allow customers who enroll in the promotion to continue to receive the benefits of the promotion after the enrollment has closed.

Q. DO ANY OF THE PROMOTIONAL OFFERINGS ATTACHED AS EXHIBIT JAR-2 CONTAIN TERMINATION LIABILITY PROVISIONS?

A. Yes. Most of the promotional offerings contain provisions that obligate customers who terminate the contract early to repay any credits received. Some termination liability provisions also require customers to pay the value of the monthly recurring charges remaining in the term contract. For example, a promotional tariff of XO Florida, Inc. contains termination liability provisions that obligate the customer to pay the total amount of the free month(s) of service credit(s), and "the value of the MRC's [monthly recurring charges] remaining in the term contract," should the customer terminate service prior to the end of the term commitment. (FPSC Price List No. 3, Fourth Revised Page 87 Section 9.1.2). Likewise, termination liability provisions set forth in Xspedius Management Co. of Jacksonville's tariff states that "[a] termination liability charge will be applicable for service rate elements provided under the Local Advantage Service term payment Plan when service is cancelled prior to the end of the chosen Term Plan. <u>The termination fee is equal to the number of months remaining under the term agreement multiplied by the monthly rate for the corresponding Term agreement</u>." (FPSC Price List No. 1, First Revised Sheet 115, Section 13.8.1) (Emphasis added).

Q. WHY IS IT IMPORTANT FOR THE COMMISSION TO CONSIDER THE PROMOTIONAL OFFERINGS OF BELLSOUTH'S COMPETITORS?

A. These promotional offerings represent the kind of competitive offers that BellSouth has to compete against on a daily basis in order to do business in Florida. As discussed above, BellSouth's competitors often condition their promotional discounts on the customer signing a term contract. Additionally, in many instances, BellSouth's competitors take advantage of their ability to bundle local service offerings with other offerings (some of which BellSouth cannot yet offer) by offering promotions that condition discounts on interLATA, intraLATA and local service on the customer signing a term contract for all of these services.

The promotional offerings of BellSouth's competitors also demonstrate the critical importance of speed to market in rolling out new promotions. Many of the ALECs promotional offerings are effective just one or two days after it is filed with the Commission. In contrast, BellSouth's promotional offerings are presumptively valid fifteen (15) days after the date of filing. Furthermore, BellSouth is obligated to post notifications of any promotional offerings on its website forty-five (45) prior to the effective date of the promotion. Unlike its competitors, therefore, BellSouth cannot roll out new promotions without first announcing its plans to its competitors well in advance.

This is significant because speed to market is important not only to the company offering the promotion, but also to the customers to whom the promotion is offered, because the sooner the offer is available, the sooner these customers can realize new benefits as a result of the competition that exists in the local telecommunications market in Florida. Clearly, less – and not more – regulatory oversight of promotional offerings should be required in Florida.

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

Q. DOES SECTION 364.01, FLORIDA STATUTES, ALTER OR EXPAND THE COMMISSION'S JURISDICTION OVER AND IN RELATION TO TELECOMMUNICATIONS COMPANIES?

A. No. Although I am not an attorney, Section 364.01, Florida Statutes, provides that the legislative intent is to give exclusive jurisdiction in all matters set forth in Chapter 364 to the Florida Public Service Commission in regulating telecommunications companies. It appears to me that nothing in Section 364.01(4) alters or expands the Commission's jurisdiction, but instead, Section 364.01(4) simply gives guidance for the Commission to consider when it has discretion under the statutes.

Q. PLEASE ELABORATE ON THE GUIDANCE THAT SECTION 364.01 GIVES THE COMMISSION.

A. Section 364.01 begins with the overarching limitation that the Commission "shall exercise over and in relation to telecommunications companies the powers conferred by this Chapter." Florida Statutes §364.01(1). The Section then provides that "[i]t is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter to the [Commission] in regulating telecommunications companies . . . ." *Id.* §364.01(2). Subsection (4) goes on to provide that "[t]he Commission shall exercise its exclusive jurisdiction [in all matters set forth in this Chapter] to" accomplish various objectives.

It is clear, therefore, that Section 364.01(4) does not expand the Commission's jurisdiction. Instead, it gives the Commission guidance as to how to exercise the jurisdiction that the Legislature already has granted the Commission.

Accordingly, Section 364.01(4) provides that the Commission "shall exercise its exclusive jurisdiction" in order to, among other things:

> "ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services," *see* §364.01(4)(b).

> "[p]romote competition by encouraging new entrants into telecommunications markets . . ." *see* §364.01(4)(d).

> "ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior . . . ." *see* §364.01(4)(g).

In fact, most of the discretion focuses on "promoting competition," which is exactly what BellSouth's promotional offerings have done. BellSouth has been offering its promotions like the January and June Key Customer offerings for several years, and during that time ALECs have gained an increased share of the local market in the most competitive wire centers. And, as the Commission's 2002 Draft Competition Report that I previously discussed reveals, ALECs continue to gain market share.

If additional restrictions are placed upon BellSouth's ability to offer promotions, Florida consumers will suffer. Without the pressure of BellSouth's promotional offerings, ALECs will be insulated from competition by BellSouth at the cost of depriving Florida consumers of the benefits of the vibrant competition that exists in the local exchange market in Florida. Because the prices of BellSouth's promotional offerings are not predatory, as BellSouth witness Bernard Shell discusses in his testimony, any harm that the ALECs purportedly suffer because of BellSouth's lower prices is simply the natural effect of competition.

Q. IS IT APPROPRIATE OR NECESSARY FOR THE COMMISSION TO PLACE MORE RESTRICTIONS UPON AN ILEC's PROMOTIONAL OFFERING THAN ON AN ALEC's PROMOTIONAL OFFERING IN ORDER TO PROMOTE COMPETITION?

A. No. While the Commission may, under appropriate circumstances, impose different regulatory oversight on ILECs than it imposes on ALECs, it cannot do so in an arbitrary, capricious or discriminatory manner. In fact, that was exactly the conclusion reached in the Fresh Look proceeding (FPSC Docket No. 980253-TX) here in Florida. The Fresh Look proceeding was a rulemaking proceeding in which this Commission issued a rule that basically allowed a customer under a term agreement with an ILEC to leave the contract to go to an ALEC without paying termination charges. This rule only applied to ILECs, not ALECs. The rule was challenged, and the Division of Administrative Hearings ("DOAHs") issued a final order on July 13, 2000 that overturned the Commission's previous ruling.

Paragraph 114 of the DOAH's order states, "[t]here was no demonstration that the ILECs' long-term contracts present any greater, or even different, obstacles to competing carriers trying to win a customer subject to such an agreement, than would an ALEC's long-term contract. Therefore, the fact that the rules capture contracts of ILECs, and not contracts of ALECs, renders the rules <u>discriminatory, arbitrary, and capricious</u>." (*See* BellSouth Telecommunications, Inc. vs. Florida Public Service Commission, Case No. 99-5369RP, Final Order issued July 13, 2000, at para. 114) (Emphasis added).

The paragraph concludes by saying, "Indeed, this discriminatory component may, contrary to the Commission's intended goal, produce less, rather than more, competition." (*Id.*) The same is true in this instant proceeding – creating a rule or establishing criteria that places restrictions only on an ILEC's promotions, and not on an ALEC's promotions, will only impede competition in Florida.

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?

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. BellSouth's position is that the existing Florida law addressing liquidated damages, along with competitive market forces, is sufficient to ensure that termination liability terms and conditions are not unfair, anticompetitive, or discriminatory. BellSouth will address existing law in its post-hearing brief.

As for competitive market forces, one need look no further than the local exchange service tariffs that ALECs have filed with the Commission to see just how common termination liability terms and conditions are in the local telecommunications market. The filed tariffs of several Florida ALECs, for example, contain language regarding termination liability that is identical or substantially similar to the following language that appears in FDN's tariff:

> Customer's termination liability for cancellation of service shall be equal to:
>
> (A) all unpaid non-recurring charges reasonably expended by Company to establish service to Customer, *plus*;
>
> (B) any disconnection, early cancellation or termination charges reasonably incurred and paid to third parties by Company on behalf of Customer; *plus*
>
> (C) all recurring charges specified in the applicable Service Order for the balance of the then current term discounted at the prime rate announced in the Wall Street Journal on the third business day following the date of cancellation;
>
> (D) minus a reasonable allowance for costs avoided by the Company as a direct result of Customer's cancellation.[5]

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[5] *See, e.g.,* Florida Digital Network, Inc. Florida Price List No. 1 §2.8.1. *See also* @Link Networks, Inc. Florida Price List No. 2 §2.11.1; 1-800-Reconex, Inc. Florida Price List No. 1 §2.7.2; Access Integrated Networks, Inc. Florida Price List No. 1 §2.7.2; Access Point, Inc. Florida Price List No. 1 §2.8.1; Actel Integrated Communications, Inc. Florida Price List No. 1 §2.8.1; AT&T Broadband Phone of Florida, LLC Florida Price List No. 2 §2.13; MCI Metro Access Transmission Services LLC F.P.S.C. Price List No. 2 §2.7; MCI Worldcom Communications, Inc. FPSC Price List No. 2 §2.8.1; Melbourne Venture Group, LLC Florida Price List No. 1 §2.16.1; Nationnet Communications Corporation Florida Local Price List §2.12.2; XO Florida, Inc. FPSC Price List No. 3 §2.7.2. This is not intended to be an exhaustive list of ALEC tariffs that contain such termination liability provisions.

The filed tariffs of other Florida ALECs contain language that is identical or substantially similar to the following language that appears in IDS Telcom, LLC's tariff:

> If any portion of the Customer's service is disconnected for any reason prior to the end of the service period, the Customer shall pay a termination liability charge equal to 100% of the payments remaining in the service period within thirty (30) days of the disconnection.[6]

The pervasive use of "full-buyout" termination charges by ALECs clearly refutes any allegations that the termination charge language in BellSouth's January and June Key Customer offerings (which, as I discuss in more detail below, are not "full-buyout" provisions) are in any way inappropriate.

In fact, termination liability clauses are commonplace in many types of contracts, not just contracts signed in conjunction with a promotional offering. Examples of such commonplace contracts include apartment lease agreements; security system agreements; satellite television agreements; car leases; and wireless or cellular service agreements. Attached as Exhibit JAR-3 are copies of a few of these types of agreements. It is obvious from these everyday examples that customers are accustomed to such clauses and recognize that they are making a tradeoff – lower rates for the services provided in return for a commitment period – when they accept such offerings.

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6 *See, e.g.,* IDS Telcom, LLC Florida Price List §2.20.2. *See also* Mpower Communications Corp. Florida P.S.C. Price List No. 1 §4.5; Teligent Services, Inc Florida Price List No. 1 §3.9.5. This is not intended to be an exhaustive list of ALEC tariffs that contain such termination liability provisions.

Issue 3A(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?

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. As discussed above under Issue 3A, it is not necessary to establish any such criteria. BellSouth's January Key Customer offering is neither unfair, anticompetitive nor discriminatory. As BellSouth witness John Casey explains in his testimony, the development of the termination liability provisions set forth in the January Key Customer offering are appropriate in light of the fact that damages from a breach of the agreement are not readily ascertainable at the time the contract is executed. Furthermore, the applicable termination charges are proportionate to the damages that might reasonably be expected to flow from the breach.

Q. PLEASE DESCRIBE THE TERMINATION LIABILITY REQUIREMENTS OF BELLSOUTH'S JANUARY KEY CUSTOMER OFFERING.

A. The termination liability requirements of BellSouth's January Key Customer offering is clearly set forth in paragraph 5 in the agreement: "In the event Subscriber discontinues business local service with BellSouth prior to the expiration of the term, Subscriber shall pay to BellSouth the amount of discounted charges for its local services that the Subscriber had received as a result of the Subscriber's participation in the Program. In addition, Subscriber shall pay to Bellsouth the amount of $100 representing the costs of administration and acquisition incurred by BellSouth. Tariff termination liability charges may apply if applicable."

Q. ARE THE TERMINATION LIABILITY TERMS AND CONDITIONS OF THE JANUARY KEY CUSTOMER OFFERING COMPARABLE TO THE TERMINATION LIABILITY TERMS AND CONDITIONS SET FORTH IN OTHER CARRIERS' PROMOTIONAL OFFERINGS?

A. Actually, the termination liability terms and conditions provisions set forth in the January Key Customer offerings often can require a customer terminating the contract to pay much less than the termination liability charges required in ALECs' promotional contracts.

Under the termination liability provisions of BellSouth's January Key Customer offering, a customer that has $75 in billed revenue each month and that terminates a 36-month term agreement after six months would pay BellSouth $212.50 [($75.00 x 25% x 6 months.) + $100], plus any credits it may have received for Hunting, in termination charges. A customer that has $3,000 in billed revenue each month and that terminates a 36-month agreement after six months would pay BellSouth $4,600 [($3000.00 x 25% x 6 months) + $100], plus any credits it may have received for Hunting, in termination charges.

If a customer contracted to spend $75 per month for 36 months with an ALEC that uses a full buy-out termination provision, and if that customer terminated the contract after 6 months, that customer would be obligated to pay the ALEC $2,250 in termination charges ($75 x 30 months = $2,250). If a customer contracted to spend $3000 per month for 36 months with an ALEC that uses a full buy-out termination provision, and if that customer terminated the contract after 6 months, that customer would be obligated to pay the ALEC $90,000 in termination charges ($3,000 x 30 months = $90,000).

Issue 3A(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?

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. As discussed above under Issue 3A, it is not necessary to establish any such criteria. BellSouth's June Key Customer offering is neither unfair, anticompetitive nor discriminatory. As BellSouth witness John Casey explains in his testimony, the development of the termination liability provisions set forth in the June Key Customer offering are appropriate in light of the fact that damages from a breach of the agreement are not readily ascertainable at the time the contract is executed. As such, the termination charges applicable when a customer terminates the June Key Customer offering are proportionate to the damages that might reasonably be expected to flow from the breach.

Q. PLEASE DESCRIBE THE TERMINATION LIABILITY TERMS AND CONDITIONS OF BELLSOUTH'S JUNE KEY CUSTOMER OFFERING.

A. The termination liability requirements of BellSouth's June Key Customer offering is clearly set forth in paragraph 5 in the agreement: "In the event the Subscriber terminates the term election agreement, the Subscriber must pay to BellSouth a termination charge as provided below for the number of months remaining on such agreed upon term. In addition, the Subscriber shall reimburse all rewards for line connection charges. This termination charge will appear on the Subscriber's final bill as a charge in the OC&C section."

Monthly TBR at time of enrollment	Set charge to be multiplied by number of months remaining on term
$75 - $149.99	$25
$150 - $3,000	$40

BellSouth witness John Casey discusses in his testimony why the June Key Customer offering contains termination liability terms and conditions that are different from the ones contained in the January Key Customer offering.

Q. ARE THE TERMINATION LIABILITY TERMS AND CONDITIONS OF THE JUNE KEY CUSTOMER OFFERINGS COMPARABLE TO THE TERMINATION LIABILITY TERMS AND CONDITIONS SET FORTH IN OTHER CARRIERS' PROMOTIONAL OFFERINGS?

A. Actually, the termination liability terms and conditions provisions set forth in the June Key Customer offering often can require a customer terminating the agreement to pay much less than the termination liability charges required in ALECs' promotional offerings.

Under the termination liability provisions of BellSouth's June Key Customer offering, a customer that had $75 in monthly billed revenue at the time it entered the contract and that terminates a 36-month term contract after six months would pay BellSouth $750 in termination charges ($25 x 30 months = $750). The contract provides that the customer also will reimburse all rewards for line connection charges. A customer that had $3,000 in monthly billed revenue at the time it entered the contract and that terminates a 36-month term contract after six monthswould pay BellSouth $1,200 in termination charges ($40.00 x 30 months). The contract provides that the customer also will reimburse all rewards for line connection charges.

If a customer contracted to spend $75 per month for 36 months with an ALEC that uses a full buy-out termination provision, and if that customer terminated the contract after 6 months, that customer would be obligated to pay the ALEC $2,250 in termination charges ($75 x 30 months = $2,250). If a customer contracted to spend $3000 per month for 36 months with an ALEC that uses a full buy-out termination provision, and if that customer terminated the contract after 6 months, that customer would be obligated to pay the ALEC $90,000 in termination charges ($3,000 x 30 months = $90,000).

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?

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. BellSouth's position is that it is not necessary to establish any new criteria to determine whether the duration of BellSouth's promotional offerings are unfair, anticompetitive, or discriminatory. BellSouth believes that there is not a "one-size fits all" answer to this issue. The timeframe for a promotional offering depends on the offering itself, and the market to which it is proffered.

Q. SHOULD BELLSOUTH BE RESTRICTED FROM OFFERING SUCCESSIVE PROMOTIONAL OFFERINGS?

A. No. When the term of the promotional contract expires, the customer is free to evaluate all of the competitive alternatives that are available at that time and decide which one of those competitive alternatives to accept. If the customer believes that the successive promotion is better than any other offering, then the customer should not be deprived of the ability to sign a new contract for a successive promotion. Restricting the introduction of successive promotional offerings would deprive customers of an additional choice for lower prices. Furthermore, restricting successive promotional offerings would hinder BellSouth's ability to compete with the competitive offerings being introduced by ALECs.

Issue 3B(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?

Issue 3B(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?

Q. WHAT ARE THE TERM LENGTHS IN BELLSOUTH'S JANUARY AND JUNE KEY CUSTOMER OFFERINGS?

A. The January Key Customer offering includes the option of an 18 or 36-month term length. The June Key Customer offering includes the option of a 24 or 36-month term length.

Q. ARE THE TERM LENGTHS OF BELLSOUTH'S JANUARY AND JUNE KEY CUSTOMER OFFERINGS UNFAIR, ANTICOMPETITIVE OR DISCRIMINATORY?

A. No. Consistent with the FCC's First Report and Order in CC Docket 96-98, released August 8, 1996 ("Local Competition Order"), BellSouth has made the January and June Key Customer offerings available for resale. As is demonstrated by the sampling of ALEC promotional offerings contained in Exhibit JAR-2, ALECs have the ability to compete for those customers that subscribe to long-term promotions, either through their own offerings or through the resale of BellSouth's Key Customer offerings. In addition, the term lengths included in several of the ALECs' promotional offerings range from one year up to five years, (*See* Exhibit JAR-2), and many of the ALEC offerings discussed in the testimony of BellSouth witness Carlos Garcia have term lengths from one year to three years.

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?

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. BellSouth has offered various promotions for several years. While it is unclear what is meant by "billing conditions or restrictions," it is apparent from the Commission's 2002 Draft Competition Report that these promotions have not inhibited the ALECs ability to compete. As such, it is neither necessary nor appropriate to establish any new criteria to determine whether the billing conditions or restrictions of BellSouth's promotional tariff offerings are unfair, anticompetitive, or discriminatory.

Q. ARE YOU AWARE OF ANY CONCERNS THAT HAVE BEEN RAISED WITH REGARD TO ANY "BILLING CONDITIONS OR RESTRICTIONS" IN THE JUNE KEY CUSTOMER OFFERING?

A. Yes. The Commission's Staff raised concerns with the Customized Large User Bill ("CLUB"), secondary location addresses ("SLA") and move provisions in their Staff Recommendation issued August 8, 2002 regarding BellSouth's June Key Customer offering.

Q. PLEASE ADDRESS THOSE CONCERNS.

A. CLUB billing is an optional service whereby customers with multiple locations can receive one bill for all locations. Specific language is included in the June Key Customer offering to allow subscribers with multi-locations that have a Customized Large User Bill ("CLUB") arrangement to have all locations participate in the promotion as long as one location is in an eligible wire center and one location meets the revenue requirement. Monthly billing for each location or account included the CLUB billing arrangement is consolidated on to the customer's CLUB bill. Since BellSouth's billing systems are not able to treat the various accounts on that CLUB bill differently, all of the accounts either get the benefits of the Key Customer offering or none of the accounts get the benefits. As long as one location is in an eligible wire center and one location meets the revenue requirements of the offering, customers should be able to receive the benefits of the Key Customer offering. Without the inclusion of this provision, customers would be forced to choose between the conveniences of the CLUB billing arrangement and the benefits of the Key Customer offering.

Secondary location addresses ("SLA") are used when it is necessary for a particular location or building to be served by a different wire center than the other locations or buildings that are subscribed to BellSouth® Centrex service, MultiServ^{SM} service or ESSX® service. This could occur, for example when a customer has a campus consisting of two or more buildings, one of which is served out of a different wire center than the other buildings. The provisions of the June Key Customer offering enable subscribers to these types of services with secondary location addresses ("SLAs") not meeting the per location revenue requirement to have all locations participate in the offering as long as it is billed under the same account and at least one location is located in an eligible wire center. Since the customer in my example above considers all of its buildings to be one location and the customer gets one bill for all of the buildings, it does not make sense to segregate one building from being eligible just because it is served by a wire center that is not included in the offering. To suggest that such provisions are improper is unnecessarily rigid and not customer friendly.

One additional billing concern addressed in the Staff's Recommendation involves a provision that allows a customer with a June Key Customer contract to move to a location that is not served by a designated hot wire center and continue to received the Key Customer benefits at that new location throughout the unexpired term of the customer's contract. This is a reasonable and customer-friendly provision that should not be altered. After all, it is nonsensical to believe that a business customer will move from outside an eligible wire center into an eligible wire center, establish their business there, sign up for the Key Customer offering, and then move back to an ineligible wire center for the sole purpose of receiving up to 20% off the tariffed rates for Key-eligible services.

Issue 3C(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?

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. As discussed above under Issue 3C, it is not necessary to establish any such criteria, and neither the CLUB nor SLA provisions set forth in the January Key Customer offering are unfair, anticompetitive or discriminatory.

Issue 3C(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?

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. As discussed above under Issue 3C, it is not necessary to establish any such criteria, and neither the CLUB, SLA, nor move provisions set forth in the June Key Customer offering are unfair, anticompetitive or discriminatory.

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

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. Section 364.051(5)(a)(2) of the Florida Statutes makes clear that a local exchange telecommunications company such as BellSouth is not precluded from

> meeting offerings by any competitive provider of the same, or functionally equivalent, nonbasic services *in a specific geographic*

> *market* or to a specific customer by deaveraging the price of any nonbasic service, packaging nonbasic services together or with basic services, using volume discounts and term discounts, and offering individual contracts.

(Emphasis added).

ALECs have no obligation to serve all customers in an exchange, and as noted in the 2002 Draft Competition Report "ALECs continue to focus on larger metropolitan areas." (*See* 2002 Draft Competition Report at 23 ~~22~~). If ALECs were not aggressively marketing their service offerings to small business customers served out of target wire centers, and if the ALECs were not winning a significant number of those small business customers, there would be little need for BellSouth to develop promotional offerings designed to retain valued customers that are being wooed by competitors. The Commission's own 2002 Draft Competition Report confirms the significant and continued growth of local competition in Florida.

In response to the ALECs' targeted marketing strategies, BellSouth designated specific wire centers in which the January and June Key Customer offering would be available. Any business customer that is served out of any of the designated wire centers and that meets the other eligibility requirements may participate in the offerings. It would be both unreasonable and contrary to Section 364.051(5)(a)(2) of the Florida Statutes to allow ALECs to focus their efforts in targeted geographic areas and not also allow BellSouth to make promotional offers to customers in the geographic areas that BellSouth determines are its most competitive markets.

Issue 3D(i): Pursuant to Section 364.051(5)(a), Florida Statutes, how should "meeting offerings by any competitive provider" be interpreted?

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. The phrase "meeting offerings by any competitive provider" should be interpreted to mean that, where competition exists, BellSouth is allowed to adjust its prices in order to compete effectively. Of course, that is exactly what BellSouth's January and June Key Customer offerings do. BellSouth offers these promotions in the wire centers where BellSouth has lost, and is continuing to lose, a significant share of business to competition. Therefore, there can be no doubt that BellSouth's 2002 Key Customer offering is a competitive response that is intended to meet offerings by competitive providers. In fact, some of the numerous ALEC offerings in the state of Florida against which BellSouth was and is competing by way of it Key Customer offerings are described in my testimony and in the testimony of BellSouth witness Carlos Garcia.

Issue 3D(ii): Pursuant to Section 364.051(5)(a), Florida Statutes, how should "specific geographic market" be interpreted?

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. The meaning of the phrase "specific geographic market" as used in Florida Statutes 364.051(5)(a)(5) is dependant on the particular circumstances at issue. For example, depending on the circumstances, a "specific geographic market" could be a wire center, it could be a subset of a wire center, it could be a grouping of wire centers, or it could be something else.

The point is that the specific geographic market chosen for promotional offerings is impacted by and dependant upon what the competition is doing. This is consistent with the following language in the Commission's 2002 Draft Competition Report:

> Evaluating market competition first requires appropriately defining the relevant market scope to include reasonable close substitute products in a geographic area. For example, in the local telephone market, the geographic area could be the entire state of Florida, a region within a state, a Standard Metropolitan Statistical Area (SMSA – a typical urban area), a local exchange area, or an even smaller area covered by a wire center. ALECs typically enter the market at the exchange level through one or more of the entry method described previously.

(*See* 2002 Draft Competition Report at page 6) (Footnote omitted).

Since ALECs are not obligated to serve all customers, they are able to target their marketing efforts and can choose to do business only in selected markets. It is those types of targeted marketing efforts with which BellSouth must compete.

When developing its 2002 Key Customer offering, BellSouth chose to offer this promotion in specific wire centers. Due to the manner in which retail rates were established and the manner in which geographic deaveraging of UNE rates was accomplished, the rates in one wire center are often different from the rates in a contiguous wire center. Moreover, BellSouth's wire center boundaries do not generally correspond to typical geographic boundaries such as city limits, county lines, etc. It is reasonable, therefore, to consider a wire center as a "specific geographic market," as BellSouth has done for its January and June Key Customer offerings.

Issue 3D(iii): Pursuant to Section 364.051(5)(a), and 364.08, Florida Statutes, how should "similarly situated" or "substantially similar" be interpreted?

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. First, it is important to make clear that Section 364.051(5)(a)(2) of the Florida Statutes states that a local exchange telecommunications company shall not "*unreasonably* discriminate among similarly situated customers." (Emphasis added). Therefore, even if it were determined that the customers in the "hot" wire centers are "similarly situated" to customers in other wire centers (which they are not), that fact alone could not result in a finding of discrimination.

In any event, the fact is that customers in "hot" wire centers are <u>not</u> similarly situated to customers in other wire centers. This is because, although it is possible - and even likely - that customers are purchasing similar services in "hot" wire centers and in other wire centers, the existence of a higher level of competition in the "hot" wire centers and the limited competitive choices in the other wire centers prevents a finding that these two sets of customers are "similarly situated."

Likewise, Section 364.08(1) of the Florida Statutes addresses "all persons under *like circumstances* for like or substantially similar services." (Emphasis added). In this proceeding, the customers served out of the "hot" wire centers and the customers that are not served out the "hot" wire centers are not under "like circumstances" because they are subject to different levels of competition.

Issue 3D(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?

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. As discussed above under Issue 3D, it is not necessary to establish any such criteria. The BellSouth January Key Customer offering is neither unfair, anticompetitive nor discriminatory. This offering is a competitive response to offerings made by competitive providers. Making this offering available in the wire centers where BellSouth has lost, and is continuing to lose, a significant share of business to competition comports with the "specific geographic market" requirement in Section 364.051(5)(a)(2) of the Florida Statutes. Furthermore, the customers to whom BellSouth made this offer available are "similarly situated" in that they have numerous competitive alternatives.

Issue 3D(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?

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. As discussed above under Issue 3D, it is not necessary to establish any such criteria. Neither BellSouth's June Key Customer offering nor a subsequent tariff filing that extends the expiration date of an existing, approved offering is unfair, anticompetitive nor discriminatory. As I mentioned earlier, without the pressure of BellSouth's promotional offerings, ALECs will be insulated from competition by BellSouth at the cost of depriving Florida consumers of the intended benefits of the vibrant competition that exists in the local exchange market in Florida.

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?

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. BellSouth's position is that it is not necessary to establish any criteria to determine whether any other terms or conditions of a BellSouth promotional tariff offering are unfair, anticompetitive or discriminatory. The primary question that should be asked is whether the promotional offering is beneficial to end user customers.

Issue 3E(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?

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. As discussed above under Issue 3E, it is not necessary to establish any such criteria. The BellSouth January Key Customer offering is neither unfair, anticompetitive nor discriminatory.

Issue 3E(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?

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. As discussed above under Issue 3E, it is not necessary to establish any such criteria. Neither BellSouth's June Key Customer offering nor a subsequent tariff filing that extends the expiration date of an existing, approved offering is unfair, anticompetitive nor discriminatory.

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

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. BellSouth's position is that the Act and this Commission's rules govern BellSouth's requirements for the resale of promotional offerings. Consistent with the Commission's Order in Docket Nos. 960833-TP, 960846-TP, and 960916-TP, *In Re: Petitions by AT&T Communications of the Southern States, Inc., MCI*

Telecommunications Corporations, MCI Metro Access Transmission Services, Inc., American Communications Services, Inc. and American Communications Services of Jacksonville, Inc. for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. concerning interconnection and resale under the Telecommunications Act of 1996, issued December 31, 1996, the following terms and conditions for the resale of promotions appear in BellSouth's interconnection agreements and Statement of Generally Available Terms and Conditions ("SGAT"), Section XIV.B:

> Retail promotions offered for ninety (90) days or less will not be discounted. Promotions of more than ninety (90) days will be made available for resale at the promotional rate minus the applicable wholesale discount.

BellSouth is in compliance with the Commission's Order, and according to the terms of the interconnection agreements entered into between BellSouth and Florida ALECs, all promotions are available for resale, and long-term promotions, including the January and June Key Customer offerings, are available for resale at the wholesale discount.

Q. ARE BELLSOUTH'S PROMOTIONAL OFFERINGS CONSISTENT WITH THE FCC'S TREATMENT OF PROMOTIONS IN THE FCC'S LOCAL COMPETITION ORDER?

A. Yes. The FCC's Local Competition Order regarding the treatment of promotions makes it clear that promotions are not limited to waivers or discounts that expire in ninety days or less. In deciding whether promotions are subject to the resale obligations set forth in the Act, the FCC concluded, "no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs." *See* Local Competition Order at ¶948 (emphasis added). Instead, the FCC concluded that while "short-term promotional prices" are not subject to the wholesale rate obligation, long-term promotional prices are subject to the wholesale rate obligation. *Id.* at ¶949 (emphasis added). The FCC then set guidelines for "determin[ing] when a promotional price ceases to be 'short term' and must therefore be treated as a retail rate" that is subject to the wholesale discount. *Id.* at ¶950. The FCC clearly recognizes that incumbents like BellSouth may offer either short-term or long-term promotions, and that short-term promotions are not subject to the resale discount requirements of the Act.

Issue 4A(i): Does the BellSouth Key Customer tariff filing (Tariff Number T-020035) meet the resale terms and conditions established pursuant to this issue?

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. Yes. As I stated previously, BellSouth's January Key Customer offering is available for resale consistent with the resale obligations of the Act, FCC rules and Commission orders.

Issue 4A(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?

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. Yes. As I stated previously, BellSouth's June Key Customer offering, including any subsequent tariff filing that extends the expiration date of this offering, is available for resale consistent with the resale obligations of the Act, FCC rules and Commission orders.

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

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. BellSouth's position is there is no basis for any additional restrictions on BellSouth's ability to engage in marketing its promotional offerings. As the Commission acknowledged in its June 28, 2002 order in Docket No. 020119-TP, BellSouth has established a region-wide, 10-day waiting period, whereby BellSouth will not initiate any win-back activities to regain a customer. (*See* FPSC Order No. PSC-02-0875-PAA-TP at page 21). In this same order, the Commission precluded BellSouth from including any marketing information in its final bill sent to customers who have switched providers. (*Id.* at page 22). Any additional restrictions would unnecessarily restrict customer choice.

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?

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. The Commission determined in its June 28, 2002 order in Docket No. 020119-TP, that BellSouth is prohibited from sharing information with its retail division, such as informing the retail division when a customer is switching from BellSouth to an ALEC. (*See* FPSC Order No. PSC-02-0875-PAA-TP at page 21).

Q. WHAT IS BELLSOUTH'S POLICY REGARDING THE SHARING OF WHOLESALE INFORMATION WITH ITS RETAIL DIVISION?

A. It is the policy of BellSouth to treat all Customer Proprietary Network Information ("CPNI") and Wholesale Information in a confidential manner. Wholesale Information is information that BellSouth has in its possession because it provides services to other carriers that provide services to end user customers.

Further, it is the policy of BellSouth to limit disclosure and the use of CPNI and Wholesale Information in a manner consistent with the requirements of the FCC rules, Section 222 of the Act, and any applicable state or local requirement. All employees of BellSouth who may have access to either CPNI or Wholesale Information receive annual training with respect to the proper use of and access to such information. It is against BellSouth policy for any employee or authorized representative of BellSouth to misuse wholesale information. It is the policy of BellSouth that no BellSouth personnel shall access any BellSouth IT system unless that person has a legitimate and authorized business purpose for such access. Without limitation, this means that BellSouth personnel are prohibited from "system surfing" just to see what information is available. BellSouth's wholesale operations do not provide leads to its retail operations. Any information used by BellSouth's retail operations to develop lists of former customers that are potentially eligible for promotional offerings are obtained from retail information sources – not wholesale sources.

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?

Q. WHAT IS BELLSOUTH'S POSITION REGARDING THIS ISSUE?

A. BellSouth's January and June Key Customer offerings complied with Florida Statutes and the Commission's rules as they existed and as they had been interpreted at the time BellSouth filed the offerings. Should the Commission find that these offerings do not comply with specific criteria that are established in this proceeding (which it should not), customers who have already contracted for service under the offering should be allowed to continue to enjoy the benefits they bargained for.

Q. WHAT FACTORS SHOULD BE CONSIDERED IF THE COMMISSION DECIDES TO ESTABLISH NEW CRITERIA TO DETERMINE WHETHER BELLSOUTH'S PROMOTIONAL OFFERINGS ARE UNFAIR, ANTICOMPETITIVE OR DISCRIMINATORY.

A. If the Commission decides to establish new criteria for BellSouth's promotional offerings, the following should be considered:

- Speed to market - Being able to roll out new offerings without extended waiting periods benefits consumers.
- Presumptive validity – The legislature has already established the requirement that tariffs will be presumptively valid and nothing established in this docket should affect this requirement.
- Level playing field - Rules applicable to promotional offerings should apply to all telecommunications service providers in the same manner. If rules are not applied uniformly, the competitors of any provider to which, for example, longer notice periods apply have the significant – and unfair – advantage of being able to determine in advance the "game plan" of those providers and, quite possibly, of being able to implement a promotion of their own before their competitor's promotion even goes into effect. It clearly would be inappropriate for any competitor to be granted such an advantage solely as a result of regulation.

Q. PLEASE SUMMARIZE YOUR TESTIMONY.

A. Competition in the telecommunications market exists in Florida. As that competition continues to grow, incumbents like BellSouth come under increasing assault from new rivals that can target the ILEC's customers and attempt to win them over with promotions. In such an environment, ILECs, as well as the ALECs, must have the ability to compete for the customers that have been, or that may be, targeted successfully by their competitors. Otherwise, competition cannot flourish, and whatever competition does exist will benefit only a few protected ALECs, but will not benefit customers as a whole.

Further, BellSouth's promotional offerings do not violate federal or state law, or the requirements of this Commission. The FCC has specifically endorsed the benefits that promotions provide to consumers.

Finally, from a public policy perspective, promotional offerings serve as concrete evidence from all competitors, ILECs and ALECs alike, that competition is taking hold in the market. If competitors were not active, BellSouth would have less need to offer promotions. BellSouth's promotional offerings, as well as those of the ALECs, constitute recognition of competition and are a step to try to meet that competition on each party's own terms. In the process, competition fosters lower rates, improved customer service, and service innovations. Business customers benefit directly from lower rates, and consumers benefit both directly, from lower rates, and indirectly through savings being passed on to them as a result of business savings. The public in general will benefit from the lively interplay of rivalry and competition among all carriers who will be free to pioneer service and marketing innovations that will improve the performance and accessibility of telecommunications in Florida.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

(#464670)

BELLSOUTH TELECOMMUNICATIONS, INC.
REBUTTAL TESTIMONY OF JOHN A. RUSCILLI
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NOS. 020119-TP AND 020578-TP
NOVEMBER 25, 2002

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH") AND YOUR BUSINESS ADDRESS.

A. My name is John A. Ruscilli. I am employed by BellSouth as Senior Director for Policy Implementation and Regulatory Compliance for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. HAVE YOU PREVIOUSLY FILED TESTIMONY IN THIS PROCEEDING?

A. Yes. I filed direct testimony, including three exhibits, on October 23, 2002.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my rebuttal testimony is to respond to certain policy aspects of the direct testimony of Mr. Joseph Gillan and Ms. Danyelle Kennedy filed on behalf of the Florida Competitive Carriers Association ("FCCA"), and the direct testimony of Mr. Michael Gallagher filed on behalf of Florida Digital Network, Inc. ("FDN") on October 23, 2002.

~~Q. COULD YOU RESPOND TO MR. GILLAN'S ASSERTION (AT PAGE 7) THAT SECTION 364.051(5)(a) "CLEARLY CONTEMPLATES THAT THE COMMISSION WILL APPLY ITS JUDGMENT, BALANCING BELLSOUTH'S ABILITY TO GENERALLY RESPOND TO COMPETITION WITH A COUNTER-BALANCING PROHIBITION AGAINST ANTICOMPETITIVE ACTS, PRACTICES AND OFFERINGS THAT UNREASONABLY DISCRIMINATE AMONG SIMILARLY SITUATED CUSTOMERS~~?"

A. ~~Yes. Since 2000, BellSouth has been "generally respond[ing] to competition~~" ~~using offerings that are similar to the Key Customer offerings that are the subject of this proceeding. Since 2000, ALECs in general have made their offerings available predominately to business customers, and some ALECs (such as Mr. Gallagher's company) have made their offerings available *exclusively* to business customers. As a result, ALECs have captured nearly one-third of the business lines in BellSouth's territory according to the Commission's 2002 Draft Competition Report.~~

~~ALECs are fond of arguing that BellSouth is an incumbent with over 100 years in the business. In fact, Ms. Kennedy makes that very argument at pages 8-9 of her direct testimony. The Commission's 2002 Draft Competition Report, however, shows that despite the fact that BellSouth has "over 100 years in the~~

~~business," ALECs have used a combination of their own facilities, resale, and UNEs to win nearly one third of the business customers in Florida *in just 6 years* (from 1996 to 2002).~~

~~In light of these facts, no objective scale would lean in favor of imposing regulatory restrictions on BellSouth's ability to offer Florida consumers lower prices to compete against the ALECs.~~

Q. IN THEIR TESTIMONY, MR. GILLAN (PAGE 2) AND MR. GALLAGHER (PAGE 4) CONTEND THAT LOCAL EXCHANGE COMPETITION IN FLORIDA IS IN ITS INFANCY. DO YOU AGREE?

A. Absolutely not. As I discussed at great length in my direct testimony, local exchange service competition is thriving in Florida. Exhibit JAR-1 to my direct testimony (which I adopt as my own), for example, clearly demonstrates that competition in Florida is anything but in its "infancy," and more recent information that BellSouth presented to the FCC on November 1, 2002 (which I adopt as my own and which is attached as Rebuttal Exhibit JAR-4 to my testimony) shows that local competition has continued to increase in Florida. As discussed in Rebuttal Exhibit JAR-4, BellSouth's most recent data indicates that total ALEC line share is continuing to increase in BellSouth's Florida service areas. BellSouth estimates that ALECs were serving over 31% of the business lines in Florida as of September 2002. (*See* Rebuttal Exhibit JAR-4 at ¶6). Among other things, the competitive data contained in Rebuttal Exhibit JAR-4 establishes that as of September 2002:

* over 104 ALECs were serving nearly 1,325,00 access lines, which is at least 18.4% of the total access lines in BellSouth's service area.
* at least 54 of the ALEC providers in Florida are facilities-based providers.

Q. PLEASE ADDRESS MR. GALLAGHER'S STATEMENTS ON PAGE 5 THAT ALECS CAN ONLY "SERVE ABOUT 60% OF THE STATES' BUSINESS LINES VIA UNE LOOP FACILITIES" AND THAT BELLSOUTH IS "LEVERAGING THE GEOGRAPHIC WEAKNESS IN FDN'S AND OTHER COMPETITORS NETWORK TOPOLOGIES BY LOWERING PRICES ONLY IN THE 'ISLANDS' OF COMPETITION?"

A. Mr. Gallagher is simply wrong. ALECs have unencumbered access to UNE loops in 100% of BellSouth's footprint in Florida. ALECs also have unencumbered access to collocate their equipment in 100% of the wire centers in BellSouth's footprint in Florida. In fact, Table 3 contained in Exhibit JAR-1 attached to my direct testimony clearly reflects that ALECs already have access to **95%** of the business lines in BellSouth's Florida service area through existing collocation arrangements.

Additionally, I demonstrated in my direct testimony that BellSouth included wire centers where ALECs were aggressively winning business lines for inclusion in the January and June 2002 Key Customer offerings. A review of Exhibit ES-7 included in Exhibit JAR-1 confirms this by showing that ALECs have completed collocation arrangements in all but four of the wire centers included in the June Key Customer offering. ALECs, therefore, can serve the vast majority of the business lines that are served out of hot wire centers via UNE loop facilities.

Q. DESPITE ALL OF THIS, MR. GALLAGHER OF FDN CONTENDS (AT PAGE 6) THAT "ALECS COULD NOT SURVIVE WERE THEY TO ADJUST PRICES TO LEVELS LOWER THAN BELLSOUTH'S KEY CUSTOMER RATES." HOW DO YOU RESPOND TO MR. GALLAGHER'S CONTENTION?

A. BellSouth has been offering Key Customer programs in Florida since 2000. Despite the existence of these programs, Mr. Gallagher's own company, FDN, has done more than just survive – it has thrived.

Q. WHAT IS YOUR BASIS FOR SAYING THAT?

A. Data provided by FDN itself. Each year, the Florida Public Service Commission serves data requests on local service providers in order to prepare its Local Competition Report for the Legislature. Through discovery, BellSouth has obtained the responses that FDN provided to these data requests in the summer of 2001 and in the summer of 2002. I have attached a copy of FDN's November 6, 2002 responses for Document Request No. 31 to BellSouth's First Set of Requests for Production of Documents (Nos. 1-31) as Rebuttal Exhibit JAR-5 to my testimony.

According to FDN's responses, FDN increased the rates it charges for its multi-line business services between the summer of 2001 and the summer of 2002. Despite these rate increases, it appears that the vast majority (if not all) of the access lines that FDN provides within BellSouth's operating territory serve customers that are located within a BellSouth hot wire center. Moreover, although BellSouth had Key Customer offerings – including the January Key Customer offering that is the subject of this proceeding – in effect between the time FDN filed its 2001 responses and the time it filed its 2002 responses, the number of access lines FDN was providing *increased in each and every service area as reported by FDN.* Rebuttal Exhibit JAR-6 is a table summarizing this information.

Again, FDN's own data shows that the number of access lines FDN was serving in BellSouth's territory increased significantly between 2001 and 2002, even though FDN *increased its rates,* and even though Key Customer offerings were available throughout this period of time. FDN can hardly be heard to complain that the Key Customer programs have prevented FDN from competing for and winning customer in Florida.

Q. DO YOU HAVE SIMILAR DATA REGARDING OTHER ALECS?

A. Not at this time, but that is not for a lack of trying. BellSouth served discovery requests upon the FCCA and each party of record in this proceeding seeking copies of those responses. To date, the only responses BellSouth has received are FDN's responses. BellSouth is in the process of filing a motion to compel the production of this information, but at least three ALECs upon whom this data request was served have withdrawn from this proceeding as of the time this testimony was filed.

Q. ~~COULD YOU ADDRESS MS. KENNEDY'S TESTIMONY (PAGE 5) THAT COMPARES NTC'S COSTS OF USING THE UNE PLATFORM ("UNE-P") TO SERVE A 4-LINE PENSACOLA CUSTOMER WITH HUNTING TO THE RATES AVAILABLE TO SUCH A CUSTOMER UNDER THE JANUARY KEY CUSTOMER OFFERING?~~

A. ~~Yes. Beginning on page 3 of her testimony and in her Exhibit DK-1, Ms. Kennedy purports to compare Network Telephone Company's ("NTC's") wholesale cost to BellSouth's retail rates charged to a four-line Pensacola customer with hunting under the January Key Customer promotion. In doing so, Ms. Kennedy represents in Exhibit DK-1 that NTC's Wholesale Costs are: \$72.92 for four UNE-P loops and ports; \$9.04 for four feature packages, and \$11.72 for usage for four lines. For purposes of this testimony, and without conceding that it is accurate, I will accept Ms. Kennedy's usage figure.~~

~~I have no idea, however, how Ms. Kennedy came up with the other "wholesale cost" figures in her Exhibit DK-1. For instance, the \$72.92 for four UNE-P lines depicted in Exhibit DK-1 comes out to \$18.23 per UNE-P line. NTC's current interconnection agreement with BellSouth, however, provides a rate of \$17.15 for a UNE-P line in Pensacola (which is in Zone 2). Four UNE-P lines in Pensacola, therefore, would cost NTC \$68.60 and not the \$72.92 depicted in~~

~~Exhibit DK-1. In fact, under the UNE rates recently established by the Commission in its September 27, 2002 Order in Docket No. 990649A-TP, NTC is able to avail itself of a rate of $15.05 per Zone 2 UNE-P line, or $60.20 for four Zone 2 UNE-P lines.~~

~~Additionally, the $9.04 for four feature packages depicted in DK-1 comes out to $2.26 per line. NTC's current interconnection agreement with BellSouth provides a features rate of $2.17 per port in Pensacola, although the rate for feature established in the Commission's September 27, 2002 UNE Order is $2.26 per port.~~

~~Finally, Ms. Kennedy fails to mention that in addition to the $98.85 that BellSouth will collect from its end user under the January Key Customer program, BellSouth also will collect the subscriber line charge of $7.84 per line from the end user.~~

~~After correcting the UNE-P costs and including the subscriber line charges of $7.84 per line in Ms. Kennedy's Exhibit DK-1, the following table indicates:~~

NTC Wholesale Cost (Zone 2)			**BST Retail Rate – Pensacola (RG 6)**	
Description	**UNE-P (4 Lines)**		**Description**	**January Key (4 Lines)**
UNE-P Cost	$68.60		Bus. Line Charges	$98.85
Feature Package	$8.68		Hunting Charges	$0.00
Local Usage	$11.72		Subscriber Line Charge	$31.36
NTC Cost	**$89.00**		**Charge to Customer**	**$130.21**
NTC Margin = $41.21 or 46.3%				

~~As can be seen from my corrected table, NTC has a margin of at least $41.21, or 46.3%. In light of this fact, Ms. Kennedy's contention that NTC, and likely other ALECs, "would never be able to match the promotional pricing being offered by BellSouth" is utterly absurd.~~

Q. ~~HOW WILL THE ORDER THE COMMISSION ENTERED RECENTLY IN DOCKET NO. 990649A-TP AFFECT YOUR CORRECTED CHART?~~

A. ~~The UNE-P rates listed in the corrected chart decreased over $2.00 per month.~~

Q. PLEASE COMMENT ON MR. GALLAGHER'S FIVE SAMPLE CUSTOMER LOCATION SCENARIOS DISCUSSED ON PAGE 12 AND SET FORTH IN HIS EXHIBIT MPG-1.

A. Mr. Gallagher's assertion that the "ALEC's overall margins would mortally suffer" if ALECs attempted to meet or beat the Key Customer prices is belied by the facts. The information included in Rebuttal Exhibit JAR-7, attached to my testimony, clearly demonstrates that efficient ALECs are able to realize significant margins, ranging from 53% to nearly 240% when competing with BellSouth's Key Customer offering when using UNE-P to serve the end users located in Zone 2 wire centers.

Q. HOW DO YOU RESPOND TO MR. GALLAGHER'S ARGUMENT (PAGE 11) THAT THE COSTS REFLECTED IN THESE ANALYSES REFLECT "JUST A PORTION OF THE ALEC'S TOTAL COST?"

A. That argument is self-serving and disingenuous. Nowhere in their testimony do Mr. Gallagher, Ms. Kennedy, or Mr. Gillan address the additional revenue sources that are available to ALECs who use UNE arrangements to provide services to end users in Florida. Referring to the corrected version of Exhibit DK-1 set forth above, for instance, NTC would pay $89.00 for the UNE-P arrangements necessary to provide four lines with hunting to a Pensacola customer. Without paying a penny more to BellSouth, NTC could use the exact same arrangements to provide numerous vertical features to the same customer, and it could charge the customer for each of those vertical features. Additionally, ALECs like FDN often provide (and charge for) additional services such as intraLATA, interLATA, and international toll services, Internet services, and other innovative and bundled service offerings. All of these additional revenue sources represent incremental revenue to the ALEC that is not mentioned in the direct testimony of Mr. Gillan, Mr. Gallagher, or Ms. Kennedy.

Further, Mr. Gallagher's, as well as Mr. Gillan's and Ms. Kennedy's contention that ALECs are unable to compete with BellSouth's Key Customer offering is clearly refuted by my Rebuttal Exhibit JAR-7 which shows:

- ALECs can realize positive margins in **all** Florida wire centers when using UNE-P to serve their end user.
- ALECs can realize significant margins (53% - 130%) in Zone 1 and Zone 2 when using UNE-P to serve their end user.

The margin available to ALECs when they purchase UNE-P to serve their end users is anything but "thin." The analysis reflected in Rebuttal Exhibit JAR-7 clearly shows that the revenues available to ALECs, even if they undercut BellSouth's Key Customer rates by 20%, provides ample room to cover the ALECs' costs.

Q. PLEASE COMMENT ON MR. GALLAGHER'S STATEMENT (PAGE 12) THAT "ZONE 2 AND ZONE 3 UNEs COST SIGNIFICANTLY MORE THAN UNEs IN ZONE 1, AND THAT FACT ALONE SERVES AS A DETERRENT TO ALECs CONTEMPLATING GEOGRAPHIC EXPANSIONS INTO ZONES 2 AND 3."

A. For one thing, Mr. Gallagher is merely repeating arguments that he made (and that the Commission rejected) in Docket No. 990649A. Beyond that, ALECs fully supported (in fact, demanded) deaveraging of rates for UNEs, particularly for the local loop. Deaveraging results in increased profit margins for ALECs in the urban areas where they have chosen to focus their efforts. It is truly disingenuous that the ALECs are now complaining because deaveraged UNE rates in Zones 2 and 3 will produce less margin than the deaveraged UNE rates in Zone 1. As explained by BellSouth and as accepted by the Commission in Docket No. 990649A, deaveraging UNE rates without similarly adjusting BellSouth's retail rates would result in wholesale rates for unbundled loops in Zones 2 and 3 that would often be higher than BellSouth's tariffed retail rates in those areas.

Indeed, if BellSouth's current tariffed 1FB average retail rates were deaveraged by applying the same deaveraging factors resulting from the current deaveraged UNE loop rates in Florida, the resulting 1FB deaveraged retail rates would be:

Zone 1 - $24.22 + $10.00 for hunting = $34.22

Zone 2 - $34.44 + $10.00 for hunting = $44.44

Zone 3 - $61.06 + $10.00 for hunting = $71.06

Of course, there is no proceeding underway to even consider either deaveraging BellSouth's existing averaged retail rates or rebalancing business and residence retail rates so that implicit subsidies are removed. BellSouth's existing averaged residence and business retail rates are not market-based, but are the result of public policy considerations associated with universal service, including implicit subsidies. As a result, residential retail rates are often below cost, and business local exchange rates have been set at levels that provide a subsidy to residential rates. In an inverse relationship to cost, urban rates have been set at levels that provide a subsidy to rural rates. Further, retail rates for vertical services, access and intraLATA toll have also been set at levels to provide a subsidy to residential local exchange rates.

ALECs are competing in a market where one competitor (i.e., BellSouth) has a portfolio of services that are priced artificially high or artificially low depending on the service, and in which that competitor is precluded by regulation from adjusting those retail rates to reflect the underlying costs. Even so, this discussion by Mr. Gallagher on page 12 of his testimony is a red herring, because the business customers that his clients have chosen to serve are typically located in Zone 1 and Zone 2 where the wholesale rates are significantly less than BellSouth's retail rates.

The hypocrisy of the ALECs' "have their cake and eat it too" arguments is truly astounding. While enjoying an improved competitive position in urban markets by virtue of the deaveraged UNE rates that they demanded, and while willingly sacrificing their competitive position in rural markets, ALECs now come before this Commission to argue that BellSouth should not be allowed to respond to the competition ALECs are bringing to the urban markets (or that if BellSouth is allowed to respond to competition in the urban markets, it may do so only by lowering its rates *across the entire state of Florida*). Simply put, the ALECs wanted (and got) an improved competitive situation in Zone 1 and Zone 2 at the expense of Zone 3. Now, ALECs want to be protected from competitive responses in Zone 1 and 2 due to the situation that they asked to be created in Zones 3.

Q. PLEASE RESPOND TO THE ALEC WITNESSES' ALLEGATIONS THAT BELLSOUTH'S KEY CUSTOMER PROMOTION DISCRIMINATES BETWEEN SIMILARLY SITUATED CUSTOMERS.

A. The ALEC witnesses are wrong. Mr. Gillan (pages 7-8), Mr. Gallagher (page 13) and Ms. Kennedy (pages 8-9) each avoid discussing the true meaning of the term *discrimination*. The term *discrimination* merely denotes the offering of different services to different customers under different rates, terms, and conditions. Not all such "discrimination" is prohibited. Instead, BellSouth is only prohibited from "unreasonably discriminat[ing] among similarly situated customers." *See* Section 364.051(a). Among other things, competition requires the ability to make distinctions based on the competitive conditions that exits in a specific geographic market.

The ALEC witnesses completely ignore this concept, thus glossing over a key and fundamental principle in common carrier regulation. In fact, the Key Customer offerings at issue in this proceeding do not constitute unreasonable discrimination, because (1) they are made generally available to all similarly situated customers, and (2) they are made available, through resale, to competitive carriers for provision to similarly situated customers.

Significantly, the January and June Key Customer offerings do not single out particular customers to the exclusion of others who are subject to the same competitive conditions. Nor do they provide offerings that are exclusively available to a single customer. Instead, the January and June Key Customer offerings are available to all customers who are served from wire centers in which ALECs indisputably have focused their efforts.

Q. ~~PLEASE RESPOND TO MR. GILLAN'S SUGGESTION ON PAGE 8 "THAT THE COMMISSION PROHIBIT BELLSOUTH FROM DISCRIMINATING BETWEEN CUSTOMERS SOLELY BECAUSE SOME CUSTOMERS MAY HAVE CHOSEN AN ALTERNATIVE PROVIDER~~."

A. If CLECs were not developing innovative service offerings, aggressively marketing these offerings to the small business customers they are targeting, and winning a significant number of those small business customers throughout the State of Florida, there would be little if any need for BellSouth to develop promotional offerings that are designed to win back customers BellSouth has lost to competitors. Both the ALECs' promotions and BellSouth's promotions, however, are examples of healthy competition.

As contemplated by Congress, local exchange service competition is taking root, and incumbents must work to keep and win back valued customers that are being wooed away by their rivals. To squelch BellSouth's ability to respond to competition would be an unneeded and unwarranted interruption of the growing competitive process now under way in the market.

Prohibiting win back promotions would signal a refusal to permit the development of true competition in favor of an artificial segmentation of market share by reserving certain desirable market shares only for competitors and preventing the incumbent carrier from properly responding in the same way as takes place in all types of markets. Prohibiting win back promotions also would create a static or frozen situation of "umbrella pricing," in which incumbents are limited in their competitive responses, in order to give an artificial advantage to less-efficient competitors. Neither competition nor consumers would benefit from such a prohibition.

~~It should come as no surprise, therefore, that the FCC has specifically endorsed win back offerings as pro-competitive. Originally, in a 1998 order on customer proprietary network information ("CPNI"), the FCC prohibited carriers from using or accessing CPNI to regain the business of a customer that had switched to another provider.[1] The following year, however, the FCC lifted this restriction on win back activities, expressly finding that "win back campaigns are consistent with Section 222(c)(1)"[2] of the federal Act.[3] In that order, the FCC stated that "all carriers should be able to use CPNI to engage in win back marketing campaigns to target former customers that have switched to other carriers," and it added that "we are persuaded that win back campaigns are consistent with Section 222(c)(1) and in most instances facilitate and foster competition among carriers, benefiting customers without unduly impinging upon their privacy rights~~."[4]

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[1] Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information and Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket Nos. 96-115 and 96-149, Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061, ¶85 (1998).

[2] This section of the Act governs how carriers "use, disclose, or permit access to" CPNI. *See* 47 U.S.C. §222(c)(1).

[3] *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 14409, ¶67 (1999) (the 'CPNI Reconsideration Order").

[4] *Id.* at ¶67.

~~More specifically, the FCC noted that restrictions on win back activities "may deprive customers of the benefits of a competitive market," explaining that:~~

> ~~*Winback facilitates direct competition on price and other terms*, for example, by encouraging carriers to "out bid" each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs.~~
>
> ~~Some commenters argue that ILECs should be restricted from engaging in winback campaigns, as a matter of policy, because of the ILEC's unique historic position as regulated monopolies. Several commenters are concerned that the vast stores of CPNI gathered by the ILECs will chill potential local entrants and thwart competition in the local exchange. We believe that such action by an ILEC is a significant concern during the time subsequent to the customer's placement of an order to change carriers and prior to the change actually taking place. Therefore, we have addressed that situation in Part V.C.3, infra. *However, once a customer is no longer obtaining service from the ILEC, the ILEC must compete with the new service provider to obtain the customer's business. We believe that such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this practice.*~~[5]

~~Additionally, the Public Service Commission of South Carolina ruled in its Order No. 2001-1036 dated October 29, 2001 that BellSouth's "Welcome Back! Win Back!" promotion, which was available only to former customers of BellSouth who were receiving services from a competitor, was neither discriminatory nor anticompetitive.~~[6]

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[5] *Id.* at ¶¶69-70 (emphasis supplied).

[6] The South Carolina Commission also ruled that in the future, BellSouth must wait 10 business days after a customer has begun receiving services from a competitor before BellSouth makes a win back offer to that customer.

Q. ~~MS. KENNEDY (PAGES 8-9) CONTENDS THAT IN ORDER FOR BELLSOUTH'S KEY CUSTOMER OFFERING NOT TO BE DISCRIMINATORY, THE ADVERTISING MATERIALS AND MARKETING FOCUS FOR EXISTING BELLSOUTH CUSTOMERS AND POTENTIAL WIN BACK CUSTOMERS CANNOT DIFFER. PLEASE RESPOND~~.

A. ~~First, it is telling that Ms. Kennedy is reduced to attempting to support her "discrimination" claims by arguing that the "size," "type," or "number of pages" of BellSouth's advertising material targeted to existing customers and former customers are not identical. As explained in the rebuttal testimony of BellSouth witness Carlos Garcia, many of Ms. Kennedy's arguments are simply inaccurate~~. ~~Even if they were not, however, Ms. Kennedy's arguments are contrary to the spirit and intent of the Florida statutory scheme, which seeks, in part, to "encourage…providers of telecommunications services to introduce new or experimental telecommunications services free of unnecessary regulatory restraints" and which further seeks to "eliminate any rules and/or regulations which will delay or impair the transition to competition." Fla. Stat. 364.01(4)(d) and (f). Although I am not a lawyer, from a policy perspective, it seems clear that by asking the Commission to dictate the type, scope and manner of BellSouth's advertising practices, Ms. Kennedy is asking the Commission to discourage new and experimental promotions and to preclude segmented marketing campaigns. Ms. Kennedy's suggestions would frustrate and impede~~, ~~rather than promote, new and experimental competitive offerings~~.

Q. ~~PLEASE RESPOND TO MS. KENNEDY'S ALLEGATIONS ON PAGE 9 THAT BELLSOUTH'S ADVERTISEMENT FOR ITS KEY CUSTOMER PROMOTION (INCLUDED AS EXHIBIT DK-4) CONFLICTS WITH STATEMENTS CONTAINED IN BELLSOUTH'S RESPONSE DATED MARCH 5, 2002 (INCLUDED AS EXHIBIT DK-5)~~.

A. ~~These allegations are without merit. Ms. Kennedy bases her allegation on a reference to one sentence that is contained in one page of BellSouth's response to FDN's petition. This reference is taken out of context and is irrelevant to the appropriateness of BellSouth's advertising. In fact, many of these same issues were addressed in BellSouth's June 19, 2002 response to NTC's May 20, 2002 letter to this Commission. A copy of NTC's letter and BellSouth's response to that letter is attached as Rebuttal Exhibit JAR-8~~.

Q. ON PAGE 9 OF HIS TESTIMONY, MR. GILLAN STATES THAT BELLSOUTH SHOULD NOT BE ALLOWED TO OFFER PROMOTIONS INVOLVING CONTRACTS WITH TERMS OF MORE THAN 12 MONTHS. SIMILARLY, ON PAGE 18 OF HIS TESTIMONY, MR. GALLAGHER SUGGESTS THAT CONTRACTUAL DISCOUNTS SHOULD BE LIMITED TO 60 TO 120 DAYS. ARE SUCH LIMITATIONS APPROPRIATE?

A. No. In a competitive market, which clearly exists in Florida, the duration of promotions is dictated by market forces and by customers – not by ALECs. Moreover, neither Mr. Gillan nor Mr. Gallagher provides any facts to justify their attempt to limit the benefits available to customers that desire the contractual stability of term contracts. This matter is further addressed in the rebuttal testimony of BellSouth witness Robert Pitofsky.

Q. ANOTHER COMMON THEME OF THE ALEC WITNESSES TESTIMONY IS THEIR POSITION THAT THE COMMISSION SHOULD LIMIT BELLSOUTH'S USE OF THE TERMINATION LIABILITY PROVISIONS. HOW DO YOU RESPOND?

A. One again, the ALECs want to have their cake and eat it too. On page 9 of his testimony, Mr. Gillan states that "[t]here clearly is a distinction between termination provisions that might arise in a competitive environment (i.e., those needed to compensate a provider for customer-specific costs) and provisions adopted by a monopoly to punitively restrict customer choice." Mr. Gillan then recommends that the Commission "adopt a presumption that any termination penalty greater than 3 months' discount is unreasonable."

Q. WHY DO YOU SAY THAT THIS IS AN EXAMPLE OF THE ALECS WANTING TO HAVE THEIR CAKE AND EAT IT TOO?

A. As I explained in my direct testimony, most ALECs do not limit their termination liability charges to 3 months' discount. To the contrary, many ALECs have full buyout termination charges in their tariffs.

The ALECs want to have their cake by making it easy for BellSouth's end users who sign contracts -- and who receive benefits under those contracts -- to leave

BellSouth for an ALEC (and for the most part keep the benefits they received). These same ALECs want to eat the same cake by making it difficult for their end users who sign contracts and who receive benefits under those contracts to leave them for BellSouth or for any other ALEC.

Q. PLEASE COMMENT ON THE MARKETING RESTRICTIONS THAT MR. GILLAN (PAGE 10), MR. GALLAGHER (PAGE 27), AND MS. KENNEDY (PAGE 12) ARE REQUESTING THE COMMISSION PLACE ON BELLSOUTH.

A. As discussed in my direct testimony, BellSouth has established a region-wide, 10-day waiting period during which BellSouth will not initiate any win back activities to regain a customer. Further, BellSouth has procedures and safeguards to limit disclosure and the use of CPNI and wholesale information in a manner consistent with the requirements of the FCC rules, section 222 of the Act, and any applicable state or local requirement. The placement of additional restrictions upon BellSouth is neither appropriate nor necessary.

Q. ~~HOW DO YOU RESPOND TO MS. KENNEDY'S SUGGESTION THAT THE COMMISSION SHOULD REQUIRE BELLSOUTH "TO OFFER ANY PROMOTION THROUGHOUT ITS ENTIRE SERVICE TERRITORY, AT LEAST UNTIL A STRUCTURAL SEPARATION OF THE COMPANY IS ESTABLISHED~~ . . .?"

A. ~~BellSouth witness Robert Pitofsky addresses the issue of requiring BellSouth to offer promotions throughout its entire service territory in his rebuttal testimony. As for Ms. Kennedy's reference to structural separation, it is simply a red herring. This Commission already has determined that it does not have jurisdiction to order a structural separation of BellSouth. (*See* Order No. PSC-01-2178-FOF-TP, in Docket No. 010345-TP, issued November 6, 2001~~).

Q. PLEASE RESPOND TO MR. GALLAGHER'S ASSERTION (PAGE 24) THAT THE RESALE OPTION WILL PROMOTE THE EROSION OF FACILITIES-BASED COMPETITION.

A. Mr. Gallagher ignores the fact that ALECs determine the most viable method to provide their service to their end users. ALECs have the ability to compete with BellSouth's Key Customer offering through resale, unbundled network elements or facilities-based services. Mr. Gallagher's statement that "facilities-based ALECs cannot beat BellSouth's Key Customer discounts and remain viable" is refuted by the margin analysis I discussed previously and reflected in my Rebuttal Exhibit JAR-7. As such, an ALEC's decision to compete with BellSouth's Key Customer promotion via the resale option, via UNEs or UNE-P or via their own facilities is no different than the decision an ALEC makes to compete with any of BellSouth's tariff offerings.

Q. ~~PLEASE ADDRESS MS. KENNEDY'S REFERENCE (AT PAGE 2) TO THE BELLSOUTH SIMPLE SOLUTIONS PROMOTION.~~

A. ~~The Simple Solutions offering was not filed with the Florida Commission and it was not available to Florida customers. Unfortunately, the offering erroneously appeared in the Florida tariff section of BellSouth's web page, and 12 Florida customers erroneously were enrolled in the promotion before this error was discovered. BellSouth is in the process of contacting these customers, explaining that they were mistakenly enrolled in the promotion, and explaining that they can no longer receive any benefits under the Simple Solutions promotion.~~

Q. P~~LEASE ADDRESS MS. KENNEDY'S STATEMENT (AT P. 6) THAT THE $100 COMPONENT OF THE TERMINATION LIABILITY CHARGE IN THE JANUARY KEY CUSTOMER OFFERING "CERTAINLY COULD HAVE BEEN INCLUDED IN THE TARIFF FILING.~~"

A. ~~The tariff filing package references other administrative costs, and this $100 charge is clearly addressed in the contract that business customers signed when they enrolled in the January Key Customer offering~~.

Q. ~~PLEASE ADDRESS MS. KENNEDY'S TESTIMONY (AT PAGES 12-13) REGARDING THE "SELECT POINTS PROGRAM."~~

A. ~~The BellSouth Select Business Platinum program is an example of the unregulated operations of BellSouth using a legitimate and common practice -- a customer loyalty program -- and pricing unregulated products and services as it deems appropriate, just like unregulated companies do, and just like BellSouth~~'s competitors do. Under the current BellSouth Select Business Platinum program that is available to Florida customers, eligible business customers earn points for each dollar they spend on BellSouth Telecommunications ("BST") and BellSouth Advertising and Publishing Company ("BAPCO") products and services. These points can be redeemed for various BellSouth non-regulated products and services; cash, in the form of a check issued by the BellSouth Select, Inc. (an unregulated direct subsidiary of BellSouth Corporation that administers the BellSouth Select Business Platinum program); or non-BellSouth products and services.

A customer is required to subscribe to at least one non-regulated BellSouth service in order to be eligible for the program. In addition, a customer is not allowed to redeem Select points if the cumulative cash value of its redeemed points exceeds the customer's cumulative spending on non-regulated services. Finally, all costs associated with the program are recorded and accounted for as non-regulated items for BellSouth.

The customer is billed the full rate for their services each month, and the revenue is recorded as regulated or non-regulated, depending on the type of service purchased. When the customer earns points that are charged to BellSouth Telecommunications, the total cost of those points (whether earned on regulated or non-regulated purchases) is charged (debited) to non-regulated revenues. Thus, BellSouth's entire cost of the BellSouth Select Business Platinum program points is borne by the non-regulated lines of business and

~~there is neither a reduction of the regulated revenues nor a discount to tariff rates~~.

~~Finally, the BellSouth Select Business Platinum program is made available on a non-discriminatory basis to all BellSouth customers in Florida who meet the eligibility requirements of the program. Several methods have been used to inform eligible customers of the program, including direct mailings, contacts by BAPCO representatives, in-bound calls, out-bound calls, and a web site (www.bellsouthselectbusiness.com).~~

Q. ~~PLEASE ADDRESS MS. KENNEDY'S ARGUMENT (AT PAGE 14) THAT "THE FACT THAT [SELECT] POINTS ACCRUE FOR YELLOW PAGES ADVERTISING IS IN ITSELF A SUSPECT TYING ARRANGEMENT"~~

A. ~~As I explained above, the untariffed Select Program requires that participants subscribe to a BellSouth unregulated service and limits the value of redemptions to the cumulative unregulated spending of a participant. Furthermore, the purchase of regulated services is not conditioned on the purchase of non-regulated services and, in fact, a customer need not purchase any regulated BellSouth service to participate in the Select Program; therefore, the Select Program does not even arguably represent a tying arrangement.~~

Q. PLEASE RESPOND TO MR. GALLAGHER'S STATEMENTS (AT PAGE 7) CONCERNING THE BILLING OF DISCONNECT CHARGES WHEN THE ALEC'S END USER DISCONNECTS HIS SERVICE.

A. The rates, terms and conditions for the application of disconnect charges are set forth in the interconnection agreement negotiated (or arbitrated) between BellSouth and an ALEC and which are approved by this Commission. The rates applicable when the UNEs are disconnected (either as a result of the ALEC directly submitting the disconnect request or due to the ALEC's end user directly contacting BellSouth or another ALEC to switch service providers), are appropriately billed in accordance with the parties interconnection agreement and represent costs that are appropriate for BellSouth to recover. The disconnect rates reflected in the FDN/BellSouth interconnection agreement were accepted by FDN and are appropriately billed to FDN when the UNEs to which they apply are disconnected.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

(#468848v2)

BY MS. WHITE:

Q Mr. Ruscilli, do you have a summary to give for the record?

A Yes, ma'am, I do.

Q If you could give that, please.

A Thank you. Good afternoon. Competition in the telecommunications market is thriving in Florida. As that competition continues to grow, incumbents like BellSouth come under increasing assault from new rivals which can freely target only specific ILEC high-margin customers and attempt to win them over with promotions.

Promotional offerings are the result of a high level of local service competition in Florida. Given that Florida customers can choose from a growing array of telecommunications services offered by numerous providers, each provider needs maximum flexibility to offer new services and competitive rates as quickly as possible. This flexibility allows Florida customers to receive the maximum benefits of competition as quickly as possible. Otherwise, competition cannot flourish, and whatever competition does exist will benefit only a few protected ALECs, not customers as a whole.

BellSouth's Key Customer promotional offerings are entirely appropriate and meet the requirements of this Commission and the laws of the State of Florida. In fact, the Florida Legislature expressly recognized and condoned efforts by price-regulated companies like BellSouth to retain their customers and win customers from ALECs when it enacted the following language in Section 364.051(5). I'll quote, "Nothing 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 in a specific geographic market or to a specific customer by deaveraging the price of any nonbasic service, packaging nonbasic services together or with basic services using volume and term discounts and offering individual contracts," end quote.

Furthermore, the FCC has repeatedly ruled that carriers may respond to specific competitive threats with rates or offerings designed to meet those threats. From a public policy perspective, promotional offerings serve as concrete evidence from all competitors, ILECs and ALECs alike, that competition is taking hold in the market. If competitors were not active, BellSouth would have less need to offer promotions. BellSouth's promotional offerings, as well as those of the ALECs, constitute recognition of vigorous local competition and are a step to try and meet that competition on each party's own terms. In the process, competition fosters lower rates, improved customer service and service innovation. Business customers benefit directly from lower rates and consumers benefit indirectly through savings being passed on to them as a result of the business savings. The public in general will benefit from the lively interplay and rivalry and competition among all carriers who will be free to pioneer service in marketing innovations that will improve the performance and accessibility of telecommunications in Florida.

In making allegations that BellSouth's Key Customer offering discriminates between similarly-situated customers, the ALECs completely ignore the fact that the Florida Statute only prohibits BellSouth from unreasonably discriminating amongst similarly-situated customers. BellSouth's Key Customer offerings do not single out particular customers to the exclusion of others who are subject to the same competitive conditions, nor do they provide offerings that are exclusively available to a single customer. Instead, BellSouth's Key Customer offerings are available to all customers who are served from wire centers in which the ALECs indisputably have focused their efforts. That concludes my summary.

MS. WHITE: Mr. Ruscilli is available for cross-examination.

CHAIRMAN JABER: We're going to come back at 1:30. Thank you.

(Lunch recess.)

(Transcript continues in sequence with Volume 3.)

STATE OF FLORIDA)
: CERTIFICATE OF REPORTER
COUNTY OF LEON)

I, LINDA BOLES, RPR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 26th DAY OF FEBRUARY, 2003.

Linda Boles

LINDA BOLES, RPR
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