



July 5, 2003

Ms. Blanca Bayó, Director
Division of the Commission Clerk
& Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

via Overnight Mail

Re: Docket No. 0201252-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.

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

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

Dear Ms. Bayó,

Please find enclosed for filing in the above dockets an original and seven (7) copies of Florida Digital Network, Inc.'s Motion for Reconsideration.

If you have any questions regarding the enclosed, please call me at 407-835-0460.

Sincerely,

Matthew Feil
Florida Digital Network
General Counsel

- AUS _____
- CAF _____
- CMP _____
- COM _____
- CTR _____
- ECR _____
- GCL _____
- OPC _____
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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: 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
)
)

In Re: Petition of Florida Digital Network, Inc., for Expedited Review and Cancellation of BellSouth's Telecommunications, Inc.'s Key Customer Promotional Tariffs and For an Investigation of BellSouth Telecommunications, Inc.'s Promotional Pricing and Marketing Practices.)
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) Docket No. 020119-TP
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In re: Petition of the Florida Competitive Carriers Association for Expedited Review and Cancellation of BellSouth Telecommunications, Inc.'s Key Customer Promotional Tariffs.)
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) Docket No. 020578-TP
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FLORIDA DIGITAL NETWORK, INC.'S MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

Pursuant to Rule 25-22.060, Florida Administrative Code, Florida Digital Network, Inc., d/b/a FDN Communications ("FDN") respectfully moves the Commission to reconsider its Final Order issued in the captioned cases on June 19, 2003.¹ In support of this Motion, FDN states as follows:

SUMMARY

1. The record in this case established that (a) facilities-based competition is stagnating as a result of BellSouth's 2002 Key Customer programs and (b) BellSouth customers not receiving

¹ See Order No. PSC-03-0726-FOF-TP, Final Order On BellSouth's Key Customer Tariffs (hereinafter "Key Customer Order" or "Order").

2002 Key Customer discounts do not pay rates lower than or even the same as they would without discounts to eligible customers. BellSouth, the Commission and the FCC have proclaimed that facilities-based competition is in the public interest and must be promoted, yet the Commission sacrifices facilities-based carriers in favor of gains by UNE-P carriers and BellSouth. The Commission has a solemn duty to protect all ratepayers from unfair, anticompetitive and discriminatory conduct, yet the Commission does not even assure customers not receiving discounts that they will at least be held harmless by ILEC promotions.

2. The Key Customer Order must be reconsidered – if not rescinded entirely – or at least clarified because the Key Customer Order relies on certain factual errors and reaches erroneous legal conclusions. As identified in the body of this Motion, the Commission erred in the Key Customer Order (1) by completely ignoring the evidence in the record that showed the unfair and anticompetitive market impacts of BellSouth’s Key Customer program, and (2) by erroneously interpreting Chapter 364 in the respect that the Commission’s decision effectively renders part of Section 364.051 a nullity.

3. With its unqualified acceptance of BellSouth’s Key Customer program, the Commission sets a dangerous course for the Florida market and, likely, for its own future decisions. By this precedent, the Commission injudiciously appears to have left itself little or no “wiggle” room to change the course of the market should competition stagnate or conditions change in the wake of ILEC conduct. Moreover, there is no indication that the Commission considered the ramifications of its decision in light of changing law and the residential market.²

² Florida Senate Bill 654, now signed into law, offers ILECs the opportunity for treating residential service as “non-basic service,” aside from the opportunity to recover specified access revenues directly from end-use customers. Thus, the new law, in combination with the Key Customer Order, may set the stage for residential customer foment, as significant residential customer rate increases may arise, with no limit on subsidization within the residential class.

STANDARD OF REVIEW

4. A motion for reconsideration should be granted if it identifies a point of fact or law that was overlooked or which the Commission failed to consider in rendering its Order.³ The motion should be based upon specific matters set forth in the record and susceptible to review.⁴ The Commission's substantive determinations must be based upon evidence that is "sufficiently relevant and material that a reasonable man would accept it as adequate to support the conclusion reached."⁵ The evidence must "establish a basis of fact from which the fact at issue can reasonably be inferred."⁶ Findings wholly inadequate or not supported by the evidence will not be permitted to stand.⁷ Additionally, clarification is warranted if a party has a genuine basis to claim that the order is ambiguous, unclear or inconsistent in a way that may affect a party's rights or interests, or if the Commission deems it necessary to explicate its ruling.

5. The Commission is not free to simply ignore evidence presented or issues raised by parties. At worst, the Commission's doing so violates the Administrative Procedures Act and a party's due process rights. At best, the Commission's doing so automatically warrants reconsideration, for one can only conclude the Commission overlooked a point of fact or law if when the Commission ignores evidence/issues. The impetus for FDN's filing this Motion is the Commission's evasion of core evidence and issues.

³ See *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962), *Pingree v. Quaintance*, 394 So.2d 162 (Fla. 1st DCA 1981); *In Re Aloha Utilities, Inc.*, Docket No. 991643-SU, Order PSC-01-0961-FOF-SU, 2001 WL 521385, *4 (2001).

⁴ *Id.*

⁵ *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. DCA 1957); see also, *Agrico Chem. Co. v. State of Fla. Dept. of Environmental Reg.*, 365 So.2d 759, 763 (Fla. 1st DCA 1979); *Ammerman v. Fla. Board of Pharmacy*, 174 So.2d 425, 426 (Fla.3d DCA 1965).

⁶ *DeGroot*, 95 So.2d at 916.

⁷ *Caranci v. Miami Glass & Engineering Co.*, 99 So.2d 252, 254 (Fla. 3d DCA 1957).

BACKGROUND

6. The history of this proceeding is documented in pages 4 – 5 of the Key Customer Order. The BellSouth tariff filings that are the focus point of the proceeding are 2002 Key Customer “promotional” tariffs generally described on pages 5 and 6. As the record reveals, the 2002 Key Customer tariffs are markedly different from the prior BellSouth “promotional” tariffs in that the prior tariffs offered lower discounts, no free hunting, and contained no termination liability.⁸

7. Exhibit No. 17 contained an accumulation of BellSouth’s reported ALEC line totals (using the same methodology accepted for BellSouth’s 271 proceeding), segregated by facilities-based, UNE-P, and resale, with data points from February 2001 to September 2002. Exhibit No. 8 contained various figures of overall competitive activity in Florida and BellSouth territory, compiled from disparate sources, purportedly from June 2001 to June 2002, though the exhibit itself admittedly raises doubts about the reliability of its data.⁹

8. Several of the issues established in this proceeding centered on what criteria, if any, the Commission should consider in evaluating whether various aspects of the 2002 Key Customer programs (e.g. pricing, termination liability, duration) were “unfair, anticompetitive or discriminatory.” On page 9 of the Key Customer Order, the Commission acknowledges Section 364.051(5)(a)2, Florida Statutes, which provides

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, non-basic services in a specific geographic market or to a specific customer by deaveraging the price of any non-basic service, packaging non-basic services together or with basic services, using volume discounts and term discounts, and offering

⁸ See Exhibit No. 11.

⁹ See, e.g., pages 14- 18 of Exhibit 8.

individual contracts. **However, the local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers.**

(Emphasis supplied.) Thus, an ILEC offering can comply with all of the conditions stated prior to the unbolded language (the primary test), but if the bolded proviso (or secondary test) is not met, the ILEC offering must be rejected. Although the Commission engaged in an analysis of discrimination,¹⁰ nowhere in the Key Customer Order does the Commission look beyond the primary test of 364.051(5)(a)2 and the price analysis of 354.051(5)(c) in considering whether the BellSouth program complained of constituted an anticompetitive act or practice, as required by the secondary test of 346.051(5)(a)2 and the issues identified.

THE COMMISSION OVERLOOKED MARKET EVIDENCE

9. Neither the staff recommendation nor the Key Customer Order make any reference to or any analysis of Exhibit No. 17, despite the undisputed fact that Exhibit No. 17 contained market information that was both current and critically focused.¹¹ Since the Commission clearly failed to consider this evidence and other evidence regarding market power, reconsideration is proper. Similarly, neither the staff recommendation nor the Key Customer Order analyze whether BellSouth's 2002 Key Customer program is unfair or anticompetitive because customers who are not receiving discounts are paying higher rates than they without the discounts provided to others. Again, the Commission overlooked these factual matters and related points of law, so reconsideration is appropriate.

10. Since inception of this case, FDN argued that BellSouth's 2002 Key Customer program had a negative impact on competition. Exhibit No. 17 offered ineluctable support to

¹⁰ FDN maintains that analysis is flawed in several respects and is addressed herein insofar as the Commission improperly ignored the anticompetitive impact on the non-hot wire center customers.

¹¹ A duplicate of Exhibit No. 17 is attached hereto and marked "Attachment A."

FDN's position that the 2002 Key Customer program was having a deleterious and disproportionate impact on facilities-based competition, as opposed to UNE-P. Yet, when Commissioner Davidson questioned market impacts at the Agenda Conference, Exhibit No. 17 was conspicuously ignored and the limitations of Exhibit 8 not explained.

COMMISSIONER DAVIDSON: I have one sort of general question on that. We're charged with assessing how programs, tariffs, offerings impact the market. And given my bent for executive summaries and guiding principles, I'm curious as to some of your general conclusions about how this Key Customer offering impacts the market. You've obviously concluded that it's not anticompetitive, and if you could just generalize some of your thoughts on how this offering sort of impacts the market in Florida separate from any specific issue, just your general thoughts, that would be useful to me.

MR. BARRETT: Commissioner, in my opinion, one of the key pieces of evidence in this case was an exhibit that was entered by BellSouth. It is Exhibit No. 8, which is the Commission's publication of the 2002 Status of Competition Report. And based on the findings in that report, the market is very competitive for business services. Throughout the recommendation, we have leaned upon that exhibit in presenting our support that this recommendation is not anticompetitive.

Does that answer your concern?

COMMISSIONER DAVIDSON: It does. Thanks. And I'm sure others will be answered as we move through, but that was helpful. Thank you.

Agenda Conference Transcript, page 10, line 23, through page 11, line 25. What was left out of this colloquy, out of the staff recommendation and out of the Order was any mention of Exhibit No. 17, which showed from BellSouth's own numbers¹² that with the advent of BellSouth's 2002 Key Customer programs and through September 2002, (i) facilities-based growth stagnated to 1,877 lines per month for all facilities-based carriers (ii) the monthly rate at which BellSouth signed up customers under Key Customer contracts exceeded total facilities-based line growth by more than six-and-a-half times, and BellSouth locked up nearly 20% of the addressable market

¹² All of the data for Exhibit No. 17 came from BellSouth filings, including information BellSouth filed in this docket.

in less than 9 months¹³ and (iii) ALECs using the UNE-P vehicle added significantly more lines than facilities-based carriers.

11. The Commission also overlooked all related evidence and all attendant explanation regarding these market impacts. Nine months of 2002 data – gathered using consistent methods from a single source that had incentive to make ALEC figures appear higher -- will better reflect the impact of a program just started at the beginning of 2002 than would six months of data compiled from multiple sources that the Commission acknowledged used inconsistent methods. Additionally, while UNE rates were lowered by the Commission for 2002 in Docket No. 990649A, UNE rates have not been lowered to the extent that UNE-L providers can compete with BellSouth's 2002 Key Customer prices; for if the UNE-L providers could, they would, considering anemic growth. UNE-P providers, in contrast, have not suffered as much (if at all) because they do not have the same capital burdens, "scale" issues, and geographic limitations as facilities-based providers. So, promoting facilities-based competition is desirable and in the best interest of the consuming public, in Florida, facilities-based competition is being sacrificed because UNE-P is better able to compete and grow in the face of BellSouth's discount tactics.¹⁴

12. FDN's testimony supports that anticompetitive conduct cannot be examined in a vacuum. The Commission cannot, as it has in the Order, evaluate whether ILEC conduct is anticompetitive without looking at the whole market picture and the status of the players. Even BellSouth witness Pitofsky stated that the Commission should look at overall market share and

¹³ Indeed, BellSouth regained nearly every line it lost to competitors in 2002. See TR 70, 83, 96, Exhibit No. 27.

¹⁴ See TR. 55-57, 135-136; Exhibit No. 17.

examine both the quality and quantity of competitors.¹⁵ Putting BellSouth's conduct in the context of a market BellSouth dominates and in which UNE-P providers prosper is precisely what the Key Customer Order fails to do. The Order must be reconsidered and reversed because the Commission ignored the deleterious and disparate impact of the 2002 Key Customer program on UNE-L facilities-based providers.

13. The other key market factor the Commission completely overlooked is the dynamics of ILEC market power and customers who do not receive discounts.¹⁶ The evidence in the record on this point was distinctly clear. Customers not receiving BellSouth Key Customer discounts received rate increases, and those rate increases exceeded the value of the discounts provided to other customers.¹⁷ The record was devoid of any proof from BellSouth that customers who received rate increases were paying the same or less than if the discounts were not offered. Instead, the record supports that instead of benefiting, or at least being held harmless, customers not receiving discounts were harmed by BellSouth's discount programs.

14. Even without invoking the "competitive necessity doctrine" which BellSouth brought into the case, the Commission has to at least recognize that it is anticompetitive¹⁸ and improper for customers not receiving ILEC discounts to be harmed as a result of discounts given to other customers. Such a ruling is essential if the Commission is to uphold its duty to promote

¹⁵ See TR 425, 428. Any BellSouth claims about the significance of just FDN market share is inconsistent with its own expert's opinion to look at the whole market.

¹⁶ It should be emphasized that customers not eligible for the BellSouth discounts are made so through no fault of their own.

¹⁷ See Exhibits Nos. 7, 14, 15.

¹⁸ Using revenues from a vast customer base not subject to competition to reduce the rates to a customer base that is subject to competition is a luxury that only the ILECs have. The ILECs unique market power and status in this regard, and in all respects, must be factored into whether or not its behavior is anticompetitive, as Mr. Gallagher testified. The Order, however, fails to take this into consideration.

competition and to protect all customers, not just those customers who may benefit from competition.¹⁹ The minimum assurance that the “have-nots” are entitled to from the Commission is that their rates are at least the same if not lower than they would be without the ILEC discounts.

15. The Commission entirely overlooked the evidence FDN produced in the record supporting the proposition that to evaluate whether ILEC conduct is anticompetitive, the Commission must consider factors beyond whether the ILEC is meeting a competitor offering. This failure may stem from the Commission’s failure to properly interpret the statute, as discussed below, but, in any case, the Commission’s ignoring FDN’s evidence and argument on market power, market status, market impacts, etc., when the question in the case is whether a dominant carrier’s conduct is anticompetitive, can simply not withstand scrutiny. Further, since telecommunications markets are constantly changing, they require closer Commission monitoring. The Commission did not pay proper consideration to whether changes in competitive trends dictate it reserve authority to order modifications to ILEC offerings should those offerings have an anticompetitive effect at some point after implementation.²⁰

ANTICOMPETITIVE ACT OR PRACTICE

16. Over and over again in the Key Customer Order, the Commission refuses to define what is or is not an “anticompetitive” act or practice.²¹ The Commission sidesteps the question,

¹⁹ See, e.g., Sections 364.01(3), 364.05(5)(a)2, 364.08, Florida Statutes. The Ohio PSC recently ruled it would permit an ILEC to offer discounted prices to customers with competitive choices, but only if ineligible customers did not get a rate increase. See Complaint of CoreComm Newco, Inc. v. Ameritech Ohio, Case No. 02-579-TP-CSS, Opinion and Order, November 26, 2002, at 31.

²⁰ See, e.g. TR 50-52, 66-68.

²¹ See, e.g., Order pages 6, 9, 16, 21, 28, 29, and 33.

despite that numerous issues in the case centered around that very definition²² and despite that the statutory demand that the secondary test of Section 364.051(5)(a)2, Florida Statutes, be met. Indeed, looking at the Order for a definition of “anticompetitive” act or practice, one finds nothing. Instead, the only determination the Commission has made is that as long as the primary test of 364.051(5)(a)2 and the parameters of 364.051(c) are met, then, ipso facto, the conduct is not anticompetitive.

17. Section 364.051(5)(a)2, Florida Statutes, provides

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, non-basic services in a specific geographic market or to a specific customer by deaveraging the price of any non-basic service, packaging non-basic services together or with basic services, using volume discounts and term discounts, and offering individual contracts. **However, the local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers.**

(Emphasis supplied.) Clearly, the Legislature meant the secondary test as independent, disjunctive, and qualifying, not as something redundant of the primary “meeting offerings” test. Were the language of the secondary test itself not clear enough, the signal “However” makes it abundantly clear that both tests must be met. Moreover, a plain reading of the language makes it clear that the secondary test takes primacy such that even if the primary test is met, the secondary test may cause an offering to be unlawful.

17. In the Order, the Commission impermissibly re-writes 364.051(5)(a)2, effectively removing the secondary test from the statute and rendering it meaningless. The Order is utterly

²² Issues 2, 3A, 3B, 3B, 3C, 3D and 3E, for instance, are replete with references to the question of what is “unfair, anticompetitive or discriminatory.” The definition of “anticompetitive” and BellSouth’s conduct meeting that definition was the focus of FDN’s entire case. Yet, in the Order, the Commission does not even attempt to define “anticompetitive” conduct, let alone consider FDN’s arguments.

devoid of any analysis of the secondary test. In fact, the Commission repeatedly refuses to address it.²³ On page 6 of the Order, the Commission states “The Florida Statutes provide sufficient guidance to evaluate promotional tariff filing” Yet, nowhere does the Commission evaluate what is or is not anticompetitive conduct. On page 9, the Commission makes a passing reference to the test in the “last sentence of Section 364.051(5)(a)(2), Florida Statutes” and refers to it as a “limitation,” but any further analysis of that limitation is nonexistent. On page 29 of the Order, where the Commission evaluates discount duration matters, the Commission, as it did throughout the Order, refuses to apply the secondary test and simply defers to the notion that BellSouth’s offerings parallels competitor offerings. In other words, the primary test is met, so the Commission will ignore the secondary test.

18. The Commission has reversed the primacy and effect of the secondary test. The Commission has effectively ruled that since BellSouth’s discount programs fulfill the primary test of 364.051(5)(a)2 and the price analysis of 354.051(5)(c), no matter what the market impact, status or condition, the secondary test of 364.051(5)(a)2 is either superseded or is automatically also met. FDN maintains that this is intuitively fallacious, aside from constituting reversible error.

19. The Commission is not free to eschew the statute, the issues, and the evidence without explanation simply because it prefers to do so, particularly where, as here, all of the foregoing are ripe for and properly presented for disposition.

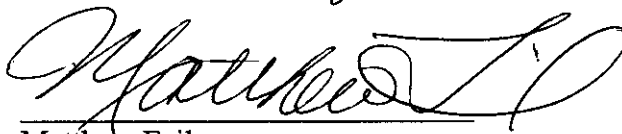
20. For the reasons stated above, the evidence and argument FDN presented in the case support that BellSouth’s conduct was anticompetitive as provided in Section 364.051(5)(a)2, Florida Statutes, and the Commission’s Order should be reconsidered and reversed in light of that evidence.

²³ See, e.g., Order pages 6, 9, 16, 21, 28, 29, and 33.

CONCLUSION

For the foregoing reasons, the Commission should grant this Motion for Reconsideration and/or Clarification by reversing the Key Customer Order. At a minimum, the Commission should clarify the Order for the following: (a) the Commission should properly define and engage in an evaluation of “anticompetitive act or practice” consistent with the statute, (b) the Commission should address the scope of its ruling and specify the Commission’s authority to address ILEC discount programs that prove to be anticompetitive at any point after implementation, and (c) the Commission should protect competitive and customer interests by specifying that customers not receiving ILEC discounts will not subsidize customers who do receive discounts.

RESPECTFULLY SUBMITTED, this 7 day of July, 2003.



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Florida ALEC Business Access Lines: Bell South Territory

Dates	Facilities Based			ALEC Total
	911 Listings	UNE-P	Resale	
February 2001	354,491	43,098	99,907	497,496
April 2002	584,779	107,975	7,696	700,450
July 2002	586,781	132,498	6,593	725,872
September 2002	594,163	143,144	6,215	743,522
Feb 2001 thru April 2002 (Net Additions)	230,288	64,877	-92,211	
14 months average	16,449/month	4,634/month	-6,587/month	
April May 2002 thru Sept 2002 (Net Additions)	9,384	35,169	-1,481	
5 months average	1,877/month	7,034/month	-296/month	
BellSouth Key Customer Jan 2002 thru Sept 13, 2002 (net additions)	112,300			
9 months average	12,478/month			
	19% eligible market			

Attachment A, page 1 of 1
001679

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by e-mail and regular mail to the persons listed below, other than those marked with an (*) who have been sent a copy via overnight mail, this 8th day of July, 2003.

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