



# Public Service Commission

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RECORDS AND REPORTING

**DATE:** SEPTEMBER 23, 1999

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

**FROM:** DIVISION OF LEGAL SERVICES (B. KEATING) *AK*  
DIVISION OF COMMUNICATIONS (MARSH) *aem* *RA* *UB*

**RE:** DOCKET NO. 990970-TP - JOINT COMPLAINT BY ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, COMMERCIAL INTERNET EXCHANGE ASSOCIATION, COMPETITIVE TELECOMMUNICATION ASSOCIATION, ACSI LOCAL SERVICES, INC. D/B/A E.SPIRE COMMUNICATIONS, INC., FLORIDA COMPETITIVE CARRIERS ASSOCIATION, FLORIDA INTERNET SERVICE PROVIDERS ASSOCIATION, AND TELECOMMUNICATIONS RESELLERS ASSOCIATION AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. REGARDING PROMOTIONAL PRACTICES AND PETITION FOR EXPEDITED RELIEF.

**AGENDA:** OCTOBER 5, 1999 - REGULAR AGENDA - MOTION TO DISMISS - PARTIES MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\990970RD.RCM

### CASE BACKGROUND

On July 27, 1999, a complaint was filed jointly by the Association for Local Telecommunications Services (ALTS), the Commercial Internet Exchange Association (CIX), the Competitive Telecommunications Association (CompTel), ACSI Local Services, Inc. d/b/a e.spire Communications, Inc. (e.spire), the Florida Competitive Carriers Association (FCCA), the Florida Internet

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FPSC-RECORDS/REPORTING

Service Providers Association (FISPA), and the Telecommunications Resellers Association (TRA), jointly referred to herein as "Petitioners," against BellSouth Telecommunications, Inc. (BellSouth). In the Complaint, the Petitioners ask the Commission to order BellSouth to cease offering promotions that provide rebates or discounts on local exchange service and that combine tariffed and non-tariffed offerings. On August 16, 1999, BellSouth filed a Motion to Dismiss, or in the Alternative, Motion to Strike the Petition, or for Summary Judgment.

On August 30, 1999, the Petitioners filed a Motion for Extension of Time to Respond to the Motion to Dismiss, and on September 1, 1999, the Petitioners submitted their Response to BellSouth's Motion to Dismiss. BellSouth did not respond to the Motion for Extension of Time.

This is staff's recommendation on the Motion for Extension of Time and the Motion to Dismiss.

#### DISCUSSION OF ISSUES

**ISSUE 1:** Should the Petitioners Motion for Extension of Time to Respond to BellSouth's Motion to Dismiss be granted?

**RECOMMENDATION:** Yes. The extension of time does not appear to be unduly burdensome to BellSouth and will not interfere with any deadlines currently established for this Docket.

**STAFF ANALYSIS:** The response to BellSouth's Motion to Dismiss was due on August 30, 1999. In the Motion for Extension of Time, the Petitioners request an extension of two days, until September 1, 1999, to file their response. The Petitioners indicate that this additional time will allow the Petitioners to better coordinate the response. The Petitioners represent that they have contacted BellSouth and that counsel for BellSouth has stated that BellSouth does not object to the extension. BellSouth did not file a response to the Motion for Extension of Time. The Petitioners filed their response to BellSouth's Motion to Dismiss on September 1, 1999.

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Staff does not believe that granting the extension of time will cause any undue burden to BellSouth, nor will it interfere with any due dates currently scheduled in this Docket. Staff recommends, therefore, that the Petitioners' Motion for Extension of Time be granted.

**ISSUE 2:** Should BellSouth's Motion to Dismiss, or in the Alternative, Motion to Strike the Petition, or for Summary Judgment, be granted?

**RECOMMENDATION:** Yes. BellSouth's Motion to Dismiss should be granted. The Petitioners have failed to state a cause of action upon which relief can be granted.

**STAFF ANALYSIS:** The Petitioners' complaint should be viewed in the light most favorable to the Petitioners, in order to determine whether their request is cognizable under the provisions of Chapter 364, Florida Statutes. As stated by the Court in Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993), "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." In determining the sufficiency of the petition, the Commission should confine its consideration to the petition and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958). Furthermore, the Commission should construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. See Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

Petitioners - The Complaint

In the complaint, the Petitioners allege that BellSouth is engaged in an improper and illegal promotional offer that is an abuse of its market power and contrary to the provisions of Sections 364.08 and 364.09, Florida Statutes. These statutory provisions prohibit a carrier from charging a rate other than the tariffed rate for a service, from giving special rebates or discounts on telecommunications service that are not tariffed, or from charging different rates to customers for the same telecommunications service. Thus, the Petitioners ask the Commission to investigate the situation and order BellSouth to cease offering the offending promotion, or any other promotion that effectively provides rebates or other non-tariffed discounts on local exchange service.

Specifically, the Petitioners state that BellSouth is bundling its local exchange service with its Internet and broadband ADSL services in order to gain a competitive edge in the market. The Petitioners explain that in April 1999, BellSouth began offering promotions for Internet service provided by its subsidiary, BellSouth.net. The promotions offered discounts or reduced prices for unlimited Internet access and DSL service only to customers that subscribed to specific, "high-end," BellSouth local exchange service offerings. The Petitioners further explain that BellSouth.net normally offers Internet service at \$19.95 per month for unlimited access, but during the promotional period, BellSouth.net offered unlimited Internet access for \$12.95 per month, if the customer also subscribed to the BellSouth Complete Choice or Business Choice bill plan option. After this promotion expired, the Petitioners claim that BellSouth began offering unlimited Internet service for \$15.00 per month to customers that subscribe to the Complete Choice bill plan. The Petitioners allege that the economic effect of these promotions is that the customers get a \$5.00-\$7.00 per month discount on their local exchange service.

The Petitioners also assert that BellSouth.net also offered a promotion that combined its Asynchronous Digital Subscriber Line (ADSL) offering, known as Fast Access, with the Complete Choice local service offering. The Petitioners maintain that the ADSL

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service is normally priced at \$59.95 per month for unlimited access, but that through the promotion, the ADSL service was available for \$50.00 a month. Thus, the Petitioners argue that customers would actually be getting almost a \$10.00 discount or rebate on their local service.

The Petitioners argue that by offering these promotions that bundle local service and unregulated competitive services, BellSouth is leveraging its monopoly to gain a competitive advantage to the detriment of the competitive market. The Petitioners also argue that these offerings unfairly discriminate between different classes of BellSouth local exchange customers.

The Petitioners assert that the Commission has jurisdiction to address this behavior in accordance with Section 364.3381, Florida Statutes, which states, in part, that:

The Commission shall have continuing oversight jurisdiction over cross-subsidization, predatory pricing, or other similar anticompetitive behavior and may investigate, upon complaint or on its own motion, allegations of such practices.

The Petitioners emphasize that BellSouth still holds about 99% of the residential market and 95% of the business market. They concede that some new entrants are having success in specific market segments, but they add that most business and residential customers in BellSouth's service territory still receive their local exchange service from BellSouth. The Petitioners further explain that most ISP providers offer their service as a "stand-alone" product, unlike BellSouth.net. The Petitioners complain that these ISP providers are unable to compete effectively with BellSouth's bundled promotional offerings. They add that even the ALECs that do offer local exchange service and Internet service are at a competitive disadvantage when they try to compete with the BellSouth bundled offerings.

The Petitioners assert that other state commissions have addressed similar offerings by ILECs, and have generally found such arrangements to be prohibited. The Petitioners offer as an example

Ameritech's bundling of its local exchange service and its cable television service through its AmeriChecks program. Under the AmeriChecks program, customers who purchased cable television from Ameritech New Media received checks for \$60 or \$120, which could then be used to pay for other Ameritech services, including local exchange service. The Ohio and Michigan state utility commissions both determined that the offering was improper because it resulted in local exchange service being provided at below tariffed rates. The Petitioners maintain that this Commission should similarly find that BellSouth's bundled offering of its Internet, DSL, and local exchange service is improper. Therefore, the Petitioners ask the Commission to assert its authority to bring an end to these offerings as soon as possible.

The Petitioners also note that while Section 364.051(6)(a), Florida Statutes, allows the ILECs to respond to competitive offerings of "nonbasic" services by packaging such services with basic services, that provision does not cover the packaging of basic services with unregulated, non-telecommunications services. They further assert that even if Section 364.051(6), Florida Statutes, is applicable, the Commission should bear in mind that that section also provides that:

[T]he local exchange telecommunications company shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers.

In addition, the Petitioners argue that BellSouth's bundling of BellSouth.net's Internet services with BellSouth's local exchange service violates Sections 364.08 and 364.09, Florida Statutes. The Petitioners emphasize that the discounts are offered only to customers of BellSouth's premium local exchange offerings, and that only those customers that choose to receive Internet service from BellSouth.net, instead of another ISP, actually receive the rebate. By providing the discount, the Petitioners argue that BellSouth is actually providing an improper rebate on local service. The Petitioners further conclude that BellSouth has also discriminatorily made this rebate available to only a select group of customers, those that purchase the high-end service. As

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such, the Petitioners argue that the offering discriminates between the high-end and low-end customers, in violation of Section 364.09, Florida Statutes.

Finally, the Petitioners argue that the bundling of BellSouth.net's Internet and ADSL services with BellSouth's premium local exchange service calling plans violates Section 254(k) of the Telecommunications Act of 1996 (the Act). Section 254(k) provides that:

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the State, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

The Petitioners contend that neither BellSouth's residential local exchange service, nor its business local exchange service can be considered competitive in Florida. The Petitioners argue that by offering these promotions, BellSouth is essentially providing discounts only on its premium local service offerings in order to encourage customers to purchase these high-end offerings and to purchase BellSouth.net's competitive services. Thus, the Petitioners maintain that BellSouth is using its local exchange service to subsidize its high-end offerings and its competitive services in violation of Section 254(k) of the Act.

For all of the above reasons, the Petitioners ask that the Commission require BellSouth to cease offering these promotions, to refrain from offering tariffed services at below tariffed rates, to show cause BellSouth for violations of Sections 364.08, 364.09, and 364.381, Florida Statutes, and to investigate BellSouth's anticompetitive behavior.

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BellSouth - Motion to Dismiss, Strike, or for Summary Judgment

BellSouth argues that the complaint targets a promotion that is entirely legal. BellSouth explains that BellSouth.net is an unregulated Internet service provided by BellSouth. BellSouth states that the regular price of its Internet service is \$19.95 per month, and its ADSL service is \$59.95 per month. From April 1, 1999, through June 30, 1999, BellSouth offered promotional discounts on these services so that the Internet service was \$12.95 per month and the ADSL service was \$49.95 per month. BellSouth also states that from January 1999 through April 1, 1999, BellSouth.net offered a \$10.00 discount off its ADSL service to BellSouth Business Choice customers. In June 1999, BellSouth offered a local service business offering called Complete Choice for Business. Thereafter, BellSouth.net offered a \$4.95 discount off its ADSL service to BellSouth's Complete Choice for Business customers. Since the conclusion of the Complete Choice promotions, BellSouth.net has continued to offer discounted rates of \$15.00 a month for Internet dial-up and \$50.00 for ADSL service to subscribers of BellSouth's Complete Choice plan. BellSouth claims that the price billed and paid for the regulated local exchange service is the tariffed rate. Only the unregulated service is discounted. BellSouth maintains that customers are not allowed to apply the discount towards payment of any regulated service.

BellSouth contends that it is not guilty of monopoly leveraging, and maintains that the Petitioners have neither defined the term or demonstrated how the term applies to BellSouth's promotions. BellSouth emphasizes that the Petitioners have the same ability to bundle Internet and ADSL services with other types of services. BellSouth notes that AT&T and ALLTEL provide discounts on Internet access if a customer also purchases long distance or wireless service. BellSouth further notes that those Petitioners that offer local service through their own facilities could also bundle Internet service with local service, while those that resell BellSouth's services could simply resell BellSouth's Complete Choice plan bundled with the ALEC's own Internet service.

BellSouth argues that the Internet market is thriving and competitive, and notes that it is not the market leader in terms of subscribers. The company maintains that its discounted Internet



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and ADSL prices are comparable to prices offered by other providers, and in certain cases the BellSouth.net discounted prices are higher. BellSouth emphasizes that the Petitioners agree that the discounted prices offered by BellSouth.net are not, in themselves, predatory. The Petitioners simply complain that the prices are only offered to certain BellSouth customers, and, therefore, the offering is inappropriate. BellSouth argues that the Petitioners' argument is without merit and is an abuse of the regulatory process.

In addition, BellSouth argues that the AmeriChecks program referenced by the Petitioners is irrelevant to this case. BellSouth notes that under the AmeriChecks program, customers of Ameritech's cable affiliate received checks that could be used to pay for any Ameritech service, including local exchange service. In this case, however, customers are not given an option on how discounts will be applied. Only the unregulated service is discounted; the regulated services are billed at the tariffed rate. Thus, BellSouth argues that there is no direct, or indirect, discount or rebate on its local exchange service.

The Company further asserts that the Petitioners misrepresent the holding of the Illinois Commerce Commission regarding the AmeriChecks program. BellSouth states that the Petitioners indicate that the Illinois Commerce Commission upheld the program because the Complainant in that case failed to demonstrate that the program violated any cost allocation rules, even though the program had "many negative policy implications." Motion at p. 7; Petition at p. 11, citing Cable Television and Communications Association of Illinois v. Illinois Bell Telephone Company, et al., 97-0344, Illinois Commerce Commission, 1999 Ill. PUC LEXIS 369, May 19, 1999. BellSouth argues that the Illinois Commission actually upheld the program because there was no evidence supporting the Complainant's allegations, and because Ameritech was receiving full payment of its tariffed rates. BellSouth further asserts that the Illinois Commission did not indicate that the AmeriChecks program had negative policy implications; rather, the Commission believed that there might be negative implications if the program were not approved. BellSouth argues, therefore, that the Petitioners have misrepresented the relevance and holding of the Illinois Commerce Commission's decision.

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In addition, BellSouth argues that it has not violated Section 254(k) of the Act. BellSouth notes that it believes that local exchange service is actually competitive. Even if, however, local exchange service is not considered a competitive service, BellSouth maintains that there is no cross-subsidization of a competitive service by a non-competitive service. BellSouth asserts that it is required to account for its regulated and unregulated services separately; thus, it cannot cross-subsidize. BellSouth further emphasizes that the Petitioners conceded that the discounted prices that BellSouth.net charges for its non-regulated services through these promotions are not predatory. BellSouth argues that if the prices charged are not predatory, then there can be no cross-subsidization. BellSouth maintains that the Petitioners have not demonstrated otherwise.

Furthermore, BellSouth complains that the Complaint is false and based upon "misleading assertions." Therefore, BellSouth argues that the Complaint is a sham pleading that should be stricken in accordance with Rule 1.150, Florida Rules of Civil Procedure.

For all of these reasons, BellSouth asks that the Petition be dismissed, stricken as a sham pleading, or that summary judgment be entered for BellSouth.

Petitioners - Response

The Petitioners address BellSouth's Motion as a Motion to Strike pursuant to Rule 1.150, Florida Rules of Civil Procedure. The Petitioners argue that it is not clear exactly what BellSouth is seeking or how the other rules referenced by BellSouth apply to the relief BellSouth seeks. Thus, the Petitioners only respond to BellSouth's request that the Complaint be stricken as a sham pleading.

The Petitioners maintain that, pursuant to Rule 1.150, Florida Rules of Civil Procedure, a pleading may only be stricken if it is shown to be inherently false and known to be false at the time the pleading was made. The Petitioners argue that the pleading must be

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clearly false for it to be stricken. If any part is true, the Motion to Strike should be denied.<sup>1</sup>

In particular, the Petitioners emphasize that there are many similarities between the allegations in the Complaint and the Motion and affidavits supplied by BellSouth. Thus, the Petitioners argue that the Complaint is not false, and, therefore, it cannot be stricken. The Petitioners add that BellSouth simply disagrees that its promotions are anticompetitive. Mere disagreement about the impact of the facts alleged, argue the Petitioners, does not warrant dismissal or granting the motion to strike.

In addition, the Petitioners argue that the Commission is charged with investigating anticompetitive behavior by LECs pursuant to Section 364.3381, Florida Statutes. The Petitioners maintain that BellSouth's promotions clearly fall into this category and should be investigated. The Petitioners further allege that the promotions constitute an improper rebate prohibited by Sections 364.08 and 364.09, Florida Statutes. The Petitioners argue, therefore, that BellSouth's Motion should be denied and that BellSouth should be required to file its answer to the Complaint within 5 days of the Commission's decision on the Motion, rather than from the date of the Order.

#### Staff's Analysis

Staff agrees with the Petitioners that it is not clear what relief BellSouth would prefer. BellSouth's Motion is styled as a Motion to Dismiss, or in the Alternative, Motion to Strike, or for Summary Judgment, which seems to indicate that dismissal is the preferred relief sought. The arguments set forth in the motion, however, shift primarily between arguments regarding sham pleadings and arguments more closely identified with summary judgment. To

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<sup>1</sup> Citing Guarantee Life Insurance Company of Florida v. Hall Brothers Press, 189 So. 243 (Fla. 1939); Menke v. Southland Specialities Corp., 637 So. 2d 285 (Fla. 2nd DCA 1994); Aider V. Temple Ner Tamid, 339 So. 2d 268 (Fla. 3rd DCA 1976); Destiny Construction Co. v. Martin K Eby Construction, 662 So. 2d 388 (Fla. 5th DCA 1995); and Spaienza v. Carland, Inc., 154 So. 2d 204 (Fla. 3rd DCA 1963).

further muddy the waters, the Petitioners only address BellSouth's Motion to the extent that striking the Complaint as a sham pleading is the relief sought. Staff has, nevertheless, addressed BellSouth's Motion as it was styled, as a Motion to Dismiss with an alternative request to either strike the Complaint, or grant summary judgment in BellSouth's favor. Based on the title of BellSouth's Motion and statements contained therein, it appears to staff that dismissal has been requested, and in this instance, appears to be the appropriate relief. Staff does not believe that the Complaint constitutes a sham pleading because the facts alleged appear to be supported in large measure by the affidavits submitted with BellSouth's Motion. Therefore, the Complaint is not inherently false. Nevertheless, viewed in the light most favorable to the Petitioners, the Complaint fails to state a cause of action upon which relief can be granted.

I. The Conduct Alleged in the Complaint Does Not Constitute Anticompetitive Behavior

The Petitioners complain that the promotions that BellSouth has recently engaged in constitute anticompetitive behavior proscribed by Section 364.3381(c), Florida Statutes, which states:

The commission shall have continuing oversight jurisdiction over cross-subsidization, predatory pricing, or other similar anticompetitive behavior and may investigate, upon complaint or on its own motion, allegations of such practices.

The Petitioners assert that BellSouth is using its monopoly local exchange market power to leverage its position in the Internet and DSL markets, which they believe will impair competition in the Internet and DSL markets, as well as in the local exchange market. They argue that this constitutes "monopoly leveraging" under §2 of the Sherman Act.

Under federal case law, a firm is deemed to be guilty of monopoly leveraging if it uses its monopoly market power in one market to gain market share in another market other than by competitive means, even if the firm is not attempting to monopolize

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the secondary market. Key Enterprises of Delaware v. Venice Hospital, 919 F.2d 1550, (11th Cir. 1990); and Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2nd Cir. 1979). A firm is not, however, guilty of monopoly leveraging simply because its size and the attending efficiencies enable it to compete effectively in a secondary market, "nor does an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market." Key Enterprises of Delaware v. Venice Hospital, 919 F.2d at 1566, 1567; citing Berkey Photo, Inc., 603 F.2d at 263, 276. In order to demonstrate that a business has engaged in anticompetitive monopoly leveraging, a complainant must show that the business meets that "essential facilities test;" and the "intent test." MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983), cert denied 464 U.S. 891. Under the essential facilities test, the business must be:

- 1). . . in control of a facility or resource that is essential to a competitor's operation; 2) that facility or resource cannot practically or reasonably be duplicated by competitors; 3) the monopolist refuses to deal with competitors; and 4) the monopolist could reasonably deal with competitors. Id.

The intent test requires that the monopolist must demonstrate illegal intent to destroy the competition. Id. at 1148; see also Loraine Journal Co. v. United States, 342 U.S. 143 (1951). A key to demonstrating intent under a theory of monopoly leveraging is a refusal to deal with competitors. Specifically, a monopolist must have refused to deal with a competitor in the monopoly market in order to impair that competitor's efforts in the secondary market. For instance, in United States v. Terminal R.R. Association, 224 U.S. 383, (1912), a group of railroads owned the only terminal in St. Louis. The owners used that power to overcharge other railroads to use the terminal, thereby giving the owner-railroads a competitive advantage in the St. Louis railway service market. The behavior must demonstrate a

Willful acquisition or maintenance of power as distinguished from growth or development as a

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consequence of a superior conduct, business acumen, or historic accident.

United States v. Grinnell Corp., 384 U.S. 563 (1966).

The acts that the Petitioners complain about do not amount to monopoly leveraging. As demonstrated by the above analysis, monopoly leveraging contemplates a monopolists use of its power in the monopolized market to impair competition in the secondary market. The Petitioners have, however, only demonstrated BellSouth's intent to compete in the Internet and DSL markets. The Petitioners have not claimed that BellSouth has used its power in the local exchange market to prevent competitors from offering Internet or DSL service, or to prevent competitors from obtaining facilities or access that they may need in order to provide such service. Instead, the Petitioners have only claimed that BellSouth is better able to offer local exchange service and Internet or ADSL service as a bundled package because of BellSouth's significant market power in the local exchange market. They assert that this is an attractive package which may woo customers away from competitors' services. The Petitioners have not, however, alleged any injury to competition itself. See Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342, 1350 (5th Cir. 1980). In fact, the courts have emphasized that the antitrust laws are not intended to protect competitors from competition. See Aquatherm Industries v. Florida Power and Light Co., 145 F. 3d 1258, 1262, 1263 (11th Cir. 1998); Levine v. Central Florida Medical Affiliates, Inc., 72 F.3d. 1538, 1551 (11th Cir.), cert denied 117 S. Ct. 75 (1996).

Furthermore, as BellSouth has alluded, BellSouth is required to offer its Complete Choice plan for resale. Thus, any of the Petitioners could purchase the plan and bundle it with their own Internet service. The Petitioners may also seek to offer local service through their own facilities, or by purchasing BellSouth unbundled network elements and then combining that service with their own Internet service. The Petitioners have not argued that BellSouth has prevented this; rather, the Petitioners argue that they are at a competitive disadvantage because they do not offer local exchange service in as many areas as BellSouth, and, therefore, they are unable to bundle local exchange service and

Internet or DSL service in as many locales. In fact, the Petitioners, using e.spire as an example, state that, "Even in those few markets where e.spire provides local service, the e.spire service is available only to business customers and the service area is severely restricted." Petition at p. 9. This only demonstrates that few of the Petitioners have chosen to offer local exchange service on a large scale. It does not demonstrate any restriction or refusal to deal by BellSouth that would harm the Petitioners' ability to offer, provide, and compete in the Internet or DSL markets.

Viewing the complaint in the light most favorable to the Petitioners, the Complaint does not demonstrate any anticompetitive behavior that requires redress by the Commission. Thus, the Petitioners have failed to state a cause of action upon which relief can be granted.

II. BellSouth's Promotions Do Not Constitute a Rebate or Discriminatory Discount in Violation of Section 364.08 and 364.09, Florida Statutes

Section 364.08, Florida Statutes, states that is unlawful to charge any rate other than that which is in the company's effective tariff. A company also may not refund any portion of the charge or otherwise give an advantage to any customer unless it is uniformly extended to all customers. In addition, a company may not "directly or indirectly" offer free or reduced service.

Section 364.09, Florida Statutes, states

A Telecommunications company may not, directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person a greater or lesser compensation for any service rendered or to be rendered with respect to communication by telephone or in connection therewith, except as authorized in this chapter, than it charges, demands, collects, or receives from any other person for doing a like and contemporaneous service with respect

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to communication by telephone under the same or substantially the same circumstances and conditions.

The Petitioners argue that the "bundling" of the discounted BellSouth.net service with BellSouth's Complete Choice offerings violates Sections 364.08 and 364.09, Florida Statutes. The Petitioners maintain that the discount constitutes a *de facto* rebate on local service to those BellSouth customers that choose BellSouth.net service over another Internet service provider. The Petitioners allege that customers that take advantage of BellSouth's promotion see reductions in the amount they pay BellSouth for local service. The Petitioners further emphasize that the rebates are only available to BellSouth's high-end customers; thus, BellSouth's promotion discriminates between high-end and low-end customers in violation of Section 364.09, Florida Statutes.

The Petitioners have not, however, alleged that BellSouth is not billing customers the tariffed rate for its local exchange service, and BellSouth maintains in its response and attached affidavits that it is charging the tariffed rate for local exchange service. Instead, the Petitioners apparently argue that because the services are billed on the same bill, and the total bill is reduced by the discount, then BellSouth must be receiving less than the tariffed rate for its local exchange service. This assertion does not, however, indicate that BellSouth has failed to "charge, demand, collect, or receive" anything other than the tariffed rate, nor does it indicate that BellSouth has offered free or reduced local exchange service. In fact, by their allegations, the Petitioners seem tacitly to agree that the customers' itemized bills actually reflect a reduced rate only on the Internet or ADSL service. The Petitioners' assertions seem to apply more to cross-subsidization, which is addressed later in this recommendation.

The Petitioners also argue that BellSouth's promotion discriminates between high-end and low-end BellSouth customers. Section 364.09, Florida Statutes, does not, however, prohibit discounts on Internet or DSL service. Also, there is no discrimination between the high-end and low-end customers, because BellSouth is not charging a different rate for providing "a like



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and contemporaneous service." Section 364.09, Florida Statutes. Customers on service plans other than Complete Choice may be receiving local exchange service from BellSouth, but they are not receiving "like and contemporaneous service." Different service plans are formulated to meet different needs. In developing different plans, BellSouth does not discriminate between customers. The promotions do not create another stratum of BellSouth customers that are receiving a "like and contemporaneous" telecommunications service at a rate that differs from other customers. Instead, it targets a group of high-end customers for the marketing of an unregulated service, which is not prohibited by the statute. Arguably, BellSouth.net's targeting of high-end BellSouth customers for this promotion is no more discriminatory than the market approach some ALECs have taken by marketing their services only to businesses. Furthermore, BellSouth's promotions cannot be considered to discriminate between those Complete Choice customers that choose the BellSouth.net service and those that do not, because the discounts do not alter the tariffed rate charged by BellSouth for the Complete Choice service, and the promotional discounts are available to any Complete Choice customer that chooses to obtain Internet or ADSL service from BellSouth.net.

Staff notes that the Petitioners compare these promotions to a promotion offered by Ameritech, called AmeriChecks. Under that plan, customers that chose Ameritech's cable affiliate as their cable provider were given checks that could be used to pay for any Ameritech service. Staff believes that the AmeriChecks program may be distinguished. The AmeriChecks program provided checks to customers that could be used to pay for any Ameritech service, including local exchange service. Thus, Ameritech could receive less than the tariffed rate for its local exchange service. Here, BellSouth.net is not offering a discount that can be applied to a tariffed service and BellSouth is not billing less than the tariffed rate for the tariffed service. As such, BellSouth is not receiving less than the tariffed rate for the tariffed service.

Staff also notes that we agree with BellSouth that the Petitioners have mischaracterized the holding of the Illinois Commission in Cable Television and Communications Association of Illinois v. Illinois Bell Telephone Company, et al., 97-0344, Illinois Commerce Commission, 1999 Ill. PUC LEXIS 369, May 19,

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1999, regarding the AmeriChecks program. The Illinois Commission analyzed the Ohio PUC's decision on the AmeriChecks program, as well as the FCC's decision regarding a similar credit card promotion offered by AT&T. The Ohio PUC believed the AmeriChecks program granted preferences and allowed Ameritech to receive different levels of compensation for the same local exchange service. In addressing a similar program offered by AT&T, the FCC determined that the source of payment for service was irrelevant as long as AT&T was billing and collecting the tariffed rate. The Illinois Commission specifically disagreed with the Ohio PUC's approach to the AmeriChecks program, and adopted the FCC's approach to the similar promotion offered by AT&T. The Illinois Commission concluded that there was no prohibition against accepting third-party negotiable instruments to satisfy a telephone bill, and that to determine otherwise would have far-reaching "negative policy implications."

Based on the foregoing, even viewed in the light most favorable to the Petitioners, the allegations in the Complaint do not state a cause of action under Sections 364.08 and 364.09, Florida Statutes. Thus, the Petitioners have failed to state a cause of action upon which relief can be granted.

III. The BellSouth.net Promotions do not result in cross-subsidization as prohibited by Section 254(k) of the Act or Section 364.3381, Florida Statutes

The Petitioners argue that

By providing effective discounts only on premium local exchange service to induce local exchange service customers to purchase those premium services and to induce the purchase of competitive services, including Internet service, from BellSouth, BellSouth is subsidizing the provision of those competitive services with its local exchange services, in clear violation of Section 254(k) of the Act. Complaint at p. 17.

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The terms "subsidization" and "cross-subsidization" contemplate that lower rates for one service are supported financially by the rates charged for another service. Section 364.3381, Florida Statutes; see also Webster's New Riverside University Dictionary (1984). Pursuant to Section 364.051(6)(b),

The cost standard for determining cross-subsidization is whether the total revenue from a nonbasic service is less than the total long-run incremental cost of the service.

The Petitioners seem to argue that BellSouth is somehow subsidizing BellSouth.net's competitive services *by discounting BellSouth's monopoly services*. Staff is somewhat perplexed as to how discounting local exchange service, as the Petitioners allege, constitutes cross-subsidization of the competitive services. Nevertheless, even considering that the discount applies to the competitive services instead of the local exchange service, the Petitioners have failed to state any basis for claiming that BellSouth's local exchange rates are subsidizing the competitive services. As BellSouth has indicated, the Petitioners have not claimed that financial assistance is flowing from BellSouth to BellSouth.net, nor have they claimed that BellSouth.net's discounted promotional prices are "predatory" or below its total long-run incremental cost of service. In fact, the Petitioners note that if BellSouth.net were offering the discounted rates on a stand-alone basis, they would not find them to be inappropriate. Staff does not believe that the mere act of offering these discounted Internet or ADSL rates to certain classes of BellSouth customers creates a cause of action for cross-subsidization.

Furthermore, BellSouth has not violated Section 364.3381, Florida Statutes, for the simple reason that Section 364.3381, Florida Statutes, clearly prohibits the subsidization of nonbasic service through the rates paid for basic service. Internet service is not a nonbasic telecommunications service. While ADSL service may be considered to be a non-basic service, Section 364.051(6)(a), Florida Statutes, allows basic and non-basic services to be packaged.

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Finally, staff notes that the crux of the Petitioners' argument is that BellSouth should be prohibited from offering this or similar promotions in connection with BellSouth's local exchange service because the Petitioners do not offer local exchange service in as large an area as BellSouth and to the number and types of customers as does BellSouth. Applying that rationale, BellSouth would be held captive to the Petitioners' own business plans so that BellSouth could not offer such promotions until the Petitioners' decided to begin providing local exchange service in all, or at least a much larger portion, of BellSouth's territory, and to all classes of customers. Customers would also be held captive to the Petitioners' business plans because they would not be able to take advantage of new and innovative offerings until the Petitioners decide to venture further into the Florida market. Staff is concerned that this may reduce customer choices and market innovations, which is neither the intent of the Telecommunications Act of 1996 nor Chapter 364, Florida Statutes.

For all of the foregoing reasons, staff recommends that BellSouth's Motion to Dismiss be granted. The Petitioners have failed to state a cause of action upon which relief can be granted.

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**ISSUE 3:** Should this Docket be closed?

**RECOMMENDATION:** Yes. If the Commission approves staff's recommendation in Issue 2, this Docket should be closed.

**STAFF ANALYSIS:** If the Commission approves staff's recommendation in Issue 2, this Docket should be closed.