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July 9, 1998

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VIA HAND DELIVERY

Ms. Blanca Bayó
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 971399-TP
In Re: Petition of BellSouth Telecommunications, Inc. to Lift Marketing Restrictions Imposed by Order No. PSC-96-1659-FOF-TP

Dear Ms. Bayó:

Enclosed are the original and 15 copies of the Brief of FCCA, AT&T, and MCI to be filed in the above docket.

I have enclosed an extra copy of the above document for you to stamp and return to me. Please contact me if you have any questions. Thank you for your assistance.

Sincerely,

Joseph A. McGlothlin

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of BellSouth Telecommunications, Inc. to Lift Marketing Restrictions Imposed by Order No. PSC-96-1569-FOF-TP	)	Docket No. 971399-TP
	)	Filed: July 9, 1998

BRIEF OF FCCA, MCI and AT&T

The Florida Competitive Carriers Association ("FCCA"), MCI Telecommunications Corporation ("MCI"), and AT&T Communications of the Southern States ("AT&T") hereby submit their post-hearing brief.

SUMMARY OF ARGUMENT

The existing carrier-neutral intraLATA protocol applicable to new customers was stipulated by all parties, including BellSouth, in 1995. When BellSouth tried to breach the stipulation the first time, the Commission agreed with FCCA, MCI and AT&T that its plan to tell new customers about BellSouth's service prior to mentioning a list of available carriers was anticompetitive. Neither the legal effect of the stipulation nor the factual basis for the requirement has changed.

Marketing activities of BellSouth's competitors do not warrant a change because BellSouth's witness acknowledged its competitors are targeting existing customers. The proposed change relative to new customers is not responsive to, and would have no effect on, those activities. (The restrictions on BellSouth's ability to market to existing customers ends as of July.)

There is no impact of intraLATA competition on the customer's choice of local calling plans, because customers do not have a local plan prior to selecting interLATA

and intraLATA carriers. BellSouth's witness acknowledged that choices of local plans are largely irrelevant to BellSouth's proposal.

The fact that BellSouth does not offer interLATA service and so is not on the first list read to new customers fails to justify the proposal because BellSouth's own data shows that -- notwithstanding the fact that customers must pick someone other than BellSouth for interLATA service -- some 73% choose BellSouth to be their intraLATA carrier under the existing carrier-neutral regime.

Possible impacts of a customer's choice of intraLATA carriers on the customer's ability to utilize BellSouth's ECS rates do not warrant BellSouth's proposal for two separate reasons. First, BellSouth's witness stressed on nine different occasions that, in order to be fair and neutral, the proposal she presented and supported in her testimony would not permit BellSouth to discuss ECS with a customer unless the customer first raised the subject of BellSouth's intraLATA service. Second, ECS is only a single offering of a single carrier. The record establishes that competitive alternatives may serve customers better than ECS. BellSouth's witness acknowledged that BellSouth would not attempt to apprise customers of competing programs that may serve customers better than BellSouth's offerings -- including ECS. Accordingly, to allow BellSouth to discuss its ECS would be discriminatory and would not "educate" customers. The real problem associated with ECS and the selection process is the fact that, while through offerings BellSouth has effectively converted the LATA into a local calling plan, competitors must presently pay switched access rates, thereby making it difficult for them to compete with ECS. The disparity

between switched access rates and the more appropriate interconnection rates -- not the carrier-neutral selective process -- should be revisited.

The genesis of the existing carrier-neutral requirement is the fact that BellSouth holds a virtual monopoly on the local exchange business. Accordingly, a new customer must contact BellSouth to select his intraLATA carrier. With a monopoly status comes certain responsibilities, including neutral "gateway functions." Until there is a meaningful degree of competition in the local exchange market, the Commission must prevent BellSouth from leveraging unfair advantages in the intraLATA market. BellSouth's petition should be denied.

POSITIONS

Issue 1: Should the Commission grant BellSouth relief from the requirements of Section 3 of Order No. PSC-96-1659-FOF-TP, issued December 23, 1996, in Docket Nos. 930330-TP and 960658-TP?

****FCCA, MCI and AT&T:** No. Aside from the legal effect of BellSouth's 1995 stipulation, BellSouth's data only shows developing competition desired by the Commission. Seventy-three percent of intraLATA customers now choose BellSouth despite first choosing another carrier for interLATA. BellSouth acknowledges competitors are targeting existing customers; the proposal does not. BellSouth's witness emphasized nine times that the petition/proposal would not permit BellSouth to address BellSouth's ECS; besides, BellSouth can't/won't tell customers of competitors' attractive offerings. The basis for the carrier-neutral gateway requirement is BellSouth's virtual monopoly on local service, and that hasn't changed. BellSouth should not be permitted to leverage its monopoly to gain unfair advantage.

Issue 1A: What relief, if any, is appropriate?

****FCCA, MCI and AT&T:** The petition should be denied for the reasons stated in (1) above. Further, no "relief" is appropriate, because BellSouth is not being disadvantaged by the existing requirement, which simply places BellSouth and its competitors on an equal footing when BellSouth informs new customers of their intraLATA choices.**

ARGUMENT (APPLICABLE TO 1 AND 1A)

The issue in this case is very narrow: Can BellSouth set itself apart from other intraLATA providers when new customers call BellSouth for local service? Most of the limitations on marketing practices that BellSouth has complained about (e.g., marketing to existing customers) were removed last month. The concerns regarding marketing to new customers - who are, in effect, a trapped audience - are quite different from those for existing customers. BellSouth is asking that it be allowed to add an additional prompt to its procedures for informing new customers about intraLATA options. This new prompt would advise the customer that BellSouth could provide the customer's intraLATA service before the customer was advised that the customer service representative could read a list of all the carriers that provide this service. The question presented is whether BellSouth can promote itself by name as an intraLATA provider to these new customers before mentioning the list of alternative carriers, or whether BellSouth's name should instead be on the list with all of the other intraLATA providers. No other competitor gets this special billing, and it would create an unfair advantage. BellSouth has filed statistical information on intraLATA market share, but it has ignored local market share. It is competition in the local market that

is relevant for these new customers because, until there is local competition, BellSouth will continue to be the bottleneck through which all new customers must pass to get intraLATA service.

For the reasons discussed in the following sections, FCCA, MCI and AT&T oppose BellSouth's proposed modification.

a. BellSouth's Proposed Prompt

Currently, when new customers call BellSouth for local service, BellSouth advises the customer that he has an option of selecting a carrier for local toll calls and offers to read the customer a random list of intraLATA carriers. Like all other intraLATA carriers, BellSouth is on that list. BellSouth claims that this procedure puts it at a competitive disadvantage. The procedure does not put BellSouth at a disadvantage: it simply puts BellSouth at parity with all the other carriers.

Ms. Geer sets forth in her testimony the proposed prompts which BellSouth is requesting this Commission to approve in this case. This new proposed procedure would add a statement, Prompt Number 2, that BellSouth can provide the customer's intraLATA service. Under BellSouth's proposal, the customer would be so advised before the customer service representative offers to read the list of carriers:

(1) BellSouth would advise the customer that he has an option of selecting a long distance carrier for local toll calls.

(2) BellSouth would advise the customer that BellSouth can provide his local toll service.

(3) BellSouth would offer to read to the customer the list of available carriers. If the customer responds affirmatively, then the list should be read.

(Tr. 28, Direct Testimony of Hilda Geer, p. 7).

Ms. Geer attempts to portray the existing competitively neutral protocols for new customers as shackles on BellSouth. The neutral gateway protocol that BellSouth is contesting requires only that BellSouth mention all providers at the same time, without favoring one over the others. In her testimony, Ms. Geer implies that the protocol somehow favors BellSouth's competitors. It does not. While the level of local competition (rather than intraLATA market share) is the litmus test relevant to restrictions on marketing intraLATA service to new customers, BellSouth's own intraLATA market share statistics belie its claim that the current procedure puts it at a competitive disadvantage. BellSouth attempts to make much of the fact that BellSouth's name is not on the first interLATA list read to customers, arguing that the customers would therefore assume BellSouth is not on the intraLATA list that follows. However, BellSouth's own data shows that under the current procedure, BellSouth is still chosen as the intraLATA carrier 72% of the time (Ex. HG-1). The other 51 intraLATA carriers split the remaining 28% of customers. Clearly, customers are not steered away from BellSouth by the interLATA exercise. Further, BellSouth's witness acknowledged that its competitors are targeting existing customers. Since BellSouth's proposal involves only new customers, it does not even address the "problem" that BellSouth describes. (Tr. 75-76).

If BellSouth's service is mentioned up front to this captive audience of new customers, while all of the other carriers are relegated to the random list, the percentage of new customers choosing BellSouth will only increase.[1] BellSouth wants to get out in front of its competition at the very time it is supposed to be fulfilling its LEC responsibility of informing new customers of their options. Because of its unique position as the gatekeeper for intraLATA service, BellSouth's initial customer contact must remain neutral.

b. Origin of Competitively Neutral Practices

Although BellSouth frames its argument as if BellSouth were asking the Commission to lift the restrictions the Commission imposed as a result of the Joint Complaint filed by MCI, AT&T, and FCCA in 1996, it is actually asking the Commission to sanction abandonment of the permanent competitively neutral practices to which BellSouth agreed in 1995. These competitively neutral basic ground rules for intraLATA presubscription were ordered by the Commission in Order No. PSC-95-0203-FOF-TP, issued in Docket No. 930330-TP. The 1996 Joint Complaint, on the other hand, resulted in the Commission imposing additional intraLATA marketing restrictions on BellSouth.

The basic ground rules require bottleneck LECs to fairly inform their customers of their intraLATA choices in a competitively neutral manner. In 1995, when the Commission was still considering whether intraLATA presubscription was appropriate

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[1]Ms. Geer tried to argue that granting the proposal would increase competition. In view of the fact that BellSouth's principal complaint is that competition has developed too far, the Commission should not take the argument seriously.

and should be implemented, various parties, including BellSouth, MCI, and FCCA, stipulated to the following:

> If intraLATA presubscription is in the public interest, balloting should not be required. However, central offices converting to interLATA equal access and intraLATA equal access at the same time should be balloted at the same time. In addition, when new customers sign up for service they should be made aware of their options of intraLATA carriers in the same fashion as for interLATA carriers. If balloting is required, participation should not be mandatory.

Order No. PSC-95-0203-FOF-TP, p. 38, emphasis added. The Commission approved this stipulation. In other words, MCI and FCCA gave up their right to argue in favor of balloting as a way to open the intraLATA market in exchange for BellSouth agreeing to a competitively neutral practice. Now BellSouth wants to breach its half of the bargain.

By argument and question, counsel for BellSouth suggested the stipulation did not preclude BellSouth's petition:

> Q. (by BellSouth's counsel) Do you know whether the issue of whether BellSouth could say something like, quote, "In addition to BellSouth," was specifically discussed by the parties in connection with the stipulation?
>
> A. No, I do not.

(Tr. 131).

However, it is not necessary to know whether BellSouth's proposal -- or variations -- were "specifically discussed," because the stipulation prescribes the same

procedure used for interLATA purposes. Accordingly, anything inconsistent with the interLATA procedure is precluded by the stipulation. BellSouth's proposal is inconsistent because it favors one carrier over others.

Nor does BellSouth address the legal import of the stipulation. Instead, BellSouth refers to the stipulation as "anecdotal" and "philosophical" arguments. (Tr. 36). However, the stipulation carriers far greater import than BellSouth acknowledges:

> It is the policy of the law to encourage and uphold stipulations in order to minimize litigation and expedite the resolution of disputes.

Spitzer v. Bartlett Brothers Roofing, 437 So.2d 758 (1st DCA 1983) (emphasis provided), quoting Steele v. A.D.H. Building Contractors, 174 So.2d 16 (Fla. 1965). In Spitzer, the court observed:

> In this case, there is no suggestion of fraud, overreaching, misrepresentation, or withholding of facts by the adversary as would render the stipulation void.

The stipulation was not conditioned on BellSouth maintaining a certain share of the market; in fact, that competitors would gain a share of BellSouth's virtual monopoly was expected, foreseen, and desired. Accordingly, BellSouth has shown no change in circumstances that warrants altering the 1995 stipulation. See Re: Rate Design for Telephone Company Carrier Access Charges, Order No. 88-664 of the Oregon Public Utility Commission, June 30, 1988.

As stated above, BellSouth agreed to use the same methods for intraLATA carriers as they use for interLATA carriers. Therefore, in deciding how to resolve this matter, the Commission must look at the interLATA procedures. The FCC recognized

the necessity for fair, even-handed business office practices when implementing equal access requirements in 1985:

> LEC personnel taking the verbal order should provide new customers with the names, and, if requested, the telephone numbers of the IXCs and should devise procedures to ensure that the names of IXCs are provided in random order.

FCC Memorandum Opinion and Order, CC Docket No. 83-1145, Phase I, adopted August 19, 1985, released August 20, 1985. This equal access requirement was specifically continued in section 251(g) of the Telecommunications Act of 1996:

> (g) Continued Enforcement of Exchange Access and Interconnection Requirements: On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

These interLATA requirements, on which the intraLATA requirements were based, are even more important today than when they were adopted. As the gateway to intraLATA and interLATA services for new customers, the LEC has both the financial incentive as well as the unique ability to steer customers toward its own long

distance service. As both the dominant 1+/0+ intraLATA toll provider and the incumbent monopoly local exchange company for the vast majority of Floridians, BellSouth is in the unique position of having customer contacts which give it an advantage over new entrants in the intraLATA presubscription market in this state. The manner in which BellSouth provides information pertaining to intraLATA service options must be handled in the same neutral manner with which it handles information concerning interLATA competition.

c. For New Customers, Competition in the Local Market is the Relevant Standard

The real issue in this case is whether BellSouth should be allowed to leverage its position as a local monopoly before it has opened its local market to competition. Presently, there is virtually no local competition. This means all new customers for local service must go to BellSouth. As a result, BellSouth is the gatekeeper for intraLATA services. When these new customers sign up for local service, BellSouth has a captive audience to which to pitch its intraLATA service. In other words, every time a new customer signs up for local service, one and only one intraLATA provider – BellSouth - has the unique opportunity to market its intraLATA service to that customer. BellSouth wants to be able to use its local monopoly position to give it an competitive advantage.

BellSouth's response to this argument seems to be that if BellSouth still has a local monopoly it is because competitors have chosen not to enter the market. This Commission has already had a proceeding to determine whether BellSouth has opened

its local market to competition and whether it has met the competitive checklist contained in Section 271 of the Federal Telecommunications Act of 1996 (the Act). Docket No. 960786-TL. This Commission found that BellSouth has not met its obligations under the Act. For example, the Commission found that BellSouth's Operational Support Systems (OSS) were inadequate. Order No. PSC-97-1459-FOF-TL. As long as competitors cannot order or bill for services from BellSouth, they will be unable to enter the market.

As stated above, all new customers must first come through BellSouth. If BellSouth is allowed to use calls to its bottleneck local services as an opportunity to leverage its intraLATA services, it would unfairly disadvantage its intraLATA competitors. New customers could be pushed into accepting BellSouth before they even know their other options. For this reason, BellSouth should use the same competitively neutral practices when talking to its customers about intraLATA choices as it uses when talking to them about interLATA choices.

d. BellSouth's Customer "Education"

BellSouth's prefiled testimony also stated that BellSouth wanted to "educate" customers about BellSouth's intraLATA toll services "in as competitively neutral manner as possible." (Tr. 31). What BellSouth meant by this request was unclear at first. FCCA, MCI and AT&T were concerned that BellSouth might be asking this Commission to allow it to market particular BellSouth intraLATA services to new customer before the customer asked BellSouth about its offerings or even after the customer had chosen a competing provider. BellSouth's witness, Hilda Geer, dispelled

any ambiguity during the hearing. On nine separate occasions she stated unequivocally that under its proposal, BellSouth would not address matters such as ECS unless the customer first raised the subject of BellSouth's intraLATA service. (Tr. 56, 57, 58, 63, 83, 84, 85, 87, and 105). Ms. Geer testified that BellSouth's petition in this case was limited to requesting permission to inform the customer that BellSouth could provide the customer's intraLATA service. She further testified that even if BellSouth's petition was granted, that BellSouth would not discuss optional EAS, Area Plus, or ECS unless the customer specifically inquired about BellSouth's service or until and unless the customer chose BellSouth as its intraLATA PIC. For instance, she stated:

> However, the only time that BellSouth would address their local toll calling plans is if the customer did select BellSouth as their carrier.

(Tr. 58).

* * * * * * * * *

> A. What BellSouth is proposing is to allow the customer the knowledge that BellSouth also provides the service. And with the restriction at the moment, a customer who comes to our business office to ask for new service is not even aware that BellSouth provides intraLATA toll service unless he directly asks a question about that service.
>
> Q. Okay. BellSouth is not proposing to give the customer details about that service unless the customer chooses BellSouth?
>
> A. That is correct.

(Tr. 63).

In response to Staff counsel:

A. One of the ways certainly that it can be corrected is by allowing the customer to be made aware of the fact that BellSouth is one of the carriers that provide this service and, as a result, he becomes aware of the full choice -- the full array of choices he might have.

(Tr. 83).

* * * * * * * *

A. Our proposal is to let the customers know that there are other carriers in the marketplace that provide the service and make them aware that BellSouth is one of those customers. (Tr. 84).

In response to Commissioner Clark:

CLARK: Suppose somebody says "Fine. I think I'll take AT&T," and suppose you have an ECS plan, a 25-cent call. Even though they've asked for AT&T, are you going to advise them about what ECS is available to them and --

GEER: No.

CLARK: -- how to reach that?

GEER: No. We would not advise the customer of our calling -- local calling plans if he has already made a selection of a different carrier. We would not be marketing our local calling plans if he has selected another intraLATA toll carrier.

CLARK: So that person would just have to find out on their own, for instance, that in Steinhatchee you had a 25-cent call plan to somebody?

GEER: That's correct.

(Tr. 85).

* * * * * * *

CLARK: Let me follow up on that. If the person says -- you know, that you run through your list, you say, do you know that BellSouth can provide it, and then they say, yeah, let me hear the list, and then they choose AT&T, you're still not going to tell them about ECS plans, don't you think that's going to be confusing, too?

GEER: Could be confusing, but our proposal has been that we will still maintain a fair and nondiscriminatory manner of sharing with the customer that BellSouth does provide the service.

(Tr. 87). (emphasis supplied)

In response to counsel for BellSouth:

Q. Would BellSouth be willing to cover those local calling plans with the customer?

A. If they have not --

McGLOTHLIN: Excuse me. I want to understand the question. Are you suggesting that BellSouth modify the presentation it's made in this petition by the question?

KEYER: No. I'm asking if BellSouth would be willing to alleviate a concern that I heard Commissioner Clark express.

A. Of offering customers the local calling plans that are available from BellSouth after the customer has already selected a different intraLATA toll carrier. Right now that is not the intent of this proceeding in any way, shape, or form for this request.

(Tr. 105).

In short, BellSouth's witness, Hilda Geer, stated repeatedly and unequivocally that under BellSouth's proposal, BellSouth would not discuss its intraLATA offerings in any way unless the new customer raised the subject.

If BellSouth had been asking for permission to "educate" customers about BellSouth's intraLATA services, this would have raised numerous discriminatory/competitive issues. Informing a customer about only one company's products is not competitively neutral, does not constitute "education," and does not enable that the customer to choose the carrier and plan that is best suited to the customer's needs. For example, BellSouth's witness admitted that BellSouth's ECS plan may not be the best option for all customers. (Tr. 62-63). Ms. Geer admitted that MCI's 5 cents a minute intraLATA rate is better for customers whose calls average less that five minutes. (Tr. 62-63). Indeed, there is no evidence in the record that ECS is a better option for the average customer. Ms. Geer admitted that she did not know the length of an average ECS call. (Tr. 49). Since there is no evidence in the record that the average ECS call is longer than five minutes, there would be no basis on which to find that BellSouth's 25 cents option is more beneficial to the average customer.

Ms. Geer testified that BellSouth does not keep up with all of the intraLATA offerings of its competitors and does not want to be required to inform customers of those competing offerings. If BellSouth were to provide unsolicited information only about its services, as opposed to all competing services, it would not be empowering the customer to make an informed intraLATA choice. For example, if a competing

intraLATA carrier offered 20 cents ECS service along the same routes as BellSouth's 25 cents ECS, the customer would be better off choosing the competing carrier over BellSouth. It is clear from Ms. Geer's testimony that BellSouth had no intention of informing customers of such a competing service. (Tr. 63).

One of the topics Ms. Geer discussed in her prefiled testimony was monthly flat rated calling plans such as optional EAS, Area Plus and Business Plus. (Tr. 29). She expressed concern that customers who had a plan such as Area Plus and who then selected a carrier other than BellSouth for their intraLATA service would be charged for a service for which they received no benefit. Id. She admitted at the hearing, however, that the statements in her prefiled testimony concerning defrauding customers who were paying for services they were not receiving were generally inapplicable to new customers and irrelevant to the issue in this case. (Tr. 52). Again, this case involves the narrow question of new customers. A new customer, by definition, does not already have local service when he calls BellSouth. If he does not already have service, then obviously he would not already have Area Plus as part of that nonexistent service. If he does not already have Area Plus, then he would not have any conflict when he chose someone other than BellSouth as his intraLATA carrier.

Because of its unique position as the gatekeeper for intraLATA service, BellSouth's initial customer contact must be neutral. BellSouth cannot steer the customer toward its own service. Once past that step, however, if a customer requests information about BellSouth's service, it should be able to market itself to the

interested customer. In that situation, the customer initiated and expressed the interest without prompting or pushing or promoting in that direction by BellSouth. In addition, BellSouth is free to market in whatever way it chooses outside of that initial customer contact. This would include television, radio, and written advertisements.

CONCLUSION

For the foregoing reasons, the Commission should deny BellSouth's request. As the monopoly gatekeeper to the intraLATA market for new customers, BellSouth should be required to continue to follow the competitively neutral procedures currently in place.

RESPECTFULLY SUBMITTED this 9th day of July, 1998.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Brief of FCCA, MCI, and AT&T** has been furnished by United States mail or hand delivery(*) this **9th** day of **July, 1998**, to the following:

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