

MCWHIRTER REEVES

ATTORNEYS AT LAW

TAMPA OFFICE:
400 NORTH TAMPA STREET, SUITE 2450
TAMPA, FLORIDA 33602
P. O. BOX 3350 TAMPA, FL 33601-3350
(813) 224-0866 (813) 221-1854 FAX

PLEASE REPLY TO:
TALLAHASSEE

TALLAHASSEE OFFICE:
117 SOUTH GADSDEN
TALLAHASSEE, FLORIDA 32301
(850) 222-2525
(850) 222-5606 FAX

December 9, 2002

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket No.: 020507-TP

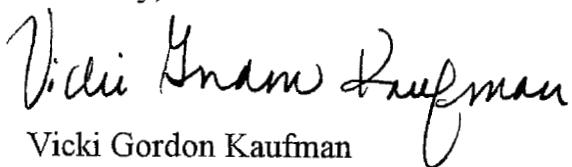
Dear Ms. Bayo:

On behalf of the Florida Competitive Carriers Association (FCCA), enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ The Florida Competitive Carriers Association's and ITC^DeltaCom Communications, Inc.'s Joint Response to BellSouth's Motion for Reconsideration, or in the Alternative, Motion to Convert to a Generic Proceeding.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,


Vicki Gordon Kaufman

VGK/bae
Enclosure

DOCUMENT NUMBER DATE
MCWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, DECKER, KAUFMAN & ARNOLD, P.A.

13457 DEC-9 2002

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of the Florida Competitive
Carriers Association Against BellSouth
Telecommunications, Inc. Regarding
BellSouth's practice of Refusing to
Provide FastAccess Internet Service to
Customers who Receive Voice Service from a
Competitive Voice Provider, and Request
For Expedited Relief.

Docket No. 020507-TP

Filed: December 9, 2002

THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION'S AND
ITC^DELTACOM COMMUNICATIONS, INC.'S
JOINT RESPONSE TO BELLSOUTH'S MOTION FOR RECONSIDERATION,
OR IN THE ALTERNATIVE, MOTION TO CONVERT
TO A GENERIC PROCEEDING

Pursuant to rule 28-106.204, Florida Administrative Code, the Florida Competitive Carriers Association (FCCA) and ITC^DeltaCom Communications, Inc. (DeltaCom) file this joint response to BellSouth Telecommunications, Inc.'s (BellSouth) Motion for Reconsideration of the Prehearing Officer's order excluding an issue from this proceeding, or in the alternative, Motion to Convert to a Generic Proceeding. BellSouth has shown no basis for reconsideration or for a generic proceeding and its motion should be denied.

INTRODUCTION

1. On June 12, 2002, the FCCA filed the Complaint that initiated this docket. The FCCA's Complaint stated that it was BellSouth's policy and practice to disconnect or refuse to provide its FastAccess service to consumers who chose a provider other than BellSouth for voice service. The FCCA alleged that BellSouth's conduct is anticompetitive, discriminatory and violative of law.

2. On October 30, 2002, Staff held an issue identification meeting in this docket. At the meeting, BellSouth orally proposed the following issue:

Should any decisions made in this proceeding apply equally to all ILECs and ALECs?

3. The FCCA and DeltaCom objected to the issue as far beyond the scope of the issues raised by the FCCA Complaint that initiated this docket. To resolve the question of whether BellSouth's proposed issue should be included for consideration, the Prehearing Officer accepted briefs from the parties.

4. On November 12, 2002, the Prehearing Officer issued the Order Establishing Procedure¹, in which he excluded the proposed BellSouth issue. On November 22, 2002, the Prehearing Officer issued an Order Clarifying Order Establishing Procedure.² The Order states:

After giving due consideration to the arguments raised by the parties in their briefs, I find it is appropriate to exclude BellSouth's proposed issue. I believe that the issue as written goes well beyond the scope of the Complaint. To include an issue regarding all ALECs and ILECs would require the Commission to review the individual practices of all ALECs and ILECs. The Complaint, however, only addresses whether BellSouth's actions regarding its FastAccess service are anticompetitive.³

Thus, the Prehearing Officer considered and rejected the arguments raised by BellSouth.

STANDARD FOR A MOTION FOR RECONSIDERATION

5. The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. *See, Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So.2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962);

¹ Order No. PSC-02-1537-PCO-TL.

² Order No. PSC-02-1618-PCO-TL.

³ *Id.* at p. 2.

Pingree v. Quaintance, 394 So.2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. *Sherwood v. State*, 111 So.2d 96 (Fla. 3rd DCA 1959), *citing, State ex. rel. Jaytex Realty Co. v. Green*, 105 So.2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." *Steward Bonded Warehouse, supra*.

6. BellSouth has failed to demonstrate that the Prehearing Officer made a mistake of fact or law in rendering his decision. Therefore, BellSouth's Motion for Reconsideration must be denied. In addition, in a last ditch effort to further delay BellSouth's compliance with the law and unnecessarily expand this proceeding, BellSouth has asked that it be "converted" to a generic proceeding. Such a request is nothing more than a retaliatory response to the FCCA's Complaint and should be denied as well.

DISCUSSION

7. BellSouth's absolute failure to meet the standard for reconsideration is nothing short of blatant. In its motion, BellSouth makes the *identical* arguments and cites the *identical* cases as it did when the issue for which it seeks reconsideration was before the Prehearing Officer. A comparison of pages 2 through 5 of BellSouth's Brief in Support of Issue 7⁴, which the Prehearing Officer considered, with pages 3 through 6 of BellSouth's Motion for Reconsideration⁵, demonstrates that all BellSouth has done in its motion is to parrot the very same arguments it made before Prehearing Officer Baez and

⁴ Attachment 1.

⁵ Attachment 2.

which he rejected. In light of the prohibition against reargument in a motion for reconsideration, as the cases cited above make clear, BellSouth's Motion for Reconsideration must be summarily rejected.

8. In an abundance of caution, however, the FCCA and DeltaCom adopt and incorporate herein the arguments previously made in response to BellSouth's Brief in Support of Issue 7 and attaches such response hereto.⁶

9. Perhaps recognizing that it has failed to meet its burden on reconsideration, BellSouth alternatively asks the Commission to "convert" this case to a "generic" proceeding. The basis for this request is nothing more than a reiteration of the arguments made in support of Issue 7, which the Prehearing Officer rejected.

10. BellSouth argues that this docket is "essentially a rulemaking procedure."⁷ However, it is no such thing -- this is a *complaint proceeding* which the FCCA initiated regarding the *antcompetitive behavior of BellSouth*. While BellSouth would prefer to shift the focus of the case, as well as delay its resolution, it has not provided a single example of the conduct of any other provider that has resulted in competitive harm to BellSouth.⁸ And in fact, BellSouth's suggestion that a "generic" issue be added to this case was nothing more than an afterthought; BellSouth did not even submit this issue when it filed its suggested issue list.

11. The addition of a "generic" issue to this docket is not only inappropriate given the scope of the FCCA's Complaint, it would serve no purpose other than to delay the present, actual, and ongoing refusal of BellSouth to comply with the law and would

⁶ Attachment 3.

⁷ BellSouth motion at 7.

⁸ The FCCA suggests that it would be extremely difficult for BellSouth to do so given its monopoly status in the marketplace.

serve to unnecessarily complicate the proceeding. The FCCA filed its Complaint in this case on June 12, 2002 and asked for expedited treatment due to BellSouth's on-going anticompetitive behavior. BellSouth filed a motion to dismiss which the Commission denied on October 23, 2002.⁹ Direct testimony, directed to the issues listed in the Order Establishing Procedure¹⁰, was filed on November 26, 2002. Rebuttal testimony is due on December 23, 2002, and the hearing is scheduled for one day on January 30, 2003. Expansion of the scope of the hearing to unrelated matters (as well as the need to notice and involve other carriers) would needlessly delay resolution of the issues raised in the FCCA's Complaint.

12. BellSouth's attempt to rely on a United Telephone rate case order¹¹ is misplaced. In that case, an issue arose in a rate case as to the appropriate rates to be charged for telephones in elevators. The Commission found that while United was in compliance with its filed tariff, there was an inconsistency in Commission policy between the electric industry and the telecommunications industry as to service to elevators. The Commission decided that the issue of "how telephones installed in both elevators and common areas of condominiums, apartments, and boarding houses should be tariffed"¹² should be dealt with in a generic proceeding. This broad tariff issue, which would affect the entire industry, has no relation to the issues in this docket. This docket concerns *BellSouth's behavior*. Even BellSouth recognizes that:

[t]he issues in this case surround *BellSouth's FastAccess Internet service*, and include consideration of whether this Commission has jurisdiction to

⁹ Order No. PSC-02-1464-FOF-TL.

¹⁰ Order No. PSC-02-1537-PCO-TL.

¹¹ Order No. PSC-92-0708-FOF-TL, *In re: Application for a rate increase by United Telephone Company of Florida*, Docket No. 910980-TL.

¹² *Id.* at 41.

grant the relief sought and whether *BellSouth's practices* relating to its FastAccess service violate any provisions of state or federal law.¹³

13. This case addresses the behavior of BellSouth, which this Commission has found to be anticompetitive in at least two other dockets.¹⁴ It is *not* a rulemaking proceeding but a complaint regarding BellSouth's behavior as an incumbent monopoly.¹⁵ The resolution of a complaint against BellSouth regarding BellSouth's conduct will not result in the establishment of a generic policy. Accordingly, any effort to characterize this matter as a generic proceeding that has industry-wide implications would constitute a denial of due process to the parties in this case.

¹³ BellSouth motion at 3, emphasis supplied.

¹⁴ See, Order Nos. PSC-02-0765-FOF-TP, PSC-02-1453-FOF-TP, PSC-02-0878-FOF-TP.

¹⁵ BellSouth recognizes that this Commission has authority to impose different regulatory oversight on BellSouth than on other companies. BellSouth motion at 4.

WHEREFORE, BellSouth's Motion for Reconsideration, or in the alternative, to Convert to a Generic Proceeding, should be denied.

Vicki Gordon Kaufman

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman & Arnold, PA
117 South Gadsden Street
Tallahassee, FL 32301
(850) 222-2525 Telephone
(850) 222-5606 Telefax

Attorneys for the Florida Competitive Carriers Association

and

Floyd R. Self
Messer, Caparello & Self, P.A.
Post Office Box 1876
Tallahassee, FL 32302-1876
(850) 222-0720 Telephone
(850) 224-4359 Telefax

Nanette S. Edwards
ITC^DeltaCom
4092 South Memorial Parkway
Huntsville, AL 35802-4343
(256) 382-3856 Telephone
(256) 382-3936 Telefax

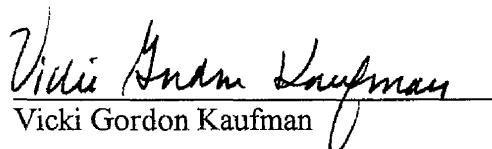
Attorneys for ITC^DeltaCom Communications, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing the Florida Competitive Carriers Association's Response to BellSouth's Motion for Reconsideration, or in the Alternative, Motion to Convert to a Generic Proceeding has been furnished by (*) hand delivery or (**) electric mail this 9th day of December, 2002, to the following:

(*) (**) Patricia Christensen
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

(*) (**) Nancy White
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301-1556


Vicki Gordon Kaufman
Vicki Gordon Kaufman

concedes that in the instant docket, it is asking the Commission to adopt an expanded policy that goes well beyond what the Commission ordered in the FDN and Supra dockets.⁴ As one Commissioner has noted, the Commission's decision in this docket is "a point that could impact the entire industry."⁵ The FCCA is suggesting that the Commission ignore this obvious fact, put blinders on, and make its decision in this docket *without giving any consideration whatsoever* to whether a decision "that could impact the entire industry" should apply to the entire industry. What the FCCA is suggesting is as self-serving as it is illogical, and the Commission should deny the FCCA's request and include Issue 7 in this docket.

Florida Courts have stated that "[i]t seems perfectly clear that rulemaking is the proper method of uniform policymaking in [a] matter of state-wide concern." *Florida Bankers Ass'n v. Leon County Teachers Credit Union*, 359 So.2d 886, 890 (1st D.C.A. 1978). The courts have further held that "[t]he model of responsible agency action under the APA is action faithful to statutory purposes and limitations, foretold to the public as fully as practicable by substantive rules,⁶ and refined and adapted to particular situations through orders in individual cases." *Anheuser-Busch, Inc. v. Dep't of Business Regulation*, 393 So.2d 1177, 1181 (1st D.C.A. 1981). Even on those occasions where "an agency's incipient policy is permissibly developed through orders," the courts have stated that "our duty is to require the agency 'to expose and elucidate

³ See Transcript of Item Number 3 of October 15, 2002 Agenda Conference at 11. Copies of relevant pages of this transcript are attached as Appendix B to this Brief.

⁴ See Tr. at 18 ("... BellSouth should not be permitted to refuse FastAccess Service to a customer or another voice provider. I think you have not addressed that issue, and that would be an issue that I think would be appropriate for a hearing."); See also Tr. at 27.

⁵ Tr. at 29.

⁶ BellSouth is unaware of this Commission having ever "foretold to the public . . . by substantive rules" any policy decisions regarding the provision of an unregulated, nontelecommunications service such as BellSouth's FastAccess Internet Service.

its reasons for discretionary action.” *General Development Corp. v. Division of State Planning, Dep’t of Admin.*, 353 So.2d 1199, 1209 (1st D.C.A. 1977). Thus if the Commission decided to impose regulations on BellSouth’s provision of its FastAccess Internet Service but not on any other provider’s provision of similar service, it would, at a minimum, be required to articulate “reasons for its discretionary actions” In light of that, it makes no sense whatsoever to exclude Issue 7 from this docket as the FCCA suggests.

As the FCCA undoubtedly will note, the Commission may, under appropriate circumstances, impose different regulatory oversight on ILECs than it imposes on ALECs. See Florida Statutes §364.01(4)(d). The Commission, however, cannot impose differing regulatory oversight in an arbitrary, capricious or discriminatory manner. That was the conclusion reached in the Fresh Look proceeding, FPSC Docket No. 980253-TX, in which the Commission issued a rule that allowed customers under term agreements with ILECs to terminate the contract to go to an ALEC without paying termination charges. This rule, which applied to ILECs but not to ALECs, was challenged, and the Division of Administrative Hearings (“DOAHs”) issued a final order on July 13, 2000 that overturned the rule. The DOAH’s Order states:

There was no demonstration that the ILECs’ long-term contracts present any greater, or even different, obstacles to competing carriers trying to win a customer subject to such an agreement, than would an ALEC’s long-term contract. Therefore, the fact that the rules capture contracts of ILECs, and not contracts of ALECs, renders the rules *discriminatory, arbitrary, and capricious.*⁷

Accordingly, if the Commission were to render a policy decision that applied to BellSouth alone, at a minimum it would have to base its decision on facts of record.

Accordingly, it makes no sense to exclude Issue 7 from this docket as the FCCA suggests.

Finally, among other things, the FCCA is asking the Commission to dictate to whom BellSouth must provide its unregulated FastAccess Internet Service,⁸ what systems and equipment BellSouth must use to provide that unregulated service,⁹ and under what rates, terms, and conditions BellSouth must offer that unregulated service to those customers.¹⁰ How the FCCA can seriously contend that it is requesting this Commission to do anything other than regulate BellSouth's unregulated, nontelecommunications FastAccess Internet Service is a mystery. Setting that aside for the moment, however, the fact remains that BellSouth is no more dominant in the market for broadband data services than are the ALECs.

This is because DSL technology is *not* the only technology that supports the provision of broadband data services to consumers – other technologies that support the provision of broadband data services to end users include wireless, cable modem, and satellite.¹¹ Moreover, DSL is not even the leading technology that supports the provision of broadband data services to consumers. As the Federal Communications Commission ("FCC") has noted, cable modem technology -- not DSL -- is leading the way in the provision of broadband data service to consumers. In February 2002, for instance, the FCC stated that "[i]n the broadband arena, the competition between cable

⁷ See *BellSouth Telecommunications, Inc. vs. Florida Public Service Commission*, Case No. 99-5369RP, Final Order issued July 13, 2000, at ¶114)(emphasis added).

⁸ See, e.g., Issue 4, 5, and 6(a)

⁹ See, e.g., Proposed Issue 9

¹⁰ See, e.g., Issues 6(a) and 6(b).

¹¹ See *In the Matter of Inquiry concerning High-Speed access to the Internet over Cable and Other Facilities*, FCC Order No. 0-355 at ¶43 (September 28, 2000) ("High-speed services are provided using a variety of public and private networks that rely on different network architectures and transmission paths including wireline, wireless, satellite, broadcast, and unlicensed spectrum technologies").

and telephone companies is particularly pronounced, *with cable modem platforms enjoying an early lead in deployment.*¹² In fact, the D.C. Circuit Court of Appeals recently reiterated that the FCC's findings "repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market." *Id.* at 428 (emphasis added). Specifically, the Court stated:

The [FCC] also noted that the "most popular offering of broadband to residential consumers is via 'cable modems' . . .," that "no competitor has a large embedded base of paying residential customers," and that the "record does not indicate that the consumer market is inherently a natural monopoly." The most recent §706 Report (not in the record of this case) is consistent: As of the end of June 2001, cable companies had 54% of extant high-speed lines, *almost double the 28% share of asymmetric DSL.*¹³

Far from being the only game in town when it comes to providing broadband data services, BellSouth trails far behind largely unregulated cable companies.

The FCCA, therefore, is asking the Commission to impose regulatory-intensive requirements on BellSouth's provision of an unregulated service that competes with the unregulated services offered by largely unregulated cable companies. If the Commission decides to impose any such requirements on BellSouth's FastAccess Internet Service, it must, at minimum, consider whether to impose the same requirements on similar services offered by ALECs who are no more and no less dominant in the highly competitive broadband data market than BellSouth. Under no circumstances can or should the Commission simply turn a blind eye to the issue and render a decision in a vacuum as the FCCA suggests.

¹² Third Report, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC Order No. 02-33 at ¶37 (February 6, 2002)(emphasis added).

¹³ See *United States Telecom Association v. FCC*, 290 F.3d 415, 428-29 (D.C. Cir. 2002) (emphasis added).

DISCUSSION

I. The Commission Should Reconsider and/or Modify Order No. PSC-02-1618-PCO-TL.

The issues in this case surround BellSouth's FastAccess Internet service, and include consideration of whether this Commission has jurisdiction to grant the relief sought and whether BellSouth's practices relating to its FastAccess service violate any provisions of state or federal law. As one Commissioner has noted, the Commission's decision in this docket is "a point that could impact the entire industry."³ As such, it is entirely appropriate that this Commission must consider whether any decision will impact *all* carriers in Florida rather than BellSouth alone.

Florida Courts have stated, "[i]t seems perfectly clear that rulemaking is the proper method of uniform policymaking in [a] matter of state-wide concern." *Florida Bankers Ass'n v. Leon County Teachers Credit Union*, 359 So.2d 886, 890 (1st D.C.A. 1978). The courts have further held that "[t]he model of responsible agency action under the APA is action faithful to statutory purposes and limitations, foretold to the public as fully as practicable by substantive rules,⁴ and refined and adapted to particular situations through orders in individual cases." *Anheuser-Busch, Inc. v. Dep't of Business Regulation*, 393 So.2d 1177, 1181 (1st D.C.A. 1981). Even on those occasions where "an agency's incipient policy is permissibly developed through orders," the courts have stated, "our duty is to require the agency 'to expose and elucidate its reasons for discretionary action.'" *General Development Corp. v. Division of State*

³ See Transcript of Item Number 3 of October 15, 2002 Agenda Conference at 29.

⁴ BellSouth is unaware of this Commission having ever "foretold to the public . . . by substantive rules" any policy decisions regarding the provision of an unregulated, nontelecommunications service such as BellSouth's FastAccess Internet Service.

Planning, Dep't of Admin., 353 So.2d 1199, 1209 (1st D.C.A. 1977). Thus if the Commission decided to impose regulations on BellSouth's provision of its FastAccess Internet Service but not on any other provider's provision of similar service, it would, at a minimum, be required to articulate "reasons for its discretionary actions . . ." In light of that, it makes no sense whatsoever to exclude Issue 7 from this docket.

That the Commission may, under appropriate circumstances, impose different regulatory oversight on ILECs than it imposes on ALECs does not lead to a different conclusion. See Florida Statutes §364.01(4)(d). The Commission cannot impose differing regulatory oversight in an arbitrary, capricious or discriminatory manner. That was the conclusion reached in the Fresh Look proceeding, FPSC Docket No. 980253-TX, in which the Commission issued a rule that allowed customers under term agreements with ILECs to terminate the contract to go to an ALEC without paying termination charges. This rule, which applied to ILECs but not to ALECs, was challenged, and the Division of Administrative Hearings ("DOAHs") issued a final order on July 13, 2000 that overturned the rule. The DOAH's Order states:

There was no demonstration that the ILECs' long-term contracts present any greater, or even different, obstacles to competing carriers trying to win a customer subject to such an agreement, than would an ALEC's long-term contract. Therefore, the fact that the rules capture contracts of ILECs, and not contracts of ALECs, renders the rules *discriminatory, arbitrary, and capricious*.⁵

Accordingly, if the Commission were to render a policy decision that applied to BellSouth alone, at a minimum it would have to base its decision on the issues in the case supported by record evidence relating to such issues.

⁵ See *BellSouth Telecommunications, Inc. vs. Florida Public Service Commission*, Case No. 99-5369RP, Final Order issued July 13, 2000, at ¶114)(emphasis added)

Moreover, among the issues included in this case, Issue 5 involves whether the Commission should "order BellSouth to provide its FastAccess Internet service, where feasible, to any ALEC end user that requires it." If BellSouth – a company that is no more dominant in the market for broadband data services than are the ALECs – is faced with a possible affirmative obligation to provide a federally tariffed, information service, then such consideration should apply to all broadband services providers. Yet, the Commission has apparently decided to limit its decision to BellSouth alone, without explaining the basis for its exclusion of this issue or how it intends to fully develop the evidentiary record necessary to reach an informed and balanced decision.

Because DSL technology is *not* the only technology that supports the provision of broadband data services to consumers – other technologies such as wireless, cable modem, and satellite technology also support the provision of broadband data services to end users,⁶ any consideration of whether BellSouth practices violate applicable law must include consideration of the implication of the Commission's decision on the industry as a whole. As the Federal Communications Commission ("FCC") has noted, cable modem technology -- not DSL -- is leading the way in the provision of broadband data service to consumers. In February 2002, for instance, the FCC stated that "[i]n the broadband arena, the competition between cable and telephone companies is particularly pronounced, *with cable modem platforms enjoying an early lead in*

⁶ See *In the Matter of Inquiry concerning High-Speed access to the Internet over Cable and Other Facilities*, FCC Order No. 0-355 at ¶43 (September 28, 2000) ("High-speed services are provided using a variety of public and private networks that rely on different network architectures and transmission paths including wireline, wireless, satellite, broadcast, and unlicensed spectrum technologies.").

deployment.⁷ In fact, the D.C. Circuit Court of Appeals recently reiterated that the FCC's findings "repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market." *Id.* at 428 (emphasis added). Specifically, the Court stated:

The [FCC] also noted that the "most popular offering of broadband to residential consumers is via 'cable modems' . . . , " that "no competitor has a large embedded base of paying residential customers," and that the "record does not indicate that the consumer market is inherently a natural monopoly." The most recent §706 Report (not in the record of this case) is consistent: As of the end of June 2001, cable companies had 54% of extant high-speed lines, *almost double the 28% share of asymmetric DSL.⁸*

Far from being the only game in town when it comes to providing broadband data services, BellSouth trails behind largely unregulated cable companies.

The Commission, therefore, is being asking to impose regulatory-intensive requirements on BellSouth's provision of an unregulated service that competes with the unregulated services offered by largely unregulated cable companies. If the Commission decides to impose any such requirements on BellSouth's FastAccess Internet Service, it must, at minimum, consider whether to impose the same requirements on similar services offered by ALECs who are no more and no less dominant in the highly competitive broadband data market than BellSouth. Under no circumstances can or should the Commission simply turn a blind eye to the issue and render a decision in a vacuum.

⁷ Third Report, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC Order No. 02-33 at ¶37 (February 6, 2002)(emphasis added).

⁸ See *United States Telecom Association v. FCC*, 290 F.3d 415, 428-29 (D.C Cir. 2002) (emphasis added).

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of the Florida
Competitive Carriers Association
Against BellSouth Telecommunications, Inc.
and Request for Expedited Relief

Docket No. 020507-TP

Filed: November 8, 2002

NOV-8 PM 3:40
CLERK
COMMISSION

THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION'S BRIEF ON CONTESTED ISSUE 7

Pursuant to the agreement of the parties at the issue identification meeting, the Florida Competitive Carriers Association (FCCA) files this brief on proposed Issue 7 raised by BellSouth Telecommunications, Inc. (BellSouth). It is FCCA's position that Proposed Issue 7 is beyond the scope of this proceeding and should be excluded.

INTRODUCTION

1. On October 30, 2002, Staff held an issue identification meeting in this docket. At the meeting, BellSouth proposed Issue 7¹, which reads:

Should any decisions made in this proceeding apply equally to all ILECs and ALECs?

FCCA objects to this issue because it is far beyond the scope of the issues raised by the Complaint that will be considered in this docket. To resolve the question of whether BellSouth's proposed issue should be included for consideration, the parties agreed to submit briefs to the Prehearing Officer on the disputed issue.²

¹ Despite the fact that BellSouth now argues the importance of this issue, it did not raise the issue when it filed its list of proposed issues on October 29, 2002.

² The parties also could not agree on Proposed Issues 8 and 9 that the FCCA presented. The FCCA has not pursued either of these issues. Staff has indicated that Issue 9 can be covered under other issues. As to Issue 8, the FCCA believes that whatever order the Commission issues at the conclusion of this proceeding, will speak for itself.

DISCUSSION

2. The FCCA initiated this case by filing a Complaint on June 12, 2002. FCCA's Complaint relates directly to the conduct of BellSouth -- that is, BellSouth's refusal to provide its FastAccess internet service to consumers who exercise the competitive option of receiving voice service from a competitive voice provider. The issue before the Commission is whether BellSouth should be permitted to engage in such conduct.³

3. FCCA's Complaint is clear that BellSouth's anticompetitive practice is directly related to its position as an incumbent local monopoly and is an attempt to further entrench its voice monopoly.⁴ It is *BellSouth's conduct* to which the FCCA Complaint is addressed. BellSouth's attempt to enlarge the scope of the docket to issues not raised by the FCCA must be rejected for the following reasons.

4. First, as noted above, this is a complaint proceeding that FCCA initiated. It is directed specifically to BellSouth's anticompetitive behavior. The parameters of FCCA's Complaint and its allegations must govern this matter. To the extent BellSouth can demonstrate that it has been harmed by anticompetitive behavior, which FCCA believes would be a very difficult burden for BellSouth to meet given its monopoly status, it may take such action as it deems necessary to address the conduct it claims has

³BellSouth's anticompetitive behavior has been the subject of at least two other dockets before this Commission. *Petition by Florida Digital Network, Inc for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc Under the Telecommunications Act of 1996; Petition by BellSouth Telecommunications, Inc for Arbitration of Certain Issues in Interconnection Agreement with Supra Telecommunications and Information Systems, Inc.*, Docket No. 001305-TP.

⁴FCCA Complaint, ¶ 14.

occurred.⁵ However, BellSouth's attempt to graft unrelated issues onto FCCA's Complaint in this case is inappropriate.

5. Second, when the FCCA filed its Complaint in June of this year, it requested expedited consideration. BellSouth's conduct occurs every day in the marketplace and every day that it is permitted to continue creates an on-going barrier to local competition. Consideration of the Complaint was delayed, in part, when BellSouth filed a motion to dismiss (which the Commission found had no merit).⁶

6. This matter is currently scheduled for one day on January 30, 2003 and tight timeframes have been established for the filing of testimony.⁷ Expansion of the scope of the hearing to unrelated matters (as well as the need to notice and involve other parties) could result in this matter being delayed further.

6. BellSouth argues that its proposed issue should be included to deal with the Commission's attempt to impose "regulatory oversight"⁸ or "regulatory-intensive requirements"⁹ on BellSouth that it does not impose on others. BellSouth claims that such action would be "arbitrary, capricious [and] discriminatory."¹⁰ However, BellSouth fundamentally has misconstrued the issues in this case -- the FCCA's Complaint is not about "regulatory oversight" nor does it involve this Commission's rulemaking authority. Rather, it is about ensuring that BellSouth follows the law and does not engage in clearly prohibitive conduct that is anticompetitive so as to strengthen its own voice monopoly position in the market to the detriment of end users.

⁵ The FCCA notes that nowhere in its Brief does BellSouth complain of any anticompetitive conduct on the part of another party.

⁶ Order No. PSC-02-1464-FOF-TI.

⁷ The current schedule calls for direct testimony to be filed on November 26th.

⁸ BellSouth Brief at p. 3

⁹ BellSouth Brief at p. 5

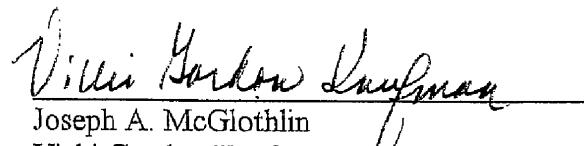
¹⁰ BellSouth Brief at p. 3.

7. BellSouth further argues that the FCCA asks the Commission to "regulate" BellSouth's unregulated FastAccess.¹¹ BellSouth is wrong again -- this case is about the anticompetitive consequences of BellSouth *refusing to serve* certain customers. The FCCA's Complaint alleges that this conduct is violative of Florida law and the Commission's mandate to open the local markets to competition. This is the ultimate issue that the Commission will decide in this case.

8. Finally, while BellSouth argues that failure to include its issue would require the Commission to "render its decision in a vacuum"¹², the opposite is actually the case. Exclusion of the broad, open-ended issue BellSouth promotes will permit the Commission and the parties to focus on the matters raised in the FCCA's Complaint.

CONCLUSION

WHEREFORE, proposed Issue 7 should not be included in this proceeding.



Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, Arnold & Steen, PA
117 South Gadsden Street
Tallahassee, Florida 32301
(850) 222-2525 Telephone
(850) 222-5606 Telefax

Attorneys for the Florida Competitive Carriers Association

¹¹ In making this argument, BellSouth strays into arguing about the manner in which FastAccess is provided as well as the provision of other DSL technology. See BellSouth Brief at pp.4-5. These matters are irrelevant to whether the inclusion of Proposed Issue 7 is appropriate in this complaint proceeding.

¹² BellSouth Brief at p. 5

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Florida Competitive Carriers Association's Brief on Contested Issue 7 has been furnished by (*) hand delivery, (**) electronic mail or U.S. Mail this 8th day of November, 2002, to the following:

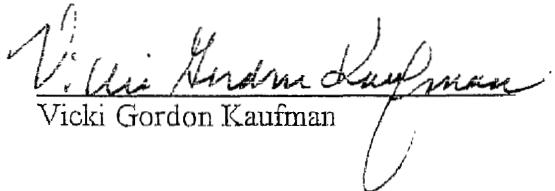
(*) (**) Patricia Christensen
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

(**) Nancy White
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301-1556

(**) Patrick W. Turner
BellSouth Telecommunications, Inc.
675 West Peachtree Street, #4300
Atlanta, Georgia 30375

(**) Floyd Self
Messer, Caparello & Self
215 South Monroe Street, Suite 701
Tallahassee, Florida 32302-1876

(**) Nanette Edwards
ITC DeltaCom
4092 South Memorial Parkway
Huntsville, Alabama 35802


Vicki Gordon Kaufman