

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of BellSouth  
Telecommunications, Inc. to lift  
marketing restrictions imposed  
by Order PSC-96-1569-FOF-TP.

DOCKET NO. 971399-TP  
ORDER NO. PSC-98-0293-FOF-TP  
ISSUED: February 17, 1998

The following Commissioners participated in the disposition of  
this matter:

JULIA L. JOHNSON, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
JOE GARCIA  
E. LEON JACOBS, JR.

ORDER DENYING MOTION TO DISMISS

BY THE COMMISSION:

I. BACKGROUND

By Order No. PSC-95-0203-FOF-TP, issued on February 13, 1995, in Docket No. 930330-TP, we found that intraLATA presubscription was in the public interest and ordered the four large local exchange companies (LECs) to implement intraLATA presubscription by the end of 1997. In the same proceeding, we ordered the LECs to file tariffs by July 1, 1995, instituting a rate element to allow the recovery of implementation costs for intraLATA presubscription.

On June 30, 1995, BellSouth Telecommunications, Inc. (BellSouth) filed the required tariff. In addition, BellSouth proposed to introduce several new intraLATA presubscription-related services and to reflect tariff language changes in its Access Services and General Subscriber Service Tariffs. On May 23, 1996, we issued Order No. PSC-96-0692-FOF-TP approving BellSouth's tariff. On May 24, 1996, the Florida Interexchange Carriers Association (FIXCA), MCI Telecommunications Corporation (MCI) and AT&T Communications of the Southern States, Inc. (AT&T) (the Complainants) filed a Joint Complaint against BellSouth. The

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Complainants alleged that BellSouth had devised anticompetitive business practices and unreasonable tariff provisions which, if allowed to remain in effect, would hinder the exercise of competitive choices. The Complainants argued that these practices would enable BellSouth, a dominant incumbent provider of local exchange services, to use its position to gain an unfair advantage over intraLATA toll competitors, thereby frustrating the purpose of Order No. PSC-95-0203-FOF-TP.

On June 11, 1996, the Complainants protested Order No. PSC-96-0692-FOF-TP and requested a hearing. On June 13, 1996, BellSouth filed a response to the Joint Complaint, along with a Motion to Dismiss. BellSouth withdrew the Motion to Dismiss on October 4, 1996.

On October 17, 1996, we conducted an evidentiary hearing on the issues in this consolidated proceeding. We voted on the issues at the November 26, 1996, Agenda Conference. Our decisions were memorialized in Order No. PSC-96-1569-FOF-TP issued on December 23, 1996, in Docket Nos. 930330-TP and 960658-TP.

On January 7, 1997, BellSouth filed a Motion for Reconsideration of Order No. PSC-96-1569-FOF-TP. On January 21, 1997, the Complainants filed a response to BellSouth's Motion. At the April 14, 1997, Agenda Conference, we voted to deny BellSouth's motion for Reconsideration. This action was memorialized in Order No. PSC-97-0518-FOF-TP issued on May 6, 1997, in Docket No. 930330-TP.

On October 21, 1997, BellSouth filed a Petition to Lift the Marketing Restrictions Imposed by Order No. PSC-97-0518-FOF-TP, in Docket No. 930330-TP. On November 10, 1997, MCI and the Florida Competitive Carriers Association (FCCA; formerly FIXCA) filed responses to BellSouth's petition. On the same day, the Joint Complainants filed a motion to dismiss BellSouth's petition. On November 18, 1997, BellSouth filed a Response and Opposition to the Joint Motion to Dismiss.

## II. ANALYSIS OF MOTION TO DISMISS

The purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action or claim. See Augustine v. Southern Bell & Telegraph Co. 91 So.2d 320 (FL 1956). In other words, the issue is whether the

petition states a claim upon which we can grant relief. In determining the sufficiency of the petition, consideration is confined to the petition and the grounds asserted in the motion to dismiss. See Flye v. Jeffords 106 So.2d 229 (1 D.C.A. 1958). We must take all material factual allegations of the petition as true. See Varnes v. Dawkins, 625 So.2d 349, 350 (1 D.C.A. 1993). The moving party must specify the grounds for the motion to dismiss. We must 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 (2 D.C.A. 1960).

In their Motion to Dismiss, the Joint Complainants argue that BellSouth's petition is nothing more than a second attempt at reconsideration of Order No. PSC-96-1569-FOF-TP and therefore violates the principle of administrative finality. Citing the Florida Supreme Court's decision in Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla 1996), the Joint Complainants state the Court held that orders of an agency must at some point pass out of the agency's control and become final, absent extraordinary situations such as fraud, mistake, or change of circumstances. The Joint Complainants claim that BellSouth has not demonstrated sufficient extraordinary circumstances, either legal or factual, to warrant us disturbing our Order. The Joint Complainants believe that the data BellSouth provided with its petition to lift the restrictions demonstrates little more than that the market is responding to the restrictions as we intended.

Further, the Joint Complainants assert that BellSouth has failed to detail its local exchange service market share for the time period before and after the marketing restrictions were imposed. The Joint Complainants believe that we must evaluate this data in our consideration of the BellSouth Petition.

In its Response and Opposition to the Motion to Dismiss, BellSouth argues that its petition is not a second motion for reconsideration but is instead a factual showing that the intraLATA market has changed more quickly than we had anticipated in our earlier Order. BellSouth states that it is prepared to demonstrate the changed circumstances at hearing. BellSouth believes that it has cited sufficient supporting data in its petition to lift the restrictions. BellSouth claims that it is seeking to prove that the goal of our Order has been met by its demonstration that intraLATA competition in Florida is now thriving.

III. DECISION

Considering the facts alleged as true and in the light most favorable to BellSouth, we hereby deny the Joint Complainants' Motion to Dismiss. BellSouth has alleged sufficient facts to demonstrate changed circumstances and thereby the requested relief of lifting the restrictions imposed by our Order. BellSouth's petition provides data indicating a 26% loss of toll PIC-able access lines for the period of June, 1996, to September, 1997, and also showing that 34% of new residential customers chose an intraLATA carrier other than BellSouth for the period January, 1997, to August, 1997. This data does indicate changed circumstances that may demonstrate that the purpose of our earlier Order has been met.


We will neither grant nor deny BellSouth's Petition to lift the marketing restrictions imposed by Order No. PSC-96-1569-FOF-TP in this Order. In consideration of the contentious nature of this proceeding and in an effort to expedite the resolution of this matter, we will set this matter for hearing.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Florida Competitive Carriers Association, AT&T Communications of the Southern States, and MCI Telecommunications Corporation's Joint Motion to Dismiss BellSouth Telecommunications, Inc.'s petition to lift certain marketing restrictions imposed by Order No. PSC-96-1569-FOF-TP is denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 17th day of February, 1998.

  
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BLANCA S. BAYO, Director  
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.