

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of 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-TL
ORDER NO. PSC-03-0084-PCO-TL
ISSUED: January 10, 2003

ORDER ON BELLSOUTH'S EMERGENCY MOTION TO COMPEL AND
FCCA'S MOTION FOR PROTECTIVE ORDER

On June 12, 2002, the Florida Competitive Carriers Association (FCCA) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) and a Request for Expedited Relief seeking relief from BellSouth's practice of refusing to provide its FastAccess service to customers who receive voice service from an Alternative Local Exchange Carrier (ALEC). By Order No. PSC-02-0935-PCO-TL, issued July 12, 2002, the request for expedited relief was denied.

On December 17, 2002, BellSouth filed its Emergency Motion to Compel against Florida Competitive Carriers Association (FCCA). On December 26, 2002, FCCA filed its Response to BellSouth's Motion to Compel and its Motion for Protective Order.

ARGUMENTS

BellSouth's Motion

In support of its Motion, BellSouth states that it served FCCA with its First Set of Interrogatories (Nos. 1 - 32) and First Requests for Production of Documents (PODs) (1-4) on November 15, 2002. BellSouth asserts that the FCCA refuses to respond to its discovery requests.

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BellSouth argues that the FCCA's own Complaint makes it clear that its discovery requests are relevant. BellSouth asserts that its discovery requests ask a series of questions designed to determine whether individual FCCA members offer DSL service, and if so, what type of service is offered. (Interrogatories No. 6-22 and PODs 2-3). BellSouth states that the FCCA refuses to answer these questions. BellSouth contends that the FCCA's Complaint clearly makes a distinction between carriers that offer voice service but do not offer DSL service, and those carriers which offer both voice and DSL services. Moreover, BellSouth states that the FCCA's Complaint alleges that the FCCA's individual members' interests are affected and claims that BellSouth's conduct is discriminatory. BellSouth argues that the FCCA should not be allowed to refuse to answer questions regarding its members' service offerings and the circumstances of their provision of such offerings, while alleging that BellSouth's actions discriminate against the FCCA members and inhibiting their ability to provide these services.

BellSouth further argues that the issues identified for this proceeding also demonstrate the relevancy of its discovery requests. BellSouth asserts that to determine whether or not it is "feasible" for BellSouth to provide its FastAccess service to any requesting end user, it is clearly relevant to determine what ALECs, including the FCCA's member companies, are doing. BellSouth asserts that its Interrogatories 6-22 and PODs 2-3 are directly pertinent to such an inquiry. BellSouth also asserts that Interrogatories 23-28 seek specific information about the amount of compensation that the FCCA members might charge for using the high frequency portion of the unbundled loop, accessing the loop for testing, repair, maintenance and/or troubleshooting, and taking any steps necessary to provide DSL service. BellSouth contends that the FCCA objects to these interrogatories even though Issues 6(a) and 6(b) require a determination of rates, terms and conditions.

BellSouth asserts that based on publically available information approximately 38% of FCCA's members provide DSL service. However, BellSouth contends that it is unable to determine in which markets the FCCA members provide DSL service or what are the terms and conditions of such service. BellSouth argues that to the extent this Commission needs to make a determination as to the "feasibility" of BellSouth providing service, which is dependent on what the ALECs are doing, and based

on the publically available information, its discovery requests are relevant.

BellSouth also argues that case law supports its contention that the FCCA must respond to its discovery requests. BellSouth cites to Rule 1.280, Florida Rules of Civil Procedure, which states that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter of the proceeding and that it is not grounds for objection if the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Further, BellSouth cites to Weyant v. Rawlings, 389 So.2d 710, 711 (2nd DCA 1980); and Jones v. Seaboard Coast Line Railroad Co., 297 So.2d 861, 863 (2nd DCA 1974) for the proposition that discovery rules should be construed liberally so as to permit any form of discovery with the scope of the rules. BellSouth argues that its discovery request are relevant because it is entitled to request information related to its defenses.

Further, BellSouth cites to Order No. PSC-92-0112-TL, issued March 27, 1992, in Docket No. 910980-TL (FCTA Order), for the proposition that the FCCA must respond to its discovery requests even if those requests seek information from the FCCA members. BellSouth states that in the FTCA Order, discovery was propounded on the Florida Cable Television Association (FCTA) which related to the nature of service provided by FCTA's members. BellSouth contends that under the FCTA Order, the association was required to respond to the discovery. BellSouth states that this Commission should not allow the FCCA to shield its members and the FCCA should be required to provide full and complete responses, just as was required in the FCTA Order. Moreover, BellSouth argues that under this Commission's duty to ensure that all providers of telecommunications services are treated fairly pursuant to Section 364.01(4)(g), Florida Statutes, it would be patently unfair to allow the FCCA to initiate complaints, then fail to respond to discovery requests under the guise that the information sought relates to non-parties.

BellSouth asks that its Emergency Motion to Compel to be granted and that the FCCA be required to fully and completely respond to its First Set of Interrogatories and its First Request

for Production of Documents. In addition, BellSouth request the response be provided in advance of the hearing.

FCCA'S Response and Motion for Protective Order

In its response, the FCCA argues that the information sought is not relevant to the issues in the case. The FCCA argues that the "triable" issues in this case are clearly limited to BellSouth's conduct and policies regarding provision of its FastAccess service. The FCCA contends that the issues identified for hearing confirm that BellSouth's behavior is the subject of this proceeding not the FCCA's members' behavior. The FCCA asserts that BellSouth makes vague claims about relevance of the information but fails to prove up its claims when the allegations are examined. The FCCA contends that what other telecommunication providers do or do not do in other states is irrelevant. The FCCA asserts that if BellSouth seeks to attack its standing, it believes that it has met its obligation to demonstrate standing so as to prosecute this Complaint.

FCCA asserts that the issues list does not demonstrate the relevancy of BellSouth's discovery request because it relates to what BellSouth should or should not do. Further, FCCA contends that this Commission specifically excluded an issue that would have broadened the scope of this proceeding to include all other ALECs and ILECs, and rejected a proposal to convert this into a generic proceeding. The FCCA contends that BellSouth's Motion to Compel is just an end-run around that decision. The FCCA also contends that to the extent BellSouth argues that it needs discovery to address the "feasibility" issue, other providers' services have no relevancy to BellSouth's actions, which are the sole subject of this case.

The FCCA also argues that BellSouth is seeking discovery from persons who are not parties to this case. Specifically, the FCCA contends that its members are not parties because they have not intervened. Further, the FCCA cites to Rules 1.340(b) and 1.350(a), Florida Rules of Civil Procedure, for the proposition that the discovery is to be sought from parties. The FCCA further contends that the information sought from its members is not in its possession, custody or control. The FCCA asserts that BellSouth is well-aware of the prohibition on discovery from non-parties.

The FCCA argues that this Commission in FCTA Order noted that discovery was not unlimited, would not be used as a vehicle for harassment, and was only required to establish the FCTA's standing. The FCCA argues that unlike the discovery served on FCTA, BellSouth's discovery is not related to FCCA's standing nor has any colorable claim been made that the FCCA does not have standing to participate in this case. Further, the FCCA asserts that it has a long history of participating in Commission proceedings and BellSouth should not be permitted to conduct a harassing and impermissible fishing expedition under the guise of "standing" issues.

The FCCA also argues that BellSouth's requests are burdensome on their face. The FCCA complains that certain requests contain multiple subparts, and that its members are asked to describe information with particularity, or identify or produce "all" documents. The FCCA contends that given the number and scope of the discovery questions, it is obvious that an inordinate amount of time would be required to fully respond.

In addition, the FCCA states that it objected to Interrogatories Nos. 7-8, 10, 12-21, and PODs 1-4 to the extent these requests seek confidential proprietary business information and trade secret information. The FCCA states that BellSouth never addressed this objection in its Motion to Compel, and the FCCA should not be required to provide such sensitive business information to BellSouth.

The FCCA concludes that BellSouth's Motion should be denied because it seeks discovery that is irrelevant to the issues in the case and that goes far beyond what is permitted by the applicable rules.

DECISION

After reviewing the parties' motions and responses, as well as the interrogatories and PODs in questions, BellSouth's Motion to Compel shall be granted in part and denied in part in the manner and for the reasons set forth below.

Rule 1.280(b) states that:

It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The FCCA claims that the information sought is irrelevant because the issues in this proceeding only relate to BellSouth's behavior. BellSouth argues that the information it seeks is relevant to issues in the case and its defenses. Similar to this case, in the FCTA Order, FCTA objected to interrogatories and PODs propounded on them because it claimed that the discovery sought was irrelevant and only meant to harass its members. The FCTA Order states that "FCTA and **its members are not immune from discovery** simply because the services it provides **are not directly at issue** in this proceeding." Id. at p. 3. (Emphasis added) However, the order limited the discovery and stated that the discovery would not be allowed to be a vehicle for harassment. As in the FCTA case, although the FCCA's members' services are not directly at issue, the information sought by BellSouth appears reasonably calculated to lead to the discovery of admissible evidence related to the issues in this case and to BellSouth's possible defenses.

The FCCA argues that BellSouth's discovery requests seek information from its members that is not permissible because the members are not parties to the action. However, like the FCTA case, the FCCA and its members are not immune to discovery merely because the association filed the Complaint rather than the individual members of the association. The FCCA's individual members shall not be allowed to thwart due process and discovery by hiding behind their association. Thus, the FCCA will be required to respond in part to BellSouth's First Set of Interrogatories and PODs.

The FCCA also raises the argument that producing the discovery will be overly burdensome because the discovery asks for detailed responses. To that extent, the FCCA's argument is without merit. However, certain of the requests appear to be burdensome; therefore, those requests are limited as set forth below. The FCCA also argues that certain of the requests seek confidential business information and/or trade secrets. To the extent that BellSouth has

produced similar information and filed the appropriate request for protection, the FCCA will be required to produce similar information and can file the appropriate request for confidential protection and obtain non-disclosure agreement(s) from BellSouth. Otherwise, the information will be limited as set forth below.

Interrogatory Nos.	Decision	Reason/Limitation
No. 3	Deny	irrelevant; not likely to lead to the discovery of admissible evidence
Nos. 5-8	Grant	relevant
Second No. 6	Grant	relevant
Second No. 7 (i), (ii), (iii), (iv)	Grant	relevant; (iii) shall be limited to technology(ies) used, FCCA is required to provide an aggregated response for total FCCA by technology
Second No. 7 (v)	Deny	overly broad and unduly burdensome
Second No. 8 (i)	Grant	relevant
Second No. 8 (ii)	Deny	overly broad and unduly burdensome
No. 9	Grant	relevant- Limited to BellSouth's nine state region
No. 10 (i), (ii), and (iii)	Grant	relevant- Limited to BellSouth's nine state region
No. 11	Grant	relevant- Limited to BellSouth's nine state region
No. 12 (all parts)	Grant	relevant
No. 13 (i)	Grant	relevant

Interrogatory Nos.	Decision	Reason/Limitation
No. 13 (ii), (iii), (iv), and (v)	Deny	irrelevant; not likely to lead to the discovery of admissible evidence
No. 14	Grant	relevant
No. 15	Grant-in part	relevant- Limit to identifying the footprint of FCCA's members network, sufficient for one to discern where the xDSL products are available - - otherwise denied as overly broad
No. 16	Grant	relevant
No. 17 (i), (ii)	Grant	relevant
No. 17 (iii), (iv)	Grant-in part	relevant- Limit to a description of contemplated joint offerings.
Nos. 18 and 19	Grant	relevant
No. 20 (i), (ii)	Grant	relevant
No. 20 (iii), (iv)	Grant -in part	relevant- Limit to a description of contemplated joint offerings.
Nos. 21 - 32	Grant	relevant- for Nos. 30 - 32 supplement any responses previously provided to comply with this Order

Production of Documents	Decision	Reasons/Limitations
No. 1	Grant	relevant- Limit as identified with regard to the interrogatory responses
No. 2	Grant-in part	relevant- Limit to documents that describe FCCA or its member's retail broadband and DSL offerings
No. 3	Grant	relevant - Limit to BellSouth's nine state region
No. 4	Deny	overly broad, vague

Since the FCCA and its members are being required to respond to BellSouth's discovery requests and since neither the FCCA nor its members are shielded from discovery merely by the Association filing the Complaint, the FCCA's Motion for Protective Order shall be denied. The FCCA obtains standing based on its members' ability to sue. If relevant discovery could be thwarted simply because an association filed suit rather than the individual members of the association, then the association would not have standing to file suit because it would fail to meet the associational standing criteria set forth in Florida Home Builders Association, et al., v. Department of Labor and Employment Security, 412 So.2d 351 (1982)¹.

In view of the short time remaining before the hearing, FCCA is directed to respond to the interrogatories and PODs for which the Motion to Compel has been granted within 7 days of the date of this Order. The responses shall be provided to BellSouth with a

¹The Court found that "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Id. at 353.

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copy to staff, by hand delivery or facsimile, to be received by no later than 5:00 p.m. on that date.

Based on the foregoing, it is


ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that BellSouth Telecommunications, Inc.'s Motion to Compel is granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that the Florida Competitive Carriers Association's Motion for Protective Order is hereby denied. It is further

ORDERED that the Florida Competitive Carriers Association shall respond to the discovery requests set forth in the body of this Order within the time limits and in the manner described in the body of this Order. It is further

ORDERED that this Docket shall remain open pending resolution of the matters to be addressed at hearing.

By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 10th Day of January, 2003.



BRAULIO L. BAEZ
Commissioner and Prehearing Officer

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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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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 25-22.0376, 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 the Commission Clerk and Administrative Services, 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.