

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-03-0180-PCO-TL  
ISSUED: February 6, 2003

ORDER ON BELLSOUTH'S SECOND EMERGENCY MOTION TO COMPEL

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.

By Order No. PSC-03-0084-PCO-TL, issued January 10, 2003, BellSouth's Motion to Compel was granted in part and denied in part and FCCA's Motion for Protective Order was denied. On January 17, 2003, FCCA filed its Motion for Reconsideration of Order No. PSC-03-0084-PCO-TL. On January 22, 2003, BellSouth filed its Response in Opposition to FCCA's motion.

On January 17, 2003, BellSouth filed its Second Emergency Motion to Compel against FCCA. On January 24, 2003, FCCA filed its Response to BellSouth's Second Motion to Compel. By Order No. PSC-03-0129-PCO-TL, issued January 23, 2003, the hearing scheduled for January 30, 2003, was continued.

BellSouth's Motion

In its Motion, BellSouth states that it served its Third Set of Interrogatories on FCCA on December 26, 2002. BellSouth asserts

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that these interrogatories sought answers to specific questions directly related to FCCA's rebuttal testimony. BellSouth contends that FCCA responded to most of the interrogatories on January 15, 2003; however, certain of the responses were evasive and failed to fully address the questions asked. BellSouth further contends that FCCA objected to two of the interrogatories, in part, on the basis that the discovery seeks information from member companies. BellSouth asserts that this objection is without merit in light of Order No. PSC-03-0084-PCO-TL, issued January 10, 2003.

BellSouth cites to Rule 1.380(3) of the Florida Rules of Civil Procedure for the proposition that under Florida law "an evasive or incomplete answer shall be treated as a failure to answer." BellSouth states that the parties are required to disclose information in their possession at the time the responses are provided and must indicate the underlying facts, citing to Shearson Lehman Hutton, Inc. v. Lambros, 135 F.R.D. 195, 198-199 (U.S. Dist. M.D. Fla. 1990). Further, BellSouth asserts that pursuant to Rule 1.280(4) of the Florida Rules of Civil Procedure parties are permitted to discover facts known and opinions held by expert witnesses, including the substance of the facts and opinions to which the expert is expected to testify. BellSouth contends that FCCA's responses to its interrogatories fail to comply with the requirement of Florida law. BellSouth ask that FCCA be ordered to provide complete responses. The interrogatories in dispute are Interrogatories Nos. 43, 44, 51, 52, 58, 62, 66, and 67. BellSouth then goes on to address each interrogatory individually.

#### FCCA's Response

In its Response, FCCA states that it filed objections to BellSouth's Third Set of Interrogatories on January 6, 2003, and its Responses on January 15, 2003. FCCA notes that on January 21, 2003, it provided supplemental responses to BellSouth's Interrogatories Nos. 58 and 62. Thus, FCCA states that those portions of BellSouth's Second Motion to Compel relating to Interrogatories Nos. 58 and 62 are moot and not addressed in its Response. FCCA then addresses each interrogatory individually.

DECISION

After reviewing the parties' motions and responses, as well as the interrogatories in question, 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), Florida Rules of Civil Procedure, 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.

Further, Rule 1.280(4) of the Florida Rules of Civil Procedure permits a party to obtain by interrogatory, of an expert witness who is expected to be called at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. Further, Rule 1.280(4) of the Florida Rules of Civil Procedure provides that a party may obtain the expert's general litigation experience. Further, under Rule 1.380 of the Florida Rules of Civil Procedures, an evasive or incomplete answer shall be treated as a failure to answer; as such, the discovering party may move for an order compelling an answer.

Interrogatory No. 43

1. Arguments

BellSouth contends that FCCA's answer was unresponsive to the request. BellSouth asserts that Interrogatory No. 43 asked whether Mr. Bradbury claimed to be qualified to give an expert opinion on economic matters. BellSouth argues that FCCA's response does not state that Mr. Bradbury claims to be an expert on anything. BellSouth argues it is entitled to know if Mr. Bradbury is claiming to testify as an expert on what is "economically sound."

FCCA responds that its answer is responsive. FCCA notes that in its answer it explains that Mr. Bradbury is qualified to opine on the matters discussed in his testimony and that it did not claim

that he is an expert qualified to testify on "any and all" economic matters.

## 2. Ruling

In reviewing BellSouth's Interrogatory and FCCA's Response, I find that FCCA's Response was not evasive or incomplete. Therefore, I deny BellSouth's request that FCCA provide a more complete response to this Interrogatory.

### Interrogatory No. 44

#### 1. Arguments

BellSouth contends that FCCA's response to Interrogatory No. 44 is completely non-responsive to a fairly clear question. BellSouth claims that to the extent that Mr. Bradbury answers in the affirmative to Interrogatory No. 43, and if he claims to be able to provide expert testimony on economic matters, BellSouth is entitled to know where Mr. Bradbury has been qualified as a witness who could give expert testimony on economic matters by a commission or a court.

FCCA asserts that its answer to this Interrogatory is responsive. FCCA contends that its answer directs BellSouth to Mr. Bradbury's testimony which summarizes his educational and professional background supporting his ability to express his opinions in the context of this case.

#### 2. Ruling

In reviewing BellSouth's Interrogatory and FCCA's Response, it is appropriate that FCCA supplement its response to BellSouth. Specifically, FCCA shall identify every proceeding in which Mr. Bradbury has been qualified to testify as an expert witness on economic matters or to which he has been qualified as an expert and has testified on economic matters. The response shall identify, related to each proceeding, whether Mr. Bradbury was specifically qualified as an expert in economic matters.

Interrogatory No. 51

1. Arguments

BellSouth contends that FCCA's answer to the interrogatory is non-responsive because the interrogatory does not relate to the language in FCCA's complaint or to the wording of the issues in this proceeding. BellSouth asserts that the language of the question goes directly to Mr. Bradbury's rebuttal testimony and certain claims he makes in that testimony. Specifically, BellSouth argues that Mr. Bradbury's testimony raises the specter that Mr. Bradbury is in a position to opine on the accuracy of Mr. Milner's testimony. BellSouth asserts that as such BellSouth is entitled to know the facts upon which Mr. Bradbury bases any conclusion that he knows more about this subject than Mr. Milner.

FCCA asserts that BellSouth apparently would like the FCCA to answer a question that is different than the one it asked. FCCA contends that BellSouth's question asks about making FastAccess available to an ALEC, whereas FCCA's answer accurately reflects that to its knowledge FastAccess is being offered to BellSouth's end user. FCCA argues that this case is not about BellSouth offering its FastAccess to ALECs; as such Mr. Bradbury's testimony discusses BellSouth's ability to provide FastAccess service to existing and potential retail customers. Further, FCCA states that the interrogatory is argumentative. FCCA contends that it is not required to accept the premise of BellSouth's question and has appropriately pointed out in other responses the range and depth of Mr. Bradbury's experience in the OSS area.

2. Ruling

In reviewing BellSouth's Interrogatory and FCCA's Response, I find that FCCA's Response was not evasive or incomplete. Therefore, I deny BellSouth's request that FCCA provide a more complete response to this Interrogatory.

Interrogatory No. 52

1. Argument

BellSouth argues that FCCA's answer was absolutely non-responsive. BellSouth states that the question was very simple: Does the FCCA maintain that end users generally know their circuit number? BellSouth contends that the answer to the question is either a "yes" or "no." BellSouth argues that if the answer to the question was "no," BellSouth then asked how Mr. Bradbury thought, where a subscriber had a FastAccess issue, and BellSouth did not have the telephone number for the subscriber in its data base, that BellSouth could use the circuit ID associated with the line the subscriber used.

FCCA contends that its answer was responsive because BellSouth asks FCCA to accept an assumption that is simply incorrect. FCCA states that the way that a customer may access assistance regarding FastAccess are delineated in its prior answers to the interrogatory's other subparts.

2. Ruling

In reviewing BellSouth's Interrogatory and FCCA's Response, it is appropriate that FCCA supplement its response. Specifically, FCCA shall provide a response to subpart vi of Interrogatory No. 52 in which BellSouth asks: Is it FCCA's position that end user subscribers generally know their circuit numbers? If the answer is negative, how does Mr. Bradbury propose that BellSouth use Customer A's circuit number to address Customer A's FastAccess service problem.

Interrogatory 58

1. Argument

BellSouth contends that this interrogatory asked for how many BellSouth FastAccess customers in fact moved to MCI's local service. BellSouth asserts that FCCA did not answer the question asked because FCCA answered that of 5,938 rejects only 260 had moved to MCI. BellSouth contends that the question required a broader answer, not just limited to the "rejects."

FCCA noted in a footnote that on January 21, 2003, it provided a supplemental response to this interrogatory. Therefore, BellSouth's request is moot.

## 2. Ruling

To the extent that FCCA's supplement response addresses the question more broadly, BellSouth's request for FCCA to provide a more complete response is moot.

### Interrogatory No. 62

BellSouth contends that the interrogatory should have been answered more directly. BellSouth argues that the interrogatory simply asked Ms. Lichtenberg to directly answer what seems to be a rather obvious point, yet the answer completely evades this simple question by providing statements more appropriate for a post-hearing brief. BellSouth contends that FCCA should be required to give a simple and clear "yes" or "no" response before providing a further explanation.

FCCA noted in a footnote that on January 21, 2003, it provided a supplemental response to this interrogatory. Therefore, BellSouth's request is moot.

## 2. Ruling

In reviewing BellSouth's Interrogatory and FCCA's Response, I find that it does not necessarily call for a simple "yes" or "no" response. To the extent FCCA has already provided a supplemental response, BellSouth's request is moot.

### Interrogatory No. 66

#### 1. Argument

BellSouth contends that the reason FCCA objected to this interrogatory was because the information sought was from members of the FCCA, who are not individually parties to this proceeding. BellSouth argues that consistent with the ruling made in Order No. PSC-03-0084-PCO-TL which overruled such objections, FCCA should be compelled to respond.

FCCA argues that it objected to this interrogatory because it is irrelevant to this proceeding since the complaint involves BellSouth's conduct and not the ALECs' conduct. Further, FCCA contends that it has sought reconsideration of Order No. PSC-03-0084-PCO-TL and incorporated by reference all of the arguments made in its Motion for Reconsideration.

## 2. Ruling

I find the discovery relevant. Further, as noted in the previous Order No. PSC-03-0084-PCO-TL,

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.

Id. at p.6. See, Order No. PSC-92-0112-TL, issued March 27, 1992, in Docket No. 910980-TL (FCTA Order). 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)<sup>1</sup>.

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<sup>1</sup>The 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



Interrogatory No. 67

1. Argument

BellSouth contends that the reason FCCA objected to this interrogatory is similar to its objection to Interrogatory 66, in that, the information sought is from a member of the FCCA, who is not an individual party to this proceeding. BellSouth again argues that consistent with the ruling made in Order No. PSC-03-0084-PCO-TL which overruled such objections, FCCA should be compelled to respond.

FCCA argues that BellSouth's motion to compel does not address its objection that the information sought is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. FCCA contends that there is no connection between the passage of testimony referred to in the beginning of the interrogatory and the question posed later in the interrogatory. Further, FCCA argues that the subject of the interrogatory - discount service offerings by AT&T - is not the subject of the complaint or one of the issues in the case. FCCA contends that it is not relevant. FCCA also argues that in its motion, BellSouth seeks to broaden the scope of the original question by applying the question to all FCCA members when the original question only referred to AT&T. FCCA again contends that it has sought reconsideration of Order No. PSC-03-0084-PCO-TL and incorporated by reference all of the arguments made in its Motion for Reconsideration.

2. Ruling

It appears that the testimony referred to in the question has no apparent relation to the remainder of the question. However, the question appears to be relevant to the extent BellSouth may inquire of a specific FCCA member the facts and circumstances under which it would continue to offer a specialized discount (i.e., for a bundled offering). For the reasons stated above regarding the

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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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ruling on Interrogatory No. 66, I find it appropriate to require FCCA to respond to the discovery request seeking information regarding an individual member's practices. As noted above, associational standing requires that the individual member need not be involved in prosecuting the claim. If, however, BellSouth could be kept from obtaining legitimate discovery under FCCA's theory that an association's member is not a party, then discovery which is an integral part of asserting any claim would be nullified.

FCCA is directed to respond to the interrogatories for which the Second Motion to Compel has been granted within 10 days of the date of this Order. The responses shall be provided to BellSouth with a 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

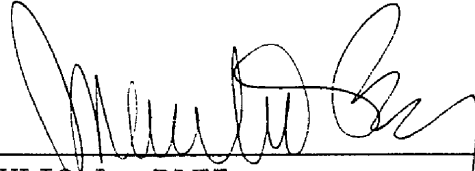
ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that BellSouth Telecommunications, Inc.'s Second Motion to Compel is granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that the Florida Competitive Carriers Association 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.

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By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 6th Day of February, 2003.



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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

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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.