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November 10, 1997

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-96-1569-FOF-TP

Dear Ms. Bayó:

Enclosed are the original and 15 copies of the Joint Motion to Dismiss of Florida Competitive Carriers Association, MCI Telecommunications Corporation, and AT&T Communications of the Southern States to be filed in the above docket.

I have enclosed an extra copy of the above documents 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

ACK _____
AFA _____
APP _____
CAF _____
CMJ _____
CTR _____
EAG _____
LET 1 JAM/jg
LIN 5 Enclosures
OFC _____
RCH _____
SEC 1
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DOCUMENT NUMBER-DATE

11551 NOV 10 97

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Bell South)	Docket No. 971399-TP
Telecommunications, Inc. to Lift)	
Marketing Restrictions Imposed)	
By Order No. PSC-96-1569-FOF-TP)	Filed November 10, 1997

JOINT MOTION TO DISMISS

Pursuant to 25-22.033, Florida Administrative Code, the Florida Competitive Carriers Association ("FCCA"), MCI Telecommunications Corporation ("MCI"), and AT&T Communications of the Southern States ("AT&T"), through their undersigned attorneys, move for an order dismissing the Petition of BellSouth Telecommunications, Inc. ("BellSouth"), filed on October 21, 1997, and in support state:

1. On May 24, 1996, FCCA (then the Florida Interexchange Carriers Association, or "FIXCA"), AT&T, and MCI, hereafter "Joint Complainants", filed a complaint against BellSouth in which they alleged that BellSouth was unfairly and anticompetitively exploiting its roles as dominant provider of local exchange service and gateway to long distance services to lever its competitive position in the intraLATA market. Among other things, Joint Complainants asserted that business office practices developed by BellSouth called for BellSouth's customer representatives to actively resist executing the instructions of BellSouth customers who, having already been won away by BellSouth's competitors, call BellSouth for the explicit purpose of changing their intraLATA carrier. In addition, Joint Complainants asserted that BellSouth should be prohibited from marketing its intraLATA service to customers who contact BellSouth in its capacity of provider of their local exchange service.

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FPSC-RECORDS/REPORTING

2. The Commission conducted an evidentiary hearing on the Joint Complaint on October 17, 1996. After hearing the evidence, the Commission issued Order No. PSC-96-1569-FOF-TP on December 23, 1996. In Order No. PSC-96-1569-FOF-TP, the Commission stated, inter alia:

Upon consideration, we believe that as long as BellSouth remains the gateway for customer contact, there is an opportunity for BellSouth to misuse that position. BellSouth could gain a competitive advantage by initiating marketing efforts to retain a customer when a customer calls to change intraLATA providers to a carrier other than BellSouth. Although BellSouth indicated that it only initiates such marketing efforts to retain small business customers, we agree with the Complainants' contention that no mechanism exists to prevent BellSouth from also applying this marketing practice to its residential customers. We conclude that if BellSouth exploits its role as the gateway for customer contact, this would stifle the development of competition in the intraLATA toll market. Therefore, BellSouth shall not be allowed to initiate marketing efforts designed to dissuade customers, business or residential, from changing their intraLATA carrier from BellSouth to another carrier for a period of 18 months. Eighteen months should be ample time for the major interexchange companies (IXCs) to establish themselves in the intraLATA market. In addition, this 18 month period is enough time to increase customers' awareness of the available intraLATA carriers.

...

Based on the above, we find that as the incumbent LEC, BellSouth has a unique position with respect to customer contacts and customer information, which could give it an advantage over its competitors in the intraLATA market. BellSouth could use routine unrelated customer contacts to market its intraLATA service. BellSouth is also privy to customer information, such as billing history and PIC changes, that its competitors are not. BellSouth could use this information as a marketing tool to persuade customers to select BellSouth as their intraLATA service provider. Therefore, we find that when existing customers contact

BellSouth for reasons unrelated to intraLATA toll service, BellSouth shall not use those opportunities to market its intraLATA toll service, unless the customer introduces the subject.

BellSouth may market its intraLATA toll services if a customer inquires about its service. For 18 months from the date of the issuance of this Order, however, BellSouth shall refrain from initiating communication with existing customers about its intraLATA services when existing customers contact BellSouth for reasons unrelated to intraLATA toll service. We believe that BellSouth's competitors can establish a competitive presence in the intraLATA market in 18 months. 18 months is also enough time to increase customers' awareness of the available intraLATA carriers. Upon the expiration of this period, BellSouth shall be allowed to market its services in the same manner as its competitors.

3. Following the issuance of Order No. PSC-96-1569-FOF-TP, BellSouth filed a Motion for Reconsideration on January 7, 1997. In Order No. PSC-97-0518-FOF-TP issued on May 6, 1997,, the Commission denied the motion. No party appealed these orders, and they became final. Thus, the Commission established June 23, 1998 as the expiration date of the restrictions.

In Peoples Gas System, Inc. v. Mason, 187 So. 2d 335 (Fla. 1966), the Florida Supreme Court articulated the doctrine of "administrative finality." 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. In its petition, BellSouth has not demonstrated any legal or factual basis sufficient to disturb the final order in which the Commission adjudicated the Joint Complainants' allegations in Docket No. 960330-TP. BellSouth's petition is

tantamount to an unauthorized, impermissible second motion for reconsideration of the decision regarding the duration of marketing restrictions..

4. BellSouth's selective use of recent data does not alter this conclusion. Even if BellSouth were to demonstrate in a new hearing that some customers are choosing carriers other than BellSouth to handle intraLATA traffic, that fact would do no more than confirm that the market is responding as the Commission anticipated it would when the Commission concluded that 1 + intraLATA competition is in the public interest. Even if accurate, data concerning the percentage of customers who very recently chose carriers other than BellSouth give no indication of the carriers' respective overall market shares. Further, it was BellSouth's dominance of the local exchange market that formed the basis for the Joint Complaint and for the findings and conclusions of Order No. PSC-96-1569-FOF-TP. BellSouth does not even allude to its share of the local exchange market before and after the entry of Order No. PSC-96-1569-FOF-TP. In short, BellSouth has failed to demonstrate any basis for disturbing Order No. PSC-96-1569-FOF-TP*. Its petition should be summarily dismissed.

* In Docket No. 930330-TP, Joint Complainants' witness testified that the restrictions on BellSouth should be maintained for five years or longer. Joint Complainants did not seek reconsideration of or appeal the Commission's decision to impose them for only 18 months. However, if the Commission processes BellSouth's petition, it would have to conduct a de novo review of the issues. In other words, the issues would not be limited to BellSouth's contention that restrictions should be lifted now. If BellSouth is allowed to make that argument, then Joint Complainants would be free to demonstrate that the 18 month restrictions are inadequate.

WHEREFORE, FCCA, MCI and AT&T move for an order dismissing the petition of BellSouth, filed in this docket on October 21, 1997.



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Attorney for AT&T Communications of
the Southern States, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Joint Motion to Dismiss** has been furnished by United States mail or hand delivery(*) this **10th** day of **November, 1997**, to the following:

Martha Carter Brown*
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Florida Public Service Commission
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