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July 2, 2002

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 020507-TL (FCCA Complaint)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response to the Complaint of Florida Competitive Carriers Association, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Patrick W. Turner

Patrick W. Turner
(2t)

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

CERTIFICATE OF SERVICE
DOCKET NO. 020507-TL

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Hand Delivery (*), Federal Express and Electronic Mail this 2nd day of July, 2002 to the following:

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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-TL
	)	Filed: July 2, 2002

BELLSOUTH TELECOMMUNICATIONS, INC.' MOTION TO DISMISS COMPLAINT OF THE FLORIDA COMPETITIVE CARRIERS ASSOCITION INC. AND OPPOSITION TO REQUEST FOR EXPEDITION RELIEF

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits its Motion to Dismiss the Complaint and Request for Expedited Relief ("Complaint") filed by the Florida Competitive Carriers Association ("the Association") on the grounds that: (1) the Florida Public Service Commission ("the Commission") lacks subject matter jurisdiction over the matters alleged in the Complaint; and (2) the Complaint fails to state a claim for which the Commission may grant relief.

In its Complaint, the Association asks the Commission to order BellSouth "to cease and desist from its practice of refusing to provide its FastAccess service to customers who select another provider for voice service . . . ." *Id.* at p.10, ¶24(b). The Commission, however, has no authority to enter such an Order because BellSouth's retail FastAccess service is an "enhanced, nonregulated, nontelecommunications Internet access service" over which this Commission has no jurisdiction. The Commission, therefore, must dismiss the Association's Complaint.

I. INTRODUCTION

BellSouth sells both a federally-regulated wholesale DSL transport service and a non-regulated retail DSL-based Internet access service, known as FastAccess.

BellSouth offers the tariffed wholesale DSL transport service through BellSouth's Special Access F.C.C. Tariff No. 1. This tariffed DSL service is designed for use by Internet service providers ("ISPs"), such as AOL, EarthLink, MSN and BellSouth's own ISP operations as a component of their Internet access services. During the FDN arbitration proceedings (to which the Complaint makes repeated reference), this federally-tariffed wholesale DSL service was analogized to the pipe through which Internet and other enhanced services can flow.

BellSouth's retail FastAccess service uses the regulated DSL transport service as an input. FastAccess is an "enhanced, nonregulated, nontelecommunications Internet access service." *See* Final Order on Arbitration, *In Re: 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*, Docket No. 010098-TP, at p. 8. (June 5, 2002) ("the FDN Arbitration Order") (citing *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations*, (Computer II Final Decision), 77 FCC 2d 384 (1980)).[1]

In support of its request for relief, the Association alleges that BellSouth "refuses to provide FastAccess service to customers who choose a voice provider other than BellSouth." *See* Complaint at 10, ¶22.[2] The Association also alleges various legal

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[1] This Order is the subject of pending requests for reconsideration and/or clarification that have been filed by both Florida Digital Network, Inc. and BellSouth.

[2] In deciding BellSouth's Motion to Dismiss, the Commission must assume all *facts* alleged in the Complaint to be true. *See Brandon v. County of Pinellas*, 141 So.2d 278, (Fla. 2nd Dist. Ct. App. 1962). For the sole purpose of this Motion to Dismiss, BellSouth will treat this allegation as though it were true. BellSouth, of course, reserves the right to challenge the truth of this allegation if this Motion is denied. As the

conclusions in its Complaint, including that the Commission has subject matter jurisdiction over the matters alleged in the Complaint, *see, e.g., Complaint* at 3, ¶1, and that BellSouth's alleged practices are discriminatory, harmful to consumers, and anticompetitive. *See, e.g., Id.* at 10, ¶23. In deciding BellSouth's Motion to Dismiss, the Commission is *not* required to assume that these legal conclusions are true. *See Brandon*, 141 So.2d at 279 (on a motion to dismiss, "[m]ere statements of opinions or conclusions unsupported by specific facts will not suffice" and the "conclusion of the pleader as to the meaning of the contracts attached to the complaint as an exhibit is not binding on the court."). *See also First Ins. Funding Corp. v. Federal Ins. Co.*, 284 F.3d 799, 804 (7th Cir. 2002)(in reviewing a district court's grant of a motion to dismiss, the appellate court "need not accept as true conclusory statements of law or unsupported conclusions of fact."); *Blakely v. Untied States*, 276 F.3d 853, 863 (6th Cir. 2002)(in reviewing a district court's dismissal of an action for failure to state a claim, the appellate court "need not accept as true legal conclusions or unwarranted factual inferences.").

Commission is aware from the FDN Arbitration proceeding, BellSouth will provide both its federally-tariffed wholesale DSL service and its retail FastAccess service over a resold line that a CLEC uses to provide voice service to an end user. BellSouth will do this because it is operationally feasible to do so. (Thus, for example, if a CLEC wanted to serve an end-user small business customer with five lines, the CLEC could provide four of those lines by way of a UNE arrangement and one of those lines by way of a resale arrangement. In that case, BellSouth is willing and able to provide its FastAccess service to the end user over the resold line.) It is not accurate, therefore, for the Association to suggest that BellSouth will not provide FastAccess service to any end user that is receiving voice service from a provider other than BellSouth. BellSouth acknowledges that BellSouth does not provide either its wholesale DSL service or its FastAccess service over the same loop that an entity other than BellSouth is using to providing voice service to an end user. While the Association alleges that BellSouth has no technical, legal or other justification for its practice, if the Commission does not grant this Motion to Dismiss, BellSouth will prove that such justification does, in fact, exist.

Instead, the Commission must independently review the state statutes that set forth the limits of its jurisdiction in order to determine whether it has the authority to impose restrictions on the manner in which BellSouth offers a non-telecommunications service like its retail FastAccess service. As explained below, the Commission has no such authority.

III. ARGUMENT

In order to hear and determine a complaint or petition, a court or agency must be vested not only with jurisdiction over the parties, but also with subject matter jurisdiction to grant the relief requested by the parties. *See Keena v. Keena*, 245 So. 2d 665, 666 (Fla. Dist. Ct. App. 1971). Subject matter jurisdiction arises only by virtue of law – it must be conferred by constitution or statute and cannot be created by waiver or acquiescence. *Jesse v. State*, 711 So. 2d 1179, 1180 (Fla. 2nd Dist. Ct. App. 1998). This Commission, therefore, must dismiss a complaint or a petition to the extent that it asks the Commission to address matters over which it has no jurisdiction or to the extent that it seeks relief that the Commission is not authorized to grant. *See, e.g.,* Order Granting Motion to Dismiss (PSC-01-2178-FOF-TP) in Docket No. 010345-TP (Nov. 6, 2001) (granting BellSouth's Motion to Dismiss AT&T's and FCCA's Petition for Structural Separation because "the Petitions fail to state a cause of action upon which relief can be granted. Namely, we have neither Federal nor State authority to grant the relief requested, full structural separation."); Order Denying Complaint and Dismissing Petition (PSC-99-1054-FOF-EI) in Docket No. 981923-EI (May 24, 1999) (dismissing a complaint seeking monetary damages against a public utility for alleged eavesdropping, voyeurism, and damage to property because the complaint involved "a claim for

monetary damages, an assertion of tortuous liability or of criminal activity, any and all of which are outside this Commission's jurisdiction.").

The Commission, therefore, must determine whether the Legislature has granted it any authority to impose restrictions on the manner in which BellSouth offers a service that is not a telecommunications service. In making that determination, the Commission must keep in mind that the Legislature has never conferred upon the Commission any general authority to regulate public utilities, including telephone companies. *See City of Cape Coral v. GAC Util., Inc.*, 281 So. 2d 493, 496 (Fla. 1973). Instead, "[t]he Commission has only those powers granted by statute expressly or by necessary implication." *See Deltona Corp. v. Mayo*, 342 So. 2d 510, 512 n.4 (Fla. 1977); *accord East Central Regional Wastewater Facilities Oper. Bd. v. City of West Palm Beach*, 659 So.2d 402, 404 (Fla. 4th Dist. Ct. App. 1995) (noting that an agency has "only such power as expressly or by necessary implication is granted by legislative enactment" and that "as a creature of statue," an agency "has no common law jurisdiction or inherent power . . . ."). Moreover, any authority granted by necessary implication must be derived from fair implication and intendment incident to any express authority. *See Atlantic Coast Line R.R. Co. v. State*, 74 So. 595, 601 (Fla. 1917); *State v. Louisville & N. R. Co.*, 49 So. 39 (Fla. 1909). Finally, "any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it." *State v. Mayo*, 354 So. 2d 359, 361 (Fla. 1977).

The Association asks the Commission to impose restrictions on the manner in which BellSouth offers its retail FastAccess services to end users in the State of Florida, and it cites several statutes that it claims grant the Commission jurisdiction to impose

such restrictions. None of the statutes cited by the Association, however, expressly grants the Commission any jurisdiction over an enhanced, nonregulated, nontelecommunications service like BellSouth's FastAccess service. The Association, therefore, must show that one or more the statutes it cites grants the Commission jurisdiction over such a service by necessary implication. As explained below, the Association cannot make that showing.

A. The Commission Does Not Have Jurisdiction Over All of BellSouth's Operations – Instead, the Commission Only has Jurisdiction Over BellSouth's Provision of Services that are Regulated Under Florida Law.

For more than a century, courts in this country have recognized that the common law and statutory obligations of a public utility apply only to the extent that it is providing a regulated public service. Those obligations simply do not apply to the extent that a public utility engages in other, unregulated business. More than 125 years ago, for instance, the New York Court of Appeals stated that:

> The carrier . . . may carry on, in connection with his business of carrier, any other business, and may use his property in any way he may choose to promote his interests, not inconsistent with the duty he owes to passengers. The vessel or vehicle which he uses is his own, and except to the extent to which he has devoted it to public use, by the business in which he has engaged, he may manage and control it for his own profit and advantage, to the exclusion of all other persons.
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> * * *
>
> The passenger has the right to be carried and to enjoy equal privileges with others, or at least to be exempt from unjust or offensive discrimination in favor of other passengers. But he has no right to demand that in matters not falling within the contract of carriage, the carrier shall surrender in any respect, rights incident to his ownership of his property.

Barney v. Oyster Bay and Huntington Steamboat Co., 67 N.Y. 301, 302-03 (Ct. App. N.Y. 1876). *Accord Norfolk &Western Ry. Co. v. Old Dominion Baggage Co.*, 37 S.E.

784 (Va. 1901) (relying on various decisions by the common law courts of England, the Court rejected discrimination challenges to a railroad's decision to grant a single company the right to enter the railroad's station to solicit incoming baggage).

Florida decisions embrace these same principles, recognizing that "there is a distinction between the performance of public duties subject to regulation, and the exercise of purely private rights in the management and control of [a telephone company's] property." *Twin Cities Cable Co. v. Southeastern Tel. Co.*, 200 So.2d 857, 857 (Fla. 1st Dist. Ct. App. 1967). Accordingly, in *Twin Cities Cable,* the Court ruled that Florida statutes grant the Commission no authority to require telephone companies to enter into pole attachment agreements with cable television companies. *Id.* More than a decade later, Congress granted the FCC the authority to regulate pole attachment agreements except where such matters are regulated by the state. *See Teleprompter Corp. v. Hawkins*, 384 So.2d 648, 649 (Fla. 1980). In response to this impending federal regulation, the Florida Commission entered an order "declaring that is has the authority to regulate pole attachment agreements." *Id.* The Supreme Court of Florida quashed the Commission's order, noting that:

> No reason was given for asserting jurisdiction other than to preempt the FCC from regulating pole attachment agreements. Although we share the concern about federal intervention in an area the state may be better equipped to handle, such concern is not enough to extend the Public Service Commission's jurisdiction. Only the legislature can do that.

Id. at 650. A decade later, the Florida courts reaffirmed that the Commission does not have jurisdiction over all of the operations of a telecommunications company, but instead, the Commission's jurisdiction extends only to those operations over which the legislature clearly has granted it authority. *See Southworth & McGill, P.A., v. Southern*

Bell Tel. & Tel. Co., 580 So.2d 628, 631 n.5 (Fla. 1st Dist. Ct. App. 1991)("There are no laws or rules with respect to the yellow page advertising directory with [the] exception of provisions with respect to allocation of gross profits from advertising in connection with establishing rates. It has been held that directory advertising is not within the scope of the telephone company's function as a regulated industry in Florida.").

B. No Statute Expressly or Impliedly Grants the Commission any Jurisdiction over Services (Like BellSouth's Retail FastAccess Service) that are not Telecommunications Services.

Despite the Association's allegations to the contrary, neither the general provisions of Section 364.01 nor the more specific provisions of any of the other statutes referenced in the Association's Complaint grant the Commission any jurisdiction over BellSouth's FastAccess service. The Commission, therefore, has no authority to impose restrictions on the manner in which BellSouth offers a non-telecommunications service like its retail FastAccess service.

1. Section 364.01 does not grant the Commission jurisdiction to impose restrictions on the manner in which BellSouth offers its retail FastAccess service.

The Association alleges that Section 364.01 generally "gives the Commission authority to regulate telecommunications companies . . . ." *See* Complaint at p.3, ¶1. It then cites various provisions of subsection 364.01(4) that purportedly grant the Commission jurisdiction to impose restrictions on the manner in which BellSouth offers its retail FastAccess service. *See Complaint* at 3, (¶¶1-2); at 5 (¶9). The Association's reliance on Section 364.01(4) is misplaced.

Section 364.01 begins with the overarching limitation that the Commission "shall exercise over and in relation to telecommunications companies *the powers conferred by*

this Chapter." Florida Statutes §364.01(1)(empnasis added). The Section then provides that "[i]t is the legislative intent to give exclusive jurisdiction in all matters *set forth in this chapter* to the [Commission] in regulating telecommunications companies . . . ." *Id.* §364.01(2)(emphasis added). Subsection (4) goes on to provide that "[t]he Commission shall exercise its *exclusive jurisdiction* [in all matters *set forth in this Chapter*] to" accomplish various objectives.

It is clear, therefore, that Section 364.01(4) does not expand the Commission's jurisdiction. Instead, it gives the Commission guidance as to how to exercise the jurisdiction that the Legislature already has granted the Commission, and the Supreme Court of Florida has held that the Legislature has granted the Commission the "exclusive jurisdiction to regulate *telecommunications.*" *See Florida Interexchange Carriers Ass'n v. Beard*, 624 So.2d 248, 251 (Fla. 1993)(emphasis added). The fact that Chapter 364 grants the Commission jurisdiction over only telecommunications services is clear not only from the text of the various statutes discussed in this Motion, but also from the statutory definitions set forth in Section 364.02. The Legislature, for instance, has defined "telecommunications company" in terms of an entity that offers two-way "telecommunications service" to the public for hire, *see* §364.02(12), and it has defined both ALECs and LECs in terms of companies that provides "local exchange telecommunications service." *Id.* at §364.02(1),(6). Similarly, both the terms "monopoly service" and "nonbasic service" apply only to "telecommunications service." *Id.* at §364.02(7),(8). The Commission, therefore, only has jurisdiction over the telecommunications services that are offered by a telecommunications company. It does not have jurisdiction over any other activities of a telecommunications company.

Accordingly, Section 364.01(4) provides that the Commission "shall exercise its exclusive jurisdiction [*over telecommunications services*]" in order to:

> ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services," *see* §364.01(4)(b); *Complaint* at 5, ¶9;
>
> "[p]romote competition by encouraging new entrants into telecommunications markets . . ." *see* §364.01(4)(d); *Complaint* at p. 5, ¶9.
>
> "ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior . . . ." *see* §364.01(4)(g); *Complaint* at p. 3, ¶1; p. 5, ¶9;

Nothing in this section grants the Commission any authority to address the manner in which any entity offers a service that is not a telecommunications service – even if the Commission believes that doing so would expand the range of consumer choice in the provision of telecommunications service, encourage new entrants into telecommunications markets, affect the manner in which providers of telecommunications services are treated, or otherwise promote what the Commission may perceive to be admirable goals. As the Florida courts have noted, "[a]n administrative rule cannot be contrary to or enlarge a provision of a statute, no matter how admirable the goal may be." *Capeletti Brothers, Inc. v. Department of Transportation*, 499 So.2d 855, 857 (Fla. 1st Dist. Ct. App.), *review denied* 509 So.2d 1117 (Fla. 1987). *Cf. Deltona Corp. v. Mayo*, 342 So.2d 510, 512 n.4 (Fla. 1977)("Sections 367.081(2) and 367.121 . . . set forth the powers of the Commission in setting water and sewer rates. These provisions do not empower the Commission to set rates so as to right any wrong which it perceives regardless of its relationship two water and sewer services.").

As the Commission has noted, BellSouth's retail FastAccess service is not a telecommunications service. Instead, it is an "enhanced, nonregulated, nontelecommunications Internet access service." *See* FDN Arbitration Order at 8. Section 364.01(4), therefore, grants the Commission no more jurisdiction to impose restrictions on the manner in which BellSouth offers its retail FastAccess service than it grants the Commission to impose restrictions on the manner in which any entity offers cable television service, lawn care service, or any other service that is not a telecommunications service.[3]

2. Section 364.051(5) does not grant the Commission jurisdiction to impose restrictions on the manner in which BellSouth offers its retail FastAccess services

The Association relies on Section 364.051(5)(b), which provides, in part, that "[t]he Commission shall have continuing regulatory oversight of nonbasic services for the purposes of . . . ensuring that all providers are treated fairly in the telecommunications market." *See* Complaint at p.5, ¶10. By its own terms, this statue only grants the Commission jurisdiction over "nonbasic services," and the term "nonbasic service" is defined as "a *telecommunications service* . . . ." *See* §364.02(8). Accordingly, this statute grants the Commission no jurisdiction over BellSouth's retail

[3] The Association also notes that Section 364.01(3) provides, in part, that "[t]he Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure." *Complaint* at 5, ¶8. Based on this provision, the Association alleges that "State law requires the Commission to encourage the development of a competitive market for local telecommunications services." *Id.* Even to the extent that this assertion is correct, the fact remains that nothing in this or any other statute allows the Commission to regulate non-telecommunications services in the name of encouraging the development of local telecommunications.

FastAccess service, which the Commission has recognized is not a telecommunications service.

The Association also relies on Section 364.051(5)(a)2. *See* Complaint at p. 5, ¶9.[4] This statute allows a price-regulated company to deaverage prices, package nonbasic services together with basic services, use volume discounts and term discounts, and offer individual contracts in order to meet the offerings by any competitive provider of similar telecommunications services. The statute then provides that in doing so, the price-regulated company "shall not engage in any anticompetitive act or practice, or unreasonably discriminate among similarly situated customers." *See* §364.051(5)(a)(2). Clearly, this statute does not grant the Commission jurisdiction to hear any and every allegation of anticompetitive acts or practices. After all, Section 364.01(3) plainly states that "nothing in this chapter shall limit the availability to any party of any remedy under state or federal antitrust laws." Instead, this statute allows the Commission to hear allegations of anticompetitive acts or practices with regard to a price-regulated company's telecommunications offerings that are designed to meet offerings of its competitors. It does not give the Commission jurisdiction to hear allegations of anticompetitive acts or practices with regard to the offering of a non-telecommunications service by any company.

3. Sections 364.10, 364.03, and 364.08 do not grant the Commission jurisdiction to impose restrictions on the manner in which BellSouth offers its retail FastAccess services

The Association relies on Section 364.10(1), which provides that "[a] telecommunications company may not make or give any undue or unreasonable

[4] Footnote 6 on page 5 of the Complaint refers to §364.051(6)(a)(2), but this clearly is a typographical error – no such section exists.

preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." *See* Complaint at p. 6, ¶11. As noted above, however, Chapter 364 only grants the Commission jurisdiction over telecommunications services. Thus, if BellSouth were to offer voice lines only to customers that purchase its retail FastAccess service, that arguably would be a term or condition under which BellSouth offers a telecommunications service, and the Commission arguably would have jurisdiction to determine whether such a term or condition violates Section 364.10(1).

That, however, is not what the Association's Complaint alleges. Instead, the Association's Complaint alleges that BellSouth offers its retail FastAccess service only to customers that purchase voice service from BellSouth. The Association's Complaint, therefore, plainly addresses allegations regarding what arguably is a term or condition under which BellSouth offers a service that is not a telecommunications service. The Commission, therefore, has no authority to determine whether this alleged term or condition violates Section 364.10(1).

This is clear from the holding of *Twin Cities Cable Co. v. Southeastern Tel. Co.*, 200 So.2d 857 (1st Dist. Ct. App. 1967), in which a telephone company refused to enter a pole rental agreement with two cable television operators. The cable television operators alleged that this refusal constituted a violation of Section 364.10[5] because the telephone company had entered similar agreements with similar customers. The Court

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[5] In 1967, Section 364.10 read as follows: "No telegraph company or telephone company shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." *See* Exhibit A. The substance of this language is identical to the substance of the language of Section 364.10(1) as it exists today.

affirmed the dismissal of the complaints, noting that "there is a distinction between the performance of public duties subject to regulation, and the exercise of purely private rights in the management and control of [a telephone company's] property." *Id.* at 857. Recognizing decisions from other states that "telephone companies are not engaged in the business of renting poles" and that "the granting or withholding of permission by the [telephone] company for the antenna company to use its facilities does not involve any question of discrimination," the Court concluded that

> it appears that there is no legal duty of the [telephone company] to furnish this service and, therefore, F.S.A. 364.10 is inapplicable, and the complaint having alleged a set of facts from which it cannot recede and which taken in their entirety as true, do not state a legal liability, the Court was correct in granting the motion to dismiss.

Id. Similarly, BellSouth's decisions regarding its provision of its retail FastAccess service do not involve any question of discrimination, and they fall outside the jurisdiction of the Commission.

For similar reasons, the Association's reliance on Section 364.08(1) is misplaced. *See* Complaint at p.1. To the extent that this section prohibits a telecommunications company from charging rates other than those specified in its tariffs, it is inapplicable because FastAccess is a non-regulated, non-telecommunications service that, quite properly, is not the subject of any Florida tariff. To the extent that this section prohibits a telecommunications company from providing special advantages or privileges, it is similar to the nondiscrimination provisions of Section 364.10. Thus, like Section 364.10, Section 364.08(1) simply does not apply to an unregulated, nontelecommunicaitons service like BellSouth's retail FastAccess service..

The Association's reliance on Section 364.03(1) also is misplaced. *See* Complaint at p.1. BellSouth is a price-regulated company, and the price regulation statutes expressly exempt BellSouth and other price-regulated companies from the requirements of section 364.03. *See* Florida Statutes §364.051(1)(c). Moreover, even if section 364.03(1) applied to BellSouth (and it does not), that section addresses the rates and the rules and regulations that apply to "messages, conversations, services rendered, and equipment and facilities supplied" by telecommunications companies. Both this subsection, as well as subsections (2) and (3) of Section 364.03, repeatedly refer to the "telecommunications facilities" used to provide such messages and services. It is clear, therefore, that this statute applies only to telecommunications services.

4. Section 364.3381 does not grant the Commission jurisdiction to impose restrictions on the manner in which BellSouth offers its retail FastAccess services.

The Association also relies on Section 364.3381, which it claims "gives the Commission continuing oversight jurisdiction over anticompetitive behavior and provides that the Commission may investigate allegations of such behavior upon complaint." *Complaint* at p.6, ¶11. This jurisdiction granted by this statute, however, is not nearly as far-reaching as the Association's Complaint suggests. Subsection (1) addresses the "price of a nonbasic *telecommunications service*," and subsection (2) provides that "a local exchange telecommunications company which offers both basic and nonbasic *telecommunications services* shall establish prices *for such services* that ensure that nonbasic *telecommunications services* are not subsidized by basic *telecommunications services.*" (Emphasis added).

Subsection (2) goes on to establish "the cost standard for determining cross-subsidization." and subsection (3) grants the Commission "continuing oversight jurisdiction . . . cross subsidization, predatory pricing, and other *similar* anticompetitive behavior . . . ." (Emphasis added). The only jurisdiction granted by this statute is the jurisdiction to determine whether the manner in which a company prices its telecommunications services results in cross-subsidization or constitutes predatory pricing or other similar anticompetitive behavior.[6] This statute clearly does not grant the Commission jurisdiction to consider the Association's allegations regarding the terms and conditions under which BellSouth will provide a service that is not a telecommunications service.

C. The Commission has no Jurisdiction over BellSouth's Federally-Tariffed wholesale DSL Service Because Exclusive Jurisdiction Over that Interstate Service Lies with the FCC.

Although the Association's Complaint is unclear in this regard, to the extent that the Association may be asking the Commission to order BellSouth to change the way in which it offers its wholesale DSL service (which is a component of FastAccess service), that request is clearly beyond the Commission's authority because the service is an interstate telecommunications service over which the FCC, and not the Florida Commission, has jurisdiction. In fact, in an Order addressing GTE's DSL-Solutions-ADSL Service, the FCC found that "this offering, which permits Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet, is *an interstate service* and is *properly tariffed at the federal level.*" *See* Memorandum Opinion and Order, *In the Matter of GTE Telephone Operating Cos.*

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[6] Nowhere in the Complaint does the Association allege that the price of any telecommunications service is inappropriate.

GTOC Tariff No. 1, 13 F.C.C. rcd 22,466 at ¶1 (October 30, 1998)(emphasis added). The FCC, therefore, has exclusive jurisdiction over BellSouth's wholesale DSL service.

The provision of BellSouth's wholesale DSL service is governed by BellSouth's Special Access FCC Tariff No. 1. That tariff states that BellSouth's provision of DSL requires the existence of an "in-service, Telephone Company [i.e., BellSouth] provided exchange line facility."[7] F.C.C. Tariff No. 1, Section 7.2.17(A). A UNE loop is not an "in-service [BellSouth] provided exchange line facility." Thus, if BellSouth were to place its tariffed DSL on a UNE loop, BellSouth would be in violation of its federal tariff.[8] The Commission clearly has no jurisdiction to alter that FCC Tariff, and the Commission was careful to note in its FDN Arbitration Order that it is not asserting jurisdiction over DSL. *See* FDN Arbitration Order at 8-9.

Moreover, the FCC recently addressed BellSouth's practice of not providing its federally-tarriffed wholesale DSL service over a UNE loop in its Order addressing BellSouth's Georgia and Louisiana 271 applications. *See* Memorandum Opinion and Order, *In re Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, Docket No. 02-35 (May 15, 2002). Parties to that proceeding raised issues that are similar to those raised in the Association's Complaint, and the FCC addressed those issues accordingly:

> BellSouth states that its policy "not to offer its wholesale DSL service to an ISP or other network services provider [ ] on a line that is provided by a

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[7] BellSouth has substantial operational reasons for this requirement, and BellSouth reserves the right to fully address these operations reasons if this Motion to Dismiss is denied.

[8] BellSouth also has no right to provide its own services over a UNE loop, as the CLEC, not BellSouth, has sole right to use the UNE loop.

> competitor via the UNE-P" is not discriminatory nor contrary to the Commission's rules. Commenters allege that BellSouth will not offer its DSL service over a competitive LEC's UNE-P voice service on that same line.[9] We reject these claims because, under our rules, the incumbent LEC has no obligation to provide DSL service over the competitive LEC's leased facilities. Furthermore, a UNE-P carrier has the right to engage in line splitting on its loop. As a result, a UNE-P c er can compete with BellSouth's combined voice and data offering on the same loop by providing the customer with line splitting voice and data service over the UNE-P loop in the same manner. Accordingly, we cannot agree with commenters that BellSouth's policy is discriminatory.

Id. at ¶157 (emphasis added). The FCC, therefore, was squarely presented with the issue of whether BellSouth's policy of not providing its federally tariffed, wholesale DSL telecommunications service over a UNE loop violates federal law. The FCC found no such violation. To the contrary, the FCC explicitly and unequivocally found that BellSouth's policy is not discriminatory and, therefore, does not violate section 202(a) of the Act. This Commission has no jurisdiction to disturb this finding by the federal agency that has exclusive jurisdiction over BellSouth's wholesale DSL service.

D. The Expedited Process Referenced in the Complaint Does Not Apply to the Claims Set forth in the Complaint.

To resolve the instant Complaint, FCCA attempts to invoke an expedited procedure that is set forth in a June 19, 2001, internal Commission memorandum ("Memorandum"). This Memorandum establishes a process for the Commission to resolve "complaints arising from interconnection agreements approved by the Commission under Section 252 of the Telecommunications Act" in approximately 99 days. See June 19, 2001 Memorandum, attached hereto as Exhibit B. Keeping with its

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[9] Commenters also claimed that "in order to prevent a customer from losing its billing telephone number (BTN) or change its established hunting sequence, the customer may be required to change the DSL service from the existing line to a "stand alone" line." *Id.* at ¶157 n. 561.

intent to only govern disputes arising out of interconnection agreements, the expedited complaint process is limited to issues of contract interpretation. *Id.*

In the instant matter, FCCA's Complaint is not a complaint "arising from an interconnection agreement" and is not limited to "issues of contract interpretation." Indeed, FCCA recognizes this very fact in its Complaint. *See* Complaint at n.1. Accordingly, the instant dispute is not the type of dispute that would be governed by the expedited process established in the Memorandum. Therefore, it is inapplicable to FCCA's Complaint and the Commission's regular rules for the treatment and resolution of expedite complaints or requests should govern.

CONCLUSION

For the reasons set forth above, the Commission should dismiss the Association's Complaint. In the alternative, the Commission should not adopt the expedited process proposed by the Association.

Respectfully submitted this 2nd day of July 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.

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453292

EXHIBIT
A

Official FLORIDA STATUTES 1967

Prepared by
Statutory Revision Department

ERNEST E. MEANS
Director

Published by the
STATE OF FLORIDA

ing that such schedules are on file and open to inspection by any person, the places where the same are kept, and that the agent will assist such person to determine from such schedules any rate, toll, rental, rule or regulation which is in force shall be kept posted by every telephone company and telegraph company in a conspicuous place in every station or office of such company. The commissioners may require compliance with the foregoing provisions either in whole, or in part.

History.—[4, ch. 6625, 1913; RGS 4396; CGL 6368.
Cf.—§38, Art. XVI, const.

364.05 Changing rates, tolls, rentals, etc.—(1) Unless the commissioners otherwise order, no change shall be made in any rate, toll, rental, contract or charge, which shall have been filed and published by any telephone or telegraph company in compliance with the requirements of §364.04, except after thirty days' notice to the commissioners and the publication for thirty days as required in the case of original schedules in said section, which notice shall plainly state the changes proposed to be made in the schedule then in force, and the time when the changed rate, toll, contract or charge will go into effect. All proposed changes shall be shown by printing, filing and publishing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection.

(2) The commissioners, for good cause shown, may allow changes in rates, charges, tolls, rentals or contracts without requiring the thirty days' notice and publication herein provided for, by an order specifying the change so to be made and the time when it shall take effect, and the manner in which the same shall be filed and published.

(3) When any change is made in any rate, toll, contract, rental or charge, the effect of which is to increase any rate, toll, rental or charge then existing, attention shall be directed on the copy filed with the commissioners to such increase by some character immediately preceding or following the item in such schedule, which character shall be in such form as the commissioners may designate. No change shall be made in any rate, toll, rental, contract or charge prescribed by the commissioners without their consent.

History.—[4, ch. 6625, 1913; RGS 4397; CGL 6361.

364.06 Joint rates, tolls, etc.—The names of the several companies which are parties to any joint rates, tolls, contracts or charges of telephone companies and telegraph companies for messages, conversations and service to be rendered shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the commissioners such evidence of concurrence therein or acceptance thereof as may be required or approved by the commissioners; and where such evidence of concurrence or acceptance is filed, it shall not be necessary for the companies filing the same to also file copies of the tariff in which they are named as parties.

History.—[6, ch. 6625, 1913; RGS 4398; CGL 6362.

364.07 Joint contracts to be filed with commissioners.—Every telephone company and every telegraph company shall file with the commissioners, as and when required by them, a copy of any contract, agreement or arrangement in writing with any other telephone company or telegraph company, or with any other corporation, association or person relating in any way to the construction, maintenance or use of a telephone line or telegraph line or service by, or rates and charges over and upon, any such telephone line or telegraph line.

History.—[7, ch. 6625, 1913; RGS 4399; CGL 6363.

364.08 Unlawful to charge other than schedule rates, etc., free service and reduced rates prohibited.—(1) No telephone or telegraph company shall charge, demand, collect or receive for any service rendered or to be rendered any compensation other than the charge applicable to such service as specified in its schedule on file and in effect at that time, nor shall any telephone company or telegraph company refund or remit, directly or indirectly, any portion of the rate or charge so specified, nor extend to any person any advantage of contract or agreement or the benefit of any rule or regulation or any privilege or facility not regularly and uniformly extended to all persons under like circumstances for like or substantially similar service.

(2) No telephone company or telegraph company subject to the provisions of this part shall, directly or indirectly, give any free or reduced service or any free pass or frank for the transmission of messages by either telephone or telegraph between points within this state; provided, that it shall be lawful in this state to issue exchange passes and franks, and grant free and reduced service, and contract for exchange of services by and between common carriers, as defined by and provided for in the act of congress entitled "An act to regulate commerce," and acts amendatory thereof and supplemental thereto.

History.—[8, ch. 6625, 1913; RGS 4400; CGL 6364.

364.09 Giving rebate or special rate prohibited.—No telegraph or telephone company shall, directly or indirectly, or by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered with respect to communication by telegraph or telephone or in connection therewith, except as authorized in this part than it charges, demands, collects or receives from any other person for doing a like and contemporaneous service with respect to communication by telegraph or telephone under the same or substantially the same circumstances and conditions.

History.—[9, ch. 6625, 1913, RGS 4401; CGL 6365.

364.10 Undue advantage to person or locality prohibited.—No telegraph company or telephone company shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject any par-

ticular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

History.—§10, ch. 6525, 1913; RGS 4403; CGL 6366.

364.11 Short and long transmission of long distance message.—No telephone or telegraph company subject to the provisions of this part shall charge or receive any greater compensation in the aggregate for the transmission of any long distance conversation or message of like kind for a shorter than for a longer distance over the same line, in the same direction, within this state, the shorter being included within the longer distance, or charge any greater compensation for a through service than the aggregate of the intermediate rates subject to the provisions of this part but this shall not be construed as authorizing any such telephone company or telegraph company to charge and receive as great a compensation for a shorter as for a longer distance. Upon application of any telephone company or telegraph company the commissioners may, by order, authorize it to charge less for longer than for a shorter distance service for the transmission of conversation or messages in special cases after investigation, but the order must specify and prescribe the extent to which the telephone company or telegraph company making such application is relieved from the operation of this section, and only to the extent so specified and prescribed shall any telephone company or telegraph company be relieved from the requirements of this section.

History.—§12, ch. 6525, 1913; RGS 4404; CGL 6368.

364.12 Transmission of messages of other companies.—Every telegraph company operating in this state shall receive, transmit and deliver without discrimination or delay, the messages of any other telegraph company.

History.—§13, ch. 6525, 1913; RGS 4405; CGL 6369.

364.13 Commissioners may require installation of stations, etc.—The commissioners shall have power to require the installation and maintenance of telegraph station or telephone toll station now in existence or respective telegraph or telephone lines as may be reasonably necessary for the public convenience and not unjustly burdensome to the company. No telegraph station or telephone toll station now in existence or which may hereafter be established shall be discontinued without the consent of the commissioners.

History.—§14, ch. 6525, 1913; RGS 4406; CGL 6370.

364.14 Readjustment of rates, charges, tolls, etc.; hearing; order compelling facilities to be installed, etc.—

(1) Whenever the commissioners shall find, after a hearing had upon their own motion or upon complaint, that the rates, charges, tolls or rentals demanded, exacted, charged or collected by any telegraph company or telephone company for the transmission of messages by telegraph or telephone, or for the rental or use of any telegraph line, telephone line or any telegraph instrument, wire, appliance, apparatus or device or any telephone receiver, transmitter, instrument, wire, cable, apparatus, conduit, machine, appliance or device, or any telephone extension or extension system, or that the rules, regulations or practices of any telegraph company or telephone company affecting such rates, charges, tolls, rentals or service are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of law, or that such rates, charges, tolls or rentals are insufficient to yield reasonable compensation for the service rendered, the commissioners shall determine the just and reasonable rates, charges, tolls or rentals to be thereafter observed and in force, and fix the same by order as hereinafter provided.

(2) Whenever the commissioners shall find, after such hearing that the rules, regulations or practices of any telegraph company or telephone company are unjust or unreasonable, or that the equipment facilities or service of any telegraph company or telephone company are inadequate, insufficient, improper or insufficient the commissioners shall determine the just, reasonable, proper, adequate and efficient rules, regulations, practices, equipment, facilities and service to be thereafter installed, observed and used and fix the same by order or rule as hereinafter provided.

History.—§15, ch. 6525, 1913; RGS 4407; CGL 6371.

364.15 Compelling repairs or improvements; order.—Whenever the commissioners shall find after a hearing had on their own motion or upon complaint, that repairs or improvements to, or changes in, any telegraph line or telephone line ought reasonably to be made, or that any additions or extensions should reasonably be made thereto, in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for telegraphic or telephonic communications, the commissioners shall make and serve an order directing that such repairs, improvements, changes, additions or extensions be made in the manner to be specified therein.

History.—§16, ch. 6525, 1913; RGS 4408; CGL 6372.

364.16 Connection of lines, and transfers.—Whenever the commissioner shall find that any two or more telephone companies, whose lines form a continuous line of communication, or could be made to do so by the construction and maintenance of suitable connections for the transfer of messages or conversations at common points between different localities which are not reached by the line of either company alone, and that such connections or facilities for the transfer of messages or conversations at common points can reasonably be made, and efficient service obtained and that a necessity exists therefor, or shall find that any two or more telegraph or telephone companies have failed to establish joint rates or charges for service by or over their said lines and that joint rates or charges ought to

State of Florida

Public Service Commission

-M-E-M-O-R-A-N-D-U-M-

EXHIBIT 1 B

DATE: June 19, 2001

TO: E. Leon Jacobs, Chairman
J. Terry Deason, Commissioner
Lila A. Jaber, Commissioner
Braulio L. Baez, Commissioner
Michael A. Palecki, Commissioner

FROM: Noreen S. Davis, Director, Division of Legal Services
Beth Keating, Communications Bureau Chief, Division of Legal Services BK
Sally Simmons, Competitive Services Bureau Chief SAS

RE: Expedited Resolution of Complaints arising from Interconnection Agreements Approved under Section 252 of the Telecommunications Act.

The Chairman has asked that expedited procedures be explored for resolving complaints arising from interconnection agreements approved by the Commission under Section 252 of the Telecommunications Act. Similar suggestions have been raised by MCI WorldCom.

We have developed what we believe will be a workable process that can be completed in approximately 99 days. We note that for a complaint to be eligible for the expedited process, it must consist of no more than three issues (with no subparts) and must meet certain criteria. The appropriate Division of Competitive Services Bureau Chief and the Division of Legal Services Communications Bureau Chief (or their designees) will review the complaint and recommend to the Prehearing Officer assigned to the docket whether the case meets the criteria for expedited treatment. If the Prehearing Officer disagrees with the recommendation, then the expedited procedure will not be used. If the expedited procedure is accepted by the Prehearing Officer, the procedure will be set forth in the Procedural Order and the Prehearing Order.

The procedure is ready for implementation for filings received on or after June 20, 2001.

The criteria and procedure are set forth below:

CRITERIA

1. Complaint limited to three issues (no subparts).

2. Complaint limited to issues of contract interpretation.

3. Parties do not dispute the actions each took (rightly or wrongly) under the contract.

DOCKET SCHEDULE

Day 1 Complaint, direct testimony & exhibits filed, limited to 3 issues maximum (no subparts). Copy served by hand, electronically or by fax on parties and staff.

Day 7	Staff to recommend to Prehearing Officer if case should be treated on expedited basis. If to be expedited, Procedural Order issues. Discovery is on an expedited basis. Parties are strongly encouraged to continue negotiation or to seek mediation during this process.
Day 15	Expedited Motion to Dismiss, if any. Copy served by hand, electronically or by fax on parties and staff.
Day 22	Response to Motion to Dismiss.
Day 34	Motion to Dismiss addressed at next available Agenda. Recommendation can be filed late with the Chairman's approval.
Day 49	Rebuttal testimony and exhibits (if Motion to Dismiss denied)
Day 72	Prehearing statements
Day 86	Prehearing conference
Day 99	Hearing - One day's duration Closing arguments will be held at conclusion of presentation of evidence. The hearing will be recessed for a period of time announced from the bench (1-2 hours) during which time staff will meet to craft an oral recommendation.[1] Hearing is reconvened for presentation of oral recommendation and bench decision. Order issued 10 working days after vote.

[1] If the record supports an interpretation of the contract different from what each party argues, a written recommendation may be required. We do not anticipate this scenario occurring very often, but if it does occur the time line would be extended to accommodate a written recommendation based on the record.