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January 22, 2003

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

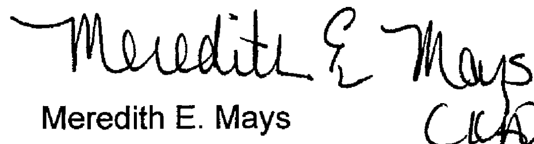
Re: Docket No. 020507-TL (FCCA Complaint)

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response in Opposition to Motion for Reconsideration of The 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,



Meredith E. Mays

Enclosure

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

477230

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CERTIFICATE OF SERVICE
DOCKET NO. 020507-TL

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and Federal Express this 22nd day of January 2003 to the following:

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(+) Signed Protective Agreement

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: January 22, 2003

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE IN OPPOSITION TO MOTION FOR RECONSIDERATION OF THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") files this Response in Opposition to Motion for Reconsideration of the Florida Competitive Carriers Association ("FCCA"). Because Prehearing Officer Baez's Order No. PSC-03-0084-PCO-TL ("Discovery Order") is fully consistent with Florida law, it should be upheld by the Commission. In the Discovery Order, Prehearing Officer Baez granted in part and denied in part a Motion to Compel filed by BellSouth finding that:

> [T]he 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.
>
> * * *
>
> [T]he 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.

Discovery Order, p. 6.

The FCCA's Motion for Reconsideration is utterly devoid of a single point of fact or law that would justify reconsideration, and the Commission should summarily reject it. Instead, of providing facts that Commissioner Baez overlooked, or law that he misapplied, the FCCA

primarily attacks Commissioner Baez's Order by referring to the procedural background in this case – which background was fully addressed in the FCCA's initial response to BellSouth's Motion to Compel filed December 26, 2002, and which has no bearing on the discovery in dispute. Rule 1.280 of the Florida Rules of Civil Procedure clearly allows BellSouth to obtain discovery regarding "any matter, not privileged, that is relevant to the subject matter of the pending action, *whether it relates to the claim or defense of the party seeking discovery or the claim or defense or any other party . . .*" The discovery sought by BellSouth is directly relevant to its defenses in this case and should be provided forthwith. Because the Discovery Order is appropriate, the FCCA should no longer be permitted to continue to deny BellSouth access to information necessary for BellSouth to prepare and present its defense to this Commission, and the FCCA's Motion should be denied in its entirety.

II. FACTUAL BACKGROUND

A. The Issues Presented in this Case Extend Beyond Prior Panel Decisions of this Commission

At the outset of its Motion, the FCCA attempts to transpose BellSouth's discovery requests into an expansion of the issues presented. This thinly veiled attempt to confuse the Commission should be rejected out of hand. Because BellSouth has been unsuccessful in its attempts to add what it believes to be a very relevant issue in this proceeding, the FCCA has chosen at every conceivable opportunity to identify various discovery disputes as relating to that issue, rather than the issues that the Hearing Officer has permitted to be considered in the case. Despite the FCCA's antics, Commissioner Baez recognized correctly that the discovery requests in dispute relate to the issues in this case and to BellSouth's possible defenses – and have no relation to BellSouth's request to convert this matter into a generic docket.

To fully appreciate the basis for BellSouth's discovery, a brief review of the factual background is appropriate. This complaint was allegedly filed because the FCCA sought to confirm its understanding of prior Commission orders. *See* Complaint, ¶ 21. However, the FCCA raised a distinction in its Complaint which this Commission had not previously addressed; specifically, that the alleged barrier to competition created as a result of BellSouth's FastAccess policy varied according to a carrier's ability to provide DSL service. Notably, at paragraph 12 of the FCCA's complaint, it stated "[c]onsumers are reluctant to change voice providers, when, as a consequence of exercising their right to choose a particular voice provider, they lose the ability to receive DSL service." The note to this statement provided that "[t]his would be the case for customers who wish to change to a voice provider who does not provide DSL service." Complaint, n. 11. The FCCA reiterated that BellSouth's policy "is a barrier to all providers who offer voice, but not DSL, service." Complaint, ¶ 20. By alleging that the purported consequences of BellSouth's policy depends upon whether or not a carrier provides DSL service, the FCCA, and not BellSouth, initially raised, in June 2002, a discoverable issue relating to whether FCCA members provide DSL service.

On November 12, 2002, Commissioner Baez released his Order establishing Procedure in this docket. The tentative list of issues included the following:

- Does the Commission have jurisdiction to grant the relief requested in the Complaint? (Issue 1)
- What are BellSouth's practices regarding the provisioning of its FastAccess Internet service to:
  - a) a FastAccess customer who migrates from BellSouth to a competitive voice provider; and
  - b) to all other ALEC customers. (Issue 2)
- Do any of the practices identified in Issue 2 violate state or federal law? (Issue 3)
- Should the Commission order that BellSouth may not disconnect the FastAccess Internet service of an end user who migrates his voice service to an alternative voice provider? (Issue 4)

- Should the Commission order BellSouth to provide its FastAccess Internet service, where feasible, to any ALEC end user that requests it? (Issue 5)
- Should the Commission order that BellSouth may not disconnect its FastAccess Internet service, where a customer migrates his voice service to an ALEC and wishes to retain his BellSouth FastAccess service, what changes to the rates, terms, and condition of his service, if any, may BellSouth make? (Issue 6a)
- If the Commission orders BellSouth to provide its FastAccess service to any ALEC end user that requests it, where feasible, then what rates, terms and conditions should apply? (Issue 6b)

Not only did the Issues list include matters that the three-member panel of this Commission addressed in prior dockets, the Issues list included an expansion of previous rulings, in that Issue 5 involves the provision of FastAccess Internet service, *where feasible*, to any ALEC end user that requests it.

Thus, despite the claim of the FCCA that its complaint sought "confirmation" of prior rulings, as of November 12, 2002 the scope of this proceeding evolved from "confirmation" into an attempt to at expansion and elimination – an expansion of prior rulings, and an elimination of a line drawn by this Commission in the rulings. Specifically, in prior orders, three Commissioners recognized the distinction between BellSouth's obligation to "continue to provide its FastAccess Internet Service" to an existing BellSouth customer (*See* Order No. PSC-02-1453-FOF-TP), as compared to requiring BellSouth to provide FastAccess to *any* requesting end user.

At this Commission's October 1, 2002 Agenda Conference, in connection with Docket No. 010098-TP, Chairman Jaber and Commissioners Deason and Palecki discussed this distinction. All agreed that BellSouth was *not* required to provide its FastAccess service to an existing alternative local exchange carrier (ALEC) customer. Instead, BellSouth's obligation related solely to existing BellSouth voice customers that migrated service. Commissioner Palecki explained:

> I don't want to speak for my fellow Commissioners, but what I was attempting to do as a Commission when we made our decision was to encourage competition for voice service by allowing FDN to continue to be the service of voice customers or to become a new voice service provider, and at the same time, not do anything at all that would provided a chilling effect on BellSouth's decision to invest tremendous dollars into DSL.

(Tuesday, October 1, 2002, Agenda Conference, p. 7).

Commissioner Deason agreed:

> If there is an existing BellSouth customer which also subscribes to BellSouth's FastAccess service, and that customer is persuaded to change voice provider to FDN, that there should be -- it should be an obligation on BellSouth's part, if this customer chooses, to continue to provide FastAccess service . . . . I had no intentions of taking that a step further and saying that if there is an existing FDN customer who chooses to acquire FastAccess service – that's between the customers and the FastAccess provider, and that's not a regulatory matter, and that's not a hindrance, in my opinion, to local competition. That is already a customer of FDN.

(Tr. pp. 9-10)

Commissioner Jaber confirmed "I was only speaking to the current BellSouth customers." (Tr. p. 11). Commissioner Palecki reiterated:

> I think that if an existing FDN customer who goes to BellSouth and says, "I would like to have Fast Access service, and I'm an existing Florida Digital voice customer," I don't believe that BellSouth should be obligated to provide FastAccess.

(Id.) Commissioner Palecki continued:

> I certainly would hope that BellSouth or any telecommunication provider that is providing DSL service would continue to provide that service to customers who are voice customers of other competitors, as long as it's profitable to do so . . . .

(Tr. p. 12).

As the foregoing discussion illustrates, Chairman Jaber and Commissioners Palecki and Deason distinguished between BellSouth's obligation to existing customers and any purported obligation to ALEC customers. Nonetheless, this distinction was either lost to or ignored by the FCCA since it sought to expand BellSouth's obligations in a manner previously rejected by this Commission.

In establishing as an issue whether BellSouth should be required to provide its FastAccess service to *any* requesting end user, the Commission made yet another distinction. This distinction concerns feasibility – Issue 5 and Issue 6b expressly include the words "where feasible." BellSouth's position is that feasibility not only considers the cost that the FCCA seeks to impose upon BellSouth, but that feasibility also includes consideration of why the FCCA and its ALEC members seek to shift this cost on BellSouth to begin with. In other words, when the industry is migrating to bundled service offerings, and FCCA member MCI WorldCom ("MCI") raises its standalone long distance rates in an obvious attempt to migrate customers to bundles, why should BellSouth be the vehicle for providing the missing piece in MCI's product offering? Is it feasible -- in the sense that feasibility is synonymous with possible, practical, viable, reasonable, realistic, practical, and sufficient – for the FCCA to request that this Commission order BellSouth to provide something that its members want, regardless of whether the FCCA and its members have the ability to provide DSL for themselves? Whether or not the FCCA agrees with BellSouth's position is not the issue – BellSouth has the right to prepare its defense in the matter it deems appropriate, and cannot be relegated to the defenses that the FCCA would choose on its behalf. The information BellSouth seeks in discovery is directly relevant to its defenses, and the Florida Rules of Civil Procedure recognize a party's right to obtain discovery when such discovery relates to a claim or defense or a party, even when the discovery may not be admissible at trial.

B. BellSouth Diligent Pursued Discovery Consistent with the Timeframes Established in this Case

On November 15, 2002, *just three days after the Order establishing Procedure,* BellSouth served discovery requests upon the FCCA. Based upon the scope of the issues raised in this proceeding and the allegations in the FCCA's complaint, BellSouth propounded a series

of requests seeking information concerning specific services provided by FCCA members. In relevant part, BellSouth sought to discover information related to whether FCCA member companies provide DSL services, whether FCCA member companies have sought to enter into joint marketing with cable companies, and whether FCCA members provide DSL services on a standalone basis. BellSouth did not seek to subpoena or serve discovery upon carriers in Florida that are not affiliated with the FCCA, nor did BellSouth propound any discovery question not directly tied to its planned defenses to the issues identified in the November 12, 2002 Order Establishing Procedure. Instead, BellSouth served only the FCCA and ITC^DeltaCom with discovery.[1]

After serving its first set of discovery requests, BellSouth propounded additional discovery to the FCCA. BellSouth's subsequent discovery requests are also directly relevant to the issues in this proceeding, and allegations made by the FCCA. Nonetheless, the FCCA continues to lodge unfounded discovery objections and/or provide incomplete discovery responses to BellSouth. *See, e.g.,* BellSouth Telecommunications, Inc.'s Second Emergency Motion to Compel, filed January 17, 2003. Thus, in connection with the FCCA's Motion for Reconsideration, the Commission has an opportunity also to provide clear guidance as to the obligation of parties to take seriously discovery matters, which obligation the FCCA is either unwilling or unable to comply with.

[1] In contrast to the FCCA, ITC^DeltaCom has responded to BellSouth's discovery requests. Many of the discovery questions submitted to ITC^DeltaCom are identical to questions directed to the FCCA. Moreover, ITC^DeltaCom is a member of the FCCA; thus, the FCCA cannot legitimately argue that it is unable to obtain the information requested by BellSouth.

III. DISCUSSION

A. The Discovery Requests at Issue Are Relevant to the Both the Issues in this Case and to BellSouth's Defenses

In addressing the issues established in this case, BellSouth is entitled to defend against the allegations raised by the FCCA. In relevant part, BellSouth is entitled to present the Commission with evidence as to why it should not expand its prior rulings and require BellSouth to provide FastAccess service to any requesting end user. BellSouth is further entitled to revisit decisions reached by the three-member panel that required BellSouth to provide FastAccess to any BellSouth end user that migrates voice service to an ALEC. To support its arguments, BellSouth is entitled to present this Commission with evidence of what the FCCA member companies are doing. Further, BellSouth is entitled to cross-examine the FCCA witnesses – which witnesses include employees of FCCA member companies – consistent with the scope of the Florida Rules of Civil Procedure.

As BellSouth demonstrated in its Motion to Compel, publicly available information clearly indicates that 5 of the FCCA's 13 member companies – which constitutes 38% of the FCCA's membership -- have the ability to provide DSL service. BellSouth cannot fully determine, however, the markets in which this service is provided nor can BellSouth determine whether such companies provide DSL service as a standalone offering – that is, provide DSL separately, and not as part of a bundled offering. Despite the FCCA's contentions otherwise, this Commission can and should consider why FCCA member MCI claims that BellSouth's actions are a barrier to competition when it has indicated in other proceedings that it (1) provides fixed wireless broadband service in Florida; and (2) as part of a DSL build-out in 2000 and into 2001 it apparently established Miami as part of its "On Net DSL network." *See e.g.* Docket No. 11901-U (Georgia Public Service Commission).

Likewise, this Commission can and should consider to what extent FCCA member AT&T provides DSL service or to what extent AT&T's recent announcement of a line splitting alliance with Covad enables it to provide customers with DSL service. What FCCA members have or have not done to enter the DSL market *is* relevant to a consideration of "feasibility" and is relevant to BellSouth's defenses. The FCCA claims on the one hand that BellSouth's policies are a barrier to competition. Yet, the FCCA concedes that this "barrier" only applies to carriers that do not offer DSL. *See* Complaint, ¶ 20. Despite this statement in the FCCA's Complaint, it will not provide this Commission with information with which it can evaluate the extent to which members provide DSL.

BellSouth's discovery requests – which primarily relate to whether FCCA members provide DSL and the specifics of such service – are also directly relevant to investment decisions. Issue 3 includes a consideration of whether BellSouth's practices violate state or federal law. By statute, the law in Florida charges this Commission with encouraging "investment in telecommunications infrastructure." *See also* Section 706, of the 1996 Telecommunications Act (encouraging the deployment of advanced services). Because investment (or perhaps, more accurately the ALECs lack of investment as compared to BellSouth's prudent and considered investment) is a component of the state and federal law at issue in this proceeding, and because the three-member panel of the Commission has acknowledged previously that any decision it makes is likely to have an impact on investment in infrastructure, the FCCA cannot realistically contend that discovery directed at the reasons why or why not FCCA members provide DSL service in Florida is not relevant here. BellSouth has filed testimony indicating that any decision is likely to negatively impact its business decisions for further deployment of services. Common sense dictates that if the Commission requires

BellSouth to provide DSL service to any requesting ALEC end user, that the ALEC will have no incentive to deploy its own infrastructure to provide this service. Why deploy equipment and facilities if the Commission will require BellSouth to fill the missing piece of the ALEC's product portfolio? Thus, not only are BellSouth's discovery requests relating to whether DSL is provided relevant, discovery requests designed to understand the basis for ALEC decisions are likewise relevant.

The FCCA erroneously asserts that providing BellSouth with the discovery somehow contradicts rulings in which the Commission declined to broaden the scope of this proceeding. The FCCA is wrong. The issues in this case cannot and should not be made in a vacuum – in considering the impact on the public, the Commission should consider to what extent, when MCI WorldCom is told by a customer that it wishes to obtain voice service and also desire DSL service, MCI WorldCom intends to provide its own facilities. Have the ALECs decided that regulatory self-help, rather than infrastructure deployment, is the optimal method to serve customers? Have the ALECs considered providing service options that provide customers with a full product portfolio or do the ALECs expect BellSouth to fill in the missing service offering? Why are the ALECs so desperate to avoid any consideration of their behavior? This Commission is charged with treating all providers fairly, and should emphatically reject the FCCA's attempt to avoid any examination or scrutiny of its actions and the actions of its member companies.

B. Florida Law Permits BellSouth to Discover Information Concerning FCCA Members

1. The Florida Cable Television Association Case Demonstrates that the FCCA Must Provide the Requested Information

This Commission correctly relied upon a prior decision – Order No. PSC-92-0112-TL (*FCTA Order)* -- in requiring the FCCA to provide BellSouth with responses to its discovery requests. In relevant part, this Commission found that discovery concerning services provided by member companies of the cable association was relevant. The Commission should affirm that decision here. The FCCA's Motion for Reconsideration fails to identify any point of law or fact concerning the *FCTA* order that merits a different outcome. The FCCA addressed the *FCTA Order* and provided its view of that order in its Response in Opposition to BellSouth's Motion to Compel. Prehearing Officer Baez was fully aware of the FCCA's position concerning the *FCTA case,* and the Commission need not entertain the FCCA's regurgitation of its argument concerning the case.

2. Pursuant to the Florida Rules of Civil Procedure the FCCA has "Control" of the Requested Information and Must Provide Discovery Responses

The FCCA also alleges that the Florida Rules of Civil Procedure support its Motion for Reconsideration. This allegation is without basis. First, the FCCA addressed the Rules of Procedure in its Response in Opposition to BellSouth's Motion to Compel. A motion for reconsideration should not be employed as a vehicle to reargue previously rejected arguments. That the Discovery Order did not refer explicitly to the Florida Rules of Civil Procedure does not lead to the conclusion that the Prehearing Officer did not review and summarily reject the FCCA's arguments, and the FCCA is not permitted to use its Motion for Reconsideration to reargue its prior views. Second, the Rules of Civil Procedure support the outcome reached by

the Prehearing Officer. Notably, the Florida Rules of Civil Procedure "are patterned very closely after the Federal Rules, and it has been the practice of the Florida courts to examine and analyze the Federal decisions and commentaries under the Federal rules in interpreting [Florida's]." *Jones v. Seaboard,* 297 So.2d 861, 863 (Fla. Dist. Ct. App. 1974). Federal case law has required parties to produce discovery information obtained from affiliated non-parties. *See e.g., Alimenta v. Anheuser-Busch,* 99 F.R.D. 309 (N.D. Ga. 1983) (discovery relating to affiliated non-party corporation was appropriate; non-party corporation actively participated in certain matters, discovery was relevant, non-party employee had knowledge of facts at issue); *and MLC Inc. v. North American Philips Corp.,* 109 F.R.D. 134 (S.D. N.Y. 1986) (documents need not be in a party's possession to be discoverable; control includes the legal right of the producing party to obtain documents upon demand; the term 'control' is broadly construed); *Camden Iron and Metal, Inc. v. Marubeni America Corp.,* 138 F.R.D. 438 (D. N.J. 1991) (documents were found in 'control' of party; court noted that 'control' centered on the legal right, authority or ability to obtain the documents at issue upon demand).[2]

Contrary to the FCCA's contentions, the Discovery Order does not conflict in any manner with applicable Rules of Civil Procedure. To the contrary, it defies logic that the FCCA has no authority or ability to request and obtain information responsive to BellSouth's discovery requests from its members. The FCCA leadership includes employees of MCI and AT&T, and such individuals could undoubtedly request and obtain the information requested by BellSouth. Furthermore, the FCCA was evidently able to convince at least two of its members, AT&T and

[2] An analogy to criminal case law is also useful. In *State v. Coney,* 272 So.2d 550 (Fla. Dist. Ct. App. 1973), the court found that "[s]o long as the pertinent and relevant information requested by a defendant is readily available to the state attorney from other state governmental agencies for his use in the prosecution of the case even though not reduced to his actual possession, then it should be likewise made available to the defendant upon his timely demand."

MCI, to provide witnesses in this proceeding. It is obviously inappropriate to allow the FCCA to pick and chose when it will call on its members to provide support for its efforts in this proceeding. It is truly remarkable that the FCCA seemingly has no problem getting AT&T and MCI to pay for witnesses to write testimony, attend depositions, and appear at hearings, but can't get its members to answer a few simple questions.

Moreover, the FCCA fails to provide this Commission with any rule, statute, or case that precludes its members from providing responsive information (or that otherwise identifies any point of law overlooked by Prehearing Officer Beaz). For example, the authority upon which the FCCA apparently relies is not a case, but is Trawick's *Florida Practice and Procedure,* which states that in responding to interrogatories an association "must give all of the information *available to the organization whether he personally knows it or not.*" Contrary to supporting the FCCA's argument, Trawick's is consistent with the Florida and federal rules of civil procedure as well as federal case law that holds that discovery from non-parties is permissible and required. Trawick's is likewise consistent with this Commission's *FCTA Order.*

C. Florida Law Requires the Commission to Treat All Carriers – including BellSouth – Fairly

Despite this Commission's charge to "ensure that all providers of telecommunications are treated fairly" the FCCA seeks to evade its discovery obligations in reliance on the Florida statute that subjects new entrants to a lesser degree of regulatory oversight. *See* S. 364.01(4)(g); S. 364.01(4)(d). The FCCA completely disregards that, rather than seeking to impose new regulatory requirements on carriers, BellSouth generally supports removing rather than imposing regulation on others. The FCCA also ignores that BellSouth seeks only to defend against a case filed by the FCCA in which the FCCA makes a distinction as to DSL services provided by carriers. That Florida statutes set forth varying degrees of regulation has no bearing whatsoever

on a party's due process rights to defend itself. The FCCA's actions are analogous to the driver of the hansom cab that carefully places blinders on its horses. The FCCA is driving, and desires that the Commission pull its cab, but only if the Commission obediently and docilely wears the blinders placed upon it, and looks neither to the left or right. Just as a horse will rebel against an unyielding taskmaster, so should the Commission reject the FCCA's attempt to guide it, with blinders intact, on the path the FCCA chooses. The Commission is entitled to a panoramic view of its path, and should proceed with caution rather than blindly up the slippery slope the FCCA is urging it to take.

The FCCA goes to great lengths to list a litany of dire consequences that would befall the Commission if it upholds the Discovery Order. In the FCCA's view, upholding the discovery order will negatively impact dockets and will deter active participation by associations. The FCCA's own language, however, is instructive. According to the FCCA, "[p]articipation by industry groups has been a valuable way for the Commission to receive critical information." In this case, the FCCA does not want to provide the critical information to which BellSouth is entitled. Instead, the FCCA wants to limit the scope of the information available to the Commission by erecting a barrier to discovery. Upholding the Discovery Order will not result in "unbridled discovery" because in any case the party seeking information must demonstrate its relevance, which relevance will depend upon the specific facts presented.

That the specific facts of any given case are controlling is readily apparent in the *Florida Home Builders* case, 412 So.2d 351 (Fla. 1982). In *Florida Home Builders*, the Court was concerned with "the cost of instituting and maintaining a *rule challenge*." 412 So.2d at 353. In that context, an association was found to have met the associational standing criteria. *Florida Home Builders* did not directly address discovery, and Prehearing Officer Baez did not

"mistakenly rely" upon that case. Instead, the logical conclusion is that the cost of "instituting and maintaining a *rule challenge*" may give rise to different relevancy issues and considerations than posed in the context of a contested proceeding. In a contested proceeding, specific facts and issues require consideration of practices of member companies whose interests are alleged to be "substantially affected." Thus, the FCCA's reliance on *Florida Home Builders* to support its attempt to thwart, rather than support, discovery is without reasonable basis. Moreover, the FCCA also fails to recognize that the right of any association to participate in a proceeding ultimately rests on the interests of its members. If its members, as it claims in this Complaint, are substantially affected in a proceeding and such interests are directly relevant to the defenses of affected parties in this case, then allowing the association to circumvent discovery will adversely impact other parties. Prehearing Officer Baez correctly rejected the FCCA's attempt "to thwart due process and discovery" and the full Commission should affirm that conclusion. *See* Discovery Order, p. 6.

D. Florida Law Permits Discovery Regarding Matters Outside the State of Florida

The FCCA's attempt to escape its obligations to respond to matters outside of Florida is also without merit. Similar to other arguments the FCCA repeats in its Motion, this position was previously made and rejected. Moreover, that this Commission has previously indicated limited interest in matters outside of Florida does not mean negate BellSouth's ability to include as a defense the contrast between actions taken by FCCA members in other states as compared to Florida. For example, BellSouth is entitled to show the different choices made by FCCA members in other states and to make arguments relating to such choices in discussing how this Commission can fulfill its regulatory mandate to encourage investment. Likewise, that the Commission declined to order discovery under the facts presented in other dockets in no way

diminishes the ability of this Commission to consider such matters, in its discretion. *See, e.g., Lytton v. Lytton,* 289 So.2d 17, 20 (Fla. Dist. Ct. App. 1974) (in divorce case, court upheld order compelling discovery of the records of an out-state corporation in the possession, custody or control of defendant husband).

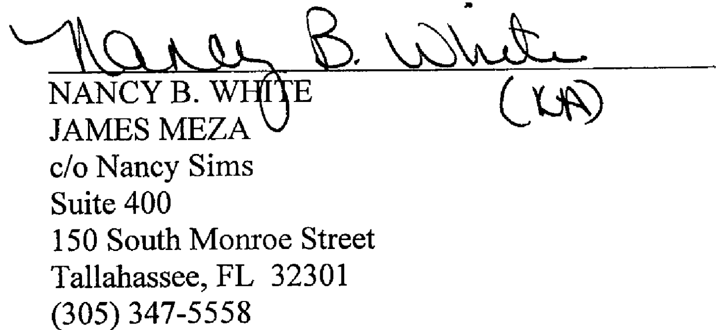
E. The FCCA Has Failed to Meet its Burden of Demonstrating any Discovery Requests are Burdensome

The FCCA previously raised its claim of undue burden, which the Discovery Order rejected. The Motion for Reconsideration fails to identify any issue that would lead to a different outcome. To the contrary, as BellSouth stated in its Motion to Compel, Florida law requires that the FCCA demonstrate the burdensome nature of discovery. *See First City Development of Florida, Inc. v. The Hallmark of Hollywood Condominium Association, Inc.,* 545 So.2d 502 (Fla. Dist. Ct. App. 1989) (a party objecting to discovery on the grounds that a request is unduly burdensome "must be able to show the volume of documents, or the number of man-hours required in their production, or some other qualitative factor that would make it so"). In both its Response in Opposition to BellSouth's Motion to Compel and in its Motion for Reconsideration the FCCA has utterly failed to make any such showing. Instead the FCCA claimed, without any basis in fact, that its members have limited resources, and that responding to BellSouth's discovery would require "an inordinate amount of time." These statements fail to demonstrate any burden, and at least one FCCA member – ITC^DeltaCom – was able to find sufficient time and resources with which to provide responses to BellSouth's discovery. If ITC^DeltaCom was able to respond to discovery, so too can the remaining FCCA members, and this Commission should dismiss this unsupported claim of burden.

III. CONCLUSION

BellSouth respectfully requests that the Commission reject the FCCA's attempt to thwart its discovery obligations and further requests that the Commission deny the FCCA's Motion for Reconsideration.

Respectfully submitted this 22nd day of January 2003.



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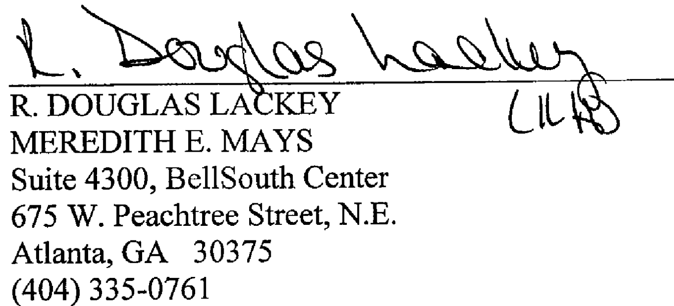

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