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February 24, 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 in Opposition to Florida Competitive Carriers Association's Motion for Reconsideration of Order No. PSC-03-0180-PCO-TL, 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,

James Meza III

James Meza III (KA)

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 Electronic Mail and U.S. Mail this 24th day of February 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<br><br>Filed: February 24, 2003 |

**BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE IN OPPOSITION TO FLORIDA COMPETITIVE CARRIERS ASSOCIATION'S MOTION FOR RECONSIDERATION OF ORDER NO. PSC-03-0180-PCO-TL**

BellSouth Telecommunications, Inc. ("BellSouth") files this Response in Opposition to the Motion for Reconsideration ("Motion") of Order No. PSC-03-0180-PCO-TL ("Second Discovery Order") filed by the Florida Competitive Carriers Association ("FCCA"). For the reasons discussed in detail in below, the Commission should deny the FCCA's Motion.

## INTRODUCTION

On December 26, 2002, BellSouth served interrogatories and requests for production on the FCCA seeking answers to specific questions directly related to FCCA's rebuttal testimony. Although the FCCA responded to most of BellSouth's interrogatories on January 15, 2003, certain responses were incomplete as they failed to fully address the questions asked. In addition, the FCCA erroneously objected to two interrogatories, including Interrogatory No. 66, which asked the FCCA to provide the following:

> Referring to the rebuttal testimony of Mr. Joseph Gillan, p. 18, lines 6-7, describe with particularity whether any FCCA members have explored "partner[ing] with competing DSL providers." Also, describe with particularity when "partner[ing] with competing DSL providers . . . ma[kes]

> sense." State all facts and identify all documents that support your response.

The FCCA objected to Interrogatory No. 66 on the grounds that the information was not relevant and because it "request[ed] information about the FCCA's member companies that is not in its possession or control." See BellSouth's Motion to Compel at 9. The FCCA asserted this objection even though the Prehearing Officer previously rejected this very argument in Order No. PSC-03-0884-PCO-TL ("First Discovery Order"), issued on January 10, 2003, wherein he held:

> FCCA and its members are not immune to discovery merely because the association filed the Complaint rather than the individual members of the association. The FCCA's individual members shall not be allowed to thwart due process and discovery by hiding behind their association. Thus, the FCCA will be required to respond in part to BellSouth's First Set of Interrogatories and PODs.

First Discovery Order, Order No. PSC-03-0084-PCO-TL, at 6.

Accordingly, BellSouth filed a Motion to Compel on January 17, 2003 to address the FCCA's objections and evasive answers. On February 6, 2003 the Prehearing Officer issued the Second Discovery Order, wherein he granted in part and denied in part BellSouth's Motion to Compel. Specifically, as it related to Interrogatory No. 66, the Prehearing Officer determined that (1) the requested information was relevant; and (2) the FCCA was required to respond to BellSouth's discovery even though it related to the FCCA's members. See Second Discovery Order at 8. Indeed, the Prehearing Officer reasoned that, if "relevant discovery could be thwarted simply because an association filed suit rather than the individual members of the association, then the association would not have standing to file suit . . . ." Id.

On February 17, 2003, the FCCA filed a Motion for Reconsideration as to the Prehearing Officer's ruling as to Interrogatory No. 66 in the Second Discovery Order on the grounds that the Commission cannot require nonparties to respond to discovery. In support, the FCCA incorporated the arguments raised in its Motion for Reconsideration as to the First Discovery Order and cited to two inapplicable federal court decisions in support.

## ARGUMENTS

As an initial matter, in the instant motion, FCCA incorporates the arguments previously raised in its Motion for Reconsideration of the First Discovery Order. BellSouth filed a detailed response to the first motion on January 22, 2002, which succinctly and definitively established that the FCCA's arguments were unsupported by the law and do not warrant reconsideration of the Prehearing Officer's previous decision regarding this same issue. BellSouth incorporates the arguments raised therein in the instant response, and the Commission should reject the FCCA's second, recent Motion for Reconsideration for the very same reasons. Furthermore, the Commission should deny the FCCA's second Motion for Reconsideration for the following additional reasons.

### I. FCCA's MOTION IS PROCEDURALLY IMPROPER

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering an order. See Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. See Sherwood v. State, 111 So. 2d 96, 97 (Fla. 3rd

DCA 1959) (citing State ex. Rel. Jayatex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Moreover, a motion for reconsideration is not intended to be "a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or the order." Diamond Cab Co., 394 So.2d at 891. Indeed, a motion for reconsideration should not be granted based upon an arbitrary feeling that a mistake may have been made, but should be based on specific factual matter set forth in the record and susceptible to review." Steward Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974).

Further, it is well settled that it is inappropriate to raise new arguments in a motion for reconsideration. In re: Establish Nondiscriminatory Rates, Terms, and Conditions, Docket No. 950984-TP, Order No. PSC 96-1024-FOF-TP, Aug. 7, 1996, 1996 WL 470534 at *3 ("It is not appropriate, on reconsideration, to raise new arguments not mentioned earlier."); In re: Southern States Utilities, Inc., Docket No. 950495-WS, Order No. PSC-96-0347-FOF-WS, Mar. 11, 1996, 1996 WL 116438 at *3 ("Reconsideration is not an opportunity to raise new arguments.").

Here, the FCCA's Motion is based, at least in part, on a new argument as it raises for the first time two federal court cases to support its bogus claim that nonparty association members cannot be required to respond to discovery under Florida law – University of Texas at Austin, et al. v. Vratil, 96 F.3d 1337 (10th Cir. 1996) and Oil Heat Institute of Oregon v. Northwest Natural Gas, 112 FRD 640 (USDC Or. 1988). See Motion at 2. Because the FCCA's argument is based upon new case law, it is procedurally improper and the Commission should not consider it.

Even if the Commission considered the FCCA's new argument, FCCA fails to identify any points of fact or law the Prehearing Officer overlooked or failed to consider. Instead, FCCA simply asserts, in a conclusory fashion, that the newly cited cases do not support the Prehearing Officer's decision requiring the members of FCCA to respond to certain discovery. Indeed, the FCCA appears to argue that the Prehearing Officer erred because he failed to consider two new cases out of the federal Tenth Circuit and Oregon that applied federal law to resolve a factually distinguishable issue, which does not meet the standard for reconsideration. Such an argument does not satisfy the standard for reconsideration as it fails to identify any point of fact or applicable Florida law that the Prehearing Officer failed to consider. Therefore, the Commission should summarily reject the FCCA's Motion, because it is procedurally improper and fails to satisfy the reconsideration standard.

**II. The Newly Cited Case Law Is Inapplicable to the Instant Matter.**

Assuming arguendo that the Commission considered FCCA's newly cited cases, such consideration would not result in a finding that the Prehearing Officer erred in granting BellSouth's Motion to Compel regarding Interrogatory No. 66. For instance, in University of Texas at Austin, et al. v. Vratil, 96 F.3d 1337 (10th Cir. 1996), the Tenth Circuit applied federal procedural law in a federal question case in finding that discovery to nonparty members of a defendant association, which lacked capacity to sue or to be sued under Kansas law, was improper under federal law. In fact, the court determined that, because it was a federal question case, there was no need to consider the association's status under state law. Id. Here, Florida procedural law and not federal law governs the proceeding. Further, under Florida law, associations like FCCA have

standing to sue and to be sued in administrative proceedings, which was contrary to the association in question in University of Texas. See Florida Home Builders Assoc, et al. v. Department of Labor & Empl. Sec., 412 So. 2d 351 (Fla. 1982).

Accordingly, the University of Texas case is distinguishable and inapplicable to the instant dispute as it does not involve a lawsuit filed by association, on behalf of its members, who refuses to provide relevant information in support of allegations and testimony. The FCCA cannot have it both ways: it cannot assert that it has standing to file a complaint but then claim that its members are immunized from discovery. Therefore, the University of Texas case does not support any finding that the Prehearing Officer erred in applying and interpreting Florida law in granting BellSouth's Motion to Compel.

Likewise, Oil Heat Institute of Oregon, 123 F.R.D. 640, 642 (D. Oregon 1988) is also unpersuasive. In that case, a federal court in Oregon found that a nonprofit trade organization in a Lanham Act case did not have "control" of documents requested in discovery. In reaching its conclusion, the court recognized that, in some situations, an association will be deemed to have control of the requested items, but determined that facts did not support such a finding in that case. Id.

The instant proceeding is entirely different as Interrogatory No. 66 does not seek the production of any documents. Rather, it asks the FCCA to identify specific back-up information (including documents) relating to allegations made by one of its witnesses in his pre-filed testimony. Nevertheless, even if the Commission construed Interrogatory No. 66 to request documents, it is inconceivable to suggest that the FCCA is not in "control" of information that form the basis of its witness' testimony, unless the FCCA is

admitting that the testimony of its witness is devoid of any factual support and based entirely upon conjecture and speculation.[1] Accordingly, the Commission should give little credence to the Oil Heat Institute of Oregon because the FCCA is in "control" of the requested information, thereby obligating it to respond to BellSouth's discovery.

Finally, Commission precedent establishes that the Commission has previously authorized discovery to associations that would require the association to disclose information obtained from its members. See In re: Application for a Rate Increase by United Telephone Company of Florida, Order No. PSC-92-0112-PCO-TL (Mar. 27, 1992) (finding that United was entitled to obtain through discovery specific information from the association and/or its members); see also, In re: Investigation to Determine Whether LEC PATS Is Competitive and Whether LEC PATS Should Be Regulated Differently Than It Is Currently Regulated, Order No. PSC-93-1513-CFO-TL (Oct. 14, 1993) (the Commission ruled on a request for confidential classification for information provided by ten members of the Florida Pay Telephone Association in response to discovery issued to the association).

## CONCLUSION

For the foregoing reasons, the Commission should deny the FCCA's Motion for Reconsideration of Order No. PSC-03-0180-PCO-TL.

[1] In the event the Commission determines that FCCA is not in "control" of the requested documents, BellSouth moves to strike the testimony of Mr. Gillan as it is based entirely on speculation and conjecture and thus cannot be relied upon by the Commission.

Respectfully submitted this 24th day of February 2003.

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