

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Florida
Competitive Carriers Association
against BellSouth
Telecommunications, Inc.
regarding BellSouth's practice
of refusing to provide
FastAccess Internet Service to
customers who receive voice
service from a competitive voice
provider, and request for
expedited relief.

DOCKET NO. 020507-TL
ORDER NO. PSC-03-0016-FOF-TL
ISSUED: January 3, 2003

The following Commissioners participated in the disposition of
this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

ORDER DENYING BELLSOUTH'S MOTION FOR RECONSIDERATION AND/OR
MODIFICATION OF ORDER NO. PSC-02-1618-PCO-TL TO THE FULL
COMMISSION, OR IN THE ALTERNATIVE,
MOTION TO CONVERT TO A GENERIC PROCEEDING

BY THE COMMISSION:

BACKGROUND

On June 12, 2002, the Florida Competitive Carriers Association (FCCA) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) and a Request for Expedited Relief seeking relief from BellSouth's practice of refusing to provide its FastAccess service to customers who receive voice service from an Alternative Local Exchange Carrier (ALEC).

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On July 3, 2002, BellSouth filed a Motion to Dismiss FCCA's Complaint and an Opposition to Request for Expedited Relief. On July 9, 2002, FCCA filed its Response in Opposition to BellSouth's Motion to Dismiss and filed a Motion for Summary Final Order.

By Order No. PSC-02-0935-PCO-TL, issued July 12, 2002, the request for expedited relief was denied. By Order No. PSC-02-1464-FOF-TL, issued October 23, 2002, we denied BellSouth's Motion to Dismiss and FCCA's Motion for Summary Final Order without Prejudice.

Shortly thereafter, the parties met with our staff to identify the issues to be addressed in this docket. Although the parties and our staff agreed on most of the issues, several issues proposed by the parties were objected to by the other party or our staff. The parties and our staff agreed that with the concurrence of the Prehearing Officer short briefs should be filed in support of issues which one party wished to sponsor over the objections of the other. Thereafter, the other party could file a response to the brief. However, FCCA decided prior to filing a brief to withdraw its contested issues; thus, only BellSouth filed a brief in support of its contested issue. FCCA filed a response in opposition to BellSouth's proposed Issue 7. BellSouth's proposed Issue 7 is "Should any decisions made in this proceeding apply to all ALECs and ILECs?"

By Order No. PSC-02-1537-PCO-TL, issued November 12, 2002, the Prehearing Officer issued the Order Establishing Procedure which excluded BellSouth's proposed Issue 7 from this proceeding. On November 22, 2002, the Prehearing Officer provided clarification regarding the reasons for excluding BellSouth's proposed Issue 7 and reaffirmed the decision to exclude proposed Issue 7, in Order No. PSC-02-1618-PCO-TL (Clarification Order).

On December 2, 2002, BellSouth filed its Motion for Reconsideration and/or Modification of Order No. PSC-02-1618-PCO-TL to the Full Commission, or in the Alternative, Motion to Convert to a Generic Proceeding (Motion). On December 9, 2002, FCCA and ITC^DeltaCom Communications, Inc. (DeltaCom) filed their Joint Response to BellSouth's Motion. DeltaCom was granted intervention by Order No. PSC-02-1515-PCO-TL, issued November 5, 2002.

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This Order addresses BellSouth's Motion and FCCA and DeltaCom's Response.

MOTION FOR RECONSIDERATION AND/OR MODIFICATION OF
ORDER NO. PSC-02-1618-PCO-TL TO THE FULL COMMISSION

As noted in the Background, on December 2, 2002, BellSouth filed its Motion for Reconsideration and/or Modification of Order No. PSC-02-1618-PCO-TL to the Full Commission, or in the Alternative, Motion to Convert to a Generic Proceeding (Motion). On December 9, 2002, FCCA and DeltaCom filed their Response to BellSouth's Motion. This section addresses only that portion of BellSouth's Motion regarding reconsideration and/or modification.

BellSouth's Motion

In support of its Motion, BellSouth asserts that this Commission should reconsider the Prehearing Officer's decision and modify Order No. PSC-02-1618-PCO-TL to include its proposed Issue 7 because the Prehearing Officer overlooked or failed to consider several points of fact, law and policy, citing to Diamond Cab Co. v. King, 146 So.2d 889, 891 (Fla. 1962). In its Motion, BellSouth raises the arguments it previously raised in its brief provided to the Prehearing Officer. BellSouth argues that since the decision could impact the industry as a whole, it is appropriate to consider whether any decision this Commission makes will impact all carriers in Florida rather than just BellSouth alone.

Citing to Florida Bankers Ass'n v. Leon County Teachers Credit Union, 359 So.2d 886, 890 (1st DCA 1978), BellSouth argues that rulemaking is the proper method of uniform policymaking in a matter of state-wide concern. BellSouth asserts that where it is permissible for an agency to develop policy through orders, the courts have stated that it is their duty to require an agency to show and articulate its reasons for discretionary action, citing to General Development Corp. v. Division of State Planning, Dep't of Admin., 353 So.2d 1199, 1209 (1st DCA 1977). BellSouth argues that if this Commission decides to impose regulations on BellSouth's provision of its FastAccess Internet Service, but not on any other provider's provision of a similar service, then this Commission at a minimum would be required to articulate the reasons for such

discretionary actions. Thus, BellSouth concludes that it makes no sense to exclude its proposed Issue 7.

Further, BellSouth argues that this Commission cannot impose differing regulatory oversight in an arbitrary, capricious, or discriminatory manner¹. BellSouth asserts that if this Commission were to render a policy decision that applies to BellSouth alone, at a minimum, this Commission would have to base its decision on the issues in the case supported by record evidence relating to such issues.

BellSouth also argues that DSL technology is not the only technology that supports broadband data services to customers. Essentially, BellSouth contends that wireless, cable modem, and satellite technology also comprise the broadband market and should be considered in any analysis of whether BellSouth has violated applicable law. Further, BellSouth cites to a recent FCC report, as well as a D.C. Circuit Court of Appeals case, which find that cable modem, not DSL, is the predominant broadband technology.² BellSouth contends that it lags behind the unregulated cable suppliers. BellSouth asserts that this Commission is being asked to regulate its provision of an unregulated service, which competes with other unregulated services offered by largely unregulated cable companies. Therefore, this Commission should address, at a minimum, whether to impose the same requirements on similar services offered by ALECs who are no more or no less dominant in the highly competitive broadband market than BellSouth.

¹BellSouth Telecommunications, Inc. v. Florida Public Service Commission, Case No. 99-5369RP, Final Order, issued July 13, 2000.

²Third Report, CC Docket No. 98-146, In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, FCC Order No. 02-33, (released February 6, 2002); United States Telecom Association v. FCC, 290 F.3d 415, 428-29 (D.C. Cir. 2002)

FCCA & DeltaCom Response

In their Response, FCCA and DeltaCom argue that BellSouth fails to meet the standard for reconsideration³, in that BellSouth makes the identical arguments and cites the identical cases as it did when the issue for which it seeks reconsideration was before the Prehearing Officer. FCCA and DeltaCom assert that a comparison of pages 2 through 5 of BellSouth's Brief with pages 3 through 6 of its Motion for Reconsideration demonstrates that BellSouth only parrots the same arguments it made to the Prehearing Officer. FCCA and DeltaCom cite to Sherwood v. State, 111 So.2d 96 (Fla. 3rd DCA 1959), citing State ex. rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla. 1st DCA 1958) for the proposition that in a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Therefore, FCCA and DeltaCom contend that in light of the prohibition against reargument in a motion for reconsideration, BellSouth's Motion for Reconsideration must be summarily rejected.

Decision

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 this Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974). This standard is equally applicable to reconsideration by this Commission of a

³See, Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So.2d 162 (Fla. 1st DCA 1981).

Prehearing Officer's order. See, Order No. PSC-96-0133-FOF-EI, issued January 29, 1996, in Docket No. 950110-EI.

Although BellSouth cites to the standard for reconsideration set forth in Diamond Cab Co. v. King, BellSouth fails to show that the Prehearing Officer overlooked or failed to consider one point of law or fact. In fact, all of the arguments BellSouth makes in its Motion were made in its brief to the Prehearing Officer. As noted by FCCA and DeltaCom, reargument is not appropriate for a motion for reconsideration.

As demonstrated in Order No. PSC-02-1618-PCO-TL (Clarification Order), the Prehearing Officer addressed the parties' arguments and set forth the reasons why BellSouth's proposed Issue 7 was excluded. Specifically, the Prehearing Officer found that the issue as written went well beyond the scope of the Complaint and that to include an issue regarding all ALECs and ILECs would require this Commission to review the individual practices of all ALECs and ILECs. Since the issue BellSouth wished to address would necessarily impact all ALECs and ILECs, the Prehearing Officer found that the issue should not be included in a simple complaint proceeding, but rather would be appropriate for a generic proceeding. Thus, all of the arguments put forth by BellSouth were considered by the Prehearing Officer in rendering his decision.

Based on the preceding reasons, BellSouth has failed to demonstrate that the Prehearing Officer made a mistake of fact or law in rendering his decision. Therefore, BellSouth's Motion for Reconsideration and/or Modification of Order No. PSC-02-1618-PCO-TL to the Full Commission shall be denied.

MOTION, IN THE ALTERNATIVE, TO CONVERT TO A GENERIC PROCEEDING

As noted in the previous section, BellSouth filed its Motion for Reconsideration and/or Modification of Order No. PSC-02-1618-PCO-TL to the Full Commission, or in the Alternative, Motion to Convert to a Generic Proceeding. This section addresses the Motion to Convert to a Generic Proceeding.

BellSouth's Motion

In its Motion to Convert to a Generic Proceeding, BellSouth argues that if this Commission denies its Motion for Reconsideration and Modification, that based on the reasons set forth in that portion of its Motion, this Commission should convert this to a generic proceeding. A summary of BellSouth's previous arguments why this Commission's decision should encompass all other ALECs and ILECs are: 1) that the decision could impact the industry as a whole; 2) that if this Commission were to render a policy decision that applied to BellSouth alone, at a minimum, this Commission would have to base its decision on the issues in the case supported by record evidence and cannot impose such regulatory oversight in an arbitrary, capricious, or discriminatory manner; and 3) that this Commission should consider the whole broadband market, including wireless, cable modem, satellite technology, as well as DSL, in determining whether BellSouth's practices, or any other ALEC's or ILEC's practices, violate applicable law.

Again, BellSouth argues that it would be inappropriate for this Commission to make a decision involving broad policy considerations and ramifications without including all affected carriers in what BellSouth terms essentially a rulemaking procedure. BellSouth also asserts that it would be a waste of this Commission's and parties' time to require it and FCCA to retry this proceeding in a generic proceeding. Further, BellSouth asserts that there appears to be a fundamental question of whether a decision in this case would have a preclusive effect on litigation on the same or similar issues in a generic proceeding. BellSouth cites to United Telephone Company of Florida⁴ for the proposition that this Commission has previously converted or referred an issue to a generic proceeding upon finding that the issue was one which all ILECs should address and that it was probable that a generic proceeding would result in rulemaking. BellSouth contends that similar to the United Telephone Company of Florida case, the issue of whether a telephone company must provide its Internet service to

⁴ Order No. PSC-92-0708-FOF-TL, in Dockets Nos. 910980-TL, 910027-TL, and 910529-TL, issued July 24, 1992, (United Telephone Company of Florida)

a specific customer is clearly a generic issue which should be addressed by ILECs and which will probably result in rulemaking.

FCCA & DeltaCom Response

In their Response, FCCA and DeltaCom disagree with BellSouth's contention that this docket is essentially a rulemaking procedure. They argue that this is a complaint proceeding which FCCA initiated regarding BellSouth's anticompetitive behavior. FCCA and DeltaCom assert that while BellSouth would prefer to shift the focus of the case, as well as delay its resolution, BellSouth has not provided a single example of the conduct of any other provider that has resulted in competitive harm to BellSouth. Further, FCCA and DeltaCom argue that BellSouth's suggested "generic" Issue 7 was nothing more than an afterthought and was not even included on the suggested issues list BellSouth initially filed.

FCCA and DeltaCom contend that the addition of this "generic" issue to this docket is not only inappropriate given the scope of the Complaint, but it would serve no purpose other than delay the present, actual, and ongoing refusal of BellSouth to comply with the law and would serve to unnecessarily complicate this proceeding. FCCA and DeltaCom assert that expansion of the scope of the hearing to unrelated matters, as well as the need to notice and involve other carriers, would needlessly delay resolution of the issues raised in FCCA's complaint.

FCCA and DeltaCom argue that BellSouth's reliance on the United Telephone Company of Florida case is misplaced because in that case this Commission found an inconsistent policy between the electric and telephone industries as to service to elevators, which it decided should be dealt with in a generic proceeding. FCCA and DeltaCom assert that the United Telephone Company of Florida case dealt with a broad tariff issue which would impact the entire industry and that issue has no relation to the issues in this docket. FCCA and DeltaCom contend that even BellSouth recognizes the issues in this docket surround BellSouth's FastAccess Internet service. FCCA and DeltaCom assert that this docket addresses BellSouth's behavior, which this Commission found to be anticompetitive in at least two other dockets. FCCA and DeltaCom claim that this is not a rulemaking proceeding but a complaint against BellSouth's anticompetitive behavior and as such the

resolution of FCCA's Complaint will not result in a generic policy. FCCA and DeltaCom argue that any effort to characterize this matter as a generic proceeding that has industry-wide implications would constitute a denial of due process to the parties in this case.

Decision

We find that this Complaint is not in any way a rulemaking proceeding. We agree that this is merely a complaint proceeding in which FCCA has alleged anticompetitive behavior by BellSouth. As such, we believe that this case may best be addressed in an individual proceeding rather than a generic proceeding, since it requires fact-specific findings.

Further, we find that to convert this docket to a generic proceeding would serve no purpose other than delay the present docket. We agree that expansion of the scope of the hearing to address generic matters, as well as the need to notice and involve other carriers, would needlessly delay resolution of the issues raised in FCCA's complaint. Moreover, we find it is premature to address these issues in a generic proceeding.

For the foregoing reasons, we find that it is not appropriate to establish a generic proceeding to address these issues at this time. Therefore, BellSouth's Motion, in the Alternative, to Convert to a Generic Proceeding shall be denied. However, this Order does not preclude BellSouth or any other party from filing a request for a generic proceeding regarding these issues in the future.

Based on the foregoing, it is

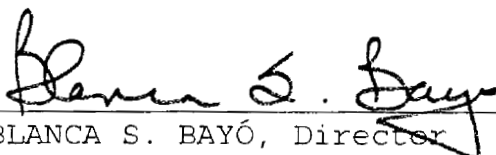
ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Motion for Reconsideration and/or Modification of Order No. PSC-02-1618-PCO-TL to the Full Commission is hereby denied. It is further

ORDERED that BellSouth Telecommunications, Inc.'s Motion, in the Alternative, to Convert to a Generic Proceeding is hereby denied. It is further

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ORDERED that this docket shall remain open pending further proceedings.

By ORDER of the Florida Public Service Commission this 3rd day of January, 2003.



BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

PAC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of

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the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.