

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of BellSouth
Telecommunications, Inc. to lift
marketing restrictions imposed
by Order No. PSC-96-1569-FOF-TP.

DOCKET NO. 971399-TP
ORDER NO. PSC-98-1469-FOF-TP
ISSUED: October 28, 1998

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

APPEARANCES:

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On behalf of BellSouth Telecommunications, Inc.

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On behalf of Florida Competitive Carriers Association.

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On behalf of MCI Telecommunications Corporation.

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On behalf of AT&T Communications of the Southern States,
Inc.

Barbara D. Auger, Esquire, Pennington, Culpepper, Moore,
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On behalf of Time Warner Communications.

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William P. Cox, Esquire, Florida Public Service
Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL
32399-0850
On behalf of the Commission Staff.

FINAL ORDER ON
BELLSOUTH TELECOMMUNICATIONS, INC.'S
PETITION TO LIFT MARKETING RESTRICTIONS

BY THE COMMISSION:

I. BACKGROUND

On October 21, 1997, BellSouth Telecommunications, Inc. (BellSouth) filed a Petition to Lift the (intraLATA toll) Marketing Restrictions imposed by Order No. PSC-96-1569-FOF-TP (Order) in Docket No. 930330-TP. On November 10, 1997, MCI Telecommunications Corporation (MCI), AT&T Communications of the Southern States, Inc. (AT&T), and the Florida Competitive Carriers Association (FCCA; formerly FIXCA), collectively referred to as the Joint Complainants, filed responses to BellSouth's petition. On the same day, the Joint Complainants filed a motion to dismiss BellSouth's petition. On November 18, 1997, BellSouth filed a Response and Opposition to the Joint Motion to Dismiss. On February 17, 1998, we issued Order No. PSC-98-0293-FOF-TP denying the Joint Motion to Dismiss and setting the matter for hearing. On June 18, 1998, an evidentiary hearing was conducted to address the issues of whether the marketing restrictions should be lifted and what relief is due to BellSouth, if any. Our decision on BellSouth's petition is set forth below.

II. POSITIONS OF THE PARTIES

BELLSOUTH'S POSITION

In Order No. PSC-96-1569-FOF-TP, at page 6, the Commission imposed the following restrictions on BellSouth with regard to its marketing of intraLATA toll services to new customers:

1. BellSouth shall advise customers that due to the newly competitive environment they have an option of selecting a long distance carrier for their local toll calls (calls made within a local calling zone to nearby communities).

2. BellSouth shall offer to read to the customer the list of available carriers. If the customer responds affirmatively, then the list shall be read.
3. If the customer declines, then the customer service representative shall ask the customer to identify the carrier of choice. If the customer's response is ambiguous or non-committal, the service representative shall offer to read the list of available carriers and encourage the customer to make a selection. If the customer does not want to make a selection, the customer shall be advised that he must dial an access code to reach an intraLATA carrier each time he makes an intraLATA call until a presubscribed carrier is chosen.

BellSouth witness Geer argues that the marketing restrictions that the Commission imposed were intended to promote intraLATA toll competition. By restricting BellSouth's ability to market its intraLATA toll services to new customers, the Commission intended to increase customers' awareness and allow competing carriers to establish their presence in the intraLATA toll market. Witness Geer explains that the restrictions prevent BellSouth from informing customers that it provides intraLATA toll service unless the customer specifically asks if BellSouth provides this service. Witness Geer contends that these restrictions have created an unlevel playing field since BellSouth does provide intraLATA toll service. Witness Geer claims that the IXCs have established their presence in the intraLATA market as is evidenced by customer awareness of choices in the intraLATA marketplace. She contends that this will not change if BellSouth is relieved of these marketing restrictions. She further contends that the requested relief will enable customers to make informed decisions, as should be the case in a competitive marketplace.

BellSouth witness Geer argues that there is ample data to suggest that there is flourishing competition in the intraLATA market. She asserts that as of May 31, 1998, BellSouth had lost 32% of its residential, 25% of its complex business, and 36% of its small business Florida intraLATA toll PIC-able lines to other intraLATA toll carriers. She contends that this data indicates market share loss. With respect to new service requests, witness Geer states that during the period January, 1997, to June, 1998, 33% of all new residential and 20% of all new business customers selected other intraLATA toll providers. For existing customers, witness Geer asserts that 84% of residential and 91% of business customers selected other intraLATA toll providers. Overall

(combining both new and existing customers), witness Geer states that for that same period, January, 1997, to June, 1998, 57% of residential and 45% of business customers selected intraLATA carriers other than BellSouth. Witness Geer concedes that this data is indicative of intraLATA PIC (LPIC) activity and not market share loss. Witness Geer also acknowledges that this activity-based data includes customers calling either the carrier or the business office for PIC changes; she asserts that these changes could be multiple activities on the same access line, which could overstate the loss.

BellSouth witness Geer also argues that the marketing restrictions create an unfair playing field and a great deal of customer confusion. Witness Geer further argues that this customer confusion results from the fact that BellSouth is not allowed to fully educate the customer about all the participants and services available in the intraLATA marketplace. According to Witness Geer, customers are not aware that there are a number of intraLATA calling plans from which they could benefit. Witness Geer contends that under these circumstances a customer could be paying for a service the customer may not be receiving, or the customer could otherwise be paying a higher rate for his or her service. In either case, witness Geer argues that BellSouth should have educated the customers initially about all available services. Witness Geer asserts that this customer confusion is due to the fact that with the current restrictions, BellSouth is not allowed to inform these customers of BellSouth's available calling plans and intraLATA toll service.

BellSouth witness Geer argues that the first "buying experience" between a company and a new customer is crucial. She contends that this first experience creates a lasting impression; hence, a company's ability to fully educate the new customer on its products and services is essential in developing a lasting relationship. Witness Geer argues that the marketing restrictions preclude BellSouth from explaining in detail products and services that can benefit its customers. Witness Geer further argues that these restrictions have allowed BellSouth's competitors to enjoy an unshackled opportunity to gain market share. Witness Geer states that the relief BellSouth is seeking is the ability to inform customers that it provides intraLATA toll service in addition to local service.

Witness Geer contends that when a new customer selects an intraLATA toll carrier other than BellSouth, BellSouth is

prohibited from educating the customer about the impact his or her choice may have on the local calling plan he or she may have chosen or may access. Witness Geer argues that to ensure that a customer continues to enjoy ECS rates, it is necessary that BellSouth be allowed to inform customers selecting an intraLATA carrier other than BellSouth that the customer can dial around using 1015124 (BellSouth's Carrier Access Code). She asserts that BellSouth communicates the dial-around process using a customer mailer. Witness Geer argues that BellSouth should be allowed to provide customers this information without having to wait "until the subject is introduced by the customer." Witness Geer asserts that BellSouth's ability to market its local toll services will enhance customers' awareness regarding the full range of choices in the marketplace and also eliminate customers' confusion.

To fully educate these customers, BellSouth has proposed the use of three prompts as guides for its customer service representatives. BellSouth argues that it will use these three prompts to advise customers regarding available choices in the intraLATA marketplace. The three prompts are as follows:

1. That the customer has a choice of selecting a long distance carrier for local toll calls.
2. That BellSouth can provide the customer's local toll service.
3. That BellSouth will read the list of the available intraLATA carriers if the customer desires.

Witness Geer argues that using these prompts in a presentation is fair and equitable to the competitors, and that it eliminates customer confusion. Witness Geer asserts that this balanced presentation is necessary because if the customer chooses not to have the list read, the current restrictions preclude informing the customer that BellSouth is also an intraLATA toll provider. She contends that the proposed prompts are competitively neutral and recommends that the Commission allow BellSouth to use them.

FCCA'S POSITION

FCCA witness Seay argues that the purpose of the intraLATA marketing restrictions was to ensure that a new customer's initial contact with BellSouth was neutral and fair, recognizing the two hats BellSouth wears in the intraLATA toll marketplace. Under one hat, BellSouth is the dominant provider of local exchange services.

Under the other hat, BellSouth is a provider of intraLATA toll services in the intraLATA toll marketplace. Witness Seay contends that these restrictions are there to prohibit BellSouth from wearing the two hats concurrently. Witness Seay asserts that the current level of customer awareness is due to aggressive marketing efforts by the competitors. Customers are starting to seek out information on services that they readily use.

Witness Seay argues that as long as BellSouth remains the dominant local exchange service provider the restrictions should remain in effect. She contends that without these restrictions, BellSouth will use its position as the gatekeeper for intraLATA toll service to influence customers during their initial contact. She further argues that the restrictions ensure neutral customer contact protocols, while at the same time enabling BellSouth to market its intraLATA toll services as it chooses outside of the initial customer contact. According to witness Seay, the competitively-neutral protocols do not disadvantage BellSouth; instead, they place BellSouth on the same footing with the other intraLATA toll carriers. She contends that BellSouth is the only intraLATA toll carrier with the unique opportunity to market its services to captive customers. Lifting the marketing restrictions will allow BellSouth to leverage its position as a dominant LEC before there is true local competition.

Witness Seay agrees that the data BellSouth has proffered shows the existence of competition in the intraLATA marketplace. She points out, however, that even with these restrictions, BellSouth still retains 75% of the market. According to witness Seay, some of the data is not relevant, since the existing customer restrictions have expired.

Witness Seay argues, at the onset of intraLATA presubscription, there was a lot of customer confusion. Customers were uninformed and unaware of the choices in the intraLATA toll environment. She contends that this is no longer the case as more and more customers are becoming increasingly aware that there are many intraLATA toll providers. Hence, BellSouth does not need the marketing restrictions lifted so that it can educate its customers. Witness Seay argues that by BellSouth seeking to educate customers, BellSouth is actually seeking to discuss its calling plans with them. Witness Seay concludes that if BellSouth discusses any of its calling plans with these new customers, BellSouth should also discuss its competitors' calling plans.

Finally, witness Seay argues that BellSouth's proposed prompts are an attempt by BellSouth to renege on a stipulation to which BellSouth is a party. She argues that with these proposed prompts, BellSouth will put its name first before the customer and only mention other intraLATA carriers if so requested. Witness Seay contends that allowing BellSouth to use the proposed prompts will undermine the intraLATA toll competition that is evolving. Witness Seay further argues that BellSouth has not been prohibited from educating its customers regarding its intraLATA toll services, when the customer introduces the subject. Witness Seay contends that with the competitively-neutral contact protocols, BellSouth should not worry about customer confusion since further discussion regarding other intraLATA services will be contingent on the customer's selection of an intraLATA toll provider.

III. DISCUSSION

As both BellSouth and the Joint Complainants have indicated, the marketing restrictions were intended to ensure competitively neutral customer contact protocols, increase customer awareness, and allow the IXCs to establish a presence in the intraLATA marketplace. The question is whether the reported market activity is sufficiently compelling to warrant lifting the restrictions now. We must also consider how many entities, besides BellSouth, are available for a new customer to call upon to initiate service.

BellSouth points to its share of LPIC activity and presubscribed intraLATA lines as indicative of market erosion that would justify relief from the marketing restrictions. We believe that the LPIC activity data for new service connections is more informative than the LPIC activity data for existing service changes and moves. The latter includes cases of multiple activity on the same line. In addition, much of the existing customer activity is undoubtedly associated with customers who want to exercise their option to select an intraLATA carrier other than BellSouth. Since there was no balloting, customers who wanted to stay with BellSouth did not need to take any action. With the LPIC activity for new service connections, there is a very low probability of multiple activity on the same line within the 17-month period cited by BellSouth witness Geer. In addition, each new service connection will include the choice of intraLATA carrier.

Witness Geer demonstrated that, as of May 31, 1998, BellSouth had 69.32% of the LPIC-able access lines. The distribution of

intraLATA presubscribed lines is a measure of market share at a snapshot in time. This measure, however, does not consider when the line was connected. For new service connections over the period January, 1997, through June, 1998, 72% of the lines were presubscribed to BellSouth for intraLATA calling. Since the marketing restrictions on existing customers did not expire until June 23, 1998, the statistics on new and existing customers were derived under the same constraints. The similar percentages for new connections and LPIC-able access lines suggest that new and existing customers have a similar propensity to select BellSouth as their intraLATA carrier. Since the marketing restrictions on existing customers have expired, these statistics corroborate BellSouth's position that the marketing restrictions on new customers should be lifted as well.

The Joint Complainants' arguments hinge on BellSouth's "gatekeeper" position for new connections. The Joint Complainants argue that the limited competition in local markets places BellSouth in the unique and advantageous position of being the first point of contact for most new connections. There is justifiable concern that BellSouth might use its gatekeeper position to unduly influence the customer's choice of intraLATA carrier.

We agree with BellSouth that the first "buying experience" is crucial. We also agree with the Joint Complainants that this makes a strong case for competitively neutral customer contact protocols when BellSouth negotiates a new customer's local service and his or her selection of intraLATA carrier. We recognize, however, that the marketing restrictions preclude BellSouth from explaining fully its products and services. Nonetheless, we believe that BellSouth has other means of educating and informing these customers besides inbound customer contacts. In addition, we note that by Order No. PSC-96-1569-FOF-TP, BellSouth was allowed to educate customers when the customers introduce the subject. We agree with both BellSouth and the Joint Complainants that customers' awareness has increased, and we believe that as awareness grows, customers will become more informed and thereby seek the necessary information to enable them to make informed decisions. We generally support BellSouth's efforts to use a customer mailer to educate customers on how to dial around as resolution for any conflicts arising from a customer's desire to use BellSouth's ECS while being PIC'd to a different intraLATA carrier. We note, however, that the mailer package discusses the dial-around process in a postscript footnote.

Indeed, the mailer package appears to target these customers more for "win back" than education.

The prompts BellSouth has proposed in this proceeding are the same prompts the Commission prohibited BellSouth from using in the original Complaint proceeding in Order No. PSC-96-1569-FOF-TP. The record shows that the only thing that has changed in the marketplace since that complaint is increased customer intraLATA activity. BellSouth still effectively maintains its gatekeeper status since alternative local providers have not garnered any significant local market share. We note that the existing prompts do not inform a customer that BellSouth is an intraLATA toll provider. We do not believe that allowing BellSouth to use its proposed prompts would be competitively neutral. We believe that to be competitively neutral the prompts must be consistent with the following: if the customer declines to have the list read to him or her and the customer leaves with knowledge of only one provider, the negotiation is not competitively neutral.

IV. CONCLUSION

The record contains valid arguments on both sides of this issue. We acknowledge that the limited competition in local markets effectively places BellSouth in a gatekeeper position with respect to new connections. While this gatekeeper position gives BellSouth an advantage in theory, we believe that market data is a more telling indicator since this data is the product of actual customer and company actions. We expect that BellSouth's new marketing efforts toward existing customers will not adversely affect the state of that market, and will confirm that customers have become sufficiently informed to make educated choices, despite any inherent advantage BellSouth has due to its gatekeeper position.

Upon consideration, we hereby grant BellSouth relief from the marketing restrictions on new customers. Specifically, we grant BellSouth relief from the requirements of Section III, Item 1, of Order No. PSC-96-1569-FOF-TP, issued December 23, 1996, in Docket Nos. 930330-TP and 960658-TP. We hereby modify Section III, Item 1, as follows: BellSouth shall advise customers that due to the newly competitive environment they have an option of selecting a carrier for their local toll calls (calls made within a local

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calling zone to nearby communities) in addition to us.¹ As previously specified in Order No. PSC-96-1569-FOF-TP, BellSouth is permitted to educate new customers who select BellSouth for their intraLATA toll service. Also, we hereby require BellSouth to rewrite its customer mailer to educate the customers on how to dial-around and not just refer to it in a footnote.

We also shall require BellSouth to provide a report on LPIC activity and the distribution of LPIC-able access lines for the six-month period following expiration of the marketing restrictions on existing customers. The report shall include LPIC activity for the six months ending December 31, 1998, and the distribution of LPIC-able access lines from June 30, 1998, to December 31, 1998. The report shall be filed with this Commission no later than February 1, 1999.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc. is granted relief from the requirements of Section III, Item 1, of Order No. PSC-96-1569-FOF-TP, issued December 23, 1996, as specified in the body of this Order. It is further

ORDERED that BellSouth shall provide a report on LPIC activity for the six months ending December 31, 1998, and the distribution of LPIC-able access lines from June 30, 1998, to December 31, 1998, no later than February 1, 1999. It is further

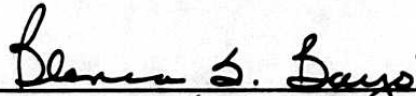
ORDERED that BellSouth shall rewrite its customer mailer as specified in the body of this Order. It is further

ORDERED that this docket shall remain open.

¹See Order No. PSC-98-0710-FOF-TP, page 5, where the Commission determined: "... we believe that Sprint's use of the phrase 'in addition to us' is potentially helpful and informative for customers; ..., accordingly, we will not prohibit Sprint from using the phrase 'in addition to us' in its customer contact protocol."

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By ORDER of the Florida Public Service Commission this 28th
day of October, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)
WPC

DISSENTS

Commissioner J. Terry Deason and Commissioner E. Leon Jacobs
dissented on this Order.

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
Records and Reporting, 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 Records and reporting 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.