

MCWHIRTER REEVES
ATTORNEYS AT LAW

ORIGINAL

TAMPA OFFICE:
400 NORTH TAMPA STREET, SUITE 2450
TAMPA, FLORIDA 33602
P. O. BOX 3350 TAMPA, FL 33601-3350
(813) 224-0866 (813) 221-1854 FAX

PLEASE REPLY TO:

TALLAHASSEE

TALLAHASSEE OFFICE:
117 SOUTH GADSDEN
TALLAHASSEE, FLORIDA 32301
(850) 222-2525
(850) 222-5606 FAX

June 12, 2002

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: In re: Complaint of the Florida Competitive Carriers Association Against
BellSouth Telecommunications, Inc. and Request for Expedited Relief
Docket No: 020507-72

Dear Ms. Bayo:

On behalf of the Florida Competitive Carriers Association (FCCA), enclosed for filing
and distribution are the original and 15 copies of the following:

- ▶ Complaint of the Florida Competitive Carriers Association Against
BellSouth Telecommunications, Inc. and Request for Expedited Relief;
and
- ▶ Direct Testimony and Exhibit of Joseph Gillan on Behalf of the Florida
Competitive Carriers Association.

Please acknowledge receipt of the above on the extra copy of each and return the
stamped copies to me. Thank you for your assistance.

Sincerely,

Wicki Gordon Kaufman

Wicki Gordon Kaufman

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MCWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, DECKER, KAUFMAN, ARNOLD & STEEN, P.A. 06124 JUN 12

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of the Florida
Competitive Carriers Association
Against BellSouth Telecommunications, Inc.
and Request for Expedited Relief

Docket No. 020507-72

Filed: June 12, 2002

**COMPLAINT OF THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION
AGAINST BELL SOUTH TELECOMMUNICATIONS, INC. AND REQUEST FOR
EXPEDITED RELIEF**

The Florida Competitive Carriers Association (FCCA), pursuant to §§ 364.01, 364.03(1), 364.051, 364.08(1), 364.10(1) and 364.3381, Florida Statutes, and rules 25-22.036(2) and 28-106.201, Florida Administrative Code, files this Complaint and Request for Expedited Relief against BellSouth Telecommunications, Inc. (BellSouth) in regard to its practice of refusing to provide its FastAccess Internet Service (FastAccess) to customers who receive voice service from a competitive voice provider. This practice is a barrier to competition and interferes with consumers' ability to select the provider of choice. Expedited relief¹ is required to immediately remove this barrier to competition and to allow the marketplace to determine which carriers will provide which services.

One of the main objectives of this Commission as it regulates telecommunications in the state is to protect consumers in the exercise of their ability to access a full array of market options – whether that option is basic telecommunications service, broad band service, long distance service, or whatever combination of those and/or other services a particular consumer selects to serve his or her own unique needs. BellSouth's FastAccess strategy -- to foreclose the

¹ In filing this Complaint, the FCCA has followed the procedures for expedited processing set out in the June 19, 2001 Commission memorandum from Noreen S. Davis to then Chairman, E. Leon Jacobs. It has filed its complaint, direct testimony and exhibits together, and it has limited its Complaint to less than three issues. Though the process described in Ms. Davis' memorandum was originally envisioned as applicable to complaints arising from interconnection agreements, it is equally useful in the context of the narrow complaint described herein. It is critical that the Commission use an expedited process to quickly resolve the important issue set out in this Complaint.

free exercise of consumer choice -- described in this Complaint, interferes with consumer options and thus with this important state policy. The Commission should rectify this situation through action on FCCA's Complaint.

It has been, and continues to be, BellSouth's practice to refuse to provide its FastAccess DSL service to customers who exercise their right in the market place to choose a carrier other than BellSouth for voice service. In its recent decision in the BellSouth/FDN arbitration², the Commission recognized that such a practice is discriminatory and anticompetitive because it forecloses choice, and directly hampers the ability of providers to compete in the Florida local market. Through action on this Complaint, the Commission should ensure that its policy decision is applicable to all competitive providers; otherwise, BellSouth will continue to engage in this anticompetitive practice.

The policy rationale that underlies the FDN decision is equally applicable to BellSouth's dealings with other competitive carriers—whether such carriers provide service over a UNE loop obtained individually or in combination with unbundled local switching (i.e., UNE-P). BellSouth should not be able to refuse to provide DSL service to customers simply because those consumers prefer a provider other than BellSouth for voice service. Thus, FCCA requests that the Commission process this Complaint in accordance with its procedures for expedited processing and that it require BellSouth to immediately cease and desist from its practice of disconnecting its DSL service to consumers who choose a voice provider other than BellSouth.

² *Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996*, Order No. PSC-02-0765-FOF-TP, Docket No. 010098-TP, issued June 5, 2002 (hereinafter "FDN Order").

I. STATUTORY AUTHORITY

1. The Commission has jurisdiction over this Complaint pursuant to §364.01, Florida Statutes, which gives the Commission authority to regulate telecommunications companies, § 364.10, Florida Statutes, which prohibits a telecommunications company from unjustly or unreasonably discriminating as to practices or services, §364.051, Florida Statutes, which prohibits anticompetitive practices, and §364.3381, Florida Statutes, which gives the Commission jurisdiction over anticompetitive behavior. Specifically, the Commission has jurisdiction to "ensure that all providers of telecommunications services are treated fairly, by preventing anti-competitive behavior" ³

2. In the FDN Order, the Commission specifically noted, "our state statutes provide that we must encourage competition in the local exchange market and remove barriers to entry." ⁴ Sections 364.01(4)(g), 364.01(4)(d) and 364.01(4)(b) specifically provide the Commission with the necessary authority to address the matters raised herein.

3. In addition, the Commission found that BellSouth's policy regarding FastAccess: raised valid concerns regarding possible barriers to competition in the local telecommunications voice market that could result from BellSouth's practice of disconnecting customers' FastAccess Internet Service when they switch to FDN voice service. That is an area over which we do have regulatory authority. ⁵

II. PARTIES

4. The Florida Competitive Carriers Association is a Florida not-for-profit corporation, whose members provide competitive telecommunications services in the state.

³ § 364.01(4)(g), Florida Statutes.

⁴ FDN Order at 8.

⁵ FDN Order at 8.

5. All pleadings, notices and other documents related to this proceeding should be provided to:

Joseph A. McGlothlin
jmcglothlin@mac-law.com

Vicki Gordon Kaufman
vkaufman@mac-law.com

McWhirter Reeves McGlothlin Davidson Decker
Kaufman Arnold & Steen, PA
117 South Gadsden Street
Tallahassee, Florida 32301
850-222-2525
850-222-5606 (fax)

6. BellSouth is a corporation organized and formed under the laws of the state of Georgia. Its main office is located at 675 West Peachtree Street, Atlanta, Georgia 30375. BellSouth is an incumbent local exchange company and provides the majority of service to customers located in its traditional service territory.

III. SUBSTANTIAL INTERESTS

7. FCCA members provide competitive local telecommunications services in BellSouth's territory. As such, their substantial interests are affected significantly by BellSouth's anticompetitive behavior. BellSouth's refusal to provide its DSL service to customers who choose a competitor for voice service continues to delay the time when meaningful local competition will become a reality for Florida consumers. BellSouth's actions directly affect the interests of FCCA's members.

IV. STATE LAW REQUIRES THAT LOCAL MARKETS BE OPEN TO COMPETITION

8. State law requires the Commission to encourage the development of a competitive market for local telecommunications services. This policy is expressly set out in state law.

Section 364.01(3), Florida Statutes, provides:

The Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure.

9. In order to carry out this legislative mandate, the Commission is to exercise its jurisdiction to ensure that the incumbent local exchange companies "shall not engage in any anticompetitive act or practice, nor unreasonably discriminate among similarly situated customers."⁶ In addition, the Commission is to:

Ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services.⁷

Promote competition by encouraging new entrants into telecommunications markets. . .⁸

Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior⁹

10. Additionally, § 364.051(5)(b) provides that:

[t]he commission shall have continuing regulatory oversight of nonbasic services for purposes of ensuring that all providers are treated fairly in the telecommunications market.

⁶ § 364.051(6)(a)2, Florida Statutes.

⁷ §364.01(4)(b), Florida Statutes.

⁸ § 364.01(4)(d), Florida Statutes.

⁹ § 364.01(4)(g), Florida Statutes.

11. Finally, § 364.3381 gives the Commission continuing oversight jurisdiction over anticompetitive behavior and provides that the Commission may investigate allegations of such behavior upon complaint. Section 364.10(1) provides that a telecommunications company may not give an undue or unreasonable preference or engage in undue or unreasonable prejudice in any respect.

12. Thus, it is this Commission's role to ensure that the incumbent local monopolies do not engage in behavior that hampers the development of a competitive market so that consumers have the widest possible choice of telecommunications providers and services.

V. BELLSOUTH'S ANTICOMPETITIVE CONDUCT IS A BARRIER TO CUSTOMER CHOICE AND TO COMPETITION

13. It is undisputed that it is BellSouth's practice to refuse to provide its FastAccess service to end users who desire to receive voice service from a carrier other than BellSouth.¹⁰ BellSouth actively thwarts consumer choice and refuses to provide its DSL service in this situation regardless of whether the competitive provider provides service over a UNE loop by itself or through combinations that include local switching as well (UNE-P).

14. This anticompetitive practice strengthens BellSouth's local monopoly. Consumers are reluctant to change voice carriers, when, as a consequence of exercising their right to choose a particular voice provider, they lose the ability to receive DSL service.¹¹ Customers are understandably reluctant to change from BellSouth when informed that they will lose their DSL service. This anticompetitive and discriminatory practice prevents consumers from taking service from the carrier they prefer, is detrimental to the development of local

¹⁰ The Commission found that BellSouth routinely disconnects its Fast Access service when a customer changes voice providers. FDN Order at 4, 10.

¹¹ This would be the case for customers who wish to change to a voice provider who does not provide DSL service.

competition, and creates yet another barrier to local entry in Florida.

15. The Commission recently addressed this issue in its FDN Order. In that case, the question of whether BellSouth could engage in the anticompetitive practice described above was extensively discussed. In its recommendation, Staff said:

[S]taff believes that FDN has raised valid concerns regarding possible barriers to competition in the voice market that could result from BellSouth's practice of disconnecting customers' FastAccess Internet Service when they switch to FDN voice service. . . . Staff is troubled by the possibility raised by FDN that BellSouth may utilize its ability to provide FastAccess Internet Service as leverage to retain voice customers, possibly creating a disincentive for customers to obtain competitive voice service.¹²

At the Agenda Conference, Staff stated: "we view this practice as anticompetitive because it does pose a barrier to FDN gaining some potential market for voice customers."¹³

16. After due consideration, the Commission ordered BellSouth to cease the practice of disconnecting FastAccess customers who choose a voice provider other than BellSouth because such behavior creates a barrier to entry.¹⁴ The Commission made it clear during its discussion that it considered BellSouth's practice to constitute a significant barrier to entry. Commissioner Palecki said:

I'm very distressed at what I believe is an anticompetitive practice of the incumbent LEC refusing DSL service to FDN voice customers.¹⁵

Commissioner Deason commented:

My concern is that they [BellSouth] feel like they can maximize revenue by threatening to disconnect FastAccess, and then they've got the whole pot, because all they've got to do is tell the customer, "Sure, you can switch to FDN for your voice, but by the way, you can't have FastAccess anymore."

. . .

¹² FDN/BellSouth Recommendation at 50-51 (Recommendation at 51). Staff noted that the practice discussed herein was the appropriate subject for a complaint pursuant to § 364.01(4)(g).

¹³ Agenda Conference transcript, Item No. 26, April 23, 2002 (hereinafter "Tr.") at 27.

¹⁴ FDN Order at 10.

¹⁵ Tr. at 6.

If I were a customer and I was presented [with that] alternative, I know what I would choose, and it would not be FDN, even though I may prefer their service and there may be some advantages in their packages and there may be some discounts on the price. But I would think that if I were willing to -- if FastAccess was valuable enough to me to pay the going rate, that to lose that service altogether and not have a meaningful alternative, I just don't see customers making the decision to switch their voice service.¹⁶

17. The Commission found that BellSouth's failure to continue provision of FastAccess service to those customers who want to receive voice service from another provider is a barrier to entry in the local telecommunications market and required BellSouth to maintain its FastAccess service.¹⁷ In the FDN Order, the Commission found:

BellSouth's practice of disconnecting FastAccess Internet service has a direct, harmful impact on the competitive provision of local telecommunications services.¹⁸

. . .

We believe that FDN has demonstrated that this practice raises a competitive barrier in the voice market for carriers that are unable to provide DSL service.¹⁹

18. The Commission recognized that "[i]t is incumbent upon us to promote competition."²⁰ It held:

Thus, in the interest of promoting competition in accordance with state and federal law, BellSouth shall continue to provide FastAccess even when BellSouth is no longer the voice provider because the underlying purpose of such a requirement is to encourage competition in the local exchange telecommunications market, which is consistent with Section 251 of the Act and with Chapter 364, Florida Statutes.²¹

¹⁶ Tr. at 39-40.

¹⁷ Tr. at 41.

¹⁸ FDN Order at 9.

¹⁹ FDN Order at 8.

²⁰ FDN Order at 10.

²¹ FDN Order at 10.

19. The Commission also found that BellSouth's practice "unreasonably penalizes customers who desire to have access to voice service from FDN and DSL service from BellSouth in contravention of §364.10.²²

20. The BellSouth policy, which the Commission required BellSouth to stop in its FDN Order, is the same BellSouth policy that is imposed, with absolutely no justification (technical, legal or otherwise), on *all* competitive voice providers. Thus, it is a barrier to all providers who offer voice, but not DSL, service. Just as the Commission found such a practice unsustainable as to FDN, and required BellSouth to cease from such a practice, it must find do the same as to all competitive carriers.²³

21. In the arbitration proceeding between BellSouth and Supra Telecommunications and Information Systems, Inc.²⁴, the Commission, at its June 11, 2002 Agenda Conference, reconsidered, on its own motion, BellSouth's FastAccess policy and adopted Staff's recommendation on the FastAccess issue to conform its Supra decision to the FDN Order. In distinguishing its FDN FastAccess decision from other arbitration matters, which are generally limited to the two arbitrating parties, and recommending its application to the BellSouth/Supra case, Staff said:

In this instance, however, the decision regarding BellSouth's policy on FastAccess went to the legality of that policy under Florida law and the Commission's jurisdiction to address it. Thus, the question here [in the BellSouth/Supra arbitration] does not hinge on any different or additional facts present in Docket No. 010098-TP that are not present in this docket. As such, staff does not believe that the Commission's decision must be solely restricted to that arbitration.

Instead, staff recommends that the Commission make a consistent finding in this docket that the practice of disconnecting FastAccess Internet Service when

²² FDN Order at 10.

²³ FCCA suggests that to reject such a policy as to FDN but to permit BellSouth to impose it on all other carriers would be discriminatory in and of itself.

²⁴ *Petition by BellSouth Telecommunications, Inc. for Arbitration of Certain Issues in Interconnection Agreement with Supra Telecommunications and Information Systems, Inc.*, Docket No. 001305-TP.

the customer switches voice providers creates a barrier to competition in the local exchange telecommunications market. As such, the Commission should remedy the situation pursuant to its authority under Section 364.01(4)(g), Florida Statutes, which provides, in part, that the Commission shall, "[e]nsure that all provides of telecommunications services are treated fairly, by preventing anticompetitive behavior. . . ." Staff believes that the Commission is also authorized to act to remedy this barrier to competition by Sections 364.01(4)(b) and (d), Florida Statutes.²⁵

Thus, the Commission has affirmed that its FastAccess policy, as articulated in its FDN Order, is to have widespread application. FCCA simply seeks confirmation of that policy in this docket.

MATERIAL FACTS IN DISPUTE

22. FCCA does not believe that there are any material facts in dispute. BellSouth admits that it refuses to provide FastAccess service to customers who choose a voice provider other than BellSouth.²⁶

23. The ultimate issue for the Commission to resolve is whether such conduct is discriminatory, harmful to consumers and anticompetitive.²⁷ The FCCA believes that the Commission has already made this finding in the FDN Order and in its Supra decision. It should issue an order making this aspect of the FDN Order and Supra decision applicable to all providers. However, BellSouth may dispute that.

RELIEF REQUESTED


24. FCCA requests that the Commission:
- a. Process this case on an expedited basis utilizing the procedures outlined in the Commission's June 19, 2001 memorandum;
 - b. Order BellSouth to cease and desist from its practice of refusing to provide its FastAccess service to customers who select another provider for voice service;

²⁵ BellSouth/Supra recommendation, May 30, 2002, at 55-56.

²⁶ Tr. at 7.

²⁷ And in fact, the Commission has already so found in the FDN Order.

- c. Provide such other relief, as the Commission may deem appropriate.


Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, Arnold & Steen, PA
117 South Gadsden Street
Tallahassee, Florida 32301
(850) 222-2525 Telephone
(850) 222-5606 Telefax


Attorneys for the Florida Competitive Carriers Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complaint of the Florida Competitive Carriers Association Against BellSouth Telecommunications, Inc. and Request for Expedited Relief has been furnished by (*) hand delivery or by U. S. Mail this 12th day of June, 2002, to the following:

(*) Beth Keating
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

(*) Nancy White
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301-1556


Vicki Gordon Kaufman