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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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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

DIRECT TESTIMONY AND EXHIBIT

OF

JOSEPH GILLAN

ON BEHALF OF

THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION

DOCUMENT NUMBER DATE

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FPSC-COMMISSION OF EDU

TESTIMONY OF JOSEPH GILLAN
June 12, 2002

1 **Q. Please state your name, business address and occupation.**

2

3 A. My name is Joseph Gillan. My business address is P. O. Box 541038, Orlando,
4 Florida 32854. I am an economist with a consulting practice specializing in
5 telecommunications.

6

7 **Q. Please briefly outline your educational background and related experience.**

8

9 A. I am a graduate of the University of Wyoming where I received B.A. and M.A.
10 degrees in economics. From 1980 to 1985, I was on the staff of the Illinois
11 Commerce Commission where I had responsibility for the policy analysis of
12 issues created by the emergence of competition in regulated markets, in particular
13 the telecommunications industry. While at the Commission, I served on the staff
14 subcommittee for the NARUC Communications Committee and was appointed to
15 the Research Advisory Council overseeing the National Regulatory Research
16 Institute.

17

18 In 1985, I left the Commission to join U.S. Switch, a venture firm organized to
19 develop interexchange access networks in partnership with independent local
20 telephone companies. At the end of 1986, I resigned my position of Vice
21 President-Marketing/Strategic Planning to begin a consulting practice. Over the
22 past twenty years, I have provided testimony before more than 35 state
23 commissions, five state legislatures, the Commerce Committee of the United

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1 States Senate, and the Federal/State Joint Board on Separations Reform. I
2 currently serve on the Advisory Council to New Mexico State University's Center
3 for Regulation.

4

5 **Q. On whose behalf are you testifying?**

6

7 A. I am testifying on behalf of the Florida Competitive Carriers Association (FCCA),
8 an advocacy group formed to promote competition broadly throughout Florida.

9

10 **Q. What is the purpose of your testimony?**

11

12 A. The purpose of my testimony is to explain why the Commission should generally
13 prohibit BellSouth from refusing to provide FastAccess Internet Access Service
14 (FastAccess) to any customer that has chosen an alternative voice provider.
15 BellSouth's actions in this regard – affirmatively refusing to sell a customer one
16 service unless the customer agrees to purchase another – is a blatantly
17 anticompetitive action that this Commission is charged with prohibiting under
18 state law. The Commission recently ordered BellSouth to cease this
19 anticompetitive and discriminatory practice in an arbitration between Florida
20 Digital Network (FDN) and BellSouth (Order No. PSC-02-0765-FOF-TP, Docket
21 No. 010098-TP). The FCCA is filing this complaint to ensure that the
22 Commission's policy is applicable to all providers of voice service (including

1 carriers leasing UNE-Loops with and without UNE-switching), consistent with
2 Chapter 364's goal of promoting competition and customer choice.

3
4 **Q. Why should the Commission generally require that BellSouth offer**
5 **FastAccess to all Florida consumers, including those that have chosen an**
6 **alternative provider of voice service?**

7
8 A. As the Commission has found, BellSouth's policy to deny FastAccess to any
9 customer subscribing to an alternative provider of voice service is contrary to both
10 the spirit and the letter of Florida law, explicitly violating Chapter 364's
11 prohibitions on anticompetitive behavior and discrimination. First, it denies
12 customers the opportunity for basic self-determination as to what combination of
13 providers best meets their specific needs, thereby frustrating the fundamental
14 legislative intent (Chapter 364.01(3)) to encourage competition because
15 competition provides "...customers with freedom of choice." Second,
16 BellSouth's conduct frustrates the achievement of an important state and national
17 goal – greater penetration of advanced services – solely for the purpose of further
18 entrenching BellSouth's voice monopoly. Third, it discriminates between data
19 customers based on their voice provider. Fourth, the strategy represents a classic
20 "tying arrangement," enabling BellSouth to cross-leverage its market position
21 between voice and data to foreclose competition. And finally, the strategy results
22 in a barrier to local competition, making it more difficult for entrants to compete
23 with BellSouth.

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1 The evidence produced in the FDN Arbitration demonstrated that BellSouth is
2 quickly establishing a market position for DSL service that exceeds even its
3 market position for voice service. BellSouth's estimated market share for DSL
4 service is roughly 99.3%, a virtual monopoly position. BellSouth's refusal to
5 provide FastAccess punishes customers for choosing alternatives, it punishes
6 competitors for choosing entry strategies other than resale, and it will ultimately
7 punish the Florida economy through its effect on entry, competition and
8 innovation. The Commission has ample authority (as set forth in the
9 accompanying complaint) to redress this situation, and it should do expeditiously.
10 Everyday that BellSouth is permitted to engage in this practice is another day that
11 Florida consumers are foreclosed from exercising their right in the marketplace to
12 choose the carrier or combination of carriers that best meets their needs.

13
14 **Q. Please describe FastAccess and BellSouth's current policy regarding its**
15 **availability.**

16
17 A. FastAccess is BellSouth's DSL Internet Access service. BellSouth's current
18 policy is to refuse this service to any consumer (including businesses) that obtains
19 voice service from a provider other than BellSouth. If a customer is currently a
20 subscriber to FastAccess and seeks to transfer its voice service to an alternative
21 provider, then BellSouth will disconnect the customer's FastAccess service,
22 forcing the customer to find an alternative provider of DSL service as well.

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1 Market evidence suggests that finding such an alternative, however, would be
2 difficult. BellSouth has over 133,000 FastAccess subscribers in Florida, while
3 ALECs have only 1,000 (Staff Recommendation, FDN Arbitration). Regionwide,
4 BellSouth added 108,000 FastAccess customers in the first quarter 2002, and
5 enjoys an annual growth rate of 141%, which is (according to BellSouth) the
6 fastest growth rate of any DSL (or even cable-modem) provider in the nation
7 (BellSouth First Quarter 2002 Earnings Release).

8
9 The problems created by BellSouth's refusal to provide FastAccess to customers
10 choosing alternative voice providers can only be expected to grow as the number
11 of FastAccess subscribers increases, and as entrants try to offer competitive voice
12 services to the mass-market. DSL is fundamentally a consumer and small-
13 business product, where local competition is just beginning to take root via entry
14 strategies such as UNE-P (i.e., unbundled loops purchased in combination with
15 unbundled local switching). It can only be because it hopes to frustrate such
16 competition that BellSouth finds it advantageous to refuse service to customers,
17 *risking* their disconnection, but fully *expecting* to retain both the DSL and voice
18 service, daring the customer to choose an competitive voice provider.

19
20 **Q. Is BellSouth's policy consistent with the creation of a competitive**
21 **environment?**

22 A. No, not at all. A critical goal of a competitive market is consumer empowerment
23 – in a competitive market, the consumer is made sovereign because it is the

1 consumer, through its ability to choose alternatives, that punishes unresponsive
2 firm behavior. BellSouth's policy turns this relationship on its head, allowing
3 BellSouth to dictate to consumers the choices they must make – take BellSouth
4 voice service or be refused FastAccess.

5
6 **Q. Why would BellSouth force consumers to make this choice?**

7
8 A. BellSouth recognizes that customers desiring DSL service are also likely to be the
9 “best” voice customers. That is, a DSL customer is more likely to purchase high-
10 margin vertical services. For instance, FastAccess customers are nearly twice as
11 likely to subscribe to BellSouth's CompleteChoice service, with more than 60%
12 of FastAccess customers subscribing to this feature package (BellSouth First
13 Quarter 2002 Earnings Release).

14
15 BellSouth also understands that FastAccess consumers are vested in its service
16 because it is the consumer that has undertaken the work to make the service
17 operational. According to BellSouth's most recent statistics (first quarter 2002),
18 over 95 percent of its residential customers “self-installed” FastAccess. After
19 having done the work to get its service operational, why should BellSouth be
20 permitted to jeopardize the arrangement, threatening to disconnect the service
21 simply because the customer desires to use a different company for its voice
22 service?

1 **Q. Is BellSouth's policy contrary to the policy goal of increased broadband**
2 **penetration?**

3
4 A. Absolutely. Section 706 of the Telecommunications Act charges the FCC and
5 each state commission with responsibility to encourage the deployment of
6 advanced services. Yet here is a company (BellSouth) whose policy is to use its
7 advanced service offering as a hostage to try and retain its local voice dominance.
8 This action violates *both* goals of the federal Act by imposing a Hobson's choice
9 on consumers – either the consumer is discouraged from using a competitive
10 voice provider, or it must sacrifice its advanced service purchased from
11 BellSouth. Most importantly, BellSouth's conduct clearly violates Chapter 364's
12 prohibition against anticompetitive conduct and discrimination.

13
14 BellSouth's policy is truly remarkable. BellSouth is refusing to provide – or,
15 even worse, where the customer is already a subscriber, BellSouth is threatening
16 to disconnect – a service that is seen as a national priority. The Commission
17 should use its authority and order that this practice cease immediately.

18
19 **Q. What justification has BellSouth offered in defense of its actions?**

20 A. In the FDN arbitration, BellSouth offered two “justifications” for its FastAccess
21 policy: (1) that it had not implemented systems that would support FastAccess as
22 a stand-alone service, and (2) the FCC does not require that it offer FastAccess to
23 customers that have chosen a different provider of voice service.

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1 As to the first justification, this reasoning would excuse BellSouth from almost
2 any transgression. All that would be required would be for BellSouth to design its
3 systems to support its desired (and unreasonable) behavior, and then use these
4 systems as the reason for its behavior. There is also the issue as to whether the
5 claim is even accurate. Last year, BellSouth informed a number of carriers
6 serving customers using UNE-P that they had “inadvertently” migrated customers
7 that were FastAccess subscribers. This letter (a copy is attached as Exhibit JPG-
8 1) demonstrates that not only can BellSouth provision FastAccess (at least with
9 UNE-P), but that if BellSouth does nothing, the migration will occur without
10 disruption.

11
12 In any event, BellSouth should be required to design systems that offer
13 nondiscriminatory treatment, not be permitted to use its systems as an excuse for
14 unreasonable conduct.

15
16 **Q. How do you respond to BellSouth’s second justification – i.e., that the FCC**
17 **has not stopped them?**

18 A. In many ways, this “justification” should be the most troubling for the
19 Commission. The Florida Commission is charged by the Florida legislature with
20 protecting Florida consumers, with promoting competition in Florida, and with
21 making sure that Florida’s entrants are not disadvantaged by anticompetitive acts
22 of Florida’s incumbents. I am unaware of any provision in Florida law that
23 waives these responsibilities simply because the Federal Communications

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1 Commission has not acted on a particular issue. (Indeed, my understanding of the
2 federal Telecommunications Act is that it expected and fully recognized that
3 States could take additional actions to promote competition, so long as such
4 actions were not inconsistent with federal law).

5
6 BellSouth's position here is part of a larger strategy to reduce any issue before the
7 Florida Commission into a debate concerning federal rules. It is true that the FCC
8 has not (yet) found BellSouth's practice to refuse FastAccess to customers of
9 alternative voice providers unlawful. Of course, had the FCC reached such a
10 decision, this proceeding would not be needed. The point of this proceeding,
11 however, is for the Florida Commission to determine whether BellSouth's
12 practice is acceptable for Florida consumers – which, in the context of the FDN
13 arbitration, it has already concluded that it is not – and to take the action needed
14 to prevent it in the future.

15
16 **Q. Is BellSouth's policy inherently discriminatory?**

17 A. Absolutely. Consider the situation of two customers currently subscribing to
18 FastAccess (which today also means they are part of BellSouth's voice
19 monopoly). One customer decides to subscribe to WorldCom's new residential
20 offering, the "Neighborhood," while the other intends to remain with BellSouth.
21 The same network facilities will be used to serve the customer choosing
22 WorldCom's voice service as are used today (or would be used to serve the
23 customer staying with BellSouth for local voice service). Thus, there can be no

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1 question that the customers are similarly situated – they are each being served
2 over identical facilities. Yet, BellSouth would provide FastAccess to one (that
3 stayed with BellSouth) while affirmatively disconnecting the other (for choosing
4 WorldCom). No clearer example of discrimination can be found.

5
6 **Q. What would be the effect of the Commission sanctioning such behavior?**

7
8 A. As I indicated earlier, BellSouth's policy effectively forecloses voice competition
9 for those customers desiring FastAccess service. It is clear that no provider is
10 capable of creating a DSL-footprint of comparable scale and scope as BellSouth.
11 Forcing customers to choose between FastAccess and local competition is unfair
12 to the customer and it forecloses an important customer segment (the 60% of the
13 FastAccess customers that desire local packages) from local competition.
14 Entrants must either attempt to duplicate BellSouth's DSL-footprint (which would
15 be prohibitively expensive if not impossible) or forego competing for customers
16 desiring such services. The effect is to create an additional barrier to competition
17 by artificially constricting the available market, particularly in the residential
18 marketplace.

19
20 The Commission has already made the correct policy choice in the FDN
21 arbitration. The purpose of this proceeding is to extend that policy to other
22 competitors, for the benefit of Florida consumers, and to make it clear that
23 BellSouth's action violates Chapter 364 and will not be tolerated. BellSouth

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1 should be ordered to establish the systems needed to fully support FastAccess,
2 irrespective of the voice provider selected by the customer.

3

4 **Q. Does this conclude your direct testimony?**

5

6 **A. Yes.**

RE: BellSouth Tariffed Digital Subscriber Line ("DSL") Service on Unbundled Network Element – Platform ("UNE-P") Loops

Dear

BellSouth has recently discovered that, as a result of a recent failure of a systems edit, BellSouth is currently providing its tariffed Asymmetrical Digital Subscriber Line ("ADSL") service to certain Internet Service Provider ("ISP") customers on one or more UNE-P loops purchased by your company. (A list of the affected telephone numbers is attached hereto.)

Since your company owns all features and functionalities of unbundled loops purchased from BellSouth, BellSouth does not have access to the high frequency spectrum on those loops for purposes of providing tariffed ADSL to its ISP customers. BellSouth thus intends to notify the affected ISPs, within twenty (20) days of the date of this letter, that it will be discontinuing tariffed DSL service on the affected lines. (The affected ISPs include BellSouth® Internet Services.)

To the extent your company desires to have ISPs continue to provide tariffed DSL on the affected lines, those lines could be converted to resold lines. On a resold line, BellSouth would continue to have access to the high frequency spectrum, as your company is only purchasing the low frequency spectrum in a resold situation. Unless we hear to the contrary within twenty (20) days of the date of this letter, the DSL will be disconnected.

Very truly yours,

Gregory R. Follensbee

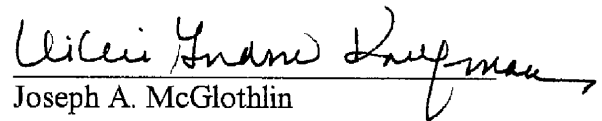
Attachment

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Direct Testimony and Exhibit of Joseph Gillan on Behalf of the Florida Competitive Carriers Association 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



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