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July 9, 2002

VIA HAND DELIVERY

Blanca S. Bayo, Director  
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COMMISSION  
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Re: Docket No.: 020507-TP

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:

- ▶ The Florida Competitive Carriers Association's Response in Opposition to BellSouth Telecommunications, Inc.'s Motion to Dismiss Complaint, and *07060-02*
- ▶ The Florida Competitive Carriers Association's Motion for Summary Final Order. *07061-02*

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,

*Vicki Gordon Kaufman*  
Vicki 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

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Docket No. 020507-TP

Filed: July 9, 2002

**THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION'S  
RESPONSE IN OPPOSITION TO BELL SOUTH TELECOMMUNICATIONS, INC.'S  
MOTION TO DISMISS COMPLAINT**

The Florida Competitive Carriers Association (FCCA), pursuant to rule 28-106.204, Florida Administrative Code, files its response to BellSouth Telecommunications, Inc.'s (BellSouth) Motion to Dismiss FCCA's Complaint. Such motion should be denied and the FCCA's complaint should be processed on an expedited basis.

**I.  
Introduction**

On June 12, 2002, FCCA filed a Complaint asking this Commission to require BellSouth to follow the policy enunciated in Order No. PSC-02-0765-FOF-TP<sup>1</sup>, in which the Commission ordered BellSouth to cease and desist from its practice of refusing to provide its FastAccess service to customers who choose a competitive provider for voice service.

On July 2, 2002, apparently still disputing the Commission's authority, BellSouth filed a motion to dismiss FCCA's complaint. The grounds upon which BellSouth predicates its motion are without merit and the motion should be denied for the reasons set forth below.

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<sup>1</sup>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, Docket No. 010098-TP, Order No. PSC-02-0765-FOF-TP, issued June 5, 2002 (hereinafter "FDN Order").

## II. Standard for Ruling on a Motion to Dismiss

Before responding to BellSouth's argument, a review of the standard to be applied to a motion to dismiss is necessary. As many courts have held

[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action . . . [T]he trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side . . . . Significantly, all material factual allegations of the complaint must be taken as true.<sup>2</sup>

The application of this well-established standard to BellSouth's motion can lead only to a denial of that motion.

While recognizing the appropriate standard applicable to a motion to dismiss<sup>3</sup>, BellSouth argues in its motion that the Commission need not accept as true "legal conclusions" set forth in the FCCA's complaint.<sup>4</sup> However, the legal conclusions in the FCCA's complaint, and upon which the FCCA relies, are not "conclusory statements of law"<sup>5</sup>; they are the legal conclusions of *this Commission* (the very agency charged with the enforcement of those statutes upon which the FCCA's complaint is based) when it previously considered the very same issues that the FCCA now raises.<sup>6</sup> Thus, these conclusions are not open to debate; they are the legal conclusions of this agency.

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<sup>2</sup> *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993) (citations omitted).

<sup>3</sup> BellSouth motion at 2, footnote 2.

<sup>4</sup> BellSouth motion at 2-3.

<sup>5</sup> BellSouth motion at 3.

<sup>6</sup> See discussion of prior Commission orders below. While BellSouth argues that the Commission "must independently review the state statutes" to determine its jurisdiction (BellSouth motion at 4), the Commission has already twice conducted that exercise.

**III.**  
**The Commission's Prior Rulings on BellSouth's FastAccess Policy**

FCCA's complaint is not the first time that the Commission has addressed the BellSouth's anticompetitive policy regarding the provision of FastAccess. On at least two other occasions, the Commission has directed BellSouth to cease from its practice of refusing FastAccess to consumers who desire a voice provider other than BellSouth.

In ordering BellSouth to cease this practice, the Commission said in the FDN arbitration Order:

BellSouth's practice of disconnecting FastAccess Internet service has a direct, harmful impact on the competitive provision of local telecommunications services.<sup>7</sup>

. . .

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.<sup>8</sup>

The Commission further 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.<sup>9</sup>

The Commission also found that BellSouth's practice unreasonably penalized customers who desired to have access to voice service from a competitor and DSL service from BellSouth in contravention of §364.10.<sup>10</sup>

The Commission reaffirmed its policy in the recent BellSouth/Supra arbitration and made it clear that the policy it had enunciated in the FDN Order was *not* limited to just those parties to

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<sup>7</sup> FDN Order at 9.

<sup>8</sup> FDN Order at 8.

<sup>9</sup> FDN Order at 10.

<sup>10</sup> FDN Order at 10.

the arbitration.<sup>11</sup> BellSouth fails to mention the Supra Order in its motion.

In the Supra Order, the Commission said:

In the FDN/BellSouth arbitration, we concluded that BellSouth's policy of disconnecting its FastAccess service when a customer switched its voice service to an ALEC using UNE-P impeded competition in the local exchange market. Therefore, we ordered BellSouth to discontinue this practice. See Order No. PSC-02-0765-FOF-TP.<sup>12</sup> We acknowledge that the FDN/BellSouth decision on this point was made in the context of an arbitration, and we note that we have generally determined that such decisions are restricted to the particular arbitration docket under consideration and the facts presented therein. *In this instance, however, the decision regarding BellSouth's policy on FastAccess went to the legality of that policy under Florida law and our jurisdiction to address it. Thus, the decision at issue here does not hinge on any different or additional facts present in Docket No. 010098-TP that are not present in this Docket. As such, our decision is not restricted solely to that arbitration.*

We make a consistent finding in this proceeding that the practice of disconnecting FastAccess Internet Service when the customer switches voice providers creates a barrier to competition in the local exchange telecommunications market. We fashion an appropriate remedy for the situation pursuant to our authority under Section 364.01(4)(g), Florida Statutes, which provides, in part, that we shall, "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior. . . ." We are also authorized to act to remedy this barrier to competition by Sections 364.01(4)(b) and (d), Florida Statutes. Additional support for this recommended action may be derived from Section 706 of the Telecommunications Act, wherein Congress has directed state commissions to encourage competition and the deployment of advanced services, as well as from Section 202(a) of the Act, in which carriers are prohibited from engaging in any unjust discrimination in their practices or provision of services. Therefore, in the interest of promoting competition in accordance with the state statutes and the federal Telecommunications Act, we reconsider, on our own motion, our decision on Issue X and require BellSouth to continue providing FastAccess even when BellSouth is no longer the voice provider.<sup>13</sup>

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<sup>11</sup> *Petition by BellSouth Telecommunications, Inc. for Arbitration of Certain Issues in Interconnection Agreement with Supra Telecommunications and Information Systems, Inc.*, Order No. PSC-02-0878-FOF-TP, Docket No. 001305-TP, issued July 1, 2002 (hereinafter "Supra Order").

<sup>12</sup> Order correctly subject to pending Motions for Reconsideration.

<sup>13</sup> Supra Order at 39-40 (emphasis added).

In both the FDN Order and the Supra Order, this Commission set out its ample authority to enforce the policy that BellSouth continues to attempt to challenge in its ill-founded motion to dismiss. BellSouth's arguments have been heard and rejected before and must be rejected again.

**IV.  
The Commission Has Jurisdiction to Address BellSouth's  
Anticompetitive FastAccess Policy**

The thrust of BellSouth's lengthy and repetitive motion is that the Commission lacks jurisdiction<sup>14</sup> to prohibit BellSouth from engaging in anticompetitive behavior that harms consumers and creates a barrier to local competition in Florida. In essence, BellSouth argues that due to the nature of its FastAccess service, the Commission is absolutely prohibited from taking *any* action in regard to that service, even action that is explicitly authorized by its enabling legislation. Even a cursory reading of Chapter 364, Florida Statutes, and the Commission's duties set out therein, belies such a position.

First, BellSouth argues that section 364.01, and particularly section 364.01(4), confers *no* jurisdiction on the Commission to remedy a behavior that the Commission finds detrimental to consumers, anticompetitive, and a barrier to local competition. Such an argument ignores the fundamental duty of this Commission, as explicitly set forth in Chapter 364, to encourage the development of a competitive telecommunications market for the benefit of Florida consumers. It is hard to imagine how the Commission's jurisdiction in this regard could be more clear or explicit.

Section 364.01 enumerates the "powers of the Commission" and the "legislative intent" in enacting Chapter 364. Section 364.01(3), Florida Statutes (emphasis supplied), provides:

The Legislature finds that the *competitive provision of telecommunications services, including local exchange telecommunications service, is in the*

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<sup>14</sup> BellSouth continues to assert this position despite the fact that on at least the two occasions discussed above, the Commission has explicitly found that it has jurisdiction to consider the issues raised in the FCCA Complaint.

*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.*

Section 364.01(4) then provides, in part, that the Commission is charged to:

[E]nsure the availability of the widest possible range of consumer choice in the provision of all telecommunications services.<sup>15</sup>

Promote competition by encouraging new entrants into telecommunications markets. . .<sup>16</sup>

Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior . . . .<sup>17</sup>

These statutory provisions give the Commission the explicit jurisdiction to take the action FCCA requests (and that it has taken in prior orders) by making it clear that BellSouth's FastAccess policy is unacceptable pursuant to provisions of Florida law. Commission action in this regard is not an "expansion" of Commission authority, as BellSouth claims, but rather a direct exercise of the jurisdiction the Legislature granted to the Commission as clearly set out in the Commission's enabling statute.

The Commission itself has explicitly found that the statutory sections cited above give it authority to act in this matter. An agency's interpretation of the statutes it enforces is entitled to great weight. *PW Ventures, Inc. v. Nichols*, 533 So.2d 281, 283 (Fla. 1988) (citations omitted) (“ . . . [W]e note the well established principle that the contemporaneous construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight.”); *Pan American World Airways, Inc. v. Florida Public Service Commission*, 427 So.2d 716, 719 (Fla. 1983) (“ . . . [T]he administrative construction of a statute by an agency or body responsible for the

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<sup>15</sup> § 364.01(4)(b), Florida Statutes.

<sup>16</sup> § 364.01(4)(d), Florida Statutes.

<sup>17</sup> § 364.01(4)(g), Florida Statutes.

statute's administration is entitled to great weight. . . .").

In the Supra Order, the Commission said:

We fashion an appropriate remedy for the situation *pursuant to our authority under Section 364.01(4)(g), Florida Statutes*, which provides, in part, that we shall, "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior. . . ." *We are also authorized to act to remedy this barrier to competition by Sections 364.01(4)(b) and (d), Florida Statutes.*<sup>18</sup>

In the FDN Order, the Commission also confirmed its jurisdiction to take action to remedy anticompetitive behavior:

[W]e believe FDN has 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.*<sup>19</sup>

...

[O]ur state statutes provide that we must encourage competition in the local exchange market and remove barriers to entry. *As set forth in Section 364.01(4)(g), Florida Statutes, which provides, in part, that the Commission shall, "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior. . .," we are authorized to address behaviors and practices that erect barriers to competition in the local exchange market. Section 364.01(4)(d), Florida Statutes, also provides, in part, that we are to promote competition. We also note that under Section 364.01(4)(b), Florida Statutes, our purpose in promoting competition is to "ensure the availability of the widest possible range of consumer choice in the provision of all telecommunications services."* Thus, the Legislature's mandate to this Commission is clear.<sup>20</sup>

It would make a travesty of the Commission's authority indeed if, as BellSouth argues, the Commission were powerless to act to curb the anticompetitive behavior<sup>21</sup> of incumbent

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<sup>18</sup> Supra Order at 40, emphasis supplied. The Supra Order is an order disposing of motions for reconsideration and is therefore a Final Order of the Commission.

<sup>19</sup> FDN Order at 8 (emphasis supplied).

<sup>20</sup> FDN Order at 9 (emphasis supplied).

<sup>21</sup> Similarly, sections 364.051(5)(b) and (5)(a)(2), Florida Statutes, give the Commission authority to remedy anticompetitive behavior and to ensure that providers are treated fairly.



monopolies and thus fail to promote consumer choice and competition -- a clear legislative goal.<sup>22</sup> Such an interpretation of Chapter 364 would have the effect of rendering meaningless many of Chapter 364's most significant provisions.

Next, BellSouth argues that §364.10 provides no authority for the Commission to act on FCCA's complaint. However, that section explicitly provides that BellSouth may not give an undue or unreasonable preference to a particular person or locality. Clearly, BellSouth's practice of refusing to provide FastAccess to consumers who choose a different voice provider is an undue or unreasonable preference under the statute's explicit terms.

The Commission has already found §364.10 applicable to prohibit BellSouth's conduct described in the FCCA's complaint:

BellSouth's practice of disconnecting its FastAccess service unduly prejudices or penalizes those customers who switch their voice service, as well as their new carrier. . . . BellSouth's practice of disconnecting its FastAccess Internet service has a direct, harmful impact on the competitive provision of local telecommunications service.<sup>23</sup>

Similarly, §364.08(1) prohibits BellSouth from discriminating among customers.

And, §364.3381 explicitly gives the Commission "continuing oversight jurisdiction" over anticompetitive behavior and vests the Commission with authority to investigate such behavior upon complaint or on its own motion. Though BellSouth argues for a very restrictive reading of this statutory section, it clearly provides the Commission with ample authority to investigate allegations of anticompetitive conduct, such as those raised by FCCA.

Finally, as BellSouth does throughout its motion, it attempts to couch its argument in terms of whether or not the Commission has jurisdiction over BellSouth's wholesale DSL

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<sup>22</sup> This is even more the case since BellSouth bundles FastAccess with regulated voice services and offers customers who take the package a discount. Testimony of BellSouth witness, John Ruscilli, Docket No. 010098-TP, Tr. at 229.

<sup>23</sup> FDN Order at 9.

service. But, the issue is the Commission's jurisdiction over voice service (which not even BellSouth disputes) and the Commission's duty to foster and encourage competition in that market.

BellSouth's attempt to frame the issue as it has misses the point and is incorrect and inappropriate. It must be rejected for several reasons. First, as this Commission has recognized, BellSouth, via the provisioning or lack thereof of its FastAccess service, is engaging in conduct in the state of Florida which is detrimental to the consumers the Legislature has charged the Commission to protect and flies in the face of the Legislature's explicit instructions that local competition be fostered and encouraged. The Commission's authority to act on FCCA's complaint stems from the impact of BellSouth's anticompetitive conduct on the local telecommunications market and the state statutes that provide the Commission with authority over that market. BellSouth's FastAccess policy results in it continuing to leverage its monopoly power in the voice market to the detriment of customers and competitors in Florida.

Second, BellSouth's attempt to rely on FCC decisions, such as the Georgia/Louisiana 271 order, to support its preemption argument are misplaced and have already been rejected by this Commission. The Commission has found that the FCC has *not* definitively addressed the issue at the heart of the FCCA's complaint<sup>24</sup> and that important issues of state law are implicated over which the Commission has exclusive authority.

As discussed in this response, the Commission has ample state statutory authority to remedy BellSouth's behavior; it has exercised that authority in two prior orders and should do so

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<sup>24</sup> FDN Order at 7.

in response to FCCA's complaint. In its motion, BellSouth has simply reiterated arguments the Commission has previously rejected. It has shown no basis for dismissal of the FCCA's complaint.

**V.**

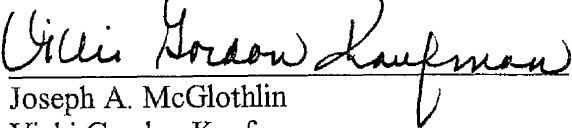
**The Commission Should Utilize the Expedited Procedure Requested by FCCA to Quickly Resolve this Complaint**

The FCCA recognized in its complaint that the expedited dispute resolution process set out in the Commission's June 19, 2001 memorandum was originally envisioned as applicable to interconnection disputes. However, such an expedited process is also particularly well suited to a case such as the instant one, in which the issue is clearly delineated (and as already been addressed by the Commission on prior occasions) and involves a matter of important policy. It is FCCA's understanding that the Chairman's office has the ability to provide for expedited scheduling<sup>25</sup> and FCCA has suggested that it be done in this case. It has attempted to facilitate the use of expedited processing by filing its testimony with its Complaint so as to avoid any unnecessary delay. The Commission should process this matter on an expedited basis to ensure that BellSouth's behavior is quickly remedied.

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<sup>25</sup> In fact, BellSouth has requested expedited processing of its complaint in Docket No. 000121A-TP.

**WHEREFORE**, BellSouth's motion to dismiss should be denied and the Commission should process the FCCA's complaint on an expedited basis.



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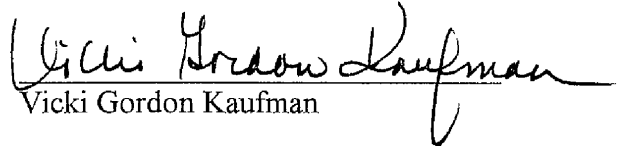
**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing The Florida Competitive Carriers Association's Response to BellSouth Telecommunications, Inc.'s Motion to Dismiss has been furnished by (\*) hand delivery or by U. S. Mail this 9<sup>th</sup> day of July, 2002, to the following:

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