

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-TP

Filed: July 9, 2002

**THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION'S MOTION FOR
SUMMARY FINAL ORDER**

The Florida Competitive Carriers Association (FCCA), pursuant to section 120.57(1)(h), Florida Statutes and rule 28-106.204(3), Florida Administrative Code, files this Motion for Summary Final Order in regard to the above Complaint. The Commission should issue a final order prohibiting BellSouth Telecommunications, Inc. (BellSouth) from denying FastAccess service to a customer who chooses a provider other than BellSouth for voice service. As grounds therefore, FCCA states:

Background

1. On June 12, 2002, the FCCA filed a Complaint against BellSouth concerning BellSouth's policy of refusing to provide its DSL FastAccess service to a customer who chooses a competitive provider for voice service. At the same time, FCCA filed its testimony and exhibit along with a request for expedited processing. On July 2, 2002, BellSouth filed a motion to dismiss the FCCA's Complaint. On July 9th, FCCA filed a response in opposition to BellSouth's motion to dismiss.

Issue

2. The issue before the Commission is: Should BellSouth be prohibited from denying FastAccess service to customers who choose a competitive voice provider.

Criteria for Entry of Summary Final Order

3. Section 120.57(1)(h), Florida Statutes, provides that in any proceeding in which an agency has final order authority, a summary final order **shall** be rendered if it is determined

from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.

4. Rule 28-106.204(4) provides, in part,:

Any party may move for final summary order whenever there is no genuine issue as to any material fact.

5. This Commission has recognized the propriety of using the mechanism of summary final order on numerous occasions. It has said:

The purpose of summary judgment, or in this instance, summary final order, is to avoid the expense and delay of trial when no dispute exists concerning material facts. . . . The question for determination on a motion for summary judgment is the existence or nonexistence of a material factual issue. There are two requisites for granting summary judgment: first, there must be no genuine issue of material fact, and second, one of the parties must be entitled to judgment as a matter of law on the undisputed facts.¹

6. Both conditions are satisfied in this case. There are no genuine issues as to any material facts -- BellSouth does not deny its refusal to provide FastAccess to customers choosing a competitive voice provider. FCCA is entitled to judgment on those undisputed facts -- the Commission has already found this behavior to contravene Florida law and policy on at least two prior occasions. The Commission has considered the same matter at issue in FCCA's complaint

¹ *In re: Request for arbitration concerning complaint of ITC^DeltaCom Communications, Inc. against BellSouth Telecommunications, Inc. for breach of interconnection terms, and request for immediate relief*, Docket No. 991946-TP, Order No. PSC-00-1540-FOF-TP at 20 (Aug. 24, 2000) (citations omitted). *See also, In re: Application for transfer of Certificate No. 281-S in Lee County from Bonita Country Club Utilities, Inc. to Realnor Hallandale, Inc.*, Docket No. 990975-SU, Order No. PSC-00-0341-PCO-SU (Feb. 18, 2000).; *In re: Petition by Florida Power & Light Company for approval of conditional settlement agreement which terminates standard offer contracts originally entered into between FPL and Okeelanta Corporation and FPL and Osceola Farms, Co.*, Docket No. 000982-EI, Order No. PSC-00-2341-FOF-EI (Dec. 6, 2000); *In re: Complaint of Bayside Mobile Home Park*, Docket No. 010726-WS, Order No. PSC-02-0247-FOF-WS (Feb. 26, 2002).

at least two other times and has reached the same result; it must reach the same conclusion here. No purpose is served by another proceeding on the very same issue.

Argument

7. It is undisputed that BellSouth refuses to provide FastAccess to a customer who chooses to exercise his/her right and select a carrier other than BellSouth for voice service. There is no technical or legal reason for BellSouth's FastAccess policy. However, this policy is a barrier to competition and unfair to Florida consumers.

8. The Commission has considered the **identical** issue on at least two prior occasions. In both instances, the Commission unequivocally found BellSouth's FastAccess policy to be harmful to consumers, discriminatory, and anticompetitive and required BellSouth to cease its practice.

9. The Commission first considered this issue in an arbitration between BellSouth and Florida Digital Networks (FDN).² In ordering BellSouth to cease this practice, the Commission said:

BellSouth's practice of disconnecting FastAccess Internet service has a direct, harmful impact on the competitive provision of local telecommunications services.³

. . .

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.⁴

10. 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

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").

³ FDN Order at 9.

⁴ FDN Order at 8.

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.⁵

11. The Commission also held 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 §364.10.⁶

13. The Commission again considered BellSouth's policy as to FastAccess in an arbitration between BellSouth and Supra Telecommunications and Information Systems, Inc.⁷ In the Order on Reconsideration, as to the FastAccess issue, the Commission reaffirmed its policy and held:

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.⁸ 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

⁵ FDN Order at 10.

⁶ FDN Order at 10.

⁷ *Petition by BellSouth Telecommunications, Inc. for Arbitration of Certain Issues in Interconnection Agreement with Supra Telecommunications and Information Systems, Inc.*, Docket No. 001305-TP, Order No. PSC-02-0878-FOF-TP (hereinafter "Supra Order").

⁸ Order correctly subject to pending Motions for Reconsideration.

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.⁹

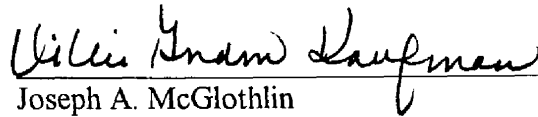
Thus, in its decision in the BellSouth/Supra arbitration, the Commission made it clear that the policy it enunciated in the FDN case was not limited to individual arbitrations, but addressed a violation of Florida law and as such had applicability beyond any individual arbitration.¹⁰

14. Having twice stated its ruling on BellSouth's FastAccess policy, it would be inefficient and a waste of the resources of the Commission, the Commission Staff and the parties to have yet another hearing to consider BellSouth's anticompetitive practice. The Commission should enter a summary final order in this case ordering BellSouth to cease its practice of denying FastAccess to customers who choose to exercise their prerogative in the marketplace by choosing a competitive voice provider.

⁹ Supra Order at 39-40 (emphasis added).

¹⁰ It should be noted that the Supra Order has already been through the reconsideration process and is a final order of the Commission.

WHEREFORE, the FCCA requests that, pursuant to section 120.57(1)(h), Florida Statutes, and rule 28-106.204(4), Florida Administrative Code, the Commission enter a summary final order directing BellSouth to permanently cease its practice of denying FastAccess service to consumers who select a competitive voice provider.



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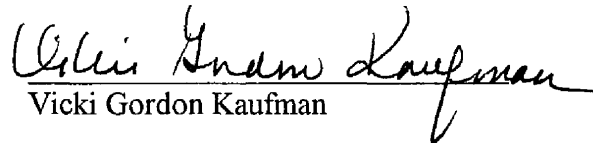
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Florida Competitive Carriers Association's Motion for Summary Final Order has been furnished by (*) hand delivery or by U. S. Mail this 9th day of July 2002, to the following:

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