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July 16, 2002

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

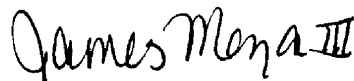
Re: Docket No. 020507-TL (FCCA Complaint)

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Opposition to the Florida Competitive Carriers Association's Motion for Summary Final Order, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,



James Meza III (KA)

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

DOCUMENT NUMBER 020507-TL

07383 JUL 16 2002

FPSC-COMMISSION CLERK

**CERTIFICATE OF SERVICE
DOCKET NO. 020507-TL**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and U.S. Mail this 16th day of July, 2002 to the following:

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James Meza III (KA)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of the Florida)	
Competitive Carriers Association)	Docket No. 020507-TL
Against BellSouth Telecommunications, Inc.)	
And Request for Expedited Relief)	Filed: July 16, 2002
_____)	

**BELLSOUTH TELECOMMUNICATIONS, INC.'S OPPOSITION TO
THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION'S
MOTION FOR SUMMARY FINAL ORDER**

BellSouth Telecommunications, Inc. ("BellSouth") opposes the Florida Competitive Carriers Association's ("FCCA") Motion for Summary Final Order ("Motion"). The Florida Public Service Commission ("Commission") should deny the FCCA's Motion because (1) the Motion is, at best, premature; (2) even if the Motion was not premature, and even if the Commission had jurisdiction to award the relief requested by the FCCA (which it does not), genuine issues of material fact exist with regard to the FCCA's Complaint; and (3) BellSouth, and not the FCCA, is entitled to judgment as a matter of law because the Commission has no jurisdiction to award the relief requested by the FCCA..

BACKGROUND

On June 12, 2002, the FCCA filed its Complaint and Request for Expedited Relief ("Complaint"), wherein it asked the Commission to 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" Complaint at p.10, ¶24(b). On July 2, 2002, BellSouth filed a Motion to Dismiss FCCA's Complaint on the grounds that (1) the Commission lacks subject matter jurisdiction over the matters alleged in the Complaint;

and (2) the Complaint fails to state a claim for which the Commission may grant relief. In its Motion to Dismiss, BellSouth demonstrated that, among other things, the Commission has no authority to order the relief requested by the FCCA because BellSouth's retail FastAccess service is an enhanced, nonregulated, nontelecommunications Internet access service over which this Commission has no jurisdiction. See Motion to Dismiss at 1. On July 9, 2002, the FCCA filed both a response to BellSouth's Motion to Dismiss and the instant Motion.

BellSouth's Motion to Dismiss is still pending. Consequently, BellSouth has yet to file an Answer to FCCA's Complaint. Additionally, assuming the Commission decides to accept the proposed pre-filed testimony the FCCA submitted with its Complaint, BellSouth has not yet addressed that testimony.

LAW AND ANALYSIS

I. Standard for a Summary Final Order.

Pursuant to Section 120.57(1)(h), Florida Statutes, any party may move for a summary final order when there is no genuine issue as to any material fact. See Section 120.57(1)(h), Florida Statutes. Under this provision, "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 summary final order." Id (emphasis added); see also, Rule 28-106.204(4), Florida Administrative Code.

In addressing motions for final summary orders, the Commission has looked to the law addressing summary judgment proceedings for guidance. See In re: Application

for Increase in Water Rates in Orange County by Wedgefield Util., Inc., Docket No. 991437-WU; Order No. PSC-01-1554-FOF-WU (Jul 27, 2001). Under Florida law, “the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and every possible inference must be drawn in favor of the party against whom a summary judgment is sought.” Green v. CSX Transp., Inc., 626 So. 2d 974 (Fla. 1st DCA 1993) (citing Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). Furthermore, as stated by the Supreme Court in Moore v. Morris, 475 So. 2d 666 (Fla. 1985)(emphasis added), “summary judgment should not be granted *unless the facts are so crystallized* that nothing remains but questions of law.” Indeed, as stated by the Commission in In re: Application for amendment of Certificates Nos. 570-W and 496-S to add territory in Charlotte County by Florida Water Services Corp., Order No. PSC-98-1538-PCO-WS (Nov. 20, 1998):

[t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. Coastal Caribbean Corp. v. Rawlings, 361 So. 2d 719, 721 (Fla. 4th DCA 1978). It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. Page v. Staley, 226 So. 2d 129, 132 (Fla. 4th DCA 1969); McCraney v. Barberi, 677 So. 2d 355 (Fla. 1st DCA 1996).

Clearly, there are circumstances in which it is appropriate for a party to request the entry of a summary final order. As explained below, however, these circumstances do not exist before the responding party has even filed an Answer to the Complaint in a docket. Nor do they exist when, as here, it is likely that genuine issues of material fact will have to be resolved in order to determine whether a party is entitled to the relief it requests.

II. The Commission Should Deny the FCCA's Motion.

The Commission should deny the FCCA's request for a summary final order for all of the reasons discussed below.

A. The FCCA's Request Is, at Best, Premature.

In the case at hand, the FCCA filed its Motion for Summary Final Order even though BellSouth's Motion to Dismiss is pending. As stated above, BellSouth's motion challenges the Commission's authority to order the relief requested by the FCCA. If the Commission determines that it does not have the authority to entertain the FCCA's Complaint, then the instant Motion is moot. Accordingly, the Commission should deny the FCCA's Motion for Summary Final Order because it is, at best, premature.

Moreover, the Commission should find that the FCCA's Motion for Final Summary Order is premature because, as stated above, BellSouth has yet to file its Answer. While the Florida Rules of Civil Procedure permit a plaintiff to move for summary judgment before an answer is filed, "[t]he burden for such a movant . . . is extremely heavy in that 'the movant must demonstrate conclusively and to a certainty from the record that the defendant cannot plead or otherwise raise a genuine issue of material fact.'" Beach Higher Power Corp. v. Granados, 717 So. 2d 563, 565 (Fla. 3rd DCA 1998) (quoting Hodkin v. Ledbetter, 487 So. 2d 1214, 1217 (Fla. 4th DCA 1986)). As explained below in Section II.B of this Opposition, even if the Commission finds that it has jurisdiction to award the relief requested by the FCCA, several genuine issues of material fact are nevertheless likely to arise in this docket. Each of these factual issues would need to be resolved before the Commission could make a policy decision that will have "broad implications for the future" See Order No. PSC-02-0935-PCO-TL at 2.

Consequently, because the FCCA cannot demonstrate “conclusively and to a certainty” that no genuine issue of material fact would arise in this docket, the FCCA’s Motion must be denied.

The FCCA’s Motion is premature for the additional reason that discovery has not even begun, much less been completed. It is well settled that in Florida, “[s]ummary judgment should not be granted until the facts have been sufficiently developed for the court to be reasonably certain that no genuine issue of material fact exists.” Brandauer v. Publix Super Markets, Inc., 657 So. 2d 932, 933 (Fla. 2nd DCA 1995). Accordingly, “[a]s a general rule, a court should not enter summary judgment when the opposing party has not completed discovery.” Id. The Commission has previously followed this rule in finding that a motion for a final summary order was premature. See In re: Application for Increase in Water Rates in Orange County by Wedgefield Util., Inc., at Order No. PSC-00-2388-AS-WU (stating that it “is premature to decide whether a genuine issue of material fact exists when OPC has not had the opportunity to complete discovery and file testimony.”).

Finally, the FCCA submitted proposed pre-filed testimony along with its Petition. If the Commission chooses to accept this pre-filed testimony, due process demands that BellSouth have the opportunity to respond to this testimony before the Commission entertains a motion for final summary order. The FCCA’s motion for a summary final order, therefore, should be denied because it is, at best, premature.

B. Even if the Commission Had Jurisdiction to Consider the FCCA's Petition, It Likely Would Have to Resolve Several Genuine Issues of Material Fact to Determine Whether the FCCA Is Entitled to the Relief It Seeks in the Petition.

BellSouth anticipates that several material factual issues would be in dispute if this proceeding were to go forward.¹ Among the genuine issues of material fact that the Commission would have to consider if it had jurisdiction to address the FCCA's complaint would be the extent of BellSouth's market power in a properly defined broadband market. See United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002). The D.C. Circuit raised this factual issue in vacating the FCC's "Line Sharing Order," which required ILECs to unbundle the high frequency spectrum of copper loops to enable ALECs to provide DSL services.

The D.C. Circuit vacated the FCC's order because the FCC had failed to take into account the substantial competition for broadband services provided by way of not only DSL technology, but also cable modem and satellite technology as well. Id. at 428-29. Significantly, the Court noted that "[the FCC's] own findings (in a series of reports under §706 of the 1996 Act) repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market." Id. at 428. The D.C. Circuit was appropriately concerned that unbundling requirements "come[] at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource." Id. at 429 (citing Iowa Utilities Board, 525 U.S. at 428-29). The D.C. Circuit concluded that "[the FCC's] naked disregard of the competitive context risks" inflicting costs on the economy where the

¹ This Section of BellSouth's Opposition addresses some, but by no means all, of the factual issues that likely would arise if the Commission had jurisdiction to award the relief sought by the FCCA's Complaint.

competitive conditions would not allow the FCC to conclude that imposing those costs “would bring on a significant enhancement of competition.” Id.

Just as the D.C. Circuit was concerned about the requirement that ILECs unbundle the high-frequency portion of the spectrum to allow CLECs to provide their own DSL service over the ILECs’ loops in the face of substantial competition in the broadband market, this Commission, in resolving the FCCA’s Complaint, must address the level of competition in the Florida broadband market. BellSouth intends to offer evidence demonstrating that the existence of significant competition in the broadband market means that customers that want an ALEC’s voice service *do have* options for high-speed Internet access, and that BellSouth’s decision not to continue to provide those customers with FastAccess cannot have an appreciable negative effect on competition for local voice service. BellSouth anticipates that the FCCA will attempt to dispute such evidence, albeit unsuccessfully. Given these factual issues that likely would arise if the Commission finds that it has jurisdiction to award the relief requested by the FCCA, the Commission must deny the FCCA’s Motion.

In addition, BellSouth intends to present evidence that if an ALEC obtains UNE service from BellSouth in order to provide telephone service to its end users, BellSouth lacks the tools it would need to provision and maintain ADSL service over that line. BellSouth also intends to present evidence that changing BellSouth’s systems to accommodate the provisioning of FastAccess over a UNE loop would be extremely costly and onerous. BellSouth anticipates that the FCCA will attempt to dispute such evidence, albeit unsuccessfully. Given that FastAccess is not a telecommunications

service and, therefore, is subject to neither unbundling requirements nor the “technically feasible” standard associated with unbundling requirements, these are factual disputes that the Commission would have to resolve if it had jurisdiction to award the relief requested in the FCCA’s Petition. The Commission, therefore, must deny the FCCA’s Motion.

C. Even if the Commission Had Jurisdiction to Consider the FCCA’s Complaint, It Would Have to Allow the Parties to Develop a Full and Complete Factual Record Against Which It Would Make Far-Reaching Policy Decision that Will Have Broad Implications.

As recognized by the Commission in Order No. PSC-02-035-PCO-TL, issued on July 12, 2002, wherein the Commission denied the FCCA’s request for an expedited proceeding, the issues presented by the FCCA in its Complaint are policy issues that have “broad implications for the future” and thus “should be thoroughly examined.” *Id.* at 2. These policy issues have yet to be fully defined or developed at this early stage of the proceedings. To the limited extent that these policy considerations were addressed in the FDN arbitration proceedings, the record was far from complete in many important regards, primarily because FDN never raised the issue addressed by the FCCA’s motion until its post-hearing briefs.² Neither BellSouth nor the Commission, therefore, had the opportunity to fully address these important policy issues in the FDN arbitration

² In fact, FDN’s witness testified that FDN was not seeking to require BellSouth to provide retail service to FDN’s voice customers and that it was not seeking to require BellSouth to have an end-user relationship with FDN’s voice customers. (See Tr. of FDN Arbitration Hearing at 36; 64; 79). In light of this testimony (and BellSouth’s good-faith reliance on this testimony in presenting its case in the FDN arbitration proceeding), it is clear that the FDN arbitration proceeding did not present the Commission with the opportunity to fully and appropriately consider and address the plethora of policy issues presented by the relief the FCCA seeks in its Petition.

proceeding. Consequently, in addition to questions of fact, important policy considerations preclude a summary final order as requested by the FCCA.

III. BellSouth Is Entitled to Judgment as a Matter of Law.

In addition to proving that there are no genuine issues of material fact, the FCCA must also establish that the undisputed facts entitled the FCCA to judgment as a matter of law in order to obtain a final summary order. See Section 120.57(h), Florida Statutes. As made clear in BellSouth's Motion to Dismiss, it is BellSouth, and not the FCCA, that is entitled to judgment as a matter of law because the Commission does not have jurisdiction to provide the requested relief – the regulation of enhanced, nontelecommunications Internet access service. In addition, the FCCA's sole argument in support of its claim that it is entitled to judgment as a matter of law is based on the Commission's decisions in the FDN and Supra arbitrations. As recognized by the Commission in Order No. PSC-02-0935-PCO-TL, the Commission's decision in the FDN arbitration is subject to two motions for reconsideration or clarification and one cross-motion for reconsideration. Order No. PSC-0935-PCO-TL at 2 n.1. Moreover, as explained in Section II.C of this Opposition, in that proceeding the Commission did not have the opportunity to fully and appropriately consider and address the many policy issues presented by the relief FCCA seeks in its Complaint. Accordingly, the FCCA's legal support is subject to revision and is far from entitling the FCCA to judgment as a matter of law.

CONCLUSION

For the reasons set forth above, the Commission should deny the FCCA's Request for a Final Summary Order.

Respectfully submitted this 16th day of July 2002.

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