

State of Florida



Public Service Commission

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DATE: October 3, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (CHRISTENSEN) *AC*
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (DOWDS) *OW*

RE: DOCKET NO. 020507-TL - COMPLAINT OF FLORIDA COMPETITIVE CARRIERS ASSOCIATION AGAINST BELL SOUTH TELECOMMUNICATIONS, INC. REGARDING BELL SOUTH'S PRACTICE OF REFUSING TO PROVIDE FASTACCESS INTERNET SERVICE TO CUSTOMERS WHO RECEIVE VOICE SERVICE FROM A COMPETITIVE VOICE PROVIDER AND REQUEST FOR EXPEDITED RELIEF.

AGENDA: 10/15/02 - REGULAR AGENDA - MOTION TO DISMISS/MOTION FOR SUMMARY FINAL ORDER - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020507.RCM

CASE BACKGROUND

On June 12, 2002, the Florida Competitive Carriers Association (FCCA) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) and a Request for Expedited Relief seeking relief from BellSouth's practice of refusing to provide its FastAccess service to customers who receive voice service from an Alternative Local Exchange Carrier (ALEC).

On July 3, 2002, BellSouth filed a Motion to Dismiss FCCA's Complaint and an Opposition to Request for Expedited Relief.

On July 9, 2002, FCCA filed its Response in Opposition to BellSouth's Motion to Dismiss and filed a Motion for Summary Final Order.

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By Order No. PSC-02-0935-PCO-TL, issued July 12, 2002, the request for expedited relief was denied.

DISCUSSION OF ISSUES

ISSUE 1: Should the Motion to Dismiss filed by BellSouth Telecommunications Inc. be granted?

RECOMMENDATION: No, BellSouth's Motion to Dismiss should be denied. (CHRISTENSEN)

STAFF ANALYSIS: Under Florida law the purpose 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. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the 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." Id. However, staff notes that BellSouth's Motion to Dismiss questions this Commission's authority to hear the subject matter. Thus, regardless of whether all of FCCA's allegations in its Complaint were facially correct, if the Commission were to determine that it lacks subject matter jurisdiction, the Complaint would have to be dismissed.

FCCA's Complaint

FCCA alleges that BellSouth engages in a practice of refusing to provide its FastAccess Internet Service (FastAccess) to customers who receive voice service from a competing voice provider. FCCA further alleges that this practice is "discriminatory and anti-competitive because it forecloses choice, and directly hampers the ability of providers to compete in the Florida local market." FCCA states that the Commission has articulated its policy regarding FastAccess in the FDN Order¹ and

¹See Order No. PSC-02-0765-FOF-TP, issued June 5, 2002, in Docket No. 010098-TP. At the October 1, 2002, Agenda Conference, the Commission voted to deny FDN's Motion for Clarification or Reconsideration and its cross-motion

Supra decision² and merely urges confirmation of that policy in this docket. Consequently, FCCA urges 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."

BellSouth's Motion to Dismiss

BellSouth alleges in its Motion to Dismiss that the Commission lacks subject matter jurisdiction over allegations made in the complaint, and the complaint fails to state a cause of action upon which relief may be granted.

BellSouth contends that the Commission lacks subject matter jurisdiction, because the Commission does not have authority over the non-telecommunications FastAccess service. BellSouth further alleges that none of the statutes relied on by FCCA expressly grant the Commission any jurisdiction over an enhanced, nonregulated, non-telecommunications service like BellSouth's FastAccess service.

BellSouth states that Section 364.01, Florida Statutes, does not expand the Commission's jurisdiction, but only gives the Commission guidance on how to exercise its jurisdiction to regulate telecommunications. BellSouth argues that the statutory definitions contained in Section 364.02, Florida Statutes, further illustrate that the Commission only has jurisdiction over the telecommunications services offered by a telecommunications company. BellSouth reads Section 364.01, Florida Statutes, to only require the Commission "to exercise its exclusive jurisdiction [over telecommunications services]". BellSouth states that nothing in Section 364.01, Florida Statutes, grants the Commission authority to address the manner in which an entity provides non-telecommunications service and that "[a]n administrative rule cannot be contrary to or enlarge a provision of a statute, no

for reconsideration. At the same agenda conference, the Commission voted to deny BellSouth's Motion to Strike and granted in part and denied in part its Motion for Reconsideration or in the Alternative, Clarification, by clarifying its previous order.

²This decision has since been memorialized by Order No. PSC-02-0878-FOF-TP, issued July 1, 2002, in Docket No. 001305-TP (Supra Order). By Order No. PSC 02-1033-FOF-TP, issued July 30, 2002, the Motion for Stay filed by Supra Telecommunications, Inc. was denied. However, Supra has petitioned the Supreme Court of Florida for review of that Order.

matter how admirable the goal may be.'" Capeletti Brothers, Inc. v. Dept. of Transportation, 499 So. 2d 855, 857 (Fla. 1st DCA 1987)

Similarly, BellSouth argues that Section 364.051(5)(a), Florida Statutes, does not grant the Commission authority over FastAccess. BellSouth states that Section 364.051(5)(a), Florida Statutes, is limited to "allegations of anti-competitive acts or practices regarding a price-regulated company's telecommunications offerings that are designed to meet offerings of its competitors."

Next, BellSouth argues that while Section 364.10(1), Florida Statutes, does prevent a company from creating an advantage or disadvantage for any person or locality, the Section would only apply if BellSouth placed an unreasonable term or condition on the provision of its telecommunications service. For example, BellSouth states that Section 364.10(1), Florida Statutes, may apply if BellSouth were to offer a voice line only to customers that purchased its FastAccess Service. BellSouth, however, states that the Complaint alleges what is arguably a term or condition - BellSouth's policy of offering its retail FastAccess service only to customers that purchase voice service from BellSouth - under which BellSouth offers non-telecommunications service. BellSouth cites to Twin Cities Cable Co. v. Southeastern Tel. Co., 200 So.2d 857 (1st DCA 1967), which held that "there is a distinction between the performance of public duties subject to regulation, and the exercise of purely private rights in the management and control of [a telephone company's] property."

FCCA's Response

FCCA states that in both the FDN Order and the Supra Order, the Commission reviewed BellSouth's practice regarding FastAccess and the Commission's authority to order BellSouth to cease the practice. FCCA states that Section 364.01, Florida Statutes, enumerates the legislative intent to provide customer choice and "ensure that all providers of telecommunications services are treated fairly by preventing anti-competitive behavior." Section 364.01(4), Florida Statutes. FCCA also notes that because the Commission has already determined that it has the authority to act, that interpretation deserves great weight. See PW Ventures, Inc. v. Nichols, 533 So.2d 281, 283 (Fla. 1988); Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716, 719 (Fla. 1983).

Next, FCCA alleges that Section 364.10, Florida Statutes, is applicable, because BellSouth gives undue or unreasonable preference by refusing to provide FastAccess to consumers who choose a different voice provider. Similarly, FCCA believes that Section 364.3381, Florida Statutes, "gives the commission 'continuing jurisdiction' over anti-competitive behavior and vests the Commission with authority to investigate such behavior upon complaint or on its own motion."

FCCA also rejects BellSouth's characterization of the issue in terms of the Commission's jurisdiction over BellSouth's wholesale DSL instead of the Commission's jurisdiction over voice service. FCCA states that the Commission has recognized BellSouth's FastAccess policy is detrimental to the consumers the Legislature has charged the Commission with protecting. FCCA alleges that BellSouth's FastAccess policy allows BellSouth to continue to leverage its monopoly power over the voice market.

Staff Analysis

BellSouth attacks the statutory references provided by FCCA and argues that those statutes only give the Commission authority over telecommunications services. BellSouth notes that its FastAccess service is a nonregulated enhanced information service.

The Commission, however, has determined that it has the authority to remedy anti-competitive behavior that is detrimental to the development of a competitive telecommunications market. See FDN Order, at 11; Supra Order, at 51. In Dockets Nos. 010098-TP and 001305-TP, the Commission required that BellSouth not discontinue its FastAccess service to a customer when that customer choose to switch from BellSouth's voice service to FDN's voice service.³ In this case, FCCA is requesting that the Commission require BellSouth to "cease and desist from its practice of refusing to provide its FastAccess service to customers who select another provider for voice service." While the remedy requested

³Staff notes that once the Commission's decision regarding the FastAccess service is memorialized in the arbitrated FDN/BellSouth agreement and the agreement is approved by this Commission, that that provision will be available for adoption under Section 252(i) of the Telecommunications Act of 1996.

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herein is broader⁴ than that previously approved, as long as the complaint states a cause of action upon which relief can be granted, the complaint should not be dismissed. See Wilson v. News-Press Publishing Co., 738 So.2d 1000, 1001 (Fla. 4th DCA 1999) (stating that "a court should not dismiss a complaint with prejudice if it is actionable on any ground."). Consequently, staff believes that BellSouth's Motion to Dismiss should be denied.

⁴It appears that FCCA is requesting that BellSouth be required to provide its FastAccess service to any customer regardless of whether that customer has ever received BellSouth voice service.

ISSUE 2: Should the Motion for Summary Final Order filed by the Florida Competitive Carriers Association be granted?

RECOMMENDATION: No, the Motion for Summary Final Order filed by the Florida Competitive Carriers Association should be denied without prejudice. (CHRISTENSEN)

STAFF ANALYSIS: FCCA filed its Motion for Summary Final Order pursuant to Rule 28-106.204(4), Florida Administrative Code, which states that "[a]ny party may move for Summary Final Order whenever there is no genuine issue as to any material fact."

FCCA's Motion for Summary Final Order

FCCA argues that it has met the requirements of Section 120.57(1)(h), Florida Statutes, and Rule 28-106.204(4), Florida Administrative Code. FCCA states that there are no genuine issues of material fact, because "BellSouth does not deny its refusal to provide FastAccess to customers choosing a competitive voice provider." FCCA also states that it is entitled to judgment as a matter of law, because the Commission has already determined that such behavior is contrary to Florida law and policy. FCCA notes that the Commission made it clear that the FDN decision was not limited to individual arbitrations, but "addressed a violation of Florida law and as such had applicability beyond any individual arbitration."

BellSouth's Response

BellSouth argues that FCCA's Motion for Summary Final Order is at best premature based on the fact that BellSouth's pending Motion to Dismiss may render FCCA's instant motion moot, and the fact that BellSouth has not filed an answer to the complaint. BellSouth states that under the Florida Rules of Civil Procedure when a plaintiff files for summary judgment before an answer is filed, 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. 3d DCA 1998) (quoting Hodkin v. Ledbetter, 487 So.2d 1214, 1217 (Fla. 4th DCA 1986)). BellSouth states that "FCCA cannot demonstrate 'conclusively and to a certainty' that no genuine issue of material fact would arise in this docket"

BellSouth states that FCCA's Motion is premature because discovery has not begun. See Brandauer v. Publix Super Markets, Inc., 657 So. 2d 932, 933 (Fla. 2d DCA 1995) (holding that "[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." "As a general rule, a court should not enter summary judgment when the opposing party has not completed discovery."); see also Order No. PSC-00-2388-AS-WU, issued December 13, 2000, in Docket No. 991437-WU (finding 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."). Likewise, BellSouth argues that due process demands that it have the opportunity to respond to the testimony filed by FCCA.

Next, BellSouth states that even if the Commission had jurisdiction, the Commission would have to resolve the issue 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) (vacating the FCC's Line Sharing Order, which required the unbundling of the high frequency spectrum of copper loops to enable ALECs to provide DSL services, because the FCC failed to take into account the competition for broadband services provided by DSL, cable, and to a lesser extent satellite.) Similarly, BellSouth believes the Commission must determine the level of competition in the Florida broadband market. BellSouth believes that significant competition in the broadband market would show that customers who want an ALEC's voice service do have options for high-speed Internet access and that BellSouth's FastAccess policy cannot have a negative effect on local competition.

BellSouth contends that it lacks the tools necessary to provision and maintain ADSL service over the same UNE line that an ALEC uses to provide telephone service. Moreover, BellSouth states that it would be costly and onerous to change its systems to provision FastAccess over a UNE loop.

Finally, BellSouth cites to Order No. PSC-02-0935-PCO-TL, issued July 12, 2002, in Docket No. 020507-TL, in which the prehearing officer recognized that FCCA's complaint presented policy issues that had broad implications for the future which should be thoroughly examined. BellSouth maintains that these policy considerations were not addressed in the FDN arbitration, because the issue was not presented until the post-hearing briefs.

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BellSouth states that FCCA's Motion for Summary Final Order should be denied, because the FDN Order FCCA relies on is under review and the Commission has not had the opportunity to consider and address the policy issues raised by FCCA's petition.

Staff Analysis

While FCCA has submitted testimony simultaneously with the filing of the complaint, BellSouth has not filed an answer to either the complaint or the testimony, nor has BellSouth conducted any discovery in this case. Staff believes that the suitable time to seek summary final order, if otherwise appropriate, is after testimony has been filed and discovery has ceased. See Order No. PSC-00-2388-AS-WU, issued December 13, 2000, in Docket No. 991437-WU. Consequently, staff recommends that FCCA's Motion for Summary Final Order be denied without prejudice.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open for an evidentiary hearing on this matter. (CHRISTENSEN)

STAFF ANALYSIS: This docket should remain open for an evidentiary hearing on this matter.