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November 6, 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 Brief in Support of Issue 7, 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,

Patrick W. Turner

Patrick W. Turner (KA)

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

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**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 6th day of November 2002 to the following:
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Patrick W. Turner

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: November 6, 2002
_____)	

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
BRIEF IN SUPPORT OF ISSUE 7**

During the October 30, 2002 issue identification meeting, the parties could not agree to whether three proposed issues should be included in this docket.¹ BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Brief in support of including the following as an issue in this docket:

Issue 7: Should any decisions made in this proceeding apply to all ALECs and ILECs?²

By objecting to the inclusion of this issue, the Florida Competitive Carriers Association ("FCCA") is asking the Florida Public Service Commission ("the Commission") to pre-judge this issue by deciding that regardless of what evidence is presented in this docket, the Commission will apply any policy decisions it may make in this docket not to the entire industry, and not even to all ILECs, but to BellSouth and BellSouth alone. For the reasons set forth below, the Commission should reject the FCCA's position and include Issue 7 in this docket.

In the orders it entered in the FDN and Supra arbitration dockets, the Commission made what the FCCA characterizes as "a policy decision."³ The FCCA

¹ The three proposed issues that are the subject of disagreement are Issue 7, Issue 8, and Issue 9 on the Tentative Issues List attached to this brief as Appendix A.

² BellSouth reserves the right to address any arguments that any other parties may make in support of the inclusion of Issues 8 or 9 by way of a reply brief filed on or before November 12, 2002.

concedes that in the instant docket, it is asking the Commission to adopt an expanded policy that goes well beyond what the Commission ordered in the FDN and Supra dockets.⁴ As one Commissioner has noted, the Commission's decision in this docket is "a point that could impact the entire industry."⁵ The FCCA is suggesting that the Commission ignore this obvious fact, put blinders on, and make its decision in this docket *without giving any consideration whatsoever* to whether a decision "that could impact the entire industry" should apply to the entire industry. What the FCCA is suggesting is as self-serving as it is illogical, and the Commission should deny the FCCA's request and include Issue 7 in this docket.

Florida Courts have stated that "[i]t seems perfectly clear that rulemaking is the proper method of uniform policymaking in [a] matter of state-wide concern." *Florida Bankers Ass'n v. Leon County Teachers Credit Union*, 359 So.2d 886, 890 (1st D.C.A. 1978). The courts have further held that "[t]he model of responsible agency action under the APA is action faithful to statutory purposes and limitations, foretold to the public as fully as practicable by substantive rules,⁶ and refined and adapted to particular situations through orders in individual cases." *Anheuser-Busch, Inc. v. Dep't of Business Regulation*, 393 So.2d 1177, 1181 (1st D.C.A. 1981). Even on those occasions where "an agency's incipient policy is permissibly developed through orders," the courts have stated that "our duty is to require the agency 'to expose and elucidate

³ See Transcript of Item Number 3 of October 15, 2002 Agenda Conference at 11. Copies of relevant pages of this transcript are attached as Appendix B to this Brief.

⁴ See Tr. at 18 ("... BellSouth should not be permitted to refuse FastAccess Service to a customer or another voice provider. I think you have not addressed that issue, and that would be an issue that I think would be appropriate for a hearing."); See also Tr. at 27.

⁵ Tr. at 29.

⁶ BellSouth is unaware of this Commission having ever "foretold to the public . . . by substantive rules" any policy decisions regarding the provision of an unregulated, nontelecommunications service such as BellSouth's FastAccess Internet Service.

its reasons for discretionary action.” *General Development Corp. v. Division of State Planning, Dep’t of Admin.*, 353 So.2d 1199, 1209 (1st D.C.A. 1977). Thus if the Commission decided to impose regulations on BellSouth’s provision of its FastAccess Internet Service but not on any other provider’s provision of similar service, it would, at a minimum, be required to articulate “reasons for its discretionary actions” In light of that, it makes no sense whatsoever to exclude Issue 7 from this docket as the FCCA suggests.

As the FCCA undoubtedly will note, the Commission may, under appropriate circumstances, impose different regulatory oversight on ILECs than it imposes on ALECs. See Florida Statutes §364.01(4)(d). The Commission, however, cannot impose differing regulatory oversight in an arbitrary, capricious or discriminatory manner. That was the conclusion reached in the Fresh Look proceeding, FPSC Docket No. 980253-TX, in which the Commission issued a rule that allowed customers under term agreements with ILECs to terminate the contract to go to an ALEC without paying termination charges. This rule, which applied to ILECs but not to ALECs, was challenged, and the Division of Administrative Hearings (“DOAHs”) issued a final order on July 13, 2000 that overturned the rule. The DOAH’s Order states:

There was no demonstration that the ILECs’ long-term contracts present any greater, or even different, obstacles to competing carriers trying to win a customer subject to such an agreement, than would an ALEC’s long-term contract. Therefore, the fact that the rules capture contracts of ILECs, and not contracts of ALECs, renders the rules *discriminatory, arbitrary, and capricious.*⁷

Accordingly, if the Commission were to render a policy decision that applied to BellSouth alone, at a minimum it would have to base its decision on facts of record.

Accordingly, it makes no sense to exclude Issue 7 from this docket as the FCCA suggests.

Finally, among other things, the FCCA is asking the Commission to dictate to whom BellSouth must provide its unregulated FastAccess Internet Service,⁸ what systems and equipment BellSouth must use to provide that unregulated service,⁹ and under what rates, terms, and conditions BellSouth must offer that unregulated service to those customers.¹⁰ How the FCCA can seriously contend that it is requesting this Commission to do anything other than regulate BellSouth's unregulated, nontelecommunications FastAccess Internet Service is a mystery. Setting that aside for the moment, however, the fact remains that BellSouth is no more dominant in the market for broadband data services than are the ALECs.

This is because DSL technology is *not* the only technology that supports the provision of broadband data services to consumers – other technologies that support the provision of broadband data services to end users include wireless, cable modem, and satellite.¹¹ Moreover, DSL is not even the leading technology that supports the provision of broadband data services to consumers. As the Federal Communications Commission (“FCC”) has noted, cable modem technology -- not DSL -- is leading the way in the provision of broadband data service to consumers. In February 2002, for instance, the FCC stated that “[i]n the broadband arena, the competition between cable

⁷ See *BellSouth Telecommunications, Inc. vs. Florida Public Service Commission*, Case No. 99-5369RP, Final Order issued July 13, 2000, at ¶114)(emphasis added).

⁸ See, e.g., Issue 4, 5, and 6(a).

⁹ See, e.g., Proposed Issue 9.

¹⁰ See, e.g., Issues 6(a) and 6(b).

¹¹ See *In the Matter of Inquiry concerning High-Speed access to the Internet over Cable and Other Facilities*, FCC Order No. 0-355 at ¶43 (September 28, 2000) (“High-speed services are provided using a variety of public and private networks that rely on different network architectures and transmission paths including wireline, wireless, satellite, broadcast, and unlicensed spectrum technologies.”).

and telephone companies is particularly pronounced, *with cable modem platforms enjoying an early lead in deployment.*"¹² In fact, the D.C. Circuit Court of Appeals recently reiterated that the FCC's findings "repeatedly confirm both the robust competition, *and the dominance of cable*, in the broadband market." *Id.* at 428 (emphasis added). Specifically, the Court stated:

The [FCC] also noted that the "most popular offering of broadband to residential consumers is via 'cable modems' . . .," that "no competitor has a large embedded base of paying residential customers," and that the "record does not indicate that the consumer market is inherently a natural monopoly." The most recent §706 Report (not in the record of this case) is consistent: As of the end of June 2001, cable companies had 54% of extant high-speed lines, *almost double the 28% share of asymmetric DSL.*¹³

Far from being the only game in town when it comes to providing broadband data services, BellSouth trails far behind largely unregulated cable companies.

The FCCA, therefore, is asking the Commission to impose regulatory-intensive requirements on BellSouth's provision of an unregulated service that competes with the unregulated services offered by largely unregulated cable companies. If the Commission decides to impose any such requirements on BellSouth's FastAccess Internet Service, it must, at minimum, consider whether to impose the same requirements on similar services offered by ALECs who are no more and no less dominant in the highly competitive broadband data market than BellSouth. Under no circumstances can or should the Commission simply turn a blind eye to the issue and render a decision in a vacuum as the FCCA suggests.

¹² Third Report, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC Order No. 02-33 at ¶137 (February 6, 2002)(emphasis added).

¹³ See *United States Telecom Association v. FCC*, 290 F.3d 415, 428-29 (D.C. Cir. 2002) (emphasis added).

Respectfully submitted this 6th day of November 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.

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Appendix A
Tentative Issues List

The tentative list of issues which have been identified in this proceeding are set forth below.

ISSUE 1: Does the Commission have jurisdiction to grant the relief requested in the Complaint?

ISSUE 2: What are BellSouth's practices regarding the provisioning of its FastAccess Internet service to:

- a) a FastAccess customer who migrates from BellSouth to a competitive voice service provider; and
- b) to all other ALEC customers.

ISSUE 3: Do any of the practices identified in Issue 2 violate state or federal law?

ISSUE 4: Should the Commission order that BellSouth may not disconnect the FastAccess Internet service of an end user who migrates his voice service to an alternative voice provider?

ISSUE 5: Should the Commission order BellSouth to provide its FastAccess internet service, where feasible, to any ALEC end user that requests it?

ISSUE 6(a): If the Commission orders that BellSouth may not disconnect its FastAccess Internet service, where a customer migrates his voice service to an ALEC and wishes to retain his BellSouth FastAccess service, what changes to the rates, terms, and condition of his service, if any, may BellSouth make?

ISSUE 6(b): If the Commission orders BellSouth to provide its FastAccess service to any ALEC end user that requests it, where feasible, then what rates, terms and conditions should apply?

*ISSUE 7: Should any decisions made in this proceeding apply to all ALECs and ILECs?

*ISSUE 8: Should the decision the Commission makes in regard to BellSouth's practice of disconnecting/refusing to provide FastAccess to a customer who chooses a competitive provider for voice telecommunications service apply to all other BellSouth wholesale arrangements using xDSL?

*ISSUE 9: Does BellSouth currently have in place the systems needed to fully support FastAccess regardless of the voice provider a customer selects? If not, should the Commission require BellSouth to establish the systems needed to fully support FastAccess regardless of the voice provider selected?

*The asterisk indicates issues about which the parties and staff disagree whether the issue should be included in this proceedings.

CERTIFIED ORIGINAL

FILE 001

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

IN RE: DOCKET NO. 020507-TL - Complaint of Florida Competitive Carriers Association against BellSouth Telecommunications, Inc. regarding BellSouth'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.

BEFORE:

CHAIRMAN LILA A. JABER
COMMISSIONER J. TERRY DEASON
COMMISSIONER BRAULIO L. BAEZ
COMMISSIONER MICHAEL A. PALECKI
COMMISSIONER RUDOLPH BRADLEY

PROCEEDINGS:

AGENDA CONFERENCE

ITEM NUMBER:

3

DATE:

Tuesday, October 15, 2002

PLACE:

4075 Esplanade Way, Room 148
Tallahassee, Florida

REPORTED BY:

MARY ALLEN NEEL
Registered Professional Reporter

ACCURATE STENOGRAPHY REPORTERS
100 SALEM COURT
TALLAHASSEE, FLORIDA 32301
(850)878-2221

PARTICIPANTS:

VICKI GORDON KAUFMAN, McWhirter Reeves Law Firm,
on behalf of FCCA.
NANCY WHITE, BellSouth Telecommunications.
PATRICIA CHRISTENSEN, FPSC.

STAFF RECOMMENDATION

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

RECOMMENDATION: No. BellSouth's Motion to Dismiss
should be deny.

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.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open
for an evidentiary hearing on this matter.

1 here does not hinge on any different or
2 additional facts present in Docket 01-0098,"
3 which is the FDN docket, "that are not present
4 in this docket. As such, our decision is not
5 restricted solely to that arbitration."

6 So you have already said you've interpreted
7 Florida law. You have reached a policy
8 decision. We don't see any reason to -- and
9 you've reached that decision twice. We don't
10 see any reason to go to hearing yet again on the
11 same issue, and we think a final summary order
12 is appropriate.

13 Now, Ms. White said that Bell doesn't want
14 another order on this matter, and I can
15 understand that. And she said that there's no
16 need because if carriers like the decision that
17 you've made on these two prior cases, all they
18 need to do is adopt part of the FDN or Supra
19 interconnection agreements.

20 What you said in these orders, however, is
21 a decision of policy, I believe. It's a
22 decision that encourages competition. It is a
23 matter that you've decided, and it should not
24 require adoption of an interconnection agreement
25 so that Bellsouth ceases this anticompetitive

1 would certainly like to see it done a lot faster
2 than it's done now, but I don't think it's quite
3 the same situation.

4 COMMISSIONER PALECKI: Thank you.

5 CHAIRMAN JABER: You had one more point,
6 Ms. Kaufman.

7 MS. KAUFMAN: I did. Thank you.

8 The other point that I have is that on the
9 issue we've been discussing, I think that you
10 should issue the final summary order. Now,
11 whether you want to set this matter for hearing
12 to go further -- and I will agree with Ms. White
13 on that point, which is that BellSouth should
14 not be permitted to refuse FastAccess Service to
15 a customer that chooses another voice provider.
16 I think you have not addressed that issue, and
17 that would be an issue that I think would be
18 appropriate for hearing. But on the more
19 limited issue that you've already decided twice,
20 I think for the reasons we've spent some time on
21 now, that you should issue your final summary
22 order.

23 So our view is, deny the motion to dismiss,
24 issue the final summary order in regard to what
25 I'll call the FDN/supra factual situation, and

1 year.

2 COMMISSIONER BRADLEY: I've got a
3 question.

4 MS. WHITE: And I guess back to the
5 question you had of why not grant the motion to
6 dismiss. I guess that's where I get a little
7 confused on what Ms. Kaufman has filed. It
8 seems to me when I read their complaint that
9 they were asking for a lot more than what the
10 Commission ordered in the FDN and Supra
11 arbitrations.

12 CHAIRMAN JABER: I think she acknowledges
13 that. Ms. Kaufman acknowledged --

14 MS. WHITE: If they're doing that, then
15 that to me has to go to hearing.

16 But one of the things that you do need to
17 do --

18 CHAIRMAN JABER: You actually agree. You
19 two need to stop and realize you agree on that
20 point.

21 MS. WHITE: Never, never.

22 CHAIRMAN JABER: You're in complete denial,
23 but you are saying the same thing on that point.

24 MS. WHITE: Well, but, see, no, not really,
25 because --

1 dismiss is the answer. If you're bound and
2 determined to go forward with this, which I
3 think you are -- I mean, I would love to have
4 the motion to dismiss, don't get me wrong. But
5 if you're bound and determined to go forward
6 with this, which I think you are, then there are
7 a lot of issues not just on the more that they
8 want, but on this thing you've already ordered.

9 CHAIRMAN JABER: But, Ms. White, we have --
10 at least the panel that decided FDN and Supra
11 has always said that.

12 MS. WHITE: I understand.

13 CHAIRMAN JABER: And from a public policy
14 standpoint, that's okay. You should have a full
15 evidentiary hearing on a point that could impact
16 the entire industry. I think we've taken great
17 pains to limit the FDN/Supra debate as we have
18 because of the evidence we had in the record.

19 And I want to go on record disagreeing with
20 something you said. The FDN decision we made,
21 as one Commissioner, was based on the evidence
22 in the record, not solely because of something
23 that came up with the brief. I can tell you
24 that just as one Commissioner.

25 Commissioners, it's my preference to go to