

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

BELLSOUTH
TELECOMMUNICATIONS, INC.,

Plaintiff,

v.

SUPRA TELECOMMUNICATIONS
AND INFORMATION SYSTEMS, INC.;
THE FLORIDA PUBLIC SERVICE
COMMISSION;
LILA A. JABER, in her official
capacity as Chairman of the Florida
Public Service Commission,
J. TERRY DEASON, in his
official capacity as
Commissioner of the Florida
Public Service Commission;
BRAULIO L. BAEZ, in his
official capacity as
Commissioner of the Florida
Public Service Commission;
MICHAEL A. PALECKI, in his
official capacity as
Commissioner of the Florida
Public Service Commission, and
RUDOLPH BRADLEY, in his
official capacity as Commissioner
of the Florida Public Service Commission

Defendants.

Civil Action No. 4:02cv325-RH/wc

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COMPLAINT

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Nature of the Action

1. Plaintiff BellSouth Telecommunications, Inc. ("BellSouth") brings this action seeking relief from a decision of the Florida Public Service Commission ("FPSC") that is contrary to federal law.

2. This case involves a decision of the FPSC requiring BellSouth to provide its DSL-Based¹ High-Speed Internet Access Service to customers who obtain voice service from Supra Telecommunications and Information Systems, Inc. ("Supra") over what are known as "unbundled network elements." What BellSouth terms "DSL-Based High-Speed Internet Access" involves two components: (1) high-speed DSL transmission service, and (2) the data manipulation and processing capabilities used to offer Internet access.

3. The market for high-speed Internet access is highly competitive, and local exchange carriers such as BellSouth are decidedly secondary players in that market. The majority of consumers who purchase a high-speed Internet access product buy cable modem service from the cable companies. The provision of cable modem service is generally unregulated.

4. The question here is whether, consistent with federal law, the FPSC could impose a significant regulation on BellSouth, a secondary provider in this market, that would impede BellSouth's choices as to how to offer its service in competition with the market-leading cable providers and others.

¹ DSL is an acronym for Digital Subscriber Line.

5. More specifically, at issue here is whether BellSouth can be required to provide DSL-Based High-Speed Internet Access Service to customers in Florida who are receiving voice service from Supra over unbundled network elements. The Federal Communications Commission ("FCC") has clearly stated that BellSouth has no such obligation.

6. This case also raises, among several other issues, the question whether the FPSC has the authority to require BellSouth to continue to provide DSL-Based High-Speed Internet Access Service to competitive local exchange carriers' ("CLEC") voice customers, given the jurisdictionally interstate nature of DSL-Based High-Speed Internet Access Service and the action the FCC has taken to ensure that such "information services" remain unregulated.

7. Because DSL-Based High-Speed Internet Access Service is an unregulated, interstate information service, the FPSC lacks jurisdiction over this issue. Indeed, the FCC has expressly preempted state regulation of interstate information services, and that decision has been upheld by several of the United States Courts of Appeals. In addition, the FCC has clearly held that incumbent carriers are not required to provide DSL service in the circumstances presented here. The FPSC has no legal authority to override the FCC's binding determination.

8. The FPSC's decision compelling BellSouth to provide DSL-Based High-Speed Internet Access Service to Supra's customers receiving voice service over UNE platform ("UNE-P") lines violates the 1996 Act and numerous FCC decisions implementing the requirements of the Act, is beyond the FPSC's authority, and is preempted by federal law and applicable FCC decisions. For those reasons, and because

the PSC's decision is arbitrary and capricious, inconsistent with the agency record, and results from a failure to engage in reasoned decision-making, it should be reversed.

Parties, Jurisdiction, and Venue

9. Plaintiff BellSouth is a Georgia corporation with its principal place of business in Georgia. BellSouth provides local telephone service throughout much of the State of Florida, and it is a Local Exchange Carrier under the Federal Telecommunications Act of 1996 ("1996 Act" or "Act").

10. Defendant Supra is a Florida corporation with its principal place of business in Florida. Supra provides local phone service to customers in the State of Florida and, on information and belief, is a Competitive Local Exchange Carrier under the 1996 Act.

11. Defendant FPSC is an agency of the State of Florida. The FPSC is a "State commission" within the meaning of the 1996 Act.

12. Defendant Lila A. Jaber is Chairman of the FPSC. Chairman Jaber is sued in her official capacity for declaratory and injunctive relief only.

13. Defendant J. Terry Deason is a Commissioner of the FPSC. Commissioner Deason is sued in his official capacity for declaratory and injunctive relief only.

14. Defendant Braulio L. Baez is a Commissioner of the FPSC. Commissioner Baez is sued in his official capacity for declaratory and injunctive relief only.

15. Defendant Michael A. Palecki is a Commissioner of the FPSC. Commissioner Palecki is sued in his official capacity for declaratory and injunctive relief only.

16. Defendant Rudolph Bradley is a Commissioner of the FPSC. Commissioner Bradley is sued in his official capacity for declaratory and injunctive relief only.

17. This Court has subject matter jurisdiction over the action pursuant to the judicial review provision of the 1996 Act, 47 U.S.C. § 252(e)(6), and pursuant to 28 U.S.C. § 1331. The Court also has subject matter jurisdiction over the action pursuant to the Supremacy Clause of the U.S. Constitution and 42 U.S.C. § 1983.

18. Venue is proper in this district under 28 U.S.C. § 1391. Venue is proper under section 1391(b)(1) because the Commission resides in this District. Venue is proper under section 1391(b)(2) because a substantial part of the events giving rise to this action occurred in this District, in which the FPSC sits.

Provision of Unbundled Network Elements Under the 1996 Act

19. Prior to this decade, local telephone service was generally provided in a particular geographic area by a single, heavily regulated company such as BellSouth that held an exclusive franchise to provide such service. Congress enacted the 1996 Act in order to replace this exclusive franchise system with competition for local service. See 47 U.S.C. §§ 251-253. As Congress explained, the 1996 Act creates a “pro-competitive, de-regulatory” framework for the provision of telecommunications services. S. Conf. Rep. No. 104-230, at 113 (1996). To achieve that goal, Congress not only preempted all state and local exclusive franchise arrangements, *see* 47 U.S.C. § 253, but also placed certain affirmative duties on incumbent local exchange carriers (“incumbent LECs” or “ILECs”) such as BellSouth to assist new entrants in the local market.

20. Among those duties is BellSouth's obligation to provide access to the piece-parts of its existing local exchange network to new market entrants such as Supra. Specifically, BellSouth has a duty to "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(3). The Act defines "network element" to include "a facility or equipment used in the provision of a telecommunications service." *Id.* § 153(29).

21. The Act directs the FCC to determine "what network elements should be made available" on an unbundled basis, *id.* § 251(d)(2), and articulates a clear limiting standard that the FCC must apply in carrying out that statutory role, *see id.*; *AT&T Corp. v. Iowa Utils Bd.*, 525 U.S. 366 (1999). According to the statute, ILECs are required to provide access to proprietary network elements only where such access is "necessary," 47 U.S.C. § 251(d)(2)(A), and they must provide access to non-proprietary network elements only where the "failure to provide access . . . would impair" the ability of other carriers to provide service, *id.* § 251(d)(2)(B).

22. Interpreting the mandate of section 251(c)(3), the FCC has required incumbent LECs to offer a variety of unbundled network elements to CLECs. Most relevant to this case, the FCC has required ILECs to engage in what is known as "line sharing." Line sharing requires ILECs to offer CLECs *high-speed data services* such as DSL on the same "local loop" -- the basic wire that connects each subscriber to the public switched telephone network -- over which BellSouth offers *voice services*. To enable line sharing, the FCC has required ILECs to make available as a UNE the "high frequency

portion of the local loop” -- that is, the portion of spectrum over which data services are provided. See Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912, 20915, ¶ 4 (1999) (“*Line Sharing Order*”).² While the FCC has required BellSouth to permit CLECs to offer *data* services on the same facilities that BellSouth uses to offer *voice* service, it has never required the converse. That is, the FCC has expressly declined to require BellSouth and other ILECs to offer the low frequency portion of the loop on an unbundled basis so that CLECs could provide voice service on the same loop that BellSouth uses to provide data services, including DSL-Based High-Speed Internet Access.

23. The FCC has also required ILECs to provide CLECs with access to a combination (also known as the UNE-P) of all of the facilities used to provision basic telephone service – the local loop, switching, and transport – including the complete platform of features, functions, and capabilities of those facilities. CLECs purchasing the UNE-P can, in turn, offer service over that complete platform to their end-user customers. When a CLEC purchases a UNE-P from an ILEC, the CLEC becomes the owner of all the features, function, and capabilities that the local loop is capable of providing. Because the CLEC has control of the entire loop, not just a particular band of frequencies on that loop, the ILEC’s has no legal obligation or ability to provide any service over that facility.

² The D.C. Circuit has vacated and remanded the FCC’s decision to require line-sharing because it was inconsistent with the robustly competitive nature of the broadband market.

24. A CLEC that provides voice service via the UNE-P can nevertheless provide a combination of both voice and DSL services over the same copper loop either individually or in conjunction with another CLEC. This practice has been labeled "line splitting."

The Internet and the Nature of DSL-Based High-Speed Internet Access Service

25. The Internet is "the international computer network of both Federal and non-Federal interoperable packet switched data networks." 47 U.S.C. § 230(f)(1). The Internet includes the now familiar World Wide Web.

26. Digital subscriber line, or DSL, technology enables digital or data signals to be transmitted over the copper loop facilities used for ordinary telephone service, and at much higher speeds than can be reached using traditional dial-up modem service. DSL is one of several platforms – such as cable modem, wireless, and satellite services – used to provide high-speed access to the Internet.

27. As noted at the outset, such DSL-Based High-Speed Internet Access services are comprised of two components: (1) high-speed communications provided over phone lines (the DSL service itself), which is offered by BellSouth on a wholesale basis through a federal tariff; and (2) the data processing and manipulation capabilities to provide access to the Internet in the way that Internet Service Providers such as America Online and Earthlink do.

See USTA v. FCC, 290 F.3d 415, 428 (D.C. Cir. 2002). The D.C. Circuit has stayed its mandate in the line sharing case until the end of this year.

28. When offered in this combination, DSL-Based High-Speed Internet Access Service is an unregulated, interstate “information service”³ offered directly by BellSouth to end-users. For more than thirty years, the FCC has consistently held that information services should remain free from federal and state regulation. The FCC has taken numerous steps to ensure that the information services market is unregulated, and its *Computer Inquiry* orders have expressly preempted state regulation of interstate information services. Moreover, the federal courts have routinely upheld this exercise of preemptive authority. For instance, in the *Computer II Further Reconsideration Order*,⁴ the Commission made clear that its decisions served to preempt any state regulation of enhanced services (which are now known as information services). See 88 F.C.C.2d at 541, ¶ 83 n.34. The D.C. Circuit upheld this exercise of preemptive authority on petitions, explaining that “[f]or the federal program of deregulation to work, state regulation of CPE and enhanced services ha[ve] to be circumscribed.” *Computer & Communications Indus. Ass’n v. FCC*, 693 F.2d 198, 206 D.C. Cir. 1982). See also *id.* at 214 (expressing agreement with FCC determination “that preemption of state regulation is justified . . . because the objectives of the *Computer II* scheme would be frustrated by state tariffing of CPE”). Accordingly, that court held, “state regulatory power must yield to the federal.” *Id.* at 216; see also *People of California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994) (recognizing that state regulation of interstate information services would “essentially negat[e] the FCC’s goal”).

³ The 1996 Act defines an “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(20).

The 1996 Act's Requirement that BellSouth Enter Into Interconnection Agreements

29. In addition to the requirement to sell unbundled network elements to CLECs, the 1996 Act also requires incumbent carriers to “negotiate” with CLECs in order to establish “the particular terms and conditions of agreements to fulfill” the other duties prescribed by section 251 of the Act. *See* 47 U.S.C. § 251(c)(1). If the parties are unable to reach an agreement voluntarily, either party may ask the state commission to arbitrate any open issues. *See id.* § 252(b)(1). The state commission may then resolve the disagreements between the parties, “ensur[ing] that such resolution and conditions meet the requirements of section 251 of [the Act], including the regulations prescribed by the Commission pursuant to section 251.” *See id.* § 252(c).

30. Additionally, after the parties have reached a full agreement – whether through negotiation, arbitration, or both – the state commission must approve or reject that entire agreement based on whether it meets the criteria set out in sections 251 and 252. *Id.* § 252(e)(1)-(3). Any party aggrieved by a state commission determination has a statutory right to bring suit in a federal district court. 47 U.S.C. § 252(e)(6)

The FPSC Proceedings

31. On September 1, 2000, BellSouth filed in the FPSC a petition for arbitration of certain issues related to a new interconnection agreement it was in the process of negotiating with Supra. BellSouth’s petition raised fifteen disputed issues. Supra filed a response in which it sought arbitration of an additional fifty-one issues. After several meetings ordered by the FPSC, the parties reduced the number of open

⁴ Memorandum Opinion and Order on Further Reconsideration, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 88 F.C.C.2d 512 (1981) (“*Computer II Further Reconsideration Order*”).

issues to thirty-seven. Among these unresolved issues was the question whether BellSouth was required to continue to provide retail DSL-Based High-Speed Internet Access to BellSouth customers who opted to switch their local phone companies and receive voice service from Supra through the arrangement, discussed above, that is known as the "UNE-P." In accordance with then-existing FCC rules, BellSouth's Federal tariff for its wholesale DSL service specifies that the service can only be offered over those lines where BellSouth provides the telephone voice service to the end user.

32. The FPSC held a hearing on September 26-27, 2001. On March 26, 2002, it issued its Final Order on Arbitration, in which it denied Supra's request that the FPSC compel BellSouth to continue to offer retail DSL-Based High-Speed Internet Access Service to its customers who have opted to receive voice service over UNE-P lines provided by Supra. See Final Order on Arbitration, *Petition by BellSouth Telecommunications, Inc.*, Docket No. 001305-TP, Order No. PSC-02-0413-FOF-TP, at 137-40 (FPSC rel. Mar. 26, 2002) ("Order No. PSC-02-0413-FOF-TP") (attached hereto as Exh. A).

33. On April 10, 2002, Supra filed a Motion for Reconsideration and Clarification of Order No. PSC-02-0413-FOF-TP in which it argued, in part, that the FPSC should reconsider its decision not to require BellSouth to continue to provide DSL-Based High-Speed Internet Access Service to BellSouth's customers who switched to Supra for voice service.

34. On July 1, 2002, the FPSC held that, although Supra had not met the conditions required for the FPSC to reconsider its decision on this point, it would reconsider its decision *sua sponte* in order to harmonize the outcome of the Supra

arbitration with its decision in a different arbitration (involving BellSouth and Florida Digital Network, Inc.⁵), in which the FPSC, claiming to rely on both federal and state law, held that BellSouth must continue to provide DSL-Based High-Speed Internet Access Service to customers receiving voice service from a CLEC over a UNE-P line. *See Order on Procedural Motions and Motions for Reconsideration, Petition by BellSouth Telecommunications, Inc.*, Docket No. 001305-TP, Order No. PSC-02-0878-FOF-TP (FPSC rel. July 1, 2002) (attached hereto as Exh. B).

35. On July 15, 2002, BellSouth filed with the FPSC an interconnection agreement for BellSouth and Supra that met the requirements set forth in the various FPSC orders, reserving the rights of both parties to seek relief from the FPSC's determinations.

36. On August 22, 2002, the FPSC approved this agreement. *See Order Approving Final Arbitrated Interconnection Agreement and Adopting Agreement, Petition by BellSouth Telecommunications, Inc.*, Docket No. 001305-TP, Order No. PSC-02-1140-FOF-TP (FPSC rel. Aug. 22, 2002) (attached hereto as Exh. C).

The FPSC's Decision Is Contrary to Federal Law

37. Regardless of whether it is authorized under state law, the FPSC's decision is contrary to federal law. The retail DSL-Based High-Speed Internet Access Service that the FPSC ordered BellSouth to provide to Supra's voice customers is an unregulated interstate information service. Because the FCC repeatedly has preempted state regulation of interstate information services, the FPSC's decision must give way to the supremacy of federal law.

⁵ The BellSouth/Florida Digital Network arbitration has not yet resulted in an appealable

38. Even if the FCC had not acted to preempt state regulation of interstate information services, Internet access service is, as a matter of federal law, interstate, not local. Applying its traditional “end-to-end” analysis, the FCC has repeatedly held that an end-user’s communications with an ISP are jurisdictionally interstate in nature. *See, e.g., Memorandum Opinion and Order, Starpower Communications, LLC v. Verizon South Inc.*, 17 FCC Rcd 6873, 6891 ¶41(2002) (“*Starpower Order*”), *petitions for review pending, Starpower Communications, LLC v. FCC*, Nos. 02-1131 & 02-1177 (D.C. Cir.). Because the FPSC has no authority to regulate interstate services except to the extent provided by the 1996 Act, and because the 1996 Act does not grant the FPSC any such authority over interstate information services, the FPSC lacked jurisdiction to order BellSouth to continue to provide DSL-Based High-Speed Internet Access Service to its customers who opted to switch to Supra for their voice service.

39. Moreover, the FPSC’s decision is contrary to well-established FCC precedent making clear that ILECs are not required to provide even wholesale DSL transmission service to the voice customers of CLECs such as Supra, much less, as here, whole DSL transmission combined with Internet access service. In numerous orders, the FCC has definitively and plainly stated that ILECs have no obligation to provide their wholesale DSL services over phone lines when the ILECs are no longer the provider of voice services over those lines. *See Third Report and Order on Reconsideration in CC Docket No. 98-147; Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, Deployment of*

order approving an interconnection agreement.

Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provision of the Telecommunications Act of 1996, 16 FCC Rcd 2101, 2114, ¶ 26 (2001); *Line Sharing Order*, 14 FCC Rcd at 20946-47, ¶ 71; see also Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354, 18515, ¶ 324 (2000) (“Texas Order”); Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., et al. for Authorization To Provide In-Region InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, 17472, ¶ 97 (2001) (declining to require Verizon to provide DSL service on lines over which Verizon did not provide voice service), *appeal pending*, *Z-Tel Communications Inc. v. FCC*, No. 01-1461 (D.C. Cir.). The FCC’s unambiguous determinations in this regard preempt the FPSC’s authority to make a decision to the contrary.

40. Additionally, BellSouth’s federal wholesale DSL tariff makes clear that BellSouth will only provide that service over loops over which BellSouth provides voice service. The FPSC lacks authority to add to or alter the terms of that federally filed tariff.

41. The FPSC’s decision requiring BellSouth to provide DSL-Based High-Speed Internet Access Service to Supra’s UNE-P voice customers is also unlawful because it effectively establishes a new UNE – the low frequency portion of the loop. Because the 1996 Act expressly grants to the FCC the authority to identify the network elements that must be unbundled, the FPSC has no authority under the statute to create a new UNE obligation that the FCC has expressly declined to mandate. The FPSC’s decision here conflicts with the FCC’s express determination that only the high-

frequency portion of the spectrum used for DSL service should be subject to a separate network element. *See Texas Order*, 15 FCC Rcd at 18517-18, ¶ 330 (noting that the FCC has “unbundled the high frequency portion of the loop when the incumbent LEC provides voice service” but has “not unbundle[d] the low frequency portion of the loop and did not obligate incumbent LECs to provide xDSL service” where end-users received their voice service from CLECs).

42. Even if the FPSC somehow did possess the authority to create additional UNE obligations, the FPSC nevertheless failed to undertake the “necessary and impair” analysis expressly required by the 1996 Act. *See* 47 U.S.C. § 251(d)(2). Accordingly, the FPSC’s determination violates the plain language of the 1996 Act.

43. In addition, the FPSC’s determination that BellSouth must provide DSL-Based High-Speed Internet Access to Supra’s customers over UNE-P lines is arbitrary, capricious, and otherwise unlawful.

44. Finally, BellSouth’s has designed its DSL-Based High-Speed Internet Access to be an overlay to its voice service. In order to comply with the FPSC’s requirement that BellSouth make its DSL-Based High Speed Internet Service available to customers not receiving their voice service from BellSouth, BellSouth will incur substantial costs. Because the FPSC’s order does not make any provision by which BellSouth may recoup those costs, BellSouth has suffered a taking of property without due process in violation of the Fifth and Fourteenth Amendments.

CLAIM FOR RELIEF

45. BellSouth incorporates paragraphs 1-44 of this Complaint as if set forth completely herein.

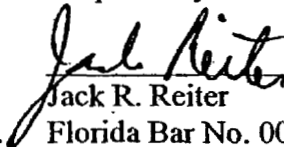
46. For all the reasons discussed above, the FPSC's and the Commissioner Defendants' decision directing BellSouth to provide DSL-Based High-Speed Internet Access Service to Supra UNE-P voice customers is contrary to federal law and is preempted by the Federal Communications Act and the FCC decisions cited in this Complaint. The FPSC's decision is also beyond its lawful authority, arbitrary and capricious, inconsistent with the evidence presented to the FPSC, and results from a failure to engage in reasoned decision-making.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff BellSouth prays that the Court enter an order:

1. Declaring that the FPSC's decision is unlawful.
2. Enjoining all the Defendants, and all parties acting in concert therewith, from seeking to enforce that unlawful decision against BellSouth.
3. Granting BellSouth such further relief as the Court may deem just and reasonable.

Respectfully submitted,



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