

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: November 26, 2002

**DIRECT TESTIMONY
OF**

JOSEPH GILLAN

ON BEHALF OF

THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION

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1 **Q. Please state your name, business address and occupation.**

2

3 A. My name is Joseph Gillan. My business address is P.O. Box 541038, Orlando,
4 Florida 32854. I am an economist with a consulting practice specializing in
5 telecommunications.

6

7 **Q. Please briefly outline your educational background and related experience.**

8

9 A. I am a graduate of the University of Wyoming where I received B.A. and M.A.
10 degrees in economics. From 1980 to 1985, I was on the staff of the Illinois
11 Commerce Commission where I had responsibility for the policy analysis of
12 issues created by the emergence of competition in regulated markets, in particular
13 the telecommunications industry. While at the Commission, I served on the staff
14 subcommittee for the NARUC Communications Committee and was appointed to
15 the Research Advisory Council overseeing the National Regulatory Research
16 Institute.

17

18 In 1985, I left the Commission to join U.S. Switch, a venture firm organized to
19 develop interexchange access networks in partnership with independent local
20 telephone companies. At the end of 1986, I resigned my position of Vice
21 President-Marketing/Strategic Planning to begin a consulting practice. Over the
22 past twenty years, I have provided testimony before more than 35 state

1 commissions, five state legislatures, the Commerce Committee of the United
2 States Senate, and the Federal/State Joint Board on Separations Reform. I
3 currently serve on the Advisory Council to the New Mexico State University's
4 Center for Regulation.

5
6 **Q. On whose behalf are you testifying?**

7
8 A. I am testifying on behalf of the Florida Competitive Carriers Association (FCCA),
9 an advocacy group formed to promote competition broadly throughout Florida.

10
11 **Q. What is the purpose of your testimony?**

12
13 A. My testimony addresses each of the listed issues in this proceeding. The purpose
14 of my testimony is to explain why the Commission should prohibit BellSouth
15 from refusing to provide FastAccess Internet Access Service (FastAccess) to any
16 customer that has chosen an alternative voice provider. BellSouth's actions in
17 this regard – affirmatively refusing to sell a customer one service unless the
18 customer agrees to purchase another – is a blatantly anticompetitive action that
19 this Commission is charged with prohibiting under state law. The Commission
20 should order BellSouth to immediately cease this anticompetitive practice and
21 require BellSouth to provide its FastAccess service to any customer requesting

1 service, so long as the network facilities used to provide voice service to the
2 customer are provided by BellSouth (including facilities provided as UNE-P).

3
4 **Q. Please summarize your testimony.**

5
6 A. BellSouth's policy to deny FastAccess to any customer subscribing to an
7 alternative provider of voice service is contrary to both the spirit and the letter of
8 Florida law and explicitly violates Chapter 364's prohibitions on anticompetitive
9 behavior and discrimination. First, BellSouth's policy denies customers the
10 opportunity for basic self-determination as to what combination of providers best
11 meets their specific needs, thereby frustrating the fundamental legislative intent of
12 Chapter 364.01(3), Florida Statutes, to encourage competition because
13 competition provides "...customers with freedom of choice." Second,
14 BellSouth's conduct frustrates the achievement of an important state and national
15 goal – greater penetration of advanced services – solely for the purpose of further
16 entrenching BellSouth's voice monopoly and permitting it to leverage its
17 incumbent monopoly position. Third, BellSouth's conduct permits it to
18 discriminate between data customers based on their voice provider. Fourth, the
19 strategy represents a classic "tying arrangement," enabling BellSouth to cross-
20 leverage its market position between voice and data to foreclose competition. And
21 finally, the strategy results in a barrier to local competition, making it more
22 difficult for new entrants to compete with BellSouth.

23

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

3
4 **Q. Does the Commission have jurisdiction to grant the relief recommended by**
5 **your testimony?**

6
7 A. Absolutely. While discussion concerning the Commission's jurisdiction to order
8 the requested relief is most appropriately left to the legal briefs, I will make
9 several brief comments on this issue. First, the Commission has already found
10 that it has jurisdiction to grant the relief FCCA seeks. It denied BellSouth's
11 motion to dismiss the FCCA's Complaint in this case based on jurisdictional
12 arguments. In Order No. PSC-02-1464-FOF-TL, the Commission rejected
13 BellSouth's argument that the Commission has no jurisdiction in this matter and
14 said: "We, however, have determined that we have the authority to remedy anti-
15 competitive behavior that is detrimental to the development of a competitive
16 telecommunications market."

17
18 Second, the Commission has already ordered BellSouth to *partially* cease its
19 anticompetitive and discriminatory behavior in the arbitration between Florida
20 Digital Network and BellSouth (Order Nos. PSC-02-0765-FOF-TP and PSC-02-
21 1453-FOF-TP, Docket No. 010098-TP, "FDN Arbitration ") and in the arbitration
22 between BellSouth and Supra Telecommunications and Information Services

1 (Order No. PSC-02-0878-FOF-TP). The FDN Arbitration (as clarified on
2 reconsideration) determined that the Commission had the jurisdiction under state
3 and federal law to address these issues and required BellSouth to continue to offer
4 FastAccess service to customers that choose to switch their voice provider.
5 Thus, the issue of the Commission's *authority* over the issues that are the subject
6 of this docket has been resolved no less than three times.

7
8 **ISSUE 2: What are BellSouth's practices regarding the**
9 **provisioning of its FastAccess Internet service to:**

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

14
15 **Q. Please describe FastAccess and BellSouth's current policy regarding its**
16 **availability.**

17
18 **A.** It is my intent to let BellSouth describe – and then attempt to justify – its current
19 practices regarding FastAccess. In summary form, however, BellSouth's current
20 policy is to refuse this service to any consumer (including business customers)
21 that obtains voice service from a provider other than BellSouth, even where the
22 exact same network facilities are involved. If a customer is currently a subscriber

1 to FastAccess and seeks to transfer its voice service to an alternative provider,
2 then BellSouth will disconnect the customer's FastAccess service, forcing the
3 customer to find an alternative provider of DSL service as well. If the customer is
4 already the customer of an alternative voice provider using BellSouth's network
5 facilities, then BellSouth will refuse to provision FastAccess on those facilities if
6 the customer requests it.

7
8 **ISSUE 3: Do any of the practices identified in Issue 2 violate**
9 **state or federal law?**

10
11 **Q. Do BellSouth's practices regarding FastAccess that you have described above**
12 **violate state or federal law?**

13
14 **A.** Yes. BellSouth's practices clearly violate both state and federal law. As with
15 Issue 1, however, this is an issue most appropriate for legal briefs. However, in
16 the following section of my testimony, I will address how BellSouth's
17 anticompetitive practice is directly contrary to important policy inherent in the
18 legal requirements for which this Commission has responsibility.

19
20 **Q. Is BellSouth's refusal to provide FastAccess to customers that have chosen an**
21 **alternative provider of voice service competitively significant?**

1 A. Yes. BellSouth's FastAccess customer base is growing rapidly. As recently as
2 year-end 2000, BellSouth had 215,500 FastAccess customers regionwide; by the
3 end of 2001, that total had increased to 620,500. As of the end of the third
4 quarter, BellSouth's DSL lines had grown to 924,000 regionwide. In the first
5 quarter, BellSouth's annual DSL growth rate was 141%, which (according to
6 BellSouth) was the fastest growth rate of any DSL provider in the nation. In
7 contrast, the total number of ALEC line-sharing arrangements added regionwide
8 by ALECs during the first half of 2002 was 2,903. In Florida, BellSouth
9 provisioned an average of 224 line-sharing arrangements (and 596 xDSL capable
10 loops) per month for the first nine months of 2002. BellSouth's estimated market
11 share for DSL service in Florida is roughly 99.3%, virtually a monopoly
12 BellSouth is quickly establishing a market position for DSL service that exceeds
13 even its market position for voice service.

14

15 **Q. Will this problem increase in the future?**

16

17 A. Yes. The problems created by BellSouth's refusal to provide FastAccess to
18 customers choosing alternative voice providers can only be expected to grow as
19 the number of FastAccess subscribers increases, and as entrants try to offer
20 competitive voice services to the mass-market. DSL is fundamentally a consumer
21 and small-business product, where local competition is just beginning to take root
22 via entry strategies such as UNE-P (i.e., unbundled loops purchased in

1 combination with unbundled local switching). It can only be because BellSouth
2 hopes to frustrate such competition that it finds it advantageous to actually *refuse*
3 service to customers, *risking* their disconnection, but fully *expecting* to retain both
4 the DSL and voice service, in effect daring the customer to choose a competitive
5 voice provider. It is difficult to think of another business where an entity would
6 turn customers away or disconnect service for which they are paying.

7
8 **Q. Is BellSouth's practice consistent with the creation of a competitive**
9 **environment – a goal this Commission is charged to implement?**

10
11 A. No, it is the antithesis of it. A critical goal of a competitive market is consumer
12 empowerment – in a competitive market, the consumer is made sovereign because
13 it is the consumer (because of its ability to choose an alternative) that punishes
14 unresponsive firm behavior. BellSouth's policy turns this relationship on its head,
15 allowing BellSouth to dictate to consumers the choices they must make – take
16 BellSouth voice service or be refused FastAccess.

17
18 **Q. Why would BellSouth force consumers to make this choice?**

19
20 A. BellSouth recognizes that customers desiring DSL service are also likely to be the
21 “best” voice customers. That is, a DSL customer is more likely to purchase high-
22 margin vertical services. For instance, FastAccess customers are nearly twice as

1 likely to subscribe to BellSouth's CompleteChoice service, with more than 60%
2 of FastAccess customers subscribing to this feature package. (BellSouth First
3 Quarter 2002 Earnings Release).

4
5 BellSouth also understands that FastAccess consumers are vested in its service
6 because it is the consumer that has undertaken the work to make the service
7 operational. According to BellSouth, over 95% of its residential customers "self-
8 installed" FastAccess (First Quarter, 2002). After having done the work to get its
9 service operational, why should BellSouth be permitted to jeopardize the
10 customer's service arrangement, threatening to disconnect the service simply
11 because the customer desires to use a different company for its voice service?

12
13 **Q. Is BellSouth's practice contrary to the policy goal of increased broadband**
14 **penetration?**

15
16 A. Absolutely. Not only does BellSouth's conduct violate Chapter 364's prohibition
17 against anticompetitive conduct and discrimination, as well as its mandate that
18 competition in the local telecommunications market be encouraged, it also
19 interferes with well-articulated national policies. Section 706 of the
20 Telecommunications Act charges the FCC and each state commission with
21 responsibility to encourage the deployment of advanced services. Yet here is a
22 company (BellSouth) whose policy is to use its advanced service offering as a

1 hostage to try and retain its local voice dominance. This action violates *both*
2 goals of the federal Act by imposing a Hobson's choice on consumers – either the
3 consumer is discouraged from using a competitive voice provider, or it must
4 sacrifice its advanced service purchased from BellSouth.

5
6 BellSouth's policy is truly remarkable. BellSouth is refusing to provide – or,
7 even worse, where the customer is already a subscriber, BellSouth is threatening
8 to disconnect – a service that is seen as a national priority. The Commission
9 should use its authority and order that this practice cease immediately.

10
11 **Q. Is BellSouth's policy inherently discriminatory?**

12
13 **A. Absolutely. Consider the situation of two customers currently subscribing to**
14 **FastAccess (which today also means they are part of BellSouth's voice**
15 **monopoly). One customer decides to subscribe to WorldCom's new residential**
16 **offering, the "Neighborhood," while the other intends to remain with BellSouth.**
17 **The same network facilities will be used to serve the customer choosing**
18 **WorldCom's voice service as are used today (or would be used to serve the**
19 **customer staying with BellSouth for local voice service). Thus, there can be no**
20 **question that the customers are similarly situated – they are each being served**
21 **over identical facilities. Yet, BellSouth would provide FastAccess to one (the**
22 **customer that stays with it) while affirmatively disconnecting the other (the**

1 customer that chooses a competitive alternative). No clearer example of
2 discrimination can be found.

3
4 **Q. What would be the effect of the Commission sanctioning such behavior?**

5
6 A. If the Commission approves such behavior, it would be sanctioning BellSouth's
7 erection of yet another barrier to local voice competition. As I indicated earlier,
8 BellSouth's policy effectively forecloses voice competition for those customers
9 desiring FastAccess service. It is clear that no provider is capable of creating a
10 DSL-footprint of comparable scale and scope as BellSouth. Forcing customers to
11 choose between FastAccess and local competition is unfair to the customer and it
12 forecloses an important customer segment (the 60% of the FastAccess customers
13 that desire local packages) from local competition. Entrants must either attempt
14 to duplicate BellSouth's DSL-footprint (which would be prohibitively expensive
15 if not impossible) or forego competing for customers desiring such services. The
16 effect is to create an additional barrier to competition by artificially constricting
17 the available market, particularly in the residential marketplace.

18

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

4
5 **ISSUE 5: Should the Commission order BellSouth to provide**
6 **its FastAccess Internet service, where feasible, to any ALEC**
7 **end user that requests it?**

8
9 **Q. Is there any reason that the Commission's policy should differ between**
10 **customers that have already chosen a new voice provider (and are asking**
11 **that FastAccess be installed on a UNE line), and customers that are *migrating***
12 **to a new voice provider (but already have FastAccess)?**

13
14 A. No, there is no distinction – legally, technically or otherwise -- between these two
15 groups of customers. It is just as discriminatory and anticompetitive for
16 BellSouth to refuse service to customers that have *chosen* an alternative voice
17 provider as it is to refuse service to customers that are *choosing* an alternative (but
18 which already have FastAccess installed). The anomalous result from the FDN
19 Arbitration – that customers that already have FastAccess may continue to receive
20 it, but that customers that wish to receive the service may be refused – is a
21 distinction that undermines the Commission's fundamental policy that BellSouth
22 may not punish Florida consumers for their choice of voice provider.

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Each of the Commission's reasons, articulated in the FDN Arbitration, for ordering BellSouth to continue as a FastAccess provider to its customers that choose an alternative – *i.e.*, to do otherwise is discriminatory, anticompetitive and inconsistent with encouraging voice competition and the deployment of advanced services – is equally applicable to customers that already have a voice provider, and now want to add FastAccess. Thus, the unqualified answer to both Issues 4 and 5 must be yes – BellSouth may not *refuse* service to a customer, whether the customer has already purchased FastAccess, or is requesting the service as a new customer.

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?

1 **Q. If the Commission orders that BellSouth may not disconnect its FastAccess**
2 **Internet service, where a customer migrates his voice service to an ALEC**
3 **and wishes to retain his BellSouth FastAccess service, what changes to the**
4 **rates, terms, and condition of his service, if any, may BellSouth make?**

5
6 A. BellSouth should not be permitted to make *any* changes to the customer's network
7 serving arrangement nor assess any additional charges to a migrating customer.
8 The same UNE-P loop/port combination that served the customer originally
9 should be used to provide voice service to the customer with BellSouth merely
10 establishing a new billing arrangement with the customer for its FastAccess
11 service (as it would if a reseller served the customer). BellSouth should not be
12 permitted to install new loop facilities, change the service to a different loop
13 arrangement, or make any other network change to the underlying service. And
14 in fact, the Commission has already decided just this in the FDN Arbitration
15 where it found that the transition must be seamless and at no additional cost.
16 (Order No. PSC-02-1453-TP).

17
18 **Q. If the Commission orders BellSouth to provide its FastAccess service to any**
19 **ALEC end user that requests it, where feasible, then what rates, terms and**
20 **conditions should apply?**

21

1 A. BellSouth should be required to provide FastAccess service to any ALEC end
2 user (served by UNE-P), under the same terms, conditions and prices that
3 FastAccess service would be offered to its own end-users. BellSouth should not
4 be permitted to require the deployment of new facilities, different loops or make
5 other change (other than what would be needed if the end-user remained
6 BellSouth's end user such as, for instance, any necessary conditioning).

7

8 **Q. Does this conclude your direct testimony?**

9

10 A. Yes.

CERTIFICATE OF SERVICE

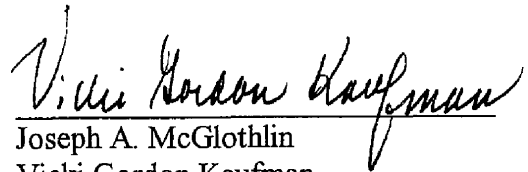
I **HEREBY CERTIFY** that a true and correct copy of the foregoing Direct Testimony of Joseph Gillan on Behalf of the Florida Competitive Carriers Association has been furnished by (*) hand delivery, (**) electronic mail, or U. S. Mail this 26th day of November, 2002, to the following:

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