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December 2, 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 Motion for Reconsideration and/or Modification of Order No. PSC-02-1618-PCO-TL to the Full Commission, or in the Alternative, Motion to Convert to a Generic Proceeding, 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,


Meredith E. Mays (LA)

Enclosure

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

DOCUMENT NUMBER - DATE
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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, (*) Facsimile and FedEx this 2nd day of December 2002 to the following:

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Meredith Mays (LA)

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: December 2, 2002
_____)	

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR RECONSIDERATION AND/OR MODIFICATION
OF ORDER NO. PSC-02-1618-PCO-TL TO THE FULL COMMISSION, OR
IN THE ALTERNATIVE, MOTION TO CONVERT TO A GENERIC PROCEEDING**

BellSouth Telecommunications Inc. ("BellSouth"), pursuant to Rule 25-22.0376, Florida Administrative Code, respectfully requests that the full Commission Reconsider and/or Modify Order No. PSC-02-1618-PCO-TL ("Order") issued by the Prehearing Officer on November 22, 2002. As explained below, the Commission should modify and/or reconsider the Prehearing Officer's decision to exclude BellSouth's proposed Issue 7¹ from consideration in this docket, because the Prehearing Officer overlooked or failed to consider several points of facts, law, and policy. See *Diamond Cab Co. v. King*, 146 So.2d 889, 891 (Fla. 1962). Alternatively, if the Commission is inclined to deny BellSouth's Motion for Reconsideration and/or Modification, BellSouth respectfully requests that this Commission convert this proceeding into a generic docket.

BACKGROUND

On October 30, 2002, the parties and Staff participated in an Issue Identification Conference, wherein the parties agreed on the majority of the issues to be presented in this proceeding. However, the parties could not agree on BellSouth's proposed Issue 7,

¹ BellSouth's proposed Issue 7 is, "Should any decisions made in this proceeding apply to all ALECs and ILECs?"

which poses the question of whether “any decisions made in this proceeding [should] apply to all ALECs and ILECs?” Accordingly, on November 6, 2002, BellSouth submitted its Brief in support of including Issue 7 for consideration in this docket. Six days later, on November 12, 2002, the Prehearing Officer issued an Order Establishing Procedure (Order No. PSC-02-1537-PCO-TL). The Prehearing Officer subsequently issued an Order Clarifying Order Establishing Procedure (previously defined herein as “Order”) on November 22, 2002, which is the subject of the instant Motion.²

Focusing solely on procedural reasons, the Prehearing Officer determined in the Order that BellSouth’s proposed Issue 7 went “well beyond the scope of the Complaint” and that “inclusion of an issue that applies to all ILECs and ALECs would be more appropriately addressed in a generic proceeding.” Order at 2. Accordingly, the Prehearing Officer denied BellSouth’s request to include Issue 7 in this proceeding but found that BellSouth could address this issue in a separate, generic proceeding.

In reaching this conclusion, the Prehearing Officer failed to consider and/or overlooked several points of fact, law, and policy that support the inclusion of proposed Issue 7, all of which are set forth below. See *Diamond Cab Co. v. King*, 146 So.2d 889, 891 (Fla. 1962).

² The Prehearing Officer rejected BellSouth’s attempt to include Issue 7 in this docket in the Order Establishing Procedure issued on November 12, 2002. However, on November 22, 2002, the day any motion for reconsideration was due for the Order Establishing Procedure, the Prehearing Officer issued the Order, which also held that Issue 7 would be excluded but clarified and provided a more detailed analysis in support. As such, the Order being challenged is the Order issued on November 22, 2002 and not the Order Establishing Procedure issued on November 12, 2002. Accordingly, BellSouth’s Motion for Reconsideration and/or Modification of the Order is timely under Rule 25-22.0376, Florida Administrative Code.

DISCUSSION

I. **The Commission Should Reconsider and/or Modify Order No. PSC-02-1618-PCO-TL.**

The issues in this case surround BellSouth's FastAccess Internet service, and include consideration of whether this Commission has jurisdiction to grant the relief sought and whether BellSouth's practices relating to its FastAccess service violate any provisions of state or federal law. As one Commissioner has noted, the Commission's decision in this docket is "a point that could impact the entire industry."³ As such, it is entirely appropriate that this Commission must consider whether any decision will impact *all* carriers in Florida rather than BellSouth alone.

Florida Courts have stated, "[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,⁴ 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, "our duty is to require the agency 'to expose and elucidate its reasons for discretionary action.'" *General Development Corp. v. Division of State*

³ See Transcript of Item Number 3 of October 15, 2002 Agenda Conference at 29.

⁴ 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.

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.

That the Commission may, under appropriate circumstances, impose different regulatory oversight on ILECs than it imposes on ALECs does not lead to a different conclusion. See Florida Statutes §364.01(4)(d). The Commission 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*.⁵

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 the issues in the case supported by record evidence relating to such issues.

⁵ See *BellSouth Telecommunications, Inc. vs. Florida Public Service Commission*, Case No. 99-5369RP, Final Order issued July 13, 2000, at ¶114(emphasis added).

Moreover, among the issues included in this case, Issue 5 involves whether the Commission should “order BellSouth to provide its FastAccess Internet service, where feasible, to any ALEC end user that requires it.” If BellSouth – a company that is no more dominant in the market for broadband data services than are the ALECs – is faced with a possible affirmative obligation to provide a federally tariffed, information service, then such consideration should apply to all broadband services providers. Yet, the Commission has apparently decided to limit its decision to BellSouth alone, without explaining the basis for its exclusion of this issue or how it intends to fully develop the evidentiary record necessary to reach an informed and balanced decision.

Because DSL technology is *not* the only technology that supports the provision of broadband data services to consumers – other technologies such as wireless, cable modem, and satellite technology also support the provision of broadband data services to end users,⁶ any consideration of whether BellSouth practices violate applicable law must include consideration of the implication of the Commission’s decision on the industry as a whole. 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 and telephone companies is particularly pronounced, *with cable modem platforms enjoying an early lead in*

⁶ 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.”).

deployment."⁷ 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.*⁸

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

The Commission, therefore, is being asking 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.

⁷ 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 ¶37 (February 6, 2002)(emphasis added).

⁸ See *United States Telecom Association v. FCC*, 290 F.3d 415, 428-29 (D.C. Cir. 2002) (emphasis added).

II. Alternatively, the Commission Should Convert this Docket Into a Generic Proceeding.

If the Commission denies BellSouth's Motion for Reconsideration and/or Modification, BellSouth requests that, for the reasons set forth in Section I, the Commission convert this proceeding into a generic docket. As set forth above, it would be inappropriate for the Commission, in essentially a rulemaking procedure, to make a decision involving broad policy considerations and ramifications without including all affected carriers. It also seems to be a waste of the Commission's and the parties' time and resources to require BellSouth, and presumably, FCCA to retry this case in the context of a generic proceeding. In addition, there appears to be a fundamental question of whether any decision in this docket will have a preclusive effect of litigating the same or similar issues in a generic docket.

The Commission has previously converted or referred an issue to a generic proceeding upon a finding that any decision would result in a rulemaking. For instance, *In re: United Tel. Co. of Fla.*, Docket 910198-TI (Jul. 24, 1992), the Commission, in a rate case, addressed whether United could charge business and not residential rates for telephones in elevators. Id. at 40. In its Order, the Commission determined "that this issue would be more appropriately addressed in a generic proceeding" and ordered its Staff to initiate a generic docket. In reaching this conclusion, the Commission held that the issue in question was a generic issue, "which should be addressed by all LECs" and that it was "probable that a generic proceeding will result in rulemaking. . . ." Id. at 41.

Like the issue of whether a telephone company could charge business rates for phones in elevators, the issue of whether a telephone company must provide its Internet service to a specific customer is clearly a generic issue, "which should be addressed by

all LECs,” and which will probably result in a rulemaking. Accordingly, if the Commission is inclined to deny BellSouth’s Motion for Reconsideration and/or Modification, BellSouth respectfully requests that the Commission convert the instant proceeding to a generic docket.

CONCLUSION

For the foregoing reasons, the Commission should modify and/or reconsider the Prehearing Officer’s decision to exclude BellSouth’s proposed Issue 7 from this matter. Alternatively, the Commission should convert this proceeding into a generic docket.

Respectfully submitted this 2nd day of December 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.

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