

McWHIRTER REEVES
ATTORNEYS AT LAW

ORIGINAL

TAMPA OFFICE:
400 NORTH TAMPA STREET, SUITE 2450
TAMPA, FLORIDA 33602
P. O. BOX 3350 TAMPA, FL 33601-3350
(813) 224-0866 (813) 221-1854 FAX

PLEASE REPLY TO:

TALLAHASSEE

TALLAHASSEE OFFICE:
117 SOUTH GADSDEN
TALLAHASSEE, FLORIDA 32301
(850) 222-2525
(850) 222-5606 FAX

December 10, 2002

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

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COMMISSION
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Re: Docket Nos.: 020119-TP and 020578-TP

Dear Ms. Bayo:

On behalf of Florida Competitive Carriers Association, enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ The Florida Competitive Carriers Association's Response to BellSouth Telecommunications, Inc.'s Motion to Compel and the FCCA's Motion for Protective Order.

Please acknowledge receipt of the above on the extra copy and return the stamped copy to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

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Enclosure

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McWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, DECKER, KAUFMAN & ARNOLD, P.A.

001051

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for expedited review and cancellation of BellSouth telecommunications, Inc.'s Key Customer promotional tariffs and for investigation of BellSouth's promotional pricing and marketing practices, by Florida Digital Network, Inc.

Docket No.: 020119-TP

In Re: Petition for expedited review and cancellation Of BellSouth Telecommunications, Inc.'s Key Customer promotional tariffs by Florida Competitive Carriers Association.

Docket No.: 020578-TP

Filed: December 10, 2002

**THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION'S
RESPONSE TO BELL SOUTH TELECOMMUNICATIONS, INC.'S
MOTION TO COMPEL
AND THE FCCA'S MOTION FOR PROTECTIVE ORDER**

The Florida Competitive Carriers Association (FCCA), pursuant to rule 1.280(c), Florida Rules of Civil Procedure and rule 28-106.204, Florida Administrative Code, files its response to BellSouth Telecommunications, Inc.'s (BellSouth) Motion to Compel and submits its Motion for Protective Order. The FCCA requests that the Commission enter an order denying BellSouth's Motion to Compel and ruling that the FCCA is not required to provide responses sought by the discovery requests that are the subject of the Motion to Compel. In support, the FCCA states:

Background

1. These consolidated cases relate to challenges to BellSouth promotional tariffs that the FCCA contends fail to meet the appropriate pricing standards and are therefore noncompensatory and anticompetitive.

2. On October 17, 2002, BellSouth served its First Set of Interrogatories and First Request for Production on the FCCA. Pursuant to the Order Establishing Procedure¹, the FCCA

¹ Order No. PSC-02-1295-PCO-TP.

filed its objections on October 28, 2002. The FCCA filed its responses on October 6, 2002.

3. On December 3, 2002, BellSouth filed a Motion to Compel the FCCA to respond to Interrogatory Nos. 6 and 16 and Production Request Nos. 6 and 17.²

Discussion

Interrogatory Nos. 6 and 16 and Request for Production Nos. 6 and 17

4. Interrogatory No. 6 seeks information from the FCCA members as to whether they have made offerings in Florida of limited time duration. If so, BellSouth seeks a detailed description of such offerings as well as the production of documents related thereto. Request for Production No. 6 requests all documents identified in or that support the FCCA's response to Interrogatory No. 6.

5. Interrogatory No. 16 seeks detailed information from FCCA members regarding the resale of promotional tariffs. Request for Production No. 17 requests all documents identified in or that support the FCCA's response to Interrogatory No. 16. These requests are well beyond the scope of permissible discovery for the reasons discussed below.

The Information Sought is not Relevant to the Issues in this Case.

6. A basic tenet of discovery is that information sought must be relevant or reasonably calculated to lead to the discovery of admissible evidence.³ Information about programs that ALECs may offer fails to meet the relevance test. As the issues in this case demonstrate, the subject matter before the Commission is the promotional programs of BellSouth. *Each and every issue* in this case relates to BellSouth's programs.⁴

² BellSouth's discovery requests and the FCCA objections are included as Attachment 1.

³ Rule 1.280(b), Florida Rules of Civil Procedure; *Allstate Ins. Co. v. Langston*, 655 So.2d 91, 94 (Fla. 1995) ("Discovery in civil cases must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence.") (citations omitted).

⁴ See, Attachment A to Order No. PSC-02-1295-PCO-TP.

7. The framing of the issues in this case has not been challenged by BellSouth and makes perfect sense in the context of Florida's regulatory scheme. The Florida Statutes contemplate a difference in the degree of regulation permitted for BellSouth, as the incumbent provider, in contrast to new entrants. For example, § 364.01(4)(d), Florida Statutes, requires the Commission to “(p)romote competition by encouraging new entrants into telecommunications markets and by allowing a transitional period in which new entrants are subject to a lesser level of regulatory oversight than local exchange telecommunications companies.” Florida law also includes a number of provisions that prohibit cross-subsidization and discrimination to protect customers (and competition) from the abuse that BellSouth’s market position as the incumbent makes possible.⁵

8. In response to the FCCA's objection that the information sought is not relevant, BellSouth alleges that the information sought relates to its "defenses" in this matter. BellSouth says it needs information about what the ALECs do to show that what it does is permissible. However, given the relevant statutory standards as well as BellSouth’s status as the incumbent, ALEC practices and programs are irrelevant to the legality of BellSouth’s behavior.

The Entities from which BellSouth Seeks Discovery are not Parties to this Case.

9. The FCCA further objected to the requests at issue because they seek information from the FCCA that is not in its possession, custody or control. Rule 1.340(b) requires responses as to “information the party has.”⁶ Rule 1.350(a) requires the production of documents “in the

⁵ See, i.e., §§ 364.051(5)(b), 364.051(5)(c).

⁶ See also, *Surf Drugs, Inc. v. Vermette*, 236 So.2d 108, 113 (Fla. 1970) (“[a] party may be required to respond on behalf of himself, his attorney, agent, or employee...”).

possession, custody, or control of the party to whom the request is directed.”⁷ Thus, BellSouth’s requests are far beyond the bounds of permissible discovery.

10. The entity who has intervened in, and who has been granted party status in this case, is the FCCA.⁸ The Commission’s grant of intervention to the FCCA does not provide BellSouth with the ability to seek discovery from individual FCCA members who are not parties to this case. BellSouth’s attempt to abuse the discovery process to obtain information from entities that are not parties to this case is impermissible. And BellSouth recognizes this because it has objected to providing discovery information related to “persons that are not parties to this case on the grounds that such Interrogatory and Request is overly broad, unduly burdensome, oppressive and not permitted by applicable discovery rules.”⁹

11. BellSouth contends that it is entitled to seek discovery from FCCA members pursuant to Order No. PSC-92-0112-TL (FCTA Order), which involved discovery directed to the Florida Cable Television Association (FCTA) in a telephone rate case. However, the scope and the subject matter addressed in the FCTA Order is readily distinguishable from the discovery BellSouth seeks here. First, the FCTA Order permitted limited discovery pertaining to the services FCTA members provided, but only as required to establish FCTA standing.¹⁰ Unlike the discovery served on the FCTA, BellSouth’s discovery is not related to the FCCA’s standing nor has any colorable claim been made that the FCCA does not have standing to participate in this case.

12. Second, even if standing were an issue, in response to BellSouth Interrogatory

⁷ See also, *Buckley Development Co., Ltd. v. Tagrin*, 270 So.2d 433, 434 (Fla. 3d DCA 1972) (a party not in possession or control of documents sought during discovery cannot be required to produce such documents).

⁸ Order No. PSC-02-0986-PCO-TP. And, it was the FCCA who filed a protest in Docket No. 020578-TP.

⁹ BellSouth’s Objections and Responses to FCCA and Mpower’s Second Set of Interrogatories and Second Request to Produce Documents, Objection No. 1, filed October 7, 2002.

¹⁰ The Commission noted in the FCTA Order that “the scope of discovery is not unlimited and discovery will not be allowed as a vehicle for harassment.”

No. 1, the FCCA has provided a list of its member companies. These entities are well-known to BellSouth (and this Commission) as competitive carriers.

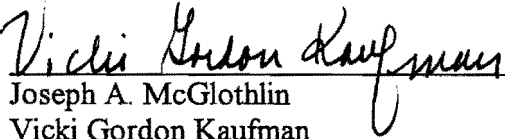
13. Third, the FCCA has a long history of participation in matters before this Commission that relate to opening the local market to competition. BellSouth should not be permitted to conduct a harassing and impermissible fishing expedition under the guise of “standing” issues.

14. Finally, BellSouth takes issue with the FCCA’s objection to the burdensome nature of Interrogatory No. 16. However, just a reading of the question makes the FCCA’s point. BellSouth asks if any member has had any contact with BellSouth regarding resale. The Interrogatory then goes on to seek information as to each communication (name, address, telephone number...). Such a request is burdensome and harassing on its face.

Conclusion

15. The information BellSouth seeks through its Motion to Compel exceeds the bounds of proper discovery and is harassing and improper. The Commission should enter an order denying the Motion to Compel and rule that the FCCA need not respond to the discovery that is the subject of BellSouth's motion.

WHEREFORE, BellSouth's motion to compel should be denied and a protective order should be entered.



Joseph A. McGlothlin

Vicki Gordon Kaufman

McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman & Arnold, PA

117 South Gadsden Street

Tallahassee, Florida 32301

(850) 222-2525 Telephone

(850) 222-5606 Telefax

Attorneys for the Florida Competitive Carriers
Association

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing The Florida Competitive Carriers Association's Response to BellSouth Telecommunications, Inc.'s Motion To Compel and The FCCA's Motion for Protective Order has been furnished by (*) hand delivery, (**) electronic mail, or U. S. Mail this 10th day of December 2002 to the following:

(*) (**) Felicia Banks
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

(**) Dana Shaffer
XO Florida, Inc.
105 Molly Street, Suite 300
Nashville, Tennessee 37201-2315

(**) Matthew Feil
Florida Digital Network
390 North Orange Avenue, Suite 2000
Orlando, Florida 32801

(**) Martin McDonnell
Rutledge, Ecenia, Purnell & Hoffman
215 S. Monroe Street, Suite 420
Tallahassee, Florida 32301

(*)(**) Nancy B. White
James Meza
Patrick Turner
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301

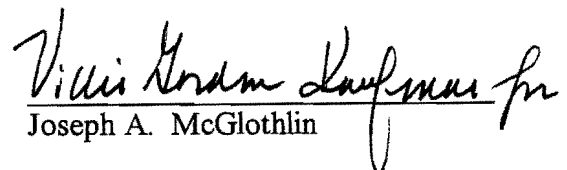
(**) Greg Lunsford
6801 Morrison Blvd.
Charlotte, NC 28211-3599

(**) Karen Camechis
Pennington Law Firm
215 S. Monroe Street
Post Office Box 10095
Tallahassee, Florida 32302-2095

(**) Nanette Edwards
Director of Regulatory Advocacy
& Sr. Attorney
ITC^Deltacom
4092 S. Memorial Parkway
Huntsville, AL 35802

(**) Carolyn Marek
Time Warner Telecom of Florida, L.P.
233 Bramerton Court
Franklin, Tennessee 37069

(**) Floyd R. Self
Messer, Caparello & Self, P.A.
215 S. Monroe Street, Suite 701
P.O. Box 1876
Tallahassee, FL 32302-1876


Joseph A. McGlothlin

ATTACHMENT 1

BellSouth's Interrogatory No. 6:

- (a) Please state whether you and/or any of your members have made any local service offerings available to Florida end users for a limited time only (i.e. in order to avail itself of the offer, the end user was required to sign-up for or otherwise accept the offering before a given date or within a given amount of time after the offer was extended).
- (b) If your response to (a) is anything other than an unqualified "no," please identify the entity and describe each such limited-time offer in detail and produce a copy of any and all documents associated with each such limited-time offers (including without limitation tariffs, documents sent to or filed with the Commission and/or its Staff; contracts, etc.).

The FCCA objects to this interrogatory as it requests information about the FCCA's member companies that is not in its possession or control. Further, the FCCA objects to this interrogatory as an impermissible attempt to seek discovery from its members who are not parties to the case. In addition, the FCCA objects on the basis that the information sought by the interrogatory is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. The FCCA objects that subpart (b) impermissibly requires the FCCA to produce documents.

BellSouth's Interrogatory No. 16:

If any member of the FCCA has ever had any contact with BellSouth regarding the resale of any BellSouth promotional tariff offering in the state of Florida, please:

- (a) State the date and nature (i.e. e-mail, letter, face-to-face conversation, telephone conversation, etc.) of each such contact;
- (b) Identify with specificity the BellSouth promotional tariff offering that was the subject of the contact;
- (c) Identify with specificity (including without limitation name address, and telephone number) the BellSouth representative that you or your members contacted regarding such contract;
- (d) Identify with specificity (including without limitation name address, and telephone number) the person who made the contact on you or your member's behalf;

(e) Describe in detail each and every communication between you and your members and BellSouth's representatives with regard to the resale of the BellSouth promotional tariff offering; and

(f) Produce all documents associated with each such contact.

The FCCA objects to this interrogatory as it requests information about the FCCA's member companies that is not in its possession or control. Further, the FCCA objects to this interrogatory as an impermissible attempt to seek discovery from its members who are not parties to the case. FCCA objects on the basis that this interrogatory is unduly burdensome and oppressive and that the information sought is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In addition, FCCA objects to subpart (f) as it impermissibly requests the production of documents.

BellSouth's Request for Production No. 6:

Please produce all documents that are identified in or support your response to BellSouth's First Set of Interrogatories, Item No. 6.

The FCCA has objected to this Interrogatory. The FCCA objects to this request as it seeks information about the FCCA's member companies that is not in its possession or control. Further, the FCCA objects to this request as an impermissible attempt to seek discovery from its members who are not parties to the case. In addition, the FCCA objects on the basis that the information sought is not relevant, and not reasonably calculated to lead to the discovery of admissible evidence.

BellSouth's Request for Production No. 17:

Please produce all documents that are identified in or support your response to BellSouth's First Set of Interrogatories, Item No. 16.

The FCCA has objected to this Interrogatory. The FCCA objects to this request as it seeks information about the FCCA's member companies that is not in its possession or control. Further, the FCCA objects to this request as an impermissible attempt to seek discovery from its members who are not parties to the case. FCCA objects on the basis that this request is unduly burdensome and oppressive, and that the information sought is not relevant and not reasonably calculated to lead to the discovery of admissible evidence.