

State of Florida



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**DATE:** DECEMBER 12, 2002

**TO:** DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYO)

**FROM:** OFFICE OF THE GENERAL COUNSEL (CHRISTENSEN) *mc ml*  
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (DOWDS, SIMMONS) *SAS*

**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.

**AGENDA:** 12/17/02 - REGULAR AGENDA - ISSUE 1 - RECONSIDERATION OF NON-FINAL ORDER - ORAL ARGUMENT NOT REQUESTED; HOWEVER, ORAL ARGUMENT MAY BE ENTERTAINED AT THE COMMISSION DISCRETION PURSUANT TO RULE 25-22.0376(5), FLORIDA ADMINISTRATIVE CODE - ISSUE 2 - PROCEDURAL MOTION - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\020507.RCM

CASE BACKGROUND

On June 12, 2002, the Florida Competitive Carriers Association (FCCA) filed a Complaint against BellSouth Telecommunications, Inc. (BellSouth) and a Request for Expedited Relief seeking relief from BellSouth's practice of refusing to provide its FastAccess service to customers who receive voice service from an Alternative Local Exchange Carrier (ALEC).

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On July 3, 2002, BellSouth filed a Motion to Dismiss FCCA's Complaint and an Opposition to Request for Expedited Relief. On July 9, 2002, FCCA filed its Response in Opposition to BellSouth's Motion to Dismiss and filed a Motion for Summary Final Order.

By Order No. PSC-02-0935-PCO-TL, issued July 12, 2002, the request for expedited relief was denied. By Order No. PSC-02-1464-FOF-TL, issued October 23, 2002, the Commission denied BellSouth's Motion to Dismiss and FCCA's Motion for Summary Final Order without Prejudice.

Shortly thereafter, the parties met with staff to identify the issues to be addressed in this docket. Although the parties and staff agreed on most of the issues, several issues proposed by the parties were objected to by the other party or staff. The parties and staff agreed that with the concurrence of the Prehearing Officer short briefs should be filed in support of issues which one party wished to sponsor over the objections of the other. Thereafter, the other party could file a response to the brief. However, FCCA decided prior to filing a brief to withdraw its contested issues; thus, only BellSouth filed a brief in support of its contested issue. FCCA filed a response in opposition to BellSouth's proposed Issue 7. BellSouth's proposed Issue 7 is "Should any decisions made in this proceeding apply to all ALECs and ILECs?"

By Order No. PSC-02-1537-PCO-TL, issued November 12, 2002, the Prehearing Officer issued the Order Establishing Procedure which excluded BellSouth's proposed Issue 7 from this proceeding. On November 22, 2002, the Prehearing Officer provided clarification regarding the reasons for excluding BellSouth's proposed Issue 7 and reaffirmed the decision to exclude proposed Issue 7, in Order No. PSC-02-1618-PCO-TL (Clarification Order).

On December 2, 2002, BellSouth filed its 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 (Motion). On December 9, 2002, FCCA and ITC^DeltaCom Communications, Inc. (DeltaCom) filed their Joint Response to BellSouth's Motion. DeltaCom was granted intervention by Order No. PSC-02-1515-PCO-TL, issued November 5, 2002.

This recommendation addresses BellSouth's Motion and FCCA and DeltaCom's Response.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant BellSouth Telecommunications, Inc.'s Motion for Reconsideration and/or Modification of Order No. PSC-02-1618-PCO-TL to the Full Commission?

**RECOMMENDATION:** No, BellSouth has failed to demonstrate that the Prehearing Officer made a mistake of fact or law in rendering his decision. Therefore, staff recommends that BellSouth's Motion for Reconsideration and/or Modification of Order No. PSC-02-1618-PCO-TL to the Full Commission should be denied. (CHRISTENSEN)

**STAFF ANALYSIS:** As noted in the Case Background, on December 2, 2002, BellSouth filed its 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 (Motion). On December 9, 2002, FCCA and DeltaCom filed their Response to BellSouth's Motion. This section will address only that portion of BellSouth's Motion regarding reconsideration and/or modification.

**BellSouth's Motion**

In support of its Motion, BellSouth asserts that the Commission should reconsider the Prehearing Officer's decision and modify Order No. PSC-02-1618-PCO-TL to include its proposed Issue 7 because the Prehearing Officer overlooked or failed to consider several points of fact, law and policy, citing to Diamond Cab Co. v. King, 146 So.2d 889, 891 (Fla. 1962). In its Motion, BellSouth raises the arguments it previously raised in its brief provided to the Prehearing Officer. BellSouth argues that since the decision could impact the industry as a whole, it is appropriate to consider whether any decision the Commission makes will impact all carriers in Florida rather than just BellSouth alone.

Citing to Florida Bankers Ass'n v. Leon County Teachers Credit Union, 359 So.2d 886, 890 (1<sup>st</sup> DCA 1978), BellSouth argues that rulemaking is the proper method of uniform policymaking in a matter of state-wide concern. BellSouth asserts that where it is permissible for an agency to develop policy through orders, the courts have stated that it is their duty to require an agency to show and articulate its reasons for discretionary action, citing to General Development Corp. v. Division of State Planning, Dep't of Admin., 353 So.2d 1199, 1209 (1<sup>st</sup> DCA 1977). BellSouth argues that

if the Commission decides to impose regulations on BellSouth's provision of its FastAccess Internet Service, but not on any other provider's provision of a similar service, then the Commission at a minimum would be required to articulate the reasons for such discretionary actions. Thus, BellSouth concludes that it makes no sense to exclude its proposed Issue 7.

Further, BellSouth argues that the Commission cannot impose differing regulatory oversight in an arbitrary, capricious, or discriminatory manner<sup>1</sup>. BellSouth asserts that if the Commission were to render a policy decision that applies to BellSouth alone, at a minimum, the Commission would have to base its decision on the issues in the case supported by record evidence relating to such issues.

BellSouth also argues that DSL technology is not the only technology that supports broadband data services to customers. Essentially, BellSouth contends that wireless, cable modem, and satellite technology also comprise the broadband market and should be considered in any analysis of whether BellSouth has violated applicable law. Further, BellSouth cites to a recent FCC report, as well as a D.C. Circuit Court of Appeals case, which find that cable modem, not DSL, is the predominant broadband technology.<sup>2</sup> BellSouth contends that it lags behind the unregulated cable suppliers. BellSouth asserts that the Commission is being asked to regulate its provision of an unregulated service, which competes with other unregulated services offered by largely unregulated cable companies. Therefore, the Commission should address, at a minimum, whether to impose the same requirements on similar services offered by ALECs who are no more or no less dominant in the highly competitive broadband market than BellSouth.

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<sup>1</sup>BellSouth Telecommunications, Inc. v. Florida Public Service Commission, Case No. 99-5369RP, Final Order, issued July 13, 2000.

<sup>2</sup>Third Report, CC Docket No. 98-146, 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, (released February 6, 2002); United States Telecom Association v. FCC, 290 F.3d 415, 428-29 (D.C. Cir. 2002)

FCCA & DeltaCom Response

In their Response, FCCA and DeltaCom argue that BellSouth fails to meet the standard for reconsideration<sup>3</sup>, in that BellSouth makes the identical arguments and cites the identical cases as it did when the issue for which it seeks reconsideration was before the Prehearing Officer. FCCA and DeltaCom assert that a comparison of pages 2 through 5 of BellSouth's Brief with pages 3 through 6 of its Motion for Reconsideration demonstrates that BellSouth in its motion only parrots the same arguments it made to the Prehearing Officer. FCCA and DeltaCom cite to Sherwood v. State, 111 So.2d 96 (Fla. 3<sup>rd</sup> DCA 1959), citing State ex. rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla. 1<sup>st</sup> DCA 1958) for the proposition that in a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Therefore, FCCA and DeltaCom contend that in light of the prohibition against reargument in a motion for reconsideration, BellSouth's Motion for Reconsideration must be summarily rejected.

Analysis

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1<sup>st</sup> DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3<sup>rd</sup> DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1<sup>st</sup> DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974). This standard is equally applicable to reconsideration by the Commission of a Prehearing Officer's order. See, Order No. PSC-96-0133-FOF-EI, issued January 29, 1996, in Docket No. 950110-EI.

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<sup>3</sup>See, Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So.2d 162 (Fla. 1<sup>st</sup> DCA 1981).

Although BellSouth cites to the standard for reconsideration set forth in Diamond Cab Co. v. King, BellSouth fails to show that the Prehearing Officer overlooked or failed to consider one point of law or fact. In fact, all of the arguments BellSouth makes in its Motion were made in its brief to the Prehearing Officer. As noted by FCCA and DeltaCom, reargument is not appropriate for a motion for reconsideration.

As demonstrated in Order No. PSC-02-1618-PCO-TL (Clarification Order), the Prehearing Officer addressed the parties' arguments and set forth the reasons why BellSouth's proposed Issue 7 was excluded. Specifically, the Prehearing Officer found that the issue as written went well beyond the scope of the Complaint and that to include an issue regarding all ALECs and ILECs would require the Commission to review the individual practices of all ALECs and ILECs. Since the issue BellSouth wished to address would necessarily impact all ALECs and ILECs, the Prehearing Officer found that the issue should not be included in a simple complaint proceeding, but rather would be appropriate for a generic proceeding. Thus, all of the arguments put forth by BellSouth were considered by the Prehearing Officer in rendering his decision.

Based on the preceding reasons, staff believes that BellSouth has failed to demonstrate that the Prehearing Officer made a mistake of fact or law in rendering his decision. Therefore, staff recommends that BellSouth's Motion for Reconsideration and/or Modification of Order No. PSC-02-1618-PCO-TL to the Full Commission should be denied.

**ISSUE 2:** Should the Commission grant BellSouth Telecommunications, Inc.'s Motion, in the Alternative, to Convert to a Generic Proceeding?

**RECOMMENDATION:** Yes, staff recommends that the Commission establish a generic docket to investigate and address whether a telecommunications carrier's refusal to provide its high-speed Internet access service to any customer other than its own voice service customer violates state or federal law, as well as any other issues the Commission deems appropriate. Further, staff recommends that in granting BellSouth's Motion that this docket be consolidated with the generic docket. (CHRISTENSEN, DOWDS)

**STAFF ANALYSIS:** As noted in the previous Issue, BellSouth filed its 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. This issue will address the Motion to Convert to a Generic Proceeding.

#### BellSouth's Motion

In its Motion to Convert to a Generic Proceeding, BellSouth argues that if the Commission denies its Motion for Reconsideration and Modification, that based on the reasons set forth in that portion of its Motion, the Commission should convert this to a generic proceeding. A summary of BellSouth's previous arguments why the Commission's decision should encompass all other ALECs and ILECs are: 1) that the decision could impact the industry as a whole; 2) that if the Commission were to render a policy decision that applied to BellSouth alone, at a minimum, the Commission would have to base its decision on the issues in the case supported by record evidence and cannot impose such regulatory oversight in an arbitrary, capricious, or discriminatory manner; and 3) that the Commission should consider the whole broadband market, including wireless, cable modem, satellite technology, as well as DSL, in determining whether BellSouth's practices, or any other ALEC's or ILEC's practices, violate applicable law.

Again, BellSouth argues that it would be inappropriate for the Commission to make a decision involving broad policy considerations and ramifications without including all affected carriers in what BellSouth terms essentially a rulemaking procedure. BellSouth also asserts that it would be a waste of the Commission's and parties' time to require it and FCCA to retry this proceeding in a generic

proceeding. Further, BellSouth asserts that there appears to be a fundamental question of whether a decision in this case would have a preclusive effect on litigation on the same or similar issues in a generic proceeding. BellSouth cites to United Telephone Company of Florida<sup>4</sup> for the proposition that the Commission has previously converted or referred an issue to a generic proceeding upon finding that the issue was one which all ILECs should address and that it was probable that a generic proceeding would result in rulemaking. BellSouth contends that similar to the United Telephone Company of Florida case, 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 ILECs and which will probably result in rulemaking.

#### FCCA & DeltaCom Response

In their Response, FCCA and DeltaCom disagree with BellSouth's contention that this docket is essentially a rulemaking procedure. They argue that this is a complaint proceeding which FCCA initiated regarding BellSouth's anticompetitive behavior. FCCA and DeltaCom assert that while BellSouth would prefer to shift the focus of the case, as well as delay its resolution, BellSouth has not provided a single example of the conduct of any other provider that has resulted in competitive harm to BellSouth. Further, FCCA and DeltaCom argue that BellSouth's suggested "generic" Issue 7 was nothing more than an afterthought and was not even included on the suggested issues list BellSouth initially filed.

FCCA and DeltaCom contend that the addition of this "generic" issue to this docket is not only inappropriate given the scope of the Complaint, but it would serve no purpose other than delay the present, actual, and ongoing refusal of BellSouth to comply with the law and would serve to unnecessarily complicate this proceeding. FCCA and DeltaCom assert that expansion of the scope of the hearing to unrelated matters, as well as the need to notice and involve other carriers, would needlessly delay resolution of the issues raised in FCCA's complaint.

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<sup>4</sup> Order No. PSC-92-0708-FOF-TL, in Dockets Nos. 910980-TL, 910027-TL, and 910529-TL, issued July 24, 1992, (United Telephone Company of Florida)



FCCA and DeltaCom argue that BellSouth's reliance on the United Telephone Company of Florida case is misplaced because in that case the Commission found an inconsistent policy between the electric and telephone industries as to service to elevators, which it decided should be dealt with in a generic proceeding. FCCA and DeltaCom assert that the United Telephone Company of Florida case dealt with a broad tariff issue which would impact the entire industry and that that issue has no relation to the issues in this docket. FCCA and DeltaCom contend that even BellSouth recognizes the issues in this docket surround BellSouth's FastAccess Internet service. FCCA and DeltaCom assert that this docket addresses BellSouth's behavior, which this Commission found to be anticompetitive in at least two other dockets. FCCA and DeltaCom claim that this is not a rulemaking proceeding but a complaint against BellSouth's anticompetitive behavior and as such the resolution of FCCA's Complaint will not result in a generic policy. FCCA and DeltaCom argue that any effort to characterize this matter as a generic proceeding that has industry-wide implications would constitute a denial of due process to the parties in this case.

#### Analysis

While staff does not believe that BellSouth's arguments support its Motion for Reconsideration and/or Modification, staff does believe that BellSouth's arguments have merit regarding whether this docket should be converted to a generic proceeding. Staff notes that the Prehearing Officer found in the Clarification Order the following:

Therefore, I find that inclusion of an issue that applies to all ILECs and ALECs would be more appropriately addressed in a generic proceeding. Even though the issue is being excluded from this proceeding, BellSouth is not precluded from petitioning this Commission to address this issue in a separate proceeding.

Order No. PSC-02-1618-PCO-TL at p. 2.

Staff notes that this is what BellSouth is now asking this Commission to consider. Staff believes that the main issues in FCCA's Complaint are whether BellSouth's practice of providing its FastAccess Internet service only to its voice service customers violates state or federal law, and if so, whether BellSouth should

be required to provide its FastAccess Internet service to any customer, regardless of the underlying voice provider. FCCA and DeltaCom argue that this Commission found BellSouth's behavior in this regard to be anticompetitive in two prior dockets. However, staff notes that in both those dockets<sup>5</sup>, the Commission's decisions were limited to BellSouth's practice of disconnecting an existing FastAccess customer's FastAccess service when that customer chose to leave BellSouth's voice service for that of another provider. However, what FCCA asks for in its Complaint is much broader than the question already addressed by the Commission.

BellSouth argues that the main issues raised in FCCA's complaint introduce a point that could impact the entire industry and should be addressed in a generic proceeding. It is possible that this Commission may conclude that BellSouth improperly limits the availability of its FastAccess high-speed Internet access product to its own voice customers. If this decision is made, it is unclear to staff why another carrier who imposed similar restrictions should be treated differently. However, this could be the outcome (albeit short-term) by limiting these matters to BellSouth practices.

Accordingly, if there are other carriers who engage in a practice similar to BellSouth's practice regarding its FastAccess offering, there is a potential for a policy decision to be articulated which could impact the whole industry. Staff believes that addressing these matters in a generic proceeding would provide for optimal evidence on which to base a decision. Contrary to FCCA's and DeltaCom's assertions that addressing the complaint in a generic proceeding would deny them due process, staff believes that a generic proceeding would provide all potentially affected

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<sup>5</sup>Order No. PSC-02-0765-FOF-TP, issued June 5, 2002, and Order No. PSC-02-1453-FOF-TP, issued October 21, 2002, in Docket No. 010098, In Re: Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996.; Order No. PSC-02-0878-FOF-TP, issued July 1, 2002, in Docket No. 001305-TP, In Re: Petition by BellSouth Telecommunications, Inc. for Arbitration of Certain Issues in Interconnection Agreement with Supra Telecommunications and Information Systems, Inc.

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parties due process rights. Staff believes that the appropriate procedure would be to establish a generic docket and consolidate this docket with the generic docket.

For the preceding reasons, staff recommends that the Commission establish a generic docket to investigate and address whether a telecommunications carrier's refusal to provide its high-speed Internet access service to any customer other than its own voice service customer violates state or federal law, as well as any other issues the Commission deems appropriate. Further, staff recommends that in granting BellSouth's Motion that this docket be consolidated with the generic docket.

**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** No. This docket should remain open pending further proceedings. Currently, this matter is scheduled for an administrative hearing to be held on January 30, 2002, which would be unaffected by the Commission's vote on Issue 1 and would remain unaffected should the Commission rejects staff's recommendation on Issue 2. Should the Commission vote to approve staff's recommendation on Issue 2 and establish a generic proceeding and consolidate this docket into that generic docket, then staff believes the hearing in this docket would need to be rescheduled and new testimony dates established for the generic proceeding to allow for notice and due process for all potentially affected persons. Further, if the Commission approves staff's recommendation on Issue 2, then all parties from this docket should automatically become parties in the generic docket.

**STAFF ANALYSIS:** Currently, this matter is scheduled for an administrative hearing to be held on January 30, 2002, which would be unaffected by the Commission's vote on Issue 1 and would remain unaffected should the Commission rejects staff's recommendation on Issue 2. Should the Commission vote to approve staff's recommendation on Issue 2 and establish a generic proceeding and consolidate this docket into that generic docket, then staff believes the hearing in this docket would need to be rescheduled and new testimony dates established for the generic proceeding to allow for notice and due process for all potentially affected persons. Further, if the Commission approves staff's recommendation on Issue 2, then all parties from this docket should automatically become parties in the generic docket. Thus, this docket should remain open pending these further proceedings.