

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 26, 2002

RECEIVED FPSC
02 DEC 26 PM 3:31
COMMISSION
CLERK

VIA HAND DELIVERY

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

Re: Docket No.: 020507-TP

Dear Ms. Bayo:

On behalf of the Florida Competitive Carriers Association (FCCA), 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 Emergency Motion to Compel and Motion for Protective Order

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

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

AUS _____
CAF _____
CMP _____
COM 5 VGK/mls
CTR 1 Enclosures
ECR _____
GCL _____
OPC _____
MMS _____
SEC 1
OTH _____

RECEIVED & FILED
RYM
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER DATE
14038 DEC 26 02
FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of the 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.

Docket No. 020507-TP

Filed: December 26, 2002

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

The Florida Competitive Carriers Association (FCCA), pursuant to rule 28-106.204, Florida Administrative Code and rule 1.280(c), Florida Rules of Civil Procedure, files its response to BellSouth Telecommunications, Inc.'s (BellSouth) Emergency¹ Motion to Compel and Motion for Protective Order. The FCCA requests that the Commission enter an order denying BellSouth's motion and ruling that the FCCA is not required to provide responses to the discovery requests that are the subject of the motion. In support, the FCCA states:

Introduction

1. The FCCA initiated this Complaint proceeding on June 12, 2002. In its Complaint, the FCCA alleges that BellSouth's policy of disconnecting or refusing to provide its FastAccess service to a consumer who selects a competitive voice provider is discriminatory and contrary to state and federal law.²

¹ Though BellSouth styles its pleading an "emergency" motion and seeks an "immediate" order from this Commission requiring the FCCA to provide answers on an "expedited" basis, BellSouth does not describe the "emergency." If the "emergency" is intended to refer to the time remaining before hearing, any "emergency" is of BellSouth's own making. The FCCA filed its Complaint in this matter on *June 12, 2002*. BellSouth waited until *November 15, 2002* to file the discovery that is the subject of its motion.

² The Commission has already reached this conclusion in several other orders. *See*, Order Nos. PSC-02-0765-FOF-TP, PSC-02-1453-FOF-TP, PSC-02-0878-FOF-TP.

DOCUMENT NUMBER DATE

14038 DEC 26 02

FPSC-COMMISSION CLERK

2. On November 15, 2002, BellSouth served the FCCA with its First Set of Interrogatories (Nos. 1-32) and its First Request for Production of Documents (Nos. 1- 4). The FCCA filed its Objections on November 25, 2002, and its Responses on December 5, 2002.

3. On December 18, 2002, BellSouth filed a Motion to Compel seeking to compel the FCCA to respond to all its discovery requests. For the reasons discussed below, BellSouth's motion should be denied and the FCCA's Motion for Protective Order should be granted.

Discussion

The Information BellSouth Seeks is Not Relevant to the Issues in this Case

4. A basic tenet of discovery is that information sought must be relevant or reasonably calculated to lead to the discovery of admissible evidence.³ As BellSouth recognizes, a primary purpose of pretrial discovery is "to 'discover' evidence relevant and pertinent to the triable issues pending before the court. . . ."⁴ BellSouth's discovery is not tailored to accomplish these goals.

5. To dispose of BellSouth's motion, the Commission must bear in mind what the "triable" issues in this case are. The "triable" issues are identified in the Order Establishing Procedure⁵ and clearly are limited to BellSouth's conduct and policies regarding provision of its FastAccess service. A review of the Issues List confirms that the subject of this docket is *BellSouth's behavior*. The issues do not relate to the services or the conduct of ALECs.⁶ Throughout this docket, BellSouth has continually and unsuccessfully attempted to shift the

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 *Jones v. Seaboard Coast Railroad Company*, 297 So. 2d 861, 863 (Fla. 2nd DCA 1974) (cited at p. 6 of the motion).

⁵ Order No. PSC-02-1537-PCO-TL, Appendix A, attached hereto as Attachment 1.

⁶ BellSouth's Mr. Ruscilli recognizes this. He states in his rebuttal testimony that "this docket does not include any consideration of all carriers." (Ruscilli rebuttal testimony at p. 3, l. 17).

focus of this proceeding from its own actions to those of other telecommunications providers.⁷ Its motion to compel is just more of the same. Though BellSouth makes vague claims about the relevance of the information it seeks, including claims that it is “directly related”⁸ and “directly relevant”⁹ to matters in this case, it fails to prove up its claims when its allegations are examined.

6. First, BellSouth says that the FCCA’s Complaint demonstrates the relevancy of its discovery requests¹⁰ because the Complaint refers to “FCCA members.” BellSouth argues that its requests are “designed to determine whether individual FCCA members offer DSL services; and if so, what types of services are offered.”¹¹ Putting aside for the moment the legal inability of BellSouth to conduct discovery as to individual FCCA members who have not intervened in this proceeding (which is discussed below), BellSouth’s claim makes the FCCA’s point. What other telecommunications providers do or do not do, what they provide or do not provide, is irrelevant to the issues here -- *even if* a competitor could or had established a DSL network *identical* to BellSouth’s, it could not support or justify requiring a *consumer* to change DSL providers so as to receive voice service from a provider of its choice nor would it have any bearing on the issues the Commission must decide in this case.

7. Similarly, what telecommunications providers do or do not do in *other states*¹² has no relevance to the issues in this docket. Interestingly, BellSouth has objected to responding to discovery “to the extent it is intended to apply to matters other than Florida intrastate

⁷ The Commission denied BellSouth’s motion to convert the FCCA’s Complaint into a “generic” docket and involve all telecommunications providers on December 17, 2002.

⁸ Motion at p. 1.

⁹ *Id.*

¹⁰ BellSouth does not distinguish (or even individually discuss) its numerous discovery requests.

¹¹ Motion at p. 3.

¹² Motion, fn 1 at p. 3.

operations subject to the jurisdiction of the Commission.”¹³ Its attempt to seek such discovery from the FCCA must be rejected.

8. It is unclear if BellSouth’s recitation of excerpts from the FCCA Complaint is intended to raise the issue of standing. If it is, the FCCA’s obligation to demonstrate standing so as to prosecute this Complaint has been satisfied.¹⁴ The FCCA has provided BellSouth with a list of its members, all of whom are well-known companies who provide telecommunications service in Florida.

9. Second, BellSouth contends that the Issue List in this case demonstrates the relevancy of its requests. However, as discussed previously, a review of the Issue List illustrates just the opposite. *Each and every* issue on the list relates to what BellSouth should or should not be permitted to do.

10. Further, the Prehearing Officer specifically rejected BellSouth’s attempt to expand the scope of this proceeding to include other telecommunications providers.¹⁵ BellSouth unsuccessfully sought reconsideration of the Prehearing Officer’s order and attempted to convert this proceeding to a generic docket. The Commission refused to do so. This motion to compel is simply another attempt to do an end-run around the Commission’s decision.

¹³ BellSouth’s Objections to the FCCA’s Third Set of Interrogatories, Objection No. 2, filed December 5, 2002; BellSouth’s Responses and Objections to the FCCA’s Second Set of Interrogatories, Objection No. 2, filed November 26, 2002; BellSouth’s Responses and Objections to the FCCA’s First Set of Interrogatories, Objection No. 2, filed November 15, 2002.

¹⁴ The FCCA doubts that it is BellSouth’s intent to seriously question the standing of the FCCA, an organization that has a long history before this Commission. For example, the FCCA has been permitted to participate and/or intervene in numerous proceedings before this Commission, including, but not limited to, both of BellSouth’s § 271 dockets, Docket No. 960786-TP; BellSouth’s key customer cases, Docket Nos. 020578-TP, 020119-TP; BellSouth’s structural separation docket, Docket No. 010345-TP; the collocation docket, Docket No. 981834-TP; and the reciprocal compensation docket, Docket No. 000075-TP.

¹⁵ Order No. PSC-02-1537-PCO-TL (rejecting proposed Issue 7: “Should any decisions made in this proceeding apply to all ALECs and ILECs?”)

11. BellSouth also argues that the issues in this case include a determination of "feasibility"¹⁶ and in fact, BellSouth's testimony is replete with excuses as to why it cannot provide FastAccess to consumers who take voice service from another provider.¹⁷ To the extent BellSouth has a "feasibility" excuse for its behavior (which the FCCA disputes), it relates to services BellSouth is able to provide. The services others provide (again, putting aside BellSouth's inability to conduct discovery as to non-parties), have no relevance to the ability of BellSouth to provide FastAccess to consumers who want it or to the Commission's duty to put a halt to anticompetitive behavior.

12. BellSouth then states that Issues 6a and 6b, relating to "rates, terms and conditions" make certain of its requests appropriate. But these issues relate to what *BellSouth* may charge consumers.¹⁸ Even BellSouth recognizes that these issues relate to "the rates, terms, and conditions of providing service"¹⁹ -- that service being BellSouth's FastAccess service.

13. Third, BellSouth argues that "publicly available" information supports its relevancy argument. BellSouth claims that it has been able to ascertain that certain FCCA members provide "some type of DSL service"²⁰ but cannot determine where such services are provided. Again, utilizing its "feasibility" argument, BellSouth claims that what the FCCA members do somehow relates to whether it is feasible for *BellSouth* to provide FastAccess to consumers who want it. There is no link between these two matters.

14. BellSouth has failed to demonstrate the relevancy of its requests to the issues in this case and its motion should be denied on that basis alone.

¹⁶ Motion at p. 4.

¹⁷ On December 23, 2002, the FCCA provided rebuttal testimony directed to these claims.

¹⁸ Both Issue 6a and 6b relate to "what changes to the rates, terms, and conditions of [FastAccess] service, if any, may *BellSouth* make?" (emphasis added).

¹⁹ Motion at p. 5.

²⁰ *Id.*

The Entities from Which BellSouth Seeks Discovery are Not Parties to this Case²¹

15. In addition to lack of relevancy, the FCCA also objects to the discovery requests at issue because they seek information from the FCCA that is not in its possession, custody or control. The entity that is a party to this case is the FCCA. The applicable rules of procedure and case law demonstrate that the FCCA's party status does not provide BellSouth with the ability to conduct a fishing expedition as to companies who are not parties to the case.

16. Rule 1.340(b), Florida Rules of Civil Procedure, requires responses as to "information the *party* has."²² Rule 1.350(a), Florida Rules of Civil Procedure, requires the production of documents "in the possession, custody, or control of *the party* to whom the request is directed."²³ Thus, BellSouth's requests to individual companies who are not parties to this case are far beyond the bounds of permissible discovery.

17. BellSouth itself is well aware of the prohibition on discovery from non-parties. 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."²⁴

18. Nonetheless, BellSouth contends that it is entitled to discovery from FCCA members pursuant to Order No. PSC-92-0112-TL (FCTA Order). The FCTA Order involved discovery directed to the Florida Cable Television Association (FCTA) in a telephone rate case.

²¹ Contrary to BellSouth's claim, the FCCA members are not "hiding" behind the organization but are adhering to the Florida Rules of Civil Procedure as BellSouth must.

²² Emphasis added; 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...").

²³ Emphasis added; 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).

²⁴ BellSouth's Objections to the FCCA's Third Set of Interrogatories, Objection No. 1, filed December 5, 2002; BellSouth's Responses and Objections to the FCCA's Second Set of Interrogatories, Objection No. 1, filed November 26, 2002; BellSouth's Responses and Objections to the FCCA's First Set of Interrogatories, Objection No. 1, filed November 15, 2002.

However, the scope and the subject matter addressed in the FCTA Order are readily distinguishable from the discovery BellSouth seeks here.

19. First, the Commission specifically noted in the FCTA Order that “the scope of discovery is not unlimited and discovery will not be allowed as a vehicle for harassment.”²⁵ The FCTA Order permitted only limited discovery pertaining to the services FCTA members provided and only as required to establish FCTA standing. 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.

20. Second, as noted above, the FCCA has provided a list of its member companies, who are well known to BellSouth (and this Commission). 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. BellSouth's attempt to abuse the discovery process to obtain information from entities that are not parties should be denied.

BellSouth's Requests are Burdensome

21. BellSouth also takes issue with the FCCA’s objection to the burdensome nature of its discovery requests. However, a review of the discovery shows that the information sought is burdensome on its face. For example, Interrogatory Nos. 7, 8, 10, 12, 13, 17, 20 contain multiple parts and actually total 26 separate questions. In addition, many of the discovery requests ask the FCCA members to describe information with particularity, or identify or produce “all” documents. Given the number and scope of the discovery questions, it is obvious that an inordinate amount of time would be required to fully respond to BellSouth’s requests.

²⁵ FCTA Order at p. 3.

**BellSouth's Discovery Seeks Confidential Proprietary Business Information
and Trade Secret Information**

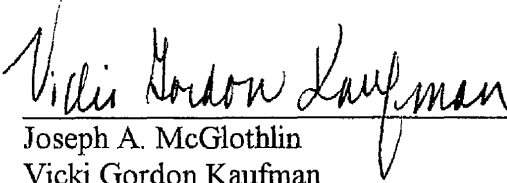
22. The FCCA objected to BellSouth Interrogatory Nos. 7 - 8, 10, 12 - 21, and Requests for Production Nos. 1 - 4 to the extent these requests seek confidential proprietary business information and trade secret information. For example, Interrogatory No. 7 seeks information regarding services provided (including protocols used), number of customers served, nature of technology used, entities from whom services are purchased (including number of circuits and location of circuits). Interrogatory No. 19 asks for information regarding joint offerings. The information sought in many of BellSouth's discovery requests is sensitive proprietary business information.

23. BellSouth's motion does not address these objections. The FCCA reasserts its objection as these discovery requests seek information about the FCCA member companies' operations that is confidential proprietary business information and/or trade secret information. The FCCA should not be required to provide such sensitive business information to BellSouth.

Conclusion

24. BellSouth's motion should be denied as it seeks discovery that is irrelevant to the issues in this case and far beyond that permitted pursuant to the applicable rules

WHEREFORE, BellSouth's motion 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

Appendix A
Tentative Issues List

The tentative list of issues which have been identified in this proceeding are set forth below.

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

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

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

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

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

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

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?

CERTIFICATE OF SERVICE

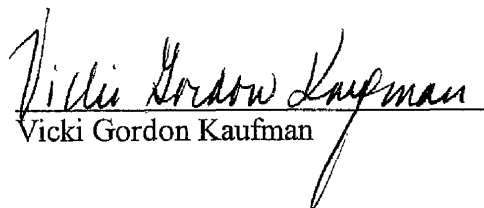
I **HEREBY CERTIFY** that a true and correct copy of the foregoing The Florida Competitive Carriers Association's Response to BellSouth Telecommunications, Inc.'s Emergency Motion to Compel and Motion for Protective Order has been furnished by (*) hand delivery, (**) electronic mail, or U.S. Mail this 26th day of December, 2002, to the following:

(*) (**) Patricia Christensen
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

(*) (**) Nancy White
(**) Meredith Mays
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301-1556

(**) Nanette Edwards
Director-Regulatory
ITC^DeltaCom
4092 S. Memorial Parkway
Huntsville, Alabama 35802

(**) Floyd Self
Messer, Caparello & Self
215 South Monroe Street, Suite 701
Tallahassee, Florida 32302-1876


Vicki Gordon Kaufman