

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: 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.

DOCKET NO. 020507-TL

FILED: February 17, 2003

**THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION'S MOTION  
FOR RECONSIDERATION OF A PORTION OF  
ORDER NO. PSC-03-0180-PCO-TL**

The Florida Competitive Carriers Association (FCCA), pursuant to rules 25-22.0367 and 28-106.204, Florida Administrative Code, files this Motion for Reconsideration of a portion of Order No. PSC-03-0180-PCO-TL (Second Discovery Order). As grounds therefor, the FCCA states:

1. On January 17, 2003, BellSouth Telecommunications, Inc. (BellSouth) filed a Motion to Compel the FCCA to respond to certain interrogatories contained in BellSouth's Third Set of Interrogatories.

2. On January 24, 2003, the FCCA responded to BellSouth's Motion to Compel.

3. On February 6, 2003, the Prehearing Officer issued the Second Discovery Order.

The Second Discovery Order grants in part and denies in part BellSouth's Motion to Compel and requires supplemental responses to certain interrogatories to be filed within 10 days of issuance of the Second Discovery Order.<sup>1</sup>

<sup>1</sup> The FCCA has filed its supplemental responses today with the one exception discussed herein.

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4. This Motion for Reconsideration addresses only that portion of the Second Discovery Order requiring a response to the first part of Interrogatory No. 66.<sup>2</sup> As to that portion of the interrogatory, the Second Discovery Order finds the information sought to be relevant.

5. Further, the first portion of Interrogatory No. 66 appears to request, and the Second Discovery Order appears to require, a response to be made to the question by each individual FCCA member. For this proposition, the Second Discovery Order relies on Order No. PSC-03-0084-PCO-TL. The FCCA has previously filed a Motion for Reconsideration of that order.<sup>3</sup>

6. Nonetheless, in an abundance of caution, the FCCA adopts and incorporates by reference its Motion for Reconsideration of Order No. PSC-03-0084-PCO-TL, filed on January 17, 2003, as it relates to the Second Discovery Order's finding that the information sought in the first part of Interrogatory No. 66 is relevant and that individual nonparty association members must respond.

7. In addition, the Commission is referred to *University of Texas at Austin, et al. v. Vratil*, 96 F.3d 1337 (10<sup>th</sup> Cir. 1996), and *Oil Heat Institute of Oregon v. Northwest Natural Gas*, 123 FRD 640 (USDC Or. 1988).<sup>4</sup> These cases hold that it is impermissible to require nonparty association members to respond to discovery directed to an association. In *University of Texas*, the Tenth Circuit Court of Appeals granted a writ of prohibition and quashed the lower court's

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<sup>2</sup> Interrogatory No. 66 states: Referring to the rebuttal testimony of Mr. Joseph Gillan, page 18, lines 6-7, describe with particularity whether any FCCA members have explored "partner[ing] with competing DSL providers." Also describe with particularity when "partner[ing] with competing DSL providers ... ma[kes] sense."

<sup>3</sup>The first part of Interrogatory No. 66 appears to ask for the same information requested in BellSouth Interrogatory No. 19, which is, in part, the subject of the FCCA's Motion for Reconsideration, filed on January 17, 2003. Interrogatory No. 19 states: Has any FCCA member at any time entered into an agreement or held any discussions with any DSL service provider and/or wholesale DSL network provider regarding (a) a joint offering or package of service involving the FCCA member's voice service and the DSL service provider's Broadband Service, including, but not limited to, engaging in line splitting; and/or (b) purchasing a wholesale broadband package for the purpose of creating a retail broadband service offering?

<sup>4</sup> The FCCA filed a request for official recognition of these decisions and copies of the decisions were provided to the parties on February 13, 2003.

order requiring National Collegiate Athletic Association (NCAA) members to respond to certain interrogatories. The appellate court found that the lower court erred in requiring unserved nonparty association members to respond to discovery. The court held:

Under Fed.R.Civ.P. 33(a), interrogatories may only be directed to a party to an action. . . . The district court's order here was not authorized by, and is in contradiction of, these federal rules concerning discovery.<sup>5</sup>

8. Similarly, in *Oil Heat Institute of Oregon*, Northwest Natural Gas' motion to compel the Oil Heat Institute (OHI), a non-profit trade organization, to respond to interrogatories was denied because the information sought was not in OHI's possession, custody, or control. The court, in denying the motion to compel, said: "There is no evidence here that OHI has any legal right to documents that belong to the member organizations."<sup>6</sup>

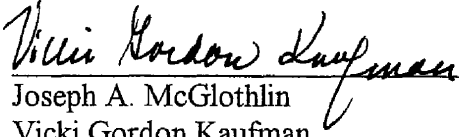
9. In addition to the authority cited in the FCCA's January 17<sup>th</sup> Motion for Reconsideration, these decisions further support reconsideration of the Second Discovery Order.

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<sup>5</sup> *University of Texas* at 1340. The Florida Rules of Civil Procedure are patterned closely after the federal rules. Florida courts examine such federal decisions in construing the Florida rules. *Jones v. Seaboard*, 297 So.2d 861, 863 (Fla. 2d DCA 1974).

<sup>6</sup> *Oil Heat Institute* at 642.

**WHEREFORE**, the FCCA requests that the Commission reconsider that portion of the Second Discovery Order described above and enter a Protective Order providing that the FCCA does not have to respond to the first part of Interrogatory No. 66.

  
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**

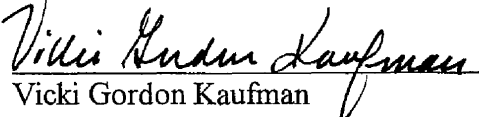
I HEREBY CERTIFY that a true and correct copy of the foregoing the Florida Competitive Carriers Association's Motion for Reconsideration of a Portion of Order No. PSC-03-0180-PCO-TL has been furnished by (\*) hand delivery, (\*\*) electronic mail, or by U.S. Mail this 17<sup>th</sup> day of February, 2003, 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