State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: MARCH 6, 2003

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

FROM: OFFICE OF THE GENERAL COUNSEL (CHRISTENSEN) PAC
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (DOWDS)

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: 03/18/03 - REGULAR AGENDA - MOTIONS FOR RECONSIDERATION - ORAL ARGUMENT REQUESTED

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).

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.

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. 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. By Order No. PSC-03-0016-FOF-TL, issued January 3, 2003, BellSouth'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 was denied. On January 6, 2003, the Prehearing Conference was held and Order No. PSC-03-0152-PHO-TL, the Prehearing Order, was issued January 29, 2003.

On December 17, 2002, BellSouth filed its Emergency Motion to Compel against FCCA. On December 26, 2002, FCCA filed its Response to BellSouth's Motion to Compel and its Motion for

Protective Order. By Order No. PSC-03-0084-PCO-TL, issued January 10, 2003, the Motion to Compel was granted, in part, and denied, in part. The Motion for Protective Order was denied. Thereafter, on January 17, 2003, FCCA filed a Motion for Reconsideration of Order No. PSC-03-0084-PCO-TL and Request for Oral Argument. On January 22, 2003, BellSouth filed its Response in Opposition to the Motion for Reconsideration.

In addition, on January 22, 2003, BellSouth filed a Motion for Continuance. On January 23, 2003, FCCA filed its Response to BellSouth's Motion for Continuance. By Order No. PSC-03-0129-PCO-TL, issued January 23, 2003, the hearing was continued. By Order No. PSC-03-0177-PCO-TL, issued February 5, 2003, the hearing was rescheduled to April 16, 2003. By Order No. PSC-03-0201-PCO-TL, issued February 11, 2003, the hearing was again rescheduled to April 22, 2003.

On January 17, 2003, BellSouth filed its Second Emergency Motion to Compel against FCCA. On January 24, 2003, FCCA filed its Response to BellSouth's Second Motion to Compel. By Order No. PSC-03-0180-PCO-TL, issued February 6, 2003, the Prehearing Officer granted in part and denied in part BellSouth's Second Motion to Compel.

On February 13, 2003, FCCA filed its Request for Official Recognition of several cases in regards to the pending Motion for Reconsideration. Then FCCA filed its Motion for Reconsideration of a Portion of Order No. PSC-03-0180-PCO-TL (Second Reconsideration Motion). On February 24, 2003, BellSouth filed its Response to FCCA's Second Reconsideration Motion.

This recommendation addresses FCCA's Motion for Reconsideration of Order No. PSC-03-0084-PCO-TL, Motion for Reconsideration of a Portion of Order No. PSC-03-0180-PCO-TL, Request for Oral Argument, and BellSouth's Responses to FCCA's Motions.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the Florida Competitive Carriers Association's Request for Oral Argument?

RECOMMENDATION: Yes. Staff recommends that the Commission grant oral argument. Staff also recommends that each side be limited to a 10 minute presentation.

STAFF ANALYSIS: On January 17, 2003, the Florida Competitive Carriers Association (FCCA) filed its Request for Oral Argument along with its Motion for Reconsideration of Order No. PSC-03-0084-PCO-TL. On January 22, 2003, BellSouth filed its Response in Opposition to the Motion for Reconsideration.

FCCA filed its Request for Oral Argument pursuant to Rule 25-22.058, Florida Administrative Code. In its Request, FCCA states that oral argument on its Motion for Reconsideration of Order No. PSC-03-0084-PCO-TL will aid the Commission in understanding the important legal and policy issues involved in the discovery dispute, and will assist the Commission in reaching a decision in this matter. BellSouth did not file a response to FCCA's Request for Oral Argument.

Rule 25-22.058(1), Florida Administrative Code, states

> The Commission may grant oral argument upon request of any party to a section 120.57, F.S. formal hearing. A request for oral argument shall be contained on a separate document and must accompany the pleading upon which argument is requested. The request shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. Failure to file a timely request for oral argument shall constitute waiver thereof.

However, Rule 25-22.058, Florida Administrative Code, applies to oral argument in the post-hearing context; this is a matter prior to hearing. Since this is a request for oral argument on a motion for reconsideration of a non-final order, staff finds that Rule 25-22.0376(5), Florida Administrative Code, is controlling, which provides that "[o]ral argument on any motion filed pursuant to this rule [Reconsideration of Non-Final Orders] may be granted at the discretion of the Commission."

Staff also notes that the general rule regarding items that are brought before the Commission prior to hearing is Rule 25-22.0021(1), Florida Administrative Code, which states:

> Persons who may be affected by Commission action on certain items on the agenda for which a hearing has not been held (other that actions on interim rates in file and suspend rate cases and declaratory statements) will be allowed to address the Commission concerning those items when taken up for discussion at the conference.

In this instance due to the legal questions to be addressed, staff believes that the Commission may be aided by hearing oral argument because the motions for reconsideration address complicated issues regarding discovery and associations. Moreover, even though the parties' right to speak on the matter is governed by Rule 25-22.0376, Florida Administrative Code, in the instant situation, staff believes that Rule 25-22.0021(1), Florida Administrative Code, is somewhat persuasive in that parties are generally allowed to participate regarding other matters that arise prior to hearing. Thus, staff recommends that the Commission grant oral argument. Staff also recommends that each side be limited to a 10 minute presentation.

ISSUE 2: Should the Commission grant the Florida Competitive Carriers Association's Motion for Reconsideration of Order No. PSC-03-0084-PCO-TL?

RECOMMENDATION: No. Staff recommends that the Commission should find that the Florida Competitive Carriers Association has failed to demonstrate that the Prehearing Officer made a mistake of fact or law in rendering his decision. Therefore, staff recommends that the Commission should deny the Florida Competitive Carriers Association's Motion for Reconsideration.

STAFF ANALYSIS: As noted in the Case Background, on December 17, 2002, BellSouth filed its Emergency Motion to Compel against the Florida Competitive Carriers Association (FCCA). On December 26, 2002, FCCA filed its Response to BellSouth's Motion to Compel and its Motion for Protective Order. By Order No. PSC-03-0084-PCO-TL, issued January 10, 2003, the Motion to Compel was granted, in part, and denied, in part. The Motion for Protective Order was denied. Thereafter, on January 17, 2003, FCCA filed a Motion for Reconsideration of Order No. PSC-03-0084-PCO-TL (Motion) and Request for Oral Argument. On January 22, 2003, BellSouth filed its Response in Opposition to the Motion for Reconsideration.

FCCA'S MOTION

In its Motion, FCCA asserts that the Prehearing Officer overlooked several points of law that necessitate reconsideration. FCCA states that the standard 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. 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 1st DCA 1981).

FCCA contends that there are five reasons that Order No. PSC-03-0084-PCO-TL (Discovery Order) should be reconsidered. These are as follows: 1) the Discovery Order conflicts with the Commission's Orders refusing to include an Issue related to all ALECs or to convert this case to a generic proceeding; 2) the Discovery Order overlooks the statutory standard that imposes a higher level of regulation on BellSouth; 3) the Discovery Order overlooks the fact that many of the requests are irrelevant, overbroad, burdensome and harassing; 4) the Discovery Order impermissibly requires extensive discovery from entities not parties to the case; and 5) the

Discovery Order impermissibly requires responses to discovery regarding matters outside the State of Florida. FCCA notes in a footnote that often more than one ground applies to a particular request and because the number of discovery requests is voluminous, FCCA included a chart listing the requests at issue and the grounds for reconsideration in Attachment A which is hereto attached and incorporated by reference.

1) The Discovery Order Conflicts With the Commission's Orders Refusing to Include an Issue Related to All ALECS or to Convert this Case to a Generic Proceeding

FCCA asserts that the Discovery Order is in direct conflict with the Order denying BellSouth's request to include an issue addressing the behavior of all ALECs or, alternatively, convert this case to a generic proceeding. FCCA argues that this case is not a broad based, generic investigation into the policies, practices or business decisions of the entire telecommunications industry. FCCA contends that what others have done to enter the broadband market is completely irrelevant to the narrow issue of this case. FCCA asserts that both the Prehearing Officer and Commission denied BellSouth's request for a generic proceeding.

FCCA argues that the Prehearing Officer effectively reversed the Commission's previous rulings with the Discovery Order. FCCA contends that the Discovery Order is inconsistent with the scope of the Complaint, and with the applicable regulatory standards discussed below. FCCA asserts that the Discovery Order's requirement that information be provided regarding services and offerings of new entrants is in direct conflict with the Commission's decision that an issue relating to the behavior of all ALECs and ILECs not be part of this case and that this case not proceed as a generic proceeding.

2) The Discovery Order Overlooks the Statutory Standard That Imposes a Higher Level of Regulation on BellSouth

FCCA states that eight of the discovery requests that the Discovery Order requires the FCCA to respond to require it to provide information about what FCCA members do or do not do in the marketplace; if an ALEC would or would not charge for a particular service in a particular situation; and if so, how much the charge would be. FCCA asserts that the Discovery Order requirement that FCCA members respond to questions of this type erroneously applies

a standard to the ALEC's behavior that only applies to BellSouth's behavior pursuant to the requirements of the Telecommunications Act of 1996 (the Act) and Chapter 364, Florida Statutes. FCCA states that Section 364.01(4)(d), Florida Statutes, provides that the Commission shall exercise its jurisdiction to:

> Promote 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 companies.*

Motion at p. 6 (emphasis in motion). FCCA argues that pursuant to this statute, the Commission regulates new entrants more "lightly" than incumbents, so as to provide new entrants with the ability to gain a toehold in areas and services that the incumbent have traditionally provided. FCCA contends that the Discovery Order ignores, overlooks, and misapprehends the explicit direction of the Act and Florida Statutes that provide for an entirely different standard of regulation of BellSouth, as an incumbent, than is imposed on new entrants.

FCCA asserts that association participation before the Commission has the effect of streamlining proceedings because the Commission need not have each individually affected party intervene and present its case in a docket that affects the interests of many. FCCA contends that participation by industry groups has been a valuable way for the Commission to receive critical information so as to make informed decisions that directly impact the lives of Florida consumers every day. FCCA contends that absent reconsideration, the Discovery Order would set a dangerous and unfounded precedent that would create an enormous deterrent to association participation in Commission proceedings. FCCA argues that the Discovery Order would turn association participation before the Commission into a license for the unbridled discovery of information regarding individual member companies, who are not parties to a case. FCCA contends that industry group participation before the Commission will significantly diminish.

FCCA further asserts that extensive resources and time are required to litigate a matter before the Commission, and many companies do not individually have such resources and are unable to litigate on an individual basis before the Commission. FCCA contends that the only way that many smaller companies can

participate in Commission dockets at all is through the vehicle of an industry association, where the cost and burden of administrative litigation can be shared among numerous companies. FCCA asserts that if the benefits of association participation are negated because individual companies must spend their very scarce time and resources to cope with extensive discovery requests, such companies will simply be unable to participate.

FCCA states that the Florida Supreme Court expressed concern with the ability of the public to access governmental agencies in Florida Home Builders.[1] FCCA states that the Court noted that the inability of an association to represent the interests of its members in an administrative proceeding(in that case a rule challenge) would significantly limit the public's ability to challenge agency rules. FCCA notes that while recognizing that individual builders could prosecute such proceedings, the Court was aware that

> the cost of instituting and maintaining a rule challenge proceeding may be prohibitive for small builders. Such a restriction would also needlessly tax the ability of the Division of Administrative Hearings to dispose of multiple challenges based upon identical or similar allegations of unlawful agency action.

Id. at 353.

FCCA also argues that the impact of the policy embodied in the Discovery Order may well be felt by the Commission. FCCA states that if individual member companies who have not intervened in a case as a party, are treated, as this Discovery Order does, as though they are individual parties to a case, such companies, to the extent they have the resources to do so, will simply intervene and participate on an individual company basis. FCCA asserts the Commission will receive more pleadings to process and be required to conduct lengthier proceedings as individual companies intervene and each participates individually in various dockets. FCCA contends the "encouragement" of participation by numerous, multiple parties, when it is not necessary, will not foster an effective and efficient process at the Commission.

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[1]Florida Home Builders Association, et al., v. Department of Labor and Employment Security, 412 So.2d 351 (Fla. 1982)(Florida Home Builders).

3) The Discovery Order Overlooks the Fact that Many Requests Are Irrelevant, Over broad, Burdensome and Harassing

FCCA contends that it objected to many of the requests on the grounds that they are irrelevant, overbroad, burdensome, and in the nature of harassment. FCCA cites to Travelers Indemnity Co. v. Salido, 354 So. 2d 963, 964 (Fla. 3rd DCA 1978), in which the Court noted that

> The law is clear that discovery under the Florida Rules of Civil Procedure, although wide-ranging, has certain limits. It cannot be utilized to explore all the minute details of a controversy or delve into immaterial or inconsequential matters. Nor can such discovery be so unduly burdensome upon a party as to be oppressive.

FCCA argues that while the Discovery Order finds some of the questions overbroad, the Discovery Order overlooks the standard discussed above and the extremely overreaching nature of many of the requests. FCCA cites to Interrogatory No. 10 to illustrate that although the Discovery Order requires FCCA members to answer the question for BellSouth's nine-state region (as opposed to all 50 states), the question remains overbroad and burdensome.

FCCA also argues that Interrogatory No. 19, as an example, is not limited in time, in geographic location, or in scope and it would require each company to canvas each employee (current and former) to answer the question. FCCA asserts that such questions, which require the extensive expenditure of time and resources to respond, are clearly beyond the bounds of appropriate discovery. FCCA contends that the Discovery Order overlooks this by seeking information about the ALECs' DSL services that are completely outside the scope of this proceeding.

FCCA cites to Order No. PSC-00-0562-PCO-EU, issued March 17, 2000, for the proposition that the Commission denied numerous discovery requests served on investor-owned utilities (IOUs), which the Commission found to be burdensome. FCCA states that the Commission found that the requests would be a massive undertaking for Florida Power and Light (FPL) and would create an undue burden on FPL, as well as Florida Power Corporation and Tampa Electric Company. FCCA argues that the burden placed on its members, with their extremely limited resources, far exceeds any burden that

might have been imposed on the IOUs in the determination of need case.

4) The Order Impermissibly Requires Discovery From Entities Not Parties to the Case

FCCA states that thirty-one (31) of the discovery requests that the Discovery Order compels answers to require information from "each FCCA member." FCCA argues that the Discovery Order overlooks the fact that requiring individual members, who have not intervened and who are not parties to the docket, to provide the extraordinarily broad range of information encompassed in the Discovery Order is a mistake of law.

FCCA contends that under the Florida Rules of Civil Procedure it is clear regarding the general rule as to whom discovery may be directed as well as a party's obligation to provide responses - such obligations rest only with parties to the case. FCCA cites to Rule 1.340(a) which states that

> . . . [A]ny party may serve upon any other party written interrogatories *to be answered (1) by the party* to whom the interrogatories are directed, or (2) if that party is a[n] . . . association . . . by any officer or agent, who shall furnish the information *available to that party*.

(Emphasis in Motion at p.13) FCCA also cites to Rule 1.340(b) which provides that

> *A party shall respond* to such interrogatory by giving the information *the party has* and the source on which the information is based.

Id. FCCA cites to Rule 1.350(a) regarding production of documents which states that

> Any party may request any other *party* (1) to produce . . . documents . . . that are *in the possession, custody, or control of the party to whom the request is directed.*

Id. FCCA also cites to Rule 1.350(c), which provides that

> This rule does not preclude an independent action against a person not a party for production of documents. . .

FCCA argues that the provisions quoted above demonstrate that discovery, under the circumstances in this matter, is not available from non-parties. FCCA states that this principle is well established in Florida law. FCCA cites to Trawick's Florida Practice and Procedure which notes that

> Interrogatories may be served by a party on any other party. If the interrogated party is a[n] . . . association . . ., the organization must designate an officer or agent to answer the interrogatories. He must give all of the information available to the organization whether he personally knows it or not. The propounding party cannot specify who is to answer for the organization. Interrogatories may not be directed to a *non-party* witness through a party.

Id. FCCA asserts that the Discovery Order overlooks these specific rules of procedure, or omits any mention of these Rules of Civil Procedure, and there applicability to discovery from non-parties, resulting in a mistake of law.

FCCA also asserts that the Discovery Order's reliance upon the FCTA Order[2] to require the production of extensive and burdensome information from individual member companies is misplaced. FCCA argues that the FCTA Order stands for a limited proposition that discovery, in narrow circumstances, may be permissible from an association regarding its members if the discovery is narrowly tailored and directed toward the issue of associational standing. FCCA argues that BellSouth's requests go far beyond any information related to standing. FCCA contends that the Discovery Order's reliance on the FCTA Order to support the provision of the information it requires from individual members is in error.

FCCA contends that the Discovery Order mistakenly relies on Florida Home Builders to require the provision of the information in dispute. FCCA asserts that Florida Home Builders supports its case because the third prong requires that an association show that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Id. at 353.

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[2]Order No. PSC-92-0112-TL, issued March 27, 1992, in Docket No. 910980-TL (FCTA Order) (The FCTA Order states that "FCTA and *its members are not immune from discovery* simply because the services it provides *are not directly at issue* in this proceeding." Id. at p. 3.) (Emphasis added)

FCCA contends that the Discovery Order would render just the opposite true because it would require the FCCA members to participate in the case as though they were actually parties and require them to respond to extensive BellSouth discovery. FCCA argues that the point of the Florida Home Builders case is that an association has the right to represent its members without the need for the members to participate as parties to the case. FCCA contends that on reconsideration, the Commission should affirm the FCCA's right and ability to participate on behalf of its members.

5) The Order Impermissibly Requires Responses to Discovery Regarding Matters Outside the State of Florida.

FCCA asserts that the Discovery Order impermissibly requires FCCA to provide responses to discovery pertaining to states other than Florida that are not relevant to this proceeding. FCCA argues that in the past this Commission has declined to allow discovery as to states other than Florida. FCCA cites to Docket No. 880069-TL, where the Prehearing Officer refused to permit Public Counsel to conduct discovery of BellSouth on three separate occasions citing to Order No. 19421 (declined to compel BellSouth to produce documents related to construction budgets in other states as irrelevant); Order No. 19681 (declined to compel BellSouth to produce information related to other states because the information was irrelevant); and Order No. 23503 (declined to compel BellSouth to produce out-of-state information).

FCCA contends that in this instance, the out-of-state discovery BellSouth seeks from the FCCA's members, like that described in the Commission's orders above, is not relevant to the issues in this case, and as discussed earlier, would be expensive and time-consuming to provide. FCCA asserts that this case is about BellSouth's provisioning of FastAccess in Florida. FCCA contends that the business practices of BellSouth's competitors in other states are irrelevant to the disposition of the issues in this proceeding. FCCA states that the Discovery Order erred in requiring responses.

BELLSOUTH'S RESPONSE

As noted in the Case Background, BellSouth filed its Response in Opposition to Motion for Reconsideration by FCCA. BellSouth argues that because the Discovery Order is fully consistent with Florida law, it should be upheld by the Commission. BellSouth

contends that FCCA's Motion is devoid of a single point of fact or law that would justify reconsideration.

BellSouth argues that FCCA's original complaint was filed because the FCCA sought to confirm its understanding of the Commission's previous orders. BellSouth states that FCCA raised a distinction in its Complaint which this Commission had not previously addressed; specifically, that the alleged barrier to competition created as a result of BellSouth's FastAccess policy varied according to a carrier's ability to provide DSL service. BellSouth asserts that by alleging that the purported consequences of BellSouth's policy depend upon whether or not a carrier provides DSL service, the FCCA initially raised a discoverable issue relating to whether FCCA members provide DSL service.

BellSouth also asserts that the issues in the case expand upon the Commission's previous orders, in that Issue 5 involves the provision of FastAccess Internet Service, where feasible, to any ALEC end user. BellSouth cites to a discussion by the members of the Commission assigned to a previous docket for the proposition that the Commission recognized the difference between requiring BellSouth to continue to provide FastAccess and requiring BellSouth to provide FastAccess to any requesting end user. BellSouth contends that this distinction is either lost to or ignored by the FCCA since it sought to expand BellSouth's obligations in a manner previously rejected by this Commission.

BellSouth argues that by the inclusion of the words "where feasible" in Issues 5 and 6[3] that "feasibility" not only considers the cost, but also includes consideration of why the FCCA and its ALEC members seek to shift this cost on BellSouth to begin with. BellSouth concludes that whether or not FCCA agrees with its position is not the issue - BellSouth has the right to prepare its defense in the matter it deems appropriate, and cannot be relegated to the defenses that the FCCA would choose on its behalf.

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[3] 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? (Emphasis added)

BellSouth concludes that the information it seeks in discovery is directly relevant to its defenses, and the Florida Rules of Civil Procedure recognize a party's right to obtain discovery when such discovery relates to a claim or defense of a party, even when the discovery may not be admissible at trial.

BellSouth also argues that it has diligently served its discovery requests on FCCA. BellSouth contends that it sought to discover information related to whether FCCA member companies provide DSL service, whether FCCA member companies have sought to enter into joint marketing with cable companies, and whether FCCA members provide DSL services on a standalone basis. BellSouth states that it did not serve discovery upon carriers in Florida that are not affiliated with the FCCA, nor did BellSouth serve any discovery questions not directly tied to its planned defenses to the issues raised in the Order Establishing Procedure.

1) The Discovery Requests at Issue are Relevant to Both the Issues in the Case and BellSouth's Defenses

BellSouth contends that it is entitled to defend against the allegations raised by the FCCA. BellSouth asserts that it is also entitled to present the Commission with evidence as to why it should not expand its prior rulings and require it to provide FastAccess to any requesting end user. BellSouth argues that it is entitled to revisit decisions reached by the three member panel. BellSouth asserts that to support its arguments, it is entitled to present evidence of what the FCCA member companies are doing. BellSouth contends that it is entitled to cross-examine FCCA witnesses - which witnesses include employees of FCCA member companies - consistent with the scope of the Florida Rules of Civil Procedure.

BellSouth argues that as it demonstrated in its Motion to Compel, 5 of the 13 FCCA members have the ability to provide DSL service. BellSouth argues that it cannot determine the markets in which the service is provided and whether the service is provided on a standalone or bundled basis. Further, BellSouth argues that this Commission should consider why FCCA member MCI claims that BellSouth's actions are a barrier to competition yet provides some DSL service and to what extent FCCA member AT&T provides DSL service itself or in conjunction with others. BellSouth asserts that what FCCA members have or have not done to enter the DSL market is relevant to a consideration of feasibility and is

relevant to BellSouth's defenses. BellSouth contends that FCCA concedes that this barrier only applies to carriers that do not offer DSL; however, despite this statement in its Complaint, FCCA will not provide this Commission with information with which it can evaluate the extent to which its members provide DSL.

BellSouth also contends that its discovery requests are also directly relevant to investment decisions. BellSouth states that Issue 3 includes a consideration of whether BellSouth's practices violate state or federal law. BellSouth asserts that state law encourages deployment of telecommunication infrastructure, and Section 706 of the Telecommunications Act of 1996 encourages deployment of advanced services. BellSouth argues that because investment is a component of state and federal law at issue in this proceeding, and because the three-member panel had previously acknowledged that any decision it makes is likely to have an impact on investment in infrastructure, FCCA cannot realistically contend that discovery directed at the reasons FCCA members do or do not provide DSL service is not relevant. BellSouth asserts that it has filed testimony indicating that any decision is likely to negatively impact its business decisions for further deployment of services. BellSouth argues that discovery requests designed to understand the basis of the ALECs' decisions are relevant.

BellSouth contends that the FCCA's assertion that providing BellSouth with the discovery would somehow contradict the Commission's previous ruling declining to broaden this proceeding is erroneous. BellSouth argues that the decisions in this case cannot be made in a vacuum. BellSouth contends that this Commission is charged with treating all providers fairly, and should emphatically reject FCCA's attempt to avoid any examination or scrutiny of its actions or the actions of its members.

2) Florida Law Permits BellSouth to Discover Information Concerning FCCA Members

BellSouth contends that the Prehearing Officer appropriately relied on the FCTA Order in requiring FCCA to provide BellSouth with responses to its discovery requests. BellSouth asserts that in relevant part, this Commission found that discovery concerning services provided by member companies of the cable association was relevant. BellSouth argues that the Commission should affirm that decision here. BellSouth contends that the FCCA Motion fails to identify any point of fact or law concerning the FCTA Order that

merits a different outcome. BellSouth argues that the FCCA addressed the FCTA Order and its view of that Order in its response to BellSouth's Motion to Compel. BellSouth asserts that the Prehearing Officer was fully aware of FCCA's position concerning the FCTA Order, and the Commission need not entertain the regurgitation of the argument concerning the case.

BellSouth also argues that pursuant to the Florida Rules of Civil Procedure FCCA has "control" of the requested information and must provide discovery responses. BellSouth contends that FCCA's argument that the Rules of Civil Procedure support its Motion for Reconsideration is without basis. BellSouth asserts that FCCA addressed the Rules of Civil Procedure in its Response in opposition to the motion to compel. BellSouth states that a motion for reconsideration should not be employed as a vehicle to reargue previously rejected arguments. BellSouth asserts that although the Discovery Order did not explicitly refer to the Florida Rules of Civil Procedure, this does not lead to the conclusion that the Prehearing Officer did not review and summarily reject the FCCA's arguments, and FCCA is not permitted to use its Motion for Reconsideration to reargue its prior views. BellSouth also argues that the Rules of Civil Procedure support the outcome reached in the Discovery Order, because the rules "are patterned very closely after the Federal Rules, and it has been the practice of the Florida courts closely to examine and analyze the Federal decisions and commentaries under the Federal rules in interpreting [Florida's]." Jones v. Seaboard, 297 So.2d 861, 863 (Fla. 2nd DCA 1974). BellSouth cites to a line of cases[4] for the proposition that federal case law requires that parties produce discovery information obtained from affiliated non-parties.

BellSouth states that contrary to FCCA's contentions, the Discovery Order does not conflict in any way with the applicable

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[4]Alimenta v. Anheuser-Bush, 99 F.R.D. 309(N.D. Ga. 1983)(discovery relating to affiliated non-party corporation was appropriate; non-party corporation actively participated in certain matters, discovery was relevant, non-party employee had knowledge of facts at issue); MLC Inc. v. North America Philips Corp., 109 F.R.D. 134 (S.D. N.Y. 1986) (documents need not be in a party's possession to be discoverable; control includes the legal right of the producing party to obtain documents upon demand; the term 'control' is broadly construed); Camden Iron and Metal, Inc. v. Marubeni v. America Corp., 138 F.R.D. 438 (D.N.J. 1991)(documents were found in 'control' of party; Court noted that 'control' centered on the legal right, authority or ability to obtain the documents at issue upon demand).

Rules of Civil Procedure. BellSouth argues that to the contrary it defies logic that the FCCA has no authority or ability to request and obtain information responsive to BellSouth's discovery requests from its members. BellSouth states that the FCCA leadership includes employees of MCI and AT&T, and such individuals could undoubtedly request and obtain the information requested by BellSouth. BellSouth further argues that FCCA was evidently able to convince at least two of its members, AT&T and MCI, to provide witnesses in this proceeding. BellSouth contends that it is inappropriate to allow FCCA to pick and choose when it will call on its members to provide support for its efforts in this proceeding. BellSouth also argues that FCCA fails to cite any rule, statute, or case that precludes its members from providing responsive information. BellSouth contends that even the authority upon which FCCA relies, Trawick's Florida Practice and Procedure, states that in responding to interrogatories an association must give all of the information available to the organization whether the association personally knows it or not, which is consistent with Florida and Federal rules of civil procedure, as well as federal case law and the FCTA Order.

3) Florida Law Requires the Commission to Treat All Carriers - Including BellSouth - Fairly

BellSouth asserts that despite this Commission's charge to "ensure that all providers of telecommunications are treated fairly," the FCCA seeks to evade its discovery obligations in reliance on Florida Statutes that subject new entrants to a lesser degree of regulatory oversight, Sections 364.01(4)(g) and 364.01(4)(d), Florida Statutes. BellSouth contends that the Florida Statutes set forth varying degrees of regulation which has no bearing whatsoever on a party's due process rights to defend itself.

BellSouth asserts that in FCCA's view upholding the Discovery Order will negatively impact dockets and will deter active participation by associations. BellSouth emphasizes that according to FCCA's own contention, industry group participation is a valuable way for the Commission to receive critical information; however, it is seeking to keep critical information BellSouth is entitled to. BellSouth states that instead, the FCCA wants to limit the scope of the information available to the Commission by erecting a barrier to discovery. Further, BellSouth contends that upholding the Discovery Order will not result in unbridled

discovery because discovery is dependent on relevance, which depends on the specific facts presented.

BellSouth states that in the Florida Home Builders case, it is apparent that the specific facts of any given case are controlling. BellSouth states that the Court was concerned with the cost of instituting and maintaining a rule challenge and in that context, the association was found to have met the associational standing criteria. Florida Home Builder, 413 So. 2d 353. BellSouth asserts that Florida Home Builders did not directly address discovery, and the Prehearing Officer did not "mistakenly rely" upon that case. BellSouth contends that the logical conclusion is that the cost of instituting and maintaining a rule challenge may give rise to different relevancy issues than a contested proceeding in which the individual member companies allege their "substantial interest" are affected. BellSouth states that as such, FCCA's reliance on Florida Home Builders to support its attempt to thwart, rather than support, discovery is without a reasonable basis. BellSouth also asserts that FCCA fails to recognize that any right of an association to participate in a proceeding ultimately rests on the interests of its members. BellSouth argues that if FCCA's members, as it claims in its Complaint, are substantially affected in a proceeding and such interests are directly relevant to the defenses of affected parties in the case, then allowing the association to circumvent discovery will adversely impact other parties. BellSouth contends that the Prehearing Officer correctly rejected FCCA's attempt to thwart due process and discovery.

4) Florida Law Permits Discovery Regarding Matters Outside the State of Florida

BellSouth contends that FCCA's attempt to escape its obligation to respond to matters outside of Florida is without merit. BellSouth asserts that FCCA previously made this argument and it was rejected. BellSouth argues that simply because the Commission has expressed limited interest in matters outside Florida does not negate BellSouth's right to include that information as part of its defense.

5) The FCCA Has Failed to Meet its Burden of Demonstrating any Discovery Requests are Burdensome

BellSouth states that FCCA previously raised its claim of undue burden, which was rejected in the Discovery Order. BellSouth

asserts that the Motion fails to identify any issue that would lead to a different outcome. BellSouth cites to First City Development of Florida, Inc. v. The Hallmark of Hollywood Condominium Association, Inc., 545 So.2d 502 (Fla. Dist. Ct. App. 1989) for the proposition that it is FCCA's burden to demonstrate the burdensome nature of discovery. BellSouth contends that FCCA claims, without any basis in fact, that its members have limited resources, and that responding to BellSouth's discovery would require an inordinate amount of time. BellSouth argues that these statements fail to demonstrate any burden, and at least one FCCA member - ITC^DeltaCom - was able to find sufficient time and resources with which to provide responses to BellSouth's discovery. BellSouth states that if ITC^DeltaCom was able to respond to discovery, so too can the remaining FCCA members, and this Commission should dismiss this unsupported claim of burden.

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. 1st 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. 3rd DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st 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.

Although FCCA cites to the standard for reconsideration set forth in Diamond Cab Co. v. King, FCCA fails to show that the Prehearing Officer overlooked or failed to consider any point of law or fact. In fact, the arguments FCCA makes in its Motion were made in its Response to BellSouth's Motion to Compel, which was reviewed and thoroughly considered by the Prehearing Officer. As noted by BellSouth, reargument is not appropriate for a motion for

reconsideration. FCCA's individual points will be addressed below, along with BellSouth's responses as appropriate.

1) Previous Orders of the Commission and the Discovery Order

As noted previously, FCCA argues that the Discovery Order conflicts with previous orders issued in this case. Specifically, FCCA argues that the Discovery Order allows BellSouth to discover information which should be excluded because the Commission chose not to broaden this proceeding to apply to all ALECs and ILECs.

Staff notes, however, this is not a point of law or fact that was overlooked or which the Prehearing Officer failed to consider in the Discovery Order. FCCA specifically argued the same points in its Response to the Motion to Compel, as noted on page 4 of the Discovery Order. The Prehearing Officer correctly rejected FCCA's argument, finding that although the information sought is not directly at issue in this proceeding, it appears that the information is reasonably calculated to lead to the discovery of admissible evidence related to the issues in the case and to BellSouth's possible defenses. See Order PSC-03-0084-PCO-TL at p. 6. None of the arguments that FCCA put forth in its Motion demonstrate that this finding is inappropriate. Moreover, staff notes that it appears that if the proceeding had been expanded to address all ALECs and ILECs, pertinent discovery would likely include broader information than the information being sought by BellSouth. Information susceptible to discovery would have encompassed *all* ALECs and ILECs, whereas BellSouth is only seeking information from the ALECs that form the FCCA.

2) Statutory Standard Not Overlooked in Discovery Order

FCCA argued in its Motion that the Prehearing Officer overlooked the statutory obligation imposed on the Commission to regulate BellSouth at a higher level of regulation. FCCA cites to Section 364.01(4)(d), Florida Statutes, which states that the Commission shall exercise it jurisdiction in order 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 telecommunication companies.

However, staff believes that this section of the statute is inapplicable to the discovery obligations imposed by the Florida Rules of Civil Procedure regarding the parties' due process rights. As BellSouth states in its response, the Florida Statutes set out varying degrees of regulation, none of which have a bearing on a party's due process rights to defend itself. Further, as pointed out by BellSouth in its Response, pursuant to Section 364.01(4)(g), Florida Statutes, the Commission also has the duty to "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint." Further, staff notes that this is not a fact or point of law which the Prehearing Officer overlooked, since FCCA failed to raise it in its Response to the Motion to Compel.

FCCA goes on to argue that should the Commission require the Association to comply with the discovery request, associations in general will be unable or unwilling to participate in Commission proceedings in the future. FCCA goes on further to argue that the impact may be felt by the Commission because of multiple parties intervening in proceedings, which is not necessary if associations are allowed to participate. FCCA cites to the Florida Home Builders case to support its position, noting that the Court found that the inability of an association to represent the interests of its members in an administrative proceeding (a rule challenge) would significantly limit the public's ability to challenge agency rules.

This case is not a rule challenge; it is a complaint. Since this is a complaint, the parties have a right under the Rules of Civil Procedure to conduct discovery which is reasonably calculated to lead to admissible evidence. As BellSouth noted in its Response, in a contested proceeding specific facts and issues require consideration of practices of member companies whose interests are alleged to be substantially affected. As noted by the Court in the Alimenta case, "[o]ne of the purposes of the discovery process is to develop the factual bases for the claims of the parties." Alimenta, 99 F.R.D. 309 at 313. The Court continued that having permitted the company to invoke the court's jurisdiction in attempting to recover under its contract with the defendant, the company cannot by using the corporation boundaries of its wholly owned subsidiaries circumvent the development of the facts necessary for a fair trial of the case. Id. Similarly, FCCA should not be allowed to use its "associational boundaries" to

circumvent the development of the facts necessary for the Commission to conduct a fair hearing in the instant case.

Moreover, in the Discovery Order, the Prehearing Officer found that if relevant discovery could simply be thwarted by an association filing a complaint rather than the individual members of the association, then the association would fail the associational standing criteria set forth in the Florida Home Builders case. Order No. PSC-03-0084-PCO-TL at p. 9. The Florida Home Builders case requires that the claim asserted not require the individual members' participation in the lawsuit. Id. at 353. Staff notes that FCCA would fail to meet the associational standing criteria because the individual members of its association would be essential for the prosecution of the claim asserted, if as FCCA claims the individual members did not have to respond to relevant discovery when the association files a complaint alleging that the individual members' substantial interests are affected. In addition, as BellSouth noted in its Response, if FCCA's members are substantially affected in a proceeding and such interests are directly relevant to the defenses of affected parties in this case, then allowing the association to circumvent discovery will adversely impact other parties.

Staff notes that the FCCA alleges that the Discovery Order will have a detrimental effect on associations' participation before the Commission. Staff notes that this argument addresses policy and neither raises a point of fact or law which the Prehearing Officer overlooked; thus, it is not a basis for reconsideration. Nevertheless, staff believes that FCCA's concerns that the Discovery Order will negatively impact associational participation at the Commission is overstated. Staff believes that under the Discovery Order, associations still have the benefit of pooling members' resources together in litigation. Staff believes the Discovery Order has no impact on the benefits derived from individual members being able to limit costs such as attorney fees, witness fees, and other associated costs of litigation. Staff also notes that under the Discovery Order neither the FCCA nor its members can claim that they incur additional costs because they are required to respond to this discovery. Since associational standing relies on the individual members' ability to sue in their own right,[5] and without the convenience of filing as an association,

[5]See Florida Home Builders at 353.

the individual members would be subject to this discovery if the petition had been filed jointly.

3) The Discovery Order Does Not Overlook Whether Some Requests Are Irrelevant, Over broad, Burdensome or Harassing

FCCA alleges that while the Discovery Order finds some of the questions overly broad, the Discovery Order overlooks the appropriate standard in determining whether a request is irrelevant, over broad, burdensome, or harassing, and the extremely overreaching nature of some of the requests. As conceded by FCCA, the Discovery Order made specific findings including finding that some of the discovery requests were over broad and unduly burdensome. The Discovery Order also sets limitations on certain requests. See Order No. PSC-03-0084-PCO-TL at pp. 7-9. Specifically, in the Discovery Order, the Prehearing Officer limited the discovery for Interrogatory No. 9 to BellSouth's nine-state region. As to Interrogatory No. 19, the interrogatory is limited in time and scope to the implementation of the technology (which is approximately 1998). Staff believes that FCCA fails to demonstrate a point of fact or law which the Prehearing Officer overlooked in rendering a decision in this regard.

As noted by BellSouth, it is FCCA's burden to demonstrate the burdensome nature of the discovery, and a blanket statement alleging that responding would be burdensome is insufficient. The Court in the First City Development case noted that words such as "overly broad" or "burdensome" ". . .have little meaning without substantive support." Id. at 503. The Court found that

> it is incumbent upon petitioners to quantify for the trial court the manner in which such discovery is burdensome. They must be able to show the volume of documents, or the number of man-hours required in their production, or some other quantitative factor that would make it so.

Id. Staff notes that FCCA did not provide such quantitative factors in its objections. Further, staff notes that ITC^DeltaCom has produced information in response to similar questions and ITC^DeltaCom is a member of the FCCA.

4) The Discovery Order Did Not Overlook Requiring Information from the Association's Members

FCCA argues that the Discovery Order overlooks the Civil Rules of Procedure which provide that discovery must be sought from parties only, thereby resulting in a mistake of law. Staff notes that the only discovery requests before the Commission are those which were propounded on FCCA who is a party to this proceeding. The contention is whether FCCA must provide responses to the requests which will require FCCA to obtain the information from its individual members.

On February 13, 2003, FCCA filed for official recognition of two cases, University of Texas at Austin, et al. v. Vratil, 96 F. 3d 1337 (10th Cir. 1996), and Oil Heat Institute of Oregon v. Northwest Natural Gas, 123 F.R.D. 640 (USDC Or. 1988)(OHI case).[6] FCCA cites to these cases for the proposition that it is impermissible to require non-party association members to respond to discovery directed to an association. Staff believes these cases are distinguishable from the instant case.

The University of Texas case involves Federal Rules of Procedure which specifically allow for an association to sue or be sued in its common name for purposes of enforcing a substantive right existing under the Constitution or laws of the United States. See Rule 17 (b), Federal Rules of Civil Procedure. However, this is a state proceeding, and the Florida Rules of Civil Procedure do not have similar language. See Rule 1.210, Florida Rules of Civil Procedure. Thus, there are no discovery rules in the Florida Rules of Civil Procedure which specifically address associations, whereas the Federal discovery rules do address the issue of conducting discovery with regard to associations. Further, associational standing is addressed by the Florida Home Builders case which is addressed in more detail below.

In the OHI case, FCCA states the Court declined to grant a Motion to Compel responses from OHI's members because the information sought was not in OHI's possession, custody, or control and there was no evidence that OHI had any legal right to the documents that belong to the organization's members. OHI case at p.

[6]Staff notes that BellSouth did not file a response to FCCA's request for official recognition, but did address these cases in its response to FCCA's Second Reconsideration Motion which is discussed in Issue 3.

642. The Court found that the only issue was whether OHI should be deemed to have control of the requested items because it represented the member organization. Id. The Court noted that there are circumstances in which a party will be deemed to have control of documents such that they have to produce them, but concluded that in this instance OHI did not have control of the documents. Id. BellSouth points to a line of cases[7] where parties were required to produce discovery from affiliated non-parties. As noted by BellSouth, FCCA's leadership consists of its members and at least one employee of a member is testifying in this proceeding. Unlike the members in the OHI case whose only duty was to pay dues, the members of FCCA appear actively involved in the decision-making processes of the Association, including when and if to become involved in litigation. OHI case at p. 642. Further, as noted below, the association only has standing based on the criteria set forth in the Florida Home Builders case, not a rule of civil procedure in Florida.

FCCA argues that the Discovery Order's reliance on the FCTA Order to require discovery is misplaced. FCCA argues against the application of the FCTA Order. However, mere disagreement with the application of a case does not rise to the level of a mistake of law.

FCCA argues that the point of the Florida Home Builders case is that an association has the right to represent its members without the need for the members to participate as parties to the case. For the reasons discussed previously, FCCA is misinterpreting the Discovery Order's application of the Florida Home Builder case. Again, mere disagreement with the application of a case does not rise to the level of a mistake of law.

5) The Discovery Order Correctly Permits Discovery Outside the State of Florida

FCCA cites to several orders issued in a BellSouth rate case from the 1980s for the proposition that the Commission has refused

[7]Alimenta v. Anheuser-Bush, 99 F.R.D. 309(N.D. Ga. 1983); MLC Inc. v. North America Philips Corp., 109 F.R.D. 134 (S.D. N.Y. 1986); Camden Iron and Metal, Inc. v. Marubeni America Corp., 138 F.R.D. 438 (D.N.J. 1991).

in the past to allow discovery outside the state of Florida.[8] FCCA argues that discovery outside the state of Florida is irrelevant to the issues in this case. As noted by BellSouth, simply because the Commission has declined to order discovery under the facts presented in another docket, does not diminish the ability of the Commission to consider such matters, in its discretion.[9] Staff agrees. Nothing in the Civil Rules of Procedure limits the scope of discovery to only the state of Florida.

Conclusion

Based on the preceding reasons, staff recommends that the Commission should find that FCCA has failed to demonstrate that the Prehearing Officer made a mistake of fact or law in rendering his decision. Therefore, staff recommends that the Commission should deny FCCA's Motion for Reconsideration.

[8]FCCA also cites to Orkin Exterminating Company, Inc. v. Couchman Crossing Associates, L.P., 790 So.2d 419 (Fla. 2nd DCA 2001) for the proposition that Courts have disallowed discovery outside the state of Florida.

[9] BellSouth cites to Lytton v. Lytton, 289 So.2d 17, 20 (Fla. 2nd DCA 1974) for the proposition that the Court upheld discovery of records of an out-of-state corporation which were in the custody, possession or control of the husband).

ISSUE 3: Should the Commission grant the Florida Competitive Carriers Association's Motion for Reconsideration of a Portion of Order No. PSC-03-0180-PCO-TL?

RECOMMENDATION: No. For the reasons articulated in Issue 2 and herein, staff recommends that the Commission should deny the Florida Competitive Carriers Association's Motion for Reconsideration of a Portion of Order No. PSC-03-0180-PCO-TL.

STAFF ANALYSIS: As noted in the Case Background, on January 17, 2003, BellSouth filed its Second Emergency Motion to Compel against FCCA. On January 24, 2003, FCCA filed its Response to BellSouth's Second Motion to Compel. By Order No. PSC-03-0180-PCO-TL, issued February 6, 2003 (Second Discovery Order), the Prehearing Officer granted in part and denied in part BellSouth's Second Motion to Compel. On February 17, 2003, FCCA filed its Motion for Reconsideration of a Portion of Order No. PSC-03-0180-PCO-TL (Second Reconsideration Motion). On February 24, 2003, BellSouth filed its Response to FCCA's Second Reconsideration Motion.

FCCA's Second Reconsideration Motion

In its Second Reconsideration Motion, FCCA states that it is only seeking reconsideration of that portion of the Second Discovery Order that requires it to respond to the first part of Interrogatory No. 66 because it requires each FCCA member to respond. FCCA states that the Second Discovery Order relies on the first Discovery Order for the proposition that a response is to be made to that question by each member of the FCCA. FCCA notes that it previously filed for reconsideration of the first Discovery Order. FCCA states that it adopts and incorporates by reference its previous Motion for Reconsideration as it relates to the Second Discovery Order's finding that the first part of Interrogatory No. 66 is relevant and that individual non-party association members must respond.

FCCA cites to University of Texas at Austin, et al. v. Vratil, 96 F. 3d 1337 (10th Cir. 1996), and Oil Heat Institute of Oregon v. Northwest Natural Gas, 123 F.R.D. 640 (USDC Or. 1988) (OHI case) for the proposition that it is impermissible to require non-party association members to respond to discovery directed to an association. FCCA argues that in the University of Texas case, the Tenth Circuit Court of Appeals granted a writ of prohibition and quashed the lower court's order requiring the National Collegiate

Athletic Association (NCAA) members to respond to certain interrogatories. FCCA states that the appellate court found that the lower court erred in requiring unserved non-party association members to respond to discovery, where the appellate court held that

> 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.

Id. at 1340. FCCA cites to Jones v. Seaboard for the proposition that the Florida Rules of Civil Procedure are closely patterned after the federal rules and the Florida courts examine such federal decisions in construing the Florida rules. Id. at 863.

FCCA argues that similarly, in the OHI case, Northwest Natural Gas' motion to compel 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. FCCA states that the court found that "[t]here is no evidence here that OHI has any legal right to the documents that belong to the member organizations." Id. at 642. Thus, FCCA asserts that in addition to the various arguments made in its previous Motion for Reconsideration, these decisions further support reconsideration of the Second Discovery Order.

BellSouth's Response

In its Response, BellSouth incorporated its arguments raised in its response to FCCA's first Motion for Reconsideration and argues that the Commission should deny FCCA's Second Reconsideration Motion for the same reasons. BellSouth raises two other additional arguments as to why FCCA's Second Reconsideration Motion should be dismissed.

BellSouth cites several Commission cases for the proposition that it is inappropriate to raise new arguments, not raised earlier, on reconsideration.[10] BellSouth contends that the FCCA's

[10]Order No. PSC-96-1024-FOF-TP, issued August 7, 1996, in Docket No. 950984-TP, In Re: Establishing Nondiscrimatory Rates, Terms, and Conditions; and Order No. PSC-96-0347-FOF-WS, issued March 11, 1996, in Docket No. 950495-WS, In

Second Reconsideration Motion is based, in part, on new arguments because it raises for the first time two federal court cases, the University of Texas case and the OHI case, to support its claim that non-party association members cannot be required to respond to discovery under Florida law.

BellSouth argues that because FCCA's argument is based on new case law, it is procedurally improper and the Commission should not consider it. BellSouth asserts that even if FCCA's new argument is considered, the FCCA fails to identify any points of fact or law which the Prehearing Officer overlooked or failed to consider. BellSouth contends that the FCCA merely asserts that these cases do not support the Prehearing Officer's decision. BellSouth asserts that the FCCA appears to argue that the Prehearing Officer erred because he failed to consider two new cases, one out of the federal Tenth Circuit and one from Oregon, that applied federal law to resolve a factually distinguishable issue, which does not meet the criteria for a motion for reconsideration. BellSouth contends that FCCA's argument fails to meet the standard for reconsideration as it fails to identify any point of fact or applicable Florida law that the Prehearing Officer failed to consider. BellSouth asserts that the Commission should summarily reject the FCCA's Motion because it is procedurally improper and fails to satisfy the reconsideration standard.

BellSouth also argues that the new cases cited by FCCA are inapplicable to the instant matter. BellSouth states that assuming for the sake of argument that the Commission considers the new cases, such consideration would not result in a finding that the Prehearing Officer erred. BellSouth argues that in the University of Texas case, the Tenth Circuit applied federal procedural law in a federal question case in finding that discovery to non-party members of a defendant association, which lacked capacity to sue or to be sued under Kansas law, was improper under federal law. BellSouth argues that in this case Florida procedural law, not federal law, governs the proceeding. Id. at 1337. BellSouth asserts that under Florida law, associations like the FCCA have standing to sue and be sued in administrative proceedings, which is contrary to the association in question in the University of Texas case citing to the Florida Home Builders case.

BellSouth asserts that the University of Texas case is distinguishable and inapplicable to the instant dispute as the University of Texas case does not involve a lawsuit filed by an association, on behalf of its members, who refuses to provide relevant information in support of the allegations. BellSouth contends that FCCA cannot have it both ways - it cannot assert that it has standing to file a complaint but then claim that its members are immunized from discovery. BellSouth states that the University of Texas case does not support any finding that the Prehearing Officer erred in applying and interpreting Florida law in granting BellSouth's Motion to Compel.

BellSouth contends that likewise the OHI case is unpersuasive. BellSouth argues that in that case the Oregon court found that a nonprofit trade organization in a Lanham Act case did not have control of documents requested in discovery. BellSouth contends that the Court in reaching its conclusion recognized that in some situations an association will be deemed to have control of the requested items, but determined that the facts did not support such a finding in that case. BellSouth argues that this case is entirely different, because Interrogatory No. 66 does not seek the production of documents. BellSouth states that rather the interrogatory asks the FCCA to identify specific back-up information, including documents, relating to the allegations made by one of its witnesses in his pre-filed testimony. BellSouth contends that it is inconceivable to suggest that the FCCA is not in control of information that forms the basis of its witness' testimony, unless the FCCA is admitting that its witness' testimony is devoid of any factual support and based entirely upon conjecture and speculation. BellSouth notes in a footnote that it moves to strike Mr. Gillan's entire testimony as speculation and conjecture in the event FCCA is found not to be in control of the requested documents. BellSouth asserts that the OHI case should be given little credence because the FCCA is in control of the requested information, thereby obligating it to respond to BellSouth.

BellSouth contends that Commission precedent establishes that the Commission has previously authorized discovery to associations that would require that association to disclose information obtained from its members. BellSouth cites to the FCTA Order for the proposition that United was entitled to obtain through discovery specific information from the association and/or its members. BellSouth also cites to Order No. PSC-93-1513-CFO-TL, issued October 14, 1993, in Docket No. 920255-TL, for the

proposition that the Commission ruled on a request for confidential treatment for information provided by ten members of the Florida Pay Telephone Association in response to discovery issued to the association.

Analysis

As noted previously, FCCA incorporates by reference all of its arguments made in support of its first Motion for Reconsideration into its Second Motion for Reconsideration. In addition, FCCA cites to two cases for which it sought official notice in connection with the first Motion for Reconsideration. Since all of FCCA's arguments, BellSouth's responses to those arguments, and staff's analysis are thoroughly addressed in Issue 2, staff will not restate those arguments and analysis herein but incorporates by reference those arguments and analysis into this issue. To the extent that the new cases, University of Texas and OHI cases, are discussed in Issue 2, those arguments and analysis are also incorporated herein. Otherwise, the cases are discussed further below.

BellSouth argues that FCCA's new cases are not appropriate for a motion for reconsideration because these cases raise new arguments that were not made previously. Staff does not believe that the two additional cases cited by FCCA raise a new argument, in that FCCA has continually argued that its members should not have to produce discovery. Thus, FCCA is only attempting to cite additional authority to support its argument. However, in considering the two additional cases, staff remains unpersuaded that FCCA and its members can avoid relevant discovery merely by having the association, rather than the individual members, file the complaint. In other words, staff remains persuaded that FCCA should provide responses to BellSouth's discovery, even if it requires that FCCA obtain the information from its individual members.

As noted in Issue 2, staff believes that the University of Texas case and the OHI case are distinguishable. Staff agrees with BellSouth that these cases are not applicable to this case. Specifically, staff believes that the University of Texas case relies on Federal Rules of Civil Procedure, which allow for associations to sue under the federal rules. In the instant case, the Florida Rules of Civil Procedure have no similar provision. Thus, on this point, federal case law is not illuminating.

Staff notes that in the OHI case, the court suggests that in certain cases an organization might have control over documents in its members' possession. OHI case at 642. To the extent that Interrogatory No. 66 asks for the documentation related to the testimony filed by FCCA's witness, it appears that FCCA likely has control of the information which formed the basis of that testimony.

As noted by BellSouth, the Commission has required associations to respond to discovery even when the association may have been required to obtain the requested information from its individual members. See FCTA case. Staff notes that members of the Florida Pay Telephone Association (FPTA) produced discovery. See Order No. PSC-93-1513-CFO-TL. In that case, FPTA intervened into the proceeding and responded to discovery. Moreover, staff believes that FCCA could have and should have included in its objections to BellSouth's discovery, any objections based on the requests being burdensome to specific members. Staff notes that ITC^DeltaCom has produced responses to BellSouth's discovery. Staff further notes that ITC^DeltaCom intervened in this proceeding and is a member of the FCCA.

Thus, for the reasons articulated in Issue 2 and herein, staff recommends that the Commission should deny the Florida Competitive Carriers Association's Motion for Reconsideration of a Portion of Order No. PSC-03-0180-PCO-TL.

However, staff believes that the Commission, at its discretion, could entertain allowing the FCCA to file supplemental objections based on whether and how the individual association members would be unduly burdened based on specific quantitative information as outlined in First City Development case such as the volume of documents, or the number of man-hours required in their production, or some other quantitative factor that would make it so. Should the Commission be inclined to permit these supplemental type of objections, staff suggests that the individual association members via FCCA make the objections within four days of the Commission's vote at the Agenda Conference, and then permit BellSouth four days thereafter to file any response. Staff further recommends that the pleading be served by hand-delivery or facsimile. The Prehearing Officer could then issue a ruling on whether to grant or deny the objections to discovery.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open pending further proceedings.

STAFF ANALYSIS: Regardless of whether the Commission approves or denies staff's recommendations on Issues 1, 2, and 3 the merits of the case need to be addressed at hearing. Thus, this docket should remain open pending further proceedings.