

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: APRIL 24, 2003

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

FROM: OFFICE OF THE GENERAL COUNSEL (CHRISTENSEN) *PAC*
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (KELLY,
ix ILLERI, PITTMAN, CASEY) *SMX*

RE: DOCKET NO. 020507-TL - COMPLAINT OF FLORIDA COMPETITIVE
CARRIERS ASSOCIATION AGAINST BELL SOUTH TELECOMMUNICATIONS,
INC. REGARDING BELL SOUTH'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: 05/06/03 - REGULAR AGENDA - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

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

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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,

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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,

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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.

On April 2, 2003, FCCA and BellSouth filed a Joint Motion for Approval of Settlement Agreement and a Joint Motion for Continuance. The Motion for Continuance was addressed by Order No. PSC-03-0476-PCO-TL, issued April 9, 2003, whereby the hearing in this matter was rescheduled to August 6, 2003, along with the rescheduling of other key activities dates.

This recommendation addresses the Parties' Joint Motion for Approval of Settlement Agreement. Included as part of the Settlement Agreement, FCCA acknowledges that with the approval of the Settlement Agreement that there would be no need for the Commission to rule on 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. Therefore, this recommendation will also address the outstanding reconsideration motions.

The Commission is vested with jurisdiction pursuant to Section 364.01, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission approve the Parties' Joint Motion for Approval of Settlement Agreement?

RECOMMENDATION: Yes, staff recommends that the Commission should approve the Parties' Joint Motion for Approval of Settlement Agreement. (CHRISTENSEN)

STAFF ANALYSIS: As noted in the Case Background, on April 2, 2003, the Parties, BellSouth and FCCA, filed a Joint Motion for Approval of Settlement Agreement. The Settlement Agreement addresses the outstanding discovery dispute between the Parties.

Specifically, BellSouth served discovery on FCCA that FCCA objected to and was the subject of numerous motions and Orders. By Order No. PSC-03-0084-PCO-TL, issued January 10, 2003, BellSouth's Motion to Compel FCCA to respond to its discovery requests was granted, in part, and denied, in part. 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. By Order No. PSC- 03-0180-PCO-TL, issued February 6, 2003, BellSouth's Second Motion to Compel FCCA to respond to its discovery requests was also granted in part and denied in part. 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.

As noted above, BellSouth, FCCA, and several members of the FCCA¹ filed a motion for approval of the Settlement Agreement entered into by them. In support of the motion, the parties ask that the Settlement Agreement will resolve the pending discovery between the FCCA and BellSouth, as noted above, and permit this case to move forward to hearing on the substantive issues. The

¹AT&T Communications of the Southern States, LLC (AT&T); MCI WorldCom Communications, Inc. and MCImetro Access Transmission Services, LLP (collectively, WorldCom); ITC^DeltaCom Communications, Inc. (ITC^DeltaCom); Access Intergrated Networks, Inc. (AIN).

Parties also ask that the Commission take the necessary action to continue the hearing currently scheduled for April 22, 2003, and reschedule the case for hearing in accordance with the parameters of the Settlement Agreement, to the extent possible.²

Settlement Agreement

The Settlement Agreement is attached to this recommendation and incorporated by reference. The salient points of the Settlement Agreement are summarized below:

1. AT&T, WorldCom, and AIN shall be substituted for the FCCA as the Complainants in this docket.

2. The status of ITC^DeltaCom who was granted intervention shall not be affected by the Settlement Agreement.

3. Upon the approval of the Settlement Agreement, the FCCA will withdraw as a party from the docket. Therefore, there will be no need for the Commission to rule on the FCCA's Motions for Reconsideration of Orders Nos. PSC-03-0084-PCO-TL and PSC-03-0180-PCO-TL. Further, none of the FCCA association members, except those members substituting for the FCCA as the Complainants, are required to respond to the outstanding discovery.

4. All prefiled testimony (direct and rebuttal), prehearing positions and discovery responses (including interrogatories, production requests, and depositions) will be adopted by the appropriate substituting party(ies) and shall be available for use in this case, subject to appropriate objection at the time of hearing.

5. AT&T, WorldCom, and AIN shall respond to the outstanding discovery as set forth in Order Nos. PSC-03-0084-PCO-TL and PSC-03-0180-TL, as if such requests were addressed individually to AT&T, WorldCom, and AIN, within fourteen (14) calendar days of a Commission order approving this Settlement Agreement. BellSouth will have seven (7) calendar days to review the responses. If necessary, the Parties shall have an additional three (3) calendar days to confer regarding the responses.

²Staff notes that the hearing was continued to August 6, 2003, by Order No. PSC-03-0476-PCO-TL, issued April 9, 2003.

6. The Protective Agreement between the FCCA and BellSouth, executed on November 26, 2002, shall continue to govern the handling of all previously supplied confidential information. AT&T, WorldCom, AIN, and BellSouth shall promptly execute Protective Agreements containing the same terms and conditions as the Protective Agreement between the FCCA and BellSouth. BellSouth shall authorize the FCCA to provide previously produced confidential information to AT&T, WorldCom, and AIN following the execution of the Protective Agreement, or shall provide such information itself.

In Paragraph 7 of the Settlement Agreement, the Parties basically request that the hearing be set no later than June 20, 2003. As noted in Order No. PSC-03-0476-PCO-TL, due to the restrictions of the Commission's calendar, this request was not accommodated. In Paragraph 6 of the Settlement Agreement, the Parties reserve their rights to make or take positions different than the Settlement Agreement in this case or future proceedings. Further, the Parties state that the Settlement Agreement shall not be read as a an admission by any Party and shall have no precedential significance in any other proceedings. In Paragraph 9 of the Settlement Agreement, the parties state that if the Commission does not accept the Settlement Agreement in its entirety, it shall be null and void.

Analysis

Staff believes that the Settlement Agreement is a fair resolution of the outstanding discovery disputes between the parties. Further, staff agrees that with the approval of the Settlement Agreement and the FCCA's withdrawal as a party, both of FCCA's motions for reconsideration of the discovery orders will be moot.

However, staff notes that the Settlement Agreement contains a provision that states "[i]f the Commission does not accept the Settlement Agreement in its entirety, it shall be null and void." However, since the Settlement Agreement frames its discussion regarding the rescheduling of the hearing date as a "request", staff concludes that the parties did not intend for the Settlement Agreement to be voided in its entirety if the hearing schedule could not accommodate a hearing before the June 30, 2003, date. Further, by letter dated April 14, 2003, the Parties indicated that they recognize that they have no control over the Commission's calendar.

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Rather, the Parties stated that it was their intent simply to have the hearing scheduled as soon as possible. The Parties affirmed that the scheduling of the hearing to August 6, 2003, would not render the Settlement Agreement void, if all other parts of the Agreement are approved in their entirety.

Staff notes that the AT&T, WorldCom, and AIN will be adopting the testimony previously filed on behalf of the FCCA. Since the Prehearing has already been held in this matter, staff suggests that AT&T, WorldCom and AIN file an amended witness list indicating which company will be sponsor each of the witnesses. Further, staff would advise AT&T, WorldCom, and AIN, to indicate in that pleading the order that the companies will be presenting those witnesses.

For the foregoing reasons, staff recommends that the Commission approve the Parties' Joint Motion for Approval of Settlement Agreement.

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ISSUE 2: Should this docket be closed?

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

STAFF ANALYSIS: Regardless of whether the Commission approves or denies staff's recommendation on Issue 1, the merits of this case shall still need to be addressed at hearing. Thus, this docket should remain open pending further proceedings.

SETTLEMENT AGREEMENT

This Settlement Agreement is made and entered into this 2nd day of April, 2003 by and between the Florida Competitive Carriers Association (FCCA), AT&T Communications of the Southern States, LLC (AT&T), MCI WorldCom Communications, Inc. and MCImetro Access Transmission Services LLP (collectively, WorldCom), ITC^DeltaCom Communications, Inc., Access Integrated Networks, Inc. (AIN) and BellSouth Telecommunications, Inc. (BellSouth) (collectively, the Parties).

WHEREAS, the FCCA has filed a Complaint against BellSouth, denominated Docket No. 020507-TL, in which it seeks a ruling that BellSouth be required to cease its practice of refusing to provide its FastAccess service to retail customers who choose a provider other than BellSouth for voice service;

WHEREAS, BellSouth has contested the substance of the FCCA's Complaint;

WHEREAS, BellSouth has propounded discovery to the FCCA and the FCCA has objected to such discovery thus giving rise to a dispute over the discovery;

WHEREAS, the BellSouth and the FCCA wish to amicably resolve this discovery dispute and avoid the time and expense of further litigation regarding the outstanding discovery issues;

NOW, THEREFORE, in consideration of the foregoing, said Parties do mutually agree as follows:

1. AT&T, WorldCom and AIN shall be substituted for the FCCA as the Complainants in this docket.

2. The status of ITC^DeltaCom, whose petition to intervene was granted in Order No. PSC-02-1515-PCO-TL on November 5, 2002, shall not be affected by this Agreement.

3. Upon approval of this Settlement Agreement, the FCCA shall withdraw as a party from this docket. Thus, there will be no need for the Commission to rule on the FCCA's Motions for Reconsideration of Order Nos. PSC-03-0084-PCO-TL and PSC-03-180-PCO-TL, filed on January 17, 2003 and February 17, 2003, and each FCCA association member is not required to respond to the outstanding discovery.

4. All prefiled testimony (direct and rebuttal), prehearing positions and discovery responses (including interrogatories, production requests, and depositions) shall be adopted by the appropriate substituting party(ies) and shall be available for use in this case, subject to appropriate objection at the time of hearing.

5. AT&T, WorldCom and AIN shall respond to the outstanding discovery as set forth in Order Nos. PSC-03-0084-PCO-TL and PSC-03-0180-PCO-TL, as if such requests were

addressed individually to AT&T, WorldCom and AIN, within fourteen (14) calendar days of a Commission order approving this Settlement Agreement. BellSouth will have seven (7) calendar days to review the responses. If necessary, the Parties shall have an additional three (3) calendar days to confer regarding the responses.

6. The Protective Agreement between the FCCA and BellSouth, executed on November 26, 2002, shall continue to govern the handling of all previously supplied confidential information. AT&T, WorldCom, AIN and BellSouth shall promptly execute Protective Agreements containing the same terms and conditions as the Protective Agreement between the FCCA and BellSouth. BellSouth shall authorize the FCCA to provide previously produced confidential information to AT&T, WorldCom, and AIN following the execution of the Protective Agreements or shall provide such information itself.

7. The Parties request that the hearing in this matter be held within 28 days of receipt of the outstanding discovery responses referred to in paragraph 5. If any additional time is needed for resolution of discovery matters, the Parties request that the hearing in this matter be held within 21 days after resolution of such discovery issues, but no later than June 30, 2003.

8. The Parties agree that they waive no arguments or rights by virtue of entering into this Settlement Agreement. The Parties reserve the right to take any position or make any argument in this docket on these matters if this Settlement Agreement is not accepted by the Commission in its entirety. The Parties further reserve the right to take any position and make any argument in any future dockets. This Settlement Agreement shall not be read as an admission by any Party and shall have no precedential significance in any other proceeding.

9. The Parties will present this Settlement Agreement to the Commission for approval as quickly as possible. If the Commission does not accept the Settlement Agreement in its entirety, it shall be null and void.

DATED this 2nd day of April, 2003.

FLORIDA COMPETITIVE CARRIERS ASSOCIATION

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ATTACHMENT
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ATTACHMENT
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