

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: COMPLAINTS OF
TERRANOVA.NET AGAINST BELL SOUTH
ALLEGING PREDATORY PRICING AND
SWITCHING ISP SERVICE WITHOUT
AUTHORIZATION

DOCKET NO. 030889-TP
ORDER NO. PSC-03-1128-FOF-TP
ISSUED: October 8, 2003

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER DISMISSING COMPLAINT

BY THE COMMISSION:

Background

Mr. William Mikalson of Terranova.net (Terranova) has filed several complaints with this Commission, starting on May 14, 2003. Terranova is an Internet Service Provider (ISP) which resells Digital Subscriber Line (ADSL) service in conjunction with its Internet service. Terranova does not provide any voice telecommunications service. Mr. Mikalson alleges that BellSouth Telecommunications, Inc. (BellSouth) is charging higher prices for wholesale ADSL transport service than what BellSouth.net, the Internet service provider arm of BellSouth, charges its retail FastAccess customers. He also alleges that BellSouth has switched Terranova's customers to another ISP without authorization. On May 14, 2003, Mr. Mikalson filed a complaint requesting that we investigate BellSouth for those actions. Mr. Mikalson was asked to provide copies of any information regarding the complaint so that we could make an inquiry of BellSouth. Mr. Mikalson stated that he was not interested in spending any more time on the complaint and

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declined to provide information. That complaint was closed on May 15, 2003.

On June 18, 2003, Mr. Mikalson filed another complaint about BellSouth, alleging that BellSouth requires all ISPs to submit a Letter of Authorization (LOA) before it will switch a customer's service to a different ISP. He alleged that BellSouth.net, however, has never obtained LOAs from its customers. Mr. Mikalson requested that BellSouth be investigated for practicing deceit to further its predatory practices. He also requested that BellSouth's DSL retail sales be halted in Florida pending the results of a full investigation of the matter.

Our staff sent an inquiry to BellSouth regarding the LOA portion of the complaint. BellSouth responded on June 24, 2003, stating that prior to October 1, 2001, all ISPs, including BellSouth.net, were required by BellSouth to provide LOAs for ADSL service. However, since that time, ISPs are only required to provide an LOA when either line sharing is present and the customer wants ADSL, or when there is a dispute between two ISPs over the same end user. Mr. Mikalson was advised of this information.

On July 8, 2003, Mr. Mikalson contacted Representative Ken Sorenson regarding his complaints. Our staff then asked Mr. Mikalson to provide documentation about one of his Internet service clients that he believed had been switched to an alternative ISP provider without the client's authorization or request. The documentation was to be provided to us by July 25. In response to this request, Mr. Mikalson provided e-mail information regarding four complaints. We will address these complaints in the order Mr. Mikalson filed them.

Analysis

(1) In his first complaint, Mr. Mikalson alleges that BellSouth prices its wholesale ADSL transport service below cost in an effort to eliminate competition from companies like Terranova. We do not, however, believe the Florida Commission is the appropriate forum for this complaint. BellSouth's ADSL service is tariffed at the FCC and that tariff contains the rates about which Mr. Mikalson complains. As such, the FCC would be the appropriate

regulatory body to address Mr. Mikalson's complaint of predatory wholesale DSL pricing.

(2) The second complaint alleges that Terranova customer Mr. Roberts' ISP/DSL package service was switched by BellSouth without authorization. Our staff called Mr. Roberts to find out what the customer experienced. Mr. Roberts said that he was having numerous problems with Terranova's ISP/DSL service. He was having to reload the software and it would work for about an hour and quit again. He called BellSouth to order service and has been pleased with the service. Based on this communication with Mr. Roberts, we do not believe he was switched by BellSouth without authorization. Nevertheless, it should be noted that our slamming rules do not apply to high-speed internet access services.

Key to this analysis is the fact that ISP services, such as those provided by Terranova, are "information services" (enhanced services), not "telecommunications services." The Telecommunications Act of 1996 defines information services as:

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

The FCC has given the following more detailed and specific definition in several of its dockets:

An ISP is an entity that provides its customers with the ability to obtain a variety of on-line information through the Internet. However, ISPs typically own no telecommunications facilities. In order to provide those components of Internet access services that involve information transport, ISPs lease lines, and otherwise acquire telecommunications, from telecommunications providers - - LECs, CLECs, IXCs and others. ISP's purchase use of analog and digital lines from LECs to

connect to their dial-in subscribers. . . . Thus, the information service is provisioned by the ISP "via telecommunications," including interexchange telecommunications, although the Internet service itself is an "information service" under section 3(2) of the Act, rather than a telecommunications service.

15 FCC Rcd 385; 1999 FCC LEXIS 6591; 18 Comm. Reg. (P & F) 1266

We note that "Information Service" and "Enhanced Service" are often used interchangeably, but have the same meaning for present purposes. In its report issued August 6, 1998, the FCC noted that "Information Service" and "Enhanced Service" extend to the same functions, and distinguished those services from "Telecommunications Service":

We have found that Congress intended the categories of "telecommunications" and "information service," established in the 1996 Act, to parallel these "basic" and "enhanced" categories. (Report to Congress on Universal Service, P21) The Commission has concluded that the definitions of "Information Service" and "Enhanced Service" should be interpreted to extend to the same functions.

13 FCC Rcd 24011; 1998 FCC LEXIS 4127

In the Matter of Computer III Further Remand Proceedings, the FCC further defined "Enhanced Services" and distinguished it from Basic telecommunications services:

Basic services, such as "plain old telephone service" (POTS), are regulated as tariffed services under Title II of the Communications Act. Enhanced services use the existing telephone network to deliver services that provide more than a basic transmission offering. Examples of enhanced services include, among other things, voice mail, electronic mail, electronic store-and-forward, facsimile store-and-forward, data processing and gateways to electronic databases.

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14 FCC Rcd 4289; 1999 FCC LEXIS 959
In the *Computer II Final Decision*, the FCC also stated:

. . . Insofar as enhanced services are concerned, there are two options - subject all enhanced services to regulation, or refrain from regulating them *in toto*. We believe that, consistent with our overall statutory mandate, enhanced services should not be regulated under the Act. (*Computer II* at ¶114)

77 FCC 2d 384 (1980)

More recently, in its Memorandum Opinion and Order released November 1, 2001, in CC Docket No. 00-227 and CC Docket No. 01-26, the FCC stated "Unlike basic services, enhanced services are not regulated under Title II of the Telecommunications Act".

Terranova is an ISP that resells ADSL service only as part of its high-speed internet service package. Thus, Terranova does not provide telecommunications services, but, instead, only an information service. Chapter 364.01 empowers this Commission to regulate "telecommunications services" only. Furthermore, Section 364.603, Florida Statutes, which serves as the basis for our slamming rules, provides that this Commission shall adopt rules to address unauthorized changing of a subscriber's "telecommunications service". As such, since high-speed internet service is an "information service" as opposed to a "telecommunications service", our slamming rule does not apply to the changing of a subscribers internet service. Accordingly, we cannot grant the relief requested.

(3) The third complaint, similar to the second, alleges that the ISP/DSL service of Mr. Richard Shultz, another Terranova customer, was switched by BellSouth without authorization. Our staff called Mr. Shultz and was told that he had problems with the Terranova service so he also called BellSouth. BellSouth shipped equipment to Mr. Shultz which was left by UPS out in the rain. Mr. Shultz shipped the equipment back to BellSouth since it was probably ruined. In the meantime, Terranova contacted Mr. Shultz and asked for a second chance to get his service working properly. That has been two months ago and Mr. Shultz is waiting to hear from Terranova to see if he owes money so he will be able to terminate

the service with Terranova. Based on this information, we do not believe BellSouth switched the customer's ISP/DSL without authorization. Furthermore, our slamming rule does not apply as, set forth under Complaint 2 above.

(4) The fourth complaint is about a BellSouth tariff filing at the FCC for a new type of circuit referred to as DSL-LITE. Terranova states that this tariff requires the ISP, such as Terranova, to have established a Broadband Gateway referred to in the FCC Tariff as End User Aggregation. Terranova further states that it is not economically feasible for anyone except BellSouth to use this transport. As with complaint number one, we find that because this is a service tariffed at the federal level, the FCC is the more appropriate forum to address this complaint.

Accordingly, Terranova's complaints will be dismissed because the Federal Communications Commission is the authority that governs the wholesale pricing of BellSouth's ADSL transport service by federal tariff. Furthermore, this Commission's slamming rules do not pertain to the switching of information services such as those provided by Terranova, although it appears that no unauthorized switching of any kind of service occurred in this instance.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the complaints of Mr. William Mikalson of Terranova.net are hereby dismissed. It is further

ORDERED that this Docket be closed.

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By ORDER of the Florida Public Service Commission this 8th Day
of October, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of

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the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.