

FLORIDA PUBLIC SERVICE COMMISSION
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MEMORANDUM

JANUARY 22, 1998

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FPSC - Records/Reporting

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF COMMUNICATIONS (AUDU) *AS*
DIVISION OF LEGAL SERVICES (COX) *VEC mcs*

RE: DOCKET NO. ~~971399-TP~~ - BELLSOUTH'S PETITION TO LIFT
MARKETING RESTRICTIONS IMPOSED ON ITS BUSINESS PRACTICES
REGARDING INTRALATA PRESUBSCRIPTION.

AGENDA: FEBRUARY 3, 1998 - REGULAR AGENDA - DECISION PRIOR TO
HEARING MOTION TO DISMISS (ISSUE 1) - PARTIES DID NOT
REQUEST ORAL ARGUMENT - PROPOSED AGENCY ACTION (ISSUE 2)
- INTERESTED PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\CMU\WP\971399.RCM

CASE BACKGROUND

By Order No. PSC-95-0203-FOF-TP, issued on February 13, 1995, in Docket No. 930330-TP, the Commission found that intraLATA presubscription was in the public interest and ordered the four large local exchange companies (LECs) to implement intraLATA presubscription by the end of 1997. In the same proceeding, the Commission ordered the LECs to file tariffs by July 1, 1995, instituting a rate element to allow the recovery of implementation costs for intraLATA presubscription.

On June 30, 1995, BellSouth Telecommunications, Inc. (BellSouth or the Company) filed the required tariff. In addition, BellSouth proposed to introduce several new intraLATA presubscription-related services and to reflect tariff language changes in its Access Services and General Subscriber Service Tariffs. On May 23, 1996, Order No. PSC-96-0692-FOF-TP was issued approving BellSouth's tariff. On May 24, 1996, the Florida

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Interexchange Carriers Association (FIXCA), MCI Telecommunications Corporation (MCI) and AT&T Communications of the Southern States, Inc. (AT&T) (the Complainants) filed a Joint Complaint against BellSouth. The Complainants alleged that BellSouth had devised anticompetitive business practices and unreasonable tariff provisions which, if allowed to remain in effect, would hinder the exercise of competitive choices. The Complainants argued that these practices would enable BellSouth, a dominant incumbent provider of local exchange services, to use its position to gain an unfair advantage over intralATA toll competitors, thereby frustrating the purpose of Order No. PSC-95-0203-FOF-TP.

On June 11, 1996, the Complainants protested Order No. PSC-96-0692-FOF-TP and requested a hearing. On June 13, 1996, BellSouth filed a response to the Joint Complaint, along with a Motion to Dismiss. The Motion to Dismiss was withdrawn by BellSouth on October 4, 1996.

On October 17, 1996, the Commission conducted an evidentiary hearing on the issues in this consolidated proceeding. The Commission voted on the issues at its November 26, 1996, Agenda Conference. The Commission's decisions were memorialized in Order No. PSC-96-1569-FOF-TP issued on December 23, 1996, in Docket Nos. 930330-TP and 960658-TP.

On January 7, 1997, BellSouth filed a Motion for Reconsideration of Order No. PSC-96-1569-FOF-TP. On January 21, 1997, the Complainants filed a response to BellSouth's Motion. At the April 14, 1997, Agenda Conference, the Commission voted to deny BellSouth's motion for Reconsideration. This action was memorialized in Order No. PSC-97-0518-FOF-TP issued on May 6, 1997, in Docket No. 930330-TP.

On October 21, 1997, BellSouth filed a Petition to Lift the Marketing Restrictions Imposed by Order No. PSC-97-0518-FOF-TP, in Docket No. 930330-TP. On November 10, 1997, MCI and the Florida Competitive Carriers Association (FCCA; formerly FIXCA) filed responses to BellSouth's petition. On the same day, the Joint Complainants filed a motion to dismiss BellSouth's petition. On November 18, 1997, BellSouth filed a Response and Opposition to the Joint Motion to Dismiss.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the Florida Competitive Carriers Association, MCI Telecommunications Company, and AT&T Communications of the Southern States' Joint Motion to Dismiss the Petition of BellSouth Telecommunications, Inc. to lift marketing restrictions imposed by Order No. PSC-96-1569-FOF-TP?

RECOMMENDATION: No. Considering the facts alleged as true and in the light most favorable to BellSouth, the Commission should deny the Joint Complainants' Motion to Dismiss. (COX)

STAFF ANALYSIS:

The purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action or claim. See Augustine v. Southern Bell & Telegraph Co. 91 So.2d 320 (FL 1956). In other words, the issue is whether the petition states a claim upon which the Commission can grant relief. In determining the sufficiency of the petition, consideration is confined to the petition and the grounds asserted in the motion to dismiss. See Flye v. Jeffords 106 So.2d 229 (1 D.C.A. 1958). The Commission must take all material factual allegations of the petition as true. See Varnes v. Dawkins, 625 So.2d 349, 350 (1 D.C.A. 1993). The moving party must specify the grounds for the motion to dismiss. The Commission must construe all material allegations against the moving party in determining if the petitioner has stated the necessary allegations. See Matthews v. Matthews 122 So.2d 571 (2 D.C.A. 1960).

In their Motion to Dismiss, the Joint Complainants argue that BellSouth's petition is nothing more than a second attempt at reconsideration of the Commission's Order No. PSC-96-1569-FOF-TP and therefore violates the principle of administrative finality. Citing the Florida Supreme Court's decision in Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla 1996), the Joint Complainants state the Court held that orders of an agency must at some point pass out of the agency's control and become final, absent extraordinary situations such as fraud, mistake, or change of circumstances. The Joint Complainants claim that BellSouth has not

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demonstrated sufficient extraordinary circumstances, either legal or factual, to warrant the Commission disturbing its Order. The Joint Complainants believe that the data BellSouth provided with its petition to lift the restrictions demonstrates little more than that the market is responding to the restrictions as the Commission intended.

Further, the Joint Complainants assert that BellSouth has failed to detail its local exchange service market share for the time period before and after the marketing restrictions were imposed. The Joint Complainants believe that the Commission must evaluate this data in its consideration of the BellSouth Petition.

In its Response and Opposition to the Motion to Dismiss, BellSouth argues that its petition is not a second motion for reconsideration but is instead a factual showing that the intraLATA market has changed more quickly than the Commission anticipated in its earlier Order. BellSouth states that it is prepared to demonstrate the changed circumstances at hearing. BellSouth believes that it has cited sufficient supporting data in its petition to lift the restrictions. BellSouth claims that it is seeking to prove that the goal of the Commission's Order has been met by its demonstration that intraLATA competition in Florida is now thriving.

Considering the facts alleged as true and in the light most favorable to BellSouth, staff recommends that the Commission deny the Joint Complainants' Motion to Dismiss. BellSouth has alleged sufficient facts to demonstrate changed circumstances and thereby the requested relief of lifting the restrictions imposed by the Commission's Order. BellSouth's petition provides data indicating a 26% loss of toll PIC-able access lines for the period of June, 1996 to September, 1997, and also showing that 34% of new residential customers chose an intraLATA carrier other than BellSouth for the period January, 1997 to August, 1997. This data does indicate changed circumstances that may demonstrate that the purpose of the Commission's earlier Order has been met. Accordingly, the Motion to Dismiss should be denied.

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ISSUE 2: Should the Commission grant BellSouth's Petition to lift the marketing restrictions imposed by Order No. PSC-96-1569-FOF-TP?

RECOMMENDATION: Yes. The Commission should grant BellSouth's Petition to lift the marketing restrictions imposed by Order No. PSC-96-1569-FOF-TP. (AUDU)

STAFF ANALYSIS:

In Order No. PSC-96-1569-FOF-TP, issued in Docket Nos. 930330-TP and 960658-TP, the Commission found that the telecommunications industry is in transition to a competitive market. Absent a fully competitive intraLATA toll market, the Commission determined that certain restrictions were appropriate. Specifically, the Commission determined that: 1) BellSouth could not market its intraLATA toll service to a new customer, unless the customer introduced the subject; 2) BellSouth could not initiate marketing efforts designed to dissuade customers, business or residential, from changing their intraLATA carrier from BellSouth to another carrier for a period of 18 months; and 3) BellSouth could not initiate communications with existing customers about its intraLATA services when existing customers contact BellSouth for reasons unrelated to intraLATA toll service for 18 months from the date of the Order. These restrictions were intended to increase customers' awareness and to allow the IXCs time to establish their presence in the intraLATA toll market. The 18 months restrictions are to expire by June 23, 1998.

On reconsideration in Order No. PSC-97-0518-FOF-TP, the Commission upheld its earlier decision to impose certain marketing restrictions on BellSouth regarding new and existing customer contact protocols. The Commission determined that due to BellSouth's "gateway" status, the marketing restrictions were necessary since the intraLATA toll market was in its infancy. However, the Commission deliberated the marketing restrictions extensively during the November 26, 1996, Agenda Conference and concluded that this issue could be revisited at a future date if market conditions dictate otherwise.

In its Petition, BellSouth argues that the restrictions have served their purpose in increasing customers' awareness regarding the availability of various intraLATA carriers, as well as to provide the major interexchange carriers (IXCs) time to establish themselves in the intraLATA market. BellSouth further argues that

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its records indicate the presence of customers' awareness regarding choice of intraLATA toll providers. With this Petition, BellSouth provides intraLATA toll statistics indicating that it lost 26% of existing intraLATA toll "PIC-able" residential and business access lines between June, 1996 and September, 1997. BellSouth further argues that between January and August, 1997, approximately 34% of new residential customers elected intraLATA toll providers other than BellSouth. In its response to the Joint Motion to Dismiss, BellSouth argues that the data provided is relevant and useful in demonstrating a thriving intraLATA toll market in Florida; thus, the goals of Order No. PSC-96-1569-FOF-TP have been met.

BellSouth contends that it has been competitively disadvantaged compared to the "[l]arge interexchange carriers who provide local, intraLATA toll and interLATA toll." BellSouth argues that these large IXCs are not bound by these marketing restrictions, and contends that some IXCs "[a]re misleading customers to believe that only one long distance company may be designated." BellSouth asserts that customers are disadvantaged in the competitive intraLATA toll market, since a customer who elects an intraLATA toll provider other than BellSouth can only benefit from the existing BellSouth Extended Calling Service (ECS) by dialing around to access BellSouth's ECS. In conclusion, BellSouth petitions that these restrictions be lifted or, alternatively, that the Commission grant some measure of relief from the Order's restrictions.

In its response to BellSouth's petition, FCCA argues that these restrictions should not be lifted prior to their expiration, since these restrictions were intended to protect its members from unfair and anticompetitive behavior from BellSouth. FCCA further argues that the restrictions were intended to provide its members with the opportunity to develop a presence in the intraLATA market that is sufficient to cope with the "gateway" status enjoyed by BellSouth. FCCA asserts that lifting these restrictions prematurely would truncate the remedy afforded to the Joint Complainants, and consequently re-expose its members to renewed unfair and anticompetitive practices that were the subject of its joint complaint. FCCA concludes that there is no factual or legal basis that supports rescinding any part of Order Nos. PSC-96-1569-FOF-TP or PSC-97-0518-FOF-TP prematurely. FCCA disputes BellSouth's assertion that the restrictions are no longer needed to achieve the Commission's objectives and denies that BellSouth is unfairly disadvantaged by these restrictions. FCCA argues in the

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Joint Motion to Dismiss that the data BellSouth has provided showing market-share erosion does not indicate BellSouth's overall market share, and concludes that BellSouth's alleged market-share erosion does not alter the Commission's earlier decision.

Staff notes that BellSouth's statistical information is useful and relevant as it pertains to its petition. Based on information presented to staff, it appears that approximately 75% of BellSouth's access lines are residential lines. Further, the distribution of BellSouth's loss in "PIC-able" lines between residence and business appear to follow this same 75% residence/25% business breakdown. Thus, staff agrees with BellSouth that this data shows the presence of a thriving intraLATA toll market as was intended by the Commission Order. Staff notes that the Joint Complainants have not commented on the accuracy or validity of these statistics; however, FCCA argues that this data does not show BellSouth's resulting market share. Staff views these statistics to imply increased intraLATA activity. Since the greatest reduction in PIC-able access lines appears to be in residential access lines, staff is satisfied with this data and believes that it is sufficient in ascertaining the level of increased activity in the intraLATA market.

Staff disagrees with BellSouth that it is disadvantaged because the major IXCs are not bound by these restrictions and therefore can cross-market their local, intraLATA, and interLATA toll services. BellSouth is prohibited by Section 271 of the 1996 Telecommunications Act from providing interLATA toll services, and there is no material local competition to support its argument that it is disadvantaged by the IXCs' cross-marketing strategy. Staff believes that as the various market boundaries are removed, cross-marketing of services is a viable marketing strategy. Staff believes that it is rather speculative to assert that such cross-marketing currently exists at such levels that BellSouth could claim it is being disadvantaged. BellSouth's claim that the IXCs are misleading customers to believe that they can only designate a single long distance company is unsubstantiated. If BellSouth so believes, BellSouth can rightfully file a complaint with the Commission. Staff disagrees with BellSouth's assertion that customers who elect other intraLATA toll providers are disadvantaged regarding ECS, because this characterization is inconsistent with the concept of intraLATA choice. It is possible that the individual customer who elects an intraLATA toll provider other than BellSouth will have to dial 10XXX to access BellSouth's

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ECS; however, customers' choice for intraLATA toll providers is the essence of intraLATA toll presubscription.

Staff agrees with FCCA that these restrictions were intended to prevent unfair and anticompetitive behaviors, and to give its members time to develop a presence in the intraLATA market. Also, staff agrees with FCCA that an early lifting of these restrictions will truncate the remedy afforded the Joint Complainants. However, staff can neither confirm nor disprove the assertion that such premature relief will re-expose FCCA's members to renewed unfair and anticompetitive practices. Staff disagrees with FCCA that there is no factual or legal basis to support rescinding any part of Order Nos. PSC-96-1569-FOF-TP or PSC-97-0518-FOF-TP prematurely. In its earlier decision, the Commission asserted that it could revisit its decision as market conditions may warrant. Staff contends that it is this sort of market erosion information that the Commission was alluding to when it stated that this "[i]ssue could be revisited" at a future date if market conditions dictate otherwise.

Staff notes that FCCA has not provided any statistics to gauge the existing intraLATA market or to refute BellSouth's statistics. Staff believes that BellSouth's statistics are relevant and reasonable. Staff notes that these are the only statistics that have been presented in this docket as proof and as a gauge of the current level of activity in the intraLATA toll market. Staff believes that it is this sort of change in market conditions that the Commission had in mind when it asserted that it could revisit its decision at a later date. Accordingly, staff recommends that the Commission should lift the marketing restrictions imposed on BellSouth in Order No. PSC-96-1569-FOF-TP.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation in Issue 1 and denies the Motion to Dismiss, this docket should be closed unless a person whose substantial interests are affected by the Commission's decision in Issue 2 files a protest within 21 days of the issuance of the Commission's Proposed Agency Action Order. If the Commission denies staff's recommendation in Issue 1 and grants the Motion to Dismiss, this docket should be closed. (COX)

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 1 and denies the Motion to Dismiss, this docket should be closed unless a person whose substantial interests are affected by the Commission's decision in Issue 2 files a protest within 21 days of the issuance of the Commission's Proposed Agency Action Order. If the Commission denies staff's recommendation in Issue 1 and grants the Motion to Dismiss, this docket should be closed.