



AKERMAN, SENTERFITT & EIDSON, P.A.

ATTORNEYS AT LAW

216 SOUTH MONROE STREET
SUITE 200
TALLAHASSEE, FLORIDA 32301-8889
(904) 222-3471
TELECOPY (904) 222-8828

December 5, 1997

ORIGINAL

Ms. Blanca S. Bayo
Director, Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 97-1056-TX

Dear Ms. Bayo:

On behalf of BellSouth BSE, Inc. enclosed for filing in the above referenced docket are the original and fifteen (15) copies of Akerman, Senterfitt & Eidson's Notice of Appearance and Motions to Dismiss Petitions of Florida Competitive Carriers Association, and MCI Telecommunications Corporation and MCI metro Access Transmission Services, Inc. Also enclosed for your records is a diskette containing the above referenced documents formatted in Wordperfect 6.1.

If you have any questions please call me at (850) 222-3471. Thank you.

Sincerely,

Mark Herron
for Mark Herron

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12489 DEC-56

FPSC-RECORDS/REPORTING
TAMPA

DOCUMENT NUMBER-DATE

12487 DEC-56

FPSC-RECORDS/REPORTING
TALLAHASSEE

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for certificate to provide alternative local exchange telecommunications service by BellSouth BSE, Inc.

Docket No. 71056-TX

Filed: December 5, 1997

MOTION TO DISMISS PETITION FILED BY MCI TELECOMMUNICATIONS CORPORATION AND MCI metro ACCESS TRANSMISSION SERVICES, INC.

Pursuant to Rule 25-22.037(2) and Rule 28-106.204, Florida Administrative Code, BellSouth BSE, Inc. moves the Florida Public Service Commission (Commission) for an Order dismissing the Petition on Proposed Agency Action filed by MCI Telecommunications Corporation and MCI metro Access Transmission Services, Inc. (collectively referred to as "MCI"). In support of this Motion, BellSouth BSE, Inc. states as follows:

1. On November 17, 1997, MCI filed a Petition on Proposed Agency Action directed to Order No. PSC-97-1347-FOF-TX. That order granted to BellSouth BSE, Inc. alternative local exchange telecommunications service certificate no. 5261 subject to the terms and conditions set forth in that order.

2. Rule 25-22.029(4), Florida Administrative Code, provides that "[o]ne whose substantial interest may or will be affected by the Commission's proposed action may file for a §120.57 hearing, in the form provided by Rule 25-22.036."

3. In its petition, MCI alleges that, by granting BellSouth BSE, Inc.'s certificate, its substantial interests would be affected as follows:

The substantial interests of MCI are affected by any Commission action granting [BellSouth Telecommunications, Inc. (BST or BellSouth)] or its

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affiliates a certificate as an alternative local exchange provider that allows BellSouth to circumvent the requirements of the [Telecommunications Act of 1996 (Act)] The Act represents Congress' attempt to carefully balance a number of competing interests. One of the major thrusts of the Act is that a new entrant, such as MCI, has a right to buy BellSouth's retail services at a wholesale discount so that it can compete against BellSouth. MCI is harmed by being denied this right to effectively compete by means of resale and is harmed by any action which allows BellSouth to circumvent its obligations to MCI under the federal act. MCI is harmed by being subject to competition from a BellSouth affiliate which is not required to comply with the obligations of an ILEC, including the obligation to resell its retail services, when the affiliate is serving in the service territory of BellSouth.

MCI Petition on Proposed Agency Action, pp. 7-8, ¶15. See also, MCI Petition on Proposed Agency Action, p. 2, ¶4.

4. MCI specifically alleges it will be subject to unfair competition. MCI Petition on Proposed Agency Action, p.3, ¶7.

5. In determining whether MCI has standing to protest the certificate granted to BellSouth BSE, Inc., the following observation provides useful guidance:

[N]ot everyone having an interest in the outcome of a particular dispute over an agency's interpretation of the law submitted to its charge, or the agency's application of that law in determining the rights and interests of members of the public, is entitled to participate as a party in an administrative proceeding to resolve that dispute. Were that not so, each interested citizen could, merely by expressing an interest, participate in the agency's efforts to govern, a result that would unquestionably impede the ability of the agency to function efficiently and inevitably cause an increase in the number of litigated disputes well above the number that administrative and appellate judges are capable of handling.

Florida Society of Ophthalmology v. State Board of Optometry, 532 So.2d 1279, 1284 (Fla. 1st DCA 1988).

6. MCI's standing, if any, in this licensing proceeding must be predicated upon a finding that its substantial interests will be affected in manner that differs from the interests of the public

generally in seeing that all applicants are certified in accordance with statutory requirements. Florida Society of Ophthalmology v. State Board of Optometry, *supra* at 1285.

7. The applicable test for determining whether MCI's substantial interests are or will be affected was initially stated in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 782 (Fla. 2nd DCA 1981), *rev. denied* 415 So.2d 1359 (Fla. 1982) and 415 So.2d 1361 (Fla. 1982), and has been consistently applied by the courts since that time. The "Agrico test" is as follows:

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and 2) that his substantial injury is of a type or nature the proceeding is designed to protect.

MCI has failed to satisfy both prongs of the Agrico test.

8. No injury in fact has been alleged by MCI. MCI alleges that "[a]llowing BSE to operate as an ALEC in BellSouth's incumbent monopoly service area without being subject to BellSouth's ILEC obligations allows BellSouth to circumvent the requirements of the ACT, including the resale pricing regulations of the Act, and subjects MCI to unfair competition." MCI Petition on Proposed Agency Action, p. 3, ¶7. The exclusive remedy for MCI's alleged injury has been provided by the Legislature in Chapter 364, Fla. Stat. By law, the Commission has "continuing oversight jurisdiction over cross-subsidization, predatory pricing, or other similar anti-competitive behavior and may investigate, upon complaint or its own motion, allegations of such practices." See, Section 364.3381(3), Fla.Stat. Inasmuch as BellSouth BSE, Inc. has not commenced operation in Florida, MCI's allegations about anticompetitive and unfair activities are, at best, premature. If and when anticompetitive or unfair activities manifest themselves, a complaint alleging such activities

should be filed with the Commission pursuant to Section 364.3381(3), Fla. Stat.

9. The second prong of the Agrico test is whether the type of injury pled is that which the applicable statute are intended to protect. The main thrust of MCI's Petition is the allegation that the grant of an alternative local exchange telecommunications service certificate is violative of the Federal Telecommunications Act.. See, MCI Petition on Proposed Agency Action, p.2, ¶4 and pp. 7-8, ¶15.

10. In addition, MCI alleges that it will suffer purely economic damages by BellSouth BSE, Inc.'s entry into the market. MCI Petition on Proposed Agency Action, pp. 6-7 ¶

11. The general rule in Florida with respect to alleged economic injury has been expressed as follows:

[I]n licensing or permitting proceedings a claim of standing by third parties based solely upon economic interest is not sufficient unless the permitting or licensing statute contemplates consideration of such interests.

Florida Medical Association v. Department of Professional Regulation, 426 So.2d 1112, 1118 (Fla. 1st DCA 1983). See also Agrico, supra at 482; Florida Medical Center v. Department of Health and Rehabilitative Services, 484 So.2d 1292, 1294 (Fla. 1st DCA 1986) and Boca Raton Mausoleum v. Department of Banking and Finance, 511 So.2d 1060, 1064 (Fla. 1st DCA 1987).

12. Review of the statute authorizing the certification of alternative local exchange telecommunications companies demonstrates that the injuries alleged by MCI are not the type of injuries that this type of administrative proceeding was designed to protect.

13. Section 364.337(1) and (2), Fla. Stat., was intended to put competition in the local exchange telecommunications market. The Commission was directed to "grant a certificate of authority to provide alternative local exchange service upon showing that the applicant has sufficient

technical, financial and managerial capability to provide such service in the geographic area proposed to be served." Section 364.337(1), Fla. Stat. MCI has not alleged that BellSouth BSE, Inc.'s application is deficient in any of the above respects.

14. As a consequence, MCI has failed to allege any injury of a type or nature that this type of administrative proceeding was designed to protect. As provided in Section 364.377(1), Fla. Stat.:

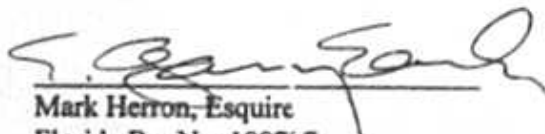
It is the intent of the Legislature that the Commission act expeditiously to grant certificates of authority under this Section and that the grant of certificates not be affected by application of any criteria other than that specifically enumerated in this subsection. (emphasis added).

15. MCI has stipulated to all the factors that an applicant must possess in order to receive a certificate of authority to provide alternative local exchange telecommunications service under Section 364.337(1) and (2), Fla. Stat. See, Section 120.80(13)(b), Fla. Stat.

THEREFORE, the Petition on Proposed Agency Action filed by MCI in this docket should be DISMISSED.

Dated this 5th day of December, 1997.

Respectfully Submitted,



Mark Herron, Esquire
Florida Bar No. 1997.7

E. Gary Early, Esquire
Florida Bar No. 325147

AKERMAN, SENTERFITT & EIDSON, P.A.
216 South Monroe Street, Suite 200
Tallahassee, Florida 32301
(850) 222-3471
Attorneys for BellSouth BSE, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties by United States mail or hand delivery this 5th day of December, 1997:

By Hand Delivery to:

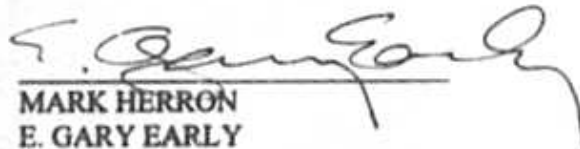
Martha Carter Brown
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd., Room 390-M
Tallahassee, FL 32399-0850

Joseph A. McGlothlin
Vicki Gordon Kaufman
117 S. Gadsden Street
Tallahassee, FL 32301
Counsel for Florida Competitive Carriers Association

Richard D. Melson
Hopping Green Sams & Smith
Post Office Box 6526
Tallahassee, FL 32314
Counsel for MCI Telecommunications Corp.

By U.S. Mail to:

Thomas K. Bond
MCI Telecommunications Corp.
780 Johnson Ferry Road
Suite 700
Atlanta, GA 30342


MARK HERRON
E. GARY EARLY