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November 17, 1997

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

Re: Docket No. 971056-TX

Dear Ms. Bayó:

Enclosed for filing on behalf of MCI Telecommunications Corporation in the above docket are the original and 15 copies of MCI Telecommunications Corporation's Response to BellSouth BSE, Inc.'s Motion to Dismiss.

By copy of this letter this document has been provided to the parties on the attached service list.

Very truly yours,

Richard D. Melson

Richard D. Melson

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 971056-TX

Filed: December 17, 1997

**MCI'S RESPONSE IN OPPOSITION TO
 BELL SOUTH BSE'S MOTION TO DISMISS**

MCI Telecommunications Corporation ("MCIT") and MCI metro Access Transmission Services, Inc. ("MCIm") (collectively "MCI") hereby respond to the Motion to Dismiss ("Motion") filed by BellSouth BSE, Inc. ("BSE") on December 5, 1997. The Motion should be denied for the reasons set forth below.

BACKGROUND

1. The underlying premise of BSE's Motion is that MCI's standing to protest the proposed grant to BSE of a certificate as an alternative local exchange company (ALEC) and the Commission's consideration of BSE's application are governed exclusively by state law. Because BSE is an affiliate of BellSouth Telecommunications, Inc. ("BellSouth"), however, the Commission is obliged to give consideration to Section 251 and 252 of the Telecommunications Act of 1996 ("Act"), in addition to the certification provisions of Chapter 364, in granting a certificate to BSE. The Act imposes certain legal obligations on BellSouth and confers certain legal rights on MCI. In the service territory of the incumbent BellSouth, the only purpose of BellSouth's sham CLEC is to circumvent BellSouth's current legal

and contractual obligations. When the interplay between federal and state law is considered, it is clear that MCI has standing to protest the grant of a certificate which authorizes BellSouth to circumvent its obligations.

2. MCI concedes that Section 364.337(1), Florida Statutes, provides that the criteria for the grant of a certificate as an alternative local exchange carrier are "sufficient technical, financial, and managerial capability" to provide such service. MCI is not challenging BSE's technical, financial and managerial capability.

3. MCI's protest does not challenge the Commission's action in granting BSE a certificate to provide service outside of the service territory of BellSouth in its capacity as an incumbent local exchange carrier (ILEC).

4. MCI's protest does challenge the Commission's action in granting BSE a certificate that permits BSE to operate as an ALEC in the service territory currently served by BellSouth in its capacity as an ILEC. MCI filed its protest because this portion of the proposed order would allow BellSouth to circumvent provisions of the Telecommunications Act of 1996. Based upon the provisions of the Act, MCI requested that this Commission determine that any certificate granted to BSE must either (i) restrict BSE from operating as an ALEC in the service territory of BellSouth, or, in the alternative, (ii) determine that when BSE does provide service in the territory of BellSouth that it

will be subject to all of the duties and obligations of the incumbent LEC, BellSouth.

STANDING

5. BSE correctly states the general rule regarding standing in Florida administrative proceedings, but misapplies that rule to the facts of this case. In order to have standing to request a formal proceeding, MCI must show: (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a formal proceeding; and (2) that the injury is of a type or nature which the proceeding is designed to protect. Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 1st DCA 1981). MCI meets both branches of this test.

Injury of Sufficient Immediacy

6. MCI suffers an immediate injury when BSE is granted a certificate by the Commission which authorizes BSE to operate as an ALEC in the service territory of BellSouth the ILEC. Under such circumstances, BSE serves no purpose other than allowing BellSouth to circumvent its legal obligations to MCI. Either: (a) BSE will charge the exact same rates for retail services as BellSouth, in which case what is BSE's purpose; or, (b) BSE will charge a lower rate, in which case MCI is immediately harmed because the wholesale discount on the lower rate is not available to MCI. Unless BSE is a farce and plans to charge rates which are identical to BellSouth's, the first customer BSE serves will

harm MCI because BellSouth will have circumvented its legal obligations to MCI.

7. The Florida courts have found that when there is a regulatory scheme which prohibits an entity from engaging in specific activity, the grant to such an entity of a certificate to engage in the prohibited activity is an immediate injury to those who are entitled to the protection of the regulatory scheme. See, Florida Medical Association v. Department of Professional Regulation, 426 So.2d 1112, 1114-1115 (Fla. 1st DCA 1983). By the same reasoning, when there is a regulatory scheme which requires an entity to comply with specific obligations, the grant of a certificate which allows the entity to circumvent those obligations is an immediate injury to the obligees. In its motion to dismiss, BSE states that MCI's standing must be predicated upon a finding that MCI's substantial interests differ from the interests of the public generally. (Motion to Dismiss, pp. 2-3) Obviously MCI's rights differ from those of the public generally. MCI has specific contractual and statutory rights of access to BellSouth's network and services which are not shared by the public generally.

8. The 1996 Act reflects Congress' recognition that competition in the local telephone market would take years to develop (and in some areas might not develop at all) if local entry required each new entrant to replicate the local services infrastructure network. Accordingly, Section 251(b) of the Act imposes various duties on all LECs. Section 251(c) of the Act

imposes additional duties on incumbent LECs such as BellSouth. Among these additional duties, ILECs have the duty to provide unbundled access to network elements. The Act requires that UNEs be provided on terms that are just reasonable and nondiscriminatory. §251(c)(3). Under the Act, ALECs have no obligation to provide unbundled access to network elements. Thus, if BSE is permitted to function as an ALEC while operating in the service territory of BellSouth, it can avoid the imposition of this duty. Telecommunications facilities and equipment which would have been part of BellSouth's network could be transferred to BSE in an attempt to prevent ALECs from exercising their right to unbundled access.

9. The Act also imposes the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers" §§ 251(c)(3) and (4). The Act prohibits ILECs from imposing any unreasonable or discriminatory conditions on the resale of such services. § 251(c)(4)(B). Section 252(d)(3) of the Act, in turn, mandates that the wholesale rates charged under Section 251(c)(4) be based on retail rates less "the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier" in providing the services at wholesale rather than retail.

10 Since the wholesale rate is based on a discount off of the monopoly's retail price, new entrants using resale cannot

exert competitive pressure on the wholesale rate. Indeed, if the incumbent monopoly raises its retail rate, the wholesale rate will necessarily increase proportionally. If BSE is allowed to resell BellSouth's services in BellSouth's territory, ALECs relying on resale still will not be able to influence the wholesale rate, but the wholesale rate will not be linked to BSE's retail rate. Thus, ALECs will be subject to price squeezes and unfair competition. BSE can keep competitors out of the resale market by selling at a price that merely covers its costs, while BellSouth continues to make profits off of both its retail and wholesale services.

11. If BSE is allowed to resell BellSouth's services in BellSouth's territory, not only would competitors be subject to price squeezes, but the wholesale prices available to ALECs would never decrease. Under the statutory scheme created by the Act, as BellSouth lowers its retail rate in response to competitive pressures, such as competition from ALECs using their own facilities or unbundled network elements, wholesale rates charged to ALECs decrease. Having a BellSouth ALEC, however, would relieve BellSouth of any incentive to ever lower rates. Any members of a service category who are likely to move to competing carriers, for example, high-end residential customers, could be targeted by BSE, while BellSouth's retail rates (and hence, wholesale rates) for the remaining customers stay the same or even increase.

12. In addition to allowing BellSouth to circumvent its obligations as an ILEC, if BSE is allowed to operate as an ALEC in BellSouth's territory, it will result in significant customer confusion and abuse of market power. BellSouth BSE intends to go into business as "BellSouth BSE". It intends to market under the name BellSouth. It intends to use the BellSouth logo. It intends to market in the area currently served by BellSouth in its capacity as an ILEC.¹ Clearly, BellSouth BSE's customers will perceive BellSouth BSE, Inc., to be the same entity as BellSouth. Besides conferring its name on the subsidiary, BellSouth will be the source of both capital and the management expertise of BellSouth BSE. Further, BellSouth does not intend to charge BellSouth BSE for the right to use the BellSouth name and logo.² Certainly BellSouth has no intention of allowing other ALECs this privilege. The Act was designed in large part to prevent incumbents from abusing their market power. Under BSE's proposal, however, BSE would have all of the benefits of that market power with none of the restrictions.

13. BellSouth's attempt to circumvent the Act by using the device of a subsidiary is not unique. Recently, regulators elsewhere have taken measures designed to prevent ILECs from using subsidiaries to avoid their obligations. On November 20,

¹ See November 5, 1997, Transcript of Testimony of Robert C. Scheye, pages 16-26, Docket No. 97-361-C, Before the South Carolina Public Service Commission.

² *Id.* at pp. 17 and 25.

1997, for example, the Texas Public Utility Commission denied GTE Communication Corporation's application to operate as a CLEC in the territory of GTE Southwest, Inc., its affiliate local exchange carrier. Texas Public Utility Commission, Docket No. 16495.

14. For the reasons discussed above, if BSE is granted a certificate by the Commission which authorizes BSE to operate as an ALEC in the service territory of BellSouth the ILEC, the harm to MCI is of sufficient immediacy to give MCI standing in this matter.

**Injury That The Proceeding Is
Designed to Protect**

15. Congress understood that ILECs would retain strong incentives to obstruct their prospective competitors' efforts to enter the local market. In particular, Congress recognized that allowing ILECs to dictate the rates, terms, and conditions upon which their prospective competitors may access the ILECs' bottleneck facilities would stifle competition just as surely as statutory or regulatory restrictions on entry. Therefore, the Act contains a number of provisions specifically designed to prevent incumbents from acting on their built-in incentives to price new entrants out of the market by charging unreasonable rates or imposing unreasonable restrictions and discriminatory conditions for interconnection, network elements, resale of incumbent services, and other statutorily mandated forms of competitive access. As discussed above, the Act was designed in

large part to prevent incumbents from abusing their market power. Under BSE's proposal, however, BSE would have all of the benefits of that market power with none of the restrictions.

16. BSE argues that MCI does not have an interest under Section 364.337 in being protected from the licensure of a local competitor who is an affiliate of an ILEC. This is not controlling, however, given the existence of the federal statute which grants MCI specific rights which would be violated by granting such a certificate. In Florida Medical Association v. Department of Professional Regulation, 426 So.2d 1112 (Fla. 1st DCA 1983), the court specifically held that the "zone of interest" inquiry is not limited to the statute under which licensure is authorized.

Neither Shared Services [426 So.2d 56], supra, nor Agrico Chemical, upon which it relies, is authority for the proposition that the basis for standing must be found within the particular statute being implemented by the agency action.

Id. at 1117-1118.

In this case, the federal statutes imposing obligations on BellSouth and conferring rights on competitors such as MCI are sufficient to confer standing.

17. Section 120.13(d), Florida Statutes, specifically provides that:

Notwithstanding the provisions of this chapter, in implementing the Telecommunications Act of 1996, Pub. L. No. 104-104, the Public Service Commission is

authorized to employ procedures consistent with that act.

The Act imposes obligations on BellSouth and confers rights on MCI. MCI submits that the Commission has authority under this section to permit MCI to participate in BSE's certification proceeding to the extent necessary to protect its rights under Section 251 and 252 of the Act.

WHEREFORE, for the reasons stated above, BSE's Motion to Dismiss MCI's protest must be denied.

RESPECTFULLY SUBMITTED this 17th day of December, 1997.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties by U.S. Mail or Hand Delivery (*), this 17th day of December, 1997.

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