

ORIGINAL

MCWHIRTER REEVES
ATTORNEYS AT LAW

TAMPA OFFICE:
400 NORTH TAMPA STREET, SUITE 2450
TAMPA, FLORIDA 33602
P. O. BOX 3350 TAMPA, FL 33601-3350
(813) 224-0866 (813) 221-1854 FAX

PLEASE REPLY TO:

TALLAHASSEE

TALLAHASSEE OFFICE:
117 SOUTH GADSDEN
TALLAHASSEE, FLORIDA 32301
(850) 222-2525
(850) 222-5606 FAX

September 7, 2001

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
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Re: Docket No.: 960786-TL

Dear Ms. Bayo:

On behalf of KMC Telecom, Inc. (KMC), enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ KMC Telecom, Inc.'s Opposition to BellSouth Motion and Staff Recommendation to Remove Testimony from hearing Track.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Consideration of BellSouth Telecommunications,)
Inc.'s entry into interLATA services pursuant to) Docket No. 960786-TL
Section 271 of the Federal Telecommunications)
Act of 1996.) Filed: September 7, 2001

**KMC TELECOM, INC.'S OPPOSITION TO BELLSOUTH MOTION AND
STAFF RECOMMENDATION TO REMOVE TESTIMONY FROM
HEARING TRACK**

KMC Telecom, Inc., ("KMC") hereby submits its Response in Opposition to the Staff recommendation to grant the BellSouth Motion to Strike and to remove additional portions of KMC's Rebuttal Testimony ("Staff Recommendation"). By motions dated August 17 and 21, 2001, BellSouth seeks to strike portions of various ALEC witnesses' testimony, including portions of the two KMC witnesses' testimony.¹ Although the BellSouth motion ostensibly seeks to exclude this testimony on the basis that it "relates to BellSouth's Operational Support System" and is being "addressed via third-party OSS testing,"² the motion actually targets testimony that addresses BellSouth's provision of, *inter alia*, loops (Checklist item iv). Likewise, by written Memorandum dated August 31, 2001, the Florida Staff recommended that additional testimony not covered by the BellSouth motion also be removed from the hearing track,³ despite the fact that this testimony addresses non-OSS issues and conforms to the prior Orders issued in this proceeding.

The testimony targeted by BellSouth and Staff does not address the functionality of OSS, which the Commission has decided will be covered by the third-party test, but rather

¹ BellSouth seeks to strike part of the testimony of KMC witnesses Mario Espin and Jim Sfakianos.

² *Motion to Strike* at page 1.

³ In a conference call hosted by Staff on August 30, 2001, Commission Staff also informed the participants that it would recommend that the BellSouth motion be granted. While KMC disagrees with the

(Footnote cont'd on next page)

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provides key factual evidence that is critical to this Commission's consideration of compliance with the non-OSS portions of the section 271 Checklist. Such evidence must be considered for this Commission to meet the statutory duty established by section 271(d) of the Communications Act, as amended.⁴

Section 271(d)(2)(B) of the Act requires that the FCC consult with the relevant State Commission "in order to verify the compliance of the Bell operating company with the requirements of subsection (c)." Subsection (c), in turn, encompasses the competitive checklist, as well as the question of Track A/Track B compliance. Since BellSouth is proceeding under an assertion of Track A compliance, this Commission must be in a position to verify BellSouth's demonstration that it is actually providing access to each of the fourteen items on the competitive Checklist. Therefore, this Commission must consider not only whether BellSouth has a paper offering, but *whether BellSouth is actually providing each item in practice*. The Commission has previously recognized this, as the issues delineated for hearing called for factual testimony on fact-intensive checklist items – like loops.⁵ The KMC testimony at issue goes solely and directly to the heart of this matter and as such must be considered in the evidentiary track.

The KMC testimony has absolutely nothing to do with the functioning of BellSouth's OSS, but rather relates solely and directly to BellSouth's failure to provide functioning T-1 loops to KMC. The testimony identifies significant problems KMC has experienced in its

(Footnote cont'd from previous page.)

Staff position, it is certainly grateful for the opportunity to discuss this matter afforded by the conference call.

⁴ 47 U.S.C. 151, *et seq.* (hereinafter "the Act").

⁵ Commissioner Deason's April 25, 2001, Order in this Docket stated that "[t]estimony and exhibits filed in this proceeding shall address [specified] issues," including "Does BellSouth currently provide unbundled local loop transmission . . . pursuant to Section 271 (c)(2)(B)(iv) and applicable rules and orders promulgated by the FCC?" "Does BellSouth currently provide all currently required forms of unbundled loops?" and "Has BellSouth satisfied other associated requirements, if any, for [checklist item iv]?" Order at pages 9 and 12.

attempt to provide its customers with predictable and reliable T-1 service, and explains the consequences to both KMC and its customers. Exclusion of this testimony would needlessly limit this Commission's view of the marketplace on a very critical issue.

The Espin and Sfakianos testimony details KMC's actual marketplace experience with BellSouth and BellSouth's corresponding failure to provide KMC with non-discriminatory access to loops as required by the Act. As such, it fits squarely into Checklist item 4 of the Act and is therefore entirely within the scope of testimony permitted by Commissioner Deason's Order. (*See* Issue 5). The testimony of these two KMC City Directors is precisely the type of factual information other state commissions have considered in their reviews, and that the FCC has requested be evaluated at the state level.⁶ Without the KMC testimony at issue, this evidence is not likely to be entered into the record. The KMC testimony is critical to this Commission's consideration of whether BellSouth is providing nondiscriminatory access to network elements other than OSS.

Unfortunately, it may be in some party's interest to distort the true scope of the OSS test. Since the vague term "Operations Support Systems" could conceivably encompass an almost unlimited universe, a third party test could be construed to cover most of the competitive checklist. However, such a result is unwise. First, the third party test was never designed to and has never been used to replace a State Commission's role as arbiter of factual evidence. Second, third party testers are ill-equipped to consider the evidence that BellSouth and Staff seek to refer to it. Could the tester, for example, hold hearings in order to resolve competing factual assertions? Significantly, several BellSouth witnesses recently testified before the South Carolina

⁶ *See, for example, Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd. 3953, ¶¶ 8, 20, 34-36 and 293-295 (rel. Dec. 22, 1999).

Commission to the limited utility of the third party test, and to the fact that the State Commission must only consider the test results along with factual evidence.⁷

Third, the attempt to refer evidence to the third party test as suggested by BellSouth and Staff raises serious questions of neutrality and responsibility. Testers have no responsibility to ensure that Florida consumers receive safe and adequate service, and they certainly lack the statutory role the U.S. Congress reserved for the State Commission.

Finally, failure to consider factual evidence would lead to a procedural *non sequitur* at the FCC when the BellSouth application eventually finds its way there. In light of the restrictive 90-day timeframe mandated by statute, the FCC has asked that State Commissions resolve factual issues prior to recommending section 271 authority. Referring factual testimony to the third party tester fails in this regard, and will place an impossible burden on the FCC. The absence of a clear factual record would almost certainly cause the FCC to reject such an application, regardless of its actual merit (or lack thereof).

Conclusion

This Commission must consider whether BellSouth is actually provisioning checklist items in compliance with the Act. Accordingly, evidence from competitors regarding BellSouth's inability to provide loops must be evaluated by the Commission prior to any determination of checklist compliance. Factual, party-specific evidence has been and must remain at the heart of every successful State Commission section 271 evaluation. The Commission should therefore decline to adopt the Staff recommendation and deny the BellSouth Motion to Strike.

⁷ *Application of BellSouth Telecommunications, Inc. to Provide In-Region InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996, Docket No. 2001-209-C, Testimony of BellSouth Witness Ronald Pate, August 23-27, 2001.*



Andrew M. Klein
Kelley Drye & Warren LLP
1200 19th Street, NW
Washington, DC 20036
(202) 887-1257 Telephone
(202) 955-9792 Telefax

Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman, Arnold & Steen, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
(850) 222-2525 Telephone
(850) 222-5606 Telefax

Attorneys for KMC Telecom, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing KMC Telecom, Inc.'s Opposition to BellSouth Motion and Staff Recommendation to Remove Testimony from hearing Track has been furnished by (*) hand delivery or by U. S. Mail on this 7th day of September, 2001, to the following:

(*) Beth Keating
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

Scott Sapperstein
Intermedia
3625 Queen Palm Drive
Tampa, Florida 33619-1309

Jeremy Marcus
Blumenfeld & Cohen
1625 Massachusetts Avenue
Suite 300
Washington DC 20036

Donna McNulty
WorldCom
325 John Knox Road
Suite 105
Tallahassee, Florida 32303

Nancy B. White
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Miami, Florida 32301

Floyd Self/Norman Horton
Messer Law Firm
Post Office Box 1876
Tallahassee, Florida 32302

James Falvey
e.spire Communications
133 National Business Parkway
Suite 200
Annapolis Junction, MD 20701

Pete Dunbar/Karen Camechis
Pennington Law Firm
Post Office Box 10095
Tallahassee, Florida 32301

Michael Gross
Florida Cable Telecommunications Assoc.
246 E. 6th Avenue
Tallahassee, Florida 32303

Susan S. Masterton
Sprint
Post Office box 2214
MC: FLTLH00107
Tallahassee, Florida 32316-2214

Kim Caswell
GTE
Post Office Box 110
FLTC0007
Tampa, Florida 33601

Ken Hoffman
Rutledge Law Firm
Post Office Box 551
Tallahassee, Florida 32302-0551

Richard Melson
Post Office Box 6526
Tallahassee, Florida 32314

Andrew Isar
Ascent
3220 Uddenberg Lane, Suite 4
Gig Harbor, WA 98335

Matthew Feil
Florida Digital Network, Inc.
390 North Orange Avenue
Suite 2000
Orlando, Florida 32801

Angela Green, General Counsel
Florida Public Telecommunications Assoc
125 S. Gadsden Street
Suite 200
Tallahassee, Florida 32301-1525

Patrick Wiggins
Katz, Kutter Law Firm
12th Floor
106 East College Avenue
Tallahassee, Florida 32301

Scheffel Wright
Landers Law Firm
Post Office Box 271
Tallahassee, Florida 32302

Office of Public Counsel
c/o The Florida Legislature
111 W. Madison Street
Suite 812
Tallahassee, Florida 32399-1400

Rodney L. Joyce
600 14th Street, N.W.
Suite 800
Washington DC 20005-2004

Catherine F. Boone
Covad Communications Company
10 Glenlake Parkway, Suite 650
Atlanta, GA 30328-3495

John Kerkorian
MPower
5607 Glenridge Drive, Suite 300
Atlanta, GA 30342

CWA (Orl)
Kenneth Ruth
2180 West State Road 434
Longwood, FL 32779

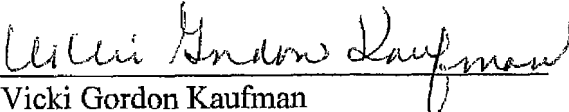
ITC^ DeltaCom
Nanette S. Edwards
4092 South Memorial Parkway
Huntsville, AL 35802-4343

Network Access Solutions Corporation
100 Carpenter Drive, Suite 206
Sterling, VA 20164

Swidler & Berlin
Richard Rindler/Michael Sloan
3000 K. St. NW #300
Washington, DC 20007-5116

Suzanne F. Summerlin
IDS Telecom L.L.C.
1311-B Paul Russell Road, Suite 201
Tallahassee, Florida 32301

Jim Lamoureux
AT&T Communications, Inc.
1200 Peachtree Street, NE
Room 8068
Atlanta, GA 30309


Vicki Gordon Kaufman