

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
ORDER NO. PSC-98-0562-PCO-TX
ISSUED: April 22, 1998

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER DENYING MOTIONS TO DISMISS

BY THE COMMISSION:

BACKGROUND

BellSouth BSE, Inc. (BSE), is a wholly owned subsidiary of BellSouth BSE Holdings, Inc., which in turn is a wholly owned subsidiary of BellSouth Corporation, Inc. (BellSouth). On August 15, 1997, BSE filed an application for a certificate to provide alternative local exchange telecommunications service in Florida. By PAA Order No. PSC-97-1347-FOF-TX, issued October 27, 1997, the Commission granted BSE's application for a certificate to provide service as an alternative local exchange carrier (ALEC). On November 17, 1997, two timely petitions on the PAA order were filed by MCI Telecommunications Corporation, MCImetro Access Transmission Services, Inc. (collectively, MCI), and the Florida Competitive Carriers Association (FCCA). On December 5, 1997, BSE timely filed Motions to Dismiss both protests. In addition, Petitions For Leave to Intervene were filed by AT&T Communications of the Southern States, Inc. (AT&T), Time Warner AxS of Florida, L.P. (Time Warner), and Teleport Communications Group, Inc. (TCG). BSE filed timely Motions to Dismiss each of these Petitions For Leave to

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Intervene. BellSouth Telecommunications, Inc., also filed a Petition For Leave to Intervene which was withdrawn.

MOTIONS TO DISMISS

In its Motions to Dismiss, BSE makes the same argument in each motion that the petitioning parties, FCCA, MCI, AT&T, TCG and Time Warner lack standing to protest Order No. PSC 97-1347-FOF-TX or to intervene in these proceedings. BSE alleges that the parties have failed to meet the two-prong test of Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So.2d 478 (Fla. 2nd DCA 1981); that is, according to BSE, they have failed to allege any injury in fact of sufficient immediacy to warrant a hearing, or any injury of a type or nature which the proceeding is designed to protect. In support of this argument, BSE states that the parties have claimed only an economic threat which is not sufficient to establish standing in licensing proceedings. Florida Medical Association v. Dept of Professional Regulation, 426 So.2d 1112 (Fla. 1st DCA 1983). In addition, BSE argues that a purely economic threat is not the type of injury the statute was intended to protect where the purpose of the statute is to create competition. BSE further states that the parties have failed to allege any deficiencies pursuant to Section 364.337, Florida Statutes, in BSE's application. Therefore, according to BSE, there is no injury alleged, and if any injury has been alleged it is not of a type that the proceeding was designed to protect.

MCI's Petition on PAA Order No. 97-1347-FOF-TX alleges that allowing BSE to operate in BellSouth's service area would harm MCI by denying MCI the right to effectively compete as a reseller. This is based on MCI's argument that without any restrictions, BSE, as a subsidiary of BellSouth, would not have the same incentive or need to make a profit that other independent ALECs would have and that with BSE serving as an ALEC, BellSouth would have no incentive to reduce retail rates. MCI also alleges that it will be harmed by allowing BellSouth to circumvent its obligations to MCI under the Telecommunications Act of 1996 (the Act). In its Response to the Motion to Dismiss, MCI reiterates that the Commission must look to both state and federal law to reach the harm alleged. MCI alleges that to allow BSE to operate in the area where BellSouth serves as the ILEC will: 1) subject other ALECS to price squeezes; 2) eliminate any incentive for BellSouth to decrease its retail rates; and 3) result in significant customer confusion and abuse of market power. MCI further alleges that the Act was designed to prevent

abuse of market power by ILECs. MCI also states that the Commission's authority to look to the Act in this proceeding is found in Section 120.80(13)(d), Florida Statutes, which provides that, notwithstanding the provisions of Chapter 120, Florida Statutes, in implementing the Act, the PSC is authorized to employ procedures consistent with the Act.

The arguments in support of FCCA's Petition on PAA Order No. 97-1347 and its Response are substantially similar to those raised by MCI. However, FCCA's pleadings emphasize that in its PAA order the Commission acknowledged that implementation of the Act bears on the PSC's consideration of BSE's application for an ALEC certificate. [Order at page 2.]

In considering the Motions to Dismiss, we view the pleadings of the petitioners in the light most favorable to the petitioners. Varnes v. Dawkins, 624 So. 2d 349 (Fla 1st DCA 1993). Also, in reviewing the Motions to Dismiss filed by BSE, only the issue of standing was raised. In reviewing a challenge to standing, we apply the Agrico test described above. To establish standing any protestor or intervenor must show that there exists an injury in fact of sufficient immediacy to warrant a hearing and that the injury alleged is of the type or nature that the proceeding is designed to protect.

We find that MCI has standing because it is a competitor-ALEC which has alleged an immediate threat of harm by the very granting of ALEC authority to the subsidiary of the ILEC to serve in the ILEC's incumbent territory. The economic harm alleged can be distinguished from that described in licensing cases cited by BSE based on the specific nature of Chapter 364, Florida Statutes, and the Federal Act, and the relationship of BSE's parent, BellSouth, to the competitive environment which these laws were designed to foster. Although BSE is correct that the Florida Statutes are very specific on the criteria to be considered in the granting of ALEC certificates, the petitioners have raised the issue of whether the Act (specifically, Sections 271 and 272) must be considered in approving the ALEC application of a subsidiary of an ILEC Regional Bell Operating Company (BOC). In urging that the Commission must look to the Act, the petitioners cite the protested order. Page two of the protested order discusses whether the granting of an ALEC certificate to BSE will circumvent the then pending Section 271 proceeding in Docket No. 960786-TL, In re: Consideration of BellSouth Telecommunications, Inc.'s Entry Into InterLATA Services Pursuant to Section 271 of the Federal Telecommunications Act of

1996. The Commission found that the ALEC certificate would not circumvent the pending proceedings, but did not look at any other aspects of Sections 271 or 272 of the Act. MCI and FCCA allege that the purpose of the Act is thwarted by granting of this certificate. The Commission has a duty under Section 364.01 (4) (g), Florida Statutes, to "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior" Further, there are certain requirements of Section 272 of the Act applying to BOCs which the Commission did not consider when the certificate was initially approved. In addition, Section 364.335(3), Florida Statutes, authorizes the Commission to issue certificates with modifications in the public interest.

In the Motion to Dismiss FCCA, BSE argues that FCCA is an organization which cannot be affected by the granting of the certificate. We find that FCCA, as an organization which includes ALEC members, has standing to protest the Commission's order for the same reasons discussed above. We have granted participation by many such industry organizations in the past.

Therefore, based on the foregoing analysis and viewing the Petitions in the light most favorable to the petitioners, we find that the petitioners have established standing to protest the Commission's order. The petitioners have met the two prongs of Agrico by sufficiently alleging: 1) an immediate threat of harm to their competitive market by the issuance of a certificate; and 2) that the harm is of a type which both the state and federal statutes are designed to protect. Accordingly, we deny the Motions to Dismiss filed by BSE. The pending Petitions for Leave to Intervene shall be granted administratively.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth BSE, Inc.'s Motion to Dismiss the Petition on Proposed Agency Action filed by MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., is denied. It is further

ORDERED that BellSouth BSE, Inc.'s Motion to Dismiss Florida Competitive Carriers Association's Petition on Proposed Agency Action is denied. It is further

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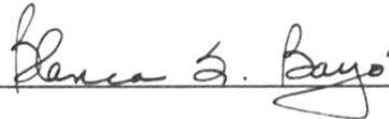
ORDERED that BellSouth BSE, Inc.'s Motion to Dismiss AT&T Communications of the Southern States, Inc.'s Petition to Intervene is denied. It is further

ORDERED that BellSouth BSE, Inc.'s Motion to Dismiss the Petition to Intervene filed by Time Warner AxS of Florida, L.P., is denied. It is further

ORDERED that BellSouth BSE, Inc.'s Motion to Dismiss Teleport Communications Group Inc.'s Petition to Intervene, as amended, is denied. It is further

ORDERED that this docket shall remain open and proceed to hearing.

By ORDER of the Florida Public Service Commission this 22nd day of April, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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 this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.