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E. GARY EARLY

March 2, 1998

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

RE: PSC Docket No. 971056-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 the Motion to Dismiss Petition to Intervene Filed by AT&T Communications of the Southern States, Inc. Also enclosed is a diskette containing the same.

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

Sincerely,



E. Gary Early

ACK

AFA

APP EGE/mcd

CAF

CMI enclosure(s)

CTR cc: All parties of record

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

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

Docket No. 971056-TX

Filed: March 2, 1998

MOTION TO DISMISS PETITION TO INTERVENE FILED BY
AT&T COMMUNICATIONS OF THE SOUTHERN STATES, 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 to Intervene filed by AT&T Communications of the Southern States, Inc. (hereinafter referred to as "AT&T"). In support of this Motion, BellSouth BSE, Inc. states as follows:

1. On February 19, 1998, AT&T filed a Petition for Leave to Intervene 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. AT&T is a certificated interexchange company in Florida. AT&T does not provide local exchange services in the state of Florida. AT&T does not compete with or purchase services from either the proposed alternative local exchange carrier, BellSouth BSE, Inc., or the incumbent local exchange carrier in some areas of the state, BellSouth Telecommunications, Inc.

3. Rule 25-22.039, Florida Administrative Code, provides that

[p]ersons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding, and who desire to become parties may petition the presiding officer for leave to intervene. Petitions for leave to intervene...must conform with Commission Rule 25-22.036(7)(a), and must include allegations sufficient to demonstrate that the intervenor is entitled to participate

in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. Intervenors take the case as they find it.

4. In its petition, AT&T alleges that, by granting BellSouth BSE, Inc.'s certificate, its substantial interests would be affected as follows:

6. Allowing BellSouth to provide local exchange services in the geographical areas in which it serves as the ILEC would affect AT&T's substantial interests by undermining and subverting the legal relationships created by the Act, thereby subjecting AT&T to anti-competitive and unfair treatment.

7. Granting BellSouth BSE the authority to engage in the local exchange business in areas in which BellSouth is the ILEC would subvert the relationship established by the Act between the retail price BellSouth charges its customers and the wholesale prices it charges its competitors. Under the Act, if BellSouth lowers its retail price, the effect of the wholesale discount lowers its competitors' costs simultaneously, and they can respond to BellSouth competitively by lowering their own prices. Thus, BellSouth, the ILEC, can not defeat competition by lowering its retail price without also lowering the corresponding wholesale price. However, if BellSouth is permitted to sell its services at a discount to "itself" (the subsidiary ALEC), then resell to customers, this mandatory relationship would be circumvented. The proposed statewide certificate would enable BellSouth to circumvent the relationship between the ILEC's retail and wholesale prices that Congress created as one of the primary means of introducing competition to the local exchange market.

8. In its regulation of ALECs, including BellSouth BSE, Inc., the Commission has the power and the obligation to prevent anti-competitive behavior and to ensure that all telecommunications companies are treated fairly. Sections 364.01(g) and 364.337(5), Florida Statutes.

9. The Commission cannot grant the authority requested by BellSouth BSE, Inc. without affecting AT&T's substantial interests. The Commission must take measures to ensure fair treatment of all telecommunications providers who wish to provide alternative local exchange service in areas in which BellSouth is the ILEC. This can be ensured adequately and effectively only by prohibiting BellSouth's subsidiary from providing ALEC service in geographical areas in which BellSouth serves as the ALEC.

AT&T Petition for Leave to Intervene, pp. 3-4, ¶6-9.

5. In determining whether AT&T 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. AT&T'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 AT&T'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.

AT&T has failed to satisfy both prongs of the Agrico test.

8. No injury in fact has been alleged by AT&T. AT&T alleges that the grant of the certification "would subvert the relationship established by the Act between the retail price BellSouth charges its customers and the wholesale prices it charges its competitors." AT&T's Petition to Intervene, p. 3, ¶7. Since AT&T does not purchase local exchange network elements from BellSouth Telecommunications, Inc., and does not compete in the local exchange market, AT&T has not demonstrated that it will suffer injury in fact of sufficient immediacy to entitle it to a hearing.

9. In addition to the lack of a factual basis for AT&T's standing, the exclusive remedy for AT&T'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. BellSouth BSE, Inc. has not commenced operation in Florida. Therefore, not only will AT&T not be affected to any extent greater than the general public by any alleged anticompetitive or unfair activities, AT&T'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.

10. The second prong of the Agrico test is whether the type of injury pled is that which the applicable statute is intended to protect. The main thrust of AT&T's Petition is the allegation that the grant of an alternative local exchange telecommunications service certificate is violative of the

Federal Telecommunications Act.. See, AT&T Petition for Leave to Intervene, pp. 2-5, ¶¶5-8.

11. Review of the statute authorizing the certification of alternative local exchange telecommunications companies demonstrates that the injuries to others alleged by AT&T are not the type of injuries that this type of administrative proceeding was designed to protect.

12. Subsections (1) and (2) of Section 364.337, Fla. Stat., were intended to establish 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. AT&T has not alleged that BellSouth BSE, Inc.'s application is deficient in any of the above respects.

13. As a consequence, AT&T 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.:

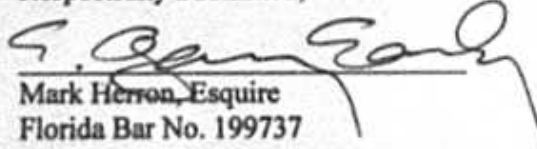
It is the intent of the Legislature that the Commission act expeditiously to grant certificates of authority under this Section and that the grant of certificates not be affected by application of any criteria other than that specifically enumerated in this subsection. (emphasis added).

14. AT&T 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 for Leave to Intervene filed by AT&T should be DISMISSED.

Dated this 2nd day of March, 1998.

Respectfully Submitted,



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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 2nd day of March, 1998:

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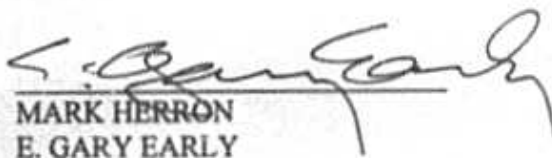
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