

FLORIDA PUBLIC SERVICE COMMISSION
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MEMORANDUM

MARCH 26, 1998

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TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (BROWN, BEDELL) *CB NCB*
DIVISION OF COMMUNICATIONS (ISLER, MUSSELWHITE) *BJM Aji*
SAS fwd#

RE: DOCKET NO. 971056-TX - APPLICATION FOR CERTIFICATE TO
PROVIDE ALTERNATIVE LOCAL EXCHANGE TELECOMMUNICATIONS
SERVICE BY BELL SOUTH BSE, INC.

AGENDA: APRIL 7, 1998 - REGULAR - DECISION PRIOR TO HEARING -
MOTIONS TO DISMISS - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\971056.RCM

CASE 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, MCI Metro 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. (TimeWarner), and Teleport Communications Group, Inc. (TCG). BSE has filed timely Motions to Dismiss each of these Petitions For

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Leave to Intervene. BellSouth also filed a Petition For Leave to Intervene which has since been withdrawn. No requests for oral argument were filed with the subject pleadings. This recommendation addresses all pending petitions on intervention and motions to dismiss.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant BSE's Motions to Dismiss the Petitions on PAA Order No. 97-1347-FOF-TX filed by MCI and FCCA?

RECOMMENDATION: No, the Motions to Dismiss should be denied. The petitions of MCI and FCCA are sufficient to establish standing in this proceeding. (Brown, Bedell)

STAFF ANALYSIS: As discussed in the Case Background, on November 17, 1997, MCI and FCCA filed petitions on PAA Order No. PSC 97-1347-FOF-TX. That order granted BSE statewide authority to serve as an ALEC. MCI and FCCA have specifically protested BSE's authority to serve as an ALEC in those areas where BellSouth is the incumbent local exchange carrier (ILEC). Both protests are substantially similar, as are BSE's Motions to Dismiss. Therefore, the Motions to Dismiss are presented as one issue in this recommendation.

PLEADINGS

In its Motion to Dismiss, BSE states that FCCA and MCI lack standing to protest Order No. PSC 97-1347-FOF-TX. BSE alleges that FCCA and MCI 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 FCCA and MCI have failed to

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allege any deficiencies 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 Ch.120, 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.]

ANALYSIS

In reviewing the Motions to Dismiss, the Commission must view the Petitions on PAA Order 97-1347 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, it should be noted that the only issue raised by BSE is one of standing. In reviewing a challenge to standing, the Agrico test described above

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applies. 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.

Staff believes 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. First, Chapter 364, Florida Statutes, as well as the Federal Act, are designed to create and foster competition in what has been traditionally a monopoly economic environment. Therefore, entry into the market by the monopoly provider's subsidiary raises the threat of unfair competition which is contrary to both the state and federal statutory schemes. Although BSE is correct that the Florida Statutes are very specific on the criteria to be considered in the granting of ALEC certificates, the protesters 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 Bell South 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.

Staff also recommends that FCCA, as an organization which includes ALEC members, has standing to protest the Commission's order for the same reasons discussed above. The Commission has granted participation by many such industry organizations in the past.

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Based on the foregoing analysis and viewing the Petitions in the light most favorable to the petitioners, staff believes that MCI and FCCA have established standing to protest the Commission's order. The protesters have met the two prongs of AgriCo. Their pleadings have sufficiently alleged that the granting of a certificate to BSE creates an immediate threat of harm to their competitive market, and that the competitive nature of the harm is of a type which both the state and federal statutes are designed to protect. Therefore, staff recommends that BSE's Motions to Dismiss the protests should be denied.

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ISSUE 2: Should the Commission grant the Motions to Dismiss the Petitions to Intervene filed by AT&T, TCG and Time Warner?

RECOMMENDATION: No. The Motions to Dismiss should be denied for the same reasons stated in Issue 1. (Brown, Bedell)

STAFF ANALYSIS: As stated in the Case Background, AT&T, TCG and Time Warner have filed Petitions to Intervene in this proceeding. BSE timely filed Motions to Dismiss all of the Petitions to Intervene on the same grounds alleged in the Motions to Dismiss the protests of FCCA and MCI. Because the arguments are substantially similar, they are not reiterated here. All intervenors are in the same market position as MCI. Therefore, if the Commission approves the Recommendation in Issue 1 and denies the Motions to Dismiss the protests of MCI and FCCA, then the Motions to Dismiss the Petitions to Intervene of AT&T, TCG and Time Warner should also be denied for the same reasons. If the Commission approves the staff recommendation on this issue, the Petitions to Intervene filed by AT&T, TCG and Time Warner will be granted administratively.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: No, if staff's recommendation is approved, this matter will proceed to hearing as scheduled. If the recommendation is denied, then no valid protest to PAA Order No. PSC 97-1347-FOF-TX will remain and the entire order should be made final and effective as of the date of this Agenda Conference. (Brown, Bedell)

STAFF ANALYSIS: The docket should remain open for the Ch. 120 proceeding scheduled to be heard in April. However, if the Commission denies staff's recommendation in Issue 1, then no valid protest will exist and the entire PAA order should be made final and effective as of the date of this Agenda Conference.