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June 15, 1998

VIA HAND DELIVERY

Blanca S. Bayo, Director
Florida Public Service Commission
Division of Records and Reporting
Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0870

Re: Docket No. 971056-TX

Dear Ms. Bayo:

I am enclosing for filing in the above docket the following documents:

1. Joint Brief of the Florida Competitive Carriers Association, MCI Telecommunications Corporation, MCImetro Access Transmission Services, Inc. and AT&T Communications of the Southern States, Inc. 06306-98

2. The Renewed Motion to Supplement the Evidentiary Record submitted by the same parties. 06307-98

3. The following confidential documents:

(a) Confidential section of the Joint Brief; 06308-98
(b) Confidential exhibit to the Renewed Motion to Supplement;
(c) Confidential attachment to the Renewed Motion to Supplement.

The confidential documents identified above are being submitted under the procedures of Rule 25-22.006, Florida Administrative Code, pursuant to the terms of a confidentiality agreement among the parties to the above docket, and to the assertion by BellSouth BSE, Inc. (BSE) that the information therein is proprietary and confidential to BSE. Counsel for BSE will provide the notice of intent contemplated by Rule 25-22.006, Florida Administrative Code, on this date.

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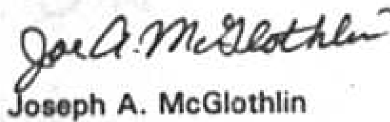
All of the confidential pages have been marked "confidential" and have been placed in a sealed envelope that is attached to this letter.

Please call me if you require any additional information.

Yours truly,



Joseph A. McGlothlin

JAM/pw
Encls.

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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. 9710[illegible]-TX Filed: June 15, 1998

JOINT BRIEF OF FCCA, AT&T, AND MCI

The Florida Competitive Carriers Association ("FCCA"), AT&T Communications of the Southern States, Inc. ("AT&T"), MCI Telecommunications Corporation ("MCIT") and MCImetro Access Transmission Services, Inc. ("MCIm") (hereafter "MCI") hereby submit their post-hearing Brief in this proceeding. For the following reasons, the record demonstrates that the Commission should not allow BellSouth Corporation ("BellSouth") and its affiliated companies, BellSouth BSE, Inc. ("BellSouth BSE") and BellSouth Telecommunications, Inc. ("BellSouth BST"), to circumvent their obligations under state and federal law and undermine real competition in BellSouth BST's ILEC local exchange market by means of a sham alternative local exchange company ("ALEC").

SUMMARY OF ARGUMENT

FCCA, AT&T, and MCI have never objected to BellSouth BSE or its sister companies competing in the territories of other incumbent local exchange companies ("ILECs"). Indeed, BellSouth BST already has a statewide ALEC certificate and could be opening up new Florida markets right now. Unfortunately, BellSouth seems more interested in circumventing its legal obligations to open up its own local monopoly market than in entering new markets as a true ALEC.

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With respect to BellSouth's ILEC service area, BellSouth BSE is a sham entrant because BellSouth BSE is simply BellSouth in a different form The Commission should recognize that BellSouth, the incumbent ILEC, is attempting to re-enter the market in a way that would avoid regulatory requirements imposed on the ILEC by the Telecommunications Act of 1996 and Chapter 364, Florida Statutes. Florida law and the federal Act contain a number of provisions specifically designed to prevent incumbents from acting on their built-in incentives to use their market power to thwart competition. However, under BellSouth BSE's proposal, when operating in BellSouth BST's ILEC service area BellSouth BSE would have all of the benefits of that market power with none of the restrictions. For example, allowing BellSouth BSE to provide ALEC services in BST's ILEC service area would eviscerate the wholesale discount mechanism Congress placed in the 1996 Act to protect the viability of resale as an entrance strategy. If BellSouth's ILEC were to attempt to use its market power and its enormous margin advantage (in the form of access revenues) to drive competition from the market by reducing its retail price, the wholesale discount imposed by Congress would operate to preserve the new entrant's margin by reducing the new entrant's costs in lockstep with BST's reduced retail prices. However, a lower retail price by BSE would reduce the new entrant's margin and squeeze it out of the market, because the wholesale discount obligation is not applicable to BSE. At the same time, because BSE is a BellSouth affiliate, its own bottom line would be subsidized by contributions and expenditures made by other BellSouth entities, and its strategic value would be gauged from the perspective of BellSouth's overall corporate

objectives in any event. Simply put, in the service area of its affiliated ILEC BellSouth BSE would enable BellSouth to escape the economics of resale on which the resale-based competition provisions of the 1996 Act are premised.

BellSouth BSE's witness tried in vain to identify a role for BSE in BellSouth BSE's ILEC service area that the ILEC could not perform. He claimed that BellSouth needs BSE because the FCC's future joint marketing restrictions may hamper BellSouth BST. Mr. Scheye could not say <u>why</u> the application of the 1996 Act's joint marketing restrictions would be problematic. More importantly, he succeeded only in adding an <u>anticipatory</u> circumvention of <u>future</u> legal requirements to the avoidance of existing legal obligations that FCCA, MCI, AT&T and other parties identified. The Commission should not countenance BellSouth's attempt to achieve back-door deregulation.

For these reasons, any certificate to provide alternative local exchange telecommunications service granted to BellSouth BSE must prohibit BellSouth BSE from operating as an ALEC in the service territory of BellSouth BST. In the alternative, if the Commission determines that BellSouth BSE should be allowed to provide <u>local exchange</u> service in the territory of BellSouth BST, the Commission should also order that when BellSouth BSE does so, it will be subject to all of the duties and obligations of the incumbent LEC, BellSouth BST.

<u>Issue 1</u>: In light of the provisions of the Telecommunications Act of 1996 and Chapter 364, Florida Statutes, should the Commission grant BellSouth BSE a certificate to provide alternative local exchange service pursuant to Sections 364.335 and 364.337, Florida Statutes, in the territory served by BellSouth Telecommunications, as the incumbent LEC.

FCCA, MCI, AT&T: No. BellSouth BSE is simply BellSouth in another form. BellSouth BSE's application to provide ALEC service in BellSouth's ILEC territory is simply an effort to re-enter the market and thwart real competition by escaping regulatory requirements, including the requirement that the ILEC's services be offered to competitors at a prescribed wholesale discount.

BST can perform all of the services BSE plans to provide in BST's area. BSE's explanation -- that it is needed because the FCC may impede BST through joint marketing restrictions -- is yet another instance of circumventing federal requirements.

The Commission must use its authority under law to recognize public interest/anti-competitive considerations and 1996 Act requirements and prohibit BSE from offering ALEC services in BST's ILEC area.**

As joint witness Joe Gillan testified: "There is really a single issue of importance to this proceeding: just how many BellSouths does it take to provide local service in its own territory? Consumers will discern only one BellSouth. Investors will evaluate a single BellSouth. No valid purpose would be accomplished by a regulatory system that pretends that there are two." (Tr. 94-95).

The only purpose of BellSouth's proposal is to allow it to circumvent its obligation under state and federal law. The Florida regulatory structure is founded on a fundamental distinction between new entrant local companies (authorized to enter the market no sooner than January 1, 1996) and incumbent local telephone companies, including BellSouth BST, who received authority prior to that date. Chapter 364, Florida Statutes, makes clear that it is the policy of the State of Florida to respect the very real differences between new entrants and incumbent local carriers. See, e.g., F.S. 364.01(4)(c) (directs the Commission to promote competition

by subjecting new entrants to a lesser level of regulatory oversi ht than incumbent local carriers). For the state statute to have meaning, the A .EC designation is intended for an *economic* unit that differs fundamentally from the incumbent local exchange carrier. (Tr. 97).

Similarly, the federal Act is premised on a clear distinction between an incumbent LEC and its entrant-competitors. No such economic distinction can or will exist between BellSouth BSE and BellSouth BST, even if a superficial legal distinction is created.

First, BellSouth BSE will not occupy a unique position in the market. Within BellSouth's region, BellSouth BSE will trade on the same name recognition as BellSouth. (Tr. 98). The legal distinction in its name will have no practical market significance in the eyes of consumers. Second, the Commission should place no faith in the superficial claim that BellSouth BSE will interact with BellSouth BST on an arms-length basis. BellSouth BSE and BellSouth BST only exist to investors as a single economic entity (BellSouth). There are no financial or market incentives for these companies to do anything other than maximize sha eholder value. This single objective is inconsistent with an "arms-length" relationship. (Tr. 98). BellSouth BSE enjoys an identity of ownership with BellSouth BST. As such, there is shareholder-indifference within BellSouth as to whether a service is sold by BellSouth BST or BellSouth BSE: the effect on BellSouth's investments, expenses, revenues and, ultimately, profits is identical. When you own the pants, it does not matter in which pocket you keep your money. (Tr. 105). Of course, this same calculus does not

apply to any other competitor.[1] Only BellSouth-BSE can view BellSouth BST as a partner and not a competitor. (Tr. 105).

Mr. Scheye, BellSouth BSE's witness, acknowledged that BellSouth named BellSouth BSE for the purpose of capitalizing on the BellSouth name. (Tr. 99). Not only does BellSouth BSE intend to go into business as "BellSouth BSE"; it intends to market under the name BellSouth. It intends to use the BellSouth logo.[2] It intends to market in the area currently served by BellSouth BST in its capacity as an ILEC. Clearly, BellSouth BSE's customers will perceive BellSouth BSE, Inc., to be the same entity as BellSouth BST.

As Mr. Gillan stated in his testimony, the BellSouth BSE proposal gives rise to three problems that are readily apparent. First, BellSouth will have gained an ability to improperly benefit its unregulated affiliate through costs incurred by its regulated twin. For instance, BellSouth has recently announced a $20 million advertising campaign intended to promote "BellSouth's" technological skills. Like all product non-specific advertising, these adds will promote BellSouth BSE and BellSouth BST without differentiation. (Tr. 102).

Second, BellSouth BSE would provide BellSouth the ability to discriminate in favor of select customers by offering targeted products through BellSouth BSE that

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[1] The prices that entrant's pay BellSouth BST are a real economic cost they incur. And, if the entrant loses a customer to BellSouth BST, a real market-loss occurs.

[2] BellSouth does not even intend to charge BellSouth BSE for the right to use the BellSouth name and logo. (Tr. 41). Certainly, BellSouth has no intention of allowing other ALECs this privilege.

are not generally available to other BellSouth customers. (Tr. 102). BellSouth BSE would (according to BellSouth) be treated like any other ALEC, with the ability to contract with customers outside of BellSouth's tariffs and otherwise applicable rules.

Third, and perhaps most importantly, BellSouth could use BellSouth BSE to avoid its obligations under the federal Act. (Tr. 102). 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 ILECs provide UNEs on terms that are just reasonable and nondiscriminatory. Section 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.

The Act also imposes on ILECs 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 . . ." Section 251(c)(3) and (4). 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. Thus, the Act imposes an obligation on ILECs to sell services for resale at a prescribed wholesale discount.

The viability of the resale entry option depends upon the sufficiency of the margin between the retail rates of the ILEC, with which entrants must compete, and the wholesale price paid by entrants, which becomes one of the costs they must recover through their own retail prices. Since the wholesale rate is based on a discount applied to the monopoly's retail price, new entrants using resale cannot exert competitive downward pressure on the wholesale rate. Indeed, if the incumbent monopoly ILEC raises its retail rate, the wholesale rate will necessarily increase correspondingly. If BellSouth BSE is allowed to resell BellSouth's services in BellSouth's territory, ALECs relying on resale still will not be able to influence the ILEC's wholesale rate, but the wholesale rate will not be linked to BSE's retail rate, which BellSouth BSE would have the ability to lower. Thus, ALECs would be squeezed between the ILEC's wholesale rate that they pay to the ILEC and the (disconnected) retail rate of the ILEC's affiliate with which they would have to compete. For example, if BellSouth BST's retail rate for basic local service is $10.00 and its wholesale discount is 20%, then ALECs can purchase the wholesale service for $8.00. Under this scenario, the ALEC has a $2.00 window within which it must try to cover its own operating expenses and still be able to offer a low enough price to compete. In contrast, if BellSouth BSE is allowed to compete in BellSouth BST's incumbent territory as an ALEC without restriction, it could purchase the wholesale service for $8.00, and sell it at retail for $9.00. Since the wholesale price remains

$8.00, suddenly, the legitimate ALECs only have a $1.00 margin with which to cover their own expenses and still offer a competitive price. At the same time, BellSouth BSE's ability to make a profit at a retail price of $9.00 would be supported by corporate advertising performed outside the ALEC for which BellSouth did not have to pay (Tr. 41); by the name recognition value of the BellSouth name and logo, which are free to BellSouth BSE (Tr. 41); or other reasons or sources that are discussed in the confidential section of this brief.

Even if BSE has no margin at a retail price it establishes below that of the ILEC, any "loss" would be a mere transfer payment that BellSouth BST could easily subsidize with its stream of access revenues.[3] (Tr. 121). The effect on BellSouth would be no different than if the ILEC were to reduce its retail price, except for the impact that the contrived disconnect between the new entrants' cost of acquiring services and the retail price with which they must compete would have on bona fide new entrants. In effect, BellSouth would have cut the wholesale discount rate in half, and the "retail" price *relevant* to the wholesale entry option would be different than BellSouth BST's list price to which the wholesale-discount obligation applies.

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[3] Mr. Scheye's insistence that BSE's success would be gauged on its ability to generate profits "by itself" collapsed when confronted with the advantage BSE would hold over other ALECs by virtue of advertising performed outside the ALEC. (TR-223). Mr. Scheye attempted to portray such benefits, for which his company would pay nothing, as the result of "synergies." (TR-223). His term is an euphemism for subsidies. The same example demonstrates that overall corporate profitability, viewed from the perspective of the total enterprise, trumps considerations of individual affiliate performance. The costs of the same outside advertising, would be justified -- not by revenues from the entity that incurs the expense -- but by the revenues the advertising generates for affiliates.

As indicated above, the difference in margins available to BST and the margin applicable to new entrants make this strategy easily affordable for Be South. For new entrants, the margin between retail and wholesale is narrow and finit ; losses incurred as a consequence of a shrinking margin are real. For the BellSouth entities, the situation is very different. In addition to the fact that costs from the pocket of one BellSouth entity represent revenues into the pocket of another BellSouth entity, the fact that the BellSouth ILEC receives access revenues, and the competing reseller does not, would exacerbate the pressure on the non-BellSouth competitors in BSE's hoped-for scenario. The margin available to the non-BellSouth ALEC is limited to the difference between its costs, including the ILECs wholesale price, and the lowest prevailing retail rate. For its competitive purposes BellSouth BST's margin consists of the difference between its network costs and all revenues it derives therefrom, including the very significant access revenues that BellSouth BST receives from resellers. (Exh. 5 at 116-117). BellSouth BSE witness Scheye claimed that access charges are an irrelevant "wash" because an indifferent BST would receive the same amount of access revenues regardless of whether they are paid by BSE or a non-BellSouth competitor. (Tr. 229). To accept his claim, one would first have to accept the proposition that BellSouth is indifferent to losing market share to its competitors in the local exchange market.[4] In addition to its basic lack of credibility, Mr.

[4] In a similar vein, Mr. Scheye argued that BST's application would not circumvent the federal Act because BSE would be treated just like any other ALEC under the law. That is the problem. BSE hopes to be treated like other ALECs, but it is not like other ALECs: it is the alter ego of a powerful ILEC that wants to exploit its market power by slipping the restraints imposed on ILECs by law.

Scheye's statement misses the point. The point is not that any reseller -- whether BSE or a non-BellSouth competitor -- would pay access charges. The point is that only BST would receive them. In essence, BST's access charge revenues constitute a huge war chest available to finance price competition with BellSouth's potential competitors. However, even with this advantage, whenever BST lowers its price, the wholesale discount will operate to lower the competitors' cost, thereby mitigating the mismatch in margins and controlling BST's market power. As has been shown, by using the BSE ALEC as the vehicle for lowering the retail price, BellSouth could leverage its margin advantage in a way that would reduce the margin available to the non-Bell resale-based competitor, squeezing it between its own unchanging wholesale costs and the lower retail price of BSE, and thereby rendering resale-based competition in BST's territory infeasible.

Mr. Scheye called this scenario "far-fetched." (Tr. 231). When it considered BellSouth BSE's application, the Kentucky Public Service Commission didn't think so. Very recently, the Kentucky Commission refused to permit BellSouth BSE to provide local exchange service in BST's ILEC service area for precisely the reasons that FCCA, MCI and AT&T have advanced in this case. At pages 4, 5, and 6 the Kentucky Commission stated:

> The intervenors argue that, if BSE provides service in BST territory, BST could subsidize BSE's prices, enabling BSE to provide BST services on a retail basis at rates that neither earn a profit nor cover BSE's costs. The resulting price squeeze would force other CLECs, which will need to make a profit to survive, out of the market.
>
> . . . . .

> The real purpose of BSE's existence, the intervenors claim, is to enable BellSouth to provide local exchange services absent the restrictions placed upon it by the Act as an ILEC in possession of bottleneck facilities. BSE will, for example, not be required to make retail services available for resale to CLECs at wholesale rates pursuant to Section 251(c)(3) and (4) of the Act.
>
> . . . . .
>
> BSE argues, among other things, that allegations regarding potential anti-competitive behavior on its part are only "conjecture," and that there are adequate remedies to deal with such activities if they occur. BSE also contends it would be economically irrational to operate in a less than profitable manner. The latter argument, however, does not take into account the ultimate benefit to BellSouth of eliminating competitors from the local market; and while it is true that anti-competitive behavior of the nature predicted by the intervenors has not yet occurred, the Commission finds that the potential for such behavior would be greatly exacerbated by granting BSE the authority it seeks.
>
> . . . . .
>
> The Commission finds that the public interest concerns raised by the intervenors herein are grave ones justifying rejection of the BST/BSE interconnection agreement and denial, in part, of BSE's application to provide local exchange services in Kentucky.

(Emphasis supplied).

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 could be targeted by BSE, while BellSouth's retail rates (and hence, wholesale rates) for the remaining customers stay the same or even increase. The subject of avoiding requirements of the federal Act is developed further in the confidential portion of this brief.

BellSouth's request can be viewed, fundamentally, as effort to obtain the regulatory flexibility of non-dominant regulatory status without first losing (and, as a consequence, perhaps *never* losing) its dominant market position. The fact of the matter is that BellSouth BSE *is* BellSouth in the eyes of both consumers and investors -- and, as such, is not an independent economic unit in any meaningful way. The Commission should not allow BellSouth to use the legal pretense of a separate BellSouth BSE to accomplish through the back-door a level of reduced regulation that its rules, the Florida statute, and federal Act would not grant directly.

**BELLSOUTH BSE FAILED TO DEMONSTRATE
A LEGITIMATE BUSINESS PURPOSE THAT THE ILEC CANNOT PERFORM**

It is reasonable to ask: If the purpose of BellSouth BSE is not to avoid legal requirements imposed on BellSouth BST, then what purpose would BSE serve in BST's ILEC service area? At hearing, Mr. Scheye strained, unsuccessfully, to identify a needed role for his new company. BellSouth BST is providing local exchange service as an ILEC. BST has also applied for and received an ALEC certificate, and BellSouth Long Distance has been created to serve as the long distance affiliate required by § 272 of the Telecommunications Act of 1996. Mr. Scheye said that BSE wants to follow customers when they leave BST's "traditional" nine-state area, but he was

forced to acknowledge that BST can provide service in other "non-traditional" regions if it chooses to do so. (Tr. 199). Mr. Scheye said BSE's purpose is to offer packaged services, but BST can do that, too, as soon as and as effectively as BSE can (neither can offer long distance until BST successfully pursues a § 271 application before the FCC). The issue of the need for BellSouth BSE in the BellSouth ILEC service area boiled down to Mr. Scheye's claim that BSE is needed because, with respect to long distance services, BST would be required to conform to the FCC's joint marketing parameters while BSE would not. (Tr. 51; 66-67). This statement is as revealing as it is speculative. Mr. Scheye told Commissioner Clark that he fears the ILEC would face restrictions in this area that would hamper the ILEC's ability to offer packaged products. (Tr. 66-67). He was unable to state in what respect the FCC's implementation of the Act's joint marketing concept would impede BST. (Tr. 67). More importantly, however, his testimony presents the Commission with this interesting perspective on the parties' respective positions: Is BSE attempting to circumvent existing restrictions of law, as FCCA, MCI, and AT&T contend? Or, is BSE anticipating, and attempting to escape in advance, future restrictions of law, as BSE's witness testified? FCCA, MCI, and AT&T submit the answer is "All of the above."

The Commission Has Authority to Deny BellSouth BSE's Requests to Provide ALEC Service in Its Affiliate's ILEC Service Area.

BellSouth BSE essentially contends that the Commission's hands are tied. It argues that the Commission is limited in this docket to a perfunctory review of financial wherewithal and management's technical expertise and experience. As FCCA developed in its response to BellSouth BSE's Motion to Dismiss its Petition on

Proposed Agency Action, the Commission implicitly rejected that argument when it considered whether the granting of BellSouth BSE's application would impact the proceedings on BellSouth Telecommunication's § 271 proceeding in Docket No. 960786-TL (Order No. PSC-97-1347-FOF-TX at p. 2).

There is authority for the Commission's wider view. Section 120.80(13)(d), Florida Statutes, directs the Commission to provide for proceedings that take into account the requirements associated with correctly implementing the federal Telecommunications Act of 1996. The geographical restriction advocated by FCCA, MCI, and AT&T are necessary for the granting of the certificate to be consistent with the implementation of the federal Act. Additionally, in § 364.01(4)(g), the Legislature directed the Commission to exercise its exclusive jurisdiction to ensure that all providers of telecommunications services are treated fairly by preventing anti-competitive behavior. This directive permeates all of the Commission's responsibilities, including the review of applications pursuant to § 364.337, Florida Statutes.

Further, Section 364.337, Florida Statutes, must be read in pari materia with Section 364.335. The latter section establishes procedures for the processing of applications for certificates, including ALEC applications. The provision states that the Commission may institute a formal proceeding on its own motion to determine whether the grant of the certificate is in the public interest [§ 364.335(2)]. It may grant with modifications required by the public interest, or it may deny a certificate. [§ 364.335(3)]. Accordingly, the Commission is free -- in fact, is obligated -- to take

public interest considerations into account in this case. The Legislature found that the competitive provision of telecommunications services is in the public interest [§ 364.01(2), Florida Statutes]; to that end, it directed that new entrants be subjected to a lesser level of regulatory oversight [§ 364.01(4)(d)]. It follows that anti-competitive practices in the provision of local exchange services are not in the public interest and are grounds for denying an application that is subject to §§ 364.337 and 364.335. Denial is necessary to ensure that ILECs do not exploit the "lesser regulation" intended for bona fide new entrants.

BellSouth BSE's argument assumes that the Commission would be helpless under the law to prevent an abuse of the application statute by a sham entrant. BSE is mistaken, as another potential sham entrant learned when it pursued an analogous application in Texas.

The Texas decision involved an affiliate of GTE. In that case, the agency refused to allow the affiliate to offer local exchange service in the GTE ILEC's service area. Docket No. 16495; Order issued on November 20, 1997. Mr. Scheye attempted to distinguish the case by attributing the outcome to unique aspects of the Texas statute. (Tr. 75). He is wrong. GTE's plan to "reenter" its ILEC market under a different regulatory regime was foiled -- not by the statute -- but by a vigilant agency.

Texas law distinguishes between the type of certificate that can be held by the Texas version of an incumbent local exchange company and the type of certificate for which a new entrant can apply. The provision of the statute that Mr. Scheye must

have had in mind prohibits a single carrier entity from holding both kinds of certificates.

Technically, the GTE affiliate that applied for the "newcomer's" certificate was not the same corporate entity as the GTE affiliate that held the incumbent's certificate. The Texas Commission recognized that the "new" carrier's claim to the "new entrant" certificate would make a mockery of the regulatory scheme devised by state and federal law. Rather than allow the affiliate to proceed with this artifice, the agency decided it would regard the two GTE affiliates as the same entity for purposes of considering the affiliate's application for authority to engage in business in the ILEC's service area. Having first formed this identity of entities, the Texas agency then concluded that the affiliates' request was precluded by the statute.[5]

The analysis in the Texas decision is fully applicable to this case, in the sense that the Texas agency's analysis helps provide the rationale for the Commission to exercise its authority, delineated above, to act in the public interest. The Florida statute does not contain the same restriction against a single carrier holding both certificates. However, the question regarding the relevancy of the Texas case to this

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[5] The rationale of the Texas agency is somewhat analogous to the doctrine called "piercing the corporate veil." Under this legal doctrine, to prevent certain types of fraud, illegal purposes, or injustices, courts will disregard a corporate identity (and the limited liability associated with the corporate structure) in order to reach and impute liability to those who -- by reason of domination of or identification with the corporation -- are deemed accountable for its actions. The doctrine is recognized in Florida. Steinhardt v. Banks, 511 So. 2d 336 (Fla. 4th DCA 1987). Interestingly, among the types of improper conduct that can lead to a piercing of the corporate veil in Florida (to impose long-arm jurisdiction over a corporation's alter ego, for instance) is the intent to avoid statutory requirements. Harris v. Hood, 167 So. 25 (Fla. 1936).

case is not whether the Florida statute prohibits the same carrier from holding two certificates. Rather, given that the applicant is again merely the alter ego of the existing dominant ILEC, the question is: Are there provisions of the Florida statute that would be made a mockery if BSE is granted a certificate, as was the case in Texas?

Chapter 364 contains provisions which demonstrate that allowing BSE to conduct business as an ALEC in BST's ILEC service area would be equally absurd and inconsistent with Florida's statutory scheme. For instance, Section 364.02(1) defines "alternative local exchange company" as: "any company certificated by the commission to provide local exchange telecommunication services in this state on or after July 1, 1995," whereas 364.02(6) defines "local exchange company" as "any company certificated by the commission to provide local exchange telecommunications service in this state on or before June 30, 1995."

Having recognized that (notwithstanding efforts to artificially distinguish them based on corporate structure) BellSouth BSE is BellSouth's ILEC in another form, the Commission should conclude that for purposes of the BST service area to certify BSE after June 1995 would be a "mockery" because it is the alter ego of a carrier that held an ILEC certificate prior to that time.

Similarly, § 364.337(2) exempts an ALEC from many of the requirements of Chapter 364 that are imposed on a local exchange company. The Commission can and should note the alter ego relationship and rule that, with respect to the portion of BSE's application that pertains to BST's ILEC service area, § 364.337, cannot be applied to BSE without subverting Florida's statutory scheme because it is impossible

for a carrier entity to be at once both subject to and exempt from the same statutory provisions.

BellSouth BSE also tried to convey the impression that other jurisdictions have regarded similar applications as non-controversial and have granted them routinely. In actuality, things have not gone as smoothly for the ILEC-related CLECs as BSE's description suggests. The decision of the Kentucky Commission, quoted above, is the most recent example of an agency that has recognized the jeopardy in which such applications place local exchange competition, and has acted to intercept the attempt by an ILEC to wield market power through an unrestrained affiliate. The Texas decision described above was not an anomaly based on a quirk in the Texas statute, as Mr. Scheye maintained. It was a policy formulation consciously designed to prevent GTE from perpetrating a sham.

There are other examples. In California, Pacific Bell Communications, an affiliate of Pacific Bell, withdrew its proposal to provide local exchange service in Pacific Bell's ILEC service area in the face of an adverse recommendation by an administrative law judge. (Application 96-03-007 before the California Public Utilities Commission). The Michigan Public Service Commission denied the application of an affiliate of Ameritech to provide local service in Ameritech's ILEC area until the FCC grants authority to Ameritech Michigan to provide in-region interLATA service. (Case No. U-11053; Order of August 28, 1996.)

Some states that have approved similar applications imposed conditions on the applicants designed to guard against anti-competitive behavior. In a proceeding

involving an affiliate of Sprint, the Nevada Public Service Commission granted the affiliate authority to provide local exchange service in Sprint's ILEC area, but required the ILEC and its affiliate to keep separate books, records, and accounts; share no officers or directors; conduct all transactions at arm's length; maintain separate credit arrangements; and submit to regular independent audits. In addition, it required the ALEC affiliate to minimize customer confusion by distinguishing its services from the ILEC in any promotions or advertising. Docket No. 96-9014; Order issued on November 17, 1997. Other states cited by BSE include several who did not address the issues of applicable federal law that parties have raised in this case.

Mr. Scheye also cited provisions of the Telecommunications Act of 1996 and the Order of the FCC in Docket No. 96-149 in support of his application. The provisions of the Act to which he referred dealt with the affiliates required by § 272 of the Act. As Mr. Scheye acknowledged, BSE is not a § 272 subsidiary. (Tr. 206). Further, in Docket No. 96-149, relied on by BSE's witness, the FCC recognized that, while the law permits bona fide § 272 affiliates to offer local exchange service in the area of their related ILECs, individual states may regulate such affiliates differently than other carriers. FCC Docket 96-149; Order 96-489, paragraph 317 (released December 24, 1996). The manner in which the FCC will treat such entities for regulatory purposes is an open question. In short, the provisions cited by Mr. Scheye do not require that BSE's application be granted.

Issue 2: In light of the provisions of the Telecommunications Act of 1996 and 364 if the Commission grants BellSouth BSE a certificate to provide alternative local exchange service in the territory served by BellSouth Telecommunications, Inc. as the incumbent LEC,

what conditions or modifications, if any should the Commission impose?

FCCA, MCI, AT&T: The Commission should not grant the certificate to BSE, the ALEC, without first requiring BellSouth BSE to abide by all terms and conditions imposed on BellSouth the ILEC, by the Telecommunications Act of 1996 and Chapter 364, if BellSouth BSE's purpose in applying for the certificate is to be able to package certain products and follow certain customers who change or add locations, as BellSouth BSE contends, these requirements would serve no impediment to BellSouth BSE's claimed business purposes.**

As discussed in Issue 1, above, the Commission should not allow BellSouth BSE to operate in the incumbent service territory of BellSouth BST. If the Commission does authorize BellSouth BSE to operate in the incumbent service territory of BellSouth BST, it should, for the reasons discussed in Issue 1, require BellSouth BSE to abide by all terms and conditions imposed on BellSouth the ILEC, by the Telecommunications Act of 1996 and Chapter 364. If BellSouth BSE's purpose in applying for the certificate is to be able to package certain products and follow certain customers who change or add locations, as BellSouth BSE contends, these requirements would serve no impediment to BellSouth BSE's claimed business purposes.

During the hearing, Mr. Scheye argued that the imposition of the obligation to provide services for resale at the ILEC's discount would make it impossible for BellSouth BSE to make a profit. (Tr. 202-203). The record demonstrates that BellSouth BSE will receive the benefit of expenses incurred by affiliates and valuable good will contributed in the form of brand name and logo, so his claim cannot be

accepted at face value. More fundamentally, Mr. Scheye's complaint is based on the erroneous assumption that the profitability or lack of profitability o BSE's operations in BST's ILEC service area is meaningful for purposes of this proceeding. As has been seen, in the context of a parent and affiliated subsidiaries engaged in a common enterprise -- attended by subsidies, shared resources, and transfer payments -- BSE's individual "bottom line" is an artificial distinction that has no meaning. (Tr. 105). Finally, the requirement would not be a penalty because -- as the record demonstrates -- BellSouth BST can do everything that BellSouth BSE proposes to do. Even Mr. Scheye acknowledged that the establishment of BellSouth BSE is a matter of choice, not a legal requirement. (Tr. 199). Should the Commission allow BSE to subvert the state and federal regulatory regimes because BellSouth BST has a lot "on its plate"? (Tr. 200). If conditions are necessary to prevent this "choice" from having the effect of circumventing legal requirements, then BellSouth cannot complain. It can always elect to do business through the ILEC.

As another alternative, if the Commission does not restrict BellSouth BSE from providing ALEC service in BST's service area, and decides not to impose the wholesale discount applicable to BST on BSE, then it should prohibit BSE from acquiring services from BellSouth Telecommunications for resale. Requiring BellSouth BSE to utilize unbundled network elements instead of resale in BST's ILEC service area would at least place BellSouth BSE and its competitors on an equal footing.

RESPECTFULLY SUBMITTED this 15th day of June, 1998.

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CERTIFICATE OF SERVICE

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