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-98-1165-FOF-TX ISSUED: August 27, 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 RESOLVING PROTEST OF ORDER NO. PSC-97-1347-FOF-TX GRANTING BELLSOUTH BSE, INC. CERTIFICATE NO. 5261 AND DENYING MOTION TO SUPPLEMENT RECORD

BY THE COMMISSION:

BACKGROUND

By Proposed Agency Action Order No. PSC-97-1347-FOF-TX, issued October 27, 1997, this Commission granted Alternative Local Exchange Telecommunications Certificate Number 5261 to BellSouth BSE, Inc. (BSE). On November 17, 1997, Florida Competitive Carriers Association (FCCA), MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively, MCI), filed timely protests of the Order, raising specific issues with respect to BSE's provision of alternative local exchange service in BellSouth Telecommunications, Inc.'s (BellSouth) service territory. AT&T Communications of the Southern States, Inc. (AT&T), Time Warner AxS of Florida, L.P. (Time Warner), Teleport Communications Group, Inc., and TCG South Florida (collectively, TCG) have intervened in this proceeding. On April 27, 1998, this Commission held a hearing in which it received testimony concerning the issues raised by the parties.

Motions to Supplement the Evidentiary Record

On May 22, 1998, FCCA filed a Motion to Compel Discovery, Motion for Leave to Supplement the Record, and Motion to Extend the Deadline for Briefs. FCCA also filed a Motion for an Order Tolling the Time for Filing Post-Hearing Briefs on May 22, 1998. BSE filed its response to FCCA's motions on May 29, 1998. Also on May 29, 1998, the parties filed a Joint Stipulation Governing Review of Information Asserted to be Confidential Supplementing the Evidentiary Record and a Joint Motion for Extension of Time to Submit Post-Hearing Briefs. By Order No. PSC-98-0765-PCO-TX, issued June 3, 1998, the Prehearing Officer granted an extension until June 15, 1998, to file the briefs. On June 15, 1998, when the briefs were filed, FCCA, MCI and AT&T filed a renewed Motion to Supplement the Evidentiary Record. BSE responded to that motion on June 19, 1998. On June 22, 1998, TCG joined in the renewed motion.

FCCA requested to supplement the evidentiary record with certain pages excerpted from a marketing study prepared by Arthur Andersen (hereinafter referred to as the Andersen study) for BSE. FCCA argues that BSE should have produced the Andersen study in response to FCCA's Request for Production of Documents No. 5, which requested documents relating to BSE's alternative local exchange company operations and their impact on BST's overall financial performance. Specifically Request No. 5 stated:

> 5. Please provide all correspondence, directives, instructions, orders, memoranda, and all other written documents comprising, discussing, referring to, or relating in any manner to the relationship between any ALEC operations BSE conducts in BellSouth's ILEC service area and the impact on BellSouth's overall (including parent and all subsidiaries) corporate financial performance.

Pursuant to the joint stipulation mentioned above, BSE agreed to produce the study for FCCA's review. After review of the document, FCCA, joined by AT&T, TCG and MCI, filed their Renewed Motion to Supplement Evidentiary Record. Thereafter, BSE filed its response to the renewed motion.

In the initial motion to supplement the record, FCCA argued that if it could address the import of the selected portions of the Andersen study, BSE's failure to produce the study during discovery

could be remedied. In the renewed motion to supplement the record, the joint movants argued that:

> 1) supplementing the record with the selected portions of the study is consistent with the stipulation all parties reached;
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> 2) the portions to be added to the record are relevant to address potential anti-competitive effects of BSE's certification; and
>
> 3) the document was responsive to interrogatory #5 and should have been produced. If it had been produced, post-hearing motions to supplement the record would have been unnecessary.

BSE responded to both motions asserting that:

> 1) BSE did not stipulate to supplementing the record;
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> 2) the Andersen study contains no information that is responsive to Request No. 5; and
>
> 3) relevancy is not the applicable standard for supplementing the record after hearing.

The subject stipulation, filed May 29, 1998, provides in paragraph 1 that the parties:

> . . . agree to expeditiously develop and enter into a confidentiality agreement that will govern the review of the Anderson [sic] study by representatives of the parties and provide for the use of relevant portions of that document in this proceeding in a manner that will guard the asserted confidentiality of the materials.

This stipulation was entered into after the hearing and after the Andersen study's existence was discovered by FCCA, but before the briefs were due. All parties made an effort to balance the

immediate needs of the parties in getting briefs filed in a timely manner while ensuring the confidentiality of the Andersen study and resolving the discovery dispute. The Prehearing Officer extended the time for filing briefs and the parties filed briefs which included argument on redacted portions of the Andersen study. At that time, it was the understanding of the Prehearing Officer and staff that the ultimate determination of the post-hearing admissibility of the Andersen study would be determined by the full Commission. Even if the parties had agreed that the Andersen Study excerpts would supplement the record, BSE would have been entitled to rebut the evidence or perhaps file a motion to strike. Staff could also object to the admissibility of the excerpts of the study. Therefore, based on the first paragraph of the parties' stipulation and on the above discussion, we conclude that the parties did not and could not supplement the record post-hearing by stipulation.

FCCA and the other intervenors also argue that the Andersen study excerpts are relevant to this proceeding and therefore, should become part of the record. BSE argues that relevancy is not the applicable standard for supplementing the record. The issue of the admissibility of the excerpts from the Andersen study is governed by the Florida Rules of Civil Procedure. A party does not have a right to present evidence after the record is closed, but the Commission may permit a party to reopen its evidence. Canova v. Florida National Bank, 60 So. 2d 627 (Fla. 1952), Wilson v. Johnson, 51 Fla. 370, 41 So. 395 (1906). Relevancy is not at issue for information sought for depositions or requests for production of documents; however, relevancy is required for admitting evidence into the record. In this case, staff believes that the evidence proffered by FCCA should not be admitted because the admitted purpose for offering it is to establish "potential anti-competitive effects." Based on our findings in later portions of this Order, the alleged potential anti-competitive effects are not relevant to the determination of whether to grant BSE the authority to operate in BST's ILEC territory.

Finally, the issue of whether the Andersen study should have been produced is not a question that has to be answered. No prejudice to the parties for failing to produce the document has been shown. Albeit after the hearing, BSE voluntarily produced the voluminous document when the issue of its production was raised. Further, based on our findings below, the information contained in the study is not relevant to our determinations.

Accordingly, the Motion and Renewed Motion to Supplement Evidentiary Record is denied.

Official Recognition

BSE applied for certification in several other states. After the hearing, two states rendered decisions on BSE's applications. Those states were Kentucky and North Carolina. In addition, the state of California ruled on similar issues related to two subsidiaries of Citizens Utilities Company. Official recognition of these decisions was requested. Many more such decisions were submitted at the hearing. All parties submitted decisions for judicial notice and no objections were filed. In the interest of keeping the Commission fully informed on the pending issues, official recognition of the following orders is granted:

(1) Kentucky Public Service Commission Order in Case No. 97-417, issued June 8, 1998, in which the Kentucky Commission denied an interconnection agreement and certificate application for BSE;

(2) California Decision No. 98-07-034, issued July 2, 1998, granting Citizens Long Distance Company an ALEC certificate to serve in the ILEC territory of its sister company; and,

(3) North Carolina Utilities Commission decision rendered on July 22, 1998, in Docket No. P691 which granted BSE a certificate to provide local exchange service.

Certification

Section 364.337(1), Florida Statutes, provides in pertinent part that:

> The commission shall grant a certificate of authority to provide alternative local exchange service upon a showing that the applicant has sufficient technical, financial, and managerial capability to provide such service in the geographic area proposed to be served.... 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 the application of any criteria

other than that specifically enumerated in this subsection.

The parties opposing BSE's certification have made it clear in their protest and in their testimony that they do not challenge BSE's technical, managerial, or financial ability to provide alternative local exchange telecommunications service in Florida. They have also made it clear that they do not object to BSE's certification to provide ALEC service in Florida generally. Witness Gillan, testifying on behalf of AT&T, MCI, and the FCCA, stated that the carriers sponsoring his testimony have no objection to BSE's entry and participation as an ALEC outside its own territory. Rather, they object to BSE's certification to provide ALEC service in the territory of its affiliate, BellSouth, the Regional Bell Operating Company (RBOC) for the Southeast, and an incumbent local exchange company (ILEC) in much of Florida. They argue that the Commission should deny BellSouth an ALEC certificate to "compete against itself" through the legal artifice of BSE.

BSE witness Scheye argues that Section 364.337, Florida Statutes, outlines the sole criteria on which a decision concerning certification may be based. Therefore, according to witness Scheye, BSE should be granted a certificate for the entire state, including BellSouth's service territory.

FCCA and AT&T generally argue that if the Commission grants BSE a certificate to provide service as an ALEC in its affiliate BellSouth's territory, they will be unable to compete effectively as resellers of BellSouth's services. They argue that without any restrictions, BSE will not have the same incentive or need to make a profit that other ALECs would have, and would have no incentive to reduce its retail rates. The parties contend that certification for BSE will allow BellSouth to circumvent its obligations under the Telecommunications Act of 1996 (the Act), and lead to abuse of market power, customer confusion and anticompetitive behavior. Witness Gillan states that BellSouth's application for an ALEC certificate is a "reentry to its own markets through a second distribution channel (i.e., BSE) with lower regulatory obligations." Witness Gillan also states that BellSouth, the ILEC, has specific obligations imposed by state and federal statutes ranging from price-cap regulation and tariffs, to a requirement to open the network to others, while BSE does not. Witness Gillan predicts that BellSouth could reprice existing services and introduce new ones through BSE without the obligation to offer a wholesale discount. Witness Gillan also argues that BSE will have

advertising and brand identification advantages as a company that will unfairly disadvantage other competitive providers.

BSE's witness Scheye responds that the protesters' concerns are purely speculative, and unfounded. He argues that Section 364.337(5), Florida Statutes, gives the Commission continuing regulatory oversight over the provision of basic local exchange telecommunications service for purposes of establishing reasonable service quality criteria, assuring resolution of service complaints, and ensuring the fair treatment of all telecommunications providers in the telecommunications marketplace. Witness Scheye also explains that if BSE were to purchase service for resale at a discount and then sell that service at less than the wholesale cost, BSE would be required to resell that service to other ALECs at the same price.

Witness Scheye argues that Sections 251 and 252 of the Telecommunications Act of 1996 (Act) and the decisions by the Federal Communications Commission (FCC) require the ILEC to treat all ALECs on a nondiscriminatory basis. Therefore, according to witness Scheye, BellSouth cannot provide any unfair advantage in the marketplace to BSE. Section 272(e)of the Act states that the incumbent local exchange company (ILEC) must fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such services to itself or to its affiliates. Section 272(g) further allows the affiliate of a BOC to provide telephone exchange services if the BOC permits other entities to market and sell its services. Witness Scheye asserts that if the 1996 Act did not contemplate such an activity there would have been no need to adopt these provisions. Witness Scheye stated that the FCC also found the arguments made by intervenors, that BSE might engage in discrimination or cross-subsidy, were "speculative" and "non-persuasive". The FCC further found no basis in the record for concluding that competition in the local market would be harmed if a Section 272 affiliate offers local exchange service to the public that is similar to local exchange service offered by the Bell Operating Company. FCC Order No. 96-149 at paragraph 315.

The record also establishes that several other states have dealt with granting local authority to the ALEC's of incumbent local telecommunications companies. For example, the Georgia Public Service Commission (GPSC) granted BSE a competitive local exchange telecommunications service certificate on March 9, 1998, in Docket Number 8043. Texas, however, denied GTE certification

because its state statute does not contemplate issuing two types of certificates in the same territory to the same company or an affiliate. Moreover, this Commission has the authority to, and has granted statewide ALEC authority to other incumbent local exchange affiliates. GTE Card Service, Inc. d/b/a GTE Long Distance was granted authority on February 24, 1997, by Order No. PSC-97-0222-FOF-TX. This Commission also granted ALEC authority to Sprint Metropolitan Networks on December 27, 1995, with language in the order stating that "Section 364.337(1), Florida Statutes requires us to grant a certificate to provide alternative local exchange telecommunications service upon a showing that the applicant has sufficient technical, financial, and managerial capability to provide such service in the geographic area proposed to be served." Order No. PSC-96-1201-FOF-TX. Furthermore, BellSouth itself already has been granted a statewide ALEC certificate by Order No. PSC-96-0704-FOF-TX issued May 23, 1996.

No parties argued or presented evidence that BSE has not met the criteria set forth in the statutes to be used for the basis of granting a certificate in Florida, and the 1996 Act does not preclude BSE from being granted a certificate. BSE has asserted that even though it does not consider itself a Section 272 affiliate at the present time because it does not have certification to provide long distance, it has nevertheless complied with all of the accounting and separation safeguards addressed in Section 272 of the Act. There is no evidence in the record that any anticompetitive harm has occurred as a result of the Commission's certification of GTE's or Sprint's ALEC affiliates, and we cannot, therefore, justify treating BSE any differently than other ALECs that are affiliates of ILECs on this record. Even witness Gillan stated that he was unaware of any instance where the harms the parties allege here have actually occurred. He explained that he thought that was because "there hasn't been any real world experience - to my knowledge any real world experience with that." We note, however, that GTE's affiliate has been certificated since February of 1997, and Sprint's affiliate has been certificated since September of 1996. In consideration of this evidence, the parties' predictions of harm in this case seem even more speculative, and, as BSE has pointed out, if it or BellSouth engage in any anti-competitive behavior, this Commission has the authority to address it when it actually occurs.

The protestors also argue that BSE should not be granted an ALEC certificate without this Commission imposing certain conditions. For example, TCG would have us impose the following:

> (1) the duty under Section 251(c)(4) to offer for resale at wholesale rates, the local service that BSE provides at retail to its customers in that territory, including the provision of such service under Contract Service Arrangements;
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> (2) the duty under Section 251(b)(3) to provide nondiscriminatory access to network elements on an unbundled basis;
>
> (3) the duty to provide information, in the form of monthly reports, regarding the service quality BSE receives from BellSouth;
>
> (4) that BSE utilize the same operational support systems available to ALECs.

Additionally, TCG urges that BellSouth's performance of its duty under Section 252(c)(2)(c) of the Act, should be reported separately for BSE.

We do not believe it is necessary, or in the public interest, to treat BSE any differently than the ALECs of other incumbent local telecommunications companies. If demonstrable anti-competitive behavior occurs, we have the authority to address it under Section 364.01(9), Florida Statutes.

Conclusion

In conclusion, we believe BSE has shown the requisite financial, technical and managerial capability to be granted a certificate to provide alternative local exchange service. The protestors and intervenors have failed to establish any basis to deny or limit BSE's authority to serve as an ALEC in BellSouth's territory.

Accordingly, we find it appropriate to reaffirm Order No. PSC-97-1347-FOF-TX, issued October 27, 1997, granting BSE statewide authority to serve without limitations or restrictions as requested by the protestors and intervenors. As no further issues remain to be addressed in this matter, this docket may be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Order No. PSC-97-1347-FOF-TX, issued October 27, 1997, is hereby reaffirmed. It is further

ORDERED that BellSouth BSE, Inc., shall have statewide authority to serve under Certificate No. 5261. It is further

ORDERED that this Order together with Order No. PSC-97-1347-FOF-TX shall serve as BellSouth BSE, Inc.'s certificate and should be retained by BellSouth BSE, Inc., as proof of its certification. It is further

ORDERED that the Motion for Leave to Supplement the Record filed by FCCA and Renewed Motion to Supplement Evidentiary Record filed by FCCA and joined by AT&T, TCG and MCI, are hereby denied. It is further

ORDERED that the Requests for Judicial Notice are granted. It is further

ORDERED that this docket may be closed.

By ORDER of the Florida Public Service Commission, this 27th day of August, 1998.

Blanca S. Bayó

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 the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.