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January 11, 1999

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. 981834-TP

Dear Ms. Bayo:

Enclosed for filing and distribution are the original and fifteen copies of the Competitive Carriers' Response in Opposition to BellSouth Telecommunications, Inc.'s Motion to Dismiss in the above docket.

Please acknowledge receipt of the above on the extra copy enclosed herein and return it to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

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Vicki Gordon Kaufman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth's Service Territory.	))))	Docket No. 981834-TP Filed: January 11, 1999

COMPETITIVE CARRIERS' RESPONSE IN OPPOSITION TO BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS

The Competitive Carriers, through undersigned counsel, file their response in opposition to BellSouth Telecommunications, Inc.'s (BellSouth) motion to dismiss their Petition for Commission Action to Support Local Competition in BellSouth's Service Territory. BellSouth's motion is without merit and should be denied.

INTRODUCTION

1. BellSouth's predictable Motion to Dismiss demonstrates why strong and immediate regulatory action is so urgently needed. Although BellSouth acknowledges that local telephone competition is developing slowly in Florida, it understandably evidences no concern or desire to work cooperatively with ALECs to improve market conditions. As one would expect, BellSouth seeks to turn the Telecommunications Act of 1996 on its head by contending that the Commission should wait until BellSouth and BellSouth alone decides the time is right for the Commission to concern itself with the lack of local competition in Florida.

2. A more disingenuous position is hard to imagine. BellSouth has contended for two years that it needs a "road map" for compliance *before* it files 271 applications. Now the Competitive Carriers have requested that the Commission take the actions needed to open the local telephone market, but BellSouth insists that the requirements for local competition should be laid out *after* it has filed a 271 case.

BellSouth's approach would allow it to maintain monopoly power as long as possible by controlling the pace of local competition. The Commission should not, as BellSouth implores, passively watch from the sidelines.

STANDARD FOR RULING ON A MOTION TO DISMISS

3. It is black letter law that "[f]or the purpose of passing upon a motion to dismiss the Court must assume all facts alleged in the complaint to be true." *Connolly v. Sebeco, Inc.*, 89 So.2d 482, 484 (Fla. 1956). *See also*, *Pate v. Threlkel*, 661 So.2d 278 (Fla. 1995); *Koehler v. Merrill Lynch & Company, Inc.*, 706 So.2d 1370 (Fla. 1998); *Chiang v. Wildcat Groves, Inc.*, 703 So.2d 1083 (Fla. 2d DCA 1997). Nonetheless, BellSouth spends much of its motion disputing the facts set out in Competitive Carriers' Petition. However, as the cited case law makes clear, this approach is misguided and serves only to illustrate the lack of merit in BellSouth's motion.

THE COMMISSION HAS AUTHORITY TO ORDER THE REQUESTED RELIEF

4. BellSouth contends that by requesting the Commission to take affirmative steps to advance local competition, the Competitive Carriers have violated the letter and spirit of the 1996 Act. (Motion, p. 2.) But BellSouth cites no specific provision of the 1996 Act that would be violated if the Commission were to act on the Petition, and fails to cite the numerous provisions in the Act that plainly authorize the Commission to take the requested action. And whatever "spirit" BellSouth purports to invoke is not from the Act, a central purpose of which is to promote competition in local exchange markets. The Petition is not only consistent with that purpose, but is

supported by the Act's express terms,[1] as well as state law, as explained below.

5. The Competitive Carriers' requests for a pricing docket, a Competitive Forum and for third-party testing of OSS are supported by the Act. Section 251 imposes a number of duties on BellSouth, not the least of which are to provide interconnection and unbundled access to network elements at cost-based rates. Section 251(d)(3) states that the FCC "shall not preclude the enforcement of any regulation, order or policy of a State commission" that establishes access and interconnection obligations, is consistent with Section 251 and does not substantially prevent implementation of Section 251 or Part II of Title II of the Act (Part II).[2]

6. Further, Section 261(b) provides that nothing in Part II "shall be construed to prohibit any state commission from . . . prescribing regulations . . . in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part." And Section 261(c) provides that nothing in Part II

> precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the [FCC's] regulations to implement this part.

In short, this Commission is authorized to undertake affirmative measures, such as those requested by the Competitive Carriers that plainly are consistent with the Act, to

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[1] BellSouth does not bring these provisions to the Commission's attention. Rather, it states that "[t]here is absolutely nothing in the Act that would authorize (or even allow) the action sought by Petitioners." (Motion, p. 4.)

[2] Part II of Title II, entitled Development of Competitive Markets, includes Section 251-61, as well as Sections 102-04.

require BellSouth to comply with its duties under section 251 and to otherwise advance local competition in Florida.

7. The Petition is consistent with state law as well. Section 364.01(4), Florida Statutes, describes this Commission's exclusive jurisdiction. Subsection (4)(d) provides that the Commission shall exercise its jurisdiction to "promote competition by encouraging new entrants into the telecommunications markets. . . ." Subsection (4)(g) requires the Commission to exercise its jurisdiction to ensure that all telecommunications providers "are treated fairly, by preventing anticompetitive behavior. . . ." These provisions of state law, as well as the federal Act, provide ample authority for the requested actions set out in the Petition.

8. As to the rulemaking request, BellSouth does not contend that the Commission lacks authority to adopt rules for expedited dispute resolution. The Competitive Carriers' request is authorized under section 120.54(7), Florida Statutes, and rule 28-103.006, Florida Administrative Code.

BELLSOUTH'S ARGUMENTS ON THE MERITS ARE FLAWED

9. As Competitive Carriers have illustrated in their Petition, the first rounds of arbitration are complete, but local competition as contemplated by the Act has failed to materialize in Florida as a result of blocking actions, sometimes called "strategic incompetence," on the part of BellSouth. A new, creative, efficient way to bring the benefits of local competition to Florida must be embraced. Through the use of the processes Competitive Carriers have outlined, the Commission can take decisive steps to help loosen the strangle hold BellSouth has on the local market so the fruits of

the Act can be realized.

A UNE Pricing Docket is Necessary

10. BellSouth, for obvious reasons, is satisfied with current UNE prices and opposes any effort to revise prices based on market experience. But BellSouth's contention that the Commission lacks authority to open a pricing docket because of existing interconnection agreements lacks legal foundation. After all, it is the Commission's responsibility under the Act to ensure that UNE prices are cost-based. 47 U.S.C. § 252(d). The 1.8% market share of new entrants, despite substantial investment and efforts in the three years since the passage of the Act, demonstrates that prices have not been set at their economic costs and that further action by the Commission is necessary. As noted above, the Commission is authorized to initiate measures promoting competition that are consistent with the Act. Further, contracts approved by the Commission contemplate that the Commission can effect pricing changes. For example, MCI's Interconnection Agreement provides that "[a]ll rates provided under this Agreement are permanent . . . and shall remain in effect until the Commission determines otherwise or unless they are not in accordance with all applicable provisions of the Act, the Rules and Regulations of the FCC in effect, or the Commission's rules and regulations. . . ." Section 1.1. BellSouth fails to take account of such provisions.

11. Even if BellSouth's contractual argument had merit (which it plainly does not), opening a generic UNE pricing docket still would be necessary. A number of interconnection agreements already have expired and many more will expire this

year and next. Realistically, few companies will be able to assemble full UNE cost cases. The best way to ensure participation by all interested companies is to have one generic proceeding in which parties can submit testimony and information as their resources permit. If the Commission were unwilling for all parties to use the new UNE pricing structure immediately, at least they would be able to do so as soon as their old interconnection agreements expired. Of course, parties still would be free to negotiate prices if a different structure was to their mutual benefit.

12. The need to open a pricing docket now is especially acute because no prices have been set for UNE combinations or for deaveraged loops. As recently as December 15, 1998, Commissioner Clark suggested that a generic proceeding might be an appropriate way to address deaveraged loops. Docket No. 960757-TP.

13. BellSouth attempts to argue about the facts supporting the need for a hearing on UNE prices. As noted above, this effort is misguided in a motion to dismiss, but in any event BellSouth's factual discussion is not illuminating. For example, BellSouth takes great umbrage at the Competitive Carriers' allegation that competition is developing at a "glacial pace," but later acknowledges that it is developing "slowly." (Motion, p. 5.) Next BellSouth argues fallaciously that because ALECs are doing business in Florida as resellers and through the use of their own facilities, it cannot be true that a UNE strategy is the only viable way to serve the Florida market. (Motion, p. 6.) BellSouth misses the point because the Petition clearly alleges that cost-based UNEs are necessary for *widespread* local competition, which does not exist in Florida today. Further, BellSouth attacks the Competitive

Carriers' request for deaveraged loop prices based on their citation to a figure from the Hatfield study. (Motion, p. 7.) But putting aside the merits of the study (which can be addressed during a hearing in this docket), BellSouth does not dispute that the cost of providing local loops is lower in urban areas than the statewide average cost, which was the point being made.

A Competitive Forum and Third-Party OSS Testing Will Jump Start Competition

14. BellSouth's attack on the Competitive Carriers' request for a Competitive Forum and for third-party testing of OSS begins with its assertion that "[u]nder the Act, a review of BellSouth's offerings to ALECs, including OSS, would occur in the context of a 271 application by BellSouth." (Motion, p. 8.) BellSouth offers no statutory or other support for its insistence on retaining control of the local entry process. Contrary to BellSouth's contentions, the affirmative duties imposed on it by Section 251 of the Act mandate the opening of its markets regardless of when, or even *whether*, BellSouth chooses to initiate section 271 proceedings.

15. Further, less than three months ago, the FCC made clear that BellSouth still has much work to do meet the Act's requirements with respect to operational issues such as OSS, performance measures, and access to loops. *In re: Second Application by BellSouth Corp. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order (rel. Oct. 13, 1998)(La. II Order). Although BellSouth contends that it is "moving ever closer to satisfying the FCC requirements for 271 relief" (Motion, p. 10), it is clearly not moving nearly fast enough, which is why the Competitive Forum and third-party-

testing of OSS are necessary. Further, in the last section 271 proceeding, the Commission directed the parties to attempt to resolve specific disputes *outside* the context of a section 271 proceeding. Order No. PSC-97-1459-FOF-TL at 12. Competitive Carriers have done so through their Petition. In order to make this an efficient and effective proceeding, Competitive Carriers have narrowly and specifically delineated the issues and have filed one joint Petition so as to avoid duplication.

16. BellSouth also attempts to inject factual disputes with respect to the need for a Competitive Forum and for third-party testing of OSS. BellSouth's factual discussion is beside the point in a motion to dismiss. In any event, its description of collaborative processes that have been requested or taken place in other states is inaccurate. For example, BellSouth states that other collaborative processes have been requested after it has initiated section 271 proceedings. In fact, in North Carolina, BellSouth sought to initiate a section 271 proceeding by filing its revised SGAT after petitioners there sought a collaborative process. And it is not true (as BellSouth suggests) that the North Carolina Utilities Commission has rejected the request for a collaborative process; it has not determined whether or not to implement such a process. Further, Georgia and Alabama already have held workshops on OSS and other issues, so it is *not* true that other southeastern states have not implemented processes for issue identification and resolution. It *is* true that much work remains to be done.

17. Although there is no section 271 proceeding pending, BellSouth's expresses concern that third-party testing will delay 271 relief. In fact, such testing is the most practical way to ensure once and for all that BellSouth provides ALECs with

OSS that works. Given the FCC's recent La. II decision, and the amount of work in many areas that BellSouth has left to do, there is no risk that third-party testing will delay BellSouth's entry into the in-region long distance market.

ALEC Complaints Must Be Resolved Expeditiously

18. Finally, the need for expedited consideration of ALEC complaints is plainly illustrated in the Petition. The Commission Staff has had workshops on this very topic; Competitive Carriers simply seek to build on this beginning. In order for interconnection agreements to actually function in the marketplace, the terms of such agreements must be swiftly enforced. This cannot happen if disputes over such agreements are bogged down for months (or even years) in administrative litigation. Expedited dispute resolution will further open the competition pathway.

CONCLUSION

19. In its continuing effort to thwart local competition, BellSouth has predictably filed a motion to dismiss Competitive Carriers' Petition. This action, in the face of Competitive Carriers' attempt to establish a dialogue and work constructively toward solutions, is only further evidence of BellSouth's unwillingness to move to a competitive marketplace. BellSouth has failed to meet the legal standard for the granting a motion to dismiss by inappropriately taking issue with the facts alleged in the Petition. Its arguments on the law are similarly misplaced.

WHEREFORE, BellSouth's Motion to Dismiss should be denied.

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CERTIFICATE OF SERVICE

I HEREBY Certify that a true and correct copy of the **Competitive Carriers'** foregoing **Response in Opposition to BellSouth Telecommunications, Inc.'s Motion to Dismiss** has been furnished by United States Mail or hand delivery (*) this **11th** day of **January, 1999,** to the following parties:

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