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November 6, 2001

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Re: Docket No.: 960786-A-TL

Dear Ms. Bayo:

On behalf of KMC Telecom, Inc. (KMC), enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ Post Hearing Statement of Issues and Positions and Brief of KMC Telecom, Inc.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

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**Before the
FLORIDA PUBLIC SERVICE COMMISSION**

In re:)	
)	
Consideration of BellSouth Telecommunications, Inc.'s Entry into InterLATA Services)	Docket No. 960786-A-TL
Pursuant to Section 271 of the)	Filed: November 6, 2001
Telecommunications Act of 1996)	

**POST-HEARING STATEMENT OF ISSUES AND POSITIONS,
and BRIEF OF KMC TELECOM, INC.**

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I. PRELIMINARY STATEMENT

Pursuant to rule 28-106.307, Florida Administrative Code, KMC Telecom, Inc.(KMC) hereby files its Post-Hearing Statement of Issues, Positions and Brief.

II. INTRODUCTION

BellSouth Telecommunications, Inc. (“BellSouth”) has failed to meet the requirements to provide in-region interLATA services pursuant to section 271 of the Telecommunications Act of 1996 (“Act”).¹ The extensive hearings held by the Florida Public Service Commission (“Commission”) demonstrate that BellSouth’s deficient performance in several critical areas is prohibiting full local competition.

KMC is a facilities-based Alternative Local Exchange Carrier (“ALEC”) competing in Florida and in many other states across the country. KMC and its affiliates are building high-speed, high-capacity advanced fiber optic networks to provide various services to business customers, including local and long distance voice and data services. At the present time, KMC provides local, long distance and data services to customers in Tallahassee, Pensacola, Greater Pinellas, Sarasota, Fort Myers, Brevard and Daytona Beach, utilizing a fiber network with SONET technology and a Lucent 5ESS switch.

BellSouth has failed to satisfy several very important areas of section 271 in the State of Florida. KMC’s ability to compete in Florida has been severely limited by BellSouth’s poor installation performance and horrible maintenance and repair services. KMC must purchase local loops from BellSouth to serve its Florida customers. BellSouth, however, continually fails to meet appropriate installation intervals and confirmed installation dates for these loops. Moreover, the dismal quality of BellSouth’s installation performance causes service

¹ Codified at 47 U.S.C. § 271.

delays and frequent outages for KMC customers, which are in turn attributed to KMC. Once loops are finally provisioned, KMC must endure chronic outages, and unsatisfactory responses to repeated trouble reports.

In addition to BellSouth's failure to comply with specific competitive checklist items, BellSouth has consistently engaged in anticompetitive and potentially unlawful behavior. Such activities include BellSouth's various WinBack efforts, which frequently involve misleading statements to KMC customers by BellSouth personnel about the financial viability of KMC and the quality of KMC services.

Due to BellSouth's clear lack of compliance with the competitive checklist, as well as its anti-competitive and potentially unlawful business tactics, the Commission must find that BellSouth is not in compliance with Section 271 of the Act and advise the Federal Communications Commission ("FCC") accordingly.

III. ARGUMENT

A. ISSUE 5

IN ORDER PSC-97-1459-FOF-TL, ISSUED NOVEMBER 19, 1997, THE COMMISSION FOUND THAT BELLSOUTH MET THE REQUIREMENTS OF SECTION 271(C)(2)(B)(IV) OF THE TELECOMMUNICATIONS ACT OF 1996. DOES BELLSOUTH CURRENTLY PROVIDE UNBUNDLED LOCAL LOOP TRANSMISSION BETWEEN THE CENTRAL OFFICE AND THE CUSTOMER'S PREMISES FROM LOCAL SWITCHING OR OTHER SERVICES, PURSUANT TO SECTION 271(C)(2)(B)(IV) AND APPLICABLE RULES AND ORDERS PROMULGATED BY THE FCC?

(A) DOES BELLSOUTH CURRENTLY PROVIDE ALL CURRENTLY REQUIRED FORMS OF UNBUNDLED LOOPS?

(B) HAS BELLSOUTH SATISFIED OTHER ASSOCIATED REQUIREMENTS, IF ANY, FOR THIS ITEM?

KMC's Position: *No. BellSouth is failing to provide access to loops in accordance with the checklist by failing to properly install and maintain loops. Making matters worse, BellSouth is using its DSL offerings to prevent ALECs from accessing customers through the unbundled loop.*

Item Four of the competitive checklist requires BellSouth to demonstrate that it provides access to unbundled local loops.² The FCC has interpreted that requirement by stating that each Regional Bell Operating Company's ("RBOC's") loop performance must afford a competitor a "meaningful opportunity to compete."³ BellSouth's loop performance in Florida certainly fails this standard. Indeed, BellSouth has failed to satisfactorily provision loops, provide maintenance and repair services, and coordinate loop cut-overs in a manner that will provide accurate provisioning dates and prevent end users from losing service. The problems

² 47 U.S.C. §271(c)(2)(B)(ii).

³ *Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3952, 4098 ¶ 279 (1999). ("*New York 271 Order*")

experienced by KMC relate primarily to DS-1 circuits, and afford KMC little opportunity to compete.

1. BellSouth Frequently Misses Installation Appointments for Loops.

In performing loop hot cuts, BellSouth frequently misses appointments, even after issuing a firm order confirmation (“FOC”). BellSouth’s most recent data indicates that it missed over 16% of the two-wire analog loop design orders of 10 circuits or more in August, 2001, while also missing 10% of the analogous non-design orders. In the very important digital loop category, BellSouth missed over 5% of the digital loop orders below DS-1, and 6.77% of the DS-1 and above orders – missing more than twice as many actual orders for ALECs than for BellSouth retail. BellSouth’s performance to KMC is even worse.⁴

Another particularly significant source of delay for customers wishing to switch to KMC is the claimed lack of facilities available from BellSouth. In such cases, KMC is unable to switch a customer because the order is designated as a “pending facility” order, requiring that it be held while BellSouth ostensibly searches for facilities. BellSouth data reveals that it placed over *half* of the ALEC digital loop (above and below DS-1 level, non-mechanized) orders in jeopardy status in August, 2001. In other instances where facilities are apparently available, the install will still be delayed due to the poor quality of the available circuits.

BellSouth’s records are inadequate to enable a timely determination as to whether there is in fact a facility available for KMC, consistent with KMC’s service request. In some instances, BellSouth records may indicate that a satisfactory circuit exists, only to be proven

⁴ See Revised Rebuttal Testimony of Jim Sfakianos, KMC Telecom, filed October 3, 2001, at page 5 (Tr. page 1402, *et. seq.*) (“Sfakianos Rebuttal Testimony”)

incorrect when the time comes to turn up that circuit.⁵ Accordingly, the procedures that BellSouth has in place are insufficient to provide an accurate and reliable FOC since these procedures fail to verify the existence of adequate facilities at the appropriate time. As noted above, BellSouth's own performance data for "Percent Jeopardies" confirms that fact.

From a business development perspective, the effect BellSouth's failure to issue "pending facility" notices in a timely manner is disruptive to KMC's operations, and damaging to KMC's professional reputation. Upon receipt of a FOC from BellSouth that it will provision the requested circuits on a date certain, KMC proceeds to notify the customer and to schedule its workforce accordingly. Therefore, when BellSouth provides last-minute notice that the installation will not take place as confirmed, the customer is inconvenienced and valuable KMC resources are wasted. Moreover, in some cases, KMC must reimburse the customer for monetary costs incurred in preparation for an install that is later cancelled by BellSouth. Many business customers will, for example, arrange to have their equipment vendors on-site at the time of the confirmed appointment, to assist in the cut-over process. Accordingly, when BellSouth fails to issue a timely "pending facility" notice, it is KMC that ultimately incurs the cost of the equipment service technician that had been scheduled to assist in an install that was subsequently cancelled. Most importantly, however, it is probable that the customer blames KMC for such missed appointments and installation delays, thereby causing irreparable harm to KMC's reputation.

While BellSouth asserts in its defense that KMC also misses installs, this point is of no relevance. KMC readily admits that it must occasionally reschedule an install. It is not acceptable, however, for BellSouth to then cancel an even greater number of installations.

⁵ See, e.g., Sfakianos Rebuttal Testimony at page 4.

BellSouth has obligations under the Act that inure independently of the manner in which particular competitors operate. BellSouth must comply with the Act by verifying available facilities with adequate notice, and by minimizing the number of missed appointments. Based on the testimony adduced in this proceeding, BellSouth is currently failing on both counts.

2. BellSouth's Two Step Loop Install Process is Highly Problematic.

On occasions when it becomes necessary to postpone a loop hot cut, BellSouth frequently fails to follow proper coordination procedures to ensure that the customer to be switched does not lose service. Unfortunately, the BellSouth loop provisioning process involves both a "D" (disconnect) order and an "N" (re-connect) order. Therefore, in the event a loop hot cut is postponed, it is imperative that both the D and N orders are postponed. However, BellSouth frequently proceeds with the "disconnect" order nonetheless, without contacting KMC for coordination (prior to working the order, BellSouth should contact KMC to ensure that both parties are prepared to proceed). Since the corresponding "re-connect" order has been postponed, the customer is left with either limited or no service.

Although BellSouth has recognized the problems associated with its current loop provisioning process, it has nonetheless indicated that a single ("C") order will not be used until 2002. Until such time as that process is implemented, competition will be seriously impaired and BellSouth cannot meet the checklist.

3. Chronic Outage Problems Plague BellSouth Loops.

Once service is finally turned up, chronic problems, including static, no dial tone and complete outages, persist. Moreover, several such problems occur within the first 30 days after installation. BellSouth's data for Florida indicates that an inordinate amount of circuits had troubles within 30 days of installation. Almost 10% of the two-wire analog loop design circuit

orders of less than ten lines that involved a technician dispatch reported troubles within 30 days of the install.⁶ Similarly, 5% and 8% of the digital loop orders also reported troubles within 30 days of installation.⁷

In some recent cases, such problems occurred immediately following installation. In those cases, KMC opened a trouble ticket with BellSouth to repair newly installed T-1 circuits only hours after BellSouth completed the requested install, and informed KMC that the circuits were tested and ready for service.

When outages and other problems occur, BellSouth fails to complete repairs in a satisfactory manner, and such problems frequently reoccur. In fact, BellSouth data in Florida indicates that over 27% of the two-wire analog loop non-design, non-dispatch troubles and 22% of the two-wire dispatch troubles were on circuits with troubles in the preceding 30 days.⁸ In addition, 33% and 52% of the troubles on "Other Design" circuits were on lines with a prior problem - that BellSouth supposedly repaired. Indeed, the recurrence of problems on BellSouth-repaired lines is so severe that BellSouth has created a chronic trouble team in a thus far ineffective attempt to address them.

In Pensacola, Florida, four of KMC's largest customers, representing a significant portion of KMC's operational revenues, have experienced particularly dramatic chronic outage problems attributable to BellSouth's poor installation performance and unsatisfactory maintenance and repair services.⁹ Indeed, these large business customers lose their T-1 service virtually every time it rains. Over a three-week period spanning late June and early July, 2001, a

⁶ Metric number B.2.19.8.1.1, August, 2001.

⁷ Metric numbers B.2.19.18.1.1 and 19.1.1, August, 2001.

⁸ Metric numbers B.3.4.9.2 and 8.1, August, 2001.

⁹ Sfakianos Rebuttal Testimony at page 3.

large hotel experienced *eight* outages, representing a total of 93 hours that the T-1 line to its location was down or otherwise experiencing trouble. Similarly, a tractor and equipment retailer experienced *seven* outages, representing a total of 46 hours that its T-1 line was either down or experiencing trouble. A credit union experienced *five* outages, totaling 36 hours that its T-1 line was either down or experiencing trouble. Finally, a door company experienced *four* outages that represented a total of *230 hours* that the T-1 line to its location was down or otherwise experiencing trouble. Although these sophisticated business customers of KMC understand that the outages described are ultimately the fault of BellSouth, they are nonetheless frustrated by frequent and persistent loss of telecommunications service that they did not experience as BellSouth customers.

In light of this extremely troublesome performance, combined with the fact that BellSouth's own retail numbers are superior, the Commission cannot find that BellSouth is in compliance with the checklist standards for loops.

4. BellSouth Uses Its DSL Offering to Prevent ALEC Access to Unbundled Loops.

BellSouth is using its DSL service offering to shield its customer base from alternative providers of local voice service. To accomplish this, BellSouth assigns its DSL service to the end user customer's primary voice line - thereby blocking all competing providers from access to that line and all lines associated with it.¹⁰ BellSouth witness Williams, in fact, admitted that the way to avoid blocking access to customers with DSL is to "put the ADSL on another line. I think that's the answer."¹¹ If the customer requesting DSL is already served by an ALEC, BellSouth will require that the customer transfer at least one voice line back to

¹⁰ See, for example, Cross examination of BellSouth witness Williams, at Tr. page 713.

BellSouth in order to obtain DSL. What BellSouth then does, however, is transfer back to itself the primary voice line, preventing ALECs from continuing to provide voice service to that customer.

In this proceeding, the Commission requested further information regarding the impact of BellSouth's current DSL policy on competition in the market for local telecommunications services, and comment on whether this issue has been addressed by the FCC. While the FCC did mention a related DSL issue in the UNE-P context in its decision on SBC's Section 271 Application for Texas, it has in no way indicated that it approves of practices such as those described above.¹² The FCC has not addressed an incumbent LEC's refusal to provide DSL service to customers of competing voice providers in the present UNE loop context, nor has it addressed the situation where a LEC is using DSL assignment to prevent access to customers with multiple UNE-loop voice lines.

The impact of this anti-competitive policy is significant. BellSouth is using the customer's decision to obtain DSL service to *physically* foreclose competitors' ability to provide voice service to that customer. Indeed, the policy described above permits BellSouth to utilize its competitive advantage in the DSL market to foreclose competition for voice service. The Commission must therefore decline to endorse any interLATA bid to extent BellSouth's anti-competitive DSL policy is maintained.

¹¹ *Id.*

¹² In the Texas proceeding, the FCC only referenced SBC's refusal to provide DSL service to customers receiving voice service from competitors using UNE-P, and declined to deny SWBT's Section 271 Application on that basis alone. *Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, CC Docket 00-65, FCC 00-238 (rel. Jun. 30, 2000) at ¶ 330.

5. What Must BellSouth Do to Satisfy Issue Five?¹³

The most important step the Commission can take to ensure that BellSouth provides adequate access to loops is to thoroughly investigate BellSouth's loop performance. Following such a review, the Commission will conclude that BellSouth must improve its performance in several critical areas. Chief among these is BellSouth performance in meeting confirmed appointments, since few items will have as significant an impact on local competition as the missed installs that end users attribute to ALECs.

Included within the missed appointment improvement program must be procedures to ensure that ALECs have equivalent access to available facilities. In those instances where facilities are truly unavailable, the Commission must ensure that BellSouth provides notice – to both ALECs and end users – early on in the provisioning process. Unfortunately, the current process does not even attempt to verify available facilities until just before the install, and is therefore wholly inadequate. Once facilities are available on a truly nondiscriminatory basis, retail customers and ALEC customers would be similarly inconvenienced and the Commission thus has twice the impetus to address this problem. The Commission must require BellSouth to consult accurate records prior to issuing a firm order confirmation, and then verify the accuracy of those records by checking that the actual circuit is in working order within a day or two thereafter – not at the install date as is current practice. Only if this process is implemented will the firm order confirmation actually serve a useful

¹³ At the hearing, Commissioner Jaber asked the parties to address what additional requirements would be necessary to effectuate a more competitive local market in Florida. (Tr. 1855-1856). Commissioner Palecki likewise asked what could be done to lessen the continual litigation between BellSouth and the ALEC community which stems from the ALECs' perception that they are not being treated at parity with BellSouth. (*See, e.g.*, Tr. at pages 380-381, 585-588).

purpose, by establishing a reasonably firm install date. That firm install date will then be confirmed well in advance of the appointment date, upon completion of the circuit check.

In terms of improving the actual hot cut process, the Commission must require that BellSouth implement a single order system to replace the current two order (“D”/disconnect and “N”/reconnect) process. While BellSouth indicated that it plans to migrate to such a system next year, actual implementation of similar system changes are often delayed. To ensure that this critical change is made, the Commission must indicate that it will condition a positive finding of checklist compliance upon completion of this important system improvement. Absent this condition, the incentive for BellSouth to implement this change in a timely manner is greatly reduced.

The Commission must also require significant improvement in BellSouth’s loop outage performance. While the process improvements noted above should lead to some corresponding improvement in BellSouth’s outage performance, the Commission must demand proof in the form of significantly fewer troubles within 30 days of installations, and fewer repeat troubles. BellSouth must be meeting performance targets established by the Commission in both the aggregate and ALEC-specific categories, to ensure that it is providing adequate, nondiscriminatory performance.

Finally, the Commission should clearly articulate a policy that will prevent BellSouth from using its newfound dominance of the DSL market to quash the fledgling competition in the voice market. In the absence of a specific, memorialized customer request, BellSouth must be prohibited from assigning DSL service to the primary line of multi-line customers and from transferring back to itself an ALEC customer’s primary line in response to a request for DSL service from the end user. This policy is absolutely fair to BellSouth, as it will

in no way limit BellSouth's ability to market its DSL service but will simply prevent the company from using the DSL service to block ALEC access to voice customers in violation of the checklist.

B. ISSUE A¹⁴

IN RENDERING ITS RECOMMENDATION ON BELLSOUTH'S § 271 APPLICATION, WHAT IS THE NATURE OF THE COMMISSION'S CONSULTATIVE ROLE?

KMC's Position: * While the Commission must advise the FCC whether BellSouth has complied with the competitive checklist, it must also determine whether the local exchange market is open to competition. In order to ensure that the local market is open, the Commission must take action pursuant to both State and Federal law. *

The consultative role given to the Commission by Congress in Section 271(d)(2) is designed to ensure that the agency closest to the specific facts upon which the application will be decided will be heard by the FCC prior to rendering its decision. The role of the Commission is to develop a comprehensive factual record concerning BellSouth's compliance or non-compliance with the requirements of the Section 271 competitive checklist, and to assess the current status of local telecommunications competition in the State of Florida, prior to the filing of BellSouth's application at the FCC.

In its prior reviews of Section 271 applications, the FCC has described the role it believes state commissions play in the process. It has, for example, stated that it will give "substantial weight" to state commission evaluations that are based on a comprehensive review

¹⁴ The Commission requested, at the hearing, that the parties brief this issue.

of the RBOC application,¹⁵ thereby equating the consultations of the Commission and Department of Justice.¹⁶

In developing a factual record and evaluating compliance, it imperative that the Commission regard the Section 271 competitive checklist as minimum standards, supplementing them as necessary with what the Commission knows is necessary for full local competition to develop in Florida.¹⁷ The Commission can and should require more evidence that the local market is open prior to endorsing any BellSouth application to provide interLATA service.

In addition to BellSouth's failure to comply with the key competitive checklist items set forth above, BellSouth has also engaged in numerous anticompetitive and potentially unlawful activities to prevent KMC from competing in its monopoly territory. As noted in the KMC testimony and at the hearing,¹⁸ BellSouth has, as part of its Winback program, solicited customers who have decided to switch to KMC with misleading, false and deceptive statements about the financial viability of KMC and the nature and quality of its services. These anticompetitive actions must be addressed by the Commission, regardless of whether they are considered part of the checklist.

¹⁵ See *In the Matter of Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-404, 15 FCC Rcd 3953 (rel. Dec. 22, 1999) at ¶ 51.

¹⁶ 47 U.S.C. 271 (d)(2)(A) and (B).

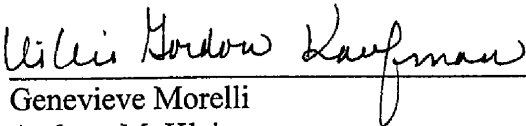
¹⁷ In New York, for example, the Commission negotiated with Bell Atlantic, and the company then filed a "pre-filing statement" indicating the actions it would take to facilitate local competition. See www.dps.state.ny.us/tel271.htm. In Texas, the PUC and competitors negotiated with SBC, the results of which were incorporated into the generic "T2A" interconnection agreement.

¹⁸ See, for example, Sfakianos Rebuttal Testimony at page 5 (Tr. page 1407); Cross Examination of BellSouth witness Cox, Tr. at pages 363-365.

IV. CONCLUSION

For the foregoing reasons, KMC respectfully requests that the Florida Public Service Commission find that BellSouth has not complied with section 271 of the Communications Act and take action to mandate such compliance.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing the Post-Hearing Statement of Issues and Positions and Brief of KMC Telecom, Inc. has been furnished by (*) hand delivery or by U. S. Mail on this 6th day of November, 2001, to the following:

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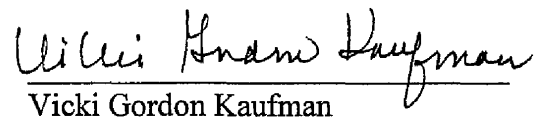
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