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February 17, 2004

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COMMISSION  
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Ms. Blanca Bayo  
Clerk  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: Docket No. 031038-TL

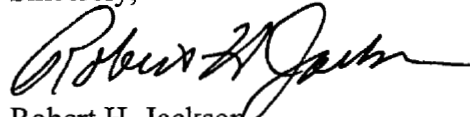
Dear Ms. Bayo:

Enclosed for filing with the Commission are an original and 15 copies of Americatel Corporation's Petition for Initiation of Proceedings in the above docket.

Acknowledgement and receipt of this letter are requested. A duplicate copy of this letter is being provided for this purpose.

If you have any questions about this contract, please contact the undersigned.

Sincerely,



Robert H. Jackson  
Counsel for Americatel Corporation

RECEIVED & FILED



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**BEFORE THE PUBLIC SERVICE COMMISSION**

In re: Petition for approval to revise customer contact protocol by BellSouth Telecommunications, Inc.	DOCKET NO. 031038-TL ORDER NO. PSC-04-0115-PAA-TL ISSUED: January 30, 2004
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**AMERICATEL CORPORATION'S PETITION FOR THE INITIATION OF PROCEEDINGS**

Americatel Corporation ("Americatel"), through counsel and pursuant to Rule 25-22.029, Florida Administrative Code ("FAC"), respectfully petitions the Florida Public Service Commission ("Commission" or "PSC") to establish a formal proceeding in the above-captioned matter. In support of its petition, Americatel states as follows:

1. The address of the Commission is 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850.
2. The petitioner is Americatel Corporation, headquartered at 4045 NW 97th Ave., Miami, FL 33178. Americatel's principal telephone number is 305-717-0200. Americatel, a Delaware corporation that is a subsidiary of ENTEL Chile, is a common carrier providing domestic and international telecommunications services, and also operates as an Internet Service Provider ("ISP"). ENTEL Chile is the largest provider of long distance services in Chile and also provides wireless and competitive local services in the Chilean market. Americatel specializes in serving Hispanic communities throughout the United States, including Florida, offering presubscribed (1+), dial-around, and prepaid long distance services, as well as private line and other high-speed services to its business customers. The majority of traffic carried by Americatel is dial-around in nature, but many customers are also presubscribed to Americatel for their long distance service.

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3. Americatel's Counsel for this proceeding is Reed Smith LLP, 1301 K Street, N.W., Suite 1100 – East Tower, Washington, D.C. 20005. Reed Smith LLP's principal telephone number is 202-414-9200.

4. As discussed in greater detail below, Americatel, as a competitor of BellSouth Telecommunications, Inc. ("BellSouth") for interexchange services, including intraLATA services, is likely to be competitively harmed if the Commission's Order No. PSC-04-0115-PAA-TL, January 30, 2004 ("*Order*") were to take effect because BellSouth would be free to leverage its position as a dominant local exchange carrier ("LEC") to its advantage in the interexchange services market.

5. Americatel became aware of the *Order* on February 4, 2004, while reviewing recent actions of the Commission that have been posted on the PSC's Internet web site.

6. The Commission's *Order* granted BellSouth tentative relief from existing customer contact protocol restrictions that prohibit BellSouth from recommending its own intraLATA services to callers to its Business Office.<sup>1</sup> At the present time, BellSouth's marketing pitch to consumers is limited to the statement that consumers may select a carrier for their local toll calls "in addition to us [*i.e.*, BellSouth]."<sup>2</sup> If the Commission permits its *Order* to become final, BellSouth would be permitted to recommend (*i.e.*, promote) its own intraLATA services so long as it also mentions that consumers are free to select another carrier and offers to read a list of those carriers.<sup>3</sup>

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<sup>1</sup> *Order*, at 4.

<sup>2</sup> *Id.*, at 2.

<sup>3</sup> *Id.*, at 3-4.

7. The PSC premised its decision to lift its marketing safeguards on several factors, including: BellSouth's assertion that, from an analysis of its August and September 2003 new service orders, only 18% of new customers chose BellSouth as their preferred intraLATA carrier; BellSouth is not restricted in marketing its services in other jurisdictions in the same manner as is in Florida; and the PSC previously granted similar relief to Verizon Florida.<sup>4</sup> Americatel addresses two of those factors below.

**BellSouth's Market Share Data Used to Justify Marketing Relief Is Inconsistent with Its Statements to Investors Concerning BellSouth's Market Share**

8. BellSouth's claim that only 18% of new customers are selecting it as their preferred intraLATA carrier seems hollow or, at least, very confusing. BellSouth has been quite successful at selling bundled service packages in the mass-market segment. For example, in its 2002 annual report to the Securities and Exchange Commission ("SEC")—the most recent SEC Form 10-K filed by BellSouth—the Company stated that its Complete Choice® local calling plan had captured 34.4% of residential access lines throughout BellSouth's operating territory and that it had also sold 1.2 million Answers<sup>SM</sup> calling packages that combine local and long distance services.<sup>5</sup> Moreover, those impressive results were achieved largely before BellSouth was even permitted by the FCC to offer interLATA services in the enormous Florida market, which occurred in December 2002.<sup>6</sup> Hence, it is likely that BellSouth's long distance market

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<sup>4</sup> *Id.*, at 3.

<sup>5</sup> See <http://www.sec.gov/Archives/edgar/data/732713/000104746903007358/a2104641z10-k.htm>, at 29 (visited February 6, 2004).

<sup>6</sup> *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee*, Memorandum Opinion & Order, 17 FCC Rcd 25828 (2002).

share is even larger today. Further, BellSouth offers its customers Area Plus® calling service that bundles local and intraLATA services together. BellSouth's Fourth Quarter 2003 Earnings Report states that it "added approximately 3 million long distance customers during 2003, for a total of 3.96 million customers and almost 30 percent penetration of its mass-market customers by year-end."<sup>7</sup>

9. BellSouth's statements about its success in marketing both long distance services and local and long distance packages contained in its financial results appear to contradict its representation to the PSC that only 18% of its new customer orders for August and September 2003 selected BellSouth for intraLATA services. While there may be additional facts that could explain these seemingly inconsistent statements, they are not in the record before the Commission. Therefore, at a bare minimum, the PSC should hold a hearing to determine the complete factual situation.

10. Further, given BellSouth's success in bundling local and long distance services, the market may be changing sufficiently for the Commission to consider BellSouth's local market share before it grants the Company intraLATA marketing relief. Most regulatory agencies, including those in Florida, use the Herfindahl-Hirschman Index ("HHI") to determine market concentration. "HHI is calculated by summing the squares of the individual market shares of all the participants."<sup>8</sup> The two federal antitrust agencies divide

the spectrum of market concentration as measured by the HHI into three regions that can be broadly characterized as unconcentrated

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<sup>7</sup> <http://bellsouthcorp.com/proactive/newsroom/release.vtml?id=44808> (visited February 6, 2004).

<sup>8</sup> U.S. Department of Justice & Federal Trade Commission, 1992 HORIZONTAL MERGER GUIDELINES, at §1.5 (available at <http://www.ftc.gov/bc/docs/horizmer.htm> (visited February 9, 2004)).

(HHI below 1000), moderately concentrated (HHI between 1000 and 1800), and highly concentrated (HHI above 1800). Although the resulting regions provide a useful framework for merger analysis, the numerical divisions suggest greater precision than is possible with the available economic tools and information. Other things being equal, cases falling just above and just below a threshold present comparable competitive issues.<sup>9</sup>

11. BellSouth has been aggressively seeking to drive out a la carte competition. For example, BellSouth appears to be refusing to provide DSL service to any customer who purchases voice services from a competitive local exchange carrier (“CLEC”). The Commission has directed BellSouth to provide DSL services to consumers who chose other carriers for voice services.<sup>10</sup> BellSouth has appealed the PSC’s orders to federal court<sup>11</sup> and has requested that the FCC preempt the PSC and several other PUCs from requiring BellSouth to provide DSL service to any customers who refuse to purchase voice service from BellSouth.<sup>12</sup> BellSouth appears to be attempting to force consumers who want to subscribe to its DSL service to purchase voice services as well. In view of this anti-competitive conduct, the Commission should grant a hearing, as requested by Americatel, before permitting its *Order* to take effect.

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<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., *In re Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.* Docket No. 001305-TP, Order No. PSC-02-0878-FOF-TP, July 1, 2002; *Petition by Florida Digital Network*, Docket No. 010098-TP, Order No. PSC-02-0765-FOF-TP, issued June 5, 2002.

<sup>11</sup> *BellSouth Telecommunications, Inc. v. Supra Telecom. & Information Systems, Inc.*, Case No. 4:02 CV 325-SM (N.D. Fla. filed Sept. 23, 2002); *BellSouth Telecommunications, Inc. v. Florida Digital Network*, Case No. 4:03 CV 212-RH-WCS (N.D. Fla. filed July 8, 2003).

<sup>12</sup> BellSouth Emergency Request for Declaratory Ruling, filed December 9, 2003; *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*, Public Notice, DA 03-3991 (rel. Dec. 16, 2003).

## **Verizon Florida Is Distinguishable from BellSouth under Regulatory Law**

12. BellSouth also argues that, since the Commission granted additional marketing freedoms to Verizon Florida, it should do the same for BellSouth. This argument does not wash.

13. While Verizon Florida is a Bell Operating Company (“BOC”) as a result of the merger of GTE with Bell Atlantic, Verizon Florida is not subject to the same restrictions as BellSouth. For example, GTE was permitted by Congress to offer interLATA services immediately upon President Clinton’s signing the Telecommunications Act of 1996 into law.<sup>13</sup> Section 601(a)(2) of the 96 Act immediately lifted the restrictions of the GTE Consent Decree,<sup>14</sup> including the prohibition against GTE offering interLATA services to its local customers.<sup>15</sup> Likewise, the former GTE Companies were never subject to the mandates contained in Sections 271 through 275 of the Communications Act of 1934, as amended (“34 Act”), which place strict standards on the BOCs’ provision of various services, including interLATA services.<sup>16</sup> Given the intent of Congress that state public utility commissions (“PUCs”) work in tandem with the FCC to promote competition and lower prices for consumers in every market, it is perfectly appropriate for the PSC to take account of federal policy and, in the process, deciding to relax a regulation for Verizon Florida, while retaining it for BellSouth. This issue should be the subject of a hearing.

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<sup>13</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“96 Act”).

<sup>14</sup> *Unites States v. GTE Corp.*, No. 83-1298 (D.D.C. December 21, 1984), *restated* January 11, 1985.

<sup>15</sup> 96 Act, at §601(a)(2).

<sup>16</sup> 47 U.S.C. §§271-275.

**BellSouth Should not be Granted More Regulatory Relief Pending Completion of the Joint Federal-State Section 272 Audit Proceedings**

14. As one of the conditions for BOC reentry into the interLATA market, Congress required the BOCs to offer in-region, intraLATA services through a separate affiliate (“Section 272 Affiliate”) that complies with various structural, non-discrimination and accounting safeguards.<sup>17</sup> Included in these requirements is the obligation for a BOC and its Section 272 Affiliate to undergo and pay for an audit of their compliance with these safeguards. The FCC and the affected PUCs provide joint oversight and review of these audits.<sup>18</sup>

15. The initial audit report for BellSouth has been received by the FCC and the affected PUCs, including the Florida Commission. The audit report for BellSouth and BellSouth’s response thereto have been made available to the public, and the FCC has requested public comments on the audit by March 9, 2004.<sup>19</sup> This audit report noted some deficiencies in BellSouth’s compliance with applicable safeguards, to which BellSouth has responded.<sup>20</sup> While some of those deficiencies seem to be rather insignificant in scope, others are not. For example, the audit report indicates that BellSouth and its Section 272 Affiliate appear to have shared Operations, Installation and Maintenance (“OI&M”) functions improperly.<sup>21</sup>

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<sup>17</sup> *Id.*, at §272(d).

<sup>18</sup> *Id.*

<sup>19</sup> “Enforcement Bureau Seeks Comment on BellSouth Telecommunications, Inc. Section 272 Biennial Audit Report in EB Docket No. 03-197,” Public Notice, DA 04-33 (rel. January 9, 2004).

<sup>20</sup> Letter from Stephen L. Earnest, BellSouth, to Terry Bowling, Pricewaterhouse Coopers; Sherry Herauf, FCC; and Trish Green, FCC, dated November 10, 2003.

<sup>21</sup> *Id.*, at Untitled Attachment, p.1 (Objective I, Procedure 3).



16. Even more significant to the instant situation is the auditor's finding that BellSouth's customer service representatives ("CSRs") improperly steered consumers toward BellSouth's Section 272 Affiliate and did not properly inform consumers of their right to select other long distance carriers.<sup>22</sup> To a competitor that must rely on BellSouth's neutrality during the order-taking process, BellSouth's assurances that it will fix this problem are not sufficient. The matter needs to be reviewed in greater detail—both before the FCC in EB Docket No. 03-197 and by the PSC in a formal hearing in the instant docket.


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<sup>22</sup> *Id.*, at Untitled Attachment 1, p.13 (Objective VII, Procedure 6).

**Relief Requested**

17. The Commission should not permit its *Order* to take effect on February 21, 2004, as scheduled. Rather, it should set the matter for hearing, pursuant to Chapter 25-22 of the Commission's Rules.

Respectfully submitted,  
AMERICATEL CORPORATION

By 

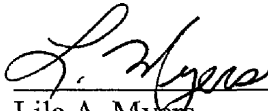
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Its Attorneys

Dated: February 17, 2004

**CERTIFICATE OF SERVICE**

I, Lila A. Myers, do hereby certify that the foregoing **AMERICATEL CORPORATION'S PETITION FOR THE INITIATION OF PROCEEDINGS** was served on this 17<sup>th</sup> day of February, 2004, upon the following by U.S. First Class and electronic mail:

BellSouth Telecommunications, Inc.  
Nancy White/James Meza III/R.D. Lackey  
c/o Nancy H. Sims  
150 South Monroe Street, Suite 400  
Tallahassee, FL 32301-1556  
[nancy.sims@bellsouth.com](mailto:nancy.sims@bellsouth.com)

  
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Lila A. Myers