ORIGINAL

Legal Department

J. PHILLIP CARVER
General Attorney

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0710

December 30, 1998

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 981834-TP

Dear Ms. Bayó:

Enclosed are an original and 15 copies of BellSouth Telecommunications, Inc.'s Motion to Dismiss Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth Service Territory. Please file this document in the captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me.

Sincerely,

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

J. Phillip Carver (BP)

J. Phillip Carver

Enclosures

cc: All parties of record
A. M. Lombardo
N. B. White
William J. Ellenberg II (w/o enclosures)

ACK
AFA
APP
CAF
CMU
CTR
EAG
LEG 1
LIN 5
OPC
RCH
SEC 1
WAS
OTH

DOCUMENT NUMBER-DATE
14707 DEC 30 98
FPSC-RECORDS/REPORTING

ORIGINAL

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: December 30, 1998

MOTION TO DISMISS PETITION OF COMPETITIVE CARRIERS FOR COMMISSION ACTION TO SUPPORT LOCAL COMPETITION IN BELLSOUTH SERVICE TERRITORY

BellSouth Telecommunications, Inc. ("BellSouth") hereby respectfully submits, pursuant to Rule 25-22.037, its Motion to Dismiss the Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth's Service Territory, filed in the above-styled matter, and states as grounds in support thereof the following:

1. The subject Petition has been filed by a number of parties that collectively refer to themselves as the "competitive carriers". These include several associations that purport to represent new entrants, as well as two of the larger long distance providers that have obtained ALEC status (e.g., AT&T, MCI). The Petition claims to be a proposal to "promote competition". In essence, the Petition raises nothing new. Instead, it is simply the latest continuation of an approach that the largest and most powerful would-be competitive carriers (most notably AT&T) have pursued since the passage of the 1996 Telecommunications Act, the demand that absolutely everything they want be given to them as a prerequisite to their entry into the local market. In this Petition -- the latest, most detailed, and most outlandish variation of this familiar theme -- these parties

make four demands: that the Commission (1) reverse its previous decisions on unbundled network element (UNE) pricing; (2) institute an open-ended "competitive forum" in which any ALEC can raise any operational issue and insist that it be resolved to its satisfaction; (3) institute an elaborate and time consuming process of third-party testing of the OSS that BellSouth would be required to implement as a result of the "competitive forum"; and finally, (4) create for ALECs a special process whereby they would have any complaint they might raise heard by the Commission on expedited basis, i.e., effectively giving them priority over all other matters before the Commission.

2. This Petition should be summarily dismissed for several reasons. First, it is flatly contrary to the Federal Act. Second, even if the proposal of the Petitioners could be considered without completely disregarding the purpose of the Act and the procedures dictated by it, this proposal is still void of merit. In the first demand, Carriers argue that the Commission should overturn its previous Orders regarding UNE prices and enter a new result more to their liking. The second and third demands are for the unwarranted construction of a series of procedural hurdles to BellSouth's future 271 application. The last request is for the Commission to unnecessarily create a special procedure for ALECs to obtain expedited hearings, beyond the process that applies to anyone else who seeks this remedy.

3. The simplest reason that this Petition should be dismissed is that it flatly violates the spirit and the letter of the 1996 Telecommunications Act. The Act sets forth in a very straightforward way the manner in which new entrants are

to obtain the tools of competition. Section 251 identifies generally the services network elements and types of interconnection that will be used for local competition. Section 252 provides a simple framework whereby new entrants are to negotiate with incumbent providers to obtain the necessary entry vehicles. Should negotiations fail, unresolved issues are ruled upon by the Commission. This process culminates in a contract that sets forth the terms and process for interconnection, resale and the purchase of UNEs (both negotiated and arbitrated), which the Commission must subsequently approve.

4. Implicit in this entire process is the expectation that all parties to the result, a Commission-approved contract, will honor the contract for its duration. In other words, the contract should be accorded the same legal significance as any other contract. This process has, of course, been completed in Florida from start to finish many times and with many ALECs. The parties have negotiated, and, where necessary, the Commission has ruled. Thus, the tools by which new entrants that desire to compete may do so have already been put in place, in keeping with the purpose of the Act and the intentions of Congress.

5. Again, the Federal statutory scheme is one in which it is incumbent upon carriers to do as much as possible to negotiate in good faith appropriate interconnection arrangements. Only if their efforts fail, is there a need for the Commission to arbitrate and enter Orders to the limited extent necessary to determine the terms by which the parties will abide. Nevertheless in this case, competitors who already have interconnection agreements in place are requesting that the Commission undo its previous Orders, set aside negotiated

contracts, and, in general, give them the benefit of prices, terms and conditions more favorable than those that either they agreed to or the Commission has ordered. There is absolutely nothing in the Act that would authorize (or even allow) the action sought by Petitioners. Instead, parties having contacts to obtain interconnection, UNEs or resale should live by those contracts, just as should any party entering into a legally binding obligation. There is no justification, either in the Act or otherwise, for this attempt to misuse the Commission to try to strike a better deal than what has in many cases, been agreed to and what this Commission in all cases, has ordered. Since this request is in obvious conflict with the procedure authorized by the Act, the Petition should be dismissed in its entirety.

6. Beyond the fundamental legal infirmity of the Petition, there is the additional problem that it attempts to demonstrate some need for the demanded relief by relying on mischaracterizations of the facts that relate to competition in Florida. Since this is a Motion to Dismiss, it is not BellSouth's intention to address herein every one of the alleged facts in the Petition. Nevertheless, it is instructive to consider at least some of the facts that negate the allegations of the Petitioners.

7. The fundamental (and fallacious) premise upon which the entire Petition is based is that local competition does not exist in Florida, and can not exist in Florida because BellSouth and this Commission have failed to give the new entrants everything they want. Although the misstatements that purport to buttress this conclusion are many and varied, one example should suffice to

demonstrate the liberties that Petitioners have taken with the facts. Petitioners cite to the report issued by the Florida Public Service Commission's Division of Communications entitled "Competition In Telecommunications Markets in Florida" (December 1998) in support of the contention that local competition is developing in Florida only at a "glacial pace" (Petition, p. 26). A reading of the actual report, however, provides a much different picture. The report states that 51 ALECs have already entered the local market in Florida. Further, 61% of exchanges in Florida are served by three or more ALECs (Id., p. 47). The Report also concludes that:

> [I]n general, ALEC rates are comparable to LEC rates. All ALECs do not necessarily target all customers; some focus only on residential customers and others offer service strictly to business customers. Additionally, since ALECs are not required to make their service universally available, they may target certain selected territories, such as areas where high-volume customers reside, and ignore territories where volumes are lower. In spite of these differences, customers appear to be able to obtain service from ALECs under terms and conditions comparable to the LECs.

(Report, p. 33) (Emphasis added).

8. Finally, in responding to the question of why the current volume of competition is not greater, the Staff noted that of the 100 ALECs that responded to the data request upon which the Report is based, only 15 stated that they had no plans to enter the local service market in Florida. Further, "[T]he most common reason cited was that entering the Florida market did not comport with the Company's strategic business objectives." (Report, p. 28). Thus, a fair reading of the Report by the Commission supports the conclusion that competition is developing, albeit slowly, that as many as 85 companies that plan to enter the local market with the tools available to them to do so, and at least

some of the companies that do not plan to enter the market have made this decision based on their own business reasons. Thus, the self-serving contention advanced by these Petitioners that local competition is impossible with the current tools is simply wrong.

9. Turning to the first of the demands of the Petitioners, we can see that this flawed premise regarding competition is at the heart of the Petitioners' claims. First, Petitioners assert that resale is not a viable way to enter the market. (Petition, p. 6, 7.) In support of this, Petitioner's claim that "AT&T and MCI WorldCom have discontinued resale strategies." (Id., p. 6.) In the above-noted Report, however, the Commission found that of the 51 ALECs that are currently providing service in Florida, 37 are doing so through resale (Report, pp. 28, 29). Petitioners next assert that the only viable entry strategy is the exclusive use of UNEs purchased from ALECs (i.e., an arrangement whereby the ALEC would supply no portion of the network it uses to serve its customers). Nevertheless, the Commission's Report reveals that one Petitioner, MCI, is serving customers in three areas in Florida via "facilities-based" service. (Report, p. 29.) Another Petitioner, Intermedia, is using a "combination of methods" to serve both residential and business customers in six areas in Florida. (Id., p. 29.) The Petition, of course, neglects to mention the fact that some of the Petitioners are currently using the entry vehicles that, according to the Petition, are unusable.

10. Only one company that joined in the Petition (AT&T) appears to serve no local customers in Florida. (Report, p. 29, 30.) But this is not surprising.

AT&T has openly pursued the approach of refusing to compete in the local market unless it is given everything it wants in precisely the manner it wants. AT&T now (along with the other Petitioners) takes the position that its recalcitrance should be rewarded, and that the Commission should offer it better UNE prices in an attempt to entice it to enter the local market. Petitioners readily acknowledge that this Commission has already set UNE prices in Florida. (Petition, p. 26.) Still, Petitioners advance the perverse argument that because they have not chosen to purchase UNEs at the prices that have been set, the Commission must have gotten the pricing wrong.

11. Petitioners give as a reason for their claimed inability to compete in the local market the prices that they must pay for UNEs in urban markets. Specifically, they contend that in urban areas ALECs are charged $17.00 per month for a loop, but that the "economic cost" of a loop is $4.74 per month in urban areas." (Petition, pp. 29-30.) Then Petitioners reveal in a footnote that the source for this deaveraged rate is the Hatfield 5.0 study. (Id.) The Hatfield cost study has been rejected by this Commission in at least three proceedings: the original arbitrations of AT&T and MCI, the subsequent docket to set additional UNE rates, and, most recently, in the context of universal service. Still, Petitioners continue to cling to a version of the facts that has long been discredited in an attempt to argue one more time the pricing issues that have already been resolved.

12. Despite this attempt to reargue their case two years after the conclusion of the arbitration hearings, the fact remains that the Commission has

already resolved these issues. UNE prices have been set in proceedings in which these same petitioners made these same arguments. Further, some new entrants are actually using the competitive tools that they have negotiated, or that have been ordered by the Commission, to compete. In contrast, Petitioners approach strategy is to complain long and loudly in an attempt to extract from the Commission an Order that will be favorable enough to them to finally entice them to compete. The fact remains, however, that this Commission has ruled on the UNE pricing issues, and there is no change in circumstances or other reason that would make revisitation of UNE prices, terms and conditions appropriate.

13. The Petitioners' demands for a "competitive forum" and for "third party testing" are also contrary to the procedures of the Act. Under the Act, a review of BellSouth's offerings to ALECs, including OSS, would occur in the context of a 271 application by BellSouth. The common procedure has been to submit a 271 application to a State Commission to better enable the Commission to fulfill its consultative role to the FCC when the BOC files its application with the FCC pursuant to § 271 (d)(1). There is nothing in the ACT to authorize a state Commission-sanctioned free-for-all in which ALECs would somehow collectively dictate what BellSouth must offer, then embark on a dilatory and unauthorized series of third party-conducted tests.

14. The Petitioners demand represents a two-pronged approach to achieving a single goal: the development of a byzantine set of procedural hurdles to BellSouth's entry into the long distance market. The only difference in this and previous attempts in other states is that, in the three states in

BellSouth's region in which this gambit has been tried previously, AT&T and the other Petitioners involved waited until after BellSouth had filed its 271 application with the respective State Commission. Here, Petitioners are taking the slightly more aggressive approach of trying to develop the impediments to BellSouth's entry into the long distance market before BellSouth actually files its request for entry. Still, no Commission in BellSouth's region has adopted this approach so far, and this Commission should declare to do so as well.

15. Typically, AT&T, MCI and some other combination of parties have made a request in the context of a pending 271 proceeding for what they call a "collaborative process." In these cases, the request is that the respective Commission, rather than simply scrutinizing BellSouth's offerings to determine whether they pass 271 muster, instead institute an elaborate process whereby all parties have an open forum to raise any operational issues that they wished. Under this proposal BellSouth would not be allowed to move forward with its 271 application until every issue was resolved to the satisfaction of all ALECs. In other words, the process is very much like the one requested here. Of the three states that have received this request, North Carolina has rejected it, while Alabama and Georgia have taken no action. Moreover, the North Carolina Commission correctly concluded that this process/forum would, in the context of their proceeding, delay rather than expedite "the process of achieving greater levels of telecommunications competition." (Order Scheduling Hearing, p. 3, entered August 21, 1998 in Docket No. P-55, Sub 1022.) Despite Petitioners' attempt to cast this "competitive forum" as the latest trend, the fact remains that

to date no Commission in BellSouth's region has accepted Petitioners' argument to take this approach.

16. Moreover, this Commission has instituted proceedings to deal with the subject technical issues when it perceives the needs to do so. Petitioners acknowledge, for example, the recent workshops concerning BellSouth's OSS systems and collocation. (Petition, p. 33.) The idea that these practical efforts by the Commission staff should be expanded into an open forum for the parties that oppose BellSouth's entry into the long distance market to raise every possible complaint that they can imagine is nothing more than an exceedingly transparent attempt to delay the general progress of competition, i.e., BellSouth's effort to compete in the long distance market.

17. Further, Petitioner's requests are based, at least in part, upon their contention that BellSouth "has refused to make the operational changes necessary to allow new entrants to compete (Petition, p. 5) Nothing could be further from the truth. Although BellSouth does not agree with all the requirements imposed by the FCC, BellSouth has expended tremendous effort (and tens of millions of dollars) to meet these requirements. As a result, the FCC found in its Memorandum Opinion and Order, dated October 13, 1998 (CC Docket 98-121) that BellSouth has met some checklist items and made "considerable progress" in meeting others (Memorandum and Order, ¶ 50) It is noteworthy that Petitioners have chosen the present time, when BellSouth is moving ever closer to satisfying the FCC requirements for 271 relief, to propose elaborate processes that would ensure further delay.

18. Petitioners next contend that after "the process of identifying and resolving issues relating to OSS in the Competitive Forum has been completed" (Petition, p. 42), then third party testing should begin. Petitioners hold up as a model of progressiveness the New York Commission, which according to Petitioners, approved third-party testing and appointed one entity to act as a consultant. This consultant retained a second entity to build an interface specifically for the purpose of testing. Then, under the Petitioners' proposal, and only then, would testing begin. Testing would continue for some undefined (but presumably lengthy) period of time until "the test scenarios are sufficiently exhausted. " (Petition, p. 43.) Then, the results of these tests would be considered in conjunction with the results of "satisfactory evidence of actual commercial usage delivered through a comprehensive and thoroughly audited performance measurement system." (Id., p. 43.) BellSouth's 271 application would be considered only at the conclusion of this process.

19. The fact that delay is the goal here is clear when one considers that Petitioners contend that there should be both third-party testing and commercial usage as a prerequisite to 271 relief, a position that has not been endorsed by any regulatory body. In fact, the FCC originally proposed testing (including internal, third party and carrier to carrier testing) as an alternative to waiting for the results of commercial usage. (See, Memorandum and Order, ¶ 86) The suggestion that both should be done is an attempt to impose an additional superfluous requirement, and one more way to delay the process.

20. The idea that the above-described process would somehow expedite the development of BellSouth's OSS is absurd. Again, the strategy of the Petitioners is evident. Even though BellSouth has no 271 application pending in Florida at this time, it is Petitioner's desire to set up a series of hurdles, procedural and technical, that are so elaborate that to get past each and every one of them would take years. The notion that setting up this byzantine scheme will somehow facilitate competition is not only counterintuitive, it lacks any logical support.

21. Finally, the Petitioners request a rule-making so that complaints against BellSouth under the interconnection agreements would be handled on an expedited basis. Rulemaking is unnecessary, however, because any party currently has the option, upon the filing of a Petition, to request that the Petition be given expedited treatment. If a request is made, the Commission weighs it on the basis of its own merit and determines whether expedited treatment is appropriate. Apparently the Petitioners are requesting that rules be promulgated to give them some special entitlement to expedited treatment. Under Petitioners proposal, ALECs would not have to establish the merits of a request for expedition like all other entities over whom the Commission has jurisdiction, but would have the ability to force the Commission to hear any complaints they may have within 60 days of filing. (Petition, p. 49.) This would effectively deprive the Commission of the discretion that it now has to treat requests for expedited treatment as it deems fit, taking into consideration the other matters before it.

22. Expedited treatment exists today, one need only prove that there is a need for this treatment. There is no reason to create a special class of parties, a class populated solely by ALECs, that would have an entitlement to make a greater claim upon the Commission's time than any other of the carriers or consumers that come before it. Instead, Petitioners should continue to have only the same right to expedited treatment as any other party, the right to request that the Commission consider an expedited treatment on an ad hoc basis and grant it upon a showing of good cause.

23. For the reasons set forth above, this Petition should be summarily dismissed. The creation of an elaborate, complicated generic process to implement local competition is entirely contrary to the 1996 Act. Further, the requested relief and the arguments that support it are either a rehash of arguments previously rejected by this Commission, or a plea to inappropriately build hurdles to BellSouth's obtaining Section 271 relief, even though there is no 271 application pending. Finally, the rulemaking requested by Petitioners is unnecessary.

WHEREFORE, BellSouth respectfully requests the entry of an Order dismissing the subject Petition with prejudice.

Respectfully submitted this 30th day of December, 1998.

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy B. White (pw)
NANCY B. WHITE
c/o Nancy Sims
150 South Monroe Street, #400
Tallahassee, Florida 32301
(305) 347-5558

William J. Ellenberg II (pw)
WILLIAM J. ELLENBERG II
J. PHILLIP CARVER
675 West Peachtree Street, #4300
Atlanta, Georgia 30375
(404)335-0711

145650

CERTIFICATE OF SERVICE
Docket No. 981834-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 30th day of December, 1998 to the following:

Staff Counsel
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin, Davidson, Decker, Kaufman, Arnold, & Steen, P.A.
117 South Gadsden Street
Tallahassee, FL 32301
(850) 222-2525
Attys. For FCCA

Andrew O. Isar
Telecommunications Resellers Assoc.
4312 92nd Avenue, N.W.
Gig Harbor, WA 98335
(253) 265-3910

Marsha Rule
Tracy Hatch
101 North Monroe Street
Suite 700
Tallahassee, FL 32301
(850) 425-6364
Attys. for AT&T

Richard D. Melson
Hopping Green Sams & Smith, P.A.
Post Office 6526
123 South Calhoun Street
Tallahassee, FL 32314
(850) 425-2313
Atty. For MCI

Dulaney L. O'Roark
MCI Telecommunications Corporation
780 Johnson Ferry Road
Suite 700
Atlanta, GA 30342
(404) 267-5789

Floyd Self
Norman H. Horton, Jr.
Messer, Caparello & Self
Post Office Drawer 1876
215 South Monroe Street
Suite 701
Tallahassee, FL 32302-1876
Attys. for WorldCom

Terry Monroe
Vice President, State Affairs
Competitive Telecomm. Assoc.
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036
(202) 296-6650

Susan Huther
MGC Communications, Inc.
3301 Worth Buffalo Drive
Las Vegas, Nevada 89129
(702) 310-4272

Patrick K. Wiggins
Donna L. Canzano
Wiggins & Villacorta, P.A.
2145 Delta Boulevard
Suite 200
Tallahassee, FL 32303
Attys. for Intermedia

Norman H. Horton, Jr.
Messer, Caparello & Self
215 South Monroe Street
Suite 701
Tallahassee, FL 32302-1876
Tel. No. (850) 222-0720
Fax. No. (850) 224-4359
Attys. for e.spire

James C. Falvey, Esq.
e.spire Communications, Inc.
133 National Business Parkway
Suite 200
Annapolis Junction, Maryland 20701
Tel. No. (301) 361-4298
Fax. No. (301) 361-4277

J. Phillip Carver (BW)