ORIGINAL

RECEIVED-FPSC

99 MAY 36 PM 2:19

RECORDS AND REPORTING

Legal Department

MICHAEL P. GOGGIN
General Attorney

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(305) 347-5561

May 6, 1999

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

Re: 980253-TX ("Fresh Look") Docket

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Rebuttal Comments, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Michael P. Goggin

Michael P. Goggin

Enclosures

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

cc: All parties of record
Marshall M. Criser III
William J. Ellenberg II
Nancy B. White

118186

AFA
APP 1
CAF
CMU
CTR
EAG
LEG
MAS 5+1=6
OPC
RRR 1
SEC 1
WAW
OTH

DOCUMENT NUMBER-DATE

05769 MAY-6 99

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed Rules 25-4.300, F.A.C., Scope and Definitions; 25-4.301, F.A.C., Applicability of Fresh Look; and 25-4.302, F.A.C., Termination of LEC Contracts.	)))))	Docket No. 980253-TX Filed: May 6, 1999

REBUTTAL COMMENTS OF BELLSOUTH TELECOMMUNICATIONS, INC.

BellSouth Telecommunications, Inc. ("BellSouth") hereby files its Comments in rebuttal to the responsive comments submitted by other parties on the proposed "Fresh Look" rules.[1]

Three proponents of the proposed "Fresh Look" rules have filed comments in response to BellSouth's comments and testimony in this matter.[2] Each claims that the proposed rules are needed because BellSouth's customers purportedly entered into long term agreements "in a monopoly environment," when BellSouth was the only available alternative. *See, e.g.* KMC at 16; FCCA at 1. In spite of prior Commission findings that competition, including switched-based competition from ALECs, has existed for some time in BellSouth's territory, none of the rules' proponents provides any evidence to suggest that the customers whose contracts would be affected by the proposed rules did not

[1] AT&T filed its initial comments in this matter on April 29. These comments do not add anything to what has been said already by other proponents of the "fresh look" rules. For this reason, and because they were filed late, the Commission need not consider them. BellSouth will respond to them, to the extent necessary, in these Rebuttal Comments.

[2] Petitioner's Response to Comments by BellSouth Telecommunications, Inc. and in Support of the Proposed Rules ("Time Warner"); The Florida Competitive Carriers Association's Responsive Comments on Proposed Fresh Look Rule ("FCCA"); and Responsive Comments of KMC Telecom Inc. and KMC Telecom II Inc, in Support of Adoption of a Fresh Look Rule ("KMC"). As noted above, AT&T also filed its initial comments, which are more or less a restatement of the FCCA's comments.

have competitive alternatives available to them when they selected BellSouth. These proponents also take issue with BellSouth's contention that the proposed rules are beyond the express statutory authority of the Commission and would violate the Florida and Federal Constitutions. These arguments are based on a misapplication of relevant precedents and should be dismissed.

The absence of any evidence that customers lacked competitive alternatives at the time they entered into the contracts that these rules would permit them to abrogate, demonstrates the utter lack of any justification for the rules. BellSouth would not have been permitted to offer such contracts if it had not been subject to "uneconomic bypass" (i.e. competition) years before the 1995 Florida price regulation legislation or the federal Telecommunications Act of 1996. Moreover, logic dictates that BellSouth would have had no incentive to offer these customers discounts from its tariffed rates, as it has in these contracts, but for the presence of lower cost alternatives offered to prospective customers. The number of carriers and types of competitive alternatives were multiplied by the 1995 legislation and the Telecommunications Act of 1996.

The proponents of the rule offer no testimony to support their assertions that the contracts were signed at a time when no competitive alternatives existed. Instead, they offer market share statistics and claim that BellSouth's share demonstrates the lack of competing alternatives. FCCA at 2; KMC at 6, 7-8.[3] In fact, the opposite is true.

[3] It should be noted that the market shares cited by the rules' proponents are misleading to say the least. The figures include both business and residential access lines. Moreover, none of the figures attempt to

While it is clear that competitive alternatives were available prior to 1996, it is also clear that the number of competitive alternatives has grown at an explosive rate. Within months of the 1996 Act's passage, six carriers of local exchange service were actively competing with BellSouth.[4]
By mid-1998, the number of local exchange carriers had increased over 800 percent to 51.[5] Indeed, as the Commission found in BellSouth's proceeding under Section 271, by 1997, BellSouth faced competition for business customers from competing providers of local exchange service throughout its territory. See, Response Comments of BellSouth Telecommunications Inc., at 2. This is all, of course, in addition to providers of Shared Tenant Services, PBX vendors and others who had been competing for these customers long before the passage of Florida's price regulation statute or the Telecommunications Act.

More importantly, the number of access lines provided to business customers by these carriers is growing at a rate of over 300 percent annually and their share of the business market is increasing at a like rate.[6] These plain facts, which the rules' proponents conveniently ignore, demonstrate that business

---

gauge competition from local access line substitutes, such as PBXs, and KMC's figures fail to take into account facilities-based competition in any form. Moreover, as BellSouth noted in its response comments in this docket, high market shares do not, as KMC suggests, equate to market power. Economists and the courts generally agree that to prove market power, it must be shown that a seller in a defined market has the power to raise prices and restrict output. *See e.g., Eastman Kodak Co. v. Technical Servs., Inc.*, 112 S. Ct. 2072, 2080-81 (1992). KMC has not attempted to even define a relevant market, much less offer proof of market power.

[4] Florida Public Service Commission, *Competition in Telecommunications Markets in Florida (1996 FPSC Report)* at 40-43. (Dec. 1996).

[5] Florida Public Service Commission, *Competition in Telecommunications Markets in Florida (1998 FPSC Report)* at 36-47. (Dec. 1998).

[6] *Id.* at 46-47. *Compare,* Florida Public Service Commission, *Competition in Telecommunications Markets in Florida (1997 FPSC Report)* at 66-73 (Dec. 1997).

customers have enjoyed competitive alternatives to BellSouth for years, and have seen their options multiply in the last three at a dizzying rate. Moreover, the explosive growth in the number of business access lines served by carriers competing with BellSouth is testimony to the fact that the contracts to be abrogated under the proposed rules are not barriers to entry in this market.

Against these undeniable facts, the only purported fact offered by the rules' proponents to show that no competitive alternatives were available are misleading market share statistics. Even if the market shares offered related to the market in which the proposed rules are designed to intervene, they would not show a lack of competitive alternatives existed at any time. All they would indicate is that, given a plethora of competitors, a steadily decreasing majority of customers chose BellSouth.

In view of past Commission findings that business customers have had competitive alternatives to BellSouth for years, the rules' proponents have the burden to prove that the contracts to be abrogated under the proposed rules were signed at a time when no competitive alternatives to BellSouth existed. Merely repeating the assertion will not make it true. No party has produced any evidence to support this assertion. Accordingly, the Commission should disregard any argument that it justifies the adoption of these rules.

Similarly, the Commission should dismiss any suggestion that BellSouth's term contracts constitute barriers to entry. The explosive growth of ALEC business is enough to disprove this assertion. More telling, however, is the fact that the rules' proponents recognize that long-term contracts are not barriers to

entry. *See, e.g.* AT&T at 3. They argue that only long-term contracts entered into before the availability of competitive alternatives should be abrogated. *Id.* In view of the evidence of competitive alternatives and the absolute lack of any proof to the contrary, then according to AT&T's logic, there is no reason to assume that BellSouth's contracts are barriers to entry, any more than one would assume so of Time Warner's or the contracts of any other ALEC.

The proponents' contention that the proposed rules would be constitutional is also somewhat hollow. Their analysis suffers from a misreading of the key precedents. Their arguments ultimately fail, however, because of their utter lack of any factual justification for the rules.

In a nutshell, KMC, FCCA and Time Warner all contend that because telecommunications is a regulated industry, BellSouth could not reasonably expect that it has any constitutionally recognized rights in its contracts. This surprising assertion is based on a misreading of the decision in *Energy Reserves Group Inc. v. Kansas Power & Light Co.*, 459 U.S. 400 (1983). In that case, a contract for the purchase of wellhead gas by a utility was found not to have been substantially impaired by a Kansas Statute that imposed price ceilings on the sale of wellhead gas, frustrating the price escalator clause in the producer's agreement. *Id.* at 410-420. The reasons for the Court's holding were that the parties' contract expressly recognized that gas prices were fixed by regulation; indeed the governmental price escalation clause would only operate in the event that Kansas or the federal government acted to raise prices. The court found that "at the time of the execution of the contracts, ERG [the producer] did not

expect to receive deregulated prices. The very existence of the governmental price escalator clause indicates that the contracts were structured against the background of regulated gas prices." *Id.* at 415. The fact that the gas producer's stated expectation was that the contract price would be fixed under federal or state law meant that its reasonable expectations were not substantially impaired when Kansas adopted a price for intrastate gas sales that was lower than the rates adopted by the federal government for interstate sales. *Id.* at 416.

The fresh look proponents misinterpret the fact-specific holding in *Energy Reserves* as a broad statement that no participant in an industry regulated by a state can have any reasonable expectation that its contracts will not be substantially impaired by the state. Time Warner, for example, says that such contracts "are simply not the type of private commercial contracts envisioned to be protected by the Contract Clause." Time Warner at 7. If the Supreme Court had believed this to be true, its opinion in *Energy Reserves* would have been a great deal shorter. Contrary to Time Warner's assertion, it is the state's exercise of its police power that must be examined to determined to see if it violates the Contract Clause, not the other way around.[7]

The first step in the analysis of a state regulation like the proposed rules is whether it would substantially impair a contract relationship. *Id.*at 411. Whether

[7] Similarly, the other authorities cited by the proponents do not stand for the proposition that the fact of regulation alone negates constitutional protections. Rather, these cases recognize that a state's exercise of its police power must serve a significant and legitimate public purpose. *See, e.g., H. Miller & Sons v. Hawkins*, 373 So.2d 913, 914 (Fla. 1979) ("[C]ontracts with public utilities are made subject to the reserved authority of the state, under the police power on express authority or constitutional authority, to modify the contract *in the interest of the public welfare* without unconstitutional impairment of contracts.") (emphasis added).

the industry to which the contract relates is regulated is a factor to be considered, but so is the degree to which the contract would be impaired. *Id.* The fact that an industry is regulated does not end the inquiry.

In this case, the degree and direction of regulation are substantially different than in *Energy Reserves.* BellSouth is not subject to rate of return regulation. The prices in the contracts at issue are not fixed by the Commission[8] and, unlike the parties in *Energy Reserves*, BellSouth and its customers have no reasonable expectation that they will be. That case concerned the gas industry at a time when regulators believed that regulation was a better governor of industries than free markets would be. The case also arose during the height of the energy crisis. The parties knew that the price provisions in their contracts would be determined by regulators and memorialized this fact in their agreement. By contrast, these contracts concern the sale of services in a deregulated telecommunications market. The legislature has encouraged the formation of such contracts by doing away with rate of return regulation and removing regulatory barriers to entry by competing providers. Indeed, the legislature specifically recognized in the 1995 legislation that discount contracts designed to meet competitive alternatives were in use and should be encouraged:

> Nothing contained in this section shall prevent the local exchange telecommunications company from meeting offerings by any competitive provider of the same, or functionally equivalent, non-basic services in a specific geographic market or to a specific customer

[8] Indeed, contrary to Time Warner's belief, the Commission lacks the statutory authority to determine just and reasonable rates for these contracts under Florida Statutes Section 364.14. *See* Florida Statutes Section 364.051(1)(c).

> by deaveraging the price of any non-basic service, packaging non-basic services together or with basic services, using volume discounts and term discounts, and offering individual contracts.

Florida Statutes Section 364.051(6)(a). Given the clear intent of the state to deregulate telecommunications markets and the clear statutory recognition and encouragement of precisely the sort of contracts at issue, no reasonable business would expect that the state intended to somehow override the constitutional protections that attach to all contracts.[9] Accordingly, it would be unreasonable to state that BellSouth has no contractual rights to impair.

As stated in BellSouth's initial comments, the impairment of BellSouth's rights would be total – the proposed rules authorize the abrogation of BellSouth's agreements with its business customers. Accordingly, the analysis must be focused on whether a significant and legitimate public purpose would be served by the adoption of the rules. *Energy Reserves,* 459 U.S. at 410-14. The purpose of this requirement is to be certain that the state's police power is not merely being used to provide a benefit to special interests. *Id.* at 412.

The purported justification for the rule is to promote competition. Leaving aside for the moment the irony of asking regulators to pass additional regulation to make a deregulated market more competitive, the rules' proponents have not demonstrated how competition would benefit from the rule. The affected contracts were entered into by customers with a range of competitive

[9] It should be noted that there is no express authority given to the Commission , in this section or elsewhere, that would permit rules to be adopted abrogating such contracts after they have been formed, nor do any of the rules' proponents cite any.

alternatives, a fact that the proponents have not even attempted to rebut with evidence. Moreover, most of the agreements were signed at a time when rule proponents like Time Warner and KMC were themselves actively competing against BellSouth. In short, the proponents have identified no category of contracts that were signed "in a monopoly environment" or when BellSouth was the "only alternative." The failure of the rules' proponents to put any evidence into the record in this matter that would justify the rules demonstrates that they are not reasonably related to any significant or legitimate *public* purpose. The rules undoubtedly would benefit some competitors, but this is not the same thing as to benefit competition.

The proposed rules lack justification. The rules' proponents have provided no evidence of the purported justification because there is none. For the same reason, the rules would not serve any significant or legitimate public purpose. For these reasons, and the reasons stated in BellSouth's prior comments, the Commission should decline to adopt the proposed rules.

Respectfully submitted this 6th day of May, 1999

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy B. White (BW)

NANCY B. WHITE
MICHAEL P. GOGGIN
c/o Nancy H. Sims
150 So. Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 347-5558

William J. Ellenberg II (BW)
WILLIAM J. ELLENBERG II
MARY K. KEYER
Suite 4300
675 W. Peachtree St., NE
Atlanta, GA 30375
(404) 335-0711

161995

CERTIFICATE OF SERVICE
Docket No. 980253-TX

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 6th day of May, 1999 to the following:

James C. Falvey
American Communications
Services, Inc.
133 National Business Parkway
Suite 200
Annapolis Junction, MD 20701

AT&T Communications of the
Southern States, Inc.
Marsha Rule
101 North Monroe Street, Suite 700
Tallahassee, FL 32301-1549
Phone: (850) 425-6365
Fax: 425-6343

Cox Communications (VA)
Jill Butler
4585 Village Ave.
Norfolk, VA 23502
Phone: 757-369-4524
Fax: 757-369-4500

DMS, Information Tech. Program
Carolyn Mason, Reg. Coordinator
Freddy Martinez
Derek Howard
4050 Esplanade Way
Bldg 4030, Rm. 180L
Tallahassee, FL 32399-0950
Phone: (850) 922-7503
Fax: (850) 488-9837

Florida Competitive Carriers Assoc.
c/o McWhirter Law Firm
Vicki Kaufman
117 S. Gadsden St.
Tallahassee, FL 32301
Phone: 850-222-2525
Fax: 222-5606

Landers Law Firm
Scheffel Wright
P.O. Box 271
Tallahassee, FL 32302
Phone: 850-681-0311
Fax: 224-5595

Messer Law Firm
Floyd Self
P.O. Box 1876
Tallahassee, FL 32302-1876
Phone: 850-222-0720
Fax: 224-4359

Pennington Law Firm
Barbara Auger
P.O. Box 10095
Tallahassee, FL 32302-2095
Phone: 850-222-3533
Fax: 222-2126

TCG South Florida
c/o Rutledge Law Firm
Kenneth Hoffman
P.O. Box 551
Tallahassee, FL 32302-0551
Phone: 850-681-6788
Fax: 681-6515

Time Warner Communications
Ms. Rose Mary Glista
700 South Quebec Street
Englewood, CO 80111
Phone: 919-501-7704
Fax: 919-501-7719

Carolyn Marek
Time Warner Telecom
Southeast Region
233 Bramerton Court
Franklin, Tennessee 37069
Tel. No. (615) 376-6404
Fax. No. (615) 376-6405

Rick Melson
Hopping Green Sams & Smith
123 So. Calhoun Street
Tallahassee, FL 32314

Kim Caswell
Mike Scobie
GTE
P.O. Box 110
Tampa, FL 33601

Normal Horton, Jr.
Messer Law Firm
P.O. Box 1876
Tallahassee, FL 32302-1876
Tel. No. (850) 222-0720
Atty. for e.spire

Charles Rehwinkel
Sprint
P.O. Box 2214
Tallahassee, FL 32316

Sandy Khazraee
Sprint
P.O. Box 2214
Tallahassee, FL 32316

Jeff Wahlen
Ausley Law Firm
227 South Calhoun Street
Tallahasee, FL

Rhonda Merritt
AT&T Communications of the
Southern States, Inc.
101 North Monroe Street
#700
Tallahassee, FL 32301-1549

Nanette Edwards
700 Boulevard So.
#101
Huntsville, AL 35802

Joe Hartwig
480 E. Eau Gallie
Indian Harbour Beach, FL 32937
"Not deliverable as addressed -
Unable to forward"

Michelle Herschel
FECA
P.O. Box 590
Tallahassee, FL 32302

Morton Posnor
Swidler & Berlin
3000 K Street, N.W.
#300
Washington, D.C. 20007

Monica Barone
Sprint
3100 Cumberland Circle
Atlanta, GA 30339

Frank Wood
3504 Rosemont Ridge
Tallahassee, FL 32312

Ned Johnston
BellSouth Telecommunications, Inc.
701 Northpoint Parkway
Suite 400
West Palm Beach, FL 33407

Michael P. Goggin (pa)

Michael P. Goggin

118115