

ORIGINAL

AKERMAN, SENTERFITT & EIDSON, P.A.
ATTORNEYS AT LAW

216 SOUTH MONROE STREET, SUITE 200
POST OFFICE BOX 10555
TALLAHASSEE, FLORIDA 32302-2555
18501 222-3471
TELECOPY 18501 222-6628

June 15, 1998

Ms. Blanca Bayo
Director, Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RE: PSC Docket No. 97-1056-TX

Dear Ms. Bayo:

On behalf of BellSouth BSE, Inc. enclosed for filing in the above referenced docket are the original and fifteen copies of BellSouth BSE, Inc.'s redacted Brief in Support of Application for Certification as an Alternative Local Exchange Carrier and one copy of the unredacted Brief containing references to confidential materials subject to a request for confidentiality filed this date. Also enclosed is a diskette containing the same in Wordperfect 6.1.

If you have any questions please call me at (850) 222-3471. Thank you.

Sincerely,



E. Gary Early

- ACK _____
- AFA 1
- APH _____
- CAF _____
- CMU 5/15/98
- CTR _____
- EAG _____
- LEG 2
- LIN 5
- OPC _____
- RCH _____
- SEC 1
- WAS _____
- OTH _____

EGE/mcd
enclosure(s)
cc: All parties of record

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

06305 JUN 15 98

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for certificate to
provide alternative local exchange
telecommunications service by
BellSouth BSE, Inc.

Docket No. 97-1056-TX

Filed: June 15, 1998

**BRIEF OF BELLSOUTH BSE, INC.
IN SUPPORT OF APPLICATION FOR CERTIFICATION AS
AN ALTERNATIVE LOCAL EXCHANGE CARRIER**

BellSouth BSE, Inc. ("BSE") pursuant to Rule 25-22.056, Florida Administrative Code, and the Commission's Order of Prehearing Instruction, hereby files its Brief in Support of its Application for Certification as an Alternative Local Exchange Carrier (ALEC), requests that the Commission enter an order granting certification as an ALEC and states:

Summary

BSE has met the standards established by the Florida Legislature for certification as an ALEC. Pursuant to Section 364.337, Fla. Stat., ALEC certification is conditioned upon a showing that the applicant has sufficient technical, financial and managerial capability to provide such service in the area to be served. Those standards have been met in this case. The Legislature has unquestionably provided that those listed standards are the only standards to be considered in the ALEC certification process.

Petitioners and Intervenors have raised issues of anti-competitive behavior and predatory pricing that are nothing more than unsubstantiated and unsupported speculation and conjecture. The PSC has sufficient investigative compliance and enforcement capabilities to ensure that any improper or illegal behavior is addressed if such behavior is ever found to have occurred. Based upon the standards that are to be applied in the certification process, the PSC should grant BSE's

DOCUMENT NUMBER-DATE

06305 JUN 15 98

FPSC-RECORDS/REPORTING

ALEC certification.

BSE Has Met All Applicable Certification Standards

The 1995 Florida Legislature, through its enactment of Chapter 95-403, Laws of Florida, established specific standards by which ALECs are to be certificated. Those standards, codified as Section 364.337, Fla. Stat., provide in pertinent part that "[t]he commission shall grant a certificate of authority to provide alternative local exchange service upon a showing that the applicant has sufficient technical, financial, and managerial capability to provide such service in the geographic area proposed to be served."(e.s.) In order to ensure that its intent regarding the standards to be applied in the certification process would not be misunderstood, the Legislature further provided that "[i]t is the intent of the Legislature that the commission act expeditiously to grant certificates of authority under this Section and that the grant of certificates not be affected by the application of any criteria other than that specifically enumerated in this subsection." Section 364.337(1), Fla. Stat. The certification standards thus are comprised of simple and objective criteria that are to be applied evenly to all companies seeking such certification.

There is no dispute regarding BSE's technical, financial and managerial capability to operate as an ALEC. The parties have stipulated that BSE is capable and should be certificated as an ALEC in areas outside of the service area of BellSouth Telecommunications, Inc. By so stipulating, the parties have acknowledged not only that BSE has the technical, financial and managerial capability to provide the service, but that BSE would be certificated to provide such services on or after July 1, 1995. Therefore, BSE meets the definition of an ALEC and the certification standards applicable thereto.

The Legislature's establishment of explicit and exclusive standards by which ALECs are to

be certificated must be given weight by the Commission. It is a fundamental precept of statutory construction that "when the language of a statute is clear and unambiguous, the statute must be given its plain and ordinary meaning." Coastal Petroleum Company v. Department of Environmental Protection, 649 So.2d 930 (Fla. 1st DCA 1995) The circumstances faced by the Court in Coastal Petroleum are similar to those in this case. In Coastal Petroleum the DEP attempted to impose financial security criteria for offshore drilling that exceeded the specific standards set forth in the statute, basing its decision on related statutes requiring oil companies to be responsible for future damages caused by drilling operations. The Coastal Petroleum court relied on the principle that "the powers of administrative agencies are measured and limited by the statutes or acts in which such powers are expressly granted or implicitly conferred" and reversed the DEP's order because the DEP action in imposing criteria not set forth in the statute was without authority and contrary to legislative intent. Coastal Petroleum at 931.

The tenets of statutory construction set forth in Coastal Petroleum are easily applied to the facts of this case. In this case BSE has met the statutory standards established by the Legislature for certification as an ALEC within the territory requested in the application. The protests of Petitioners and Intervenors based on anti-competitive future effects are, similar to provisions regarding future oil drilling damages, speculative in nature and may be fully addressed at such time as they occur under the auspices of related compliance statutes.

**Speculative Anti-Competitive Effects
are not Grounds for Denial of Certification**

The Florida Public Service Commission has never denied a company the authority to provide

telecommunications services because it might, at some unspecified time in the future, violate applicable statutes and rules. Nevertheless the Petitioners and Intervenors have requested that the Commission deny or restrict certification of BSE on the basis that such certification will present "an ability to improperly benefit" and the "ability to discriminate" so as to allow BSE in concert with BellSouth Telecommunications, Inc. to act anticompetitively. (T102) This argument is without legal or logical support, and placed in a more common scenario would require the denial of all drivers licenses because the applicants would have "an ability" to speed, or require the denial of all liquor licenses because the applicants would have "an ability" to serve minors. Neither of these situations occur because applicants and regulators understand that incidences of non-compliance with any standard must be addressed as they occur in the context of an investigative, compliance or enforcement action.

Section 364.337(1), Fla. Stat. provides the sole and exclusive criteria for certifying an ALEC. As an ALEC, BSE will interact with BellSouth Telecommunications, Inc. on the same basis and under the same terms and conditions as any other ALEC. (T28,34,182) In the event that, subsequent to certification, BSE and BellSouth Telecommunication, Inc. collude to avoid the requirement that all ALECs be treated equally or to provide some special benefit to BSE, the Commission has a full range of compliance and enforcement measures at its disposal to remedy any such situation. See e.g. Sections 364.185 and 364.285, Fla. Stat.

In that regard, BSE has in the context of this proceeding, provided sworn testimony that it will comply with all statutes and rules applicable to it, including the prohibitions against anti-competitive activity, and will make its records and agreements available to the PSC to ensure compliance (T28, 81-82, 181). Mr. Gillan's testimony that "there would be so little you [the

Commission] could do about" anticompetitive practices (T119) and his doubts that the Commission could "do anything meaningful" to prevent such practices (T155) ignores or belittles the Commission's ability to adequately implement the broad investigative powers conferred by the Florida Legislature. See Sections 350.117, 350.121, 350.123, 350.124 and 350.127, Fla. Stat.

Through its enactment of Sections 350.127 and 364.285, Fla. Stat., the legislature has given the Commission the authority to modify or revoke BSE's ALEC certificate if it acts unlawfully. However, neither Chapter 350 nor Chapter 364, Fla. Stat., provide that the mere speculative possibility of future unlawful acts is a basis upon which ALEC certification may be withheld or restricted. It would be unjust and arbitrary for the Commission to deny BSE certification as an ALEC on the basis of the Petitioners' and Intervenors' speculative and hypothetical contention that BSE may act unlawfully in the future. If such an event occurs, Petitioners and Intervenors may file complaints with the Commission, or the Commission may act on its own initiative to remedy any such abuse of the certificate authority.

**BSE has no Inherent Advantage Over
Any Other ALEC in the State of Florida**

The Petitioners and Intervenors also attempt to show that BSE's ability to resell the incumbent's services can lead to anticompetitive actions. Their witness, Mr. Gillan, produced Exhibit 5 at the hearing in an attempt to illustrate this point. The argument is seriously flawed and, as was shown in the hearing, inconsistent with the statements of AT&T in FCC Docket No. 96-149, Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended (hereinafter Docket 96-149). It should, therefore, not be surprising that Mr. Gillan abandoned his concerns regarding resale in BSE's subsequent North Carolina certification

hearing, at which he made no mention of the resale issue.

Mr. Gillan's exhibit is an attempt, through example, to demonstrate that BSE has an advantage over other resellers because BellSouth Telecommunications, Inc. collects access charges associated with local exchange service. Somehow, Mr. Gillan theorizes that BellSouth Telecommunications, Inc.'s retention of access charges in the resale environment will allow BSE, as a reseller, to charge less than other resellers for local telecommunications services. There are several fatal flaws in this argument.

First, the access charges collected by BellSouth Telecommunications, Inc. remain unchanged whether BellSouth Telecommunications, Inc. retains the local service on a retail basis with the end user customer, or whether BellSouth Telecommunications, Inc.'s local service is resold by BSE or any other ALEC. In other words, BellSouth Telecommunications, Inc. will receive the same access charges regardless of which LEC is actually providing the local service, i.e. BellSouth Telecommunications, Inc. at retail rates or any ALEC using BellSouth Telecommunications, Inc. resold services. (T213-215) BellSouth Telecommunications, Inc. would, of course, lose the access revenues if any ALEC chose to serve the end user with its own facilities, including unbundled network elements. (T214) In addition, because the wholesale discount is assumed to be set based on the actual cost avoided by BellSouth Telecommunications, Inc. when it provides the service on a wholesale basis, BellSouth Telecommunications, Inc.'s margin for local telecommunications services remains the same whether it provides the service on a retail or wholesale basis. Of course, this leveling of the playing field for all competitors was the intent of the Federal Act.

Because of the wholesale/retail pricing requirements of the Federal Act outlined above, BellSouth Corporation is worse off, not better off, if BSE were to sell local telecommunications

services at a price lower than the wholesale price. Using Mr Gillan's example, BellSouth Corporation will obtain revenues of \$35.30 with associated margin from the combination of local telecommunications services (\$24.69) and access charges (\$10.61). If BellSouth Telecommunications, Inc. resells the local service at the wholesale rate to any ALEC, the margin is unchanged, i.e., the reduction in retail revenue is offset by an identical reduction in expense, and access charges continue to be collected by BellSouth Telecommunications, Inc. However, if BSE chose to charge a price below the wholesale price for its local telecommunications services, the margin to BellSouth Corporation would be reduced because the lower revenue would not be offset by any reduction in expense. (T215-216) In addition, BellSouth Corporation would have incurred costs associated with providing the services through BSE. The end result is that BellSouth Corporation would be worse off financially rather than better off as postulated by Mr. Gillan.

There is another, equally practical reason that BSE has no advantage in the price it charges for its services over any other ALEC. In accordance with Section 251(b) of the 1996 Act, ALECs are required to resell their services, although without a discount. For example, if BellSouth Telecommunications, Inc. (the ILEC) offered a retail service at \$20.00 which had a wholesale price of \$16.00, BSE could not price at or below this level, without losing money. (T230) If BSE attempted to provide its local service at \$14.00 (\$2.00 below its cost), other ALECs could purchase the service for resale by paying the \$14.00 to BSE rather than purchasing the service from BellSouth Telecommunications, Inc. at \$16.00. (T49-50; 80-81) Thus, BSE could have no competitive advantage. In addition, BSE would lose money on every transaction.

Finally, the Petitioners and Intervenors themselves have taken contradictory positions before the FCC, showing the fallacy of Mr. Gillan's logic. In his testimony before the Commission, Mr.

Gillan was critical of the fact that BSE would operate as a reseller, testifying that such resale promoted unfair competition and would effectively block competitors from the market. (T115-119) Mr Gillan testified that, in his opinion, the only way for BSE to be put "on the same basis as everyone else" would be through the purchase of network elements. (T131-133)

Contrary to Mr. Gillan's testimony, AT&T indicated, in comments to the FCC in Docket 96-149, that local service resale by an ILEC affiliate was not a problem. AT&T expressed its belief that the purchase of network elements by an affiliate would violate the Federal Act, but that the resale of services was acceptable, and concluded that "[t]he joint marketing provisions of Section 272(g) likewise make clear that the provision of exchange services by the affiliate (other than through resale) would be inconsistent with the statute" (e.s.). The FCC, in describing the comments of the parties, indicated that "AT&T and MCI, on the other hand, argue that Section 272(g)(1) allows Section 272 affiliates to resell the BOC's local services, but does not permit Section 272 affiliates to purchase unbundled network elements from the BOC" (e.s.) (Docket 96-149, para 308). AT&T's concern over the affiliate being able to have options other than resale, according to the FCC was the "affiliates will be able to avoid paying access charges ... and to avoid the imputation requirements of Section 272(e)(3)" (para 308). MCI agreed with the AT&T conclusions, but for a slightly different reason. The FCC indicated that MCI asserted "that the opportunities for discrimination and cross-subsidy are substantially greater when a BOC provides network elements to its affiliate than when it offers retail services at a standard wholesale discount" (para 308). Of course, the FCC determined that the affiliate could provide local exchange services through both resale and unbundled network elements and found AT&T's concerns to be "unpersuasive" (para. 314). Reselling and the purchase of network elements are the only two options available to a typical

ALEC. (T188) It is, at best, disingenuous for Petitioners and Intervenors to argue that resale is preferable to the purchase of network elements when it suits their purposes before the FCC, and to produce a witness to argue that the purchase of network elements is preferable to resale when it suits their purposes before the Florida PSC.

For all of the above reasons, Petitioners and Intervenors attempt to substantiate their concern over the ALEC certification of BSE should be completely disregarded. BSE will have no inherent competitive advantage over any other ALEC competing in the State of Florida.

**There is no Basis for Treating BSE as the
Equivalent of BellSouth Telecommunications, Inc.**

BellSouth BSE, Inc. is a corporation authorized to do business in the State of Florida and, under the laws of the State of Florida, is a separate and distinct entity from BellSouth Telecommunications, Inc. As a separate legal entity, BSE is entitled to be treated independently of any other company, even if those companies are affiliated. See Dania Jai Alai Palace, Inc. v. Sykes, 450 So.2d 1114 (Fla. 1984); USP Real Estate v. Discount Auto. Parts, 570 So.2d 386 (Fla. 1st DCA 1990) Under the laws of Florida, there is no basis for the Commission to "pierce the veil" of BSE's corporate existence based upon a speculative supposition that BSE may collude with its corporate sibling to engage in anti-competitive behavior. The fact is that BSE is not BellSouth Telecommunications, Inc. and is not an incumbent local exchange telecommunications company. BSE is a wholly owned subsidiary of BellSouth Corporation. BSE shares no common officers, directors, employees, assets, physical plants or other network elements with BellSouth Telecommunications, Inc. (Exhibit 4, Deposition of Scheye, pp. 12-13, 26, 28-30) BSE intends to provide services and bundles of services separate and distinct from those provided by BellSouth

Telecommunications, Inc. (T33, 43, 52, 64-65, 200) No provision of Florida law prohibits BSE from being certificated as an ALEC throughout the entire area for which BSE has sought ALEC certification. (T170-171; Section 364.337, Fla. Stat.) Based on the foregoing, there is no basis in either fact or law for the Commission to treat BSE as the "alter-ego" of BellSouth Telecommunications, Inc. As such BSE is entitled to be treated as a separate entity and its application for certification as an ALEC is entitled to be reviewed and approved on its own merits.

In addition to the fact that BSE is not an incumbent "local exchange telecommunications company" under Florida law, BSE is not an "incumbent local exchange carrier" (ILEC) as defined in the Federal Telecommunications Act of 1996 (the Federal Act). See 47 U.S.C. Section 251(h). The ILEC definition is inapplicable to BSE because BSE did not provide service on the date of enactment (47 U.S.C. Section 251(h)(A)), and was neither a member of the exchange carrier association pursuant to FCC rules, nor a successor or assign of such an association member (47 U.S.C. Section 251(h)(B)(i) and (ii)).

The Act provides that the FCC may, by rule, treat a LEC as an incumbent if the LEC occupies a comparable position as the ILEC, has substantially replaced the ILEC and such treatment is consistent with the public interest, convenience and necessity (47 U.S.C. Section 251(h)(2)(A), (B), (C)). The rules then establish those instances in which a LEC may be considered an assign for the purpose of ILEC treatment. The Federal Act defines an affiliate very generally in Section 153, while defining LEC obligations in Section 251(a) and (b), and the additional obligations of ILECs in Section 251(c). FCC Rule 53.207 states that, if a BOC transfers to its affiliate ownership of any network elements that must be provided on an unbundled basis pursuant to Section 251(c)(3) of the Act, the affiliate must continue to offer such network elements on an unbundled basis pursuant to

the ILEC requirements. No such condition exists for BSE because, as a reseller, BSE will not own any network facilities. Further, BellSouth Telecommunications has not transferred any network capabilities to BSE.

Section 272 of the Federal Act provides the safeguards that are in place to assure that ILEC affiliates and non-affiliates are treated in a non-discriminatory manner. (T27) For example, Section 272(e) - "Fulfillment of Certain Requests," obligates the entity that is subject to the Section 251(c) - "Additional Obligations of Incumbent Local Exchange Carriers," to fulfill requests "from an unaffiliated entity for telephone exchange service and exchange access" within the same time frames that it provides such services "to itself or to its affiliates" (e.s.). (Section 272(e)(1). This provision is applicable to all affiliates of the ILEC, not just those affiliates that may be required for the provision of manufacturing or interLATA services. The Federal Act, therefore, clearly defines what an affiliate is, what an ILEC is, and when an affiliate could be classified as comparable to the ILEC. Because BSE will, in no way, replace BellSouth Telecommunications, Inc., assume any of its obligations or requirements, or receive or have transferred to it any of the assets that BellSouth Telecommunications, Inc. requires to meet its ILEC obligations, BSE is neither an ILEC nor comparable to an ILEC.

Not only has the FCC, under the authority in Section 251(h), declined to establish rules that would impose ILEC status on an affiliate such as BSE, in considering this type of issue it has concluded just the opposite. In Docket 96-149, the FCC addressed the provision of local exchange and exchange access by LEC affiliates (Section VIII). Based upon a voluminous and comprehensive record, the FCC found "no basis in the record of this proceeding to find that a BOC affiliate must be classified as an incumbent LEC under Section 251(h)(2) merely because it is engaged in local

exchange activities" (para 312). Based on its thorough analysis of the issue, the FCC thereupon concluded that "a BOC affiliate should not be deemed an incumbent LEC, subject to the requirements of Section 251(c) solely because it offers local exchange service; rather, Section 251(c) applies only to entities that meet the definition of an incumbent LEC under Section 251(h)" (para 312). As previously discussed, BSE does not meet the definition of an ILEC under Section 251(h).

The FCC found that an affiliate is not prohibited from obtaining resold local exchange service and unbundled network elements (para 313). The FCC further found that the increased flexibility resulting from the ability of an affiliate to provide both interLATA and local services from the same entity serves the public interest (para 315). As a result, the FCC concluded that BOC affiliates that do not meet the definition of an ILEC should not be precluded from providing local exchange services (para 312). The FCC rejected AT&T's argument that the affiliate's provision of local exchange service would slant the playing field as "unpersuasive" because other telecommunications providers would be able to provide local exchange services on the same terms and conditions (para 314). (See T30) In addressing these issues, the FCC never concluded that the affiliate was exempt from the state commission's authority to certify alternative carriers in a particular state. However, the FCC did preclude a state commission from imposing ILEC status inappropriately. The FCC stated "we conclude that states may not unilaterally impose on non-incumbent LECs obligations the 1996 Act expressly imposes only on incumbent LECs." The FCC correctly concluded that incumbency is not an inherited characteristic based upon affiliation, rather, it is determined solely on what the LEC is and how the LEC operates.

**There are Sound Business and Regulatory
Reasons for Establishing BSE**

Petitioners and Intervenors have attempted to argue that BSI is unnecessary and that there are no marketing or regulatory reasons for creating BSE. This is clearly not the case. Several ILECs have or are, themselves, creating ALEC affiliates for a variety of reasons. In this case, BSE was not created by the ILEC, BellSouth Telecommunications, Inc., but rather by BellSouth Corporation. The basis of establishing BSE as an ALEC was not grounded solely on restrictions placed upon BellSouth Telecommunications, Inc. Rather, there remains some regulatory uncertainty concerning the degree to which an ILEC, including BellSouth Telecommunications, Inc. may jointly market long distance services (once BellSouth Corporation is authorized) and whether long distance can be fully integrated by the ILEC in the manner that BSE envisions long distance will ultimately be provided in its package. (T209-211) Because long distance is seen as being an integral part of the ALEC's package, regulatory uncertainty is not a trivial concern. However, there are other compelling reasons for the creation of the ALEC. First, from a regulatory perspective, a separate affiliate that could integrate local and long distance was deemed to be in the public interest by the FCC because it could provide new and innovative services. (T32; Docket 96-149, para. 315) Similarly, from both the legal and regulatory perspective, the 1996 Federal Act and the FCC rules recognize that an ILEC affiliate providing local exchange services was contemplated. Despite Petitioners' and Intervenors' argument that BellSouth Telecommunications, Inc. could go out of region and offer integrated packages, there is no legal or regulatory prohibition or restriction to establishing a new affiliate as an ALEC and there are recognized benefits for doing so.

There are also several operational benefits to creating an ALEC affiliate. BSE is intended to focus on integrated packages and multistate capabilities. (T32, 43, 52) By limiting its focus BSE anticipates being more effective in these markets. (T199-200) Attempting to do this through

BellSouth Telecommunications, Inc., with its comprehensive existing retail services and wholesale capabilities, would not allow the same level of focus. (T200) Similarly an ALEC such as BSE or any one of the other certificated ALECs, including Petitioners and Intervenors, may develop systems and infrastructure uniquely for its products and services. The incumbent would more likely need to attempt to incorporate these functions into its existing systems and procedures.

By creating BSE as an ALEC there is assurance that BSE will interface with BellSouth Telecommunications, Inc. on the exact same terms and conditions as any other ALEC. It will use the same operational support systems; it will get the same resale discount; and it will interface subject to negotiated interconnection agreement (or statement of generally available terms and conditions) as other ALECs. (T34, 58) From a competitive standpoint, the other ALECs should actually prefer that BSE be the provider of integrated packages, if their real concern was full and fair competition, not simply to obstruct the development of competition.

Whether one considers the 1996 Federal Act, the FCC rules and/or sound financial and business reasons, a BellSouth ALEC affiliate is envisioned by the rules and created for sound market reasons.

**Actions by Other State Commissions
Strongly Support Certification of BSE**

The Petitioners and Intervenors suggest that it is a novel concept that an ALEC affiliate of an ILEC should be permitted to provide local exchange service within the franchise territory of the ILEC. To the contrary, the concept is not novel, but rather is one that has been accepted and implemented on 23 occasions and by 18 state commissions (T85-89; Ex. 6), including Florida. See Florida PSC Order PSC-95-1602-FOF-TX, Docket No. 95-1310-TX, Notice of Proposed Agency

Action Order Granting Certificate to Provide Alternative Local Exchange Telecommunications Service to Sprint Metropolitan Networks, Inc., December 27, 1995; Florida PSC Order PSC-97-0222-FOF-TX, Docket No. 96-1371-TX, Notice of Proposed Agency Action Order Granting Certificates to Provide Alternative Local Exchange Telecommunications Services to GTE Card Services Incorporated d/b/a GTE Long Distance, Incorporated, February 24, 1997. The other state orders specifically include three states in which BSE has been certificated to operate as an ALEC in BellSouth Telecommunications, Inc. territory. See Alabama Public Service Commission Report and Order, Docket 26192, February 20, 1998; Georgia Public Service Commission Interim Certificate of Authority to Provide Competitive Local Exchange Telecommunications Services, Docket No. 8043-U, March 9, 1998; Public Service Commission of South Carolina, Order Approving Certificate to Provide Local Service, Docket No. 97-361-C, December 23, 1997.

Petitioners' and intervenors' reliance on the Order of the Public Utility Commission of Texas denying GTE Communications Corporation's application to operate as an ALEC in Texas as a basis for the Florida Public Service Commission to deny certification as an ALEC to BSE in Florida is misplaced. That Order specifically provides that the denial was based upon a specific finding that "because PURA precludes the issuance of a COA as a matter of law." Public Utility Commission of Texas, Order, p.1 Docket No. 16495, November 20, 1997; see also T169. The specific requirements of Texas law, specifically that contained in PURA Section 54.102(a), upon which the Texas Commission based its order, do not exist in Florida law. Therefore the Texas Order is of little or no persuasive authority in Florida.

In Kentucky, which is the only state that has rejected certification of BSE in the same operating territory as BellSouth Telecommunications, Inc., the Kentucky PSC acknowledged in its

Order that its decision was based solely on its view that the risk of anticompetitive behavior could not be mitigated because of the Kentucky PSC's perceived inability to regulate CLEC behavior, which inability extends to the finding that a CLEC is not even required to file applications to begin operations or to have its financial stability monitored by the Kentucky PSC. (Order at p.3) BSE respectfully suggests that the Florida Commission has never attempted to avoid its statutory and regulatory obligations (see p.4 of this Brief) and should not do so now.

BSE Will Compete in the Local Exchange Market

The Petitioners and Intervenors contend that BSE should not be certificated because BSE's operation as an ALEC within BellSouth Telecommunications, Inc.'s franchise territory will not be sufficiently competitive. (T97-98) In general, the nature and extent of BSE's planned competition in the local exchange market is legally irrelevant to the certification standards set forth in Section 364.337(1), Fla. Stat. Nonetheless, the Petitioners and Intervenors contention that BSE's certification as an ALEC will not promote competition in the local exchange market is flawed because 1) it is based upon an artificially narrow concept of competition that actually disserves customers, 2) it is factually wrong because BSE will compete and 3, it is nothing more than an attempt to keep a viable ALEC competitor out of the integrated one-stop shopping market.¹

Nothing in Chapter 364, Fla. Stat., nor elsewhere in Florida law, establishes that a specific

¹ As explained by BSE, the business plan of BSE is to serve a market comprised of those customers who desire integrated one-stop shopping service, defined as the ability to purchase a complete package of telecommunications services both in and outside of Florida and in and outside of BellSouth's traditional operating areas, receiving one bill and interacting with one point of contact. (T185-186,200)

type or level of competition in the local exchange market is a requirement of ALEC certification. Wisely, the Florida Legislature did not presume to define in advance precisely how the local exchange market will evolve, what entities will emerge to compete in it, what services those entities will offer, or what market niche those entities might select for themselves. Rather, the Florida Legislature provided a single certification requirement, that being that the applicant demonstrate that it possesses "sufficient technical, financial and managerial capability to provide such service in the geographic area proposed to be served." Section 364.337(1), Fla. Stat. Those standards ensure that an ALEC is financially, technically and administratively competent to provide uninterrupted quality services to the consumer. How and to what extent the ALEC will use the provision of those services to compete with the ILEC and other entities in the marketplace is irrelevant to the initial certification provision.

Petitioners' and Intervenors' contention that BSE will not compete is built upon an artificially narrow concept of competition that disserves the interest of telecommunications customers. What Petitioners and Intervenors really mean by competition is: Does the entry of BSE tend to erode the local exchange market share of BellSouth Telecommunications, Inc.? This is the wrong focus. The more proper focus is: Does the entry of BSE provide for additional choices for customers of local exchange service? The focus for this Commission should not be competition between or against any specific competitors, but additional choices for customers in the marketplace. Such was the opinion expressed at the hearing. (T130) As the record in this case reflects, BSE will offer integrated one-stop shopping service to customers in Florida who desire that type of telecommunications service. BSE will compete with all entities, including BellSouth Telecommunications, Inc., to best serve those customers, with the corresponding prospect of achieving a market share just like any other

ALEC. BSE respectfully submits that the true basis for the Petitioners and Intervenor's opposition is not their concern that BSE will fail to bring competition to the local exchange market, it is their fear that BSE will bring competition to an important segment of the local exchange market -- customers who seek integrated one-stop shopping. It is generally accepted that the ability to offer true one-stop shopping is the key to success in the evolving telecommunications industry. Petitioners and Intervenor's do not want an ALEC competitor that combines the BellSouth brand with a focused marketing approach aimed at that segment of the telecommunications market that desires integrated one-stop shopping. Of course, that is exactly what BSE is designed to do. Customers will gain from BSE's entry as an ALEC, which is the real benefit of competition.

Post Hearing Motions

Subsequent to the hearing, the Florida Competitive Carriers Association ("FCCA") filed the following motions: (i) a motion for an order compelling BSE to produce certain documents that it believed were improperly withheld from the response to FCCA's First Request to Produce Documents (Request No. 5); (ii) a motion to supplement the record; (iii) a motion for an extension of time to file post-hearing briefs in this docket; and (iv) a motion for oral argument. In addition, FCCA, acting in concert with AT&T Communications of the Southern States, Inc. ("AT&T") and MCI Telecommunications Corporation ("MCI") filed a joint request that the Commission take official recognition of an order of the Kentucky Public Service Commission which denied the application of BSE for authority to provide local exchange service as a "competitive local exchange carrier," pursuant to Kentucky law, in the incumbent local exchange service area of BellSouth Telecommunications, Inc.

With respect to FCCA's motion for an extension of time within which to file post-hearing

briefs, the parties filed a Joint Motion for Extension of Time within which to file post-hearing briefs, extending the time of submission from June 1, 1998 to June 15, 1998. Commissioner Deason, acting as prehearing officer granted that motion. PSC Order-98-0765-PCO-TX.

With respect to FCCA's motion to compel discovery of documents, FCCA and BSE entered into a stipulation providing for a review of the information at issue, upon execution of a confidentiality agreement, and procedures for submission of a motion to supplement the record and for addressing the issue in post-hearing briefs. BSE's agreement to provide access to the document at issue was without prejudice to BSE's position that the document was not responsive to FCCA's Request to Produce Documents, Request No. 5.

Pursuant to the confidentiality agreement entered into between the parties, the FCCA and other parties identified 29 pages of the document at issue to be submitted in a confidential exhibit. The exhibit will be the subject of a motion to supplement the record and will be addressed in the posthearing brief.

The document at issue is an analysis of possible ALEC business strategies and capabilities prepared for BSE by Anderson Consulting in late 1997 and early January 1998. It is composed, loosely, of 15 volumes of material, consisting of somewhere between two to three thousand pages (no one has ever counted), and, when placed in a stack, is nearly two feet tall. The various volumes address a multitude of issues, such as follows: BST Sales Solutions Assessment (Volume 1); BSLD Customer Care Solutions Assessment (Volume 2); BellSouth CLEC - Mass Markets Customer Care Estimating/Value Package Definition and Assumption (Volume 3); CLEC Planning Chart (Volume 4); Business Markets Customer Post Acquisition Team (Volume 5); CLEC Architecture Team (Volume 6); Sievel/CMS Scenario Solution Plan (Volume 7); Aurum/Actiview Scenario Solution

Plan (Volume 8); CLEC Gateway Implementation Plan (Volume 9); Business Goals and Critical Success Factors (Volume 10); CLEC Business Application Integration Team (Volume 11); CLEC Billing Team (Volume 12); CLEC Mass Market Team (Volume 13); Mass Market Application Assessment (Volume 14); and CLEC Application Integration Team (Volume 15).

From these thousands of pages Petitioners and Intervenors propose to supplement the evidentiary record with 29 pages of material culled from various volumes without regard for the purpose for or the context within which the material was prepared, without regard to the fact that this information was prepared by a source outside of BellSouth Corporation and BSE, and without regard for whether the assumptions underlying the consultant's recommendations are still valid for the purposes that Petitioners and Intervenors seek to introduce this information into the record.

The pages identified by Petitioners and Intervenors do not in any way or manner support the assertions of Petitioners and Intervenors at hearing. They do not document allegations that BSE will purchase services from BellSouth Telecommunications, Inc. at rates not otherwise available to other ALECs or in any manner not available to other ALECs. Nothing in the 29 pages identified, nor elsewhere in the study, provide any indication of plans for predatory pricing or price squeezing as alleged by Petitioners and Intervenors. The pages identified support the testimony presented by BSE at hearing as to BSE's relationship with BellSouth Telecommunications, Inc. and its plans to compete in the marketplace like any other Florida certificated ALEC, and are therefore redundant and repetitive of evidence in the record. Specific groups of the 29 pages are discussed briefly below.

Several of the pages identified by Petitioners and Intervenors from Volume 9 set forth regulatory analysis issues based on assumptions at that time. (Volume 9, pp. 42-44). They assess the uncertainty in ascertaining the implications from FCC rulings, decisions of the Eighth Circuit

Court of Appeals, and possible outcomes from a decision by the United States Supreme Court. The implications from the various scenarios are set forth in a matrix of regulatory outcomes without assigning a probability that any specific outcome would occur. This analysis is consistent with the testimony of BSE's witness in this case, Bob Scheye and is therefore redundant and repetitive of evidence in the record.

A second group of pages are from Volumes 7 and 8 and make reference to a "Greenfield Solution Plan." (Volume 7, p. 3 and Volume 8, p. 6) [REDACTED]

[REDACTED]

[REDACTED] (See, e.g., Volume 8, p. 6 [REDACTED]).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Petitioners and Intervenors further present a series

of pages that evaluate systems - what they can do and what they can't do. (Volume 6, p. 311; Volume 2, p. 173; Volume 4, p. 108; Volume 6, p. 409; Volume 2, p. 170) The issue presented by Andersen Consulting in its report is what are the capabilities of these systems had they been chosen to be considered by BSE. By selectively culling the pages of the Andersen Consulting study, Petitioners and Intervenors fail to show that several other commercially available systems were reviewed and analyzed by the study. It was ultimately decided that a Greenfield approach was preferable, and that there would be no utilization of any systems of BellSouth Telecommunications, Inc., consistent with the testimony of Mr. Scheye. Thus, these charts are out of date and out of context.

A third group of pages analyze potential threats to BellSouth business markets posed by AT&T and Teleport Communications Group (TCG). (Volume 7, p. 51 and Volume 9, p. 57). These pages represent Andersen Consulting's analysis of market conditions and recommendations. They are consistent with Mr. Scheye's testimony that BellSouth Corporation needs additional capability in the marketplace through BSE in order to offer the bundles of packaged products in a manner that BellSouth Telecommunications, Inc. may not be able to do, and are therefore redundant and repetitive of evidence in the record.

The next page (Volume 10, p. 310) presents a series of issues that an ALEC must address. It is clear from the chart that Andersen recommended that [REDACTED]

The following pages refer to BellSouth MNS, Incorporated - which is identified in the Andersen Consulting study as BLSM: BLS is for BellSouth, M is MNS. (Volume 10, p. 30; Volume 10, p. 193; Volume 10, p. 192; Volume 10, p. 76) References to BLSM in the Andersen study are based on an assumption that is no longer valid. At one point BLSM was envisioned to be a division of BSE that was to provide unregulated enhanced services. Since that time, BellSouth MNS, Incorporated has been separately incorporated. It provides managed network services, in conjunction with EDS, to various retail customers. The relationships envisioned in the study no longer apply and those pages relying on those relationship assumptions are no longer valid.

The next group of pages concern "CLEC Customer Post-Acquisition Team Assumptions." (Volume 5, p. 74, p. 190, p. 73, p. 80 and p. 101) It is significant to note specifically listed assumptions set forth on various pages may no longer be valid or operative. For example, there is no "Corporate Governance" group as referenced. (See, e.g., Volume 5, p. 74, #57) In addition,

specific references to competition with BellSouth Telecommunications, Inc. must be viewed in context with the specific assumption. (See, e.g. Volume 5, p. 73, #50) Because, BSE will sell packages that the ILEC (BellSouth Telecommunications, Inc.) can not offer, BSE will not directly compete with the identical services that BellSouth Telecommunications, Inc. offers. That is not to say that BSE will not compete with BellSouth Telecommunications, Inc. for customers through its offer of bundled services. As testified to by Mr. Scheye, BSE will compete against any ILEC and any other ALECs in the Florida market to serve customers who desire certain bundled services.

Finally, there are various pages dealing with the "CLEC Business Process Team" (Volume 10, p. 40, p. 41, p. 50, p. 110, p. 117, p. 428 and Volume 5, p. 186) Several of these pages reference "BLSM" (BellSouth MNS, Incorporated), which as previously noted is not a part of BSE, although at the time the Andersen study was prepared, it was assumed that it would be a division of BSE. (See, e.g. Volume 10, p. 40 and p. 117)

One of the pages presented by Petitioners and Intervenors notes that [REDACTED] (See, Volume 10, p. 17) It would be natural to expect that such referrals would occur since BSE will only be providing integrated packages. For example, if BSE received a call requesting stand-alone mobile service, such a call could be referred to BellSouth Mobility, a referral that is not precluded under the Federal Act or Florida state law.

Several pages of the study describe marketing missions or relationships that BSE may have with other entities providing services. BellSouth Telecommunications, Inc. and BSE will have separate marketing missions, just as BSE has a separate marketing mission from BellSouth Mobility Inc (BMI), BellSouth Long Distance, Inc. (BSLD), and BellSouth.net, Inc. (BS.net). If customers

specific references to competition with BellSouth Telecommunications, Inc. must be viewed in context with the specific assumption. (See, e.g. Volume 5, p. 73, 450) Because, BSE will sell packages that the ILEC (BellSouth Telecommunications, Inc.) can not offer, BSE will not directly compete with the identical services that BellSouth Telecommunications, Inc. offers. That is not to say that BSE will not compete with BellSouth Telecommunications, Inc. for customers through its offer of bundled services. As testified to by Mr. Scheye, BSE will compete against any ILEC and any other ALECs in the Florida market to serve customers who desire certain bundled services.

Finally, there are various pages dealing with the "CLEC Business Process Team" (Volume 10, p. 40, p. 41, p. 50, p. 110, p. 117, p. 428 and Volume 5, p. 186) Several of these pages reference "BLSM" (BellSouth MNS, Incorporated), which as previously noted is not a part of BSE, although at the time the Andersen study was prepared, it was assumed that it would be a division of BSE. (See, e.g. Volume 10, p. 40 and p. 117)

One of the pages presented by Petitioners and Intervenors notes that [REDACTED] (See, Volume 10, p. 17) It would be natural to expect that such referrals would occur since BSE will only be providing integrated packages. For example, if BSE received a call requesting stand-alone mobile service, such a call could be referred to BellSouth Mobility, a referral that is not precluded under the Federal Act or Florida state law.

Several pages of the study describe marketing missions or relationships that BSE may have with other entities providing services. BellSouth Telecommunications, Inc. and BSE will have separate marketing missions, just as BSE has a separate marketing mission from BellSouth Mobility Inc (BMI), BellSouth Long Distance, Inc. (BSLD), and BellSouth.net, Inc. (BS.net). If customers

of those entities became customers of BSE, BSE would be an extension of their existing BellSouth service. A chart comparing the marketing opportunities vis-a-vis other BellSouth corporate entities is included. (See, Volume 5, p. 186). It is curious to note that Petitioners and Intervenors have selected a page relating to service assurance and maintenance supplier requirements for inclusion in these documents presented. (See, Volume 10, p. 428) The Andersen study recommends that suppliers acting on behalf of the ALEC (BSE) should present themselves as the ALEC when customer site visits are made. (See, Volume 10, p. 428, #54-25) This recommendation is consistent with this Commission's order in the AT&T arbitration regarding branded leave behind cards. (PSC Dockets 96-0833, 96-0846, and 96-0916; Order PSC-96-1579-FOF-TP at pp.63-64)

In conclusion, the sum of the information contained in the 29 pages of the Andersen study selected for use by the Petitioners and Intervenors does not support any contention of those parties raised in this proceeding, is redundant and repetitive of evidence properly in the record, contains outdated assumptions and materials and, most importantly, is the work of an independent consultant that does not necessarily reflect the position of BSE.

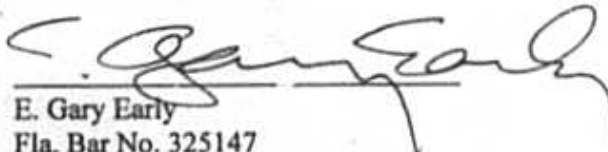
The Commission Should Grant the BSI Application

The standard for ALEC certification is plain, straightforward and clear. The demonstration to be made is that BSE has sufficient technical, financial and managerial capability to provide such service in the geographic area proposed to be served. It is undisputed that BSE possesses those qualifications. BSE's presence in the integrated one-stop shopping market niche will promote competition for those customers. The Petitioners and Intervenors apparently desire that BellSouth Corporation should assign that role to BellSouth Telecommunications, Inc. so that BellSouth Telecommunications could add that business focus to its myriad other obligations as an ILEC, but

BellSouth Corporation has chosen a different vehicle. (T200) BellSouth Corporation has created an ALEC dedicated to serving the integrated one-stop shopping market. Nothing in Florida law or federal law prohibits BellSouth Corporation from choosing that avenue. Inasmuch as BSE has met the applicable ALEC certification criteria it should be certificated by this Commission.

WHEREFORE, for the reasons set forth herein, BellSouth BSE, Inc. respectfully requests that the Commission enter an order granting it certification to operate as an alternative local exchange carrier within the state of Florida.

Respectfully Submitted,



E. Gary Early
Fla. Bar No. 325147
Akerman, Senterfitt & Eidson, P.A.
216 South Monroe Street, Suite 200
Tallahassee, FL 32301

Mark Herron
Florida Bar No. 199737
MARK HERRON, P.A.
216 South Monroe Street, Suite 200A
Tallahassee, Florida 32301

Attorneys for BellSouth BSE, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to the following parties by hand delivery or U.S. Mail this 15th day of June, 1998:

Martha Carter Brown
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 390-M
Tallahassee, FL 32399-0850
Counsel for the Public Service Commission

Marsha Rule
AT&T
101 North Monroe Street
Suite 700
Tallahassee, FL 32301
Counsel for AT&T Communications
of the Southern States, Inc.

Richard D. Melson
Hopping Green Sams & Smith
Post Office Box 6526
Tallahassee, FL 32314
Counsel for MCI Telecommunications Corp.

Robert G. Beatty and Nancy B. White
c/o Nancy H. Sims
150 S. Monroe Street, Suite 400
Tallahassee, FL 32301
Counsel for BellSouth Telecommunications, Inc.

Kenneth A. Hoffman
Rutledge, Ecenia, Underwood,
Purnell & Hoffman, P.A.
P.O. Box 551
Tallahassee, FL 32302
Counsel for Teleport Communications Group, Inc.

Pete Dunbar, Esquire
Barbara D. Auger, Esquire
Pennington, Moore, Wilkinson
& Dunbar, P.A.
215 S. Monroe Street, Suite 200
Tallahassee, FL 32301
Counsel for Time Warner AxS of Florida, L.P.

Joseph A. McGlothlin
Vicki Gordon Kaufman
117 S. Gadsden Street
Tallahassee, FL 32301
Counsel for Florida Competitive Carriers Association

By U.S. Mail to:

Thomas K. Bond
MCI Telecommunications Corp.
780 Johnson Ferry Road
Suite 700
Atlanta, GA 30342

Michael McRae, Esq.
Teleport Communications Group, Inc.
2 Lafayette Centre
1133 Twenty First Street, N.W.
Suite 400
Washington, D.C. 20036

Carolyn Marek
Time Warner Communications
Post Office Box 210706
Nashville, TN 37221


MARK HERRON
E. GARY EARLY