

RECEIVED-FPSC

Legal Department

MICHAEL P. GOGGIN
General Attorney

99 APR 29 PM 4:41

ORIGINAL

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

RECORDS AND
REPORTING

April 29, 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 Response 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 (xcr)

Michael P. Goggin

Enclosures

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

RECEIVED & FILED

[Signature]
FPSC-BUREAU OF RECORDS

AFA	_____
APP	_____
CAF	_____
CMU	1 _____
CTR	_____
EAG	_____
LEG	_____
MAS	5 _____
OPC	_____
RRR	1 _____
SEC	1 _____
WAW	_____
OTH	_____

DOCUMENT NUMBER-DATE

05455 APR 29 99

FPSC-RECORDS/REPORTING

**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 29th day of April, 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 Technology
Program
Carolyn Mason, Regulatory
Coordinator
4050 Esplanade Way
Bldg 4030, Rm. 180L
Tallahassee, FL 32399-0950
Phone: 922-7503
Fax: 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**

**Carolyn Mason
Freddy Martinez
Derek Howard
Dept. Management Svcs.
Information Tech. Program
4050 Esplannade Way
Bldg. 4030, Suite 180
Tallahassee, FL**

**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
Tallahassee, FL**

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

**Scheff Wright
Landers Law Firm
P.O. Box 271
Tallahassee, FL 32302**

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

**Joe Hartwig
480 E. Eau Gallie
Indian Harbour Beach, FL 32937**

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

Morton Posner
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 (cc)
Michael P. Goggin

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed Rules 25-4.300, F.A.C.,) Docket No. 980253-TX
Scope and Definitions; 25-4.301, F.A.C.,)
Applicability of Fresh Look; and 25-4.302,)
F.A.C., Termination of LEC Contracts.) Filed: April 29, 1999
_____)

RESPONSE COMMENTS OF BELL SOUTH TELECOMMUNICATIONS, INC.

BellSouth Telecommunications, Inc. ("BellSouth") hereby files its Comments in response to the comments submitted by other parties on the proposed "Fresh Look" rules. Due to the abbreviated briefing cycle in this matter, BellSouth is not certain that it has yet received all comments and testimony filed by the parties in this matter despite its diligent efforts to obtain them.¹ Accordingly, BellSouth reserves the right to respond to any such comments and testimony it may subsequently receive if and when it files rebuttal comments and/or testimony in this matter.

The proposed "Fresh Look" rules would allow parties that have entered into otherwise valid and binding contracts with BellSouth, despite the availability of competitive alternatives, to abrogate those contracts without incurring the full termination liability to which those parties agreed. The purported justification for fresh look offered by its proponents, is that the contracts eligible under the proposed rules were signed when BellSouth and other incumbent local exchange carriers (ILECs) faced no competition. This assertion flies in the face of prior Commission rulings that competitive alternatives have existed for the

¹ BellSouth has received comments filed by KMC Telecom Inc. (and its affiliate), Sprint Corporation, and the Florida Competitive Carriers Association, and testimony filed by Supra Telecom and Information

DOCUMENT NUMBER-DATE

05455 APR 29 1999

FPSC-RECORDS/REPORTING

services covered by these contracts for many years. Not surprisingly, none of the proponents offers any evidence to support their assertion that no competition existed at the time such contracts were formed. The fresh look proponents also argue that ILEC contracts of greater than six months' duration constitute barriers to entry into the local exchange market. Again, no evidence is provided to support this assertion. In view of this total failure to provide any evidence suggesting the need for such rules, the Commission should reject them out of hand.²

The proposed rules would affect only contracts between ILECs and their customers that would not terminate until at least 6 months after the rules would take effect. Virtually all such contracts to which BellSouth is a party involve medium to large business customers. The commission has permitted BellSouth to enter into such contracts since the 1980's in order to meet competition. Moreover, in 1997, the Commission found that several alternative local exchange carriers ("ALECs") were competing against BellSouth throughout its territory, providing switched-based alternatives to business customers wholly or in part through their own facilities.³ Thus, competition has existed in the local exchange business customer market for years.

Systems, Inc., Time Warner Telecom of Florida, L.P., e.spire Communications, Inc. and GTE Florida Incorporated.

² As stated in its initial Comments, BellSouth contends that the Commission lacks the statutory authority to adopt such rules, and that such rules would violate both the Florida and United States Constitution.

Because none of the other parties have discussed these issues, BellSouth will not address them further here.

³ *In re: Consideration of BellSouth Telecommunications, Inc.'s entry into interLATA services pursuant to Section 271 of the Federal Telecommunications Act of 1996*, Order No. PSC-97-1459-FOF-TL ("BellSouth 271 Order") at 15-31 (Nov. 19, 1997).

Six parties have filed comments or testimony in this docket supporting the adoption of such rules. The proponents of the rules claim that they are justified because the contracts at issue were entered into at a time “when there was no competition and the incumbent was the only option for customers.” Comments of American Communications services of Jacksonville, Inc. d/b/a e.spire Communications, Inc. (collectively “e.spire”) at 1. *See also* Direct Testimony of Ronald C. Smith for Supra Telecommunications and Informations Systems, Inc. (“Supra”) at 3; Direct Testimony of Carolyn M. Marek for Time Warner Telecom of Florida, L.P. (“Time Warner”) at 4-5; Florida Competitive Carriers Association's Comments (“FCCA”) at 1; Comments of KMC Telecom, Inc. (“KMC”) at 2. Given the Commission findings that competition has existed for business customers for years, the proponents of the rules clearly have the burden of proof to justify such a wild assertion.⁴ None even takes up this burden, much less carries it.

Only two proponents of the rule filed testimony (Supra and Time Warner).⁵ Neither witness, however, produces any evidence to justify these proposed rules. For example, Supra's witness, Mr. Smith, claims that the contracts in question “were entered into during a time when the ILEC was the only choice.” Supra at

⁴ A number of proponents state that the contracts at issue were entered into in a “monopoly environment,” e.spire at 1; FCCA at 1; and make unsubstantiated assertions of market power, KMC at 2-4, or market “dominance,” Time Warner at 2. None of them provide any expert economist evidence, attempt to define a relevant market, describe market conditions at the time the contracts were entered into, or even say when the affected contracts were formed. One commenter, KMC, attempts to show market power by purporting to measure market share. Even if it were appropriate, under generally accepted economic theory, to presume market power solely from high market shares (and it is not), KMC fails in the attempt. First, KMC's data defines the market as all BellSouth access lines. This measure is at once too broad, as it includes residential lines, and too narrow, as it does not include access lines provided by competitors. It also fails to take into account access line substitutes such as PBXs. Furthermore, KMC does not explain why access lines, rather than customers or revenues, is a reliable measure of shares. In light of this failure of proof, these unsubstantiated claims should be disregarded.

3. This assertion is wholly unsupported by any evidence. Merely making this claim does not make it true. In fact, as the Commission has found, competitive alternatives for the services provided by these contracts have been available for years. Similarly, Mr. Smith characterizes the contracts as “barriers to competition,”⁶ and says that the proposed rules “may be the only way that ALECs will be able to compete for the business of these particular customers.” *Id.* Again, Mr. Smith provides no evidence to back up these assertions, which are plainly incorrect. Time Warner’s witness, Ms. Marek, makes similar assertions, stating that the rules would assure customers the benefit of alternatives “from the outset of competition,” Time Warner at 4, as if competition has yet to begin. She also complains that without the rules, “ALECs will not have an opportunity to market their services to many of these potential customers” for years, *id.* at 5. Time Warner also fails to back up these assertions with any facts.

It is not surprising that the rules’ proponents can offer no proof to justify the adoption of these rules. There is none. Medium and large business customers have enjoyed competitive alternatives to ILEC local exchange services for years. *See generally*, Responsive Testimony of C. Ned Johnston (“Johnston”). The Commission permitted ILECs to offer such contracts in order to meet competition. Immediately after the passage of Florida’s price regulation

⁵ The remaining proponents filed comments, but no evidence.

⁶ It is interesting to note that only ILEC contracts are alleged to be barriers to competition. ALECs, such as KMC, admit that long-term contracts “provide a useful mechanism for attracting customers and delivering cost savings to those customers.” KMC at 2. Presumably, KMC and other ALECs have entered into long term contracts with their own business customers. Such contracts would present no less a barrier to other ALECs than would ILEC contracts, yet no ALEC has suggested that ALEC contracts be subject to

legislation in 1995, and the Telecommunications Act of 1996, this competition increased markedly with the entry of ALECs, like Time Warner, TCG, Intermedia and others. Johnston at 2-3. Accordingly, it is certainly not true that the contracts to be abrogated by these rules were entered into at a time when the ILEC was the only choice available.

It is also inaccurate for the proponents of these rules to claim that they would not have an opportunity to market their services to medium and large business customers absent the rules, or that the contracts in question are barriers to entry. Florida's economy is vibrant and growing, and the market for business telecommunications services is growing along with it. The entry of new business into Florida's economy and the addition of more telecommunications services by existing businesses (who presently might be ILEC customers) provide a constant source of marketing opportunities for ALECs. Johnston at 4. In addition, as Sprint points out in its comments, Sprint at 3, the average duration of the ILEC contracts at issue is three years. This means that about one third of all such contracts expire each year, providing additional marketing opportunities for ALECs. *Id.* ALECs also are permitted to resell BellSouth's contracts (and receive a wholesale discount). Of course, customers faced with an attractive offer from an ALEC also may choose to terminate their contracts early and honor the termination provisions. Given all of these opportunities to market their services to business customers, it would be ludicrous to suggest, as the rules'

these rules. This highlights the fact that the rules, as proposed, would not be "carrier neutral," as FCCA and e.spire contend. FCCA at 1; e.spire at 1.

proponents do, that absent the adoption of these rules, the ALECs will not be able to market their services to business customers.

Indeed, many of the proponents of these rules, such as Sprint and Time Warner, were actively competing against business customers at the time these contracts were formed. As Sprint points out in its comments, virtually all contracts that would be affected by the rules have been entered into after January 1, 1997. Sprint at 3. As the Commission found in BellSouth's 271 proceeding, facilities-based ALECs, including Sprint, already were competing for business customers in BellSouth's territory by that time. BellSouth 271 Order at 15-30. This underscores the lack of any justification for these rules. It would be unfair, both to BellSouth and to newly entering ALECs, to give ALECs who have been marketing their services to these customers for years, an opportunity to win through regulation customers that they lost in the competitive arena.

The proponents' comments and testimony provide no justification for the proposed rules. The customers whose contracts are at issue did not lack for competitive alternatives when they agreed to enter into such contracts. The ALECs do not lack opportunities to compete for such customers today. Indeed, ALECs were actively competing against BellSouth when the vast majority of these contracts were formed. In view of the lack of any justification for these rules, they should be rejected.

Respectfully submitted this 29th day of April, 1999

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy B. White (re)

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 (re)

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

161357