

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 18 , 2005

IN RE:

**PETITION OF BELL SOUTH LONG DISTANCE, INC.
TO PROVIDE COMPETING LOCAL
TELECOMMUNICATIONS SERVICES**

**DOCKET NO.
03-00602**

**ORDER GRANTING CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY**

This matter came before Chairman Pat Miller, Director Deborah Taylor Tate and Director Sara Kyle of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a Hearing held on November 8, 2004 to consider the *Petition of BellSouth Long Distance, Inc. to Provide Competing Local Telecommunications Services* ("Application") filed by BellSouth Long Distance, Inc. on November 13, 2003. The *Application* requests the Authority grant a certificate of public convenience and necessity to provide competing local interexchange telecommunications services, including: facilities-based and resold local exchange services, exchange access, and interexchange telecommunications services, within the State of Tennessee.

BACKGROUND

This docket was commenced on November 13, 2003 when BellSouth Long Distance, Inc. ("BSLD"), a wholly owned subsidiary of BellSouth Corporation, filed its application for a Certificate of Public Convenience and Necessity ("CCN") to provide competing local telecommunications services in Tennessee on a statewide basis. The *Application* of BSLD seeks

a grant of authority to provide services in addition to the CCN previously granted to BSLD by the TRA¹ and its filing, in part, results from the remand to the Authority of another matter by the Tennessee Court of Appeals.²

Previous BSLD and BSE Dockets

On August 1, 1997, BSLD filed its original Application for a CCN to Provide Operator Services and Resell Interexchange Telecommunications Services in Docket No. 97-01404. Interventions were granted in that docket to MCI Telecommunications Corporation ("MCI"), AT&T Communications of the South Central States, Inc., ("AT&T"), Time Warner Communications of the Mid-South, L.P. ("Time Warner"), Communications Workers of America, AFL-CIO ("CWA"), NEXTLINK Tennessee ("Nextlink") and TCG MidSouth, Inc., ("TCG"). After a hearing on the merits, the Authority approved, in part, BSLD's application for a CCN, as reflected in an Order dated May 4, 1999.

On October 30, 1997, BellSouth BSE, Inc. ("BSE"), an affiliate of BellSouth Telecommunications, Inc. ("BellSouth"), filed an application pursuant to Tenn. Code Ann. § 65-4-201 (2004) for a CCN in Docket No. 97-07505 seeking authority to operate in Tennessee as a competing telecommunications services provider. In its application, BSE stated that it initially planned to "operate as a reseller of such services, but may subsequently operate as a facilities-based local exchange provider."

AT&T filed a petition to intervene in that docket citing concerns about potential discriminatory and preferential practices. AT&T's petition was granted as were the petitions for intervention filed by MCI, MCImetro Access Transmission Services, Inc. ("MCImetro"),

¹ Application of BellSouth Long Distance, Inc. for a Certificate of Convenience and Necessity to Provide Operator Services and Resell Interexchange Telecommunications Services in Tennessee, *Order Granting in Part and Denying in Part Application for Certificate of Public Convenience and Necessity*, Docket No. 97-01404 (May 4, 1999)

² *BellSouth BSE, Inc. v. Tennessee Regulatory Authority*, No. M2000-00868-COA-R12-CV, 2003 WL 354466 (Tenn. Ct. App. Feb. 18, 2003)

American Communications Services, Inc. ("ACSI"), Nextlink, CWA, Time Warner and Southeastern Competitive Carriers Association ("SECCA"). Discovery was conducted by the parties and pre-filed testimony and pre-hearing briefs were submitted to the Authority.

Following a public hearing on the merits held on April 9, 1998, and the filing of post-hearing briefs, the Authority rendered its decision on September 15, 1998, granting BSE a CCN "only to the extent that BSE shall be allowed to provide competing local exchange service within Tennessee in those service areas outside of [BellSouth's] current service area, and not otherwise inconsistent with state and federal law and the rules and orders of the TRA and the FCC."³ An Order was entered on December 8, 1998.

On December 21, 1998, BSE filed a second application in Docket No. 98-00879 requesting a CCN to provide expanded intrastate telecommunications service. Through this application, BSE sought authorization to provide local exchange service in the part of Tennessee currently served by BellSouth. Petitions for intervention filed by AT&T, Nextlink, MCI Telecommunications, Inc. d/b/a MCI WorldCom ("MCI WorldCom"), and SECCA were granted. During the pendency of that docket, BSE filed in the Tennessee Court of Appeals a petition for review of the Authority's December 8, 1998 Order granting BSE partial certification. Thereafter, BSE filed a motion with the Court of Appeals to stay BSE's appeal in Docket No. 97-07505 pending resolution of BSE's second application. The Court granted BSE's motion.

A Hearing in Docket No. 98-00879 was held on May 4, 1999. Post-hearing briefs were filed by all parties. At an Authority Conference held on September 14, 1999, the Directors voted unanimously to deny BSE's second application, finding that approval of BSE's application would not be in the public interest because the potential for anti-competitive activity could

³ Application of BellSouth BSE, Inc for a Certificate of Convenience and Necessity to Provide Intrastate Telecommunications, *Order Granting in Part and Denying in Part Application for Certificate of Public Convenience and Necessity*, pp 16-17, TRA Docket No 97-07505 (December 8, 1998).

adversely affect competition. An Order denying BSE's second application was entered on February 14, 2000, from which BSE appealed to the Court of Appeals.⁴

On February 18, 2003, the Tennessee Court of Appeals issued an opinion in *BellSouth BSE v. Tennessee Regulatory Authority*,⁵ reversing the Authority's Order issued on February 14, 2000 in Docket No. 98-00879 and remanding the case to the Authority. In its opinion, the Court found that the TRA should not have denied BSE's application but instead should have granted the CCN, at the same time establishing specific safeguards to address the anti-competitive concerns of the TRA.

BSLD'S APPLICATION IN DOCKET NO. 03-00602

The *Application* of BSLD was filed with the Authority on November 13, 2003, in lieu of additional proceedings related to the applications of BSE.⁶ BSLD's *Application* seeks authority to provide facilities-based competing local exchange services including exchange access telecommunications services in Tennessee.

In filing the *Application*, BSLD contended that the TRA's approval of BSLD's current CCN in Docket No. 97-01404, together with the TRA's approval of the application of BellSouth Telecommunications, Inc. ("BellSouth") under 47 U.S.C. § 271,⁷ the FCC's findings regarding

⁴ Application of BellSouth, BSE, Inc for a Certificate of Convenience and Necessity to Provide Intrastate Telecommunications Services, *Order Denying Application of BellSouth, BSE, Inc for a Certificate of Public Convenience and Necessity to Provide Expanded Intrastate Telecommunications Services*, Docket No 98-00879 (February 14, 2000).

⁵ *BellSouth BSE, Inc v Tennessee Regulatory Authority*, No M2000-00868-COA-R12-CV, 2003 WL 354466 (Tenn Ct App Feb 18, 2003)

⁶ In a letter filed with the Application, BSLD's attorney stated

Considering all the intervening factors, particularly the Federal Communications Commission's ("FCC's") approval of BellSouth's § 271 application and finding of compliance with 47 U S C § 272, BSLD has opted to amend its CCN to add the ability to provide local service statewide as well

Letter to the Authority from Guilford F Thornton, Jr, Esq, p 1 (November 13, 2003)

⁷ *BellSouth Telecommunications, Inc Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No 97-00309, *Advisory Opinion to the Federal Communications Commission* (October 10, 2002)

BellSouth's § 271 application⁸ and the Tennessee Court of Appeals' decision in *BellSouth BSE v Tennessee Regulatory Authority* all weigh in favor of granting BSLD's application for an amended CCN.

AT&T filed a petition to intervene in this matter, stating that it has an interest in insuring that, if BSLD's Application is granted, the TRA will impose appropriate safeguards to deter BSLD and BellSouth from engaging in anti-competitive practices.⁹ During the February 9, 2004 Authority Conference, the panel assigned to this docket granted intervention to AT&T and appointed the Authority's General Counsel or his designee to act as the Hearing Officer in this proceeding to hear preliminary matters prior to the Hearing.

On April 2, 2004, Time Warner filed a Petition to Intervene which was granted by the Hearing Officer without opposition from BSLD or AT&T. All the parties requested and obtained a postponement of a procedural schedule to negotiate toward an agreement regarding the establishment of safeguards in the consideration of BSLD's Application. The parties responded periodically that negotiations regarding the safeguards issue were ongoing. A number of stipulations were discussed; however, instead of executing a proposed stipulation, the Intervenors announced that they would withdraw their interventions. AT&T and Time Warner filed motions to withdraw their petitions to intervene on October 6, 2004 and October 8, 2004, respectively.¹⁰

Pursuant to Tenn. Code Ann. § 65-4-204 (2004), public notice of the Hearing in this matter was issued by the Hearing Officer on October 29, 2004. No persons sought intervention

⁸ *In the Matter of Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee*, FCC 02-331 (Memorandum Opinion and Order) 17 F C C R 25828 (December 19, 2002)

⁹ *Response of AT&T to Objection of BellSouth Long Distance*, p. 3 (January 27, 2004)

¹⁰ The Hearing Officer issued *Order Granting Withdrawal of Petitions to Intervene Filed by AT&T of the South Central States, Inc. and Time Warner Telecom of the Mid-South, LLC and Establishing Hearing Date* on November 8, 2004

or participation at the time of the Hearing held on November 8, 2004. Guilford Thornton, Esq. of Stokes, Bartholomew, Evans & Petree, P.A. represented BSLD, and Mario L. Soto, President of BSLD, participated in the Hearing. Mr. Soto presented testimony and was available for questions by the panel. At the conclusion of BSLD's presentation of proof, based upon the record in this docket, the panel voted unanimously to grant BSLD's *Application*.

FINDINGS AND CONCLUSIONS

BSLD's *Application* was considered in light of the criteria for granting a CCN as set forth in Tenn. Code Ann. § 65-4-201 (2004), which provides, in pertinent part:

(a) No public utility shall establish or begin the construction of, or operate any line, plant, or system, or route in or into a municipality or other territory already receiving a like service from another public utility, or establish service therein, without first having obtained from the authority, after written application and hearing, a certificate that the present or future public convenience and necessity require or will require such construction, establishment, and operation, and no person or corporation not at the time a public utility shall commence the construction of any plant, line, system or route to be operated as a public utility, or the operation of which would constitute the same, or the owner or operator thereof, a public utility as defined by law, without having first obtained, in like manner, a similar certificate . .

* * *

(c) After notice to the incumbent local exchange telephone company and other interested parties and following a hearing, the authority shall grant a certificate of convenience and necessity to a competing telecommunications service provider if after examining the evidence presented, the authority finds:

(1) The applicant has demonstrated that it will adhere to all applicable commission policies, rules and orders; and

(2) The applicant possesses sufficient managerial, financial, and technical abilities to provide the applied for services.

Pursuant to Tenn. Code Ann. § 65-4-201 (2004), the TRA has promulgated rules, 1220-4-8-.01 through 1220-4-8-.04. that establish guidelines for considering an application for a CCN. Also under Tenn. Code Ann. § 65-5-112 (2004), a competing telecommunications provider is required

to file with the Authority (1) a plan containing the provider's plan for purchasing goods and services from small and minority-owned telecommunications businesses; and (2) information on programs that might provide technical assistance to such businesses.

BSLD is a Delaware corporation whose stock is publicly traded on the New York Stock Exchange and on the Boston, Chicago, Pacific and Philadelphia exchanges in the United States and on the London, Frankfurt, Amsterdam and Swiss exchanges abroad. BSLD was incorporated in the State of Delaware on March 13, 1996 and is authorized to provide long distance telecommunications services in all 50 states. In addition, BSLD is certified as a competing local exchange carrier ("CLEC") in the State of Connecticut.

The complete street address of BSLD's registered agent is 500 Jallan Bldg., Two Union Square, Chattanooga, TN 37402-2571. The complete street address of BSLD's corporate office is BellSouth Long Distance, Inc., 400 Perimeter Center Terrace, Suite 350, Atlanta, Georgia 30346. The telephone number is (770) 352-3077 and the facsimile number is (678) 443-3470.

The *Application* and supporting documentary information existing in the record demonstrate that BSLD has the requisite technical and managerial ability to provide competing local exchange telecommunications services within the State of Tennessee. Specifically, BSLD's senior management team possesses extensive business, technical, operational and regulatory telecommunications experience. BSLD has the necessary capital and financial ability to provide the services it proposes to offer. BSLD has represented that it will adhere to all applicable policies, rules and orders of the Authority. BSLD stated that it served notice of its application to all eighteen incumbent local exchange carriers ("ILECs") operating within the State of Tennessee. BSLD expects to offer a variety of local services primarily to business customers with an emphasis on complex data services such as frame relay. BSLD also intends to provide competing local telecommunications services and interexchange services including

exchange access telecommunications services within the State of Tennessee. While BSLD seeks statewide certification in the State of Tennessee, BSLD has no plans to offer local exchange telecommunications services in areas served by any incumbent local exchange telephone company with fewer than 100,000 access lines. BSLD intends to offer telecommunications services through its own facilities, resold facilities and through a combination of these provisioning methods using the unbundled element ("UNE") platform.

BSLD has filed a satisfactory small and minority-owned telecommunications business participation plan, pursuant to Tenn. Code Ann. § 65-5-112 (2004) and the Authority's Rules. BSLD has also acknowledged its obligation to contribute to the funding of the small and minority-owned telecommunications business assistance program, as set forth in Tenn. Code Ann. § 65-5-113 (2004). BSLD has addressed all numbering issues as well as provided an acceptable Corporate Surety Bond in accordance with the requirements of Tenn. Code Ann. § 65-4-125(j) (2004).

BSLD has been operating successfully in Tennessee as a reseller of BellSouth's local service since 1998 with no complaints. Financially, the stability of the revenues BSLD has enjoyed as a reseller will allow BSLD to continue to be a "going concern" in the foreseeable future.

Pursuant to 47 U.S.C. § 272(b), BSLD, as an affiliate of a Bell Operating Company, is subject to the following specific checklist of statutory structural and transactional safeguards concerning the treatment of "Section 272 affiliates." Accordingly, BSLD

- (1) shall operate independently from the Bell operating company;
- (2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate;
- (3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;

- (4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company; and
- (5) shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.

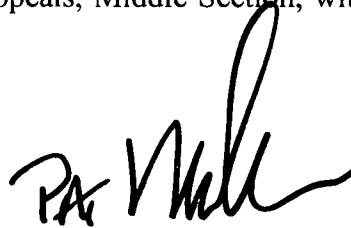
In addition, BellSouth and its Section 272 Affiliates, including BSLD, are subjected to a joint Federal/State audit, conducted every two years by an independent auditor. This audit is to determine whether BellSouth and its affiliates have complied with Section 272 and the regulations promulgated thereunder, especially whether there is compliance with the separate accounting requirements under 47 U.S.C. § 272(b).

These Section 272 safeguards are predicated upon a Regional Bell Operating Company ("RBOC") receiving Section 271 authority and therefore were not in place when the Authority considered and denied BSE's application for CCN in Docket No. 98-00879 in 1999. Accordingly, the Authority finds that the need to develop safeguards in granting BSLD's *Application* is greatly diminished now that the Section 272 safeguards are in place. The Authority finds that the Section 272 safeguards, combined with the biennial joint Federal/State audit, provide sufficient protection against potential anti-competitive practices and cross-subsidization between BSLD and BellSouth.

Based on the record in this docket, the Authority finds that all the requirements of managerial, technical and financial resources for obtaining a CCN have been fulfilled by BSLD. The panel finds that BSLD has demonstrated that it will adhere to all applicable authority policies, rules and orders. The panel further finds that approval of BSLD's *Application* would inure to the benefit of the present and future public convenience by permitting competition in the telecommunications services markets in the State and by fostering the development of an efficient, technologically advanced statewide system of telecommunications services.

IT IS THEREFORE ORDERED THAT:

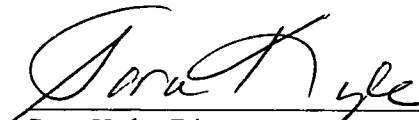
1. The *Petition of BellSouth Long Distance, Inc to Provide Competing Local Telecommunications Services* is approved, pursuant to Tenn. Code Ann. § 65-4-201 (2004) and TRA Rules 1220-4-8-.01 through 1220-4-8-.04;
2. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration within fifteen (15) days of the date of this Order; and
3. Any party aggrieved by the Authority's action embodied herein may file a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.



Pat Miller, Chairman



Deborah Taylor Tate, Director



Sara Kyle, Director