BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 8, 1998

IN RE:	**APPLICATION OF BELLSOUTH BSE, INC. FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATIONS**	)))))	**Docket No. 97-07505**

ORDER GRANTING IN PART AND DENYING IN PART APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

This matter is before the Tennessee Regulatory Authority (the "Authority" or "TRA") on the Application of BellSouth BSE, Inc. for a Certificate of Public Convenience and Necessity (the "Application"). The Authority has unanimously determined that the Application should be granted in part and denied in part.

I. Travel of the Case

BellSouth BSE, Inc. ("BSE") filed its Application for authority to operate in Tennessee as a competing telecommunications service provider[1] on October 30, 1997, pursuant to T.C.A. § 65-4-201. The Southeastern Competitive Carriers Association ("SECCA"), MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc. ("MCI"), AT&T Communications of the South Central States, Inc. ("AT&T"), American Communications Services, Inc. ("ACSI")[2], NextLink Tennessee L.L.C. ("NextLink"), Time Warner

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[1] Such service providers are commonly known as "competing local exchange carriers" or "CLECs."
[2] ACSI has since changed its name to e.spire.

Communications of the Mid-South, L.P. ("Time Warner") and the Communication Workers of America, AFL-CIO ("CWA") were granted intervention in this contested case proceeding.

By letter dated November 18, 1997, BSE waived the sixty (60) day period within which the Authority is required to render a decision pursuant to T.C.A. § 65-4-201. A Pre-Hearing Conference in this matter was held on December 29, 1997. The Hearing Officer issued his Report and Recommendation on February 4, 1998, which set forth a schedule for the parties to serve and answer discovery requests, and to pre-file testimony and briefs. Pre-filed testimony was received by the Authority on February 27, 1998, on behalf of BSE and SECCA. On March 13, 1998, rebuttal testimony was filed by BSE. A public hearing on the merits was held on April 9, 1998. Post-hearing briefs were filed on May 15, 1998, by MCI, AT&T, BSE, and jointly by ACSI, NextLink, and SECCA. The Authority considered this matter at a regularly scheduled conference held on September 15, 1998.

II. Arguments of the Parties

BSE is an affiliate of BellSouth Telecommunications, Inc., ("BellSouth Telecommunications") and both BSE and BellSouth Telecommunications are subsidiaries of BellSouth Corporation. In its Application, BSE requests "that the Authority grant a Certificate to Applicant to provide local exchange telecommunications services throughout the State of Tennessee in all geographic locations permitted by the provisions of T.C.A. § 65-4-201." *BSE's Application at 1.* According to the Application, BSE plans to operate as a reseller, but may subsequently operate as a facilities-based local exchange provider. *Id. at 2.* Finally, BSE requests in its Application "to offer these services on a statewide basis as allowed by state and

federal law." *Id. at 3.* Hence, among other things, BSE acknowledges in its Application that any authority granted in this case must be in accordance with both state and federal law.

BSE contends that its Application is consistent with both the federal Telecommunications Act of 1996 and relevant orders of the Federal Communications Commission ("FCC"). *Pre-Hearing Brief of BSE at 1.* Moreover, BSE maintains that approval of its Application would not violate the anti-competitive provisions contained in T.C.A. § 65-5-208(c) and would in fact foster the pro-competitive policy adopted by the Tennessee General Assembly. *Id.*

While the intervenors vigorously oppose BSE's entry into the areas served by BellSouth Telecommunications, the intervenors generally do not oppose BSE's entry into other areas which are open to competition in Tennessee, and do not challenge BSE's financial, managerial or technical ability to provide local telecommunications services in such areas. *Sather Pre-Filed Direct Testimony at 10-11.*[3] The intervenors are emphatic in their argument that certifying BSE in BellSouth Telecommunications' territory would irreparably harm the development of competition in the local market. *See e.g. Post-Hearing Brief of AT&T at 2; Sather's Pre-Filed Direct Testimony at 6.* The primary threats raised by the intervenors in opposition to the Application are the potential for the anti-competitive practices of discriminatory or preferential

[3] No other witnesses appeared for the intervenors. Most intervenors had no objections to BSE operating as a CLEC, for example, in territory served by Citizens or Sprint/United. At page 1 of the Joint Post-Hearing Brief of ACSI, NextLink, and SECCA, several intervenors joined MCI in suggesting that BSE's Application be granted on the condition that it apply only to local exchange service outside of the historical, franchised Tennessee territory of BellSouth Telecommunications. In its Pre-Hearing Brief at 14, AT&T also supported BSE's Application to provide service in Tennessee, to the extent that it was limited to areas other than those served by BellSouth Telecommunications. Interestingly, in its Post-Hearing Brief at n. 4, AT&T later argued that there was no reason to grant BSE a certificate to provide service outside BellSouth Telecommunications' service territory, because BellSouth Telecommunications could simply petition the TRA to modify its certificate in Tennessee to provide service to other areas.

treatment, avoidance of ILEC obligations, price squeezing, and cross-subsidization. *See e.g. AT&T's Pre-Hearing Brief at 7; MCI's Post-Hearing Brief at 3-4.*

BSE indicates that it will operate under the same rules as all other CLECs and that approval of its application is in the public interest since it will "increase the options available to customers in Tennessee" resulting in "downward pressure on rates." *BSE witness Robert Scheye's Pre-Filed Direct Testimony at 4.* BSE also argues that Tennessee customers who have operations in multiple states will have the convenience of "one stop shopping" for all telecommunications services. *Scheye's Hearing Testimony, Transcript of Hearing at 25.*

NextLink argues in its *Pre-Hearing Brief at 1-3* that "...the sole reason for [BellSouth Corporation's] creation of BSE is to allow BellSouth Telecommunications to avoid its obligations under state and federal laws which are intended to promote local competition." Further, NextLink argues that "While it is impossible to predict with certainty every problem that will be created by BellSouth being authorized to offer the same set of services through two entities-- each subject to different rules and obligations--in the same market, there are three general areas where concerns are readily apparent." Such concerns included: (1) BSE's ability to benefit from BellSouth Telecommunications' promotions through shared use of the Bell logo; (2) BSE's ability to select BellSouth Telecommunications' best customers and offer them special deals that BellSouth Telecommunications cannot offer because of statutory prohibitions; and (3) BellSouth Telecommunications' ability to use BSE to avoid its obligations to permit the unrestricted resale of its services at wholesale rates.[4]

[4] Section 251 (c)(4) of the Telecommunications Act of 1996 requires incumbent local exchange carriers to "offer for resale at wholesale rates any telecommunications services that the carrier provides at retail to subscribers who are not telecommunications carriers."

AT&T agreed with NextLink's assessment of the difficulty in accurately predicting every problem associated with "a telecommunications services provider being authorized to offer the same set of services through two or more entities--each subject to different rules and obligations--in the same market." *AT&T's Pre-Hearing Brief at 13.* AT&T emphasized the inherent advantage to BSE flowing from its affiliate relationship with BST, arguing: "When BSE solicits their business, consumers will be offered the same BellSouth services, under the same BellSouth name, with the same BellSouth personnel, using the same BellSouth local network." *AT&T's Post-Hearing Brief at 7.*

SECCA's witness Les Sather also addressed the competitive advantage to be gained by BellSouth Corporation and its subsidiaries, stating: "BellSouth Corporation with dual regulatory status will effectively shed itself of the requirements of the Telecommunications Act of 1996:

(i) avoiding regulations that are applicable to incumbent local exchange companies, particularly discount of resale offerings and non-discriminatory availability of unbundled network elements.

(ii) avoiding requirements that are applicable uniquely to Regional Bell Operating Companies ("RBOCs").

Sather Pre-Filed Direct Testimony at 6.

Mr. Sather further asserted that BellSouth Corporation, through BSE, could price retail services at or slightly above the wholesale rates available to new entrants, while the advertising and overhead costs that should be borne by BSE could instead be treated as part of BellSouth Corporation's costs. In such case, Mr. Sather reasoned that BSE would appear not to be predatorily pricing its services, because its retail prices would cover its wholesale costs. *Sather Pre-Filed Direct Testimony at 9.*

MCI expounded upon Mr. Sather's concern that BellSouth Corporation may, by seeking the certification of BSE, be allowed to avoid the effects of RBOC requirements on BellSouth Telecommunications, noting:

> Under the Act, CLECs have no obligation to provide unbundled access to network elements. Thus if BellSouth BSE is permitted to function as a CLEC while operating in the service territory of BST, it will give BellSouth Corporation a vehicle for avoiding the requirement to unbundle. Telecommunications facilities and equipment which would have been BST's network could be transferred to BellSouth BSE or installed initially as BSE facilities in an attempt to prevent CLECs from exercising their right to unbundled access to the piece parts of the public switched network.

MCI's Post-Hearing Brief at 5-6.

Other intervenors argued that the Authority was statutorily empowered to "pierce the corporate veil" of BSE in this matter in order to effectively deny BellSouth Corporation and its subsidiaries a competitive advantage. *Pre-Hearing Brief of SECCA at 2; Post-Hearing Brief of SECCA, ACSI and NextLink at 6-8* (citing *Tennessee Public Service Commission v. Nashville Gas Company*, 551 S.W. 2d 315, 319 (Tenn. 1977)) for the proposition that "a regulatory body such as a Public Service Commission, is not bound in all instances to observe corporate charters and the form of corporate structure . . . in regulating a public utility"). Additionally, such intervenors argued that even BSE acknowledges that, under some circumstances, the Authority can consider, for purposes of regulating BellSouth Telecommunications, the impact that BSE's actions could have on BellSouth Telecommunications. *Id. (referring to Scheye's Hearing Testimony on cross-examination, Transcript of Hearing at 123*, that if a hypothetical situation existed in the future where BellSouth Telecommunications came before the Authority for a rate increase caused by all of its highly profitable business customers migrating to BSE, then the Authority would take that into account in considering BST's request.)

BSE vehemently argues that its certification is consistent with the law. With respect to federal law, BSE asserts that neither the federal Telecommunications Act nor orders of the FCC prohibit an affiliate of an incumbent local exchange company ("ILEC") from providing local exchange service. *See FCC Order, CC Docket No. 96-149.* Moreover, in support of its Application, and in response to the opposition of the intervenors, BSE places much reliance on the safeguards established under Section 272 of the federal Act. *See Pre-Hearing Brief of BSE at 3* ("All the safeguards and procedures established for a long distance affiliate (e.g. BSLD) to provide local exchange services are equally applicable to an affiliate such as BSE."); *see also Scheye's Cross-Examination Testimony, Transcript of Hearing at 46* ("Any of those entities -- and typically it might be the long distance company, but it doesn't really make any difference -- any affiliate of an incumbent would fall into those nondiscrimination provisions [of Section 272].").

AT&T counterargues that the safeguards established under Section 272 are not applicable in this proceeding. *AT&T's Pre-Hearing Brief at 4.* Specifically, AT&T argues that BSE is not a Section 272 affiliate because it is not seeking to provide one or more of the specific services defined in Section 272(a)(2), and, therefore, BSE may not take advantage of the FCC's pronouncement that Section 272 does not prohibit a Section 272 affiliate from providing local exchange services in addition to interLATA services. *Id.*

III. Opinion of the Authority

At a minimum, the proper resolution of the instant matter requires the Authority to balance the interests of BellSouth Corporation and its subsidiary, BSE, in participating in the competitive process against the interest of the competitors of BellSouth Corporation's subsidiary,

BellSouth Telecommunications, to be protected from unfair competition. Additionally, the Authority must consider whether the overall public interest is promoted by granting BSE a Certificate of Convenience and Necessity to operate as a competing local exchange carrier within the service territory of its affiliate, BellSouth Telecommunications.

While it is true that the FCC declared in CC Docket No. 96-149, ¶ 312 that "a BOC Section 272 affiliate is not precluded under Section 272 from providing local exchange service, provided that the affiliate does not qualify as an incumbent LEC subject to the requirements of Section 251(c)[,]" BSE's reliance upon the safeguards of Section 272 is premature.[5] It is the opinion of the Authority that Section 272 is inapplicable to BSE given the terms under which it is seeking operating authority in Tennessee.[6]

Under Section 271, subsections (a) and (b), a BOC must obtain prior authorization from the FCC before providing non-incidental long distance service to customers within the states in which such BOC was allowed to provide local services prior to the enactment of the Act.[7] The FCC is to grant authorization only after the requirements of Section 271 have been met. As recently noted by the Fifth Circuit Court of Appeals, "[e]ven then, however, the BOC in question

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[5] In response to the intervenors' argument that too much risk for anti-competitive behavior exists to allow BSE to operate as a "competitor" of BellSouth Telecommunications, BSE argues that any risk of anti-competitive behavior is amply addressed by the safeguards contained within Section 272. *BSE's Post-Hearing Brief at 2-3.*

[6] Although the Directors unanimously found that BSE's Application was not appropriate for providing service within BellSouth Telecommunications' territory, the Directors' opinions vary on the value of BSE's 272 argument. Director Greer is of the opinion that, BSE's 272 argument, even if it were applicable, might not constitute adequate safeguards under T.C.A. § 65-5-208(c) to justify a grant of BSE's Application in full. Director Kyle expressed no opinion on this matter.

Additonally, BSE's application indicates that it does not seek to provide any Section 272 services, but instead will operate solely as a CLEC. BSE, by limiting its Application to the services described therein, has exempted itself from Section 272(a) language. Consequently, all Section 272 safeguards that apply to a Section 272(a) affiliate would not be applicable to an entity such as BSE. Section 272 safeguards would, however, be applicable to a BOC affiliate who sought to provide Section 272(a)(2) services.

[7] Such service is commonly referred to as "in-region long distance service."

may initially only provide long distance service through a separate affiliate. 47 U.S.C. §§ 271(d)(3)(B)& 272(f)(1)." *SBC Communications, Inc. v. FCC, 154 F.3d 226 (5th Cir. 1998).*

Section 272 of the Telecom Act requires BOCs to offer the following services through separate affiliates, after Section 271 authorization requests are approved: [8]

1) Manufacturing Activities;

2) Origination of interLATA telecommunications services, other than --

(i) incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of section 271(g);

(ii) out-of-region services described in section 271(b)(2); or

(iii) previously authorized activities described in section 271(f); and

(3) InterLATA information services, other than electronic publishing (as defined in section 274(h)) and alarm monitoring services (as defined in section 275(e)).

It is appropriate that BSE has not requested in its Application to provide non-incidental services, because BSE cannot satisfy the requirements for a Section 272 affiliate, for those services, until interLATA permission is granted pursuant to Section 271.[9] The Authority concludes that BSE cannot, at this time, as a matter of law, provide Section 272(a)(2) non-incidental services, does not intend to provide Section 272(a)(2) incidental services, and is,

[8] Section 271(d)(3)(B) states: "the required authorization will be carried out in accordance with the requirements of Section 272." (emphasis added); see also Section 273 (a) ("A Bell operating company may manufacture and provide telecommunications equipment, and manufacture customer premises equipment, if the Commission authorizes that Bell operating company or any Bell operating company affiliate to provide interLATA services under Section 271(d) . . . "). Thus, the use of a Section 272 affiliate is the statutorily permitted vehicle that the BOC must use to provide the denoted services.

[9] The testimony of BSE's only witness in this case recognizes the same. Both in his pre-filed testimony *at 4*, and during the hearing, *Transcript of Hearing at 129*, Mr. Scheye acknowledged that BSE is not seeking authority to provide in-region interLATA services by its Application at this time. We also note that BSE does not seek to provide any of the Section 272 incidental services allowed to be offered by BST or its affiliate prior to Section 271 authorization being granted.

therefore, not a Section 272 affiliate.[10] Having concluded as such, it is difficult to embrace the position that the safeguards established under Section 272 are applicable to BSE. It is equally difficult to accept that an entity such as BSE is of the type contemplated by the FCC's pronouncement that Section 272 does not prohibit a Section 272 affiliate from providing local exchange services in addition to interLATA services.

Furthermore, as conceded by BSE in its Post-Hearing Brief, a full consideration of the Application cannot be had without considering whether BSE's Application is in the public interest. *Post-Hearing Brief of BSE at 1.* Of essential concern is whether the potential benefits that might be realized by Tennessee consumers, if BSE's Application is granted, sufficiently outweigh the potential harm that might be caused to Tennessee consumers if BSE's Application is granted. *See Post-Hearing Brief of MCI at 2.*

The concerns cited by the intervenors are genuine. As earlier noted, the primary threats raised by the intervenors in opposition to the Application are the potential for the anti-competitive practices of discriminatory or preferential treatment, avoidance of ILEC obligations, price squeezing, and cross-subsidization. The General Assembly and the Authority both recognize that there are material differences between incumbents and competing carriers and thus have adopted different regulatory schemes for each. For example, in addressing the potential for

[10] From the Authority's point of view, it is sufficient here for the Authority to find that the potential for harm from allowing BSE to provide service within BellSouth Telecommunications' territory outweighs the benefits of a grant of full authority to BSE. However it should be noted that , even if BSE could be found to be a Section 272 affiliate today, the public interest concerns under state law, including T.C.A. § 65-5-208(c), would still have to be weighed. The Authority forms no conclusion as to whether such public interest concerns would be cured by BellSouth's compliance with the requirements of Section 271, or BSE's designation as a Section 272 affiliate. Should circumstances change, and if BSE files anew, then the Authority will consider those questions based upon the facts then before it.

anti-competitive pricing by an incumbent carrier such as BellSouth Telecommunications, T.C.A. § 65-5-208(c) provides in part that:

> [A]n incumbent local exchange telephone company shall adhere to a price floor for its competitive services[.] . . . The price floor shall equal the incumbent local exchange telephone company's tariffed rates for essential elements utilized by competing telecommunications service providers plus the total long-run incremental cost of the competitive elements of the service.

However, T.C.A. § 65-5-208(c) does not directly apply to competing carriers such as BSE.[11] In addition, incumbents are required to submit tariffs with detailed cost data to support their rates, while CLECs are required to file informational tariffs only.

These and other distinctions in state law between ILECs and CLECs provide a window of opportunity for anti-competitive behavior, through which an incumbent and a CLEC affiliate could traverse, if unchecked. Whether anti-competitive behavior occurs intentionally or unintentionally, such behavior could substantially undermine the Authority's ongoing efforts toward achieving a pro-competitive environment. Curbing the potential for anti-competitive activity among both incumbent and competing carriers is within the TRA's statutory grant of authority. Specifically, T.C.A. § 65-5-208(c) provides that:

> The authority shall, as appropriate, also adopt other rules or issue orders to prohibit cross-subsidization, preferences to competitive services or ***affiliated entities***, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices. (emphasis added).

The Authority has concluded that anti-competitive behavior, whether intentional or not, and whether slight or aggressive, can cause irreparable harm to Tennessee's emerging competitive process. Thus, if BSE is permitted to operate within the service territory of

[11] Director Greer is of the minority opinion that T.C.A. § 65-5-208(c) "applies not only to the ILEC but also to all of its affiliates," which here would include BSE and BellSouth Corporation. *Transcript of Authority Conference, September 15, 1998, at 19.*

BellSouth Telecommunications, the potential for anti-competitive behavior between BSE and BellSouth Telecommunications, as described in T.C.A. § 65-5-208(c), is so great as to command the highest level of scrutiny.[12]

BSE argues that the Authority should not pre-judge the potential for anti-competitive behavior, but rather wait and react to any complaints of anti-competitive behavior as they arise. The Authority is unconvinced, however, that merely reacting to complaints satisfies the Authority's responsibilities under T.C.A. § 65-5-208(c). Moreover, the Authority is equally convinced that it cannot expeditiously and effectively take peak actions necessary to counter any negative effects of anti-competitive behavior once such effects have been experienced by competitors. In fact, it is questionable whether the Authority could ever actually reverse any substantiated harm.

The Authority concludes that BSE's Application for authority to provide competing local exchange service within BellSouth's service territory does not promote the public interest. The Authority is, at this time, unconvinced that the nondiscriminatory requirements of Sections 251 and 252 of the federal Act, the rules and orders of the FCC, and Tennessee law ensure that BellSouth Telecommunications cannot provide BSE with any market advantage, or vice-versa.[13] See *Pre-Hearing Brief of BSE at 3*. We acknowledge BSE's representations that it will negotiate with BellSouth Telecommunications on the same terms and conditions as any other CLEC and

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[12] Director Greer disagreed with the majority on this point. It is his opinion that under the statute "BellSouth Corporation would not be able to divert any services though BSE or create any pricing situations disadvantageous to other CLECs." *Transcript of Authority Conference, September 15, 1998 at 19-20.*

[13] The Directors were unanimous in their concern that adequate safeguards were necessary to protect the competitive marketplace from the potential effects of affiliate transactions. On this point, Director Greer stated: "I would want certain safeguards in place to monitor the affiliate transactions and performance. However, neither applicant nor any of its affiliates have offered any such safeguards to justify such a granting." *Transcript of Authority Conference, September 15, 1998 at 21.*

that it will otherwise abide by both the letter and the spirit of T.C.A. § 65-5-208(c). However, BSE and BellSouth Telecommunications are affiliates whose business practices and activities are not easily monitored by either the Authority or competitors. Recognizing the high potential for anti-competitive behavior, the Authority must consider the swiftness with which any improper behavior would be discovered, and how quickly such behavior, if discovered, could be remedied. Additionally, we are concerned with the impact that any anti-competitive behavior could have on competitors and on the public. If abuses go undetected for only a short period, one might think that the potential for lasting harm must necessarily be small. But, that may not necessarily be the case. The Authority concludes that the potential for anti-competitive behavior between BSE and BellSouth Telecommunications is great, and that such anti-competitive behavior, when engaged in, is likely to be undertaken stealthily so as to increase its potential for going permanently undiscovered. Unfortunately, neither the Authority's independent powers to investigate nor the ability of competitors to complain of suspect activities can be hailed as a timely and effective means of monitoring actual anti-competitive activity between BSE and BellSouth Telecommunications. The negative consequences to Tennessee consumers of anti-competitive behavior among BSE and BellSouth Telecommunications is too great to leave to chance.

BSE contends that the anti-competitive arguments of the intervenors are speculative and undefined. If that is the case, then likewise BSE's position on how competitively neutral its business activities with BellSouth Telecommunications will be is equally speculative. In any event, T.C.A. § 65-5-208(c) requires the Authority to prospectively assess BSE's Application. Moreover, the Authority does not find it necessary to list each possibility for abuse by BSE. It is sufficient to acknowledge that even a small misstep can be fatal to the goal of competition.

The key to the Authority's review of BSE's Application is evaluating what best serves Tennessee's policy on competition. The Tennessee General Assembly declared, in T.C.A. § 65-4-123, that:

> the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers.

Further, in the preamble to the Tennessee Telecommunications Act of 1995, the General Assembly proclaimed that "It is in the public interest of Tennessee consumers to permit competition in the telecommunications services market[.]" Public Chapter No. 408. While granting BSE's request in full could conceivably result in more choices and some measure of rate relief in the very short term, such action could equally result in fewer choices, increased prices, and thwarted competition in the local market in the long term if BSE and BellSouth Telecommunications, either inadvertently or willfully, act in a manner that undermines Tennessee's competitive goals.

The General Assembly has further pronounced that "Competition among providers should be made fair by requiring that all regulation be applied impartially and without discrimination to each[.]" Again, T.C.A. § 65-5-208(c) reveals important distinctions between ILECs and CLECs. If BSE's Application is granted in full, BellSouth Telecommunications may, by design or chance, evade regulation and thus violate the declaration that competition among providers be fair.

Recognizing that competition in the local telecommunications market across the nation, including Tennessee, is in an embryonic stage and that the Tennessee General Assembly is

acutely concerned about promoting competition within Tennessee, the Authority must be cautious in its consideration of BSE's Application for authority to operate within BellSouth Telecommunications' service territory. It is the opinion of the Authority that BSE's operation as a CLEC in BellSouth Telecommunications' territory would, at this time, substantially undermine Tennessee's competitive goals. Although the Authority's decisions do not generally rest on "possibilities" and "potentialities," protective measures are warranted when the harm that may be inflicted is menacing, affects a substantial portion of the state's population, and may be irreversible. The Authority finds this to be such a case.

Although BSE attempts to support its public interest cause by emphasizing that the FCC has concluded that "as a matter of policy [sic] regulations prohibiting BOC Section 272 affiliates from offering local exchange service do not serve the public interest[,]" *FCC CC Docket No. 96-149, para. 315*, it should be noted that the FCC was not considering Tennessee law.

The Supreme Court of the United States has recognized that agency decisions must sometimes be based upon educated predictions when the events to which the decisions refer are future ones. *FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 813-14 (1978).* Furthermore, the Tennessee Supreme Court has opined that "in the evaluation of evidence the agency is specifically authorized to utilize its 'experience, technical competence, and specialized knowledge.'" *CF Industries v. TPSC, 599 S.W.2d 536, 542 (1980).* Utilizing the same, the Authority is convinced that granting BSE's Application in full, at this time, would contravene the intent of the General Assembly, offend the public interest, and thwart the movement towards a more competitive environment in the local telecommunications market.[14]

[14] Director Greer noted for the record that BSE's testimony suggested that it would not be offering anything new to customers. Transcript of Authority Conference, September 15, 1998 *at 20*. He also expressed strong concerns

We disagree with BSE's contention that its Application should be granted in full because the Authority granted statewide CLEC authority to similarly situated incumbents, Citizens Telecommunications Company d/b/a Citizens Telecom ("Citizens") and Sprint Communications Company L.P.("Sprint"). In Tennessee, Citizens and Sprint, and their sister companies, are not similarly situated to BellSouth Telecommunications and BSE. First, neither Citizens nor Sprint are BOCs, nor does either possess the historical market dominance and clout so closely associated with BOCs. Second, neither Citizens nor Sprint were subject to either the Modification of Final Judgment, or Section 271 requirements. Finally, unlike Citizens and Sprint, BellSouth Telecommunications has approximately eighty percent (80%) of the access lines in Tennessee. As the dominate local carrier in Tennessee and as a BOC under federal law, BellSouth Telecommunications is legally subject to a greater and far more distinct level of scrutiny in this state. For these reasons, the Authority finds, in the context of BSE's Application, that BSE and BellSouth Telecommunications are not similarly situated to Citizens and Sprint.[15]

Having considered the record in this case and the arguments of the parties, the Authority unanimously grants in part, and denies in part, BSE's Application for a Certificate of Convenience and Necessity. The Authority specifically unanimously grants BSE's Application only to the extent that BSE shall be allowed to provide competing local exchange service within Tennessee in those service areas outside of BellSouth Telecommunications, Inc.'s current service

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regarding Mr. Scheye's testimony with respect to contract service arrangements ("CSAs") and the belief by BSE that such CSAs entered into by BSE would not be subject to approval by the Authority. Id. *at 21.*

[15] It should be noted that neither Sprint's nor Citizen's applications for authority were contested. Intervention is important in aiding the Authority in identifying and defining public interest issues.

area, and not otherwise inconsistent with state and federal law and the rules and orders of the TRA and the FCC.[16]

IT IS THEREFORE ORDERED THAT:

1. BellSouth BSE, Inc.'s Application for a Certificate of Public Convenience and Necessity pursuant to T.C.A. 65-4-101 is hereby granted only to the extent that BSE shall be allowed to provide competing local exchange service within Tennessee in those service areas outside of BellSouth Telecommunications, Inc.'s current service area, and not otherwise inconsistent with state and federal law and the rules and orders of the TRA and the FCC. BSE's Application is otherwise denied.

2. Any party aggrieved by the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within ten (10) days from the date of this Order.

[16] Chairman Malone instructed BSE that this matter is not closed to reconsideration in the future, stating: "[I]f BSE believes at a later time that it can carry the public interest burden herein raised and alleviate the agency's concerns with respect to T.C.A. § 65-5-208(c), it may petition the Authority at any time at its discretion for further authority." *Transcript of Authority Conference, September 15, 1998 at 18-19.*

3. Any party aggrieved by the Authority's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.

CHAIRMAN

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DIRECTOR

DIRECTOR

ATTEST:

EXECUTIVE SECRETARY

* * * Director Sara Kyle will file a separate opinion.

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	APPLICATION OF BELLSOUTH BSE, INC. FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE INTRASTATE TELECOMMUNICATIONS	)))))	Docket No. 97-07505

CONCURRING OPINION OF DIRECTOR SARA KYLE

Director Sara Kyle participated in deliberations in this matter on September 15, 1998. She concurs in the result as referenced by her comments on page 21 of the transcript. "I too believe that BSE's certificate should be granted but limited to those areas in which BST is not the incumbent and not otherwise restricted by state or federal law."

DIRECTOR

ATTEST:

EXECUTIVE SECRETARY