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June 7, 1999

Mr. David Waddell
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

Re: Application of BellSouth BSE, Inc. For a Certificate of Public Convenience and Necessity to Provide Intrastate Telecommunications Services
Docket No. 98-00879

Dear David:

Attached please find the original plus thirteen copies of the Post-Hearing Brief of the Southeastern Competitive Carriers Association ("SECCA") in the above-referenced docket. Copies of this letter have been served on all parties of record.

Sincerely,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

Henry Walker

Henry Walker

JEH/sja
cc: All Parties of Record

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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 Services

Docket No. 98-00879

POST HEARING BRIEF OF THE SOUTHEASTERN COMPETITIVE CARRIERS ASSOCIATION

The Southeastern Competitive Carriers Association ("SECCA")[1] hereby submits its post-hearing brief in this proceeding. SECCA strongly supports the Tennessee Regulatory Authority's (the "Authority") original decision in this matter (*Before the Tennessee Regulatory Authority,* Docket No. 97-07505, *Order Granting in Part and Denying in Part Application for Certificate of Public Convenience and Necessity*, Issued December 8, 1998. "December 8, 1998 Order"), and believes that the concerns raised by the Authority in that decision are the very same ones it should use to deny BellSouth BSE ("BSE") certification as a "CLEC" in the BellSouth Telecommunications ("BST") ILEC territory for a second time. The record in this case demonstrates that the Authority's concerns have not been and likely can not be satisfied by any wholly-owned

[1]SECCA's members are: ITC DeltaCom, Inc., ICG Communications, MCI WorldCom, e.spire Communications, Business Telecom, Inc., Competitive Telecommunications Association, Time Warner Telecom, NEXTLINK, Telecommunications Resellers Association, Qwest Communications, AT&T of the South Central States, and State Communications.

subsidiary of BellSouth Corporation applying for authority to operate as a "CLEC" in BST's historical monopoly territory.

The Authority should decline to certificate any BellSouth affiliate offering basic local exchange service in BST's monopoly territory as anything other than a monopoly ILEC. The reasons for denying the in-territory certificate in this case are compelling and are set forth herein.

The Authority's first Order in this matter recognized the lack of benefit to consumers that certifying BellSouth as a CLEC in its ILEC territory would provide (December 8, 1998 Order pp. 12, 14) and recognized as well threats to the competitive market that can easily result from treating BellSouth's subsidiary as a non-dominant CLEC in territory served by BST as the historical monopoly provider. (*Id* 12 - 15.) Nothing in BSE's new case or in the Tennessee local exchange market has changed these concerns. BSE has offered no concession and likely can offer no concession (outside of agreeing to be treated as an ILEC and subject to BST's regulatory obligations) that can allay these concerns. For reasons set forth herein, SECCA commends the Authority to the reasons set forth by the Authority itself in its own December 8, 1998 Order and urges the Authority to issue a similar decision in this second round of this docket.

1. **There is no service or group of services BSE can offer that BellSouth Telecommunications is not already authorized to provide as an ILEC in its territory.**

Mr. Scheye concedes that the packages of services he has stated that BSE intends to offer in Tennessee can be provided via BST. (Tr. 94 - 96.) The sole example BSE has given (resold basic service of a non-BST ILEC "packaged" with BellSouth wireless service) is not only something BST could do if it so desired (*Id.*), it is indeed something BSE is already authorized to do in

Tennessee under the Authority's December 8, 1998 Order which granted BSE authority in areas of Tennessee not served by BST. Under the authority BST and BSE already have in Tennessee, BellSouth can sell basic local exchange/wireless packages and other packages both inside BST territory (BST) and outside BST territory (BSE). BellSouth Corporation currently has authority to provide local exchange service to every single customer in Tennessee.

As noted by the Authority in its December 8 Order, "(t)he 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." (December 8, 1998 Order, p. 10.) There is no hardship worked on the BellSouth Corporation by the Authority's declining to permit it to operate as a CLEC, via BSE, in BST's monopoly territory. Tennessee statutory law, under T.C.A. § 65-5-208© *inter alia*, and the Authority's own regulations appropriately recognize a distinction between ILECs and CLECs and set up a different regulatory scheme for each. The Authority must treat BellSouth and any local exchange affiliates it chooses to establish to operate in the BST territory as the ILEC that it is.

BellSouth Telecommunications can provide any telecommunications service or package that BSE could offer inside the BST territory. BellSouth faces regulation as a dominant provider, the "ILEC" in its territory, because that is what it is. Its services are regulated accordingly. By creating a legal entity that is imperceptibly different in the market -- but that is subject to none of the obligations of an incumbent carrier -- BellSouth understandably desires to retain all the market advantages of incumbency while gaining all the flexibility of non-dominance via BSE. (*Gillan prefiled direct*, p. 7.) The distinctions established by the General Assembly and the Authority between ILECs and CLECs would be blurred to the point of irrelevance should the Authority

determine that BellSouth Corporation can indeed operate as a CLEC (via BSE) in its ILEC territory.

2. BSE has no current business plan.

According to BSE President and Vice-President Mr. Scheye, BSE no longer intends to follow either the business plan it set forth in its original application or the business plan laid out in the Andersen Consulting Report (Tr. 99, 106-107, 187-188, Exhibits 2, 3, 4, 5, 9.) The one example Mr. Scheye points to regarding the type of service BSE intends to provide in Tennessee is the service it currently offers in Tampa (T. 125.) As Mr. Scheye agreed, the service BSE offers in Tampa (GTE territory) is something BSE is already authorized to provide in Tennessee, as it is outside of BST's ILEC territory. (T. 91.) Mr. Scheye also has told the Authority that its Tampa offering is unlike any package BSE would put together in Tennessee because no non-BST territory in Tennessee contains as sizeable a market as Tampa. (*Id.*) The Authority is left, therefore, with two outdated business plans for BSE -- one submitted with the original application and one that is part of the Andersen Consulting Report.

Having no business plan tends to suggest no business reason to exist. Had BSE submitted a complete business plan, the Authority would still be have to examine the propriety of granting this non-dominant type certificate to BSE in BST's territory and to consider potential abuses. The fact that no current business plan has even been submitted forces both the Authority and intervening parties (as a policy matter) to speculate about why BSE might seek certification in BST's territory. If BST can already provide the services BSE anticipates offering in the BST territory, then

there clearly is no business reason for BellSouth Corporation to seek certification of a wholly-owned CLEC in the BST territory.

This lack of an enunciated business plan simplifies the case before the Authority. In the last round of this proceeding, the Authority had to consider whether any benefits that might be realized by Tennessee consumers as a result of BellSouth BSE's certification in the BellSouth BST territory were outweighed by the harm such certification could cause to competition in Tennessee's local exchange markets and Tennessee consumers. Lack of any business plan/business purpose means that there is no potential benefit to consumers to even be evaluated and weighed against the potential for harm.

3. Permitting BellSouth to operate as a CLEC in its ILEC territory carries with it serious potential consequences and threats to the competitive market.

It is impossible to predict with certainty every possible harm that could result from permitting BellSouth to operate as a CLEC under vastly reduced regulation in its ILEC territory. (*Gillan prefiled direct* 7.) A number of adverse consequences are, however, readily apparent. The Andersen Consulting Report, performed on behalf of BellSouth Corporation and BSE and with the assistance of BellSouth employees, including Mr. Scheye, offers some insight into some of the problems that could arise. (Tr. 100, 201.) Whether BSE ever intends to make use of any of the contents of the report or not, BellSouth's own report highlights many of the concerns the Authority noted in its December 8, 1998 Order and other examples showing the potential for anticompetitive activity on the part of BellSouth through the operation of its in-territory CLEC.

- BellSouth can use BSE to ameliorate the requirement, now confirmed by the Supreme Court, that BST must make combinations ("bundles") of unbundled

network elements ("UNEs") available to competitors at cost-based rates. (*See* Exhibit 5, pp. 18 - 20.)

According to Mr. Scheye, avoidance of BST's requirements under the Act to resell and unbundle was indeed one of the reasons for the formation of BSE. (Tr. 130.) Throughout his testimony, Mr. Scheye consistently disavowed the Andersen Report and said that its contents do not reflect the way BSE will operate. (Tr. 112.) The Authority should recognize, however, that whether BSE currently intends to rely on this study or not, the concerns raised by the report's contents are still valid because there is nothing to stop BSE, BST and BellSouth Corporation from implementing policies identical to those contained in the report. (Tr. 209 - 210.) Concerns regarding BellSouth's avoidance of the Act's resale and unbundling requirements were raised by the intervenors in Docket No. 97-07505 and were noted by the Authority as of concern in its December 8, 1998 Order (pp. 12 - 15.) Such concerns were raised even before the intervenors or the Authority had the chance to review the Andersen Report and to see that concerns of anticompetitive activities are corroborated by BellSouth's own consultant report.

- BST can coordinate with BSE and provide sales leads so as to ensure that customers that BST cannot satisfy, for whatever reason, can be approached by BSE. (Tr. 99, 215-216.)

This activity is another that Mr. Scheye notes as having been part of BSE's plan at one point in time but no longer. (*Id.*) The Authority must be aware of how harmful such collaboration between BST and BSE would be to competition in Tennessee. BellSouth Corporation could virtually ensure that no customer of any significance ever left its service by using BSE to offer exactly what a disgruntled customer of BST is looking for. True CLEC competitors would never

be able to match the customer information that BSE would have from such collaboration with BST and there would be no way to even know, much less prove, whether BSE's offering to certain such "at-risk" customers covered their costs or not. The relevance of this part of BSE's old business plan is that if BSE is granted a certificate in BST's territory, BSE and BST can still engage in such collaboration and will surely do so, as noted by the intervenors in the briefs and testimony filed in conjunction with Docket 97-07505. The incentive for such collaboration is strong and, as the Authority noted in its December 8, 1998 Order, "BSE and BellSouth Telecommunications are affiliates whose business practices and activities are not easily monitored by the Authority or competitors." (Order p. 13) Proving such collaboration after the fact would be nearly impossible.

- Once operational, BSE and BST would be able to coordinate on every issue of significance -- including advertising (Tr. 204 - 206), "market segment position" (Tr. 208), "business plan pricing consistency" (Tr. 213), and provision of sales leads, "reasons for win/losses from past sales" (Tr. 216.)

All of these items and many others in the Andersen Report, taken together, suggest a perfect coordination among all of the BellSouth affiliates, clearly including BSE and BST. Though Mr. Scheye himself was "uncomfortable" with this description of BSE and BST coordination (Tr. 209), he concedes that there is nothing that could stop such coordination from taking place. (Tr. 209 - 210.) Nondiscrimination requirements can not protect true CLECs from such coordinated competition from BST and BSE. BSE would be aided and abetted in every imaginable way by BST (and vice-versa) to the extreme detriment of true CLECs.

In response to the question of whether BSE was envisioned as operating independently of BellSouth Corporation, Mr. Scheye stated:

> That's not the criteria. We can't operate independently of BellSouth Corporation. They own us. They clearly do not let us operate independently . . . The "operate independently" is from the incumbent LEC, in this case BellSouth Telecommunications. (Tr. 118.)

The same is certainly true of BellSouth Telecommunications. Being wholly-owned by BellSouth Corporation, BST does not operate independently of BellSouth Corporation either. Because neither BSE nor BST can operate independently of BellSouth Corporation there is no reason to believe that BSE and BST will or can operate independently of each other. Only BSE (unlike true CLECs) enjoys an identity of ownership with BST. (*Gillan prefiled direct*, 3-4.) For this reason, there is shareholder-indifference within BellSouth as to whether a service is sold by BST or BSE. (*Id.*) To the extent that collaboration among the affiliates advances the goals of BellSouth Corporation, such collaboration is certain to take place.

Some other examples of potential harms are:

- BellSouth would be able to improperly benefit its unregulated affiliate through costs incurred by its regulated twin. BellSouth recently announced a $20 million advertising campaign intended to promote "BellSouth's" technological skills. Like all product non-specific advertising, these ads will promote BellSouth-BSE and BellSouth Telecommunications without differentiation. (In fact, it is difficult to conceive of any advertisement that includes the BellSouth name and logo that would not benefit BellSouth-BSE.) (*Gillan prefiled direct* 7 - 8.)

  BSE very obviously intends to capitalize on the good name of "BellSouth" in the marketplace -- a name that was established primarily by BellSouth Telecommunications as the sole provider of local exchange service for the majority of Southeasterners for as long as anyone can remember. One example is the ad BSE placed in Tampa noting "It's not like we got into this business yesterday." (Tr. 231.) If BSE is truly an independent entity guided by the leadership of

Mr. Scheye, then indeed it did get into the local exchange business "yesterday," figuratively speaking -- not only in Tampa where the ad was placed, but everywhere else BSE intends to operate. (*Id.*) While Tampa, Florida is not BST territory, this example is the only one available where actual BSE advertising can be seen, as it is the only place where BSE is providing service. (Tr. 125.) The caption in the Tampa ad demonstrates that BellSouth BSE intends to establish itself in consumers' minds as synonymous with BellSouth Telecommunications. Similarly, customers calling to inquire about the BellSouth BSE-BellSouth wireless package are greeted with an employee of BellSouth answering the phone "BellSouth." (Tr. 151.)

- BSE would provide BellSouth the ability to discriminate in favor of select customers by offering targeted products through BSE that are not generally available to other BellSouth customers. (*Gillan prefiled direct* 8., Tr. 147.)

- BellSouth could also use BSE try to avoid its obligations under the federal Act, in particular its obligation to permit the unrestricted resale of its services at wholesale rates. (*Gillan prefiled direct* 8.)

The premise of the wholesale pricing option is that the relevant "retail" price off of which competitors receive a discount is the tariffed rate of the ILEC, here BST. (*Id.*) Approving BSE would violate this principle by providing BellSouth Corporation *two* legal entities -- yet a *single* market presence -- to offer its local services. (*Id.*) BellSouth would be able to reprice existing services and introduce new ones though presumably without an obligation to offer a wholesale equivalent subject to the appropriate discount.[2] In effect, the "retail" price *relevant* to

[2]This concern is based on the *assumption* that BSE is not an ILEC and subject to applicable provisions of the Telecommunications Act. Whether BSE is an incumbent LEC is an open legal issue, however, currently before the Federal Communications Commission.

consumers would be BSE's price, rather than BST, the ILEC's price, but competitors would not have the opportunity to resell BSE's service with any discount. (*Id.*)

4. BSE's concessions to the Authority's concerns about certifying it as a CLEC in BST's territory are, for the most part, meaningless.

BSE has offered four changes to its original application:

1. BSE would voluntarily agree that it would not offer retail prices below BST's wholesale rate -- at least without permission.

2. BellSouth would agree to establish BellSouth BSE in accordance with Section 272 of the Telecommunications Act.

3. BSE offers to abide by the requirements of T.C.A. § 65-5-208(c).

4. BSE would agree to file its CSAs with the Authority (an offer made at the hearing itself).

The first three of these, discussed in greater detail below, in no way reduce the potential for competitive harm, discrimination and customer confusion that justified the TRA's initial decision. BSE's filing its CSAs might arguably be of some benefit but would not be significant enough to ameliorate the vast majority of concerns raised in the December 8, 1998 Order. Filing of CSAs would be of limited benefit because, according to Mr. Scheye, BSE does not intend to use CSAs as its primary or "normal" mode of operation. (Tr. 35.) Because CSAs represent only one type of harm that BellSouth could achieve with its in-territory CLEC and because BSE does not even intend to make widespread use of them, certificating BSE with the caveat that it must file all CSAs would be nothing but a small bandaid on a gaping wound.

- BSE has offered that it will not offer retail prices below BST's wholesale rate -- at least without permission.

This concession or guarantee by BSE, as attractive as might seem on the surface, is utterly useless for preventing BellSouth from placing its competitors into the price squeeze noted as of concern in the Authority's December 8, 1998 Order (p. 10.) BSE only promises to not price below its affiliate's wholesale price (and then proposes a procedure for doing even that). Unlike BSE, a legitimate entrant could not survive if it simply recovered the cost of its wholesale service. (*Gillan prefiled direct* 4.) A legitimate entrant must also recover its costs to market the service, provide customer support, and provide a return to its investors. (*Id.*) Thus, BSE's proposed "solution" to the danger of a price-squeeze is a conditional promise that would actually allow a price squeeze to occur, in violation of the public interest and of T.C.A. §65-5-208(c). Additionally BSE has testified that it will typically offer local service as part of a package with other services. Nothing in its proposal would prevent it from offering a "below wholesale" price by simply discounting the prices of other components in the package. (*Id.*)

- BSE offers to abide by the requirements of T.C.A. § 65-5-208(c), which states:

> © Effective January 1, 1996, an incumbent local exchange telephone company shall adhere to a price floor for its competitive services subject to such determination as the authority shall make pursuant to § 65-5-207. 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. When shown to be in the public interest, the authority shall exempt a service or group of services provided by an incumbent local exchange telephone company from the requirement of the price floor. 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]

Though BSE claims to offer to comply with this provision, it does not believe that doing so binds it to the price floor set in the statute (BST's price floor). (Tr. 167, 173.) Offering to comport with a provision may sound like a concession but in this case it is not. By claiming that BSE is not an ILEC, BSE asserts that its own price floor is not BST's price floor but is, rather, based loosely on BSE's costs of buying resold local exchange service at the wholesale discount. (Tr. 167.) Certifying BSE as a "CLEC" in BST's territory and permitting it to operate pursuant to CLEC regulation (or even its definition of following T.C.A. § 65-5-208(c)) would permit BellSouth Corporation, via BSE, to evade the price floor requirement established by statute.

The statutory price floor is in place to prevent BST from engaging in anticompetitive pricing (predatory pricing, cross-subsidization) as the statute authorizes the Authority to adopt still "other rules . . .to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices." If BellSouth is permitted to evade the statutory price floor requirements, it will avoid the primary statutory protection that CLECs have from BellSouth's anti-competitive pricing practices.

If BST's price floor for a particular service is $12.15, for example, then competitors that are more efficient -- regardless of their entry mode -- can potentially charge $12.15 or some discount from that amount to serve their customers and remain competitive with the dominant

provider, BellSouth. If the wholesale rate for the service is $10.31, a CLEC reseller would then have a potential margin of $1.84. (Tr. 231.) Such a CLEC reseller would have advertising costs, marketing costs and customer support costs that it would have to recover in this $1.84 in addition to any profit it might hope to make. (Tr. 233-234.) BSE faces none of these costs and indeed is itself fully financed by BellSouth Corporation at this time such that any costs it does incur are financed by the ultimate parent corporation.

Permitting BSE to use $10.31 as its price floor in BST territory would eliminate any possibility for a true CLEC relying on resale to compete against BellSouth. (Tr. 234.) Whereas BellSouth Corporation would see only a slight reduction in the "bottom line" for each customer served by BSE at $10.31, an entrant relying on resale would find itself having to compete against "BellSouth" at the $10.31 rate -- the rate that equals the most significant of its underlying costs. Additionally, in the resale environment, BellSouth Corporation receives not only the basic rate paid by the end user or CLEC competitor but also receives the access revenues associated with the customer. (Tr. 232-234.) This greatly ameliorates the fact that it is receiving $1.84 less for the basic service. While BSE does not have any incentive to offer this lower priced local exchange service in order to get customers from BST, it certainly does have an incentive to take a little bit less money from a customer today in order to keep that customer in the BellSouth family of services. (Tr. 237.)

BST could not, under Tennessee law, charge $10.31 for basic local exchange service as established in this example. To permit BellSouth Corporation to use BSE to accomplish that which BST can not legally do (price below its price floor) is clearly not in the public interest and not

sound policy. Additionally, it does not comply with T.C.A. § 65-5-208(c), Mr. Scheye's offer notwithstanding.

- BSE offers to operate in accordance with Section 272 of the Telecommunications Act.

Mr. Scheye acknowledges that it must conform to Section 272 in order to provide interLATA services, which BSE would hope to offer once BST gains interLATA authority pursuant to Section 271 of the Act. Therefore, the offer is not anything that BSE wouldn't have to do anyway. Additionally, BSE made this offer in the Docket 97-07505 and it is, therefore, nothing new. The Authority considered this proposal of BSE at length in its December 8, 1998 Order (pp. 8-10) and rejected it as inapplicable, given that BSE cannot satisfy the requirements of a 272 affiliate until interLATA permission is granted BST pursuant to Section 271. (December 8, 1998 Order p. 9.) Additionally, the Authority recognized that entities such as BSE were not the sort of RBOC subsidiaries contemplated by the FCC in establishing regulations to implement Section 272. (December 8, 1998 Order p. 10.) Most significantly, this proposal does nothing to eliminate the competitive concerns discussed herein. (*Gillan prefiled direct* 8.)

Conclusion

To grant BellSouth BSE authority in BST territory of Tennessee would result in no benefit to Tennessee consumers. Indeed, it would cause great harm to nascent local exchange competition in Tennessee and, thereby harm the public interest. The concerns cited by the Authority in denying BSE such authority in its December 8, 1998 Order in Docket No. 97-07505 ("anti-

competitive practices of discriminatory or preferential treatment, avoidance of ILEC obligations, price squeezing and cross-subsidization") are not only still present but have been confirmed as legitimate concerns by evidence introduced in this case. SECCA respectfully requests that BellSouth BSE's application to operate as a CLEC in BST's ILEC territory be denied by the Authority for reasons set forth herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been hand delivered or mailed to the following persons on this the 7th day of June, 1999.

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