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June 7, 1999

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

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

Dear Mr. Waddell:

I am enclosing with this letter an original and thirteen (13) copies of BellSouth BSE, Inc.'s Posthearing Brief in the above referenced matter. Copies have been served on counsel for parties of record.

Should you have any questions or require anything further at this time, please do not hesitate to contact me.

Sincerely,

Guilford F. Thornton, Jr.

GFT/lb

cc: Robert C. Scheye

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 IN TENNESSEE**

DOCKET NO. **98-00879**

POSTHEARING BRIEF

I. Introduction and Summary

BellSouth BSE, Inc. ("BSE") files this brief in support of its application for statewide authority to provide service as a competing telecommunications service provider in Tennessee. This proceeding was initiated to address the issues arising from Docket No. 97-07505 in which BSE was certificated only in those areas not currently served by its ILEC affiliate, BellSouth Telecommunications, Inc. ("BST").[1] In that docket, the Directors raised concerns, particularly regarding competitive safeguards and the public interest. For example, Director Greer stated: "My inclination is to grant BSE's CCN statewide, but I would want certain safeguards in place to monitor the affiliate transactions and performance."[2] Chairman Malone instructed BSE that the matter of statewide certification was not closed for 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."[3] BSE has focused its proposals on these specific issues in this proceeding.

BSE's new application, the prefiled testimony of BSE's President Robert C. Scheye, plus Mr. Scheye's testimony at the May 4, 1999 hearing in this matter all address directly the

[1] See *Order issued December 8, 1998, Docket No. 97-07505.*

[2] *Transcript of Authority Conference, September 15, 1999 at 21.*

[3] Id. *at 18-19.*

concerns previously raised by the Directors regarding statewide certification. In its new application, BSE proposed specific safeguards to protect against anticompetitive behavior prohibited by T.C.A. § 65-5-208(c). At the hearing, Mr. Scheye identified a number of additional measures the Authority could require - and BSE would accept - in order to satisfy these concerns, including the filing of customer service agreements ("CSAs") and BSE adherence to the cost floor requirements on ILECs present in T.C.A. § 65-5-208(c).[4] Mr. Scheye also described in detail BSE's unique product offering to residential customers in Tampa, Florida, introduced in October 1998. The intervenors produced no evidence that BSE's activities in Florida - or any other of the BellSouth states where BSE is certificated statewide - have disrupted the market or caused harm in any way.

BSE substantiated the reasonableness of its proposals - and the unreasonableness of the intervenors' views – through analysis and references to previous actions taken by the Congress, the Federal Communications Commission ("FCC") and multiple other state commissions. The arguments made here by SECCA have been rejected previously by the FCC and most state commissions and are inconsistent with previous statements made by its own member companies. In this docket, BSE has put forth a proposal which contains more safeguards than ever required by the Congress or any other regulatory agency. Only if the law or competitive circumstances in Tennessee differs dramatically than those present in other jurisdictions would these proposals be inadequate. There has been no suggestion that circumstances in Tennessee differ from those in other states.

The intervenors are attempting merely to deny BSE competitive entry into the market statewide, in violation of the principles underlying T.C.A. § 65-4-123.[5] Unable to address the issues involved in this proceeding, the intervenors, as Directors Greer and Kyle pointed out at the hearing, seek to "raise the bar"[6] to place unreasonable and unnecessary requirements on BSE, far

[4] During cross examination, counsel for the Southeastern Competitive Carriers Association ("SECCA") asked Mr. Scheye how BSE would calculate its price floor when reselling BST service. Counsel for SECCA suggested BSE should use BST's underlying costs. Mr. Scheye responded that BSE's price floor would be the price it paid BST plus its actual costs, not BST's tariffed rate. Because this hypothetical originated with Director Greer, he voiced his agreement with the method utilized by Mr. Scheye. *Transcript of May 4, 1999 hearing at 174-177.*

[5] T.C.A. § 65-4-123 provides in part: "[T]he 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 providers."

in excess of those faced by any other CLEC seeking certification in Tennessee. Such barriers to entry would be inconsistent with previous Authority action[7], and would violate Section 253 of the Federal Telecommunications Act of 1996 ("the Federal Act"), as recently interpreted by the FCC in a Tennessee case concerning Hyperion's entry into the competitive market.[8]

In sum, in order to deny BSE's application for statewide certification, the Authority must (1) discount the competitive safeguards proposed by BSE - which are more stringent than required by any regulatory agency - and the new services it offers; (2) ignore the applicable orders from the FCC and other state commissions; and (3) distinguish the Authority's previous actions on CLEC applications from Sprint-United and Citizens. This would necessarily have to be accomplished without violating state and federal law concerning barriers to competitive entry, and on the basis that Tennessee exhibits competitive issues beyond those in any other state.

II. BSE meets the requirements contained in T.C.A. § 65-4-201(c).

BSE's application and the uncontroverted testimony of Mr. Scheye set forth BSE's managerial, financial and technical abilities. Secondly, Mr. Scheye testified *repeatedly* that BSE "will adhere to all applicable authority policies, rules and orders", whatever they may be. *(See Transcript ("Tr.") at 22, 28, 30, 41, 48, 81, 85, 88, 139, 140, 156, 157, 161-164, 225 and 226.)* Accordingly, the statutory requirements of T.C.A. § 65-4-201 have been met, and a certificate granting statewide authorization should issue.

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[6] DIRECTOR GREER: "I think what I see happening here is that there are a set of CLEC rules that he has said at least seven or eight times today that he is willing to agree on and several of the ILEC rules that he has agreed to. And now are we asking him – is Mr. Walker asking him how many more of the ILEC rules are we asking him to agree to that were not even covered in our last order where we said they were coming up short? I think we're continuing to raise the bar. Mr. Walker – my question would be – and you don't have to answer this either – is it looks like we're going to ask BSE to agree to both sets of rules both ILEC rules and the CLEC rules. And I don't think that's what the FCC or our rules ever intended."

DIRECTOR KYLE: "And I would have to agree with Director Greer...We've answered this question numerous times today. They're going to agree, number one, with what the law says, number two, with the rules we set out. And I think if we think It's necessary for that you agree more – with more than just what the CLEC rules are, I think we can vote on that in an intelligent, reasoned manner...And, like Director Greer said, raising the bar is beyond me." *Transcript, May 4, 1999 hearing at 162-164.*

[7] The Authority previously approved CLEC applications for statewide authority filed by affiliates of ILECs Sprint-United (Docket No. 96-01153) and Citizens Telecom (Docket No. 96-00779).

[8] See *Memorandum Opinion and Order released May 27, 1999 in CC Docket No. 98-92.*

III. Competitive Safeguards.

In its application and prefiled testimony, BSE introduced several new proposals intended to address the concerns previously raised by the Directors regarding the potential for anticompetitive behavior between BSE and BST in violation of T.C.A. § 65-5-208(c). Here BSE offers a price floor by which it cannot resell service at a price below the actual cost which it pays BST. Secondly, BSE offers to submit itself to the structural separation requirements contained in Section 272 of the Federal Act.[9] Chairman Malone concluded in the previous proceeding that BSE is not a Section 272 affiliate under the Federal Act, as BSE is not proposing to offer any of the specific services enumerated in Section 272(a)(2). Accordingly, Chairman Malone found that the Authority could not bind BSE to the affiliate safeguards found in Section 272. Here BSE is offering to submit itself to those structural separation restrictions as a provision in its certificate for statewide authority.

In the hearing Mr. Scheye testified that while BSE believes existing statutory and regulatory provisions provide sufficient oversight, BSE nonetheless is willing to accept additional stipulations to its certificate as the Authority may deem appropriate. Specific conditions discussed at the hearing which Mr. Scheye specifically indicated he would accept include the following:

(1) BSE would file with the Authority and agree to resell customer service agreements ("CSAs") *(Tr. at 30 and 177-178)*;

(2) BSE would agree to be bound by the provisions of T.C.A. 65-5-208(c), specifically with respect to price/cost floors *(Tr. at 28, 154 and 166)*;

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[9] 47 U.S.C. Sec.272(e) provides as follows:

(e) FULFILLMENT OF CERTAIN REQUESTS.--A Bell operating company and an affiliate that is subject to the requirements of section 251(c)--

(1) shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates;

(2) shall not provide any facilities, services, or information concerning its provision of exchange access to the affiliate described in subsection (a) unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions;

(3) shall charge the affiliate described in subsection (a), or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service; and

(4) may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated.

(3) BSE would file tariffs (*Tr. at 41*);

(4) BSE would consent to regular audits of its operations by the Authority (*Tr. at 81*);

(5) BSE would provide cost allocation data with respect to joint product offerings with BellSouth Mobility or other affiliates (*Tr. at 226-227*);

(6) BSE would accept advertising restrictions concerning the use of the name "BellSouth BSE" similar to those required by the Georgia Public Service Commission in its Order granting BSE statewide certification[10] (*Tr. at 225*); and

(7) BSE would submit to any other applicable ILEC rules in the event BSE undertakes the activities of its ILEC affiliate BST. (*Tr. at 155-158*).

In light of this testimony, there can be no doubt that BSE "has demonstrated it will adhere to all applicable Authority policies, rules, and orders."

IV. Service in Tampa, Florida.

In the previous proceeding, the Directors raised concerns regarding public interest. To address those concerns, in addition to the proposed competitive safeguards already discussed, BSE has described in detail in this proceeding its new service to Tampa, Florida, which began in October, 1998. BSE is providing local service as part of a package of services to over 1000 mostly residential customers. BSE is offering service there which was previously unavailable and which is not currently offered by any other carrier. The intervenors produced no evidence as to market disruption in Tampa or in any of the states where BSE is certificated statewide, including six of the nine states in the BellSouth region.

V. Intervenors' Arguments

As in BSE's initial application for statewide authority, SECCA and other prospective competitors intervened in this proceeding. The intervenors' arguments, however, do not provide a basis for denying BSE the ability to provide statewide service. Every argument raised by the intervenors here has been rejected in other forums. While pursuing these same arguments, the intervenors introduce no evidence that circumstances exist in Tennessee which are so unique that the findings of the Congress, the FCC and most other state commissions should be ignored.

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[10] *Order dated March 9, 1998 in Docket No. 8042-U.*

SECCA's witness Mr. Gillan suggests: (1) that BellSouth Corporation, because it has an ILEC (BST), should not be allowed to create an affiliated CLEC which can offer service in the same region *(Tr. at 238-04)*; (2) that such an affiliate would utilize resale of BST's services for potentially anticompetitive activity *(Tr. at 238-06)*; and (3) that safeguards, such as regular Authority-authorized audit, would not alleviate these concerns *(Tr. at 250-251)*.

SECCA's leading argument is that a CLEC affiliate, such as BSE, should not be allowed to operate in the same area served by the ILEC. This argument is bewildering in light of what precedes it. In enacting the Federal Act, the Congress established the concept of an affiliate to an ILEC which could offer local exchange service as well as other services (e.g. long distance). In order to provide these services, the affiliate must *necessarily* be a CLEC. When the affiliate operates as a CLEC, there are no additional requirements, conditions or safeguards placed on it.

On at least three different occasions, the FCC has determined that it is appropriate for an ILEC to have a CLEC affiliate, such as BSE. [11] These decisions were made after the FCC reviewed and rejected the comments and arguments of the same parties who are now trying to keep BSE from providing service in Tennessee. Specifically, the FCC has found:

(1) that the certification of a CLEC which is an affiliate of an ILEC does not violate the public interest;[12]

(2) that Sections 251, 252 and 271 of the Federal Act provide adequate safeguards to protect against potential anticompetitive behavior;[13]

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[11] See *First Report and Order adopted December 23, 1996 in ICC Docket No. 96-149, (non-accounting safeguards)*; *Report and Order adopted September 30, 1997 in WT Docket No. 96-162, (competitive service safeguards for local exchange carrier provision of commercial mobile radio services)*; and *Memorandum Opinion and Order, adopted August 6, 1998 in CC Docket No. 98-147 (deployment of wireline services offering advanced telecommunications capability)*.

[12] "We also conclude as a matter of policy that regulations prohibiting BOC section 272 affiliates from offering local exchange service do not serve the public interest. To the extent that there are concerns that the BOCs will unlawfully subsidize their affiliates or accord them preferential treatment, [833] we reiterate that improper cost allocation and discrimination are prohibited by existing Commission rules and sections 251, 252, and 272 of the 1996 Act, and that predatory pricing is prohibited by the antitrust laws. Our affiliate transaction rules, as modified by our companion Accounting Safeguards Order, address the BOCs' ability to engage in improper cost allocation. The rules in this Order and our rules in our First Interconnection Order and our Second Interconnection Order ensure that BOCs may not favor their affiliates. In sum, we find no basis in the record for concluding that competition in the local market would be harmed if a section affiliate 272 offers local exchange service to the public that is similar to local exchange service offered by the BOC." *CC Docket No. 96-149, para 315.*

[13] "In addition, we do not believe that more stringent safeguards are necessary to prevent an anticompetitive price squeeze by an incumbent LEC. We do not believe that price squeezes will be more likely without Section 22.903.

(3) that certificating a CLEC affiliate of an ILEC should promote competition because it will employ the same operational support systems as other CLECs, thus creating greater incentives for the ILEC to accommodate all CLECs;[14]

(4) that a CLEC affiliate of an ILEC should not be limited to resale or to the purchase of unbundled network elements from the ILEC;[15]

(5) that a CLEC affiliate of an ILEC can be utilized to provide new advanced data services; and the Section 272 structural separation safeguards can be employed, even though these advanced data services are not specifically enumerated in Section 272 of the Federal Act[16]; and

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Because of the new interconnection obligations imposed on LECs in the Act, incumbent LECs must make interconnection available to CMRS providers offering telephone exchange service and exchange access service in conformity with the terms of Sections 251(c) and 252, including offering rates, terms, and conditions that are just, reasonable, and nondiscriminatory. Section 252 requires incumbent LECs to negotiate interconnection agreements, and also provides for mediation and arbitration by the state commissions. We find that Sections 251 and 252, together with our affiliate transaction rules, reduce the risk of such price squeezes." *WT Docket No. 96-162, para 62.*

"We also believe that the safeguards we adopt today ensure the minimum necessary level of transparency to police the price and nonprice discrimination concerns discussed above. Our requirement that certain services, facilities and network elements provided by the incumbent LEC to its CMRS affiliate must also be available to independent CMRS operators on the same prices, terms and conditions ensures that these transactions between the incumbent and its CMRS affiliate will be arms-length transactions...[T]he prohibition on joint ownership of incumbent LEC landline transmission and switching facilities provides further assurance that the incumbent LEC will not be able to misallocate costs or discriminate against the affiliate's competitors. We note that this restriction does not prevent an incumbent LEC or its CMRS affiliate from offering bundled telecommunications services, provided that similar functionality is available to independent CMRS providers. These protections also do not prevent the CMRS affiliate from building integrated wireless-wireless networks, as the CMRS affiliate is free to construct (or accept from the incumbent LEC under nondiscriminatory terms and conditions) wireline local facilities." *WT Docket No. 96-162, para. 61.*

[14] "In addition, we seek to facilitate the ability of competing carriers to offer advanced services on an equal footing with incumbent carriers and their affiliates... We note that, to the extent an incumbent LEC chooses to establish a separate affiliate to provide advanced services, the incumbent LEC should have an additional incentive to improve its processes and provide unbundled elements and collocation space as quickly and cheaply as possible to all competitors, including its advanced services affiliate." *CC Docket No. 98-147, para 14.*

[15] "We believe it is important to permit the incumbent LEC's CMRS affiliate to own facilities for the provision of competitive landline local exchange service, including obtaining access to unbundled a network elements from its incumbent LEC affiliate, so that the CMRS affiliate will have the ability to provide consumers with an integrated package of CMRS and local exchange services. Indeed, we see no sound economic or other public interest reason to prevent the CMRS affiliate from acquiring and deploying its own landline local exchange facilities and therefore becoming a competitive LEC in its region. This approach is fully consistent with our decision in the Non-accounting Safeguards Order to permit a BOC long distance affiliate to resell local exchange services and to obtain interconnection and access to unbundled network elements from the BOC for the purpose of the affiliate creating its own local exchange service offerings, including bundled packages." [161] *WT Docket No. 96-162, para 66.*

[16] *CC Docket No. 98-147, para 96.*

(6) that the FCC has already established regulations whereby a cellular affiliate of an ILEC may offer local exchange service under separation requirements *less stringent* than those set forth in Section 272.[17]

In light of the foregoing, SECCA's argument that a CLEC affiliate of an ILEC "is a legal fiction" *(Tr. at 239)* is discredited. SECCA witness Mr. Gillan simply ignores the steps taken by the FCC to establish operational groundrules for CLEC affiliates of ILECs for the provision of a wide variety of services, some enumerated in Section 272 and some not. Whether it be its general application of affiliate restrictions in the accounting safeguards docket (No. 96-149), the less stringent safeguards established in the cellular docket (No. 96-162), or the most recent application of the Section 272 safeguards in the advanced data services docket (No. 98-147), the terms and groundwork for addressing appropriate structural separation between an ILEC and its affiliates have been established.

In the advanced data services docket (Docket No. 98-147), the FCC went further to distinguish how these services would be regulated and what obligations it proposes if the services are offered by the ILEC as opposed to the CLEC affiliate.[18] The FCC has determined,

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[17] "Specifically, we require that incumbent LECs offering in-region broadband CMRS services must do so through a separate corporate affiliate. The CMRS affiliate must: maintain separate books of account, and must maintain the books, records and accounts in accordance with generally accepted accounting principles (GAAP); [105] not jointly own transmission or switching facilities with the affiliated LEC that the affiliated LEC uses for the provision of local exchange services in the same in-region market; and acquire any services from the affiliated LEC on a compensatory arm's length basis, as required by our affiliate transactions rules. LEC transactions with the CMRS affiliate will be subject to the Commission's joint cost and affiliate transaction rules. Title II will be subject to the Commission's joint cost and affiliate transaction rules. Title II common carrier services or services, facilities, or network elements provided pursuant to Sections 251 and 252 that are acquired from the affiliated LEC must be made available to all other carriers, including CMRS providers, on the same rates, terms, and conditions." *WT Docket No. 96-162, para 38.*

[18] "We believe that, if an incumbent LEC, wishes to establish an advanced services affiliate that would not be deemed in incumbent LEC, it should comply with the following structural separation and nondiscrimination requirements:

> First, the incumbent must "operate independently" from its affiliate. [185] In particular, the incumbent and affiliate may not jointly own switching facilities or the land and buildings on which such facilities are located. [186] In addition, the incumbent may not perform operating, installation, or maintenance functions for the affiliate. [187]
>
> Second, transactions must be an arm's length basis, reduced to writing, and made available for public inspection.[188] We propose that the affiliate be required to provide a detailed written description of any asset or service transferred and the terms and conditions of the transaction on the Internet, through the company's home page, within ten days of the transaction· [189] This would provide a readily accessible mechanism for new entrants to ensure they are receiving treatment equivalent to that provided to the incumbent LEC's advanced services affiliate. All transactions between the incumbent and its affiliate also must comply with the affiliate

despite the arguments of intervenors, that it is neither appropriate nor necessary to treat CLEC affiliates as ILECs.[19]

As discussed in detail in Docket No. 97-07505, state commissions in almost every case have certificated ILEC affiliates as CLECs to provide service statewide. Included among these are six other states within the BellSouth region which have certificated BSE statewide.[20]

The Florida Public Service Commission, in certificating BSE statewide, endorsed the concept that market entry by a CLEC affiliate of an ILEC will promote competition by providing incentives for the ILEC to treat all CLECs fairly. After hearing the arguments of SECCA and

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transactions rules, as modifies in the *Accounting Safeguards* proceeding. [190] We believe that these affiliate transactions rules are, in the context of transfers from incumbent LECs to their advanced services affiliates, sufficient to discourage, and facilitate detection of, improper cost allocations in order to prevent incumbent LECs from imposing the costs of their competitive ventures on telephone ratepayers.

Third, the incumbent and affiliate must maintain separate books, records, and accounts.

Fourth, the incumbent and advanced services affiliate must have separate officers, directors, and employees.

Fifth, the affiliate must not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the incumbent.

Sixth, the incumbent LEC, in dealing with its advanced services affiliate may not discriminate in favor of its affiliate in the provision of any goods, services, facilities or information or in the establishment of standards. [191]

Seventh, an advanced services affiliate must interconnect with the incumbent LEC pursuant to tariff or pursuant to an interconnection agreement, and whatever network elements, facilities, interfaces and systems are provided by the incumbent LEC to the affiliate must also be made available to unaffiliated entities."[192]

FCC Docket 98-147, para 96.

[19] "We are committed to ensuring that an optional alternative pathway is available for incumbent LECs that are willing to offer advanced services on the same footing as any of their competitors. As described more fully below, we believe that, if advanced services are offered by an affiliate that is truly separate from the incumbent LEC (an "advanced services affiliate"), that affiliate should not be deemed an incumbent LEC and, therefore, should not be subject to the incumbent LEC regime established by Congress in section 251(c). In addition, we tentatively conclude below that such an advanced services affiliate to the extent it provides interstate exchange access services, should, under existing Commission precedent, be presumed to be nondominant (and, therefore, not be subject to price cap regulation or rate of return regulation for its provision of such services). We also tentatively conclude below that such an affiliate, as a non-incumbent, also should not be required to file tariffs for its provision of any interstate services that are exchange access." *FCC Docket No. 98-147, para 86:*

[20] Alabama Order, issued 2/20/98 in Docket No. 26192
Florida Order, issued 8/27/98 in Docket No. 971056-TX
Georgia Order, issued 3/9/98 in Docket No. 8042-U
Mississippi Order, issued 9/17/98 in Docket No. 97-UA-0625
North Carolina Order, issued 7/22/98 in Docket No. P-691
South Carolina Order, issued 12/23/97 in Docket No. 97-361-C

others there, they found concerns of prospective anticompetitive behavior to be speculative and unsupportable. Specifically, Commissioner Susan Clark commented:

> "I also think the ALEC may be an incentive to the ILEC because they are going to need some services from the ILEC, and they are going to be demanding those services that in turn will have to be made available to every other ALEC. So I think it will have an acceleration effect. And I frankly don't foresee it becoming anticompetitive, I foresee it being pro-competitive. But the avenue of complaint to us or other appropriate agency if they engage in anticompetitive behavior is available."[21]

Commissioner Leon Jacobs agreed, saying: "I agree that this is a positive step and should enhance competition" [22]

In addition, most state regulatory commissions have endorsed the standards set forth in the Federal Act and implemented by the FCC concerning affiliate licensure. In the advanced data services docket (No. 98-147), commissions as diverse and aggressive as those in the states of New York[23], California[24], and Illinois[25] have endorsed the FCC's proposed safeguards governing CLECs which provide advanced data services.

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[21] *Transcript, August 4, 1998 Agenda Conference, Docket 971056-TX at 10-11.*

[22] *Id at 10.*

[23] "[W]e agree that the advanced services subsidiary should be subject to existing federal and state rules for similarly situated affiliates unless it can be shown that these requirements are unnecessary. In this regard, the in-region, long distance affiliate requirements provide a close parallel of the type of additional federal protections that should be adopted. Both the in-region long distance affiliate and the advanced services affiliate will provide core telecommunications services. Therefore, the Commission's tentative conclusion that the advanced services affiliate's safeguards should mirror the safeguards required of long distance affiliates appears reasonable." *CC Docket 98-147, Comments of New York Sate Department of Public Service at 4, 6 and 7.*

[24] "Separate affiliates are a viable alternative to imposing ILEC regulations on these companies that seek to offer advanced services, provided that structural safeguards and nondiscrimination requirements are in place. California submits that the structural and transactional requirements and nondiscrimination safeguards contained in Section 251(b) and (c) provide an appropriate framework for obtaining the type of information necessary to analyze the level of independence of a BOC's advanced services affiliate." *CC Docket 98-147, Comments of the People of the State of California and the Public Utilities Commission of the State of California at 1-2,4,5.*

[25] "It is the ICC's position that the advanced services affiliate should not be limited in its ability to resell telecommunications services or purchase unbundled network elements from the incumbent LECs. However, those wholesale services ort network elements should be made available to the advanced services affiliate by the incumbent LEC through tariffs and interconnection agreements. Further, the rates, terms and conditions at which the affiliate receives wholesale services and network elements should be made available to unaffiliated advanced services providers. This will prevent the incumbent LEC from favoring its affiliate over unaffiliated providers. " *CC Docket No. 98-147, Comments of Illinois Commerce Commission at 2-3.*

SECCA's final argument that the most significant problems will occur if CLEC affiliates are allowed to resell the ILEC's services (Tr. at 238-07) is contradicted by SECCA's own members. In comments to the FCC, both AT&T and MCI have supported resale by the affiliates, while recommending that there be a prohibition against the use of unbundled network elements.[26] AT&T has gone so far as to prepare an ex parte presentation for the FCC solely on this topic.[27] SECCA witness Mr. Gillan here suggests that these parties have recanted their positions in favor of the one now being pursued by SECCA. (Tr. at 241-242) There is no indication by either party that this is indeed the case. There is no evidence that AT&T and MCI now wish to interpret the Federal Act completely differently that they have previously. At any rate, the FCC has disregarded any proposal to limit a CLEC affiliate's ability to resell *or* purchase unbundled network elements. SECCA presents no evidence to support a different finding by the Authority.

VI. Andersen Study.

In an effort to find some sleeves for their own vests, the intervenors at the hearing subjected Mr. Scheye to lengthy cross-examination with regard to a study performed by Andersen Consulting at BSE's request in 1997-98. At the time BSE first made the intervenors aware of this study's existence, BSE indicated in its data responses that the study had not been implemented by BSE and that it contained no data relevant to this proceeding.[28] At the hearing, Mr. Scheye, early in his cross-examination, indicated that BSE made the decision not to go forward with the recommendations in the plan. (*Tr. at 102-103*) Specifically, Mr. Scheye said "it was determined basically in the latter part of 1997 that the plan really wasn't feasible and essentially they allowed the consultant to complete the study in January of 1998, but there was

[26] "AT&T and MCI, on the other hand, argue that section 272(g)(1) allows Section 272 affiliates to resell the BOC's local services, but does not permit Section 272 affiliates to purchase unbundled network elements from the BOC. [810] According to AT&T, Section 272 affiliates will be able to avoid paying access charges if they are permitted to provide local exchange services using unbundled elements, which will also enable such affiliates to avoid the imputation requirements of Section 272(e)(3). [811] AT&T further argues that, to the extent that a Section 272 affiliate is able to avoid imputation requirements of section 272(e), the BOC would have perverse incentives to maintain access at rates above those for unbundled network elements. [812] MCI asserts that opportunities for discrimination and cross-subsidy are substantially greater when a BOC provides network elements to its affiliate than when it offers retail services at a standard wholesale discount. [813]" *CC Docket No. 96 149, para 308.*

[27]AT&T argued that Section 272(g) provides for an affiliate to "market or sell telephone services provided by the Bell operating company, so long as other entities may market and sell the BOC's telephone exchange service. It does not otherwise allow the affiliate to provide local exchange services, particularly through the use of unbundled network elements." *CC Docket No. 96-149, AT&T 10/15/96 Ex Parte at 19-22.*

no intention of ever following that particular plan..." (*Tr. at 107*) While Mr. Scheye repeatedly indicated that BSE has not adopted the recommendations in the Andersen study, counsel for the intervenors continued to identify recommendations in the study as components of BSE's business plan. As Mr. Scheye testified, this is not the case. Even if the Andersen study's recommendations had been adopted by BSE, no evidence was presented that would give the Authority grounds to deny BSE's application.

VII. Section 253 of the Federal Act.

In light of the intervenors' failure to cite any law or regulation unique to Tennessee which would justify a denial of BSE's application, one must consider the application of Section 253 of the Federal Act, especially in light of the FCC's recent action preempting T.C.A. § 65-4-201(d) in Docket 98-92 ("the Hyperion case"). As the Directors are no doubt aware, Section 253 of the Federal Act prohibits states from erecting barriers to competitive entry to telecommunications service providers. In the Hyperion case, the Authority had restricted Hyperion's CCN to those areas not served by ILECs with fewer than 100,000 lines, pursuant to T.C.A. § 65-4-201(d). The FCC found that the restrictive language in subsection (d) was not "competitively neutral" and, therefore, violated Section 253(a) of the Federal Act. Accordingly, the Authority's Order enforcing subsection (d) was set aside. The FCC adopted the minority opinion of Director Greer from the Authority hearing in that matter: "Section 253(a) of the Act specifically addresses the prohibition of any State regulation or statute that prohibits the ability of any entity to provide any interstate or intrastate telecommunication service. As I see it, we have a conflict between the federal law and one of our state statutes, and the federal law must prevail"[29] The FCC found that because the state statute shielded the ILEC from competition by other LECs, the provision was not competitively neutral.[30]

The FCC in the Hyperion case required "competitive neutrality among the entire universe of participants and potential participants in a market."[31] Further, the FCC concluded 'that by

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[28] See *BSE Response to SECCA's Data Request, February 16, 1999 at 1.*

[29] *Memorandum Opinion and Order released May 27, 1999, CC Docket No. 98-92 at 4.*

[30] Section 253 does not prohibit a state commission from imposing, on a competitively neutral basis, requirements that are intended to preserve universal service, etc.

[31] *Memorandum Opinion and Order released May 27, 1999, CC Docket at 9.*

requiring competitive neutrality, Congress has already decided, in essence, that outright bans of competitive entry are never "necessary" to preserve and advance universal service within the meaning of section 253(b).'[32] Analogizing the ruling in the Hyperion case to this proceeding, barring BSE from entry into the statewide local service market in order to protect existing CLECs would not be competitively neutral.

The TRA has previously certificated CLEC affiliates of both Sprint-United and Citizens Telecom to provide competing local service on a statewide basis. In addition, over thirty CLECs have been certificated by the Authority. For the Authority to adopt requirements for BSE that are not competitively neutral, vis a vis BSE's competitors, would amount to treatment of BSE in a noncompetitivly neutral manner in violation of Section 253 of the Federal Act as well as T.C.A. § 65-4-123.

X. Conclusion.

In sum, BSE has met the statutory requirements for statewide certification. Proposed competitive safeguards, including a price floor in compliance with T.C.A. § 65-5-508(c) and the application of Section 272 structural separation safeguards, address previous concerns about prospective anticompetitive behavior by BSE. Further, Mr. Scheye has testified to BSE's willingness to accept additional conditions to its certificate for statewide authority. The advent of BSE's service in Tampa, Florida provides evidence to the kind of benefits customers, including residential customers, can expect if BSE is authorized to provide statewide service. Repeated decisions by the FCC as well as other state commissions support a public interest finding in favor of BSE's certification on a statewide basis.

The intervenors' arguments put forward in this case are internally inconsistent, and certainly inconsistent with previous decisions by the FCC and most other state commissions. Concerns raised by the intervenors regarding anticompetitive behavior have all been addressed. Their continued objection to BSE's certification betrays their real agenda which is simply to deny BSE the opportunity to compete for business in Tennessee. To deny BSE a statewide certificate would (1) limit the choices that consumers have for telecommunications services, (2) thwart competitive entry, and (3) risks running afoul of Section 253 of the Federal Act which

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[32] Id *at 10.*

prohibits barriers to competitive entry. Accordingly, BSE requests additional authority to provide service on a statewide basis.

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CERTIFICATE OF SERVICE

I, Guilford F. Thornton, Jr., hereby certify that I have served a copy of this pleading on the individuals listed below on this the 7th day of June, 1999.

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