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June 7, 1999

K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37219

Re: Application of BellSouth BSE, Inc. for a Certificate of Convenience and Necessity to Provide Intrastate Telecommunications Services
Docket 98-00879

Dear David:

Enclosed for filing are the original and thirteen copies of NEXTLINK's Post Hearing Brief in the above-captioned proceeding.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

Henry

By:
Henry Walker

HW/nl
Attachments
cc: Parties

505

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 NEXTLINK

NEXTLINK Tennessee, Inc. ("NEXTLINK") submits the following post-hearing brief in opposition to the application of BellSouth BSE, Inc. ("BSE").

ARGUMENT

I. It is illegal for BellSouth Telecommunications, Inc. ("BST") to operate as a competitive local exchange carrier ("CLEC") in areas where BST itself is the incumbent local exchange carrier. As a Texas PUC Commissioner said in rejecting a similar application from GTE, "If we allow regulated companies to use an affiliate in their own territory to avoid their responsibilities and to enter the competitive market, we make a mockery of the whole regulatory and legal scheme."[1]

Under Tennessee law, CLECs and incumbent carriers are separately defined and regulated. A CLEC cannot be an incumbent. An incumbent cannot be a CLEC. Since BST cannot enter the CLEC market directly, it cannot do so indirectly through an affiliate. These arguments and supporting case law are discussed more fully in the post-hearing brief filed by NEXTLINK in BSE's earlier application. A copy of that brief is attached and incorporated herein.

[1] A copy of the statement was introduced as an exhibit to the testimony of SECCA witness, Les Sather, in docket 97-07505, Application of BellSouth BSE, Inc.

II. As a matter of regulatory policy, BSE's application should be denied. As SECCA witness Joe Gillan explained, the only reason that service resale is attractive to BSE is because the fundamental economics of resale do not apply to BSE.

It is self evident that, by taking advantage of the BellSouth name and BellSouth's advertising, BSE will be able to offer resale service more cheaply than a genuine CLEC. In effect, the BellSouth "retail" price will become not BST's tariffed rate, but BSE's discounted rate. But BSE, unlike BST has no obligation to offer that service at a wholesale discount.

As Mr. Gillan said, BSE has discovered no special secret for offering telephone service at a cheaper rate than BST. If BellSouth had such a secret, BST itself could immediately reduce its rates. But BSE's business plan only makes sense if one understands that BSE will be no more than an unregulated operating division of BST.

III. BSE's only "public interest" argument for granting this application is that BSE will be able to offer multi-state contracts to customers who operate both inside and outside the BellSouth region. If the TRA decides to grant the application for that reason, the Authority should -- and, legally, must -- continue to regulate BSE under the rules and statutes applicable to incumbent carriers.

If there is any specific rule which should be applied to BST but not BSE, the CLEC affiliate should file a petition asking the Authority to waive that rule.

CONCLUSION

For legal and policy reasons, BSE's application must be denied. In the alternative, BSE must be regulated as what it is, a sales division of BST. If BSE seeks a waiver of any TRA rule which applies to incumbents, such requests can be considered on a case-by-case basis.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

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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. 97-07505

POST-HEARING BRIEF OF SECCA, ACSI AND NEXTLINK

The Southeastern Competitive Carriers Association ("SECCA"), American Communications Services, Inc. ("ACSI"), and NEXTLINK Tennessee, L.L.C. ("NEXTLINK"), (collectively the "intervenors"), submit the following, post-hearing brief.

Summary

BellSouth BSE ("BSE"), an affiliate of BellSouth Telecommunications, Inc. ("BST"), seeks to operate as a competitive local exchange carrier ("CLEC") throughout Tennessee, including areas where BST itself is the incumbent local exchange carrier. While the intervenors have no objection to BSE's operating as a CLEC in, for example, territory served by Citizens or Sprint/United, it is both illegal and unnecessary to allow a BST affiliate to operate as a CLEC in the same markets where BST itself must operate as an incumbent carrier. Under Tennessee law, BST cannot evade the legal requirements applicable to an incumbent by doing indirectly, through an affiliate, what it cannot do directly.

I. As Robert Scheye, BSE's vice president and only witness, readily admitted, BST itself cannot legally obtain a CLEC certificate to operate within BST's territory. Tr., 129. That said, this proceeding should go no further. It is a fundamental principle of both regulatory and antitrust law that a company may not engage in prohibited conduct simply by creating an affiliate to do what the company itself is prohibited from doing.

II. Scheye also acknowledged that, even though BSE is an "affiliate" of BST, as that term is used in both the federal Telecommunications Act and in the BST-AT&T interconnection agreement, BSE does not intend to obey the ruling of this agency that the interconnection agreement applies to BST "and its affiliates." Tr. 108. Scheye's admission makes it legally impossible for the TRA to find that this CLEC applicant will "adhere" to the orders of the agency. *See* T.C.A. § 65-4-201(c). Therefore, the application must be denied.

III. Finally, the TRA's own, recently adopted rules on competition specifically allow "incumbent local exchange telephone companies," such as BST, "to resell local telecommunication services within their existing service area *without obtaining an additional certificate or authorization.*" Rule 1220-4-8-.11 (emphasis added). In other words, BST needs no authority to begin operating today as a reseller within its own territory. Under this rule, however, BST would still be classified and regulated as an incumbent carrier.

The TRA should allow BSE to operate as a CLEC outside BST's territory. That part of the application should be granted. On the other hand, BST needs no certificate to operate as a reseller in BST's service territory. That part of the application should be dismissed.

Argument

I. To obtain a CLEC certificate, an applicant must "demonstrate" that it will "adhere" to all "applicable policies, rules and orders" of the TRA. T.C.A. § 65-4-201(c). In this case, BSE vice president Robert Scheye testified that he does not intend to obey the TRA's final order in the AT&T-BST arbitration proceeding in which the agency held that BST "and its affiliates" (Tr. 42) are bound by the terms of the interconnection agreement.

Scheye testified (at 108):

> Q. Do you intend to abide by the interconnection agreement between BST and AT&T? Do you consider yourself bound by that agreement?
>
> A. No. I didn't enter into it.
>
> Q. So you don't intend to abide by it?
>
> A. I'm not a party to it. I don't know how I abide by something that I'm not a party to.

Scheye explained that he did not believe that the term "affiliate," as used in the agreement, applied to BSE. Tr. 109. Yet the agreement itself defines the term "affiliate." The term means "affiliate as defined in the [federal Telecommunications] Act." Tr. 111. Scheye conceded that BSE is an "affiliate" as defined in the federal Act. *Id.* Therefore, BSE is an "affiliate" as defined in the interconnection agreement. Nevertheless, Scheye insisted that he would not comply with the agreement and might even withdraw his CLEC application if the agreement applies to BSE:

Q. Mr. Scheye, if this agency were to decide that BSE is an affiliate of BST under the terms of the AT&T contract and therefore is bound by the terms of that contract, would you proceed with this application?

A. I couldn't meet those requirements, no, sir.

Tr. 113.

Scheye's admission that he will not abide by the TRA's order in the arbitration proceeding means, of course, that BSE cannot "demonstrate" that it will abide by the agency's decisions. Therefore, this application must be dismissed until BSE agrees to abide by the interconnection agreement or a reviewing court overturns the TRA's holding that the agreement applies to BST's affiliates.

II. Scheye also agreed that it would be illegal under Tennessee law for BST to obtain a CLEC certificate to provide service in areas where BST is the incumbent local exchange carrier:

Q. In your opinion, Mr. Scheye, could BellSouth Telecommunications obtain a CLEC license in Tennessee?

A. Yes, for the territory it doesn't serve.

Director Malone: I beg your pardon?

The Witness: For the territory like in the Sprint territory, the Citizens, if it wanted to serve just those territories, it could. Tr. 129.

Scheye is correct. BST can only operate as a CLEC outside BST's service area. The reason is self-evident. The statutory scheme created by the Tennessee General Assembly in 1995 (Chapter 408 of the Public Acts of 1995) rests on the basic concept that incumbent carriers and CLECs are two different types of providers with different rights and obligations. A CLEC cannot be an incumbent. An incumbent cannot be a CLEC.

For example, rates of incumbent carriers are regulated, either through traditional, rate base regulation or through a "price regulation" plan. T.C.A. § 65-5-209. Incumbents must also "adhere to a price floor for competitive services." T.C.A. § 65-5-208(c). These requirements do not apply to CLECs. Similarly, the TRA's recently adopted rules for the regulation of local exchange carriers are also designed to maintain the distinction between incumbent carriers and CLECs. *See* TRA proposed rules 1220-4-8-.01, *et seq*. To prevent an incumbent carrier from engaging in anticompetitive practices, the rules impose unique obligations on incumbents regarding the filing of tariffs, cost-support data, and financial reports. None of these obligations apply to CLECs.

Although Scheye acknowledged that BST cannot operate as a CLEC in BST's own territory, he seeks through BSE to do indirectly what BST cannot do directly. He intends to provide a local exchange service with all the market power of an incumbent but without the legal restrictions that apply to an incumbent carrier.

BSE's plan is clearly illegal. The same statutes that protect the public from BST necessarily protect consumers from any BST affiliate which offers the same service in the same market. Otherwise, those statutes would be useless.

charters and the form of corporate structure . . . in regulating a public utility"); *United Inter-Mountain Tel. v. Public Service Commission*, 555 S.W.2d 389, 392-93 (Tenn. 1977) (quoting *Tennessee Public Service Commission v. Nashville Gas*); *P.F. Collier & Son Corporation v. F.T.C.*, 427 F.2d 261, 267 (5th Cir. 1970) (noting that in enforcement of Federal Trade Commission Act "strict adherence to common law principles is not required . . . where strict adherence would enable the corporate device to be used to circumvent the policy of the statute."). *See also Federal Power Commission v. United Gas Pipe Line Co.*, 393 U.S. 71, 89 S. Ct. 55, 21 L.Ed.2d 55 (1968).

Economic regulation, whether accomplished through the antitrust laws or through regulatory agencies, is intended to prevent companies with market power from abusing competitors and customers. As an incumbent carrier, BST obviously has market power. As a BST affiliate offering the same service in the same market, BSE is no different. As Scheye himself testified, if a CLEC were to accuse either BSE or BST of anti-competitive conduct, "the result . . . would be the same." Tr. 116-117. Nevertheless, Scheye stated flatly that BSE has no intention of abiding by the rules and statutes that apply to incumbent carriers. Tr. 123. And that, presumably, is the purpose of this application --- to permit the Bell companies to offer local exchange service within BST's service area without the regulatory obligations that apply to incumbent carriers. If the TRA intends to regulate BST effectively, it cannot allow this to happen.

IV. BSE's request to operate as a reseller of BST's local service is not unexpected. Anticipating that incumbent local exchange carriers might wish to do exactly what BSE requests, the TRA's new rules specifically allow incumbent carriers "to resell local telecommunication

services within their existing service area" without any additional authority from the TRA. Rule 1220-4-8-.11.

The rule authorizes such services under the authority already held by the incumbent carrier. No other certificate is required. The rule does not require or allow an incumbent to obtain a CLEC certificate or to masquerade, through an affiliate, as a "competing local exchange carrier."

The recently adopted rule strikes a balance between regulatory flexibility and regulatory control. It gives an incumbent the flexibility to operate as a reseller while maintaining the regulatory controls which are applicable to incumbents. BSE's plan to operate as a reseller under a CLEC certificate, rather than as an incumbent carrier, is clearly inconsistent with the TRA's rule.

Conclusion

It is striking that Scheye himself predicted that the TRA would likely treat BST and BSE as one entity for ratemaking (Tr. 121) and competitive (Tr. 116-117) purposes; but, in this application, he asks the TRA to exempt BSE from the very rules and statutes which are intended to prevent BST from abusing its market power.

There is no dispute that Tennessee's regulatory framework is based on the difference between incumbents, which have market power, and CLECs, which do not. It is equally clear that, within BST's service territory, BSE has the same market power as BST and must be regulated as an incumbent carrier. For that reason, BSE's application to operate as a CLEC within BST's service area must be denied.

Respectfully submitted,

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