BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

FEBRUARY 14, 2000

IN RE:	)	
	)	
APPLICATION OF BELLSOUTH, BSE, INC.	)	**DOCKET NO.**
FOR A CERTIFICATE OF CONVENIENCE	)	**98-00879**
AND NECESSITY TO PROVIDE INTRASTATE	)	
TELECOMMUNICATIONS SERVICES	)	
	)	

ORDER DENYING APPLICATION OF BELLSOUTH, BSE, INC. FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO PROVIDE EXPANDED INTRASTATE TELECOMMUNICATIONS SERVICES

This matter came before the Tennessee Regulatory Authority ("Authority") on the above-docketed application of BellSouth, BSE, Inc. ("BSE") for a certificate of public convenience and necessity to provide expanded intrastate telecommunications services ("Application") pursuant to Tenn. Code Ann. § 65-4-201. At a regularly scheduled Authority Conference held on September 14, 1999, the Directors of the Authority voted unanimously to deny BSE's application.

TRAVEL OF CASE

BSE filed its Application on December 21, 1998, seeking to expand the Authority's grant of limited certification to BSE in Docket No. 97-07505. On December 8, 1998, the Authority entered its Final Order in Docket No. 97-07505[1] reflecting its grant of limited certification which permits BSE to provide telecommunications services only in territories

wherein BSE's affiliate, BellSouth Telecommunications, Inc. ("BellSouth") does not operate and where the provision of service is not otherwise inconsistent with state and federal law. In its Final Order of December 8, 1998, the Authority cited concerns raised by the intervenors in that matter and concluded that the potential for anti-competitive harm outweighed the benefits that consumers might receive by permitting BSE to operate as a competing local exchange carrier ("CLEC") in BellSouth territory.

On January 22, 1999, BSE filed the testimony of its President, Mr. Robert C. Scheye, in support of its Application in this docket. Mr. Scheye also testified as BSE's only witness in Docket No. 97-07505. On January 29, 1999, the Authority issued a Notice establishing a schedule for intervention petitions and discovery and setting a Pre-Hearing Conference for February 9, 1999.

On February 4, 1999, petitions to intervene were filed by AT&T Communications of the South Central States, Inc. ("AT&T"), MCI Telecommunications Corporation d/b/a MCIWorldCom ("MCI"), NEXTLINK Tennessee, LLC ("NEXTLINK") and the Southeastern Competitive Carriers Association ("SECCA"). AT&T incorporated a motion to summarily dismiss BSE's Application within its petition to intervene. SECCA filed a separate Motion to Dismiss. At the Pre-Hearing Conference held on February 9, 1999, BSE did not object to the interventions and Chairman Melvin J. Malone, serving as Hearing Officer, granted the interventions. Also, during the Pre-Hearing Conference, BSE announced that, on February 8, 1999, it had filed in the Tennessee Court of Appeals a Petition for Review of the Authority's December 8, 1998, Order in Docket No. 97-07505.

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[1] The Authority's December 8, 1998 *Order Granting in Part and Denying in Part Application for Certificate of Public Convenience and Necessity*, reflected action taken by the Directors at the September 15, 1998 Authority Conference.

In his *First Report and Recommendation* issued on February 18, 1999, the Hearing Officer recommended that the Authority hold this matter (the Application and motions to dismiss) in abeyance until such time as the Court of Appeals for the Middle Section of Tennessee (hereafter, "Court of Appeals") disposed of the aforementioned appeal. The Authority approved the Hearing Officer's Report and Recommendation by majority vote at an Authority Conference held on March 2, 1999.[2] In light of the Hearing Officer's recommendation to hold this matter in abeyance until the conclusion of BSE's appeal, BSE filed a request for a stay of its appeal with the Court of Appeals on March 5, 1999. Thereafter, on March 11, 1999, the Court of Appeals issued an Order granting the stay. On March 12, 1999, BSE filed in this proceeding a copy of its appellate motion and the Court's March 11, 1999 Order.

On March 2, 1999, SECCA filed the direct testimony of its witness, Mr. Joseph Gillan. BSE filed rebuttal testimony of Mr. Scheye on March 18, 1999. At a Special Authority Conference on March 23, 1999, the Directors considered and denied the pending Motions to Dismiss.[3] By Notice issued on April 8, 1999, the Authority set the Application for hearing on April 27, 1999. On April 12 1999, BSE filed a copy of its Notice of Voluntary Withdrawal and Motion to Dismiss its appeal of the December 8, 1998 Order. On April 14, 1999, MCI filed an Agreed Motion to continue the hearing until May 4, 1999. Thereafter, counsel for BSE filed a letter with the Authority agreeing to extend further the schedule for decision of

[2] The Authority entered an order reflecting this action on November 23, 1999.

[3] The Authority entered an order reflecting this action on November 24, 1999.

this matter under Tenn. Code Ann. § 65-4-201 until June 1, 1999.[4] The Hearing Officer entered an Order on April 20, 1999, granting the continuance of the hearing until May 4, 1999.

THE MAY 4, 1999 HEARING

The hearing on the merits of BSE's Application was held as scheduled before the Directors of the Tennessee Regulatory Authority. The parties were represented by counsel as follows:

Guilford F. Thornton, Jr., Esq., Stokes & Bartholomew, P.A., 424 Church Street, Suite 2800, Nashville, Tennessee 37219, appearing on behalf of BSE;

James Lameroux, Esq., AT&T Communications of the South Central States, Inc., 1200 Peachtree Street, N.E., Atlanta, Georgia, 30309, appearing on behalf of AT&T;

Jon E. Hastings, Esq., Boult, Cummings, Conner & Berry, 414 Union Street, Suite 1600 Nashville, Tennessee 37219, and Susan Berlin, Esq., MCI Telecommunications Corporation, 6 Concourse Parkway, Atlanta, Georgia, 30328, appearing on behalf of MCI;

Henry Walker, Esq., Boult, Cummings, Conner & Berry, 414 Union Street, Suite 1600 Nashville, Tennessee 37219, appearing on behalf of NEXTLINK and SECCA; and

Ed Harvey, Esq. for Chuck Welch, Esq., Farris, Mathews, Branan & Hellen, PLC, 511 Union Street, Suite 2400, Nashville, Tennessee 37219, appearing on behalf of Time Warner Communications of the Mid-South, L.P.

At the hearing, counsel for AT&T made a motion that the Authority take official notice of the record from Docket No. 97-07505 in this proceeding. Counsel for BSE presented no objection to this request. As a result, the Authority, acting pursuant to Tenn. Code Ann. § 4-5-313(6) took official notice of the same. In addition to this evidentiary material, the parties proffered the testimony of both Mr. Robert Scheye and Mr. Joseph Gillan. Mr. Scheye and

[4] Through subsequent correspondence, BSE agreed to extend the schedule for decision of this matter until September 30, 1999.

Mr. Gillan were both available for cross-examination during the hearing. On June 7, 1999, the parties filed post-hearing briefs addressing the issues arising from BSE's current Application.

ISSUES PRESENTED FOR RESOLUTION

The Authority enumerated several areas of concern when it denied BSE authority to operate on a statewide basis in its December 8, 1998 Order entered in Docket No. 97-07505. However, despite these concerns, the Authority acknowledged during deliberations in Docket No. 97-07505 that BSE might, at a later date, be able to address the Authority's concerns and file an application seeking expanded certification. This acknowledgment was reflected in footnote sixteen (16) of the December 8th Order as follows:

> [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 Tenn. Code Ann. § 65-5-208(c), it may petition the Authority at any time at its discretion for further authority.

Following the above-described instruction, BSE filed its pending Application. As a result of this new filing, the inquiry in this proceeding turns on whether BSE has adequately addressed and resolved the concerns raised by the Authority in Docket No. 97-07505. The determination of whether the concerns originating in Docket No. 97-07505 have been resolved by BSE involves the resolution of the following six (6) issues:

1. Whether there exists the potential for discriminatory treatment of other CLECs or for preferential treatment of BSE by BellSouth when there are no safeguards being offered to monitor affiliate transactions or performance;

2. Whether BellSouth seeks to avoid its ILEC obligations through BSE's ability to select BellSouth's best customers and offer special deals that BellSouth cannot offer due to statutory prohibitions;

3. Whether there exists the potential for the prohibited acts of price squeezing and cross-subsidization;

4. Whether in the solicitation of BellSouth business customers by BSE, those customers will continue to be offered the same services under the same utility's name, with the same personnel over the same local network as employed by BellSouth;

5. Whether BSE presented substantial and material evidence that it would provide services to consumers that could not be offered by BellSouth; and

6. Whether it is in the public interest for a Regional Bell Operating Company ("RBOC") such as BellSouth, to have an affiliated CLEC operating within its territory.

POSITION OF PARTIES

Issue 1. Whether there exists the potential for discriminatory treatment of other CLECs or for preferential treatment of BSE by BellSouth when there are no safeguards being offered to monitor affiliate transactions or performance.

BSE addresses the concerns of the Authority by offering to voluntarily adhere to the structural separation provisions of § 272(b) of the federal Telecommunications Act of 1996 (47 U.S.C. § 272 (b)). The structural separations that must be established between a Regional Bell Operating Company ("RBOC") and its "Section 272 affiliate" are set forth as follows:

(b) Structural and transactional requirements

The separate affiliate required by this section--

(1) shall operate independently from the Bell operating company;

(2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate;

(3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;

(4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company; and

(5) shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection. (47 U.S.C.§ 272(b)).

BSE argues that the Federal Communications Commission ("FCC") deemed these structural separation provisions sufficient in its Notice of Proposed Rulemaking in CC Docket 98-147, when the FCC proposed to apply them to incumbent RBOC affiliates that could be created to provide advanced telecommunications services pursuant to 47 U.S.C. § 706. Further, BSE argues that these provisions are more stringent than the requirements established by six (6) of the BellSouth regional states that have granted statewide certification to BSE.

SECCA contends that these provisions which BSE agrees to follow, do nothing to reduce the potential for anti-competitive harm, discrimination and customer confusion. SECCA witness Mr. Gillan testified that BSE is a legal fiction in BellSouth's territory and would unfairly benefit from advertising designed to reinforce a "single BellSouth" image.[5] Mr. Gillan characterizes BSE's concession to comply with 47 U.S.C. § 272 as "nothing more than the sleeves from BSE's vest," when BSE acknowledges that it must conform to 47 U.S.C. § 272 in order to provide interLATA services.[6]

Issue 2. Whether BellSouth seeks to avoid its ILEC obligations through BSE's ability to select BellSouth's best customers and offer special deals that BellSouth cannot offer due to statutory prohibitions.

SECCA initially raised this issue in the Docket No. 97-07505 and raised it again in this proceeding. SECCA argues that BellSouth could use BSE as a means to avoid its own

[5] *See* attached Exhibit to Mr. Gillan's pre-filed Direct Testimony.

[6] *See* Mr. Gillan pre-filed Direct Testimony, p. 8.

obligations under the federal Telecommunications Act, in particular BellSouth's obligation to permit the unrestricted resale of its services at wholesale rates. SECCA asserts that BellSouth would be able to re-price existing services and introduce new services through BSE without the obligation of offering a wholesale equivalent to a competitor at the appropriate discount.

Under cross-examination by MCI in Docket No. 97-07505, Mr. Scheye testified that BSE, like any other competing local exchange carrier ("CLEC"), would be permitted to enter into contract service arrangements ("CSAs") with its customers without being required to file such CSAs for approval by the Authority. Further, Mr. Scheye stated that BSE would make CSAs available for resale to other CLECs, but not at a discount as required of BellSouth.[7] In this proceeding, however, Mr. Scheye testified that BSE would file its CSAs with the Authority for the Authority's review and approval. Mr. Scheye also stated that BSE would agree to be bound by the price floor in Tenn. Code Ann. § 65-5-208(c); however, he declined to obligate BSE to the Authority's Order issued on January 23, 1997, which binds affiliates of BellSouth to the AT&T/BellSouth Arbitration Agreement (Docket No. 96-01152).

Issue 3. Whether there exists the potential for the prohibited acts of price squeezing and cross-subsidization.

In Docket No. 97-07505, SECCA's witness Mr. L. G. Sather testified that BellSouth Corporation, the parent company of BellSouth and BSE, could control the allowable retail market price by simply raising BellSouth's retail rates. While BSE's costs would rise like other CLECs, BSE could hold its retail rates steady and suffer a loss, which would be offset

[7] *See* Hearing Transcript of April 9, 1998, Docket No. 97-07505, pp. 103-106.

by the added profit that BellSouth would gain. Thus, according to Mr. Sather, CLECs competing with BSE would have to raise rates or absorb the increased cost.

In its Application and in Mr. Scheye's pre-filed direct testimony, BSE maintained that unusual circumstances may arise that would necessitate the pricing of services below the floor.[8] According to Mr. Scheye's testimony during the hearing, BSE now proposes to be bound by the price floor under Tenn. Code Ann. § 65-5-208(c). By such an agreement, BSE agrees not to resell BellSouth services for less than BSE pays for such services, which would include services BSE may provide through CSAs. In addition to BSE's commitment at the hearing to adhere to Tenn. Code Ann. § 65-5-208(c) and to file CSAs, BSE also agreed to file tariffs, to consent to audits of its operations by the Authority, and to provide cost allocation data with respect to joint product offerings with BellSouth Mobility or other BellSouth affiliates.

As further support of its position that price squeezing will not occur if its Application is granted, BSE referred to paragraph 62 of the FCC Order entered in CC Docket 96-162. The FCC stated in that paragraph that 47 U.S.C. §§ 251 and 252, in conjunction with the FCC's affiliate transaction rules, should reduce the risk of potential price squeezing between an RBOC and its affiliates.[9] In its post-hearing brief, BSE referred to the comments of Commissioner Susan Clark of the Florida Public Service Commission, which refuted the theoretical price squeeze circumstances suggested by the opponents of BSE's statewide certification as a CLEC.[10]

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[8] *See* Mr. Scheye's pre-filed Direct Testimony, p. 5, and BSE's December 21, 1998 Application, p.3.

[9] *See* BSE Post Hearing Brief (June 7, 1999), p. 7.

[10] *See* BSE Post-Hearing Brief (June 7, 1999), p. 10.

SECCA, however, asserts that BSE's agreement to abide by Tenn. Code Ann. § 65-5-208(c) is not significant. In his pre-filed testimony, SECCA's witness Mr. Gillan testified that a legitimate entrant in the marketplace could not survive if it simply recovered the cost of its wholesale service.[11] The entrant would also have to recover its costs associated with marketing the service and providing customer support and to allow for a return to its investors. Mr. Gillan testified that nothing would prevent BSE from offering services below wholesale cost by simply discounting the prices of other service components in the package.

Issue 4. Whether in the solicitation of BellSouth business customers by BSE, those customers will continue to be offered the same services under the same utility's name, with the same personnel over the same local network as employed by BellSouth.

Mr. Gillan attached to his prefiled direct testimony[12] a copy of an advertisement placed by BSE in Florida Trend magazine in December 1998. The full-page advertisement depicts turn of the century telephone operators at a switchboard and also depicts a modern cellular phone, with the message: "It's not like we got into this business yesterday." The advertisement further states that while "*BellSouth*" is moving into the Tampa, Florida area, it has been a major player in the telecommunications business for over one hundred (100) years. Finally, this advertisement briefly discusses the new Ericson digital wireless system and a home telephone option and makes mention of BSE in the last line of the advertisement.

As further support for its position that there is little separation between BSE and BellSouth, SECCA's witness Mr. Gillan testified that consumers would discern only one (1) BellSouth and that investors will evaluate only one BellSouth even though the regulatory

[11] *See* Mr. Gillan's pre-filed direct testimony, p. 4.

[12] *See* May 4, 1999 Hearing Transcript, p. 238-15.

system assumes that there are two different companies.[13] Mr. Gillan stated that the Authority should reject BellSouth's request to "compete" against itself through the legal fiction of BSE.[14] Mr. Gillan states that BellSouth's own marketing confirms SECCA's concern that BSE would advertise to reinforce a "single BellSouth" image.[15] In addition, Mr. Gillan discussed a recent announcement by BellSouth of a $20 million advertising campaign to promote "BellSouth's" technological skills.[16]

Mr. Scheye, in his prefiled rebuttal testimony, contends that Mr. Gillan ignored two significant facts, that GTE is the ILEC in Tampa, Florida and that BellSouth does not offer a package of local service and wireless within BellSouth territory. He also stated that advertisements very similar to the one described by Mr. Gillan were published at the same time for the cellular only service. At the hearing Mr. Scheye agreed to accept advertising restrictions concerning the use of the name "BellSouth BSE" as an attempt to reduce possible customer confusion between BSE and its affiliate BellSouth.

Issue 5. Whether BSE presented substantial and material evidence that it would provide services to its customers that could not be offered by BellSouth.

In its testimony, BSE referred to service offerings in Tampa, Florida as evidence that BSE would offer services to Tennessee customers that are not offered by BellSouth. Mr. Scheye testified that in October 1998, BSE offered a package of resold GTE local service and

[13] *See* Mr. Gillan's pre-filed Direct Testimony, p. 2.

[14] *See* Mr. Gillan's pre-filed Direct Testimony, p. 3.

[15] *See* Mr. Gillan's pre-filed Direct Testimony, p. 3.

[16] *See* Mr. Gillan's pre -filed Direct Testimony, p. 7.

BellSouth PCS service in the Tampa market which included a one number capability. According to Mr. Scheye, none of the six (6) wireless/cellular providers, GTE, or numerous CLECs in Tampa have offered the same type of service package that BSE offers. Mr. Scheye testified that over 1,000 customers, approximately 95% of those being residential, had subscribed to BSE's package since October 1998.

SECCA argues that BSE's service offering in Tampa could be offered by BellSouth in Nashville and other BellSouth areas in Tennessee. According to SECCA, BellSouth could package its local service in Nashville in cooperation with BellSouth Mobility or BellSouth PCS without requiring BSE's statewide certification. Further, SECCA argues that BellSouth itself could seek CLEC certification so that it could provide services in non-BellSouth service areas. SECCA referred to Hearing Exhibit No. seven (7), an April 29, 1999 BellSouth press release, as evidence demonstrating BellSouth's ability to provide the same services as BSE. As evidenced by the BellSouth press release, BellSouth operations in Lexington, Kentucky began with the installation of state-of-the-art fiber optic telecommunications facilities in Fayette County to serve the complex telecommunications needs of large business customers in the metropolitan Lexington area. GTE, not BellSouth, currently serves the Lexington, Kentucky area as the incumbent provider. Mr. Gillan also testified that the Kentucky Public Service Commission limited BSE to non-BellSouth areas, but is now reconsidering that decision in a generic docket to look at both GTE and BellSouth.[17]

[17] On September 8, 1999, BSE filed a copy of the August 31, 1999 Order of the Kentucky Public Service Commission ("KPSC") entered in Case No. 98-410, which reversed the KPSC's earlier decision that denied BSE full authority to operate in Kentucky. This new order permits BSE to operate in BellSouth territory in Kentucky under certain conditions enumerated therein.

Issue 6. Whether it is in the public interest for a Regional Bell Operating Company ("RBOC") such as BellSouth, to have an affiliated CLEC operating within its territory.

In its December 8, 1998, Order, the Authority stated that it must consider whether the overall public interest is promoted by granting BSE a Certificate of Public Convenience and Necessity ("CCN") to operate as a CLEC within the service territory of BellSouth. BSE asserts that statewide certification as the CLEC affiliate of BellSouth is in the public interest and that competition will not be deterred, but in fact, may be enhanced. In support of its position, BSE states that on three (3) occasions, the FCC has determined that it is appropriate for an ILEC to have a CLEC affiliate. Specifically, at pages 6-8 of its Post-Hearing Brief, BSE states the FCC made the following findings in orders that the FCC entered in ICC Docket 96-149, WT Docket No. 96-162 and CC Docket 98-147:

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

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

(3) [T]hat 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 ILECs to accommodate all CLECs;

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

(5) [T]hat 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; and

(6) [T]hat 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. (Footnotes omitted)

As further support for its position, BSE referred to the deliberative comments of the Commissioners of the Florida Public Service Commission, who approved BSE's request for statewide certification on August 4, 1998, and the excerpts from the orders of other southeastern state commissions which granted BSE full certification.[18] BSE claims that the findings by the FCC and by the southeastern states[19] refute the arguments placed forward by SECCA and the other intervenors. BSE also offered statistics which it claimed demonstrated that BSE's status as a CLEC in the other BellSouth region states did not deter other competitors from entering the market.[20]

BSE argues that the intervenors are merely attempting to delay its competitive entry into the market in violation of the policy enumerated by the General Assembly under Tenn. Code Ann. § 65-4-123. BSE contends that the intervenors are seeking to "raise the bar" in that the requirements that BSE must meet under Tenn. Code Ann. § 65-4-201 exceed those required of other CLECs. BSE contends that these requirements are inconsistent with previously approved applications for Sprint Communications Company L.P. ("Sprint") in Docket No. 96-01153 (Order entered on October 3, 1996), and Citizens Telecommunications Company d/b/a Citizens Telecom ("Citizens") in Docket No. 96-00779 (Order entered on June 27, 1996). Thus, according to BSE, this inconsistent treatment would act as an unlawful barrier to entry in violation of 47 U.S.C. § 253.

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[18] The comments of the Florida Public Service Commission are found in Hearing Exhibit No. 6. These comments were placed in the record by BSE in support of its position that its entry into the market will not create an anticompetitive environment.

[19] The Southeastern states that have granted statewide authority to BSE are: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina and South Carolina.

In its Post-Hearing Brief, AT&T argues that BSE is not a CLEC in a traditional sense because BSE is not interested in competing with BellSouth, rather, BSE desires to compete against BellSouth's competitors. Further, AT&T asserts that the Authority must look beyond the legal form of corporations and make its decisions on economic reality, not legal fictions. AT&T suggests that regulatory policies designed to limit the activities of RBOCs are based on the RBOC's effective monopoly control of access to the local exchange market, and that while the federal Act does diminish the amount of restrictions placed on the RBOCs, the Act does not provide for an RBOC affiliate, such as BSE, to obtain full CLEC status.

AT&T argues that while permitting competition in all telecommunications services markets is the fundamental goal of Tenn. Code Ann. § 65-4-123, the provisions of all statutes regulating telecommunications services are to be construed to effectuate that goal. AT&T contends that the basic premise expressed under Tenn. Code Ann. § 65-4-201(c) is that the monopoly status enjoyed by the ILECs, such as BellSouth, will come to an end via competition from other service providers. However, AT&T asserts that the statute does not contemplate, or even authorize the granting of certificates to affiliates of an incumbent that have no interest in competing against the incumbent.

AT&T asserts that BSE's Application is evidence of BSE's dependence on BellSouth. AT&T points out that, at pages 12 through 13 of the Application, BSE acknowledges that its service may be augmented with new services and capabilities as they become available from BellSouth. According to AT&T, this admission demonstrates BSE's dependence on its affiliate BellSouth. AT&T further contends that BSE relies on BellSouth's experience to

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[20] BSE Post-Hearing Brief (June 7, 1999), pp. 8-10.

demonstrate that it is qualified to provide CLEC services in Tennessee.[21] BSE's total dependence on the BellSouth economic unit is also supported by Mr. Scheye's testimony under cross-examination that BSE does not have a business plan and that decisions concerning BSE must be made by BellSouth Corporation. For example, Mr. Scheye testified that BellSouth Corporation made the decision as to which subsidiary, BSE or BellSouth, would seek entry into the Lexington, Kentucky market.[22]

AT&T argues that no legal authority, statute or order exists that authorizes the creation or operation of BSE. AT&T contends that even assuming such authority does exist, the record in this matter does not support the Authority granting BSE statewide certification. AT&T concludes that the issue is not how to design a regulatory system to accommodate BellSouth, rather, the issue is whether under existing Tennessee law and the proof in the record, BSE has demonstrated that it should be granted statewide certification.

In its Post-Hearing Brief, SECCA argues that BellSouth can offer all services that BSE proposes in conjunction with BSE statewide. Further, if BSE has no business plan, then there is no benefit to consumers to be evaluated and weighed against the potential for anticompetitive harm. SECCA referred to excerpts from the Andersen Consulting Report, as proof that the potential activity in which BSE could engage would create an anticompetitive environment.[23] The Andersen Consulting Report listed specific roles in which BSE could

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[21] AT&T Post-Hearing Brief (June 7, 1999), pp. 7-9.

[22] AT&T Post-Hearing Brief (June 7, 1999), pp. 7-12.

[23] The Andersen Consulting Report was developed in 1996 through 1997 at the behest of BSE. This report acted as a proposed business plan for BSE at that time. *See* cross-examination of Mr. Scheye, Hearing Transcript (May 4, 1999) at 100. Mr. Scheye further described the Report as a proposal that was not implemented due to the plan's complexity and estimated cost of implementation as well as a change in the business orientation of BSE. *See* cross-examination of Mr. Scheye, Hearing Transcript (May 4, 1999) at 102-103.

operate after obtaining full certification. Examples of the potential roles for BSE discussed in the consulting report included, but were not limited to the following: (1) the use of BSE to ameliorate the requirement that BellSouth must make combinations of unbundled network elements available to competitors at cost-based rates; (2) the coordination of efforts between BellSouth and BSE in providing sales leads; (3) the coordination of advertising; and (4) the coordination of market segment position and business plan pricing.[24] SECCA also contends that further anticompetitive behavior will arise if BSE is permitted to market services at a wholesale rate that is lower than BellSouth's price floor for the same services.[25] Thus, SECCA maintains that such potential behavior is neither sound public policy, nor does such behavior comply with the requirements of Tenn. Code Ann. § 65-5-208 (c).

On cross-examination, SECCA's witness Mr. Gillan testified that the operation of BSE in BellSouth territory, not its certification, is the actual deterrent to competitors entering the marketplace. However, Mr. Gillan testified that the FCC has determined that if an RBOC affiliate operates as a CLEC, the affiliate should not necessarily be treated in the same manner as the incumbent RBOC; however, the FCC has not determined the amount of separation required to avoid treating a CLEC affiliate of an incumbent RBOC in a similar manner as that RBOC is treated under the federal Telecommunications Act.[26] Finally, Mr. Gillan testified that certification of Sprint to operate in United's CLEC territory was not the same situation as the certification of BSE within BellSouth's territory. Mr. Gillan maintained that one

[24] SECCA Post-Hearing Brief (June 7, 1999), pp. 5-9.

[25] SECCA's Post-Hearing Brief (June 7, 1999), pp. 2-7, 12-13.

[26] *See* Hearing Transcript (May 4, 1999), p. 241.

distinguishing characteristic is that as a national long distance carrier, Sprint's primary focus is to enter into local markets that extend beyond its primary territory.

NEXTLINK's Post-Hearing Brief generally echoed the arguments of SECCA and attached its Joint Post-Hearing Brief from Docket No. 97-07505 as additional support. NEXTLINK raises the argument that BSE's plan for statewide certification is illegal. NEXTLINK argues that BellSouth seeks to do through BSE what it is prohibited from doing itself; that is to operate as a CLEC within its own territory. NEXTLINK asserts that it is well established that corporations cannot evade state and federal antitrust laws simply by operating through its affiliates. Thus, according to NEXTLINK, the public interest is not served by the grant of additional authority to BSE.

FINDINGS OF FACT AND CONCLUSION OF LAW

After receiving proof on the issues set forth above, the Directors of the Authority, upon careful consideration of the entire record in this matter, made the following findings of fact and conclusions of law:

In an attempt to resolve the concerns of the Authority, BSE made the following concessions at the hearing in this matter: (1) BSE agreed to adhere to a price floor equal to the resale price that is charged by BellSouth; (2) BSE agreed to voluntarily operate subject to the requirements of 47 U.S.C. § 272, which address affiliate safeguards; and (3) BSE agreed to abide by all Authority rules and Orders.

While the concessions made by BSE herein may be tendered in good faith, these concessions are not sufficient to resolve the public interest concerns raised by the Application or to resolve the issues presented to the Authority herein. Tenn. Code Ann. § 65-4-201(a) requires that a CCN be granted if it can be shown that the grant of such certification will serve

the present or future public interest. In addition, the State has the authority under 47 U.S.C. § 253(b) to impose restrictions on companies such as BSE to "protect the public safety and welfare." 47 U.S.C. § 253(b) as follows:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Although BSE has agreed to be subject to the requirements of 47 U.S.C. § 272, it remains a type of affiliate not contemplated under § 272, and still cannot, in the Authority's opinion, as a matter of law, provide Section 272 non-incidental services.[27] BSE presented no compelling evidence or testimony that supports the grant of a Section 272 affiliate designation as is contemplated by 47 U.S.C. § 272. Further, the Authority remains unconvinced that the public welfare is served by enlarging the grant of certification to BSE. As the Authority has previously recognized, one of the major requirements of Section 272 affiliate status is that an RBOC has received Section 271 approval. One of the conditions precedent for an RBOC obtaining such approval is a determination that adequate Operational Support Systems ("OSS") with performance measurements are in place. These systems and performance measurements provide assurance that the public welfare is protected by ensuring that competing carriers have a means to compete and are treated in a competitively neutral manner by the ILEC.

The Authority reviewed BSE's initial application "carefully analyzing its relationship with BST and BellSouth Corporation"[28] for any potential adverse affects on the development

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[27] *See* The Authority's December 8, 1998 *Order Granting in Part and Denying in Part Application for Certificate of Public Convenience and Necessity*, pp. 8-10.
[28] *See* Authority Conference Transcript, (Sept. 15, 1998), p. 15, lines 2-16.

of competition. While BSE's initial application was denied in part based on assessments in several key areas, one critical area of concern was that the affiliate relationship between BST and BSE could be potentially and irreversibly adverse to competition, thus granting the application in full would not be in public interest. In reviewing the current application, the Authority recognized that BellSouth remains without Section 271 approval in Tennessee. Absent such approval, this Authority still is without evidence that demonstrates that BellSouth has the necessary OSS safeguards in place to ensure fair treatment among all CLECs. Exacerbating our concern is that no other performance measurements have been established, which arguably help to serve as support to the existence of competitive neutrality in the relationship between BellSouth, BSE and other CLECs. Without these safeguards and measurements the Authority would have difficulty determining whether BellSouth in fact afforded preferential treatment to its affiliate CLEC in Tennessee. As a result, the Authority has concluded, competition could be adversely affected before corrective actions could be taken to neutralize the effects of any such preferential treatment. Based on the foregoing, the Authority continues to maintain that approval of BSE's Application is not in the public interest and may, in fact, be inconsistent with the state's goal to foster competition in Tennessee. As was noted earlier, here too, BSE offered little convincing evidence or testimony to diminish the Authority's concerns regarding potentially abusive collusive behavior.[29]

BSE attempts to resolve the concerns of the Authority by promising to comply with the requirements of 47 U.S.C. § 272 and by relying on its approval in other states in the

[29] *See* The Authority's December 8, 1998 *Order Granting in Part and Denying in Part Application for Certificate of Public Convenience and Necessity,* pp. 10-14.

BellSouth region. In determining whether or not to approve BSE's second Application, the Authority is wary of being guided solely by actions taken by other state regulatory agencies absent the evidence necessary to resolve the Authority's concerns raised by BSE's initial application in Docket No. 97-07505. It is incumbent upon the Authority to consider the interests of Tennessee consumers and whether those interests are advanced, or in the least, are not harmed by approving BSE's Application. The Authority, for the purposes of this review, must not assume that the interests of consumers in all states are the same, nor that there exists identical uniformity amongst the laws and regulations guiding individual state utility commissions in the regulation of competing telecommunications carriers. The Authority thus concludes that the mere fact that BSE has been certified in other states in the BellSouth region neither demonstrates that an anticompetitive environment will not be created in Tennessee nor that Tennessee consumers will benefit if BSE's Application is approved.

In an effort to lessen the anticompetitive effect of its expanded certification, BSE agreed to be bound by a price floor equal to the resale price paid to BellSouth for the purchase of its telecommunications services. However, BSE failed to demonstrate whether the resale price it will pay to BellSouth will or will not include operator service costs, administrative costs, or marketing and advertising costs. Absent an evidentiary demonstration of all costs to be included in the resale price paid to BST, the "price floor" promised by BSE may not be comparable to that set for incumbents under Tenn. Code Ann. § 65-5-208(c). Furthermore, the Authority is of the opinion that if a price floor is to act as a deterrent against price squeezing, the floor must be set in a manner that will ensure that all of the costs of providing the services are included therein. Thus, a meaningful promise to be bound to a price floor will not only include the rate paid to BellSouth by BSE, but will also include additional costs

incurred by BSE in providing such services. Under BSE's proposal to set the price floor at the resale rate paid to BellSouth, BSE would still be free to sell a service below the total cost that BSE must incur to provide that service.

Another factor in considering BSE's Application is that BSE failed to submit a viable business plan and a cost allocation manual. The Authority has routinely examined the business plans of CLEC applicants when determining whether such applications meet the requirements of Tenn. Code Ann. § 65-4-201(c). In considering BSE's application the review of a cost allocation manual is essential when the Authority must determine whether the grant of certification to a BellSouth affiliate such as BSE will foster competition and promote the public interest. More specifically, the filing of a cost allocation manual aids the Authority in determining whether the appropriate safeguards are in place to prevent cross-subsidies between regulated and non-regulated services. The lack of a business plan and cost allocation manual prevents the Authority from determining the extent to which BSE intends to operate, and whether such operation and the provisioning of telecommunications services on an expanded level is compatible with the public interest.

On September 8, 1999, the Authority, acting in accordance with Tenn. Code Ann. § 4-5-313(6), notified the parties herein that it was taking official notice of the Access Line and Service Data information for all exchanges in Tennessee. In acting under Tenn. Code Ann. § 4-5-313(6), the Authority provided the parties with an opportunity to respond to this action by September 13, 1999. No party to the proceeding filed an objection. The Access Line and Service Data information is included in the TRA Form 3.01 Reports ("3.01 Reports") filed with the Authority for the quarter ending March 31, 1999. These reports are filed by all

incumbent telecommunications services providers that own access lines in the State, and as a result of such operations have earned revenues for the preceding year in excess of $1,500,000.

In addition to financial information, these 3.01 Reports also contain information concerning the number of access lines that the qualifying company maintains within the state of Tennessee. These 3.01 Reports demonstrate that BellSouth (BSE's affiliate) controls the largest number of access lines in the state, which demonstrates that BellSouth serves a predominant percentage of the local exchange market in Tennessee.

As stated in the December 8, 1998 Final Order entered in Docket No. 97-07505, the Authority did not accept BSE's contention that it should be granted full certification merely because the Authority had previously granted statewide certification to other incumbents such as Citizens and Sprint, and the Authority does not accept such a contention today. In Tennessee, Citizens, Sprint and their affiliated companies are not similarly situated to BellSouth and BSE. Neither Citizens nor Sprint are RBOCs, and neither possesses the historical market dominance so closely associated with RBOCs such as BellSouth.[30] Unlike Citizens and Sprint, BellSouth maintains approximately eighty percent (80%) of the access lines in Tennessee. Therefore, since BSE is the affiliate of the dominant local exchange carrier in Tennessee, the actions which BSE seeks to take must be evaluated by assessing whether such actions will truly foster competition in Tennessee. The Authority finds that Citizens and Sprint are not similarly situated to BSE and BellSouth.

[30] Neither Citizens nor Sprint is subject to the constraints arising from the divestiture of AT&T, nor to the requirements of 47 U.S.C. § 271.

Based upon the foregoing findings and conclusions, the Authority determines that BSE's Application seeking additional certification must be denied.

IT IS THEREFORE ORDERED THAT:

1. The Application of BellSouth, BSE, Inc. for a Certificate of Public Convenience and Necessity to Provide Expanded Intrastate Telecommunications Services is denied;

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

3. Any party aggrieved by the Authority's action embodied herein may file a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.

Melvin J. Malone, Chairman

H. Lynn Greer, Jr., Director

Sara Kyle, Director

ATTEST:

K. David Waddell, Executive Secretary