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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 13, 1997

Ms. Janice Myles
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
Room 544, 1919 M. Street, N.W.
Washington, D.C. 20554

Dear Ms. Miles:

In compliance with Public Notice, DA 97-2112, dated September 30, 1997, the Public Service Commission of South Carolina files these Reply Comments related to BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc.'s filings for provision of in-region, interlata service in South Carolina.

If I can be of further assistance or provide additional information, please feel free to contact me.

Sincerely,

Gary E. Walsh

GARY E. WALSH
DEPUTY EXECUTIVE DIRECTOR

GEW:de

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

IN RE:

Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc., for provision of In-Region, InterLATA Services for South Carolina	)	CC Docket No. 97-208

REPLY COMMENTS OF THE
PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

The Public Service Commission of South Carolina ("Commission") submits these Reply Comments for the purpose of emphasizing four points. First, the Commission has conducted a complete and careful investigation into BellSouth's application. The Commission had no higher goal than the one assigned to it--to fulfill its responsibilities under Section 271 of the Telecommunications Act of 1996 ("Act"). Indeed, no party ever suggested that the Commission's investigation was anything other than fair and thorough during that investigation; it is only now, after the Commission reached its conclusions that such claims are being made by parties whose legal and factual representations were rejected by the Commission on the merits.

Second, the Commission is alarmed that some parties have made representations concerning their efforts to enter the local market in South Carolina that are at odds with representations these same parties previously made to the Commission. These new, contradictory representations should not be credited. Moreover, there is still conspicuously lacking in the CLECs' carefully worded statements of intent any firm commitment with specific dates to provide local residential competition to BellSouth in South Carolina any time in the near future. For all the talk about providing facilities based local service, the CLECs have offered nothing tangible to the consumers of South Carolina. Again, we absolutely reject the proposition that Section 271 allows long distance providers to block competition for long distance services in South Carolina without themselves competing in local services markets. To do so would deny South Carolina consumers the benefits of competition in both markets.

Third, the Commission fully stands by its conclusion that BellSouth has complied with the requirements for interLATA entry under Section 271, including the competitive checklist. It is our understanding and belief that this conclusion should warrant deference from the FCC under the Act. Our conclusion is, however, supported by the failure of those same parties who now disagree about BellSouth's satisfaction of the checklist ever to present their arguments to the proper forum -- the Commission.

Fourth, it is imperative that the FCC avoids any action that would improperly diminish the role of the State Commission in administering the local market provisions of the

telecommunications act. Congress reserved critical powers to the state Commissions because it recognized their unique understanding and knowledge of local markets.

I. THE COMMISSION CONDUCTED A FULL AND FAIR REVIEW OF BELLSOUTH'S COMPLIANCE WITH SECTION 271

Section 271(d)(2)(B) of the Act requires the FCC to consult with the commission of any State that is the subject of a Section 271 application. 47 U.S.C. § 271(d)(2)(B). In preparation for this consultation, and with the encouragement of the FCC as well as the United States Department of Justice, the Commission undertook a detailed examination of BellSouth's proposed application, conducting a complete investigation and extended public hearing into BellSouth's activities in South Carolina. The Commission examined the state of the local market in South Carolina, the steps that BellSouth has taken to facilitate the entry of CLECs into this local market, and the impact that BellSouth's ability to offer interLATA services would have on South Carolina consumers. At the conclusion of this investigation and public hearing, the Commission unanimously concluded that BellSouth had satisfied the Act's requirements under Section 271(c) to provide interLATA services in South Carolina, and that South Carolina consumers would benefit from BellSouth's ability to offer these services. The Commission adopted Order No. 97-640 which reflected in detail the specific findings of the unanimous Commission. Adoption of such a

proposed order is fully consistent with the Commission's rules and practices.

Faced with a Commission Order rejecting their substantive arguments, some parties question the integrity of the Commission's investigation. AT&T, for example, claims the Commission's findings are the result of "Potemkin-proceedings." AT&T Comments at 2. MCI asserts that "there can be no confidence in the integrity of the process." MCI Comments at 10. Sprint complains that the "Commission did not attempt to obtain a full factual record on CLEC entry." Sprint Comments at 34. Interestingly, in arguing that the Commission should not have adopted the prevailing party's proposed order, MCI relies on a case that says just the opposite. See MCI at 10 (citing Southern Pacific Telecommunications v. AT&T, 740 F.2d 980, 994-95 (D.C. Cir. 1984)). In Southern Pacific, the U.S. Court of Appeals for the D.C. Circuit directly rejected arguments that a district judge's opinion should be entitled to less deference simply because it had been submitted in proposed form by one of the parties. Id.[1]

AT&T, MCI and Sprint all participated in the Commission's investigation and public hearing. At no time during the proceedings did any of these carriers complain about the scope or focus of the Commission's investigation. Indeed, AT&T's own

[1] The other case, cited by MCI which has also been presented as conclusory evidence of its argument, is clearly not related to the facts in this matter. That case deals with a Department of Labor Administrator who ignored the findings and conclusions of the Administrative Law Judge who presided over the case. Clearly, no such circumstance exists in the instant matter. Mastercraft Flooring, Inc. v. Donavan, 589 F. Supp. 258, 262 (D.D.C. 1984).

Proposed Order filed with the Commission on July 22, 1997, fully set forth the issues addressed during the proceedings. Only in the context of attacking findings with which they disagree have these carriers questioned the integrity of the Commission's proceedings.

The investigation conducted by the Commission was careful, fair and thorough. BellSouth was required to file its application at least 120 days before any requested PSC action. All interested parties were invited to participate. The Commission's process allowed all parties the fullest use of its discovery procedures. The parties exchanged interrogatories and document requests, and the Commission staff issued its own data requests. Finally, a four-day public hearing was held, at which witnesses were presented to the Commission and were subjected to cross-examination. AT&T, MCI, ACSI and Sprint (among others) all presented testimony at the public hearing. Attorneys for AT&T, MCI, Sprint and others engaged in lengthy cross-examination of BellSouth witnesses.

AT&T, MCI and Sprint nonetheless complain that the Commission did nothing more than passively acquiesce in the wishes of BellSouth. Intervenors such as AT&T, MCI and Sprint were active and forceful participants who presented the Commission with extensive written evidence and testimony. All witnesses were subject to cross-examination by all parties. While these parties now continue to make their same arguments, their disagreement with the Commission's conclusions is not

evidence of unfairness in the process and should be given no weight.

Some of the parties' Comments point to the Commission's adoption of a proposed order submitted by BellSouth as evidence of a deficiency in the Commission's investigation. AT&T, in particular, claims that the use of this order proves that the Commission did not independently consider the record but instead "rubber-stamped" the views of BellSouth. AT&T Comments at 47.

As AT&T and the other parties with such views well know, the Commission is not alone in considering proposed orders presented by parties appearing before it. Parties submit proposed findings and orders in virtually every agency and court proceeding at the State and Federal level. As referenced earlier, the case law cited by MCI concerns a matter in which AT&T's proposed findings of fact and conclusions of law were adopted practically verbatim by a District Court judge and the U.S. Court of Appeals for the D.C. Circuit affirmed. Southern Pacific Combinations, 740 F.2d 980 (D.C. Cir. 1984). Likewise, in the proceedings below, AT&T agreed that submission of a Proposed Order was proper. Hearing Transcript, Docket No. 97-101-C at Volume 7 of 7, p. 420. Indeed, AT&T filed its own 51-page Proposed Order to the Commission in Docket No. 97-101-C and urged the Commission to adopt its Findings of Fact and Conclusions of Law, instead of the Proposed Order filed by BellSouth. The Commission carefully considered AT&T's Proposed Order, just as it did all materials presented during the course of the proceedings. The Proposed Order submitted by AT&T did not represent the facts developed in

the Commission's investigation or the law as the Commission has found it to be.

We would not, nor did we, blindly or tacitly accept the proposals of any party. Rather, our conclusions were reached only after soliciting and considering all relevant evidence from all interested parties, only after hearing relevant testimony from all interested parties at a public hearing, and only after carefully weighing all of the evidence. While the parties who believed differently from the Order of the Commission may be unhappy with the conclusions, this unhappiness does not justify questioning the legitimacy of the process.

II. CLECS HAVE FAILED--AND CONTINUE TO FAIL--TO TAKE REASONABLE STEPS TO ENTER SOUTH CAROLINA'S LOCAL RESIDENTIAL MARKETS ON A FACILITIES BASIS

In its Comments dated October 17, 1997, the Commission noted that parties might attempt to bypass the Commission's performance of its consultative duties under Section 271 by presenting facts to the FCC that could have been presented in the Commission's Docket No. 97-101-C. The Commission expressed its belief that, if that were to occur, such attempts should be rejected by the FCC in order to insure the integrity of the statutory consultation process. Unfortunately, some CLECs are now offering evidence to the FCC about operations in South Carolina that, if true, should have been presented to the Commission at the time of our well-publicized considerations of this matter.

Disregard for the proper administrative procedure is not acceptable to this Commission, and should not be rewarded by the FCC. As regulators, we depend upon the parties who come before us to be candid, frank, and forthright. A party violates this duty when it withholds relevant information.

Specifically, the Commission concluded based on all the evidence before it in Docket No. 97-101-C that no CLEC presented evidence that it was taking reasonable steps toward implementing any business plan for facilities based residential local service. The Commission's specific finding was based on record evidence presented to the Commission by the CLECs themselves. Although the Commission did not determine whether BellSouth was eligible to apply under Track A or Track B and deferred this issue to the FCC, the Commission conducted a factual review of the state of competition in South Carolina and expressly found that "none of BST's potential competitors are taking any reasonable steps toward implementing any business plan for facilities-based local competition for business and residential customers in South Carolina." Order 97-640 at 19. To accept additional information not presented to the Commission deliberately undermines the role of the state Commission and the integrity of the states statutory consultative function.

ACSI made no representation to the Commission (through its witness James Falvey) that it had any intention of serving residential customers in South Carolina. However, in its comments to the FCC, ACSI now contends that it "will provide facilities-based service to residential customers through MDUs

and STS providers where it makes economic sense," ACSI Comments at 14, and that it "is interested in providing facilities-based services to residential customers wherever it can do so profitably." ACSI Comments at 15. At the time of the hearing, ACSI had no facilities based switched local exchange service anywhere in South Carolina. (Tr. 97-101-C, Vol. 7 of 7, p.350). Further, in response to the Commission's question as to when ACSI intended to come to South Carolina, the ACSI witness did not give a specific response and simply stated "I think early next year you'll see us here." (Tr. 97-101-C, Vol. 7 of 7, p.360). To the contrary, ACSI now claims that it "has been moving at a frantic pace to provide facilities-based local exchange services" in South Carolina, ACSI Comments at ii. ACSI Comments at 18.

In the AT&T arbitration with BellSouth, AT&T did not state any specific plan to provide facilities-based competition in South Carolina on any basis.

ITC DeltaCom ("DeltaCom") chose not to participate in the Commission's proceedings. It is for this reason that "there is very little evidence before the [FCC] at this time on which to evaluate DeltaCom's intentions and efforts to provide residential service." DOJ Evaluation at 10. Even if the FCC were to consider DeltaCom's new representations in this proceeding, they appear to be extremely limited. Their lack of specificity is troubling to the Commission. There is no statement within their Comments that DeltaCom was working toward serving residential customers at the time of the Commission's considerations in Docket No. 97-101-C. Nor can the Commission locate in DeltaCom's

submission a date certain nor any firm commitment to offer facilities-based residential service in South Carolina.

The Commission recognizes that carriers such as DeltaCom may be dependent upon BellSouth for their entry into the local market. Yet DeltaCom has never made any complaint, either formal or informal, to this Commission regarding BellSouth's cooperation. Given the evidence gathered by the Commission during its investigation of BellSouth's local offerings and the lack of notice of a Complaint to this Commission, we would not conclude that BellSouth has been an impediment to DeltaCom's entry. Therefore, we cannot find that BellSouth has somehow made it impossible for DeltaCom to provide service in South Carolina. Nor can we discern even a definitive commitment to serve South Carolina residential consumers by DeltaCom.

As stated in our prior comments in this matter, statements by parties attempting to submit factual information after the conclusion of our proceedings should be rejected by the FCC. The State Commissions' role would be greatly diminished and "gaming the system" will be incented if a party is allowed to hold back evidence until after the State Commission has ruled, if such evidence is still considered by the FCC. DeltaCom did not appear before the Commission in this matter. Its statements as to its actions have not been subjected to the cross-examination of all parties and tested through the investigation by the Commission. The FCC will only encourage this type of behavior by any consideration of such intentionally or unintentionally withheld statements.

The Department of Justice appears to agree with our position. In its comments, the Department of Justice "strongly encourage[s] all interested parties to participate fully in state 271 proceedings, and urge[s] the [FCC] to take any appropriate steps to encourage such participation." DOJ Evaluation at 11 n.21.

The FCC should not be swayed by the arguments of parties that are looking for a way to prevent additional long distance competition by professing, at the eleventh hour, an interest in the South Carolina marketplace. Our interest lies in the benefit to South Carolina consumers of encouraging the greatest possible competition in <u>all</u> telecommunications markets in South Carolina. That interest would be poorly served if words are allowed to replace acts.

The CLECs have set no specific dates when they will begin to serve the local market. While they now complain about BellSouth, they have never filed complaints about BellSouth's actions with the Commission. Until these CLECs take tangible steps, and until they are consistent in representations about their intentions, they should not be allowed to stop the competition which the Commission is encouraging in South Carolina.

III. BELLSOUTH HAS SATISFIED THE COMPETITIVE CHECKLIST

We note that some of the CLECs have presented the FCC with complaints about BellSouth's satisfaction of the competitive checklist. Most of these complaints were addressed by the

Commission during the investigation of BellSouth's application, and they were rejected for the reasons set forth in the Commission's Order.

Complaints that have been raised for the first time before the FCC but could have been presented to the Commission should be summarily rejected by the FCC. Not only could parties have raised their grievances during the Commission's open review of BellSouth's interLATA eligibility, but they also could have invoked the mediation, arbitration, and complaint mechanisms that have been designed for that purpose. In fact, all of these avenues remain open to these parties today. The failure of these parties to raise their complaints in a forum where they could be resolved leads the Commission to conclude that these are not sincere efforts by CLECs to resolve good-faith disputes, but rather efforts to deny the consumers of South Carolina the benefits of open telecommunications markets.

IV. THE ROLE OF THE STATE COMMISSION PER THE TELECOMMUNICATIONS ACT OF 1996

In that regard, it is imperative that the FCC avoid any actions that would improperly diminish the role of the State commissions in administering the local market provisions of the Act. Under the Act, it is State commissions that mediate and arbitrate disputes between CLECs and incumbent local exchange carriers, set prices for interconnection and network elements, and approve and enforce interconnection agreements and statements

of generally available terms. See 47 U.S.C. § 252(a)-(e). The FCC's duties under Section 271 do not allow the FCC to overrule the responsibilities delegated to the states under the Act. The FCC, therefore, must reject calls by various parties to substitute its judgment regarding intrastate matters for the judgment of the Commission.

Congress reserved critical powers to the State commissions because it recognized their unique understanding and knowledge of local markets. Congress understood that State commissions are in the best position to make decisions about local markets. The Commission also owes a unique duty under our State laws and Commission rules and regulations to the consumers of South Carolina to see that they benefit from competition in the telecommunications industry. Such competition is in the interest of the consumers of South Carolina, and the Commission has determined that these consumers will best be served by allowing BellSouth to offer interLATA services.

It should be noted that our determination has in fact been confirmed. Faced with the Commission's recommendation to the FCC that BellSouth's application be approved, CLECs for the first time are presenting to the FCC promises of entry into the South Carolina local residential market.

The Commission's recommendation that BellSouth be allowed to enter the long distance market in South Carolina apparently has caused CLECs to take another look at South Carolina's local markets. This interest appears to be without specifics and for the most part limited to local business customers. But if the

expression of interest eventually leads to firm business plans and financial investments by the CLECs in the South Carolina local residential market, it is the consumers of South Carolina that will benefit from this reassessment by the CLECs.

While this reassessment is a start, the Commission believes that talk by CLECs about serving the South Carolina local market will not soon materialize into actual, available service to all consumers unless the FCC allows BellSouth to enter the long distance market. Our decision approving BellSouth's SGAT, finding all checklist items available, and noting the public benefits of BellSouth's interLATA entry, has interested CLECs in South Carolina's local market. We continue to believe that BellSouth's actual offer of long distance service is the strongest incentive available to drive CLECs into the local residential market.

The consumers of South Carolina deserve these competitive benefits as soon as possible. They will receive them only when the FCC approves BellSouth's application, consistent with this Commission's recommendation in Docket No. 97-101-C.