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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Rules and Policies on Foreign)
Participation in the U.S.) IB Docket No. 97-142
Telecommunications Market)

To: The Commission

REPLY COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation, on behalf of itself and BellSouth International, Inc. ("BellSouth"), hereby respectfully submits the following reply comments in the above-captioned proceeding. BellSouth replies to the commenters who opposed its Petition For Clarification and Reconsideration ("*Petition*") and hereby supports the petition for reconsideration filed by SBC Communications, Inc. ("SBC").

I. THE SAME PUBLIC INTEREST STANDARD SHOULD BE APPLIED TO INTERNATIONAL CARRIERS ENTERING U.S. MARKETS AS TO BOCs ENTERING IN-REGION INTERLATA MARKETS

The Commission's *Foreign Participation Order*¹ adopted in this proceeding created an "open entry standard for WTO Member applicants" seeking to enter the U.S. market. The Commission has always recognized the public benefits that new entry can

¹ *Report and Order and Order on Reconsideration, Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Dkt. No. 97-142, *Market Entry and Regulation of Foreign-Affiliated Entities*, IB Dkt. No. 95-22, FCC No. 97-398 (rel. Nov. 26, 1997)(*"Foreign Participation Order"*).

bring.² Previously, the Commission recognized that foreign carrier entry into the U.S. market, particularly the market for international calling between the U.S. and the carrier's home market, could harm U.S. consumers to the extent foreign carriers could leverage market power in their home market in an anticompetitive fashion.³ Pointing to commitments by WTO member governments to open their home country markets and to improvements in the Commission's regulatory framework, the Commission concluded that it could presume that entry by foreign carriers, including those with market power in their home markets, would be in the public interest of U.S. consumers. The Commission dispensed with its ECO test, which required an examination of whether there were either legal or practical barriers to competition in the foreign carrier's home market.⁴ In the context of its public interest assessment, the Commission chose to presume that new entry by these carriers would be in the public interest based merely on foreign government commitments to open their markets rather than on an actual examination of those markets. The Commission concluded that "open" markets, in this relative sense,

² See Report and Order, *Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Serv. off of the Island of Puerto Rico*, 2 FCC Rcd 6600, 6604, ¶30 (1987) ("plac[ing] a burden on any entity opposing entry by a new carrier into interstate, interexchange markets to demonstrate by clear and convincing evidence that [additional] competition would not benefit the public") (emphasis added); Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, *MTS-WATS Market Structure Inquiry*, 81 F.C.C. 2d 177, 201-02, ¶103 (1980) (Commission will "refrain from requiring new entrants to demonstrate beneficial effects of competition in the absence of a showing that competition will produce detrimental effects").

³ See, e.g., *Merger of MCI Communications Corporation and British Telecommunications, plc*, GN Dkt. No. 96-245. FCC 97-302 at ¶¶156-161.

⁴ *Foreign Participation Order* at ¶30.

coupled with Commission oversight would be sufficient to protect U.S. consumers from any abuse of market power while preserving the benefits of new entry.

BellSouth pointed out in its *Comments* and in its *Petition* that the same public interest test that the Commission applied in considering foreign carrier entry should apply to BOC entry into in-region long distance under section 271. If foreign carrier entry into new U.S. markets can benefit U.S. consumers, then domestic BOC entry into new U.S. markets surely benefits U.S. consumers. BellSouth's *Petition* also pointed out that if the Commission could presume that foreign governmental promises to open their local markets and the Commission's ability to regulate would nullify the possibility of anticompetitive harm from the exercise of foreign carrier market power, then the same presumptions ought to be applied to BOC long distance entry. As BellSouth's *Petition* explained, federal and state measures to open U.S. local markets are in-place and have been operating to open the local market -- they are not mere promises. U.S. local markets are far more open than foreign markets, and any presumption that "open" foreign markets can effectively protect consumers must apply in spades to the demonstrably open U.S. local markets.⁵ BellSouth's *Petition* simply pointed out the need for consistent Commission application of the same standard.

In replying to BellSouth's *Comments* in its *Foreign Participation Order*, the Commission attempted to distinguish its positive assessment of the public interest in foreign carrier entry from BOC entry into long distance on two grounds. *Foreign*

⁵ *Petition* at 4-5. Similarly, the Commission's domestic regulatory authority is more extensive and affords even more protections against potential anticompetitive exercise of market power.

Participation Order at ¶ 58. First, that BOCs will be “significant” market participants in the U.S. long distance markets, while foreign carriers will not be significant participants in the markets they enter. Second, that different statutes apply to the two types of entry, sections 214 and 310 to foreign carrier entry and section 271 to BOC entry. BellSouth’s *Petition* demonstrated that both grounds were specious.

Only the oppositions of AT&T, MCI and the Telecommunications Resellers Association addressed BellSouth’s *Petition*, and they add little of substance. None of the opponents sought to support the Commission’s first ground for distinguishing an analysis of BOC from foreign carrier entry -- that BOC’s will be “significant” market participants while foreign carriers will not. In fact, this rationale conflicts directly with the Commission’s judgment that BOCs will not become dominant players in the U.S. long distance market.⁶ BellSouth’s *Petition* noted that “distinguishing the size of the market share below the threshold where that share allows some inference of market power is a meaningless exercise, and provides no reasoned basis for decision-making.” *Petition* at 6.

The opponents do support the Commission’s notion that the public interest test that applies to BOC entry under section 271 is different from the tests in sections 214 and 310. *See, e.g.,* Opposition to Petitions For Reconsideration of MCI Telecommunications Corporation, IB Docket No. 97-142 (filed February 10, 1998) (“MCI Opposition”);

⁶ Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning the Interstate Interexchange Marketplace*, FCC No. 97-142 (rel. Apr. 18, 1997).

AT&T Comments In Support of MCI Petition for Reconsideration and Opposition to Petitions of BellSouth, KDD and SBC, File No. IB 97-142 (filed February 10, 1998) (“AT&T Opposition”), at p.10. Yet the words of the various public interest tests are essentially identical.⁷ However, the Commission’s reasoning here is particularly suspect, and opponents do not add to its substance. The Commission’s *Foreign Participation Order* reasoned that:

the BOCs are subject to a detailed statutory regime that governs their entry into in-region interLATA service under Section 271 of the Act. In considering entry by a foreign applicant into the U.S. international services market, on the other hand, the Commission is required to ensure that such entry is consistent with the public convenience and necessity.

Foreign Participation Order at ¶ 58. AT&T argues that BellSouth “fails to acknowledge the specific statutory requirements to which the BOCs are subject under Section 271 of the Telecommunications Act, and which are unaffected by the WTO Agreement.” AT&T Opposition at 10. Similarly, MCI adds that BOCs must live within section 271 “including the public interest test and other detailed requirements of Section 271”. MCI Opposition at 7.

These oppositions miss the point. As spelled out in BellSouth’s *Petition*, “entry into long-distance markets under section 271 clearly requires that all its various requirements be met.” *Petition* at 7. BellSouth is simply pointing out that the public interest test under section 271 is fundamentally the same as the public interest test under

⁷ Section 214 (a) requires examination of the “public convenience and necessity” while section 271(d)(3)(C) uses the phrase “public interest, convenience and necessity.” There is no substantive difference between these formulations of the public interest test, and the Commission has never treated them differently.

sections 214 and 310. Opponents point to no difference in the language, legal application or intent of those tests. The fact that section 271 contains other requirements, which BellSouth has explicitly acknowledged, does not distinguish the fact that the public interest is the public interest.⁸

The opponents to BellSouth's *Petition*, all part of the currently protected long distance industry, seek to create a unique public interest test for BOC entry into new markets under section 271, a test separate from and uninformed by Commission public interest analysis in the directly analogous case of foreign entry under sections 214 and 310. These oppositions serve to underline the need for consistent application of the same words and presumptions under the public interest test throughout the Communications Act. Acting upon the ad hoc distinctions drawn by AT&T, MCI and the Telecommunications Resellers Association would run counter to the public interest in competition and to the basic tenets of the Administrative Procedures Act, which prohibits arbitrary and capricious agency action.

The oppositions to BellSouth's *Petition* offer no support for one leg of the Commission's action here, and nothing of substance to support the other. The Commission must reconsider and revise its *Foreign Participation Order* to the extent that it depends upon any distinction between BOC and foreign carrier entry and upon the application of different standards to these two groups of carriers.

⁸ In fact, section 271's other pre-requisites to BOC long distance entry serve to focus section 271's public interest test more narrowly than the tests in sections 214 and 310. See *Brief in Support of Application by BellSouth for Provision of In-Region, Interlata Services in Louisiana, CC Docket No. 97-231*, (filed November 6, 1997) pp. 84-88.

II. U.S. CARRIERS SHOULD NOT HAVE TO SEEK REGULATORY REVIEW PRIOR TO ACQUIRING A CONTROLLING INTEREST IN A FOREIGN CARRIER

SBC's petition correctly pointed out that the Commission reversed its own policy concerning the need for review and approval of a U.S. carrier's acquisition of a controlling interest in a foreign carrier.⁹ In 1995, the Commission determined that such an investment did not warrant scrutiny.¹⁰ Now, only a short time later, the Commission, as GTE Service Corporation notes,¹¹ without proper notice, reverses course. The stated reason is because the Commission's experience in the interim "indicates there can be significant risks to competition when a U.S. carrier owns a controlling interest in a foreign carrier with market power."¹² There is no explication of the factual basis for this determination.¹³

⁹ *Opposition to and Comments on Petitions for Reconsideration*, filed February 10, 1998, ("SBC Petition") at 2.

¹⁰ *In the Matter of Market Entry and Regulation of Foreign-Affiliated Entities*, 11 FCC Rcd 3873, 3912-14 (1995) ("*Foreign Carrier Entry Order*") ("...we do not find that the same anticompetitive concerns exist where a U.S. carrier invests in a foreign carrier as exist where a foreign carrier invests in a U.S. carrier. . . . in circumstances where a U.S. carrier has a substantial investment in a dominant foreign carrier and uses its influence over the foreign carrier to obtain an anticompetitive advantage on the affiliated route, we have jurisdiction over the U.S. carrier, through its licenses and authorizations in the United States, to redress its behavior").

¹¹ *Comments of GTE Service Corporation on Petitions for Reconsideration*, filed February 10, 1998, ("GTE Comments") at 3. n.7.

¹² *Foreign Participation Order* at ¶140.

¹³ See 5 U.S.C. §706(2)(E)(1997); *North Carolina Utilities Comm. v. FCC*, 552 F.2d 1036, 1052 (1977); *cert. denied* 434 U.S. 874 (1977).

AT&T and MCI opposed SBC's argument. MCI argued that SBC "misinterpreted the Commission's finding," because the Commission only retained "the right to examine not the investment *per se*, but the potential for competitive distortion in the United States that may arise from the creation of a foreign affiliation on the route."¹⁴ MCI's fine parsing of the Commission's intention avoids what underlies SBC's central point in this regard. The Commission has not articulated what has changed in a short period of time to warrant a reversal of considered Commission policy and the imposition of a burden on U.S. carriers that threatens U.S. carriers' investment opportunities overseas. Conceivably, the Commission will elucidate a rational basis for the reversal when it rules on the SBC Petition. Additionally at that time, the Commission, for the first time, may state a factual basis for its assessment. Nevertheless, BellSouth supports SBC and GTE's view that the rule revision runs counter to "long-standing policy in favor of U.S. investment abroad."¹⁵

AT&T argued for prior review, also, noting that "[l]iberalized market entry rules require effective safeguards against the abuse of market power."¹⁶ It is entry into the U.S. international telecommunications market that is being liberalized by the Commission's action in this proceeding.¹⁷ Yet, the Commission perceives a need to create a barrier to

¹⁴ MCI Opposition at 6.

¹⁵ *Foreign Carrier Entry Order*, *supra* n.9. at 3913.

¹⁶ AT&T Opposition at 7.

¹⁷ *Foreign Participation Order* at ¶2 ("We adopt an open entry standard for WTO Member country applicants that favors their participation and will enable U.S. consumers to enjoy the benefits of increased competition").

U.S. carriers' ability to enter into foreign telecommunications markets. The imposition of this limitation on U.S. carriers runs counter to the overarching intent of the proceeding -- "to promote competition in the global market for telecommunications services."¹⁸

BellSouth supports the SBC Petition for the reasons given therein, in the GTE Comments, and those set forth above.

III. THE COMMISSION MAY NOT IMPOSE COMMON CARRIER STATUS ON A NON-COMMON CARRIER CABLE SYSTEM

In the context of justifying its "new open entry policies to applications to land and operate submarine cables from WTO Member countries,"¹⁹ the Commission found it necessary to expound on its authority to condition new and existing cables such that they would have to be operated on a common carrier basis.²⁰ SBC, in its petition, made it clear that cable operators, like many other telecommunication providers, may chose common carriage or private carriage.²¹ The Commission has broad powers under Title II of the Communications Act and, in particular, under Section 214.²² However, as SBC and GTE²³ quite properly noted, the D.C. Circuit has delineated the limitations on the Commission's discretion to denominate a carrier's status--it is a determination that must

¹⁸ *Foreign Carrier Entry Order* at ¶4.

¹⁹ *Id.* at ¶93.

²⁰ *Id.* at ¶95.

²¹ SBC Petition at 8.

²² 47 U.S.C. §214 (1997).

²³ GTE Comments at 5.

be made in terms of functions not regulatory goals. Accordingly, BellSouth agrees with SBC and GTE that the Commission should temper its *dicta* and grant the SBC Petition in this regard.

IV. THERE SHOULD BE ONE SPECIAL CONCESSIONS RULE OF GENERAL APPLICABILITY

SBC explained that there is one new rule addressing special concessions that appears to apply to all U.S. carriers except BOCs' affiliates. The exception to the rule results from the Commission's practice of applying a special condition on Section 214 authorizations that permit BOC affiliates to terminate traffic in their regions.²⁴ BellSouth agrees with SBC, BOC affiliates may not be singled out by the Commission "[w]ithout particularized findings of fact." No such findings have been made in this proceeding. In light of other safeguards erected by the Commission, no such findings would be warranted. Accordingly, BellSouth encourages the Commission to grant SBC's petition in this regard.

²⁴ SBC Petition at 7-8.

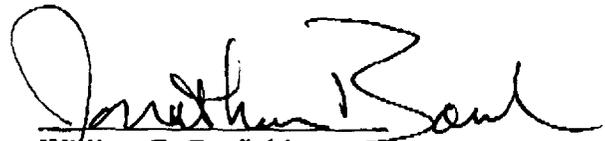
V. CONCLUSION

For the reasons stated above, BellSouth respectfully requests that the Commission grant BellSouth's Petition for Clarification and Reconsideration and SBC's Petition for Reconsideration.

Respectfully submitted,

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Dated: February 20, 1998

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of February, 1998 served the following parties of this action with a copy of the foregoing REPLY COMMENTS OF BELLSOUTH CORPORATION by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties at the addresses shown below.

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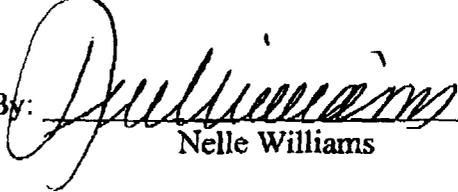
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