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April 22, 1998

Via Hand Delivery

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: *In re LCI Petition for Declaratory Ruling Concerning Bell Operating Company Entry into In-Region Long Distance Markets*
CC Docket No. 98-5

Dear Ms. Salas:

Enclosed for filing is an original and twelve copies of the Reply Comments of BellSouth Corporation on LCI's Petition for Declaratory Ruling. Pursuant to the FCC Public Notice released on January 26, 1998, we are also providing a copy to Janice M. Myles, Common Carrier Bureau, and to ITS, Inc.

Please date stamp the extra copy and return it to the individual delivering this package. Thank you for your assistance in this matter.

Sincerely,

Michael K. Kellogg

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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In the Matter of LCI Petition for Declaratory Ruling Concerning Bell Operating Company Entry into In-Region Long Distance Markets	CC Docket No. 98-5

To: The Commission

REPLY COMMENTS OF BELLSOUTH CORPORATION

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April 22, 1998

Before the
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Washington, D.C.

In the Matter of LCI Petition for Declaratory Ruling Concerning Bell Operating Company Entry into In-Region Long Distance Markets	CC Docket No. 98-5

To: The Commission

REPLY COMMENTS OF
BELLSOUTH CORPORATION

The comments submitted in response to LCI's petition for declaratory judgment make plain that the proposal has no chance of success. The comments have highlighted that there is no statutory basis for LCI's proposal and that LCI's purported goals of promoting competition in the market for intrastate and interLATA telecommunications services will not be advanced, but may well be hampered by, its "Fast Track" plan. The Commission should not waste any more time or resources on what amounts to little more than a publicity stunt.

1. To have any impact, LCI's "voluntary" plan must attract volunteers. Yet, all five regional Bell companies have independently rejected the proposal.[1] Even the CLECs have described LCI's so-called "Fast Track" scheme as a "blind alley"[2] that could lead to nothing but

[1]See Opposition of Ameritech at 20 (LCI's plan is "yet another attempt to game the regulatory process in order to delay long distance competition"); Bell Atlantic Comments at 6 (describing LCI's proposal as "contrary to the public interest and the law"); BellSouth Comments at 1 (LCI's proposal is "unlawful and unwise"); SBC Comments at 34 (LCI's proposal "would produce no benefits for consumers and, in fact, would harm them significantly"); U S West Comments at ii (describing various "infirmities" as "fatal to LCI's proposal").

[2]KMC Comments at 11; RCN/Cleartel Comments at 12.

"an empty gesture"[3] from the Commission. If the Commission is too hard-pressed fully to consider Bell company applications filed under section 271,[4] then it certainly should not dwell any longer on LCI's pointless petition.

2. LCI's proposal, as with all variations on the proposal offered by other CLECs, would simply tack onto the end of section 271's preconditions for interLATA entry an additional set of conditions. This cannot be reconciled with the 1996 Act. Section 271(d)(4) — which provides that the "the Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist" — forbids adding any condition beyond those that Congress imposed. This mandate is so plain that even the CLECs concede that the Commission may not modify the requirements imposed by section 271 to effectuate LCI's proposal.[5]

Nevertheless, some CLECs go even further than LCI and suggest that the Commission should simply throw out the carefully crafted congressional test for Bell company entry in the in-region, interLATA market and adopt "entirely new standards" for assessing section 271 applications.[6] This is particularly ironic given that Congress adopted the standards incorporated

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[3]Level 3 Comments at 14.

[4]See Letter of Chairman William E. Kennard to Senator Sam Brownback (Mar. 2, 1998) (describing how staffing, resource, and timing limitations led to the Commission's decision not to address all of the requirements of section 271 when assessing BellSouth's Louisiana application).

[5]See generally AT&T Comments at 6 (arguing that LCI's proposal cannot substitute for the requirements of sections 251 and 271 of the Act); MCI Comments at 14 ("the Commission does not have the authority to waive the Section 271 requirements"); CPI Comments at 13 ("LCI's proposal may not comport with the language and the theory of Section 271"); Excel Comments at 7, 8; see also State Advocates Comments at 2 ("even if the LCI alternative were adopted, this should not eliminate any of the other requirements of Section 271 that would remain within the Act").

[6]See, e.g., ICG Comments at 10 (calling LCI's proposal "complex" and urging Commission to institute full-fledged rulemaking).

into sections 251-252, 271, and 272 of the Act largely at the urging of CLECs themselves, who convinced Congress that it should condition the approval of Bell company applications on their satisfaction of the fourteen-point checklist.[7] Although CLECs now may want an even better deal than the one they struck with Congress, the Commission lacks authority to override Congress's legislative judgment by imposing different conditions.[8]

It is not true, as KMC Telecom and others have suggested, that the Communications Act itself authorizes the Commission to modify the conditions for section 271 relief.[9] The Commission's authority to "perform any and all acts, make such rules and regulations, and issue such orders" that may be necessary in the execution of its functions is limited to those acts "not inconsistent with this Act." 47 U.S.C. § 154(i) (emphasis added); see also id. § 303(r) (authorizing Commission to make such rules and regulations and prescribe such restrictions and conditions "not inconsistent with law, as may be necessary to carry out the provisions of this Act") (emphases added).[10] In any case, to the extent it can be regulated at all, the structure of

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[7]See 141 Cong. Rec. S7886 (daily ed. June 7, 1995) (statement of Sen. Pressler); 141 Cong. Rec. H4521 (daily ed. May 3, 1995) (statement of Rep. Fields).

[8]See BellSouth Comments at 1-6.

[9]KMC Comments at 14 (citing sections 4(i), 4(j), 214(c), and 303(r) as support for argument that "[t]he Communications Act gives the Commission very broad powers to regulate the dynamic communications industry"); see also RCN/Cleartel Comments at 15 (identical quotation).

[10]While it is true that the Commission has authority to attach to the issuance of a section 214 certificate "such terms and conditions as in its judgment the public convenience and necessity may require," this power provides no support for the claim that the Commission has authority to adopt LCI's proposal. Section 271 already incorporates a public interest test, § 271(d)(3)(C), and both section 274(d)(4) and judicial precedent make plain that this additional test does not nullify the checklist. See generally NAACP v. FPC, 425 U.S. 662, 669 (1976) ("the use of the words 'public interest' in a regulatory statute . . . take meaning from the purposes of the regulatory legislation"); New York Central Sec. Corp. v. United States, 287 U.S. 12, 25 (1932) ("the term

local telephone operations is within the states' jurisdiction.[11] As the Eighth Circuit has made clear, "section 2(b) . . . prevents the FCC from issuing regulations involving telecommunications matters that are fundamentally intrastate in character."[12] Not one of the CLECs' proposals can be reconciled with Congress's allocation of federal/state responsibilities or section 271's prohibition on extending the checklist.

3. The specific proposals put forward by CLECs make clear that their only interest is in promoting the CLECs' own welfare, not competition or consumer welfare.[13] More generally, however, there is no factual merit to the idea that the Commission should sanction a "brain-storming" session for "fixing" the 1996 Act. Underlying this suggestion is the premise that Congress somehow got it wrong and that the "carrot" of section 271 approval is insufficient to

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'public interest' as thus used [in a statute] is not a concept without ascertainable criteria"); Business Roundtable v. SEC, 905 F.2d 406, 413 (D.C. Cir. 1990) ("broad 'public interest' mandates must be limited to 'the purposes Congress had in mind when it enacted [the] legislation'") (quoting NAACP v. FPC).

[11]See, e.g., WorldCom Comments at 6 ("[a]ny reorganization of the BOCs will affect the delivery of local exchange services, which is a traditional state concern"); State Advocates Comments at 5 (degree of regulatory oversight "must be resolved by state commissions").

[12]Iowa Utils. Bd. v. FCC, 120 F.3d 753, 805 (8th Cir. 1997), cert. granted sub nom. AT&T Corp. v. Iowa Utils. Bd., 118 S. Ct. 879 (1998).

[13]For example, MCI proposes that Bell companies alone should be barred from using their brand names when providing local service, thereby ensuring that AT&T, MCI, and Sprint will be in the best possible position not only to preserve their long distance oligopoly but to extend it into local services as well. See MCI Comments at 9-10. And some CLECs have proposed shifting the burden of proof to the Bell companies to demonstrate on an ongoing basis why section 271 authority, once given, should not be revoked. See KMC Comments at 10-11; RCN/Cleartel Comments at 11-12; cf. First Report and Order, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905, 22072 [¶ 345] (1996) (holding that complainant "will have the ultimate burden of persuasion throughout the [§ 271(d)(6)] proceeding").

open local telecommunications networks to genuine competition.[14] This premise is demonstrably false.

Healthy local competition is developing across the nation. In BellSouth's region, for example, there were 66 operational facilities-based carriers (on a state-by-state basis) having approximately 76,000 local exchange service lines and 212 physical and virtual collocations at BellSouth wire centers as of March 31, 1998. One hundred and thirty-four resellers had resold over 318,000 local lines, 59 percent of them to residential customers. As of March 31, 1998, BellSouth had ported nearly 54,000 numbers and provided almost 15,000 unbundled loops for connection of CLEC customers to CLEC switches. Over 115,000 interconnection trunks currently connect CLEC and BellSouth networks for the exchange of local traffic.[15] These and similar figures prove, among other things, that BellSouth has developed the systems needed to support CLEC entry. Indeed, the Connecticut Department of Public Utility Control ("CTDPUC") vigorously disputes LCI's sweeping generalization that the Bell companies have not provided

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[14]See AT&T Comments at 6-7; WorldCom Comments at 3-4; Excel Comments at 2-4.

[15]See also BellSouth's Responses to the Common Carrier Bureau's Survey on the State of Local Competition, available at <http://www.fcc.gov/ccb/local_competition/survey/responses/> (Mar. 27, 1998) (redacted version) (containing competition data as of December 31, 1997). This data confirms that BellSouth's statements to the New Zealand Ministry of Commerce about competition in New Zealand (see Ad Hoc Users Comments at 3-4) have no applicability to the United States. In New Zealand, not only is there no statutory obligation for the ILEC to interconnect, to offer its services for unrestricted resale, or to unbundle network elements, but there is no structural or non-structural separation among the local, mobile, long distance, and international lines of business. Similarly inappropriate is CompTel's complaint (at 10-11) that BellSouth's non-recurring charges for UNEs used in end-to-end combinations in South Carolina are too high, see also Excel Comments at 3, for this amounts to nothing more than a complaint that BellSouth (in accordance with judicial decisions) is providing its end-to-end telecommunications services to CLECs at the resale rate. Any efficient competitor can compete through resale under the statutory retail-less-avoided-cost formula.

CLECs nondiscriminatory access to OSSs. See CTDPUC Comments at 3 (referring to LCI Petition at 6-7).

Notwithstanding LCI's self-serving statements, the evidence is clear that any delay in the development of local competition for residential customers — the problem that LCI claims to want to ameliorate — is not the product of ILEC intransigence but rather of delays in retail rate rebalancing and universal service reform.[16] It is also undeniable that while AT&T and MCI have pulled back from residential resale, they continue to be interested in local business services, for which the same access to the incumbents' networks is needed.[17] This confirms that CLECs' profit-maximizing business strategies, not any inability to obtain facilities or services from ILECs, are the limiting factor in local competition.

In any event, if there were substance to CLECs' arguments about a need for additional Commission action to open local markets (which there is not), the proper course would be

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[16]See Joel Klein, Assistant Attorney General, Antitrust Division, The Race For Local Competition: A Long Distance Run, Not a Sprint, at 13 (Nov. 5, 1997) (reprinted at <http://www.usdoj.gov/atr/speeches/1268.htm>) ("residential customers still will not get the full benefit of competition if we continue to rely on a system of implicit — as opposed to explicit — subsidies that make at least some of them unattractive to competitive carriers"). See generally BellSouth Comments at 10; SBC Comments at 6 (because universal service reform has not yet been realized, residential prices remain artificially low while prices for business customers and certain optional vertical services are kept high in order to subsidize residential basic local exchange service).

[17]See, e.g., Rebecca Cantwell, MCI Official Tells State to Eye Gorilla, Rocky Mountain News (Denver), Mar. 20, 1998, at 3B ("MCI has pulled back from plans to enter the local residential market by reselling service from U S West Communications, claiming it would lose too much money"); Leslie Gornstein, MCI, AT&T Foray Against PacBell Comes a Cropper, The Orange County Register, Mar. 8, 1998, at B03 ("Both AT&T and MCI have all but given up, saying they no longer are taking new local residential customers because the business is too expensive"); Interview with Tim Price, MCI's President and Chief Operating Officer on March 2, 1998, reprinted at <http://www.pathfinder.com/fortune/digitalwatch/0302tec1.html> ("If most of my revenue came from residential customers, I would do resale. But most of my revenue comes from business-to-business sales. Since the profits come earlier, we can invest to infrastructure").

enforcement of existing obligations under sections 251 and 252.[18] The Commission has already established a local competition enforcement task force "to ensure meaningful enforcement of the pro-competitive policies of the Telecommunications Act of 1996" and to "identify trouble spots and initiate enforcement actions to ensure open entry to local markets."[19] Once again, there is no need for the Commission to give further consideration to LCI's petition.

4. Whatever the reasons for CLECs' failure to compete for residential customers, there is no doubt that the "cure" proposed by most of the CLECs — effectively a second MFJ — would be far worse than the supposed "disease." The CLECs want a complete divestiture of the BOCs' retail operations, together with new line-of-business restrictions[20] or, at a minimum, a divestiture under which BOCs would be required to spin off their local loops.[21] The MFJ, however, provides no support whatsoever for the partitioning of local, intrastate operations by state regulators (and certainly not by this Commission)

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[18]See, e.g., 47 U.S.C. § 208(a) (authorizing any person "complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof" to file a complaint with the Commission); § 253(d) (Commission has authority to preempt the enforcement of any state or local statute or legal requirement that has the effect of prohibiting any entity from providing a telecommunications service); § 252(e)(5) (Commission has authority to preempt the jurisdiction of a State commission that fails to act to carry out its responsibilities under section 252).

[19]Press Release, FCC Creates Local Competition Enforcement Task Force (Jul. 15, 1997).

[20]MCI Comments at 18 (referring to the divestiture of AT&T in 1984 as "the first divestiture of the Bell System"); AT&T Comments at 7-8 (criticizing LCI's proposed separation requirements because they "do not sever the affiliation between the BOC's wholesale and retail operations"); CPI Comments at 8-9 (proposing the divestiture of either the retail services or the local telephone network).

[21]See Level 3 Comments at 16 (arguing that the Commission should "requir[e] LECs to divest their bottleneck loop facilities, including central office buildings"); WorldCom Comments at 2 (suggesting the separation of the BOC's "Loop Entity" from its "Retail/Switching Entity").

The MFJ was a voluntary consent decree, settling two federal lawsuits filed under the Sherman Act. As Judge Greene stated in approving the MFJ, "the Court's determination here is concerned solely with remedies . . . . A decree must 'break up or render impotent the monopoly power found to be in violation of the [Sherman] Act' . . ."[22] No comparable remedial purpose would justify the kind of restructuring proposed by LCI and the other CLECs, for there has been no proof in court of any antitrust wrongdoing. Moreover, even Judge Greene recognized that line-of-business restrictions were "directly anticompetitive" and could be justified "only if there is a substantial possibility that [the BOCs] will use monopoly power to impede competition in [an otherwise competitive] market."[23] No comparable finding has been — or could be — made to justify a divestiture of the Bell companies' retail businesses from their network facilities, particularly given the market-opening provisions of the 1996 Act. In fact, some CLECs themselves recognize that many incumbent LEC facilities are not even arguably "bottleneck" facilities in the first place.[24]

As BellSouth explained in its initial comments, the LCI proposal would have serious anticompetitive consequences that would not be offset by any public benefit.[25] Most significantly, LCI's proposal would deprive consumers of the benefits of having Bell companies compete in the

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[22]United States v. AT&T, 552 F. Supp. 131, 150 (D.D.C. 1982) (quoting United States v. Grinnell Corp., 384 U.S. 563, 577 (1966)), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

[23]Id. at 187.

[24]See RCN/Cleartel Comments at 8; Level 3 Comments at 7.

[25]BellSouth Comments at 7-12.

provision of integrated services.[26] As Ameritech has written, "[f]orced structural separation can reduce customer choice, degrade service, and create customer confusion."[27]

Far from disproving the record showings of competitive harm from forced separation, CLECs acknowledge that structural separation as contemplated by LCI could be harmful. For example, MCI recognized that the wholesale provider would have no incentive to improve its facilities.[28] ICG similarly explains that LCI's proposal would "fail[] to further the ultimate statutory goal of fostering true facilities-based competition."[29] According to the State Consumer Advocates, LCI's proposal is misguided because it could cause customer confusion, deny consumers the opportunity to buy local service from an integrated provider, possibly endanger universal service, and lead to little or no rate reductions for residential customers.[30]

5. The CLECs' utter inability to articulate any overall benefit from LCI's proposal highlights the real motive underlying the scheme: delaying genuine competition in interLATA markets. Here, LCI is not alone. The Ad Hoc Telecommunications Users, for instance, expressly

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[26]See SBC Comments at 8 ("the residence consumer would of course be denied the benefits of increased competition that would come about were the BOCs allowed to compete effectively").

[27]Opposition of Ameritech at 12. See also Campaign for Telecommunications Access Comments at 5 (criticizing LCI proposal because it would prohibit some opportunities for introducing advanced technologies; it would create further disincentives to bringing affordable and usable new technologies to people with disabilities and older adults; and it has the effect of being a "charade that would divert Commission and state commission resources from the work already going on to reconfigure the industry").

[28]MCI Comments at 12; see id. at 13 (warning that results of LCI's proposal "could be anticompetitive").

[29]ICG Comments at 5.

[30]State Advocates Comments at 4-5.

propose that the Commission deny section 271 applications just so that "RBOCs will have an incentive to restructure pursuant to the LCI 'fast track' proposal."[31] Apparently without intentional irony, CompTel similarly suggests a prolonged rulemaking to produce "fast track" procedures.[32] ICG, KMC Telecom, Level 3 Communications, and WorldCom also recommend a lengthy rulemaking that LCI itself acknowledges would delay competition "for several more years."[33]

CONCLUSION

The proposals of LCI and the other CLECs run directly counter to both the fundamental purpose of the 1996 Act — to open up all markets to competition as rapidly as possible[34] — and Congress's specific direction to expedite consideration of Bell company interLATA petitions and related matters under section 252.[35] LCI's petition should be dismissed quickly so that the Commission does not inadvertently give the CLECs what they have wanted all along — an indefinite delay in granting section 271 relief so that the CLECs alone will be able to provide integrated services and "one-stop" shopping to residential consumers.

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[31]Ad Hoc Users Comments at i.

[32]CompTel Comments at 17.

[33]See ICG Comments at 10; KMC Comments at 16; Level 3 Comments at 14; WorldCom Comments at 7; LCI Comments at 3.

[34]See S. Conf. Rep. 104-230, at 1 (1996) (purpose of the Act is "to provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition") (emphasis added).

[35]See, e.g., 47 U.S.C. § 271(d)(3) (requiring Commission to make its determination "[n]ot later than 90 days after receiving an application"); id. § 252(e)(4), (f)(3) (deadlines for state decisions).

Respectfully submitted,

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April 22, 1998

CERTIFICATE OF SERVICE

I, Holly R. Schroeder, hereby certify that on this 22nd day of April 1998, a true and correct copy of the REPLY COMMENTS OF BELLSOUTH CORPORATION was served on the following by hand (in the case of persons designated with an asterisk) or First Class mail.

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