

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

SEP 28 1998

FEDERAL COMMUNICATIONS COMMISSION
DEPT. OF THE RECORDS

In the Matter of

Application by BellSouth Corporation,
BellSouth Telecommunications, Inc., and
BellSouth Long Distance, Inc., for Provision
of In-Region, InterLATA Services in
Louisiana

CC Docket No. 98-121

To: The Commission

**BELLSOUTH'S OPPOSITION TO
MOTION OF AT&T CORP. TO STRIKE RESPONSIVE EVIDENCE**

AT&T's Motion to Strike (filed Sept. 17, 1998) rests on a fundamental misstatement of the Commission's rules governing section 271 proceedings. AT&T suggests that BellSouth was barred from filing any "post-application evidence" or legal argument because there is a blanket policy that BOCs may not "introduce new information at the reply comment phase." AT&T Motion at 1-2 & n.1. But AT&T's attempt to secure the last word in section 271 proceedings is nonsense. Consistent with nearly universal practice in administrative and court adjudication, the BOC applicant – as the party seeking relief – is entitled to respond to the claims of its opponents. In this proceeding, BellSouth properly exercised this basic procedural right.

The Commission has held that, in replying to comments on its section 271 application, a BOC may submit new evidence and/or legal argument that (1) is "directly responsive to arguments raised by parties commenting on its application" and (2) relates to a period of time prior to the filing of the comments to which the BOC's new material responds. Application of BellSouth Corp., et al. Pursuant to Section 271 of the Communications Act of 1934, as

No. of Copies rec'd
List A B C D E

574

Amended, To Provide In-Region, InterLATA Servs. in South Carolina, 12 FCC Rcd 539, 561

¶ 38 (1997). In other words, the BOC may counter opponents' evidence and argument with genuinely responsive material, but not with material that puts a new temporal period or entirely new questions at issue. As explained below, the evidence AT&T seeks to have stricken from the record falls well within these Commission guidelines.

I. BUSINESS RULES

AT&T would have this Commission strike BellSouth's showing that, whereas AT&T claimed it had not received certain business rules as of August 1998, those rules actually were provided on July 17. Compare BellSouth Reply Br. at 32 & Stacy OSS Reply Aff. ¶ 42 with AT&T's Bradbury Aff. ¶¶ 106-107. There could be no clearer example of how baseless AT&T's Motion is. According to AT&T, it may make false statements about events that occurred up to the date of its filing, and the BOC then is barred from correcting the record. This Commission has not established any such rule, nor would fundamental fairness or sound policy allow AT&T's one-sided approach.

II. OSS CAPABILITIES

AT&T further maintains that BellSouth could not inform this Commission either that AT&T began to use BellSouth's Access Daily Usage File ("ADUF") on July 24, 1998, or that BellSouth has completed a repair to its OSS ordering interfaces that AT&T suggested was not being undertaken. See BellSouth Reply Br. at 40, 67 (ADUF); BellSouth Reply Br. at 23 & Stacy OSS Reply Aff. ¶ 26 (ability to view customer service records for customers served by UNEs).

As for AT&T's use of ADUF since July, this fact pre-dates the filing of AT&T's comments and directly refutes AT&T's claims that BellSouth was (as of early August) "currently

incapable” of providing certain billing information. AT&T’s Hamman Aff. ¶ 13; see also id. ¶¶ 20-21 (withholding fact that AT&T was, at the date of AT&T’s filing, receiving ADUF data). Indeed, AT&T’s use of ADUF shows that AT&T affirmatively misled the Commission when it maintained, in its August 4 Comments, that BellSouth was not providing ADUF reports. AT&T Br. at 44-45. Far from moving to strike BellSouth’s responsive evidence, AT&T should be filing a correction to its own Comments.¹

Regarding the OSS interface repair, AT&T objects that BellSouth confirmed in its Reply Brief that CLECs are able to view, using the LENS, CGI, and EC-Lite interfaces, customer service records (“CSRs”) for end users served through UNEs. As AT&T itself made clear in opposing BellSouth’s Application, this capability is not “new.” Rather, the capability was designed into BellSouth’s interfaces. See AT&T’s Bradbury Aff. ¶¶ 142-143; see also Stacy OSS Aff. ¶ 64 (discussing capability of viewing CSRs). The issue raised by AT&T in early August was whether BellSouth was fixing a problem that had prevented AT&T from using the capability of viewing CSRs for end users served by UNEs. AT&T’s Bradbury Aff. ¶ 143; AT&T Br. at 38. In its reply filing, BellSouth addressed AT&T’s implication that BellSouth was not making timely corrective efforts with the best possible evidence: the fact that the fix sought by AT&T was not merely under development, but actually had been implemented. Stacy OSS Reply Aff. ¶ 26.

¹ AT&T’s request to strike the ADUF information from BellSouth’s Reply Brief is immaterial in any event, given that the same information was presented in the Reply Affidavit of David Scollard (at ¶ 2), which AT&T has not moved to strike.

III. PERFORMANCE DATA AND MEASUREMENTS

AT&T also tries to exclude from the record responsive data relating to performance measurements, which further confirm BellSouth's provision of facilities and services to CLECs on a nondiscriminatory basis.

A. OSS Flow-Through Data (BellSouth Reply Br. at 34; Stacy OSS Reply Aff. ¶¶ 62-64; Stacy Performance Reply Aff. ¶ 21 & Exs. 4a-4e, 5a-5b)

BellSouth's data about EDI and LENS flow-through responded directly to: (1) commenters' assertions that BellSouth should have provided additional or different flow-through data in its Application; (2) claims about the specific reasons why CLEC orders "fell out" of electronic interfaces for manual processing, the types of orders that fell out, and BellSouth's methodology for adjusting for CLEC errors; (3) representations about the error rates of particular CLECs, such as ITC DeltaCom; and (4) claims (made wholly without regard to the data in BellSouth's Application) about the flow-through capabilities of BellSouth's EDI interface as of August 1998. See ALTS Br. at 15-16; AT&T Br. at 4. 42-43; AT&T's Pfau/Dailey Aff. ¶¶ 73-76; AT&T's Bradbury Aff. ¶¶ 13, 20-21, 196; CompTel Br. at 6-9; DOJ Br. at 30-31 & nn.59 & 60; e.spire Br. at 30; MCI Br. at 48-49; MCI's Green Decl. ¶ 159; Sprint's Closz Aff. ¶¶ 47-49. BellSouth's data all relate to the period January 1998 to July 1998 – within the same period addressed by the commenters. Although BellSouth corrected errors in some data that had been provided with its Application, see Stacy OSS Reply Aff. ¶ 64, the corrections occurred as part of providing the responsive data.² Surely AT&T would not have BellSouth knowingly respond to commenters with incorrect data.

² The data originally provided with BellSouth's Application understated the percentage of orders that flow through, but nevertheless showed nondiscriminatory access for CLECs. See

B. Loop Cut-Over Data (BellSouth Reply Br. at 65; Milner Reply Aff. ¶ 19)

AT&T objects to submission of performance data regarding loop cut-overs during the period January 1998 through July 1998 (in one case) or January 1998 to August 1998 (in two other cases). As indicated in BellSouth's filing, this data directly rebutted Sprint's Closz Affidavit, at paragraph 52. In that affidavit, Sprint made misleading representations about BellSouth's provisioning of unbundled loops "today." By providing data covering (in some cases) a portion of August 1998 as well as prior months, BellSouth simply ensured that it addressed the same period of time about which Sprint had made its claims.

C. Costs and Burdens of Additional Performance Measures Proposed by CLECs (BellSouth Reply Br. at 87)

AT&T seeks to strike from BellSouth's Reply Brief a discussion showing the unreasonable burden of providing performance measures at the level of geographic and product disaggregation urged by AT&T and some other CLECs. E.g., AT&T's Pfau/Dailey Aff. ¶¶ 95-97 & Attach. 3; CompTel at 11-12; Hyperion Br. at 7-8; MCI Br. at 38-40; Sprint's Closz Aff. ¶¶ 36-39; WorldCom Br. at 12-14. AT&T's grounds for this portion of its motion are utterly unclear. Indeed, AT&T's motion is all the more inexplicable because AT&T does not seek to strike the information cited in BellSouth's Reply Brief, which is found in the Performance Reply Affidavit of William Stacy (at ¶ 4).

IV. DIRECT ACCESS TO CENTRAL OFFICES

AT&T's gamesmanship is further revealed in its request to strike legal argument regarding combining UNEs. See BellSouth Reply Br. at 56-58. AT&T suggests that although

BellSouth Br. at 26. Thus, BellSouth's corrections did not entail any substantive change to its Application.

BellSouth's Application correctly anticipated the arguments AT&T would make regarding UNE combinations, see BellSouth Br. at 40-41, BellSouth also should have responded in advance to the DOJ's back-handed support for a requirement of direct physical access to incumbent LECs' central offices. BellSouth could not possibly have foreseen that the DOJ would ignore the holdings of the Eighth Circuit and indirectly endorse an unlawful requirement of direct physical access to BellSouth's central offices as punishment for failing to combine UNEs on behalf of CLECs. See DOJ Br. at 14-15 & n.28 (arguing that direct access is appropriate because "BellSouth is itself responsible" for the requirement that CLECs combine UNEs). In its reply, BellSouth simply responded to this new, untenable DOJ position.³

AT&T's attempt to excise this portion of BellSouth's Reply Brief is all the more bizarre given that AT&T's own Comments, while not actually arguing for direct physical access, noted BellSouth's position that such access would be unlawful because (among other things) it would constitute an unauthorized taking of BOC property. AT&T Br. at 13 n.3. AT&T cannot credibly claim that it lacked "a fair opportunity to respond" to an issue that AT&T raised in its own Comments. AT&T Motion at 2.

V. RESALE OF CONTRACT SERVICE ARRANGEMENTS

AT&T also maintains that it was wrong for BellSouth to respond to arguments by AT&T and Sprint about the terms under which CLECs may resell contract service arrangements ("CSAs"). See BellSouth Reply Br. at 82-83 & Varner Reply Aff. ¶¶ 50-51 (responding to AT&T Br. at 71-73; AT&T's Augier Aff. ¶ 35; Sprint Br. at 40-42). AT&T does not dispute that BellSouth's submission was responsive, but only suggests that this response should have been

³ The argument to which AT&T objects also is found in BellSouth's Varner Reply Aff. (at ¶¶ 18-19), which AT&T has not moved to strike.

filed with BellSouth's Application. In fact, BellSouth's Application did anticipate and address the issue of reselling CSAs, including resale to customers that are not similarly situated. See BellSouth Br. at 62; Varner Aff. ¶¶ 202, 202(1), 202(4); SGAT § XIV(C), (C)(3) (appended to Varner Aff. as Ex. AJV-1). BellSouth further addressed AT&T's arguments about CSAs in a letter delivered to AT&T before AT&T filed its reply Letter from Victoria K. McHenry, BellSouth, to Stephen C. Garavito, AT&T, at 6 (July 31, 1998), attached to Ex Parte Letter from Kathleen B. Levitz, BellSouth, to Magalie Roman Salas, FCC, CC Dkt. No. 98-121 (filed Aug. 3, 1998). BellSouth thus more than fulfilled any obligation to anticipate the CSA issue. But see Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Servs. in Michigan, 12 FCC Rcd 20543, 20575, ¶ 57 (1997) (noting that a BOC is not required to "address every argument and allegation its opponents might make").

CONCLUSION

AT&T's Motion to Strike makes no sense in light of the Commission's procedures for section 271 filings. It makes perfect sense, however, as an effort by AT&T to prevent consideration of evidence that – as AT&T apparently recognizes – puts various misstatements by AT&T to rest. Nothing in this Commission's rules or decisions gives AT&T free rein to distort the facts.

Respectfully submitted,



MICHAEL K. KELLOGG
AUSTIN C. SCHLICK
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900
*Counsel for BellSouth Corporation,
BellSouth Telecommunications, Inc., and
BellSouth Long Distance, Inc.*

CHARLES R. MORGAN
WILLIAM B. BARFIELD
JIM O. LLEWELLYN
1155 Peachtree Street, N.E.
Atlanta, GA 30367
(404) 249-2051
DAVID G. FROLIO
1133 21st Street, N.W.
Washington, D.C. 20036
(202) 463-4182
Counsel for BellSouth Corporation

MARGARET H. GREENE
R. DOUGLAS LACKEY
STEPHEN M. KLIMACEK
675 W. Peachtree Street, N.E.
Suite 4300
Atlanta, GA 30375
(404) 335-0764
*Counsel for BellSouth Telecommunications,
Inc.*

JAMES G. HARRALSON
28 Perimeter Center East
Atlanta, GA 30346
(770) 352-3116
Counsel for BellSouth Long Distance, Inc.

September 28, 1998

CERTIFICATE OF SERVICE

I, David M. Burke, hereby certify that on this 28th day of September, 1998, I caused copies of BellSouth's Opposition to Motion of AT&T Corp. to Strike Responsive Evidence to be served via first-class United States mail upon all parties on the attached service list, except those parties designated with an asterisk, who will be served by hand.



David M. Burke

SERVICE LIST

FCC Docket No. 98-121

Federal Communications Commission	<ul style="list-style-type: none">* Magalie Salas (Original + 6 copies) Office of the Secretary Federal Communications Commission Room 222 1919 M Street, N.W. Washington, DC 20554* Janice Myles (5 copies) Policy and Program Planning Division Common Carrier Bureau Federal Communications Commission Room 544 1919 M Street, N.W. Washington, DC 20554
U.S. Department of Justice	Donald J. Russell (5 copies) U.S. Department of Justice Antitrust Division, City Center Building 1401 H Street, N.W., Suite 8000 Washington, DC 20530
Louisiana Public Service Commission	Lawrence St. Blanc Executive Secretary Louisiana Public Service Commission P.O. Box 91154 Baton Rouge, LA 70821
ITS	* ITS 1231 20th Street, N.W. Washington, DC 20036
Alliance for Public Technology	Jennings Bryant Donald Vial Alliance for Public Technology 901 15 th Street, N.W. Washington, DC 20005

American Council on Education;
National Association of College and
University Business Officers; and
Management Education Alliance

Sheldon Elliott Steinbach
Vice President & General Counsel
American Council on Education
One Dupont Circle, N.W.
Washington, DC 20036

Christine E. Larger
Director, Public Policy and
Management Programs
National Association of College and
University Business Officers
2501 M Street, N.W.
Washington, DC 20037

Francis J. Aguilar
Executive Director
Management Education Alliance
Cumnock 300
Boston, MA 02163

Ameritech

Kelly R. Welsh
John T. Lenahan
Gary L. Phillips
Ameritech
30 South Wacker Drive
Chicago, IL 60606

Theodore A. Livingston
John E. Muench
Dennis G. Friedman
Christian F. Binnig
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, IL 60603

Association for Local Telecommunications
Services

Richard J. Metzger
Emily M. Williams
Association for Local Telecommunications
Services
888 17th Street, N.W.
Washington, DC 20006

AT&T

Mark C. Rosenblum
Leonard J. Cali
Roy E. Hoffinger
Stephen C. Garavito
AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920

* David W. Carpenter
Mark E. Haddad
Joseph R. Guerra
Richard E. Young
Michael J. Hunseder
Sidley & Austin
1722 Eye Street, N.W.
Washington, DC 20006

Competition Policy Institute

Ronald Binz
Debra Berlyn
John Windhausen
Competition Policy Institute
1156 15th Street, N.W., Suite 310
Washington, DC 20005

Competitive Telecommunications Association

Genevieve Morelli
Executive V.P. and General Counsel
The Competitive Telecommunications
Association
1900 M Street, N.W.
Suite 800
Washington, DC 20036

Danny E. Adams
Steven A. Augustino
Melissa M. Smith
Kelley Drye & Warren LLP
1200 Nineteenth Street, N.W., Suite 500
Washington, DC 20036

Cox Communications, Inc.

Laura H. Phillips
J.G. Harrington
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, DC 20036

e.spire Communications

Riley M. Murphy
Executive Vice President
and General Counsel
James C. Falvey
Vice President - Regulatory Affairs
e.spire Communications, Inc.
131 National Business Parkway
Suite 100
Annapolis Junction, MD 20701

Brad E. Mutschelknaus
John J. Heitmann
Kelley Drye & Warren LLP
1200 Nineteenth Street, N.W.
Suite 500
Washington, DC 20036

Excel

James M. Smith
Vice President,
Law & Public Policy
Excel Telecommunications, Inc.
1133 Connecticut Avenue, N.W.
Suite 750
Washington, DC 20036

Dana Frix
Robert V. Zener
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007

Hyperion Telecommunications, Inc.

Janet S. Livengood, Esquire
Director of Regulatory Affairs
Hyperion Telecommunications, Inc.
DDI Plaza Two
500 Thomas Street
Suite 400
Bridgeville, PA 15017-2838

Dana Frix
Douglas G. Bonner
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Suite 300
Washington, DC 20007-5116

Intermedia Communications Inc.

Jonathan E. Canis
Enrico C. Soriano
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036

Keep America Connected!;
National Association of Commissions
for Women; National Hispanic Council
on Aging; and United Homeowners Assoc.

Angela Ledford
Keep America Connected
P.O. Box 27911
Washington, DC 20005

Camille Failla Murphy
National Association of Commissions
For Women
8630 Fenton Street
Silver Spring, MD 20901

Thomasa C. Rosales
National Hispanic Council on Aging
2713 Ontario Road, NW, Suite 200
Washington, DC 20009

Jordan Clark
United Homeowners Association
655 15th Street, NW, Suite 460
Washington, DC 20005

KMC

Mary C. Albert
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007

Robert E. Litan and Roger G. Noll

Robert E. Litan
The Brookings Institution
1775 Massachusetts Avenue, NW
Washington, DC 20036

Roger G. Noll
Professor of Economics
Stanford University
Stanford, CA 94305

MCI

Jerome L. Epstein
Marc A. Goldman
Paul W. Cobb, Jr.
Thomas D. Amrine
Jeffrey I. Ryen
Jenner & Block
601 Thirteenth Street, N.W.
12th Floor
Washington, D.C. 20005

Mary L. Brown
Keith L. Seat
Karen T. Reidy
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

OmniCall

Kim Robert Scovill, Esquire
Vice President-Regulatory Affairs
OmniCall, Inc.
430 Woodruff Road, Suite 450
Greenville, SC 29607

PCIA

Robert L. Hoggarth
Angela E. Giancarlo
The Paging and Messaging Alliance
of the Personal Communications
Industry Association
500 Montgomery Street, Suite 700
Alexandria, VA 22314-1561

Radiofone

Harold Mordkofsky
Susan J. Bahr
Blooston, Mordkofsky, Jackson
& Dickens
2120 L Street, NW, Suite 300
Washington, DC 20037

Sprint

Leon M. Kestenbaum
Vice President, Federal Regulatory Affairs
Sprint Communications Company L.P.
1850 M Street, NW
Washington, DC 20036

Philip L. Verveer
Sue D. Blumenfeld
Thomas Jones
Gunnar Halley
Jay Angelo
Sophie Keefer
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036-3384

State Communications

Hamilton E. Russell, III
Vice President-Regulatory Affairs
& General Counsel
State Communications, Inc.
200 North Main Street
Suite 303
Greenville, SC 29601

Dana Frix
Robert V. Zener
Swidler Berlin Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, DC 20007

Telecommunications Resellers Association

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006

Time Warner

Brian Conboy
Thomas Jones
A. Renee Callahan
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036

Triangle Coalition

Walter L. Purdy
Triangle Coalition for Science
and Technology Education
5112 Berwyn Road
College Park, MD 20740-4129

U S WEST Communications, Inc.

John L. Taylor
Suite 700
1020 19th Street, NW
Washington, DC 20036

WorldCom, Inc.

Catherine R. Sloan
Richard L. Fruchterman, III
Richard S. Whitt
WorldCom, Inc.
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036-3902

Andrew D. Lipman
Robert V. Zener
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116