Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of	)	
	)	
Joint Application by BellSouth Corporation,	)	
BellSouth Telecommunications Inc., and	)	
BellSouth Long Distance, Inc. for Provision	)	CC Docket No. 01-277
of In-Region, InterLATA Services	)	
In Georgia and Louisiana	)	
	)	

OPPOSITION COMMENTS OF KMC TELECOM, INC.

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SUMMARY

BellSouth has failed to demonstrate compliance with several sections of the competitive checklist and is preventing local competition in Georgia, Louisiana, and throughout its monopoly region. KMC and other CLECs continue to suffer from unsatisfactory performance in many significant checklist areas, including access to unbundled loops, 911 and E911 services, white page directory listings and number portability.

BellSouth fails to meet confirmed loop installation appointments in anything resembling a satisfactory manner, missing as many as 25-33% of its appointments for unbundled loops. Other loop problems include an apparent lack of facilities and inadequate hot cut procedures. Once loops are installed, outage problems begin immediately. While KMC suffers from numerous outages following loop installs and conversions, chronic outages are an even bigger concern. Repeated outages on the same circuit are commonplace.

BellSouth also fails to process the directory listing information for KMC's customers in an accurate, reliable and satisfactory manner, and does not maintain the 911 database entries for competing LECs with the same accuracy and reliability that it maintains the database entries for its own customers.

In addition to BellSouth's failure to comply with these specific checklist items, BellSouth has consistently engaged in anticompetitive and potentially unlawful behavior. This activity includes use of proprietary information for BellSouth's own "Winback" efforts, as well as false and misleading representations to KMC customers.

Due to BellSouth's clear lack of compliance with the competitive checklist and its anticompetitive and potentially unlawful business tactics, the Commission must deny BellSouth's application.

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OPPOSITION COMMENTS OF KMC TELECOM, INC.

KMC Telecom, Inc. ("KMC") by its attorneys, hereby submits these comments in opposition to the Joint Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., (collectively "BellSouth") for authority to provide in-region, interLATA services in the States of Georgia and Louisiana, pursuant to section 271 of the Communications Act of 1934, as amended.[1]

KMC is a facilities-based Competitive Local Exchange Carrier ("CLEC") competing in Georgia, Louisiana, and in many other states across the country. KMC and its affiliates are building high-speed, high-capacity advanced fiber optic networks to provide various services to business customers, including local and long distance voice and data services. KMC

[1] 47 U.S.C. §271. *See Comments Requested on the Application by BellSouth Corporation for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the States of Georgia and Louisiana*, Public Notice, CC Docket No. 01-277, DA 01-2286 (Oct. 2, 2001).

is currently providing service in eight of the nine BellSouth monopoly states, including Augusta and Savannah, Georgia, and Monroe, Shreveport and Baton Rouge, Louisiana.[2]

I. BELLSOUTH HAS NOT DEMONSTRATED COMPLIANCE WITH THE SECTION 271 COMPETITIVE CHECKLIST

BellSouth has failed to demonstrate compliance with several sections of the competitive checklist and is preventing local competition throughout its region.[3] KMC has suffered through numerous BellSouth obstacles in attempting to compete both in Georgia and Louisiana as well as six of the remaining BellSouth monopoly states.

KMC has endured unsatisfactory performance in many areas, relating to the following section 271(c)(2)(B) checklist items, specifically:

(iv) - access to unbundled loops (DS-0 and DS-1);

(vii) - access 911 and E911 services;

(viii) - white page directory listings; and

(xi) - number portability.[4]

In addition to BellSouth's failure to comply with all the competitive checklist items, BellSouth has consistently engaged in anticompetitive and potentially unlawful behavior. Such activities include using proprietary information obtained from KMC for the purpose of

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[2] Attached hereto as Attachment One is the affidavit of John D. McLaughlin, Jr., Director, State Government Affairs for KMC, and, as Attachment Two, affidavits from the following KMC City Directors as filed in the proceedings below: Chuck Weiss – Augusta, GA; Kathryn Johnson - Savannah, GA; Randy Braddock - Monroe, LA; Richard Demint - Shreveport, LA; and Gregory Chiasson - Baton Rouge, LA.

[3] 47 U.S.C. 271(c)(2)(B).

[4] In light of the commonality of issues, items iv. and xi., as well as items vii and viii will be addressed together herein.

BellSouth's own "Winback" efforts and making false and misleading statements to KMC customers.

Due to BellSouth's clear lack of compliance with the competitive checklist, as will be described herein, and anticompetitive and potentially unlawful business tactics, the Commission must deny BellSouth's application.

II. BELLSOUTH IS NOT PROVIDING ACCESS TO LOOPS AND SATISFACTORY NUMBER PORTABILITY IN ACCORDANCE WITH THE 271 CHECKLIST

The Commission has required that a Regional Bell Operating Company's ("RBOC's") loop performance afford a competitor a "meaningful opportunity to compete,"[5] and that number portability be accomplished "without impairment of quality, reliability, or convenience."[6] BellSouth's loop performance certainly fails these standards in both Georgia and Louisiana. BellSouth's substandard performance includes missed installation appointments, botched hot cuts, and wholly inadequate maintenance and repair. The problems KMC experiences relate to both DS1 and DS0 circuits, and affords KMC little opportunity to compete.

A. BellSouth Frequently Misses Firm Appointments for Loop Hot Cuts.

BellSouth's performance in meeting confirmed installation appointments is abysmal. BellSouth's own most recent data indicates that it missed ***over one-fourth*** of the basic two-wire analog loop installs for KMC in Georgia during August, 2001, a decline of 10% as compared to its June performance.[7] As bad as that performance is, BellSouth's Georgia performance on other installs is both poor and erratic. BellSouth missed 7.7% of the DS-1 orders

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[5] *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3952, 4098, para. 279 (1999) ("*New York 271 Order*").

[6] *Id.* at para. 367, *citing* 47 U.S.C. § 153(30).

[7] Affidavit of John D. McLaughlin, Jr., attached hereto as Attachment One. (*McLaughlin Affidavit)*

and 11% of the "UNE Other Design installs" in August, after missing 33% of the DS-1 installs, 19% of the two-wire loops with LNP Design installs and 25% of the Digital loops < DS-1 and ISDN loop installs in June.[8] Such extremely poor and inconsistent performance makes it quite difficult to compete on a UNE-loop basis. In fact, during the period July, 2000, through April, 2001, BellSouth missed 23% of all UNE appointments it had confirmed for KMC in Georgia.[9]

Unfortunately, BellSouth's horrible performance is not limited to Georgia. In Louisiana, BellSouth missed 41% of the DS-1 installs for KMC in June, 25% of the basic two-wire analog loop installs in July, 2001, and 28% of the DS-1 installs in August. Like Georgia, BellSouth Louisiana missed 11% of the "UNE Other Design" installs in August, and 27% of the two-wire loops with LNP Design. BellSouth's Louisiana performance was even worse than BellSouth Georgia's performance during the period October, 2000, through April 2001, missing 33% of all UNE appointments it confirmed with KMC.[10]

Remarkably, BellSouth seeks to defend this unacceptable performance by stating that it missed less installation appointments for CLECs than its retail customers.[11] The fact that BellSouth's performance is even worse for retail customers should result in an inquiry into its retail operations, and certainly provides no basis upon which to grant a 271 application. For parity to be used as an appropriate benchmark, there must be at least some semblance of adequate retail performance. Barring such performance, an absolute standard must be used to supplement or replace the parity measure.

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8 *Id.*

9 *Id.*

10 *Id.*

11 *Joint Application of BellSouth Corporation, et. Al. For Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Application, 104 (filed Oct. 2, 2001).

One component of this poor installation performance, and a source of significant delay when customers attempt to switch to KMC, is the apparent lack of available facilities.[12] In such cases, BellSouth will designate the order as "held, pending facility." The problem with this designation is threefold. First, there is the delay in switching the customer to KMC. Second, there is the manner in which BellSouth confirms that facilities do or do no exist. Finally, there are serious questions about the veracity of the claims that facilities are unavailable.

Obviously, the first problem is the one that results in the customer switch being delayed. This can cause a dissatisfied customer, and results in lost revenue to the CLEC. The manner in which BellSouth fails to verify the existence of facilities should be of even greater concern to the Commission. The procedures that BellSouth has in place are simply insufficient to provide an accurate and reliable order confirmation since they fail to verify the existence of adequate facilities at the appropriate time. Upon receipt of a CLEC order, BellSouth will conduct a cursory check of its records, confirm the order and ***then,*** just prior to the install, verify that the necessary facilities exist. In many instances, BellSouth records will indicate that a satisfactory circuit exists, only to be proven incorrect when the time comes to turn up that circuit. This leads to a delayed install and provides inadequate notice to both the CLEC and the end user that the change in service providers will not take place as scheduled.

In still other cases, BellSouth has indicated that no facilities were available when in fact KMC discovered that there were.[13] In one particular case, facilities were "found" only after the customer, facing a delay in service, contacted BellSouth.[14] Fortunately for KMC, the

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[12] *See, for example,* Attachment Two: Braddock Affidavit at para. 3; Demint Affidavit at para. 2 and Chiasson Affidavit at para. 1.

[13] *See, for example,* Attachment Two: Braddock Affidavit at para. 3.

[14] Attachment Two: Braddock Affidavit at para. 3; Demint Affidavit at para. 2.

customer stuck with his decision to switch; there are likely, however, many instances in which a customer has decided to stay with BellSouth after an install was delayed for pending facilities. The evidence in Georgia and Louisiana illustrates that BellSouth is not acting in a non-discriminatory manner when it comes to putting orders in pending facility status.

On occasions when it becomes necessary to postpone a loop hot cut, BellSouth frequently fails to follow proper coordination procedures to ensure that the customer to be switched does not lose service. Unfortunately, the BellSouth loop provisioning process involves both a "D" (disconnect) order and an "N" (re-connect) order. Therefore, in the event a loop hot cut is postponed, it is imperative that both the D and N orders are postponed. However, BellSouth frequently proceeds with the "disconnect" order nonetheless, without contacting KMC for coordination (prior to working the order, BellSouth should contact KMC to ensure that both parties are prepared to proceed). Since the corresponding "re-connect" order has been postponed, the customer is left with either limited or no service. Until BellSouth moves to a single ("C") order, competition will be seriously impaired and BellSouth cannot meet the checklist.

While the BellSouth hot cut coordination process is not good, it is made worse when technicians do not follow prescribed procedures – procedures that are critical when a live customer is being converted. As the Commission is aware, Bell Atlantic-NY had similar loop hot cut problems, that were uncovered during the review of its checklist performance. After New York Commission staff, CLECs and Bell Atlantic agreed on a uniform hot cut process, it was learned that the central office technicians were still simply ignoring the process and doing as they wished. To its credit, Bell Atlantic at least acknowledged the problem and found ways to create the proper incentives for its technicians to follow the process.

In testimony before the state commissions during their reviews of §271 compliance, BellSouth admitted that it had not investigated whether its technicians were following the prescribed procedures and therefore had no way of knowing whether they are, that compliance may vary by region and can affect new installs, hot cuts and repair performance, and that BellSouth is not even aware of the corrective measures undertaken by fellow RBOCs to ensure compliance with checklist Item Four.[15] The difference of opinion between BellSouth's view of checklist compliance and that of KMC and its City Directors appears to be due to the fact that BellSouth is viewing it's performance in terms of what the BellSouth technicians ***should*** be doing, while the KMC City Directors are testifying as to what those technicians are ***actually*** doing. Unfortunately for BellSouth, it cannot claim checklist compliance while admitting ignorance of relevant facts.

BellSouth claims that its local number portability performance measurements do not include a calculation for disconnect timeliness because, "…that measure does not does not reflect the actual customer experience."[16] This is clearly not the case, as hot cut timeliness is essential as competitors attempt to compete with BellSouth via the UNE-loop. BellSouth is not even in a position to dispute the evidence presented by competitors, since it acknowledges that its own number portability measures are useless.[17] The end result is that even when BellSouth completes the physical hot cut, it fails to complete the requisite translation work in its switches for roughly one in five KMC orders. As a result, new KMC customers cannot receive incoming

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[15] *See, e.g.*, cross examination of BellSouth witnesses Ainsworth and Heartley before the South Carolina Public Service Commission, July, 2001, Docket 2001-209-C

[16] *Joint Application of BellSouth Corporation, et. Al. For Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Application, 136 (filed Oct. 2, 2001).

[17] *See, e.g.*, testimony and cross examination of BellSouth witnesses Varner before the South Carolina Public Service Commission, August, 2001, Docket 2001-209-C.

calls for up to twenty-four hours, depending on whether BellSouth failed to port some or all of the lines.[18]

B. Installation and Chronic Outage Problems Plague BellSouth's Loops.

When BellSouth finally provides UNE loops, outage problems begin. The BellSouth loop outages are so endemic as to prevent UNE-loop competition.[19] Within 30 days of BellSouth turning up loops for KMC in Georgia, 11% of the analog loops, 8.3% of the analog loops with LNP and 7% of the DS-1 loops failed in August. Prior to that, 9.5% of the analog loops with LNP and 25% of the digital loops < DS-1 failed in July, while 25% of the DS-1 and higher loops failed in June. KMC experiences very similar outage problems in Louisiana. In June, 2001, 15.4% of the two-wire analog loops with LNP, 14% of DS-1 loops and 19% of Digital loops < DS-1 failed within 30 days of being installed.

While outages following loop installs and conversions are a serious problem, chronic outages are an even bigger concern. BellSouth's own reported performance numbers indicate that over ***two-thirds*** of KMC's DS-1 loops in Georgia that suffered a trouble in August had a prior trouble, while 42% of KMC's DS-1 loops with trouble in Louisiana in August had a prior trouble. In fact, ***three-fourths*** of the Georgia DS-1 circuits in July suffered from that same problem, while nearly half of KMC's DS-1 loops suffered from a prior trouble in Louisiana. Unfortunately, this is not a recent crisis. For the ten month period July, 2000, through April, 2001, the number of trouble reports on KMC circuits in Georgia that had a trouble in the

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[18] Attachment Two: Braddock Affidavit, para. 6, Weiss Affidavit, para. 9.

[19] KMC believes that its outage problems may be more severe than the CLEC aggregate numbers reveal since it generally competes in the Tier III cities that most other companies ignore. While these cities are apparently also ignored by the BellSouth capital expenditure planners, they are an important component of the Commission's goals of widespread competition and broadband deployment.

preceding 30 days averaged almost 20%.[20] In Louisiana, almost one out of every five troubles on KMC UNE circuits during the seven month period from October, 2000, through April, 2001 were on lines with a prior problem.[21]

In light of this extremely troublesome performance, combined with the fact that BellSouth's own retail numbers are much better, BellSouth cannot claim to be in compliance with the checklist standards for loops. In approving the Bell Atlantic-NY application, for example, the Commission stated that:

> performance data on the rate of repeat trouble reports indicates that Bell Atlantic repairs trouble for competitors at the same level of quality that it provides to itself, or better. Consistently from June through September 1999, for both resale and unbundled network elements, a lower percentage of competitors' customers reported repeat trouble within 30 days than Bell Atlantic's retail customers.[22]

As a result of the chronic troubles, several KMC City Directors in have mandated, as standard procedure, the installation of several DS-0 back up circuits for each BellSouth DS-1,

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[20] These KMC-specific numbers are generally consistent with the equally horrifying CLEC aggregate numbers reported by BellSouth. For April, 2001, for example, BellSouth reported the following repeat trouble report percentages: twenty-two percent (22%) for business lines, forty-eight percent (48%) for Design, twenty-four percent (24%) for UNE Design, seventeen percent (17%) for UNE Non-Design and twenty-three (23%) for Local Trunks. *Performance Measurements for Telecommunications Interconnection, Unbundling and Resal*e, BellSouth Monthly SQM Performance Report, Docket 7892-U (Apr. 2001).

[21] During that period, BellSouth reported the following repeat trouble report percentages for DS-1 circuits: April twenty-nine percent (29%), March thirty-three percent (33%), February thirty-six percent (36%), January twenty-nine percent (29%), December twenty-four percent (24%), November thirty-three percent (33%), October thirty-two percent (32%). Source: BellSouth PMAP Website (http://pmap.bellsouth.com).

[22] *New York 271 Order*, at para. 224. The FCC stated that, "[I]n order to compete effectively in the local exchange market, competing carriers must be able to access maintenance and repair functions in a manner that enables them to provide service to their customers at a level of quality that matches the quality of service that Bell Atlantic provides its own customers." *Id.* at para. 222, *citing Application of BellSouth Corporation for Provision of In-Region, Inter-LATA Services in Louisiana*, 13 FCC Rcd 20599, 20694 (1998) ("*Second BellSouth Louisiana Order"*).

so that KMC customers are not completely out of service when the BellSouth DS-1 goes down.[23] These back up circuits, of course, are installed at KMC's own expense.

C. BellSouth Fails to Properly Disconnect Loops.

Finally, BellSouth fails to properly disconnect loops when requested by KMC. [24] In most instances, BellSouth takes weeks to accomplish the actual disconnect, and release the facility for re-use by KMC or others. KMC estimates that, in Georgia, between twenty percent (20%) and thirty percent (30%) of the facilities underlying loop disconnect orders remain unavailable thirty (30) days later.[25]

In Louisiana, BellSouth's failure to disconnect loops properly has led to working disconnect orders prematurely, resulting in customer outages, as well as failing to work disconnect orders (sometimes for weeks) so as to release facilities for re-use by KMC or others.[26]

In sum, BellSouth's loop performance simply does not afford competitors a "meaningful opportunity to compete," as required by the Commission. [27]

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[23] Attachment One: McLaughlin Affidavit.

[24] Attachment Two: Braddock Affidavit, para. 9; Demint Affidavit, para. 4; Chiasson Affidavit, para. 3.

[25] Attachment Two: Weiss Affidavit, para. 11.

[26] Attachment Two: Chaisson Affidavit, para. 4; Braddock Affidavit, para. 5.

[27] *See, e.g., New York 271 Order* at para. 279, and *Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant To Section 271 Of The Telecommunications Act Of 1996 To Provide In-Region, InterLATA Services In Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, para. 251 (2000).

III. BELLSOUTH FAILS TO PROVIDE WHITE PAGE DIRECTORY LISTINGS AND ACCESS TO 911 AND E911 SERVICES IN ACCORDANCE WITH THE 271 COMPETITIVE CHECKLIST

BellSouth has failed to process the directory listing information for KMC's customers in an accurate, reliable and satisfactory manner, despite the fact that KMC submits that information in accordance with BellSouth's procedures, and routinely fails to provide KMC with adequate time in which to review directory listing proofs. The Commission has required that RBOCs provide white page listings "with the same accuracy and reliability that it provides its own customers."[28] Furthermore, BellSouth fails to provide access to 911 and E911 service even though the Commission requires that RBOCs, "must maintain the 911 database entries for competing LECs with the same accuracy and reliability that it maintains the database entries for its own customers."[29]

A. BellSouth Fails to Process KMC Customer Directory Listing Information Accurately in Accordance with the Competitive Checklist.

BellSouth does not process KMC's customer directory information correctly, if at all. Just several months ago, for example, BellSouth Georgia lost all KMC directory listing information submitted by KMC's Augusta office for the prior year, including both new and changed listings. Since BellSouth failed to provide adequate time to enable KMC to review the directory listing proofs, the problem did not become apparent until two weeks prior to the directory closing. As a result, KMC had only two weeks to manually write up listings for

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[28] *Second BellSouth Louisiana Order* at page 20747.

[29] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd, 20543, 20679 (1999).

approximately three hundred fifty (350) KMC customers, including emergency and non-emergency listings for the local county government.[30]

Similarly, in October of 2000, BellSouth changed its procedure for submission of directory listings without adequate notice to KMC. KMC's Savannah office was therefore forced to re-enter all directory listings, necessitating the assignment of three full-time personnel for an entire month.[31] Finally, adding insult to injury, BellSouth printed an incorrect number for KMC Telecom in the most recent BellSouth white pages in Savannah, Georgia.[32] Ironically, the number that BellSouth printed was assigned to a back-up DS-0 line that KMC maintained to compensate for outages in the BellSouth-supplied DS-1.

Since BellSouth asserts that it uses the same entry system region-wide, it is not surprising that KMC has experienced similar problems in Louisiana. There, BellSouth incorrectly listed a large block of numbers for a medical center in the Shreveport directory.[33] After much discussion with BellSouth regarding the problem and the impact of such problems on the customer, BellSouth – quite remarkably - again listed the numbers incorrectly for that same customer, this time listing both the incorrect numbers published the year before as well as the correct numbers.

BellSouth is simply not in compliance with this checklist item. BellSouth witness W. Keith Milner has testified that "because methods and procedures have been in place to allow other carriers access to BellSouth's white pages listing capabilities for many years, the necessary

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30 Attachment One: McLaughlin Affidavit; Attachment Two: Weiss Affidavit at para. 13.

31 Attachment Two: Johnson Affidavit at para. 6.

32 Attachment One: McLaughlin affidavit at para. 14.

33 Attachment Two: Demint Affidavit at para. 5.

methods and procedures pursuant to which CLECs may obtain such listings are business as usual for BellSouth.[34] However, at the Louisiana LEC Collaboratives, BellSouth admitted having problems with its quality control methods for CLEC directory listings.[35] If this is "business as usual" for BellSouth's treatment of CLECs, then its claim of checklist compliance cannot be supported. Absent proof that BellSouth has treated its own retail customer listings with such neglect, the Commission must find that BellSouth has failed to provide white page listings to competitors in accordance with the Act and Commission standards.[36]

B. BellSouth Fails to Provide Access To 911 and E911 Services in Accordance with Checklist Item vii.

Access to emergency services is not something that should be impaired by competition. Unfortunately, KMC's experience with the lack of access to accurate E911 services from BellSouth in Louisiana is very disturbing.[37] In one particular case, a KMC-served medical facility called 911 for emergency assistance, only to find that the name of the medical facility was not shown on the 911 technician's screen and that its address was shown incorrectly. In this instance, the location of the emergency was fortunately discussed by the caller and the 911 technician before any emergency vehicles were dispatched.

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[34] *See, Consideration and Review of BellSouth Telecommunications, Inc.'s Preapplication Compliance with Section 271 of the Telecommunications Act of 1996,* Affidavit of W. Keith Milner on behalf of BellSouth Telecommunications, Inc, 65-66 (Apr. 20, 2001).

[35] LPSC Local Exchange Company Collaboratives Regarding the Provision of Telecommunications Services in Louisiana (May 16, 2001).

[36] *See, e.g.,* 47 U.S.C. §251(b)(3); *New York 271 Order* at para. 359.

[37] Attachment Two: Demint Affidavit, para. 6.

KMC, of course, raised this issue in the collaborative meetings held by the Louisiana Commission.[38] During the collaborative, BellSouth acknowledged a database problem relating to its provision of 911 services for CLECs and pledged to work with KMC toward a solution. BellSouth, however, has thus far failed to demonstrate that it provides nondiscriminatory access to E911 services to CLECs in Louisiana. This is far too important an issue for the Commission to gloss over.

It appears that BellSouth's problems in processing KMC customer information may relate to a global translation problem. In Louisiana, KMC customers have also experienced problems relating to the accuracy of Caller ID. In some instances, the incorrect caller identification number is being displayed on the handset of the person being called by the KMC customer. For example, in one case the KMC NXX was being reflected as a call from New York, New York.[39] In other cases, no caller identification name or number is displayed on the handset of the person being called. In the LEC Collaboratives,[40] BellSouth acknowledged a "translation" problem and that also affected other CLECs, but has apparently not resolved the issue.

Whatever the cause of BellSouth's problems in processing directory listings and providing emergency services may be, the Commission must require that it be resolved prior to any finding that BellSouth has complied with these important but often overlooked checklist items.

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[38] LPSC Local Exchange Company Collaboratives Regarding the Provision of Telecommunications Services in Louisiana, KMC Telecom, Inc.'s Comments Regarding Collaborative Issues, at 10 (dated May 16, 2001).

[39] Affidavit of Richard S. Demint, para. 7; Affidavit of Randy Braddock, para. 8.

[40] LPSC Local Exchange Company Collaboratives Regarding the Provision of Telecommunications Services in Louisiana (May 16, 2001).

IV. BELLSOUTH IS ENGAGING IN ANTI-COMPETITIVE AND POTENTIALLY UNLAWFUL ACTIVITY

In addition to BellSouth's failure to comply with the competitive checklist items noted above, it has also engaged in numerous anticompetitive and potentially unlawful activities to prevent KMC and others from competing in its monopoly territory. Such activities include using proprietary information obtained from KMC for the purpose of BellSouth's own Winback efforts, engaging in misrepresentations, and preventing KMC from serving customers that desire DSL service.[41]

A. BellSouth's Anti-Competitive "WinBack" Activities.

BellSouth has filed "WinBack" tariffs in many of its monopoly states, including Georgia and Louisiana. Under this tariff, BellSouth makes discounts available only to CLEC customers and not to BellSouth's own customers. While the tariff is styled as a promotion, with an offering period of ninety days, BellSouth requires that customers sign an often multi-year contract, during which term the discount would apply. Obviously, the intent is to prevent CLECs from gaining market share and to prevent competition by tying up the customer with a long-term agreement. Although the offering of such discounts could make the returning customer less profitable or even unprofitable for BellSouth, CLECs are driven out of the market and BellSouth is able to maintain market share and rely on the profits from the rest of its customer base – that would not be eligible for the discounts.

While BellSouth has apparently suspended some Winback activities in the midst of allegations regarding BellSouth's tactics, and several Commissions have initiated

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[41] Since this is a more recently developing issue, KMC plans to investigate this further and address it subsequent to the filing of these comments.

investigations, this issue is simply too large to be left unresolved while BellSouth is permitted to obtain more market power via interLATA entry.

KMC has been the target of BellSouth's questionable tactics, including instances in Georgia and Louisiana. As part of its Winback program, BellSouth sends sales representatives to customers who have decided to switch to KMC, enticing them with the discounts mentioned above.

Most significantly, BellSouth is apparently using proprietary information obtained from KMC through the BellSouth wholesale unit for the benefit of its own retail units.[42] Following almost immediately the submission by KMC of orders to switch end user customers, BellSouth has dispatched member of its Winback team. BellSouth's reaction is simply too instantaneous. KMC customers report that, after not hearing from BellSouth for years, they suddenly receive a call and/or visit right after making the decision to switch to KMC – before the switch is actually made.

BellSouth admits that it and its agents engaged in some improper activity.[43] What is not clear, however, is whether BellSouth has undertaken all appropriate steps to prevent such activity. In testimony before the South Carolina Commission, for example, BellSouth witness Ruscilli testified that at least one BellSouth employee was found to have accessed confidential information for improper Winback use.[44] Mr. Ruscilli, however, stated that a decision on what action to take against that employee had yet to be made – five or six months following the

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[42] Attachment Two: Demint Affidavit, para. 9. Such use would obviously violate §222 of the Communications Act, as amended, 47 U.S.C. §222.

[43] *See, for example,* Testimony of BellSouth witness Ruscilli before the South Carolina Public Service Commission, July, 2001, Docket 2001-209-C, and Exhibit JAR-17.

[44] Testimony of BellSouth witness Ruscilli before the South Carolina Public Service Commission, July, 2001, Docket 2001-209-C.

discovery of that serious breach![45] The Commission must certainly decline to endorse any interLATA bid while BellSouth continues to engage in such improper and potentially unlawful activities.

B. Misleading Statements Made by BellSouth Employees and Agents.

KMC customers have reported many instances in which misleading statements have been made by BellSouth salespersons. These tactics include statements such as "KMC is simply a reseller" and inferences that "KMC is going bankrupt" like many other CLECs.[46] KMC has unfortunately lost customers due to these practices. Some customers, however, have contacted KMC regarding BellSouth's representations. This has allowed KMC to become aware of these practices and raise them both with BellSouth and with the regulators. This is yet another barrier to competition, courtesy of BellSouth.

BellSouth's misleading and deceptive practice should not be tolerated and the Commission cannot grant's BellSouth's application in light of its clearly anticompetitive and potentially unlawful practices.

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45 *Id.*

46 Attachment Two: Chiasson Affidavit, para. 5.

V. CONCLUSION

For the foregoing reasons, KMC respectfully requests that the Commission find that BellSouth has not complied with section 271 and deny the application.

Respectfully submitted,

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