

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

In the Matter of)
)
Applications by BellSouth Corporation *et al.*) CC Docket No. 01-277
for Authorization to Provide In-Region,)
InterLATA Services in Georgia and Louisiana)

MOTION TO STRIKE OF COVAD COMMUNICATIONS COMPANY

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On November 30, 2001, BellSouth Corporation (BellSouth) filed an *ex parte* letter and supporting documentation with the Commission in the above-referenced docket. The entirety of BellSouth's *ex parte* presentation to the Commission is late-filed evidence in violation of the Commission's procedural orders. Covad Communications Company (Covad), by its attorney, hereby respectfully moves to strike BellSouth's November 30 *ex parte* letter and all of its attachments. In the alternative, should the Commission deny this motion and thus continue its tradition of permitting Bell Operating Company (BOC) long distance applicants to ignore the late-filed evidence rules, Covad highlights those factual materials that BellSouth deliberately omitted from its submission. Although Covad would prefer that the Commission adhere to its rules, it is equally important that the Commission be aware of the misleading nature of BellSouth's submission.

I. BellSouth violated the Commission's long-established procedural rules by submitting late-filed evidence, and that evidence must be stricken from the record in this proceeding.

The Commission has long required BOC long distance applicants to include in its initial application all of the factual material to support its contention that it is in compliance with the competitive checklist of section 271 of the Act. Specifically, the Commission requires that "a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings."¹ The simple reason for this requirement, as the Commission has

¹ See "Updated Filing Requirements For Bell Operating Company Applications Under Section 271 Of The Communications Act," FCC Public Notice, rel. Mar. 23, 2001, at 3-4.

repeatedly stated, is that it would be otherwise “highly disruptive to our processes to have a record that is constantly evolving.”²

In order to meet its burden of proof, an applicant may submit new evidence after the initial filing “solely to rebut arguments made or facts submitted by other commenters.”³ The Commission does not, however, permit BOCs to introduce such evidence *ad infinitum*, but rather requires that such new evidence “may cover only the period placed in dispute by commenters, and thus should not relate to performance after the filing of comments by third parties (*i.e.*, generally the 20th day of the proceeding).”⁴

BellSouth made a tactical error in filing its applications for Louisiana and Georgia. BellSouth hoped that the Commission would ignore the ongoing OSS test in Florida, and thus not recognize the myriad problems with BellSouth’s OSS revealed in that thorough test. At the same time, BellSouth knew that if it did not have its “anchor state” application approved by the Commission before the results of the Florida OSS test came to the Commission’s attention, BellSouth would have to actually fix its defective OSS before the Commission would approve a BellSouth long distance application. If, on the other hand, BellSouth slid an application through before the Florida OSS test results came before this Commission, BellSouth would be able to point to the Georgia OSS test as evidence of its compliance with the competitive checklist. It is tautological to say that the Florida test is more comprehensive, because it is finding dozens of defects with

² *Id.* at 4.

³ *Id.*

⁴ *Id.* at 4, citing *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*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3968-69, paras. 34-37 (1999) (*Bell Atlantic New York Order*); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, at para. 51 (1997) (*Ameritech Michigan Order*).

BellSouth's region-wide OSS that did not come to light in the Georgia test. Thus, BellSouth knows that the Florida test is a problem for its OSS checklist compliance.

BellSouth's initial solution was to ignore the issue and hope no one brought it up. Despite BellSouth's best efforts to squelch competitive dissent⁵, the issue did come up. Covad submitted a list of the open observations and exceptions in Florida, all of which highlight the serious and competitively harmful flaws that pervade BellSouth's OSS. Although BellSouth made a weak effort to rebut those factual assertions in its reply comments, it was not until its November 30, 2001 *ex parte* submission that BellSouth undertook to fully address the Florida OSS test. Covad can only surmise that BellSouth felt compelled to finally make this factual showing because it feared that the Commission was actually paying attention to the Florida test and the concomitant flaws with the Georgia test that Florida reveals. Unfortunately for BellSouth, its decision to finally address the merits of the factual opposition to its applications comes with less than 30 days left in the 90 day consideration of those applications.

The Commission's procedural rules provide that "an applicant may submit new factual evidence in its reply if the sole purpose of that evidence is to rebut arguments made, or facts submitted, by commenters, provided the evidence covers only the period placed in dispute by commenters and in no event post-dates the filing of the relevant comments."⁶ BellSouth made no such effort in its reply comments, choosing to wait to make such a submission until weeks after reply comments were due. BellSouth's November 30, 2001, *ex parte* purports to simply update the Commission on the status of the Florida OSS test as of November 29, 2001. In reality, BellSouth makes substantial

⁵ For example, the comments of New South before the FCC are a remarkable about-face from its comments before the state commissions in the exact same proceedings.

legal and factual arguments related to changes to its OSS it has purportedly made in response to KPMG's findings in Florida – changes made as recently as last week.

BellSouth's *ex parte* is nothing less than a full-blown brief, a sort of super-reply comments, offering dozens of pages of substantive arguments and timed so as to deny competitors a full and fair opportunity to respond.

For example, to respond to CLEC complaints in this proceeding (and the Florida OSS test finding) that BellSouth does not accurately process orders that are faxed, BellSouth asserts in its *ex parte* that “[t]o resolve this issue, BellSouth will implement a process in the LCSC whereby any fax failures will be flagged to the attention of an LCSC Manager for investigation on November 30, 2001.”⁷ In response to CLEC complaints that orders are processed incorrectly by BellSouth (and the same Florida OSS test finding, exception 116), BellSouth now claims that it “has investigated and found that the unexpected responses resulted from employee errors. Additional training was provided on these issues, and BellSouth updated the LCSC work instructions to address the issue.” These late BellSouth solutions are untested, unverified, unreliable, and untimely.

As to other late-filed claims, BellSouth is simply misleading or wrong. For example, as to Exception 107, which reports KPMG's finding that BellSouth did not properly process electronically submitted LSRs, BellSouth claims that “BellSouth expects KPMG to **close** this exception.”⁸ Does that mean it is closed? No. KPMG reports the status of the exception as open, and it remains open. BellSouth's expectations hardly merit consideration. As to the lack of electronic ordering capability for IDSL loops, BellSouth contends that it “believes it could implement Phase 1 by

⁶ See *FCC March 23, 2001, Public Notice* at 8.

⁷ BellSouth *ex parte* Outline at 13.

February 2, 2002 and Phase 2 by the end of September 2002.” It is likely BellSouth’s hope that the Commission will mistake BellSouth’s “belief” for a commitment to actually provide electronic ordering capability. BellSouth has made no such commitment.

In sum, the late-filed evidence contained in BellSouth’s November 30, 2001 *ex parte* should be stricken from the record in this proceeding. BellSouth had a full and fair opportunity to present factual and legal arguments explaining how the Florida OSS test’s findings are not relevant to the instant proceeding, or do not demonstrate lack of OSS checklist compliance. Rather than doing so, BellSouth chose to avoid the issue and file a last minute comprehensive evidentiary package timed in a manner to all but preclude competitive analysis of the complex data and arguments presented therein. If there was ever a clear example of exactly the type of BOC applicant behavior the Commission has sought to prevent through its procedural rules, this is it. Covad’s Motion to Strike BellSouth’s November 30, 2001, *ex parte* letter, and all associated attachments, should be granted.

II. Even if the Commission denies this Motion, it cannot rely on BellSouth’s representations as the definitive version of the status of the Florida OSS test.

The Commission should strike BellSouth’s November 30, 2001 *ex parte* submission as untimely. Even if the Commission does so, however, it should take steps to ensure it is not tainted by the representations BellSouth has made concerning the Florida OSS test. Specifically, BellSouth would have the Commission believe that only a few minor issues remain to be resolved, and that the KPMG findings in Florida are not that different from the findings in Georgia. BellSouth must have assumed no one would bother to look at the publicly available records that document the actual status of the

⁸ BellSouth Nov. 30, 2001, *ex parte* Outline at 14.

Florida OSS test. The Commission should avail itself of that information, which is updated frequently by KPMG and maintained on the web page of the Florida Commission.⁹

BellSouth makes two basic misrepresentations about the ongoing Florida OSS test. First, BellSouth cites certain open exceptions that have been recently closed, or will soon be closed, as evidence that the Florida OSS test issues are largely resolved.

BellSouth fails to mention, however, the dozens of observations and exceptions that remain open, each of them competitively significant examples of the harm caused by BellSouth's failure to comply with its OSS checklist obligations. The Commission can find a list of those open observations and exceptions on the publicly available web site of the Florida Commission. Second, BellSouth claims that certain exceptions are simply "small issues"¹⁰ that the Commission should ignore. For example, exception 6, which BellSouth claims is "small," highlights the conclusion of the Department of Justice that BellSouth's EDI testing capabilities are nonexistent, which is why Covad and other competitive LECs have had such a hard time implementing EDI. Specifically, exception 6 states KPMG's finding that "BellSouth lacks an appropriate process, methodology and a robust test environment for testing of the electronic data interchange (EDI) interface." That exception is still open, and it is hardly a "small issue."

Other exceptions of note that are still open and unresolved include the following:

Exception 90: "KPMG Consulting did not receive timely Non-Mechanized Firm Order Confirmations (FOCs) from BellSouth via fax and electronic mail."

Exception 100: "KPMG Consulting has not received timely mechanized Unbundled Network Elements – Loop (UNE-L) Firm Order Confirmations (FOCs) from BellSouth's

⁹ <http://www2.scri.net/psc/industry/telecomm/oss/pdf/exception11-28-01.pdf> (exceptions); <http://www2.scri.net/psc/industry/telecomm/oss/pdf/observation11-28-01.pdf> (observations).

¹⁰ Nov. 30 ex parte letter at Tab 21.

Electronic Data Interchange (EDI) interface. This exception was originally issued as Observation 101.”

Exception 105: “KPMG Consulting has not received responses to several Local Service Requests (LSRs) using the Electronic Data Interchange (EDI) interface.”

As evidence on the importance of this ongoing Florida test, KPMG continues to find problems and open exceptions since the time that BellSouth filed the instant applications at the FCC. Despite the late-filed date of its OSS *ex parte*, BellSouth does not mention these new exceptions:

Exception 110: “BellSouth does not have adequate guidelines for call tracking and resolution at its Local Carrier Service Center (LCSC).”

Exception 112: “BellSouth’s systems or representatives have not consistently provisioned service and features as specified in orders submitted by KPMG Consulting.”

Exception 113: “KPMG Consulting has found that BellSouth does not capture xDSL transactions, which are processed through Corporate Order Gateway (COG), for the “Ordering: Percent Flow-Through Service Requests (Summary)” and “Ordering: Percent Flow-Through Service Requests (Detail)” Service Quality Measurements (SQMs).”

Exception 116: “BellSouth representatives did not provide expected responses to Local Service Requests (LSRs) submitted by KPMG Consulting via facsimile (fax).”

Exception 117 (opened Nov. 8): “KPMG Consulting has not received manual Firm Order Confirmations (FOC) on orders that have been assigned a Completed (CP) or Pending (PD) Status in Bellsouth’s Customer Service Order Tracking System (CSOTS).”

Exception 122 (opened Nov. 15): “BellSouth did not provide flow through classification information for Digital Subscriber Line (DSL) orders submitted by KPMG Consulting.”

These new exceptions are particularly troubling, given that KPMG did not test DSL OSS *at all* in Georgia. The fact that these issues are coming to light at all in Florida is entirely a result of the Florida Commission’s dedication to a truly independent OSS test, rather than one directed by BellSouth. The Commission has insight into the serious problems with BellSouth’s OSS only because the Florida test is examining DSL

capabilities. If the Commission is not concerned about DSL issues, it should rely entirely on the Georgia test.

Finally, there are numerous observations that remain open in Florida, all of which highlight the true nature of BellSouth's OSS. Some of these observations are in the process of being escalated to exceptions. Although not all these observations have not yet been elevated to exceptions, their mere existence in such large numbers, coupled with the large number of open exceptions, suggests strongly that BellSouth's OSS is dysfunctional. Among the open exceptions in Florida:

Observation # 45: "KPMG has not received response to several LSRs submitted via the TAG interface."

Observation #68: KPMG cannot replicate values for the Ordering: Percentage flow-through metrics. Observation to be escalated to Exception status."

Observation #81: "KPMG Consulting has not received manual Firm Order Confirmations (FOC) on orders that have been assigned a Completed Status (CP) in Bellsouth's Customer Service Order Tracking System (CSOTS). KPMG Consulting to escalate to exception."

Observation #82: "BellSouth's systems or representatives did not update Customer Service Records (CSRs) consistently following a change in the status of a customer's account."

Observation #86: "The BellSouth Release Management Team does not provide all prioritized Change Requests to the BellSouth Relationship IT Team for development and implementation."

Observation #100: "KPMG Consulting has not received timely Completion Notices (CNS) submitted via the Electronic Data Interchange (EDI) and Telecommunications Access Gateway (TAG)."

Observation #102: "The BellSouth ECTA system failed to process the Mechanized Loop Test (MLT) as designed."

Observation #104: "KPMG Consulting has experienced multiple system errors while processing Local Service Requests (LSRs) through the Local Exchange Navigation System (LENS) interface."

Observation #108: “BellSouth Business Rules for Local Ordering - OSS99 , contains inconsistent and incomplete instructions necessary for Competitive Local Exchange Carriers(CLECs) to access and use BellSouth’s systems.”

Observation #111: “BellSouth has implemented an inadequate process for CLEC interaction with the Local Carrier Service Center Order (LCSC) Fleming Island Call Center.”

Observation #115: “The BellSouth Account Team does not respond to CLEC inquiries within the documented customer contact timeframes.”

As with the exceptions, there are numerous new observations opened by KPMG since BellSouth filed the instant applications. If the Commission is going to consider BellSouth’s late-filed evidence concerning the Florida OSS test, it must consider all of the information pertaining to that test, including information that it is not favorable to BellSouth’s spin. Among the recently opened observations:

Observation #122, opened 10-5-01: “KPMG Consulting has not received Completion Notices (CN) to several Local Service Requests (LSRs) submitted via the Telecommunications Access Gateway (TAG) interface.”

Observation # 123, opened 10-5-01: “BellSouth does not have processes or documentation available with sufficient detail to guide a CLEC to during the upgrade from one version of an interface to a different version.”

Observation #127, opened 10-17-01: “BellSouth does not provide complete Firm Order Confirmation (FOC) or Completion Notice (CN) responses for xDSL service requests submitted through the BellSouth Local Exchange Navigation System (LENS).”

Observation #130, opened 10-23-01: “BellSouth Local Carrier Service Center (LCSC) procedures for handling fax failures are not documented.”

Observation #135, opened Nov. 14, 2001: “KPMG Consulting has not received timely responses for the pre-order queries, Address Validation (AVQ), Address Validation by Telephone Number (AVQ_TN), Customer Service Record (CSRQ), Estimate Due Date (EDD), Service Availability (SAQ) and Telephone Number Assignment (TNAQ) submitted via the Local Exchange Navigation System (LENS) Web interface.”

In sum, the large number of open observations and exceptions in Florida highlight the exact same defects with BellSouth's OSS that the Department of Justice found and that Covad and other commenters have argued in their comments. Why does this matter, given that BellSouth applied for long distance authority in Georgia and Louisiana, not in Florida? The Commission has a very clear choice in front of it: approve this application while ignoring the very serious defects in BellSouth's OSS because they came to light in a different state, or acknowledge the reality of BellSouth's game and reject the application because the Commission knows BellSouth's OSS to be defective. Should it matter that the Commission knows BellSouth's OSS (which by BellSouth's own admission is region-wide) to be defective because the Florida Commission has been more attentive to OSS issues? Of course not. The evidence that BellSouth does not comply with its OSS checklist obligations is on the record. The Department of Justice, Covad, and other commenters all offer such evidence to the Commission. The Commission's decision in this proceeding will set the bar for future applications from BellSouth, and that bar will be set so low that BellSouth's OSS will remain fixed at its current dysfunctional state. The choice should be clear.

III. Conclusion

For the reasons set forth herein, Covad's Motion to Strike should be GRANTED. BellSouth's *ex parte* letter, presentation, and attachments, dated November 30, 2001¹¹, should be stricken from the record in CC Docket No.01-277.

¹¹ Although BellSouth made its *ex parte* presentation to the Commission on November 29, 2001, it did not file the *ex parte* notification and attachments until November 30, 2001.

Respectfully submitted,

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