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FEDERAL COMMUNICATIONS COMMISSION  
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DEC 13 2001

FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

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

CC Docket No. 01-277

**BELLSOUTH'S OPPOSITION TO COVAD'S MOTION TO STRIKE**

BellSouth hereby responds to the Motion to Strike of Covad Communications Company ("Covad") filed on December 3, 2001.

In its Motion, Covad argues that BellSouth somehow violated this Commission's rules by responding to the request of the Commission's staff for additional material on certain issues. BellSouth provided those materials at a meeting with the Staff on November 29, 2001, and then, in accord with the Commission's rules, attached them to an *ex parte* letter filed on November 30. Because BellSouth was responding to the Staff's request for clarification of these issues, BellSouth's November 30 *ex parte* letter and accompanying materials were entirely proper under the Commission's rules. Nor is Covad correct that BellSouth addressed issues for the first time in this *ex parte*. On the contrary, BellSouth has discussed all these issues, and particularly the Florida Third-Party test, in significant detail in both its Application and its Reply. BellSouth was simply providing further detail on that test to respond to certain discrete questions raised by the Staff. BellSouth's filing was thus entirely appropriate, and Covad's motion should be denied.

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1. This Commission has long recognized that it “may request additional information from [a section 271] applicant” in the form of *ex parte* communications and filings. *New York Order* ¶ 42.<sup>1</sup> Indeed, as the Commission has explained, “[i]t is critical to the agency’s deliberative process that the Commission and staff fully understand the evidence and arguments presented in the BOC’s 271 application . . . . Accordingly, the Commission retains the discretion to request additional information from the applicant or other parties that elaborates on positions set forth in the original application, comments, or reply comments.” *Id.* “Nothing in [its] procedural rules or past precedent precludes the Commission and the staff from requesting” such information. *Id.*

This understanding that it is appropriate to elaborate on positions in response to a Staff request -- an understanding that the Commission reiterated in the *Texas Order* (at ¶ 42) -- is directly applicable here and completely undermines Covad’s argument.<sup>2</sup> Contrary to Covad’s argument that BellSouth “ignored” the Florida Third-Party Test until this recent *ex parte* (Covad Motion at 4), BellSouth addressed the Florida test before, *see, e.g., Stacy Aff.* ¶ 595 & Exhs. OSS-80, OSS-81, and simply provided further elaboration in the *ex parte* at the request of the Commission’s Staff.

In fact, in both its Application and its Reply Comments, BellSouth discussed the Florida Third-Party Test in significant detail. BellSouth explained first that, in light of the significant

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<sup>1</sup> *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 3953 (1999) (“*New York Order*”).

<sup>2</sup> *Application by SBC Communications Inc., Southwestern Bell Tel. Co., 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 (2000) (“*Texas Order*”).

evidence of nondiscriminatory performance based on actual competitive usage in Georgia and Louisiana (and the existence of a Georgia third-party test), the Florida test should not be a concern in this Application. *See Application* at 52 & 62 n.59; *Stacy Aff.* ¶¶ 444, 598. In accord with this Commission’s precedents, BellSouth continues to believe that evidence of actual competition and commercial usage of OSS is the most reliable indication that BellSouth’s markets are open. *See, e.g., Texas Order* ¶ 98 (“The most probative evidence that OSS functions are operationally ready is actual commercial usage.”). This evidence shows, among other things, that CLECs have at least a 17% market share of total access lines in Georgia and a 9% share in Louisiana and that BellSouth’s performance results are strong across a broad range of metrics (*see BellSouth Reply* at 7). Accordingly, by providing detailed performance evidence (together with the results of the Georgia Third-Party Test), BellSouth provided the Commission with “all of the factual evidence on which the applicant would have the Commission rely in making its findings.”<sup>3</sup>

BellSouth did not stop there, however. BellSouth’s Application *also* addressed the then-open exceptions raised by KPMG in the Florida Third-Party Test. *See Stacy Aff.* ¶ 595 & Exhs. OSS-80, OSS-81.

In their comments on BellSouth’s Application, several parties, including Covad, raised issues relating to the Florida Third-Party Test. *See, e.g., Covad Comments* at 45-53. BellSouth addressed each of the commenters’ arguments in its Reply, and, in particular, provided a detailed response to every last Florida exception that the commenters had identified. *See BellSouth Reply Comments* at 53; *Stacy Reply Aff.* ¶¶ 370-374 & Exh. OSS-31.

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<sup>3</sup> *See Updated Filing Requirements For Bell Operating Company Applications Under Section 271 Of The Communications Act,” FCC Public Notice, D.A. 01-734, rel. Mar. 23, 2001, at 3-4.*

After the filing of that Reply, the Common Carrier Bureau's Staff requested BellSouth to elaborate on certain aspects of the Florida Third-Party Test, specifically the metrics and volume-testing components of the test. In response to the Staff's expressed interest in further clarification as to those discrete subjects, BellSouth provided materials on the Florida Third-Party Test to the Staff at the November 29 meeting and then filed those materials as attachments to an *ex parte* letter on November 30, 2001. BellSouth's *ex parte* was thus a wholly proper part of the "ongoing dialogue with parties" that the Commission has emphasized is "imperative" in order to "ensure that [the Commission has] a clear and accurate understanding of the information contained in all formal submissions." *New York Order* ¶ 42.

Indeed, the particular exceptions that Covad notes in its motion highlight the propriety of BellSouth's filing. For instance, Covad faults BellSouth for allegedly failing to address Florida Exception 116 more promptly. *See* Covad Motion at 5. KPMG issued that exception, however, on November 8, 2001, more than a month after BellSouth filed this Application, and just before BellSouth's Reply Comments were due. BellSouth discussed the issue in its reply filing, *see Stacy Reply Aff.*, Exh. OSS-31 at 28, and, at the Staff's request, expanded upon that discussion in its *ex parte*. To the extent that such recently issued exceptions are even relevant here, it is difficult to see how BellSouth could have acted more promptly.

Similarly, although Covad claims that BellSouth was tardy in responding to Exception 107 (Covad Motion at 5), BellSouth addressed that exception in both its Application and its Reply. *See Stacy Aff.* Exh. OSS-80 at 27; *Stacy Reply Aff.* Exh. OSS-31 at 27. Again, in response to a Staff request, BellSouth elaborated on that issue in the *ex parte*.<sup>4</sup>

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<sup>4</sup> Covad criticizes as "misleading" BellSouth's statement that it expects KPMG to close Exception 107. Covad Motion at 5. BellSouth made that statement because KPMG

AT&T's *ex parte* letter purporting to support Covad's motion is no more persuasive. AT&T also is wrong in suggesting that BellSouth has improperly added material to the record here. As an initial matter, as explained above, any information that BellSouth has provided came in response to a request from the Common Carrier Bureau and was thus proper. Second, and in any event, the vast bulk -- almost 190 pages of the pages submitted -- of the material was already in the record. For instance, for the convenience of the FCC Staff attending the meeting, BellSouth *refiled* two lengthy exhibits (OSS-53 and OSS-54) to the affidavit of William Stacy, the Joint Reply Affidavit of William Stacy, Alphonso Varner, and Ken Ainsworth, portions of the GPSC Reply Comments, and excerpts from the KPMG MTP Final Report in Georgia. Other materials included in the *ex parte*, including the comparisons of reject rates, manual order percentages, and FOC/reject benchmarks and the analyses of BellSouth's performance on specific ISDN, digital loop, and line sharing metrics are grounded in specific performance evidence that also was already in the record. AT&T's argument is thus both legally wrong and factually incorrect.

2. Covad also seeks to use its motion to "highlight[] those factual materials that BellSouth deliberately omitted from its submission." Covad Motion at 2. Covad's assertion that BellSouth has "deliberately omitted" items is baseless.

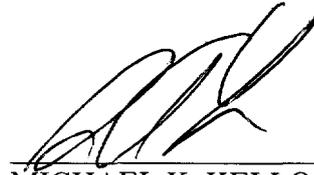
Indeed, had Covad taken the time to review the record, it would have seen that BellSouth had in fact addressed *every one* of the open exceptions Covad alleges BellSouth "fail[ed] to mention." Covad Motion at 7. Covad (at 8) specifically lists six Exceptions (110, 112, 113, 116, 117 and 122), that BellSouth has allegedly failed to address. The first 5 of those, however, *were*

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representatives had indicated such an intent. On November 29, in its weekly conference call, KPMG announced that it had recommended closing Exception 107.

addressed by BellSouth in its Reply. *See Stacy Reply Aff.* ¶¶ 370-374 & Exh. OSS-31. The last one (Exception 122) was not yet open when BellSouth filed its Reply, and was in fact addressed by BellSouth in an attachment in the November 30 *ex parte* filing. *See FL 3PT Open Exceptions – Metrics* (attached to 11/30/01 *ex parte* materials). Similarly, every other Exception (numbers 6, 90, 100, 105, 107, 116) raised by Covad in its Motion was also addressed by BellSouth either in its Application, its Reply, or both. *See Stacy Affidavit Exh. OSS-80; Stacy Reply Aff.* ¶¶ 370-374 & Exh. OSS-31. Covad’s allegation that BellSouth deliberately failed to mention these exceptions in an attempt to hide this information from the Commission is thus flatly wrong.

Respectfully submitted,



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December 13, 2001

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