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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 2, 2002

**VIA HAND DELIVERY AND ELECTRONIC FILING**

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

**Re: Written *Ex Parte* Presentation; CC Docket 02-35**
Application by BellSouth Corporation for Provision of In-Region, InterLATA Services in Georgia and Louisiana

Secretary Dortch:

On April 16th and 17th, 2002, Michael Duke of KMC Telecom and counsel representing KMC Telecom met with Commissioner Martin, several of the Commissioners' Legal Advisors, and Commission staff regarding the above-referenced matter. Following those meetings, BellSouth submitted additional *ex parte* material addressing, in part, several of the issues raised by KMC Telecom. Unfortunately, these BellSouth filings fail to resolve any of the significantly anticompetitive issues highlighted by KMC Telecom. During several of the *ex parte* meetings, KMC Telecom was asked to provide updates on the issues raised. In response to those requests, and in order to assist the Commission in comprehensively evaluating the BellSouth §271 application, KMC Telecom submits this written *ex parte*.

The Anticompetitive DSL Issues Remain Unresolved

BellSouth has failed to adequately address and resolve the anticompetitive concerns that result from the manner in which it ties DSL and voice services, and assigns DSL service to multi-line customers. Despite the fact that KMC Telecom raised these issues in its comments and *ex parte* filing, we have not been contacted by BellSouth as part of any attempt to actually resolve them. While BellSouth has made two *ex parte* submissions touching on this subject, BellSouth has not provided any of the relevant information directly to the competitors affected by this issue. More significantly, however, the actions BellSouth claims to be taking are wholly insufficient and, at best, partially resolve only one of the three DSL-related obstacles BellSouth has created.

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BellSouth continues to employ three separate DSL-related anticompetitive methods to thwart competitor access to loops. First, BellSouth assigns DSL service to the primary line of a multi-line account, which prevents competitors from providing voice service to that customer (since BellSouth will not engage in line splitting in this scenario). Second, BellSouth will – for no valid reason – transfer back to itself a CLEC customer's primary voice line if the end user requests DSL service from BellSouth. This prevents the competitor from continuing to provide voice service to that customer since all incoming calls are directed initially to the primary line. Finally, BellSouth rejects valid orders to switch voice service to a competitor if the customer's service record has a DSL ordering code on the account – even if the end user is not receiving DSL service.

In its March 19, 2002 *ex parte* filing, BellSouth attempts to confuse the issue of DSL service over the platform with DSL service to a UNE Loop end user. In so doing, BellSouth attempts to unilaterally extend a limited reference contained in the Commission's Texas 271 order into a global resolution of the entire issue. Unfortunately for BellSouth, this results in a failure to address the Loop-related issues raised by KMC Telecom and others, and prevents BellSouth from demonstrating compliance with checklist item iv of the Competitive Checklist - which is separate and distinct from the UNE-P related checklist item, ii.

After spending three pages in its March 19th *ex parte* defending its Platform-related DSL policies, BellSouth spends just one paragraph attempting to defend its discriminatory DSL assignment practices as they relate to facilities-based, UNE-Loop competitors. BellSouth has presented *no evidence* in this proceeding that proves that it is assigning DSL service to multi-line accounts in accordance with the Act (either section 251 or section 271). With all due respect to BellSouth's outside counsel, their statements from the March 19th *ex parte* cannot be considered as evidence in this proceeding, and their assertions that BellSouth will send out a "notice to its sales agents reminding them" of BellSouth policy is certainly not the type of action this Commission should accept as adequate.

BellSouth has failed to contact KMC to discuss the proposals KMC has put forth in an attempt to address these problems. As the Commission is aware, KMC has proposed that BellSouth refrain from assigning DSL service to customers' primary lines – a solution that BellSouth's own DSL expert has indicated will work (*see* pages 15-16 of KMC Comments and page 12 of the KMC April 17th *ex parte*). Likewise, where KMC or another CLEC has won a customer's voice account, KMC has proposed that BellSouth cease transferring back to itself the customer's primary line, in response to a request for DSL service only (*see* pages 15-16 of KMC Comments, and page 12 of the KMC April 17th *ex parte*). These constructive proposals are entirely fair to BellSouth and, more importantly, are fair to competitors. Without them, BellSouth cannot realistically claim to be providing "nondiscriminatory access" to the local loop since it will continue to provide its own retail business with superior access to loops.

With regard to the DSL USOC problem, which causes CLEC service orders to be rejected, BellSouth filed an April 12, 2002 *ex parte*. The revelation that BellSouth implemented an "interim process" on April 1, 2002 to partially address the DSL USOC problem, came as a complete surprise to KMC Telecom since we were *never notified* of this new process. According to the *ex parte*, Commission staff "asked for clarification" of the interim process, while the KMC

operational folks were never even apprised of the interim process in the first place. Obviously, BellSouth has no interest in actually resolving these problems, since it is not even notifying the affected carriers of changes designed to address them.

In the final analysis, the fact remains that BellSouth continues to illegally tie its voice and DSL services, and continues to implement this illegal policy in a manner that causes BellSouth to also violate Sections 251(c)(3) and 271(c)(2)(B)(iv) of the Act.

In our comments and prior *ex parte*, KMC noted that the Louisiana PSC was in the process of addressing this topic. Significantly, the Florida Public Service Commission has now also resolved the issue, in a bilateral arbitration between Florida Digital Network and BellSouth (KMC and other similarly-situated carriers also alerted the Florida PSC to this problem in the §271 proceedings there). In its pro-competition decision, the Florida Commission determined that BellSouth must cease using its DSL service to block a competitor's access to the end user's voice service, by requiring that BellSouth continue to provide DSL service to end users who switch their voice service to the UNE loop-based competitor. "The threat of losing internet service is a barrier to phone competition," PSC Chair Lila Jaber was quoted as saying by the Palm Beach Post. We at KMC wholeheartedly agree, and do not believe that this Commission could declare the BellSouth market "open to competition" while such significant barriers remain. The solutions proposed by KMC Telecom are fair, and must be implemented without any further delay.

BellSouth's *Ex Parte* Filings Doom its Application on Checklist Item iv Compliance

As a facilities-based carrier, KMC Telecom needs access to the local loop in order to make the "last mile" connection to many end users. KMC Telecom has described, in detail, the difficulties it faces in attempting to obtain access to BellSouth loops (See pages 5-16 of KMC's Comments, pages 3-7 of the McLaughlin Affidavit, and pages 7-18 of the April 17th KMC *ex parte*). BellSouth's performance data confirms these shortcomings, and the company's evidence is simply insufficient to enable a finding of compliance with checklist item iv.

The Wireline Competition Bureau has wisely inquired about BellSouth's loop performance. In response, BellSouth filed an *ex parte* on April 17, 2002, that attempts to explain its poor performance in provisioning loops. The April 17th filing, however, clearly confirms that BellSouth is failing to provision loops in either a satisfactory or nondiscriminatory manner.

In its *ex parte*, BellSouth attempts to exclude from the evaluation those trouble reports for which it does not believe it is responsible ("Reports not Attributable to BST" column on page 2). To begin with, one would expect that these would have already been excluded from the metric results if they were truly not attributable to BellSouth. Second, the trouble reports BellSouth seeks to eliminate are categorized based solely on BellSouth's own view. BellSouth seeks to exclude, for example, circuit trouble reports that are closed as "TOK/FOK" (Tested OK/Found OK, we guess), a designation that CLECs (including KMC) believe is often applied erroneously by BellSouth technicians. Third, it is entirely unclear as to what the "Information" category of excluded reports would encompass (are they reports BellSouth is unable to

categorize and regarding which BellSouth gives itself the benefit of the doubt?). Finally, and perhaps most significantly, BellSouth's performance following all of this cleansing is still wholly unsatisfactory, with more than 5% of the digital loop installs failing within 30 days, on average, over the past three months (versus just 2% of its retail installs). In fact, BellSouth's own numbers reveal a *21% increase* in the percentage of UNE loop troubles for which it is admittedly responsible between December and February, in Georgia.

BellSouth then asserts, at page two of the April 17th *ex parte*, that the "majority of the CLECs . . . received excellent performance" on this measure, but fails to indicate how many orders were submitted by this alleged majority. Clearly, most of the orders could have been submitted by less than half of the CLECs. BellSouth ultimately admits, as it must, that it failed to provide parity with the retail analogue and that BellSouth retail reported only a "very small number of troubles." Thus, BellSouth admits discriminatory treatment.

Despite the fact that KMC Telecom purchases digital loops from BellSouth and has repeatedly raised these issues with BellSouth, this Commission and the State Commissions, we only learned of the "action plans" that BellSouth has allegedly implemented in an effort to improve its admittedly poor performance through the *ex parte* filings. As with the DSL issue noted above, BellSouth never contacted KMC personnel to discuss the "action plans" it claims to be implementing. How effective can these measures be if they are not taken in coordination with the affected parties? More importantly, knowing only what we do from the April 17th *ex parte*, these BellSouth "action plans" appear totally inadequate. When, it is reasonable to inquire, were these plans implemented? Why are some of the steps allegedly being taken in Louisiana not being taken in Georgia? When is BellSouth going to work with competitors to find real solutions?

Significantly, BellSouth admits in that same April 17th *ex parte* that its poor installation performance is apparently tied to the lack of facility/jeopardy issue that KMC has also been highlighting for some time (*see, for example,* pages 7-9 of KMC's Comments and pages 14-16 of the April 17th *ex parte*). In other words, BellSouth is finally admitting that its discriminatory facility assignment practices will cause competitors to suffer poor installation performance. This is cause for tremendous concern, given that BellSouth placed CLEC DS-1 and higher loop orders in jeopardy status 56% of the time in Georgia and 74% of the time in Louisiana, during February, as compared to just 4% and 12% for BellSouth retail in Georgia and Louisiana, respectively.

Finally, BellSouth admits in the April 17th *ex parte* that "known defective pairs" exist (as KMC has consistently asserted), and that it sometimes assigns "digital loops with marginal transmission capabilities" to CLECs. In the final analysis, KMC is pleased to see that BellSouth is finally acknowledging the significant issues raised by KMC, and is admitting the harmful effects they have on competition. As BellSouth itself recognizes, however, "additional steps" may need to be taken in order to bring its performance "into parity with the retail analogue." (page 3 of the April 17th *ex parte*) As a result, the Act gives the Commission no choice but to wait for BellSouth to actually provide such nondiscriminatory performance.

BellSouth's Data Proves that its Loop Performance Remains Wholly Unsatisfactory

The flowing prose of BellSouth's witnesses and counsel cannot stand in the stead of actual performance data demonstrating checklist compliance. Unfortunately for BellSouth, its performance data does not support a grant of its application.

In its April 17th *ex parte*, KMC noted that BellSouth's own report on percent of orders placed in jeopardy status demonstrates that BellSouth was failing to provide nondiscriminatory access to loops. The data just released for March now reveals that BellSouth's performance has gotten even worse. As indicated on the chart below, BellSouth's performance to competitors declined by 123% for UNE ISDN loops and by 42% for 2-wire analog loops with LNP between February and March:

**Percent of Orders Placed in Jeopardy Status**

**UNE ISDN and Analog Loops**

(All CLEC Orders in Georgia)

| **UNE ISDN** | | |
|---|---|---|
| **Month** | **BellSouth** | **CLECs** |
| February, 2002 | 7% | **13%** |
| March, 2002 | 10% | **29%** |
| **2-Wire Analog w/LNP, Non-Design** | | |
| February, 2002 | 1% | **4%** |
| March, 2002 | 1% | **5.7%** |

Similarly, the decline in BellSouth's performance for the critical DS-1 and above loops was 53% between January and March:

| **Percent of Orders Placed in Jeopardy Status**<br>**Digital Loops DS-1 and Above**<br>(All CLEC Orders in Georgia) | | |
|---|---|---|
| **Month** | **BellSouth** | **CLEC** |
| January, 2002 | 3% | **43%** |
| February, 2002 | 4% | **56%** |
| March, 2002 | 6% | **59%** |

KMC also noted in its prior filings that competitors face much higher trouble rates once loops are finally provisioned. BellSouth admitted in its April 17, 2002 *ex parte* filing that it did not meet the retail analogue for percent of troubles on digital loop installs for the period December, 2001 through February, 2002 (even after it cleansed the data). As evidenced in the chart below, BellSouth continued to provide widely disparate performance again in March. Clearly, whatever "action plans" BellSouth claims (in its April 17th *ex parte*) to have implemented have failed to bring its performance into compliance with the checklist.

| **Percent of Provisioning Troubles within 30 days**<br>**UNE Digital Loops DS-1 and Above**<br>(CLEC Aggregate Data for Georgia) | | |
|---|---|---|
| **Month** | **BellSouth** | **CLECs** |
| February, 2002 | 2% | **8%** |
| March, 2002 | 2% | **8%** |

Unfortunately, the disparate number of loop troubles continues to plague competitors following the post-install period. The disparity has actually increased since KMC brought the February data to the Commission's attention in its April 17th *ex parte*, with the percentage of troubles on the "other non-designed" loops provided to competitors growing by roughly 43% over the past two months:

| **Overall Customer Trouble Report Rate**<br>**Other (non 2-wire) Non-Designed Loops**<br>(CLEC Aggregate Data for Georgia) | | |
|---|---|---|
| **Dispatch** | | |
| **Month** | **BellSouth** | **CLECs** |
| February, 2002 | 1.5% | **7%** |
| March, 2002 | 1.7% | **10%** |
| **Non-Dispatch** | | |
| February, 2002 | 1% | **7%** |
| March, 2002 | 1% | **10%** |

The Commission Must Deny the BellSouth Application

In sum, recent evidence has served to further demonstrate the full extent to which the BellSouth application fails to meet the standards established in the Act for interLATA entry. BellSouth has not disputed that it continues to engage in what can only be labeled as anticompetitive activity, and BellSouth's own filings reveal that the company must its improve its wholesale performance in order to meet the checklist. If BellSouth has not been able to improve its performance during this critical time, while its application is pending, it certainly cannot be relied upon to improve it following interLATA entry. The Commission therefore has no choice but to deny the BellSouth application at this time.

This *ex parte* filed is being made in conformance with the Commission's rules. Please file this notice with the record of the above-referenced proceeding. Should you or any member of the Commission have any questions with regard to the foregoing, please do not hesitate to contact the undersigned at your convenience.

Respectfully submitted,

TRICIA BRECKENRIDGE

Tricia Breckenridge
KMC Telecom, Inc.

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