

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
 )  
Verizon Petition for Declaratory Ruling ) WC Docket No. 02-80  
Regarding CLEC Obligations To Cure )  
Assigned Indebtedness )

**COMMENTS OF BELLSOUTH**

**BELLSOUTH CORPORATION**

Jonathan Banks  
Mary J. Peed  
Richard M. Sbaratta

Its Attorneys

Suite 900  
1133 21<sup>st</sup> Street, N.W.  
Washington, DC 20036  
(202) 463-4182

Date: May 13, 2002

BellSouth Comments  
WC Docket No. 02-80  
May 13, 2002

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Verizon Petition for Declaratory Ruling	)	WC Docket No. 02-80
Regarding CLEC Obligations To Cure	)	
Assigned Indebtedness	)	

**COMMENTS ON COUNTER-PETITION FOR DECLARATORY RULING**

BellSouth Corporation, for itself and its wholly-owned affiliated companies (collectively “BellSouth”), submits the following Comments in response to the above-captioned Counter-Petition for Declaratory Ruling filed by Verizon.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

The Wireline Competition Bureau seeks comment on Verizon’s request for three rulings addressing telecommunications carriers’ rights and obligations in the bankruptcy context. Verizon asks the FCC to declare that “the Communications Act does not except carriers from the rights afforded by section 365 of the Bankruptcy Code” and that, “where one CLEC wishes to take over another’s service arrangement with nothing more than a name change, that constitutes an ‘assignment or transfer’ within the meaning of Verizon’s tariffs.”<sup>2</sup> Verizon further seeks

---

<sup>1</sup> FCC Public Notice, *Wireline Competition Bureau Seeks Comment on Verizon’s Petition for Declaratory Ruling Regarding ILEC Obligations to Continue Providing Services*, DA 02-1017 (May 3, 2002) (“Counter-Petition Notice”). See Comments and Counter-Petition of Verizon, filed April 29, 2002. (“Verizon Counter-Petition”).

<sup>2</sup> Counter-Petition Notice at 1.

clarification concerning “the circumstances under which carriers in bankruptcy are obligated to provide notice of possible discontinuance or transfer to their customers.”<sup>3</sup>

BellSouth fully supports Verizon’s request and submits that:

- Both the Bankruptcy Code and the Communications Act demonstrate that carriers are entitled, as a minimum, to the same rights as other creditors in a bankruptcy proceeding;
- The “name change” scenario postulated by Verizon would in fact and law operate as an assignment under both Verizon's and BellSouth’s tariffs and contracts, thereby making an assignee liable for any outstanding indebtedness on a delinquent carrier’s account;
- There is a substantial public interest in requiring carriers in bankruptcy to provide timely notice to all customers *and* providers of their current financial and operational status as well as their future plans in order to avoid adverse impacts on governmental interests, including national security, and the public generally; and
- The Commission should refrain from imposing unreasonable prior approval or similar burdens on the exercise of ILEC’s rights under the bankruptcy code, including rejecting the suggestion of the U.S. Department of Justice that 214 authority is required to cut off service to a delinquent debtor.

## **II. THE BUREAU SHOULD ISSUE THE REQUESTED RULINGS**

### **A. Existing Law Provides Appropriate Protections for the Interests of Carrier Debtors, Carrier Creditors, and End Users**

It is a false dichotomy to suggest that effectuation of a carrier’s rights under Section 365 of the Bankruptcy Code, 11 U.S.C. §365, to obtain a cure of pre-petition indebtedness before permitting an assumption of the underlying service contract could be inconsistent with a carrier creditor’s obligations under the Communications Act. Nothing in the text of either law compels that conclusion, nor would long standing principles of statutory construction permit such a nullification of material carrier rights absent express statutory support. Rather, the requirements

---

<sup>3</sup> *Id.*

of both statutes can and should be harmonized to effectuate the important public policies embodied in each, just as the Commission has done with respect to other elements of the Bankruptcy Code in its *Streamlining Order*.<sup>4</sup> As shown below, denial or burdensome conditioning of a carrier's ability to exercise its cure rights under Section 365 would create perverse incentives contrary to the public interest in maintaining service to the public and rehabilitating troubled providers.

A finding that telecommunications carriers are not entitled to the protections of Section 365 would also upset the careful balance struck by Congress between debtors' and creditors' rights. Recognizing both the importance of utility services such as telecommunications to debtors and the adverse impact on other ratepayers of customer defaults, Congress enacted Section 366 of the Bankruptcy Code, 11 USC §366. That section provides that a utility is required to continue to provide service post-petition only where it receives timely adequate assurance of payment. The adequate assurance requirement is in addition to, and does not substitute for, a utility's rights under Section 365. Rather, Sections 365 and 366 must be interpreted consistently to permit a utility to secure assumption or rejection of its contracts under Section 365 prior to confirmation of a debtor's plan.

This is particularly crucial given the special obligations of telecommunications carriers to provide service to all comers indifferently. Their common carrier status diminishes their ability to protect themselves when initiating service to a new subscriber and means that debts avoided by bankrupt entities will ultimately burden the remaining universe of users. The interests of innocent creditors and other innocent users should not be compromised in this manner. The

---

<sup>4</sup> See *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations, Report and Order*, 2002 FCC Lexis 1455, ¶54 (March 21, 2002) ("*Streamlining Order*").

Bureau should, therefore, issue the requested ruling and declare that telecommunications carriers may fully exercise their executory contract rights under Section 365.

**B. Carriers Should Be Permitted To Enforce Tariff and Contract Provisions Requiring Assumption of Outstanding Debts by Assignees of In-Place Service Arrangements**

In its Counter-Petition, Verizon explains that its tariffs and interconnection agreements “expressly allow a carrier...to assume the existing service arrangements of another carrier and specif[y] that the new carrier becomes liable for any outstanding debt.”<sup>5</sup> BellSouth’s federal tariffs and interconnection agreements contain substantially similar provisions. For example, BellSouth’s Access Tariff provides that:

2.1.2. Limitations

- (A) . . . Where there is no interruption of use or relocation of the services, such assignment or transfer may be made for all services, to:
- (1) Another customer whether an individual, partnership, association or corporation, provided the assignee or transferee assumes all outstanding indebtedness for such services, and the unexpired portion of the minimum period and the termination liability applicable to such service, if any; or
  - (2) A court-appointed receiver, trustee or other person acting pursuant to law in bankruptcy, receivership, reorganization, insolvency, liquidation or other similar proceedings, provided the assignee or transferee assumes the unexpired portion of the minimum period and the termination liability applicable to such services, if any.<sup>6</sup>

As Verizon points out, such provisions are “entirely consistent with section 365’s requirement for cure of any indebtedness associated with any executory contract that is being

---

<sup>5</sup> Verizon Counter-Petition at 24 (footnote omitted).

<sup>6</sup> BellSouth Telecommunications, Inc., Tariff F.C.C. No. 1, 2<sup>nd</sup> Revised Page 2-1 (effective June 16, 1993).

assumed and assigned.”<sup>7</sup> This treatment is likewise consistent not only with the public interest, but with prior FCC precedent. In the *Streamlining Order*, the Commission recognized that acquisition of the stock or substantially all of the assets of a bankrupt carrier is a fundamentally different type of transaction from the creation of a debtor-in-possession or appointment of a trustee.<sup>8</sup> Although the latter two are treated merely as *pro forma* transfers, the purchase of a carrier’s operations requires an affirmative public interest examination precisely because there is a new entity stepping into the shoes of the former provider. There is simply no reason, public policy or otherwise, to ignore the significance of the same distinction in applying the contract assumption rules to a carrier’s executory contracts in bankruptcy.

Existing carrier commitments and procedures for transitioning service arrangements to the acquirer of a bankrupt’s estate are already governed by the FCC’s Public Notice of May 22, 2001.<sup>9</sup> Further clarification of carrier responsibilities in circumstances of financial distress both pre- and post-bankruptcy as explained below should assist in addressing any additional concerns that have been raised provided that all parties, including the acquiring entity, are required to cooperate consistent with applicable law. It follows that an exemption of acquiring carriers from the cure provisions of Section 365 would run counter to the Commission’s public interest responsibilities herein.

---

<sup>7</sup> Verizon Counter-Petition at 27.

<sup>8</sup> *Streamlining Order*, ¶54

<sup>9</sup> FCC Public Notice, *Requirements for Carriers To Obtain Authority Before Discontinuing Service in Emergencies*, DA 01-1257 (May 22, 2001).

**C. The Bureau Should Clarify the Obligations of Carriers in Bankruptcy To Provide Notice to Affected Customers**

It is patently obvious that the customers of a carrier contemplating (or in) bankruptcy would benefit from being apprised earlier rather than later of the risks of possible discontinuance of their services. This is true for both end user customers and access customers such as IXC's who may rely on CLEC facilities to reach their subscribers. It is particularly critical in the Chapter 7 liquidation context, where it is reasonable to assume that the risks of future service disruption are materially greater than in a reorganization proceeding. But, early notice is also important to a carrier debtor's suppliers, and not just to ILECs. IXC's and other wholesale service providers also need notice so that they can take steps to mitigate losses and prepare to transition endangered services. Indeed, given the present precarious financial condition of many IXC's, they may be at even greater immediate risk from the failure of a carrier debtor to provide adequate notice to jointly served customers or to make timely arrangements to assume or reject outstanding service agreements.

As the Commission is aware, ILECs already have in place procedures for transitioning services between carriers so as to minimize the potential for end user disruption.<sup>10</sup> Such procedures, when properly implemented, can go a long way towards ensuring that the interests of end users, including users such as the United States government with weighty national security concerns,<sup>11</sup> will be protected in the event of the bankruptcy of a critical supplier. The existence of such procedures alone does not, however, substitute for proper notice to customers and cooperation among carriers. Accordingly, BellSouth agrees with Verizon that clarification regarding the obligations of carriers contemplating filing for or already in bankruptcy to provide

---

<sup>10</sup> See Verizon Counter-Petition at 17-18.

<sup>11</sup> See Comments of the General Services Administration, WC Docket No. 02-80, filed April 29, 2002, at 3-4.

timely notice to their customers and to cooperate with other carriers consistent with their obligations under Bankruptcy Code and the Communications Act is warranted.

In issuing such a clarification, however, the Bureau should be mindful that, although the FCC has a legitimate interest in protecting the customers of a debtor carrier, it should not act on that interest in a manner that will improperly burden other innocent users or providers. If the Commission imposes unwarranted burdens on wholesale carriers facing the bankruptcy of one of their carrier customers, such carriers will have a fiduciary obligation to respond in the commercial marketplace in ways that could have unforeseen adverse effects on those customers. Ultimately, the public interest could suffer from creation of such an environment.

A notable example of such an undue burden would be endorsement of the arguments of the United States on behalf of the FCC and the General Services Administration that ILECs must obtain FCC approval under Section 214 of the Act, 47 U.S.C. §214, before terminating service to a delinquent carrier customer for nonpayment.<sup>12</sup> No such requirement currently exists. Section 214 obligates carriers to obtain FCC approval only prior to discontinuing service offering to a “community,” not to a non-paying subscriber. The cases cited by the United States all dealt with the carrier discontinuance of a service to all customers, not to a single debtor.<sup>13</sup>

---

<sup>12</sup> See United States’ Response to Emergency Motion for Interim Relief Pending Appeal To Stay Appellees From Violating Injunction Entered by Hon. Joseph J. Farnan, *In re: Winstar Communications, Inc., et al*, Case No. 01-1430(JJF), filed April 30, 2002, at 3-4.

<sup>13</sup> See *Southwestern Bell Telephone Co., et al., Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, 8 FCC Rcd 2589, 2596 (1993) (discontinuance of all dark fiber offerings); *Bell South Telephone Companies Revisions to Tariff*, F.C.C. No. 4, 7 FCC Rcd 6322, 6323 (1992) (discontinuance of Calling Party Number service); *Western Union Telegraph Company, Petition for Order to Require the Bell System to Continue to Provide Group/Supergroup Facilities*, 74 F.C.C.2d 293 (1979) (discontinuance of group and supergroup offerings is not discontinuance of service requiring 214 approval).

In contrast, in the typical bankruptcy case involving an ILEC creditor, the ILEC stands ready (in conjunction with other carriers, as necessary) and does in fact continue to provide service to the entirety of a community under terms consistent with the requirements of the Bankruptcy Code and the Communications Act. Under such circumstances, termination of service to a nonpaying carrier, whether prior to an order for relief or subsequent to the rejection of the debtor's service agreement, does not trigger a prior approval requirement under Section 214.<sup>14</sup> Adopting the government's suggested distortion of Communications Act requirements is not necessary to ensure that the legitimate interests of both government and private users in service continuity are fully protected.

### III. CONCLUSION

For the foregoing reasons, BellSouth submits that the Bureau should issue the requested declaratory rulings.

Respectfully submitted,

#### BELLSOUTH CORPORATION

By: /s/ Jonathan Banks  
Jonathan Banks  
Mary J. Peed  
Richard M. Sbaratta

Its Attorneys

Suite 900  
1133 21<sup>st</sup> Street, N.W.  
Washington, DC 20036  
(202) 463-4182

Date: May 13, 2002

---

<sup>14</sup> See *Total Telecommunications Services, Inc., et al v. AT&T Corporation*, 16 FCC Rcd 5726, ¶30 (2001).

CERTIFICATE OF SERVICE

I do hereby certify that I have this 13<sup>th</sup> day of May 2002 served the following parties to this action with a copy of the foregoing **COMMENTS** by electronic filing and/or by electronic mail, addressed to the parties listed below.

+Marlene H. Dortch  
Secretary  
Federal Communications Commission  
The Portals, 445 12<sup>th</sup> Street, S. W.  
Room 5-B540  
Washington, D. C. 20554

\*Qualex International  
The Portals, 445 12<sup>th</sup> Street, S. W.  
Room CY-B402  
Washington, D. C. 20554

\*Carmell Weathers  
Competition Policy Division  
Room 6-B153  
Federal Communications Commission  
The Portals, 445 12<sup>th</sup> Street, S. W.  
Washington, D. C. 20554  
cweather@fcc.gov

/s/ Anthony V. Jones  
Anthony V. Jones

+ VIA ELECTRONIC FILING  
\* VIA ELECTRONIC MAIL