

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

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 Florida and Tennessee

)
)
)
)
)
)
)

WC Docket No. 02-307

COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P.

Marybeth M. Banks
H. Richard Juhnke
Sprint Communications Company L.P.
401 9th Street, N.W., Suite 400
Washington, D.C. 20004
(202) 585-1908

October 10, 2002

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY1

II. THE CLEC INDUSTRY IS IN A STATE OF CRISIS (PUBLIC INTEREST).....4

III. OUT OF REGION RBOCs HAVE FAILED TO COMPETE AGAINST
FELLOW RBOCs (PUBLIC INTEREST).7

IV. COMPETITION IN FLORIDA AND TENNESSEE HAS NOT BEEN FIRMLY
ESTABLISHED (PUBLIC INTEREST).....9

V. CONCLUSION.....12

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of)
)
Joint Application by BellSouth Corporation,)
BellSouth Telecommunications, Inc.,) WC Docket No. 02-307
and BellSouth Long Distance, Inc. for)
Provision of In-Region, InterLATA Services)
in Florida and Tennessee)

COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P.

Sprint Communications Company L.P. opposes the above-captioned application of BellSouth for authorization to provide in-region, interLATA services in Florida and Tennessee.¹ The public interest requires that the application be denied unless the Commission is convinced that the local markets have been opened fully and irreversibly to competitive entry. In Sprint's view, this is not yet the case.

I. INTRODUCTION AND SUMMARY

A. Introduction

A key purpose of the 1996 amendments to the Communications Act of 1934 (the Act) was to open the local market to competition. To that end, Congress envisioned three avenues of local entry: resale, use of incumbent LEC unbundled network elements and facilities-based competition; and it placed incumbent LECs in the rather unnatural role of

¹ Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in Florida and Tennessee, WC Docket No. 02-307 (filed September 20, 2002) (Application).

assisting their would-be competitors by imposing the interconnection, resale, unbundling and collocation obligations of § 251(c).

To encourage the principal ILECs – the BOCs – to cooperate in this process, Congress enacted the “carrot” of § 271, giving the BOCs the right to enter the interLATA long distance market in-region once their local markets were truly open. The Commission recognized the importance of local market competition in one of the first applications it decided under this section.

Although Congress replaced the MFJ’s structural approach, Congress nonetheless acknowledged the principles underlying that approach that BOC entry into the long distance market would be anticompetitive unless the BOCs’ market power in the local market was first demonstrably eroded by eliminating barriers to local competition. *** In order to effectuate Congress’ intent, we must make certain that the BOCs have taken real, significant and irreversible steps to open their markets. We further note that Congress plainly realized that, in the absence of significant Commission rulemaking and enforcement, and incentives all directed at compelling incumbent LECs to share their economies of scale and scope with their rivals, it would be highly unlikely that competition would develop in local exchange and exchange access markets to any discernable degree.²

If the BOCs are allowed to enjoy the § 271 “carrot” before local competition is fully and irreversibly established, they will have little incentive to cooperate with competitive LECs thereafter, unless they are subject to continuing regulation. Successfully maintaining such a regulatory structure and adapting it to changes in technology will require significant on-going resources of both the Commission and interested parties, with, at best, uncertain results. It would be far preferable to withhold the § 271 “carrot” until local competition is sufficiently entrenched that competitive forces can supplant the intensive regulation and enforcement that otherwise would be required. Sprint does not

² Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, 12 FCC Rcd 20543, ¶18 (1997) (Michigan Order).

believe that point has yet been reached in the states of Florida and Tennessee for which BellSouth is seeking § 271 authorization.

The public interest inquiry should focus on competition in the local market. In the recent decision of the Court of Appeals for the District of Columbia concerning the FCC's grant of SBC's 271 application for long distance service in Kansas and Oklahoma remanding the "price squeeze" issue,³ the court commented on the Commission's inadequate consideration of the appellants' claim that the low volume of residential customers in these states and SBC's pricing which does not provide enough margin to make competition profitable are evidence of a "price squeeze" that is inconsistent with the public interest. The court stated: "Here, as the Act aims directly at stimulating competition, the public interest criterion may weigh more heavily towards addressing potential 'price squeeze.'" *Id.* at 555. Clearly, the court considers the Act's goal of "stimulating competition" to refer to competition in the local market, the market adversely affected by a "price squeeze." Thus, it is appropriate to consider whether the dismal state of competition and the low volume of residential customers served by facilities-based competitors is in the public interest when evaluating a § 271 application.

B. Summary

As shown below, the CLEC industry is in a state of crisis. The past year has been marked by the collapse of many major CLECs and a severe tightening of capital to would-be entrants. Further, the regulatory environment is now in a state of uncertainty as

³ Joint Application by SBC for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, 16 FCC Rcd 6237 (2001), remanded, Sprint Communications Co. L.P. v. FCC, 274 F. 3d 549 (DC Cir. 2001).

a result of the recent decision of the D.C. Circuit Court of Appeals on UNE standards.⁴ Uncertainty now reigns concerning whether or not the Commission will reduce the RBOCs' UNE and line sharing obligations, creating even more business uncertainty for the competitive industry.

Further evidence of the dismal state of competition is the fact that the RBOCs have failed to establish themselves outside their territory, other than to meet conditions placed on them as a result of their mergers. In Florida and Tennessee, the low market shares for CLEC residential customers indicate that competition has not been firmly established.

II. THE CLEC INDUSTRY IS IN A STATE OF CRISIS (PUBLIC INTEREST)

The past year has been marked by the bankruptcy of many of the CLECs that were in the vanguard of the industry: Adelphia Business Solutions, ART, Birch, Convergent, Covad, e-Spire, ICG Communications, Metropolitan Fiber Networks, McLeodUSA, Mpower, Net2000, Network Plus, NorthPoint, Rhythms, TeleGlobe, Teligent, Viatel Holding, Williams Communications Group, WinStar and XO Communications, to name a few.⁵ WorldCOM, which claims to be the largest CLEC in the U.S. in addition to providing long distance services,⁶ reported financial

⁴ United States Telecom Association v. Federal Communications Commission, 290 F.3d 415 (D.C.Cir. 2002)(petitions for rehearing pending).

⁵ Covad emerged from bankruptcy on December 20, 2001, and Birch on September 30, 2002. McLeodUSA emerged from bankruptcy under a plan which eliminated approximately \$3 billion in debt and \$325 million in interest. Bankruptcy Court Approves Strategy for Reorganization, The Wall Street Journal, A19 (April 8, 2002).

⁶ See Statement of Victoria D. Harker before the Subcommittee on Communications, Committee on Commerce, Science and Transportation, United States Senate, June 19, 2002.

misrepresentations and was forced into bankruptcy. BellSouth recently referred to “the acknowledged crisis in the telecommunication industry” and stated that “[t]he number of bankruptcy filings of BellSouth’s access customers has dramatically increased...”⁷

Industry experts agree that when the smoke clears from “the steady stream of Chapter 11 filings in the competitive telecom sector,” only a few CLEC companies will remain.⁸

Indeed, the number of CLECs has decreased dramatically from 330 at the end of 2000 to fewer than 80 today.⁹

The bleak state of the industry is making it extremely difficult for the surviving CLECs to obtain capital to expand their facilities. At the FCC’s October 7, 2002 *en banc* hearing on steps towards recovery in the telecommunications industry, Robert Konefal of Moody’s Investment Service commented that the CLECs which have emerged from bankruptcy will find new capital “very difficult to obtain.”¹⁰ Given the current high risk associated with the CLEC industry, any financing that can be obtained comes at a high price. In the telecom industry, capital spending decreased by 25 percent last year and is expected to be another 20 percent lower this year.¹¹

⁷ In the Matter of BellSouth Telecommunications Inc. Tariff F.C.C. No. 1, Transmittal No. 657, Reply of BellSouth Telecommunications Inc., August 1, 2002.

⁸ Telecom Services – Alternative Carriers: Competition Telecom, Morgan Stanley, Dean Witter, P. Kennedy, at *1 (June 19, 2001).

⁹ Yochi J. Dreazen, FCC’s Powell Says Telecom ‘Crisis’ May Allow a Bell to Buy WorldCom, The Wall Street Journal, A4 (July 15, 2002).

¹⁰ Edie Herman, Economists Give FCC Pessimistic Outlook on Telecom Health, Communications Daily, p. 2 (October 8, 2002).

¹¹ Dreazen, A4.

In addition to these financial hurdles, CLECs now face regulatory uncertainty concerning the availability and pricing of UNEs. In its May 24, 2002 opinion, the D.C. Circuit addressed the RBOCs' appeals of the FCC's UNE Remand decision¹² in which the FCC reviewed its definition of "impair" and other unbundling criteria and its list of UNEs in light of the Supreme Court's decision in *Iowa Utilities Board*. The court remanded the Commission's UNE Remand Order in an opinion that displayed some hostility towards UNE-based competition, despite the Supreme Court's recognition, just a few days earlier, that the Commission could set UNE rates so as to promote local competition broadly.¹³ The D.C. Circuit's decision, coming in the midst of the Commission's own UNE Review proceeding,¹⁴ creates additional uncertainty for the already troubled competitive industry. At one extreme, the FCC could decide that the RBOCs are no longer required to provision many UNEs in metropolitan areas. Since a significant portion of the competitive industry relies on UNE components, CLEC investments likely will be scaled back until the regulatory environment becomes clearer. In the interim, funding for an industry already under severe financial pressure will be extremely scarce, and what is available will be high-priced.

¹² In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("UNE Remand Order").

¹³ Verizon Communications Inc. v. Federal Communications Commission, Nos. 00-511 *et al.* (S. Ct. May 13, 2002).

¹⁴ In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Notice of Proposed Rulemaking, released December 21, 2001.

At a minimum, until decisions are made concerning the availability of UNEs, the Commission must pay more attention to the market shares of the competition. It is highly unlikely that the percentage will increase at the same pace as it has in recent years, given the tumult recounted above. Indeed, it is more reasonable to expect that the market shares of competitors will shrink as the uncertainty about the availability and pricing of UNEs restricts further investments and sends additional competitors into bankruptcy.

III. OUT OF REGION RBOCs HAVE FAILED TO COMPETE AGAINST FELLOW RBOCs (PUBLIC INTEREST)

With the exception of limited out-of-region initiatives to meet merger commitments, ILECs have chosen not to compete with each other for customers outside their territories. Why would this be the case? ILECs not only know the local market, but they come equipped with the complex back-office systems needed to provide service efficiently and economically. It is telling, then, that despite earlier assertions to the contrary, the RBOCs have remained largely outside the local competition fray. If local competition were truly enabled, these RBOCs, who are high on the learning curve for the provision of local service, would have the incentive to enter the local markets outside their serving territories with bundles of local and long distance service.

In its recent order approving Verizon's Section 271 application for Rhode Island, the Commission found that the lack of entry by other carriers – either out-of-region RBOC or CLEC – can be explained by factors beyond the control of the applicant, “such as a weak economy, individual competing LEC and out-of-region BOC business plans, or poor business planning by potential competitors.”¹⁵ This suggests that the Commission

¹⁵ In the Matter of Application of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company

believes that the public interest considerations should only include factors within the control of the applicant. Sprint disagrees. In Sprint's view, consideration of the public interest should include all factors, whether or not they are within the applicant's control, that bear on whether the local market has indeed been irreversibly opened. The fact that the carriers which are best prepared to enter the local markets are not even attempting to do so in any market outside their local territories is indicative of some deterrent to entry and should give the Commission pause as it considers whether or not local competition is fully and irreversibly enabled.

Perhaps Sprint's experiences can shed some insight into why ILECs have not chosen to compete. Despite its own extensive experience in the local markets as an incumbent LEC with over 8 million access lines, Sprint has no significant CLEC operations today. On the contrary, Sprint has cut back significantly on its previously planned CLEC activities. Over one year ago, Sprint abandoned its local market entry via resale or UNE-P altogether. After efforts to establish local service in selected major markets in Georgia, New York, Texas and California, Sprint determined that entry through either of these means could not be profitable, even taking into account its ability to retain long distance customer accounts. In late 2000, Sprint stopped accepting new residential customers for local service in these markets. It no longer has any residential customers in either Georgia or New York, and only a few remain in California and Texas.

In October 2001, Sprint announced the discontinuance of its Sprint ION residential and business offerings. Sprint had viewed Sprint ION as a breakthrough,

(d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island, CC Docket No. 01-324, Memorandum Opinion and Order, released February 22, 2002, ¶ 106 (Rhode Island Order).

integrated offering that promised to give consumers a superior alternative to the local offerings of ILECs. However, after extensive testing, including commercial offering of the service in a number of states, Sprint determined that it could not economically justify continuation or expansion of the service.

Among the factors contributing to Sprint's decision to withdraw from the local market was the difficulty of obtaining the "last mile" facilities needed for the service from the RBOCs. No Bell Company has found it to be in its own interest to cooperate in establishing local competition. Thus, at every turn, there are lengthy delays, inadequate provision of service, and oftentimes high prices.

Due to the delays and failure of the Bell Companies to provide service, as well as the regulatory and legislative uncertainties regarding the future availability of facilities, discussed above, carriers have no assurance about the level of future rates or the availability of services and service elements. Making business decisions to expend massive amounts of capital is, in the face of such uncertainties, very risky.

IV. COMPETITION IN FLORIDA AND TENNESSEE HAS NOT BEEN FIRMLY ESTABLISHED (PUBLIC INTEREST)

As noted above, the Act allows competitors to enter the local market via three entry strategies: resale of the incumbent's network, the use of unbundled network elements, or interconnection to the incumbent's network by pure facilities-based providers, or some combination thereof. The Commission has found that all three means of entry should be available:

Congress did not explicitly or implicitly express a preference for one particular strategy, but rather sought to ensure that all procompetitive entry strategies are available. Our public interest analysis of a section 271 application, consequently,

must include an assessment of whether all procompetitive entry strategies are available to new entrants.

Michigan Order ¶387. In discussing how it would evaluate whether all strategies are available, the Commission made clear that there should be competition in each means of providing competitive local service and to both business and residential customers:

The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large).

Id. ¶391.

In its Rhode Island Order, the Commission stated that the public interest standard does not require it to “consider the market share of each entry strategy for each type of service.” ¶ 104. However, the public interest standard does require that local competition be healthy and sufficient to endure after RBOC entry. Low levels of facilities-based competition, particularly in the residential market, should signal that competitors are unwilling or unable to make a sizeable investment in the market. If competition is not fully and irreversibly enabled in that market, the RBOC will retain its monopoly control over residential customers, and its entry into the long distance market will not serve the public interest.

Although BellSouth claims that meaningful competition exists, competition in the Florida and Tennessee residential markets is *de minimis*. In this application, BellSouth estimates using Method One that competitors in Florida provide facilities-based service to approximately 417,258 residential lines and in Tennessee to approximately 13,891

residential lines.¹⁶ These numbers equate to approximately 8.9 percent of the 4,675,021 residential lines in Florida and 0.7 percent of the 1,912,043 residential lines in Tennessee. These percentages indicate that competitors are not willing to make a sizeable investment in the residential market. Indeed, the minute percentage of CLEC residential customers in Tennessee clearly indicates that competition in this market has not been fully and irreversibly enabled.

Further jeopardizing CLEC competition, particularly in the residential market, is the precarious financial state of several competitors. As noted in Section II above, many CLECs have filed for bankruptcy, and capital for expansion is severely restricted and high-priced. Thus, CLECs will be unlikely to invest in residential services in the future, and their market share is unlikely to grow. Moreover, the fact that the competitive market share is spread among 105 CLECs in Florida and 77 CLECs in Tennessee suggests that individual market shares of some CLECs may simply be unsustainably small. *Id.*, ¶ 5.

The Commission has repeatedly stated that “factors beyond the control of the BOC, such as individual competitive LEC entry strategies, can explain low levels of residential competition.”¹⁷ However, small CLEC residential market shares are the norm, not the exception. Clearly, the reluctance of CLECs across the nation to enter the residential market is evidence of a widespread, systemic problem with the development

¹⁶ Application, Affidavit of Elizabeth A. Stockdale, Tables 1 and 4.

¹⁷ See, e.g., Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in New Jersey, WC Docket No. 02-67, Memorandum Opinion and Order, FCC 02-189, at para. 168 (rel. June 24, 2002).

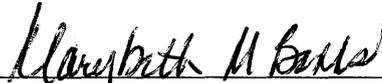
of residential competition which cannot be explained away by “competitive LEC entry strategies.” Rather, the miniscule market shares indicate that factors within the BOCs’ control are preventing the full and irreversible entry of CLECs into the residential market.

V. CONCLUSION

Because BellSouth has failed to demonstrate that there is meaningful competition in the states here at issue, its application for § 271 relief should be denied.

Respectfully submitted,

Sprint Communications Company L.P.



Marybeth M. Banks

H. Richard Juhnke

401 9th Street, N.W., Suite 400

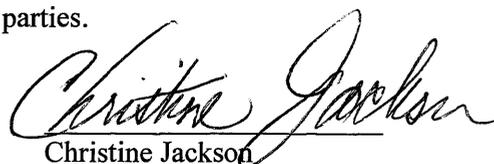
Washington, D.C. 20004

(202) 585-1908

October 10, 2002

CERTIFICATE OF SERVICE

I, Christine Jackson, do hereby certify that this 10th day of October 2002 copies of the Comments of Sprint Communications Company L.P. on the Application by BellSouth Corp., et al., for Provision of In-Region, InterLATA Services in Florida and Tennessee, WC Docket No. 02-307, will be delivered as indicated below to the following parties.


Christine Jackson

VIA E-MAIL AND HAND DELIVERY

*Janice Myles
Wireline Competition Bureau
Federal Communications Commission
Room 5-C327, 445 12th Street, S.W.
Washington, D.C. 20554
jmyles@fcc.gov
cnewcomb@fcc.gov

**Qualex International
Portals II, Room CY-B402
445 12th Street, SW
Washington, DC 20554
qualexint@aol.com

**Luin Fitch
U.S. Department of Justice
Antitrust Division
Telecommunications & Media Enforcement
1401 H Street, NW, Suite 8000
Washington, DC 20530
Luin.Fitch@usdoj.gov

*Twelve paper copies
**One paper copy

VIA E-MAIL AND U.S. MAIL

Beth Keating
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399
bkeating@psc.state.fl.us

Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505
sara.kyle@state.tn.us

VIA U.S. MAIL

Michael K. Kellogg
Sean A. Lev
Leo R. Tsao
Kellogg, Huber, Hansen, et al.
1615 M Street, NW, Suite 400
Washington, DC 20036
*Counsel for BellSouth Corp., BellSouth
Telecommunications, Inc. and BellSouth
Long Distance, Inc.*

Jeffrey S. Linder
Suzanne Yelen
Wiley Rein & Fielding, LLP
1776 K Street, NW
Washington, DC 20006
*Counsel for BellSouth Corp., BellSouth
Telecommunications, Inc. and BellSouth
Long Distance, Inc.*

Harris R. Anthony
400 Perimeter Center Terrace
Suite 350
Atlanta, GA 30346
Counsel for BellSouth Long Distance, Inc.

James G. Harralson
Lisa S. Foshee
Jim O. Llewellyn
4300 BellSouth Center
675 West Peachtree Street
Atlanta, Georgia 30375
*Counsel for BellSouth Corp. and BellSouth
Telecommunications, Inc.*

Jonathan B. Banks
1133 21st Street, NW, Room 900
Washington, DC 20036
*Counsel for BellSouth Corp. and BellSouth
Telecommunications, Inc.*

Guy M. Hicks
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300
*Counsel for BellSouth Corp. and BellSouth
Telecommunications, Inc.*

Nancy White
150 S. Monroe Street
Suite 400
Tallahassee, FL 32301
*Counsel for BellSouth Corp. and BellSouth
Telecommunications, Inc.*