Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

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BellSouth Telecommunications, Inc. and	)	WC Docket No. 02-304
Tariff FCC No. 1, Transmittal No. 657	)	
	)	

OPPOSITION OF
MPOWER COMMUNICATIONS CORP.
TO BELLSOUTH DIRECT CASE

Mpower Communications Corp. ("Mpower") hereby submits its Opposition to BellSouth Telecommunications, Inc.'s ("BellSouth's") Direct Case and its Comments on the issues raised by the Federal Communications Commission ("Commission" or "FCC") on the BellSouth tariff which was filed to become effective August 3, 2002.

I. Introduction

In the wholesale environment, BellSouth has a monopoly on "bottleneck" equipment, such as loops. BellSouth's request shows a desire to continue to act like the monopoly provider it has long been in retail telecommunications services. It wants to be completely protected not only from known credit risks but from all possible credit risks. This is not the way competition works.

No competitive local exchange carrier ("CLEC") would consider using a system for determining customer deposits which is vague, complex and not necessarily correlated to payment on time. A CLEC must take some risk of non-payment and must

use the best available methods -- such as a standard credit rating system -- to determine whether to obtain a deposit from its customers. BellSouth is already better protected than its wholesale customers and should not be allowed to implement the proposed "creditworthiness" system.

II. Basis For Requiring a Deposit

BellSouth proposes to use an elaborate system for determining "creditworthiness" prior to determining whether a customer must pay a deposit. First, it is not clear how BellSouth proposes to determine creditworthiness. BellSouth filed hundreds of pages of information from securities analysts regarding how to analyze creditworthiness. A process which requires hundreds of pages just to detail the system and which fails to specify how the system will be implemented does not provide adequate clarity and explicitness to meet the requirements of FCC Rule 61.2.

Further, BellSouth proposes to use one of these vaguely outlined systems to analyze the "creditworthiness" of each of its competitors and to re-analyze the competitor's "creditworthiness" as the competitor's business grows. Such an approach seems designed to give BellSouth a nearly unfettered ability to require its competitors to pay millions of dollars in deposits regardless of the actual degree of risk that the competitor will not pay or will not pay on time.

Second, it is not clear how the proposed definition of creditworthiness might correlate to late payments or defaults. A much more straightforward approach is to continue to allow deposits if the competitor or customer has a history of late payments. BellSouth already has that ability. It can obtain deposits totaling two months of a

company's average monthly billing, based upon a history of late payments. In what way is the present system inadequate to protect BellSouth?

In fact, BellSouth's present system of charging deposits based upon "late" payment of bills fails to account for the wholly inadequate BellSouth billing system. In its Direct Case, BellSouth makes much of sending bills to its competitors within 6-7 days of the billing date.[1] BellSouth, however, does not subtract that week from the 30 days it allows competitors to pay BellSouth bills before counting them as "late." It also does not take into account the time a check is in transit or the time BellSouth takes to record receipt of payment. Thus, during the approximately two weeks available to evaluate and pay BellSouth's bills, CLECs must spend in excess of a hundred hours each month attempting to audit the bills.

BellSouth bills are thousands of pages long, often lack vital descriptive information and contain numerous errors. Despite the fact that the CLEC must undertake massive bill verification efforts, it is still expected to pay within approximately two weeks to avoid having its payments be counted as "late." In many competitive industries, bills paid in such a short period of time may be entitled to a discount, rather than being counted as late.

Third, and most important, these vague forward-looking methods seem designed more to maintain BellSouth's dominance and control than to protect BellSouth. In the telecommunications marketplace of today, it seems doubtful that BellSouth could meet its own proposed requirements for its competitors. Thus, the system proposed would allow BellSouth to require all of its competitors to make sizable deposits, which could be

[1] BellSouth Direct Case, Ex. 1, p. 2, "Designation Order Paragraph 12 Issues & Responses."

increased, at will, as the customer's business grows, regardless of the customer's payment history.

In competitive environments, lenders may utilize systems such as BellSouth proposes to determine whether to make a loan. In competitive systems, however, no one is required to borrow or to borrow from any given lender. The wholesale market for access to incumbent local exchange carrier ("ILEC") networks is not competitive, however, and any competitive carrier wanting to operate in BellSouth's territory must buy "bottleneck" wholesale products from BellSouth, e.g. loops. Having an unfettered ability to require the payment by competitors of enormous and increasing deposits combined with control over the "bottleneck" facilities the competitors must buy results in a high probability of anti-competitive behavior. This result would not provide an acceptable balance between the interests of BellSouth and the interests of its wholesale customers and competitors, the CLECs.

Fourth, BellSouth argues that given the status of the telecommunications markets, its risks are rising dramatically every year. The peak of CLEC bankruptcies has already passed. Most telecommunications carriers that require bankruptcy protection have already filed; many have failed but others have exited bankruptcy. Further, it should be noted that BellSouth's own statistics do not support its arguments of dramatically rising risk. BellSouth's figures show that almost 90% of payments to BellSouth for 2002 were made in advance![2]

[2] BellSouth Direct Case, Ex. 2, p. 1, "Designation Order Paragraph 13 Issue and Response."

BellSouth's three page list of bankruptcies for 2000-2002, in Ex. 2, do show a significant increase in bankruptcies from 2000 to 2001. The number listed rose from 14 to 40. If, however, one removes the unique cases of Global Crossing and WorldCom from the list of bankruptcies for 2002, one can draw two conclusions which are directly contrary to BellSouth's positions. 1) The actual number of bankruptcies listed are then identical for 2000 and 2002, i.e. 14. The large number of bankruptcies in 2001 appears to have been a temporary phenomenon. 2) The possible loss through bankruptcies in 2002, without the unique cases, is substantially less than for 2001. While Global Crossing and WorldCom do involve very large amounts of money, these situations are unique both because of their size and because of allegations of the most massive frauds in history.

In addition, BellSouth states that "[a]ll of these [bankruptcy] proceedings remain open, so BellSouth cannot calculate the percentage recovered." [3] (Emphasis added.) All of these proceedings are not open, however. Mpower's restructuring was "effective" as of July 2002. Mpower is listed on the 2002 chart, however, as having defaulted on more than $2,000,000 in payments to BellSouth. Not only has Mpower exited its bankruptcy proceeding but the $2,000,000 listed is several times what Mpower records as its undisputed pre-petition debt to BellSouth. Further, Mpower's Chapter 11 restructuring predominantly involved a change of ownership from the previous stockholders to the bondholders and preferred shareholders. Thus, Mpower's "ordinary course" creditors were or are expected to be paid in full, including BellSouth. This is not unique among current telecommunications company bankruptcies. Mpower and undoubtedly, other companies, should not be on this list at all.

[3] BellSouth Direct Case, fn 11.

Fifth, BellSouth shows a table of the percent of bills disputed and the percent of disputed bills adjusted.[4] This is presented to "provide information on possible changes in customer behavior,"[5] however, it is likely that it provides more information on BellSouth's behavior. According to BellSouth's table, the average percentage of "disputes adjusted" is consistently very close to 50% throughout 2000 and 2001, as well as for January and February of 2002. All subsequent figures are substantially lower. BellSouth notes that June, July and August disputes may still be open.[6]

Since these Comments are being filed in late October, the oldest disputes admittedly still open are five months old! It seems likely, however, that the lower figures for March, April and May also reflect disputes that are still open. Mpower, for example, still has disputes open with BellSouth that it initially filed in March. In fact, for more than a year, Mpower has requested that BellSouth implement the "billing quality assurance program" outlined in its interconnection agreement. Despite escalating this request to the top of the hierarchy at BellSouth, no action has yet been taken.

BellSouth often denies disputes arbitrarily, with little or no explanation or "loses" disputes that Mpower has filed. When this happens, Mpower must refile the dispute, sometimes multiple times. Ultimately, a group of disputes which BellSouth has been unwilling or unable to resolve through its normal dispute resolution processes will be escalated to Mpower's Strategic Relations Department for negotiation and settlement. Only then do the accumulating disputes get resolved.

[4] BellSouth Direct Case, Ex. 1, pp. 3-4.
[5] *Id.*, at p. 3.
[6] *Id.,* at p. 4.

Regardless of whether substantial numbers of CLEC disputes with BellSouth are five months or eight months old, however, Mpower believes BellSouth's figures illustrate the continuing difficulties CLECs have in getting a fair hearing from the ILEC in order to get their disputes resolved. Mpower does not believe BellSouth should have a similarly powerful position to determine unilaterally whether a CLEC is "creditworthy."

It should also be noted that because CLECs provide services in a competitive environment, CLECs could not afford to treat their customers in the manner proposed by BellSouth. Mpower, for example, does perform a standard credit check on its prospective customers in order to avoid selling to customers that have poor credit ratings and payment histories. Not having a captive market like the ILECs, however, CLECs could not even consider using some elaborate tool not based upon current or past payment behavior, let alone implement such a proposal. In a competitive marketplace, there is no way to eliminate all risk. An attempt to implement a plan such as BellSouth's would cost CLECs customers rather than providing them more assurance of payment. BellSouth should not be allowed to demand deposits on such a speculative basis, nor should they be able to demand increased deposits based solely on the growth of the CLEC's business. Such a result would not be a just and fair balancing of the interests of the ILEC and the CLECs.

III. Refund of Deposits

In the competitive marketplace, it is common to negotiate a rolling return of deposits or reduced amounts for letters of credit, based upon meeting annual requirements for timely payments a predetermined percentage of the time. If BellSouth were operating in a competitive environment, it might be motivated to obtain the business

of its customers by treating them fairly and by rewarding good payment histories with the return of unneeded security arrangements. Instead, BellSouth requests the ability to implement such an elaborate system that it states it lacks resources to use it to review each customer's credit on an annual basis![7] Conversely, it only takes a few minutes to determine whether the customer did, in fact, pay promptly over a period of months or even years. As discussed above, the speculative "creditworthiness" models are inappropriate. Further, BellSouth should be required to return deposits to wholesale customers who do, in fact, make payments on a timely basis.

IV. Dispute Resolution

Mpower does not oppose the use of standard, commercial dispute resolution processes. It does, however, oppose changing standard commercial arbitration procedures to require one party to pay all of the costs should it be designated as the "loser." First of all, arbitration decisions are often compromises. It is not always easy to determine who has "won" and who has "lost." Second, standard dispute resolution procedures provide that each party pay its own costs. Parties have control over their own expenses and are not motivated to over-spend, based upon the hope or expectation of causing harm to the other party should they lose. Third, CLECs typically are far smaller than ILECs and might not have the resources to pay for its large competitor's costs. What a CLEC might do "in-house," an ILEC might pay a Washington law firm to perform. The possibility of having to absorb not only one's own costs but those of a larger competitor could operate to chill the filing of legitimate disputes.

[7] BellSouth Direct Case, fn 19.

V. Conclusions

Thus, BellSouth should not be allowed to implement such a speculative, vaguely defined "creditworthiness" system for establishing customer deposits. Not only does BellSouth not need additional "protection," according to the facts it supplied in its Direct Case, but it is not clear its proposed system would provide the "protection" it seeks. Conversely, it would allow for an arbitrary transfer of scarce resources from struggling CLECs to their bigger "bottleneck" wholesale services provider, a result which would be damaging to CLECs, as well as anti-competitive.

Respectfully submitted,

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