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December 17, 2002

**Ex Parte Notice**

**ELECTRONICALLY FILED**

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

Re: Application by BellSouth Corporation for Provision of In-Region,  
InterLATA Services in Florida and Tennessee  
**Ex Parte Notice; WC Docket 02-307**

Secretary Dortch:

This filing is necessary to respond to the inaccuracies contained in the *ex parte* submission filed by BellSouth in the above-captioned docket on December 11, 2002. The BellSouth filing is a remarkable document, for its mischaracterization not only of the materials previously filed by KMC Telecom, but more importantly for its misleading characterization of BellSouth's UNE loop performance and the relevant standards.

BellSouth appears to have forgotten that the Telecommunications Act of 1996 ("Act") requires it to make available *nondiscriminatory access* to loops.<sup>1</sup> Specific measures have been established to determine whether BellSouth is in fact providing such access, and BellSouth is clearly failing those standards. The Commission can reach no conclusion other than to find that BellSouth has not complied with the Act and the Competitive Checklist contained therein.

In a continuing attempt to confuse the issue, BellSouth characterizes its loop performance using absolute measures when the relevant standard is in fact a parity measure

<sup>1</sup> 47 U.S.C. §§ 271(c)(2)(B)(ii) and (iv), and §251(c)(3).

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(because that is how one measures discrimination). Since BellSouth is so clearly discriminating against competitors, it is understandable that it would try to distance itself from its own performance standards. The Commission, however, cannot condone such action and must instead ensure compliance with the Act.

The Commission has repeatedly criticized BellSouth's loop performance during the past year, but has gone on to excuse that performance based in part on promises by BellSouth that it would take action to correct the deficiencies. Instead of improving, however, BellSouth's performance has gotten much worse. BellSouth's failure to deliver on its promises is an affront to the Commission and demonstrates the wisdom of requiring current compliance and not promises of future performance. It is respectfully submitted that the Commission must consider taking enforcement action, as it stated it may, in light of these very serious declines. At the very least, the Commission cannot reward such malfeasance with two additional grants of interLATA operating authority.

There is simply no excuse for BellSouth's current performance or for the backsliding seen of late. At the outset, BellSouth asks that the Commission ignore its horrendous facility jeopardy performance for several baseless reasons. First, it claims that competitors are targeting customers in areas that are "heavily congested and capacity constrained." KMC competes against BellSouth in Pensacola, Daytona Beach, Brevard and Chattanooga – hardly dense urban areas of the type to which BellSouth makes reference. Next, BellSouth claims that some of its retail "loops" run between central offices. There must, however, be some connection (*i.e.* a loop) to the customer premises (unless BellSouth is using point-to-point wireless, which it has not asserted) to provide this "retail EEL" service. Since it was BellSouth, however, that developed and agreed to use the metrics and definitions now in place, it cannot now be heard to complain that they are somehow unfairly skewing performance against it. Finally, if this were such a significant problem, one would logically expect BellSouth to have recalculated its performance excluding these circuits – unless doing so would reveal that its performance is still clearly discriminatory (given the magnitude of the performance discrepancy, this is a very plausible inference).

We agree with BellSouth's next statement, however, that "what is important for assessing BellSouth's performance" is "whether BellSouth meets its due date commitments." Unfortunately for BellSouth, it has consistently missed many more installation appointments for competitors than for its retail customers. That is discriminatory and a violation of the Act.

BellSouth has missed a higher percentage of DS-1 and higher installations for competitors between April and September, 2002, and in 10 of the last 12 months in Florida. It also missed more competitor installs in each of the last 12 months in Tennessee. Herein lies BellSouth's most blatant attempt to mislead the Commission: It asserts that this is "excellent service delivery" since it met "over 90%" of the CLEC appointments, when the real test – and

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the appropriate standard – reveal it met 99% of its own appointments in Florida and 97-98% of its installs in Tennessee.

As if this were not bad enough, BellSouth then asserts that “there is no evidence of discriminatory treatment” since it achieved this imaginary 90% standard. To the contrary, BellSouth’s data provides a textbook example of discrimination. In Florida, BellSouth missed fewer of its own installations despite having nearly *five times* as many orders in August, and had one-third fewer misses in September despite having more than twice as many retail orders. The Tennessee numbers are equally shocking, revealing that BellSouth missed just over half as many installs on the exact same number of orders in August and had less than half as many retail misses despite having 75% more retail orders in September. It is difficult to imagine data that would more clearly demonstrate discriminatory treatment – conduct that eliminates any meaningful opportunity for facilities-based carriers to compete.

Another BellSouth fallacy is that small volumes should somehow be ignored. When dealing with DS-1 and higher circuits, there will never be huge volumes since these circuits’ *raison d’être* is to replace numerous voice-grade facilities. Even one miss can affect upwards of 672 telephone lines. The Commission must also bear in mind that BellSouth has itself stated the obvious: smaller volumes are easier to meet. There is simply no excuse for BellSouth to miss so many more competitor orders so consistently.

In addressing its discriminatory provisioning quality performance, BellSouth again resorts to the ‘imaginary standard’ fallacy. Since BellSouth has so clearly failed to meet the accepted standard, it attempts to exclude certain classes of troubles (as categorized by its own technicians) and then claim victory by meeting some imaginary percentage-based standard. Nowhere, however, does BellSouth even claim to be meeting the actual standard – parity and nondiscrimination.

In the ongoing, post-installation environment, BellSouth’s discriminatory loop performance continues. Here again, there is simply no acceptable reason why competitors’ loops should experience trouble so much more often and on such a consistent basis. Once again, the standard is parity and nondiscrimination, and once again BellSouth does not even come close to meeting it.

Finally, we must address BellSouth’s false accusations that KMC did not present a complete picture of BellSouth’s performance to the Commission, such as the fact that BellSouth’s retail jeopardy performance declined along with its wholesale performance. The record reveals that page 7 of the KMC *ex parte* filing of December 5, 2002, contains the exact BellSouth retail jeopardy data that BellSouth falsely asserts was omitted. The better question is whether BellSouth really believes that this drop justifies or excuses its serious backsliding in Georgia. In addition, staff and the Commissioners’ legal advisors will recall that KMC verbally provided its own order volume numbers in order to present an accurate picture of its results –

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proving yet again the falsity of the BellSouth assertions. Regarding missed appointments, KMC presented the only “crucial” and relevant information – the facts on BellSouth’s discriminatory treatment – BellSouth’s assertions regarding its own imaginary standards notwithstanding. Lastly, the data on slide 11 of KMC’s December 5<sup>th</sup> *ex parte* that BellSouth takes issue with was derived directly from Exhibit PM-33 to the BellSouth Varner Affidavit, which clearly indicates that the competitor CTRR was higher than BellSouth retail in 26 of the 28 categories this year (not that missing 26 of 32, as BellSouth asserts, would make any difference in terms of checklist compliance).

In conclusion, the Commission must focus on compliance with the Act and ignore BellSouth’s attempts at obfuscation. It is clear to even the most casual observer that BellSouth has not met the Competitive Checklist. As a result, it is respectfully submitted that BellSouth’s application should be denied until such time as it can prove compliance with the Act.

Please file this notice with the record of the above-referenced proceeding. Should you have any questions with regard to the foregoing, please do not hesitate to contact the undersigned at your convenience. Thank you for your assistance in this matter.

Respectfully submitted,

/s/

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