

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INQUIRY INTO THE USE OF CONTRACT SERVICE )  
ARRANGEMENTS BY TELECOMMUNICATIONS ) CASE NO.  
CARRIERS IN KENTUCKY ) 2002-00456

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE  
TO TIME WARNER'S MOTION FOR REHEARING

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, responds to the motion of Time Warner Telecom of Ohio, LLC ("TWT") seeking rehearing of the Commission's April 29, 2005, Order.

After extensive proceedings<sup>1</sup> including data requests, an informal conference, and hearing, the Commission's April 29, 2005, Order required all telecommunications carriers to file CSAs for local exchange service. The Commission noted the various proposals of parties and the substantial disagreement among the parties,<sup>2</sup> reaching certain conclusions that were well supported by the record. The Commission correctly recognized that CSAs "now form a vital component of telecommunications carriers' response to competition. CSAs also continue to be invaluable to carriers as they seek to meet customers' unique circumstances." The Commission further determined that CSAs, when disclosed by filing with the Commission, "violate neither KRS 278.160 or KRS 278.170."<sup>3</sup>

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<sup>1</sup> CLECs were made parties to this case and had full opportunity to participate.

<sup>2</sup> Order, April 29, 2005, at 12, *In the Matter of: Inquiry Into the Use of Contract Service Arrangements by Telecommunications Carriers in Kentucky*, Case No. 2002-00456 ("CSA Order").

<sup>3</sup> *Id.* at 12.

TWT's motion is based on two false assumptions. First, TWT claims the Commission is improperly revoking an exemption previously granted. On the contrary, this Commission consistently has required the filing of CSAs for ILECs and CLECs alike, except for the abbreviated summary filing of CSAs granted BellSouth in Case No. 2001-00077. While not all CLECs have consistently abided by the Commission's requirements, Commission staff also have been clear and consistent in their interpretation and understanding of the Commission orders in this regard.<sup>4</sup>

Second, TWT claims its alleged exemption from filing requirements of CSAs points to historical distinctions the Commission has made since 1984 between CLECs and "dominant providers with market power, like BellSouth". TWT's Motion at 3. TWT's motion asking the Commission to unfairly impose greater obligations on ILECs than on CLECs is based on the false premise such an unequal playing field would be justified by ILEC's "market power".

Legal authorities establish that market power is, in essence, the power to exclude competition. While market share figures may imply such power, they are not determinative. "In evaluating monopoly power, it is not market share that counts, but the ability to maintain market share." *United States v. Syufy Enterprises*, 903 F.2d 659, 665-66 (9th Cir. 1990). BellSouth does not have the ability to exclude competition. On the contrary, the local telecommunications market in Kentucky has been deemed irreversibly open to competition.<sup>5</sup> Substantial evidence demonstrates that market entry

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<sup>4</sup> CSA Order at 13.

<sup>5</sup> Memorandum Opinion and Order, at 3, In the Matter of *Joint Application by BellSouth Corp., et al., for provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, WC Docket No. 02-150 (rel. Sept. 18, 2002).

is easy and is facilitated by the requirements of Sections 251 and 252 of the Telecommunications Act. For example, there is a minimum of 8 CLEC competitors, and a maximum of 56, operating in each wire center in BellSouth territory.<sup>6</sup> Because BellSouth does not have the ability to exclude competitors, even if BellSouth were determined to have a high market share, in this context, such would not equate with market power.

TWT argues that the Commission's blanket requirement for filing CSAs by CLECs and ILECs alike is a step backwards in telecommunication flexibility. Unquestionably, granting TWT's rehearing motion to allow only CLECs an exemption from filing requirements, would be a giant step backwards and would unfairly shackle ILECs in their efforts to respond to customers. A filing requirement applicable only to ILECs would create a competitive disadvantage to ILECs because potential customers would know their CSAs would be publicly filed only if they contract with ILECs but not if they contract with CLECs. BellSouth has no objection, and in fact supports, allowing less burdensome or simplified filing requirements, so long as the same rules are applicable and enforced as to all competitors.<sup>7</sup>

This Commission's decision, although not granting BellSouth or any of the other parties all of the relief requested, nonetheless, struck a balance for a level playing field among competitors. If the Commission should grant rehearing and the relief TWT

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<sup>6</sup>Kathy Blake's Direct Testimony, Ex. KKB-9, Case No. 2002-00276, In the Matter of: *Petition of BellSouth Telecommunications, Inc. for Presumptive Validity of Tariff Filings*, August 16, 2004.

<sup>7</sup> As the Commission noted, since 1999, BellSouth has entered into more than 1,000 CSAs. Commission Order at 5. This docket arose from merely two complaints by customers, who also happen to compete with BellSouth and whose motivation thus could be open to question. In both of those cases, the facts were contested and the Commission's earlier decisions were based on strongly disputed and unsupported hearsay testimony. Other than the two complaints filed four years ago, out of over 1,000 CSAs BellSouth has entered into, no witness, no testimony, and no evidence of any kind, has been presented to establish, let alone suggest, any impropriety in a CSA by BellSouth or any other ILEC.

requests, there is no question that the balance would be unfairly tipped to CLECs in what has been determined here, and in other proceedings to be a competitive market.<sup>8</sup>

BellSouth has no objection if the Commission decides to revisit streamlining or eliminating CSA filing requirements. However, BellSouth urges the Commission in any review of this matter to continue on the path of even-handed application of such requirements so that a particular competitor or group of competitors is not disadvantaged. For that reason, unless the Commission chooses to reverse the filing requirements as to all competitors, it should deny TWT's motion for rehearing.

Respectfully submitted,



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<sup>8</sup> See, e.g. April 28, 2005, Presumptive Validity Order, 2002-00276, at 5.