COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION CONCERNING THE PROPRIETY OF PROVISION OF INTERLATA SERVICES BY BELLSOUTH TELECOMMUNI-CATIONS, INC. PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996	)	CASE NO. 96-608

ORDER

On August 8, 1997, MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc. (collectively "MCI"), filed a motion to dismiss this case ("MCI Motion") claiming that the order of the Federal Communications Commission ("FCC") in Application by SBC Communications, Inc., Pursuant to §271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma (CC Docket No. 97-121, June 26, 1997) ("SBC Order") resolves all issues relating to the application of BellSouth Telecommunications, Inc. ("BellSouth") to provide interLATA services in Kentucky. MCI argues that the SBC Order clarifies that BellSouth's application is governed by §271 (c)(1)(a) ("Track A") rather than §271 (c)(1)(B) ("Track B") and concludes that, since BellSouth itself has admitted there are no qualifying competitors providing residential and business service in Kentucky, any Track A application must fail.

MCI correctly points out that the Commission, in its Order dated December 20, 1996, determined that Track A is appropriate for BellSouth in Kentucky because qualifying competitors have requested interconnection. See 47 U.S.C. §271. Track B enables a Bell Operating Company to present a Statement of Generally Available Terms

("Statement") rather than one or more interconnection agreements to demonstrate that it has legally opened its local market to competition. Track B does not require the presence of a facilities-based competitor, for the obvious reason that Track B was created to ensure that Bell operating companies were not prevented from entering the interLATA market simply because no such competitor had requested interconnection.

BellSouth, in its response to MCI's motion, filed August 15, 1997 ("BellSouth Response"), asserts that "[t]he choice of Tracks is up to the Bell Company."[1] The Commission does not agree. The statute itself, as well as the SBC Order, makes it abundantly clear that a request for interconnection forecloses Track B if the requestor is facilities-based and requests access and interconnection to provide local exchange service to business and residential customers as described in §271(c)(1)(A).[2] The Commission earlier ruled that BellSouth's Statement would be considered in this proceeding only because it is not entirely clear that a "facilities-based" carrier has requested interconnection. In its Order dated April 16, 1997, the Commission explained that it was not clear whether, for purposes of §271, a carrier is considered "facilities-based" only if it is constructing its own facilities as opposed to purchasing unbundled elements from the incumbent local carrier. Because the Commission's role under §271 is to advise the FCC, the Commission did not wish to foreclose consideration of the Statement in the absence of a clear statement from the FCC that a carrier is "facilities-based" if it provides service pursuant to unbundled elements. MCI in its motion does not

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1 BellSouth Response at 6.

2 SBC Order at Para. 54.

address this issue. However, the FCC has done so in Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Michigan (CC Docket No. 97-137, August 19, 1997). At Paragraphs 86-103, pursuant to a lengthy legal analysis with which this Commission concurs, the FCC confirmed that unbundled elements purchased from an incumbent carrier are the purchaser's own facilities for purposes of §271. Accordingly, the Commission finds that Track B is closed to BellSouth in Kentucky and that its Statement should not be considered in this docket.

However, Track A remains open. BellSouth currently has entered into numerous negotiated agreements that have been approved by this Commission, as well as binding arbitrated agreements with MCI and AT&T. Accordingly, this proceeding should focus on whether the terms of those agreements satisfy the checklist, and whether BellSouth is making all items on the competitive checklist found at §271(c)(2)(B) available as a practical matter, at parity and without discrimination.

As a final matter, MCI points out that BellSouth itself has stated that there are currently no Track A providers in Kentucky and that such a provider must be present for a Track A application to succeed.[3] However, the quoted statement of BellSouth was made many months ago. Since then, MCI itself has entered into a binding agreement with BellSouth that may be found to satisfy Track A. It is true that MCI has not begun to serve customers pursuant to its agreement with BellSouth. However, the agreement through which it may do so is in place. The incentive provided by §271 and discussed

[3] MCI Motion at 2.

in the SBC Order, at Paragraph 57, has been serving its purpose: BellSouth appears to have moved expeditiously to satisfy the interconnection requests of potential competitors, including MCI. Moreover, BellSouth claims to provide each item of the competitive checklist to competitors. MCI says itself that the interconnection agreements with BellSouth, when fully implemented, will result in "the type of business and residential services satisfying Track A."[4]

In contrast, the FCC rejected SBC Communications' ("SBC") Oklahoma application because the company could not show that Brooks Fiber, a competitor relied upon exclusively by SBC for purposes of satisfying Track A,[5] was a provider of both residential and business service. Brooks Fiber, after all, stated it would not accept requests for residential services in Oklahoma,[6] and the record showed that Brooks Fiber was providing residential services without charge to only a few employees for testing purposes. It remains to be seen which competing carriers' business activities will be relevant to BellSouth's application to the FCC.

The FCC has stated there must be an actual commercial alternative to the Bell operating company in order for a Track A application to succeed.[7] Whether such an alternative exists in BellSouth's market is a matter to be determined -- particularly since events are moving so rapidly that, even if such an alternative does not exist as of the

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4 MCI Motion at 11-12.

5 SBC Order at Para. 6.

6 SBC Order at Para. 9, 20.

7 SBC Order at Para. 14.

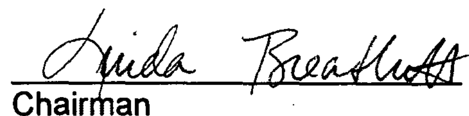
date of this Order, it might very well exist by the time BellSouth files its application with the FCC. AT&T and MCI appear to be reasonable commercial alternatives to BellSouth which will serve both residential and business customers and, given that they have entered into binding agreements with BellSouth, it is to be expected that they will actually be competing in BellSouth's market in short order. Thus, the Commission cannot definitively state at this time that the hearing should be canceled.

This Commission has previously stated that it will not truncate this proceeding absent firm legal standards applied to irrefutable facts demonstrating that such truncation is appropriate and will not simply prevent this Commission from compiling as complete a record as possible to advise the FCC in making its decision.

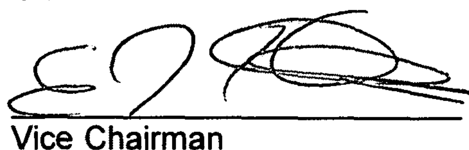
For the foregoing reasons, IT IS HEREBY ORDERED that MCI's motion to dismiss this proceeding is denied.

Done at Frankfort, Kentucky, this 21st day of August, 1997.

PUBLIC SERVICE COMMISSION



Chairman



Vice Chairman

Commissioner

ATTEST:

Executive Director