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January 27, 1997

Ms. Blanca S. Bayó
Director, Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket Nos. 960846-TP, 960833, 960916

Dear Ms. Bayó:

Enclosed for filing on behalf of MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. in the above docket are the original and 15 copies of MCI's Response to BellSouth's Motion for Reconsideration.

By copy of this letter, this document has been provided to the parties on the attached service list.

Very truly yours,

Richard D. Melson

RDM/cc
Enclosures
cc: Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petitions by AT&T Communications of the Southern States, Inc., MCI Telecommunications Corporation, MCI Metro Access Transmission Services, Inc., and American Communications Services, Inc. for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. concerning interconnection and resale under the Telecommunications Act of 1996.	)	Docket No. 960833-TP Docket No. 960846-TP Docket No. 960916-TP Filed: January 27, 1997

MCI'S RESPONSE TO BELLSOUTH'S MOTION FOR RECONSIDERATION

MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively, MCI) hereby file their response in opposition to BellSouth's Motion for Reconsideration of Order No. PSC-96-1579-FOF-TP (Order). As grounds for its opposition, MCI states:

Standard of Review

The purpose of a motion for reconsideration is to bring to the attention of the tribunal some point of fact or law which it overlooked or failed to consider when it rendered its decision. Diamond Cab Co. of Miami v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). As the court in State v. Green, 106 So. 2d 817, 818 (Fla. 1st DCA 1958) said with reference to petitions for rehearing:

> The sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent, or rule of law

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> which the court has overlooked in rendering its decision. . . .
>
> It is not a compliment to the intelligence, the competence or the industry of the court for it to be told in each case which it decides that it has "overlooked and failed to consider" from three to twenty matters which, had they been given proper weight, would have necessitated a different decision.

When measured against these standards, BellSouth's Motion for Reconsideration (Motion) must be denied. BellSouth has failed to show that there are any matters of record or points of law that the Commission overlooked or failed to consider in rendering its Order. Instead, BellSouth's Motion reargues matters that were covered (or could have been covered) in its post-hearing brief, refers to extraneous material outside the record of the proceeding, and offers "alternatives" to the Commission's decisions in the form of post-hearing constructs that find no basis in the record.

Recombination of Unbundled Network Elements

BellSouth has provided no basis for the Commission to reconsider its decision that MCI and AT&T must be permitted to recombine unbundled network elements in any manner they choose and that the price for the combination of network elements must equal the sum of the individual element prices.

BellSouth begins with the incredible assertion that the Commission "misunderstands" BellSouth's position on recombination of network elements. (Motion at 5) BellSouth says that it does not oppose the recombination of such elements, but is only concerned about their pricing when the recombination recreates an existing BellSouth service. (Motion at 6) If anyone misunderstands the

position that BellSouth took throughout the proceeding, it is BellSouth itself, not the Commission. As BellSouth stated in its post-hearing position on Issue 2:

> AT&T and MCI should be allowed to combine BellSouth provided elements with their own capabilities to create a unique service. **They should not be allowed to rebundle these elements to recreate a retail service that is already available to AT&T/MCI via resale.** (BellSouth Brief of the Evidence (BST Brief), page 28, emphasis added)

This position was followed by about 7-1/2 pages of argument in which BellSouth argued why such recombination should not be permitted and concluded by saying that:

> . . .this Commission should, instead, order that unbundled elements may not be rebundled in a way that duplicates an available BellSouth service. (BST Brief at 35)

The only hint that BellSouth viewed recombination as a pricing issue came in the very last sentence of its discussion of Issue 2, in which BellSouth stated:

> Another logical alternative would be to treat this scenario as what it is, a resold service and price it as such. (BST Brief at 35)

BellSouth cannot be permitted, on reconsideration, to change the entire thrust of its position on this issue and introduce for the first time pricing arguments which it hinted at -- but elected not to fully develop -- at the time it filed its post-hearing brief.

The apparent reason that BellSouth is seeking to recast its argument in terms of a pricing issue is to bolster its separate argument that, because of the Eighth Circuit's stay of the FCC's pricing rules, the Commission is not bound by the FCC Rules

relating to the combination of network elements. That argument is erroneous. The Eighth Circuit has **not** stayed Rule 51.315 relating to combination of unbundled network elements. While the stay of the pricing rules means that the Commission is not required to follow the FCC-prescribed TELRIC methodology for determining the price of individual network elements under Section 252(d)(1) of the Act, the stay does not mean that the Commission can ignore the **statutory** pricing standard. Under that standard, the price of a network element must be based on its cost. Section 252(d)(1) does not contemplate or permit unbundled network elements to be priced differently depending on the type of telecommunications service they are used to provide. The avoided cost standard urged by BellSouth simply has no application under the Act to the pricing of unbundled network elements.

BellSouth also argues that the combination of network elements should be considered as a pricing issue because of the interplay with the joint marketing restrictions contained in the Act. Again there is no basis for reconsideration. BellSouth points to nothing that the Commission overlooked or failed to consider. To the contrary, the potential impact of the joint marketing restrictions was explicitly considered, both in the Order (page 37) and during the discussion among the Commissioners leading up to their decision on this issue.

In the course of its arguments, BellSouth improperly relies on matters outside the record of this proceeding. First, BellSouth attaches a copy of an amicus brief filed in the Eighth Circuit by four members of Congress. That brief is not part of the record in

this proceeding and in fact was the subject of an earlier improper ex parte communication by Mr. Lombardo to Commissioner Clark. While BellSouth might have been able to adduce evidence of legislative intent during the hearing in this case, this brief was not offered as evidence at that time. Further, MCI submits that this brief would have been inadmissible as evidence of legislative intent had it been offered. See, Blanchette v. Connecticut General Insurance Corp. (Regional Rail Reorganization Act Cases), 419 U.S. 102, 132, 42 L.Ed.2d 320, 347 (1974) in which the U.S. Supreme Court stated:

> Finally, reliance is put on what is referred to as "subsequent legislative history" in the form of. . .an amicus brief filed in this Court on behalf of 36 Congressmen. But post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage. [citations omitted]

Further evidence of the unreliability of that brief is that fact that a similar amicus brief supporting the opposite position was filed in the Eighth Circuit by Congressmen Bliley, Hollings, Stevens, Inouye, Lott and Markey.

Next, BellSouth refers to decisions (or recommendations) from other arbitrations which have addressed the combination of unbundled elements. This information is also outside the record and should be disregarded. If the Commission nevertheless considers such information, it should be aware that BellSouth has provided an unrepresentative sample, and that the majority of state commissions who have considered the issue have held that combinations of network elements are permitted at unbundled element

prices. These include California, Hawaii, Iowa, Indiana, Ohio, Texas, Oklahoma, Virginia, Illinois, Connecticut, Colorado, Nebraska, Oregon, Kentucky, Pennsylvania, Minnesota, Missouri and Washington.[1]

In summary, BellSouth has provided no basis on which the Commission can properly reconsider the portion of the Order relating to the combination of unbundled network elements.

Tariff Terms and Conditions

BellSouth asks the Commission to reconsider its decision that no existing tariff restrictions would apply to resale of BellSouth services except for certain cross-class selling restrictions enumerated in the Order. BellSouth argues in effect that all of its tariff restrictions are presumptively reasonable and must be applied in a resale environment unless a potential reseller demonstrates that they are unreasonable or discriminatory.

BellSouth's argument improperly attempts to shift the burden of proof from itself to MCI and AT&T. Under Section 51.513 of the FCC's Rules (which has not been stayed) a LEC may impose restrictions -- other than restrictions on cross-class selling and

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[1] See, California Public Utilities Commission, Application 96-08-041, p.7; Hawaii Public Utilities Commission, Docket No. 96-0329, p.25; Iowa Utilities Board, Docket Nos. ARB-96-1 and ARB-96-2; Indiana Utility Regulatory Commission, CAUSE NO. 40571-INT-01; Ohio Public Utility Commission, Case No. 96-832-TP-ARB, pp. 12-13; Public Utility Commission of Texas, Docket Nos. 16300 and 16355, p. 38; Corporation Commission of Oklahoma, CAUSE NO. PUD 960000242, Order No. 407738, pp. 8-9; State Corporation Commission of Virginia, Case Nos. PUC960117, PUC960118, PUC960124, PUC960131, p. 14; Illinois Commerce Commission, Docket No. 96 AB-005, p. 45; Connecticut Department of Public Utility Control, Final Award in Arbitration between AT&T and SNET, p. 7; Public Utilities Commission of Colorado, Docket No. C96-1231, p. 68; Nebraska Public Service Commission, Docket No. C-1400, p. 46; Public Utility Commission of Oregon, Docket No. ARB 5, p. 19; Kentucky Public Service Commission, Case No. 96-431, Pennsylvania Public Utility Commission, Docket No. A-310125 F0002; Minnesota Public Utility Commission, Docket No. P-442, 407/M-96-939, pp. 21-22; Missouri Public Service Commission, case No. TO-97-63, p.35; and Washington Utilities and Transportation Commission, Docket No. UT-960309, pp. 12-13 and Docket No. 960307, pp. 40-41.

short term promotions -- "only if it proves to the state commission that the restriction is reasonable and nondiscriminatory." That rule clearly places the burden on BellSouth to support the reasonableness of its proposed restrictions, not on MCI to prove their unreasonableness. BellSouth directs the Commission to no evidence regarding the reasonableness of its tariff restrictions that the Commission overlooked or failed to consider. Its motion for reconsideration on this point must therefore be denied.

Services Excluded from Resale

The section of BellSouth's Motion concerning services excluded from resale contains a hodgepodge of issues. BellSouth asks for reconsideration of the requirement to resell contract service arrangements. BellSouth cites no evidence that the Commission overlooked or failed to consider. Instead, it simply reargues its position in the case and refers to orders or recommendations from two other states where state commissions reached a different conclusion than the Commission. BellSouth seeks reconsideration of the requirement to resell Lifeline and LinkUp services, but argues nothing beyond what one Commissioner has already stated in his dissenting opinion. Clearly there is nothing here that the Commission overlooked or failed to consider.

BellSouth also seeks "clarification" of the Commission's requirement that short-term promotional offerings be made available for resale at the promotional price. BellSouth argues that such short-term promotions can be resold only by purchasing the underlying non-promotional retail service at the normal discounted rate. BellSouth is half right. Clearly a competitor **can** choose to

purchase the underlying service at the normal discount from the retail price. However, just as clearly, a competitor is entitled to purchase a promotion for resale at the full promotional price. FCC Order 96-325, ¶¶ 948-950. While the FCC Rules have exempted short-term promotions from the wholesale pricing requirement of Section 251(c)(4), such promotions remain subject to the basic statutory resale requirement in Section 251(b)(1).

Pricing of Channelization and Common and Dedicated Transport

MCI does not oppose the requests for clarification made by BellSouth in this portion of its Motion. MCI does oppose reconsideration of the $1.60 per mile rate for dedicated transport. BellSouth simply asks that its originally proposed tariff rate of $16.75 per mile be established as the price for this unbundled element. As the staff noted in its corrected recommendation, however, tariff rates are not an appropriate basis for pricing unbundled network elements. The $1.60 per mile rate established by the Commission is supported by the testimony and exhibits of AT&T's witness Ellison. BellSouth has provided no valid basis for reconsideration of this rate determination.

PIC Changes

MCI does not object to BellSouth's request for clarification regarding its ability to accept and process PIC change requests submitted via the CARE system in cases where BellSouth is directed by the ALEC to process such requests. It would be appropriate for the Order to require that BellSouth not process such PIC changes <u>unless</u> BellSouth has been directed to the contrary by the customer's local service provider. This would address the

Commission's concern that control over the PIC change process reside with the customer's local exchange provider, while accommodating any ALECs who may have valid reasons for asking BellSouth to process such changes on their behalf.

BellSouth has presented no basis, however, to reconsider the requirement that BellSouth be required to provide an appropriate ALEC contact number to non-BellSouth end user customers who mistakenly call BellSouth's business office to request a PIC change.

CABS-Formatted Billing

BellSouth requests that the Order be reconsidered to give it 180 days, rather than 120 days, to implement CABS-formatted billing. MCI takes no position on this request for reconsideration, since MCI has subsequently agreed with BellSouth to the use of a 180 day time frame.

Access to Customer Records

BellSouth's request for reconsideration of the Commission's decision regarding access to customer records identifies nothing that the Commission overlooked or failed to consider in reaching its decision. The concerns about "roaming" expressed in BellSouth's Motion were explicitly considered in the Order. In fact, MCI and AT&T were directed to work with BellSouth to develop an appropriate interface to discourage roaming.

The Order also properly took into account that ILECs are not the sole guardians of the customer's privacy, and that MCI and AT&T have a duty as well to protect customer privacy. Given that duty, the use of a blanket written letter of authorization in which MCI

and AT&T certify that they will access a customer's information only with the customer's prior authorization is an appropriate balancing of the interests of all parties.

BellSouth's Motion identifies a number of "alternatives" to the blanket letter of authorization, including a three-way call to the BellSouth service center or a faxed copy of the customer service record based on verbal authorization of the customer. Neither of these alternatives, however, is supported by the record in this case nor was either alternative advanced in BellSouth's post-hearing brief. (See BST Brief at 64) BellSouth cannot be permitted to advance new theories on reconsideration when it failed to offer them during the final hearing.

Pricing - General

BellSouth requests that the Commission reconsider its decision to establish permanent rates for some network elements and asks the Commission instead to treat all unbundled element rates as interim, and subject to true-up, until after the Eighth Circuit has ruled and the proper pricing standards under the Act are established with certainty.

MCI opposes this request. There are at least two problems with establishing interim rates subject to true-up. First, such rates create great uncertainty and risk for new entrants, who are exposed to the threat of retroactive, higher rates. This makes it difficult for the entrant to make sound business judgments as to market entry, and has a chilling effect on the introduction of competition. Second, while MCI is not seeking reconsideration of unbundled element pricing, MCI believes that the Commission's

pricing decisions do not comport with the requirements of the Act. MCI believes it is important for purposes of obtaining timely and complete judicial review that the Commission's intention to establish permanent rates remain clear.

MCI also opposes BellSouth's request that the submission of additional cost studies be deferred. The Commission explicitly found that "the evidence reveals that BellSouth's proposed nonrecurring rates are, in some instances, excessive." (Order, page 33) BellSouth should be required to promptly submit the required cost studies for such charges so that MCI will not be exposed indefinitely to paying excessive charges for any functions.

WHEREFORE, MCI respectfully urges the Commission to deny BellSouth's Motion for Reconsideration, except for the minor clarifications to which MCI does not object.

RESPECTFULLY SUBMITTED this 27th day of January, 1997.

HOPPING GREEN SAMS & SMITH, P.A.

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to the following parties by hand delivery this 27th day of January, 1997.

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