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July 2, 2003

BY HAND DELIVERY
Ms. Blanca Bayó, Director
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Re: Docket Nos. 981834-TP and 990321-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of AT&T Communications of the Southern States, LLC are an original and fifteen copies of the AT&T Communications of the Southern States, LLC's Response to Joint Motion of Verizon Florida Inc. and Sprint-Florida, Incorporated to Strike the Revised Rebuttal Testimony of Steven E. Turner and the Surrebuttal Testimony of Jeffrey A. King. Also enclosed is a 3 1/2" diskette with the document on it in Microsoft Word 97/2000 format.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,

E. Gary Early

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EGE/amb
Enclosures
cc: Tracy W. Hatch, Esq.
Parties of Record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Competitive Carriers for Commission action to support local competition in BellSouth Telecommunications, Inc.'s service territory	Docket No. 981834-TP
In re: Petition of ACI Corp. d/b/a Accelerated Connections, Inc. for generic investigation to ensure that BellSouth Telecommunications, Inc., Sprint-Florida, Incorporated, and GTE Florida Incorporated comply with obligation to provide alternative local exchange carriers with flexible, timely, and cost-efficient physical collocation.	Docket No. 990321-TP Filed: July 2, 2003

AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC'S RESPONSE TO JOINT MOTION OF VERIZON FLORIDA INC. AND SPRINT-FLORIDA, INCORPORATED TO STRIKE THE REVISED REBUTTAL TESTIMONY OF STEVEN E. TURNER AND THE SURREBUTTAL TESTIMONY OF JEFFREY A. KING

AT&T Communications of the Southern States, LLC (hereinafter "AT&T), pursuant to Rule 28-106.204, Fla. Admin. Code, hereby responds to the Joint Motion of Verizon Florida Inc. and Sprint-Florida, Incorporated to Strike the Revised Rebuttal Testimony of Steven E. Turner and the Surrebuttal Testimony of Jeffrey A. King (hereinafter the "Joint Motion"), and requests that the Commission deny the Motion, and states:

1. In their Joint Motion, Verizon Florida Inc. (hereinafter "Verizon") and Sprint-Florida, Incorporated (hereinafter "Sprint"), argue that the revised testimony of Steven E. Turner and the surrebuttal testimony of Jeffrey A. King should be stricken from the record of this proceeding, on the basis that they constitute a fundamental deviation from earlier testimony filed

with the Commission or constitute an improper response to testimony filed by others. The Joint Motion should be denied.

2. A review of the testimony in its proper context reveals that Mr. Turner's revised testimony, filed on June 6, 2003, and Mr. King's surrebuttal testimony, filed on June 18, 2003, do not constitute substantive revisions. Rather, this testimony serves only to correct errors in the original testimony or to properly respond to the testimony of others. Moreover, irrespective of how Verizon and Sprint would characterize this testimony, under applicable law, a Motion to Strike is an inappropriate means of resolving the concerns of Verizon and Sprint.

I. The Subject of the Motion goes to the Weight, not the Admissibility, of the Evidence

3. A determination of the nature of Mr. Turner's revised testimony and of Mr. King's surrebuttal testimony is unnecessary because the issues raised by Verizon and Sprint are ones that are capable of being fully addressed through cross-examination of Mr. Turner and Mr. King. The purpose for filing the revision, and for the early filing of the surrebuttal testimony, was to provide all parties advance notice of the revisions before the hearing. If any party believes the testimony to be inconsistent with earlier testimony or to be non-responsive to the testimony of others, that may be brought out on cross-examination, with the responses going to the weight of the evidence, rather than its admissibility.

4. The suggestion that the testimony should be stricken, and that testimony be either limited or precluded "on the issue of DC power metering" ignores the purpose of a fact-finding proceeding. Such proceedings are designed not to review proposed action, but rather to develop agency action. See e.g. *Lawnwood Medical Center, Inc. v. Agency for Health Care Administration*, 678 So.2d 421 (Fla. 1st DCA 1996); *Beverly Enterprises-Florida, Inc. v. Department of Health and Rehabilitative Services*, 573 So.2d 19 (Fla. 1st DCA 1990). Verizon

and Sprint ask the Commission to ignore relevant, pertinent factual information as the Commission develops its final agency action. Such a request is adverse to the interests of telecommunications subscribers in Florida, who have a direct interest in ensuring that the Commission make decisions in their interest with the best information available.

5. AT&T has attempted to provide advance notice of its witnesses testimony in keeping with the intent of the procedural order in this case. Any legitimate concerns that Verizon and Sprint may have can be adequately and fully addressed through the procedures available via the remaining schedule in this case. In keeping with the interests of the Florida telecommunications subscribers, the Commission should deny the Joint Motion, and should proceed to judge the evidence on its merits.

II. The Relief Sought is an Unjust and Unnecessary Sanction

6. The Joint Motion is based upon a disputed analysis of the content of the testimony. Verizon and Sprint argue factual issues through statements such as "AT&T's metering proposal is a solution in search of a problem, given the availability of the alternative approach followed by Verizon and Sprint, which allows ALECs to be billed simply according to the amount of power they request," (Joint Motion at 6), and "Mr. King is wrong - - Verizon indeed permits ALECs to order whatever load they desire, regardless of whether that load corresponds to the List 1 Drain of their equipment, the List 2 Drain of their equipment, or neither." (Joint Motion at 8).

7. Objections of this nature go beyond the typical bases for a motion to strike. Such bases include challenges to the competency of the witness (see *Florida Dept. of Transportation v. Armadillo Partners, Inc.*, ___ So.2d ___, 28 Fla. L. Weekly S349 (Fla. 2003); *Above All*

Drywall v. Shearer, 651 So.2d 195 (Fla. 1st DCA 1995)); to testimony that is so speculative as to not be probative as to any issue (*Shearon v. Sullivan*, 821 So.2d 1222 (Fla. 1st DCA 2002); to evidence or testimony that violates an order *in limine* (*Cummins Alabama, Inc. v. Allbritten*, 548 So.2d 258 (Fla. 1st DCA 1989); and to evidence that is subject to exclusion under the Florida Evidence Code (see Section 90.403, Fla. Stat.), subject to a privilege under the Florida Evidence Code (see Sections 90.501-90.510, Fla. Stat), or subject to exclusion as hearsay under the Florida Evidence Code (see Section 90.802, Fla. Stat.). None of those bases exist in this case.

8. For the Commission to strike the testimony of Mr. Turner and Mr. King would constitute the most severe sanction available for an action that, at its very worst, constituted a good faith effort to revise testimony found by AT&T to be potentially confusing, and which could lead to an erroneous conclusion, and to respond to the prefiled technical testimony of a Commission witness. Such a severe sanction would constitute an abuse of the Commission's discretion. See *Kamhi v. Waterview Towers Condominium Association, Inc.*, 793 So.2d 1033 ((Fla. 4th DCA 2001); *State v. Trummert*, 647 So.2d 966 (Fla. 4th DCA 1994). The court in *Trummert* made a particularly cogent observation regarding the sanction of striking otherwise admissible and pertinent evidence when it held that "[w]hile some type of sanction may be appropriate for the prosecution's shortcomings, the interests of the citizens of the State of Florida should not be jeopardized by imposing the extreme sanction of exclusion of what may well be crucial evidence . . . ." (e.s.) *Trummert* at 968. Although *Trummert* dealt with a criminal proceeding, the court's recognition of the overriding interests of the citizenry is directly applicable to proceedings before the Commission.

9. Verizon and Sprint acknowledge that it is clearly within the Commission's authority to accept this testimony. For the reasons stated therein and in this response, AT&T has demonstrated why this testimony should be included in the record when the hearings are held in this case. Accordingly, the Commission should consider the best available evidence on these issues and deny the Joint Motion and proceed to judge the evidence on its merits.

III. Verizon and Sprint have not Demonstrated Prejudice Sufficient to Justify Striking the Testimony

10. Verizon and Sprint argue that the testimony of Mr. Turner and Mr. King should be stricken because:

> In adopting this fundamentally flawed proposal just weeks before the hearings on the issue, AT&T has effectively precluded the ILECs from reasonably conducting discovery to ascertain the basis for AT&T's changed position — discovery that would be essential to resolution of the issue, given that AT&T's stated positions on metering DC power usage are so incomplete and insufficiently supported in many respects. Putting aside the procedural improprieties of its approach, AT&T's metering proposal is a solution in search of a problem, given the availability of the alternative approach followed by Verizon and Sprint, which allows ALECs to be billed simply according to the amount of power they request.

Joint Motion at 6. This statement reinforces AT&T's assertion that the Joint Motion is nothing more than an effort to articulate their disagreement with the substance of the testimony. In that regard, if AT&T's proposal is "incomplete and insufficiently supported," or if the "alternative approach" advanced by Verizon and Sprint is superior, then that is a question for the Commission, as the finder-of-fact, to determine. The "prejudice" here is that they don't like the testimony, and that is not a sufficient basis to justify the imposition of the severe sanction of striking prefiled testimony.

11. As to the alleged "prejudice to Verizon and Sprint," it must be recognized that the revised testimony of Mr. Turner was filed with the Commission on June 6, 2003, approximately five months before the cost phase hearing currently scheduled for November 4-5, 2003. The surrebuttal testimony of Mr. King was filed with the Commission on June 18, 2003, which is the original date set for surrebuttal testimony before the cost and technical portions were bi-furcated. This date is approximately 8 weeks before the technical phase hearing scheduled for August 12-15, 2003. If there is information that needs to be obtained as to AT&T's prefiled testimony, such questions can be addressed through discovery, which does not close until August 1, 2003, or through such other means as deemed appropriate by the Commission. Rather than immediately proceed with discovery, as was and still is allowed in the Order Establishing Procedure, Verizon and Sprint have chosen to waste 19 days on the Joint Motion, and to then complain about a lack of time to prepare. The Joint Motion constitutes a waste of not only Verizon and Sprint's time, but also a waste of the Commission's time in having to deal with the Joint Motion.

12. The issue raised, i.e. whether a competitor should be charged a rate based on the List 1 Drain load or a rate charged on actual usage is not so foreign to Verizon and Sprint, is not so unusual or unique, and is not so conceptually difficult as to prevent Verizon and Sprint from being prepared to address their concerns to the Commission. The revised and surrebuttal testimony should not cause Verizon and Sprint to amend their views of the appropriate billing method, but should only require them to continue to oppose an alternative method that they are already on the record as opposing.

13. In addition to the relief afforded by a resort to available avenues of discovery, the merits of the AT&T position can be addressed through cross examination of Mr. Turner and Mr.

King, or through the examination of their own witnesses or the Commission's witnesses. There simply is no prejudice or harm from the prefiling of this testimony.

14. Verizon and Sprint have not, and can not, articulate any valid reason why they are unable to prepare to address the testimony of Mr. King by the time of the August 12-15, 2003, hearing, and Mr. Turner by the time of the November 4-5, 2003, hearing. Therefore, in keeping with the interests of the Florida telecommunications subscribers, the Commission should deny the Joint Motion, and should proceed to judge the evidence on its merits.

IV. There is no Prohibition in Correcting Testimony, even at the Hearing

15. Prefiled testimony does not become actual testimony until a witness, after having been placed under oath, adopts the testimony at a hearing. At that time, the witness can correct or revise his or her testimony if the witness believes it necessary to accurately convey his or her opinion. Such a correction has historically been allowed by the Commission, and the basis for any changes is considered to be a matter of the weight to be given to the testimony.

16. In this case, rather than waiting until the hearing, AT&T felt it to be in the interest of the Commission and all parties to provide the revision to Mr. Turner's testimony as early as possible, so as to avoid surprise and misunderstanding. AT&T should not be subject to severe sanction for doing now what Mr. Turner could have been done at the hearing.

17. To strike a good faith revision to the prefiled testimony of a witness filed more than two months from the date of the hearing has the effect of compelling a witness to offer testimony that is not "the truth" as that witness believes it to be. Such a sanction serves no valid purpose, and is absolutely inimical to any concept of fairness or due process.

18. It is important to note that Verizon and Sprint do not challenge the relevance or materiality of the testimony regarding rates based on actual use, but rather seek to exclude the testimony on purely procedural grounds. It should not be the practice of the Commission to prevent the introduction of relevant evidence and testimony affecting telecommunication rates in the absence of truly egregious or bad-faith conduct. Such aggravating circumstances do not exist in this case.

19. The very purpose of the Commission is to protect the public health, safety and welfare by, in part, ensuring that rates for telecommunication services are reasonable and are not an impediment to competition. See Section 364.01, Fla. Stat. As such, the Commission protects the interests of consumers and of competing companies seeking reasonable access to the marketplace. Those interests are not advanced by striking competent, relevant, and factual testimony and evidence demonstrating the actual costs to incumbent local exchange carriers for services to competitors, costs that will be ultimately borne by the consumer.

20. For the reasons set forth herein, the Commission should deny the Joint Motion, and should proceed to judge the evidence on its merits.

V. The Revisions do not Constitute a "Fundamental Deviation" of Previously Filed Testimony

21. If the Commission decides that the revisions to Mr. Turner's testimony can not be addressed as a matter of the weight to be given the testimony, and chooses to review the extent to which the revisions constitute a "fundamental deviation" as alleged by Verizon and Sprint, the Commission should still conclude that the revisions are not so fundamental as to constitute grounds to strike the testimony.

22. The testimony of Mr. King is not a fundamental deviation of his Direct Testimony filed December 19, 2002. His testimony is clear that charges for power for collocated equipment should be based on actual power used. (See e.g. King Direct, p. 9 lines 4-5, 12-16). The testimony offered by Mr. Turner serves only to revise testimony that he found to be incorrect after its prefiling. As set forth earlier, the issue of whether a competitor should be charged a rate based on the List 1 Drain load or a rate charged on actual usage is relatively simple, and are not so divergent as constitute a "fundamental deviation." In that regard, Verizon and Sprint acknowledge that ALECs can be billed "simply according to the amount of power they request." (Joint Motion at 6) All Mr. Turner and Mr. King suggest is that ALECs can be billed simply according to the amount of power they use. As set forth at page 9 of the Joint Motion, Verizon and Sprint are fully aware of the AT&T's position that power should be based on actual usage. Both ILECs should have no difficulty articulating any alleged problems.

23. For the reasons set forth herein, the Commission should deny the Joint Motion, and should consider Mr. Turner's testimony in full and on its merits.

VI. Mr. King's Surrebuttal Addresses Technical Issues Raised by PSC Witness Rowland L. Curry

24. As to Mr. King's testimony, Verizon and Sprint's assertion that Commission witness Rowland L. Curry's rebuttal testimony, filed on April 18, 2003, "merely restated and agreed with the Verizon position" (Joint Motion at 7), the fact remains that Mr. Curry testified as to the problems in metering and monitoring "actual use" and expressed a preference for either drain load or fuse load specifications. Rebuttal Testimony of Rowland L. Curry at 3. Mr. Curry was specific in his technical testimony that "there does not appear to be a (sic.) effective means by which actual usage can be precisely metered or monitored." Therefore, it is entirely

appropriate for Mr. King to offer surrebuttal as to those technical issues, and to have that testimony considered by the Commission as part of the technical phase of this proceeding. Moreover, the date of the filing of the surrebuttal is the same as the original date set for surrebuttal for the consolidated hearing.

25. Mr. King filed direct testimony in this proceeding on or about December 19, 2002. Verizon and Sprint have represented that "Mr. King argued in earlier rounds of testimony that List 1 Drain is a 'suitable proxy for actual usage when determining collocation power.'" AT&T can only hope that this incomplete quotation of Mr. King's testimony was not an intentional effort by Verizon and Sprint to mislead the Commission. However, the entire quote, taken from Mr. King's direct testimony, is that "AT&T believes the Commission should order the use of List 1 Drain specifications as a suitable proxy for actual usage when determining collocation power charges if meters or measuring facilities are unavailable or not economically feasible at the PDB or BDFB." Direct Testimony of Jeffrey A. King at 10. [1]

26. As with the revised testimony of Mr. Turner, Verizon and Sprint do not challenge the relevance or materiality of Mr. King's testimony regarding rates based on actual use. Mr. King's testimony in his direct and surrebuttal testimony demonstrates his belief that actual usage is the preferred method of calculating energy usage. In addition, Mr. King goes into detail in his surrebuttal to counter Mr. Curry's assertion that measuring actual usage is not practical. See Surrebuttal Testimony of Jeffrey A. King at 9-10. As both Mr. Curry and Mr. King offered testimony addressing purely technical issues, as set forth herein, that testimony should be considered by the Commission at the hearing on the technical issues of this docket proceeding.

[1] Verizon and Sprint have consistently quoted testimony out of full context throughout their motion. It seems that most of their objections would have been resolved if they simply had read all of the prefiled testimony and read it in its full context.

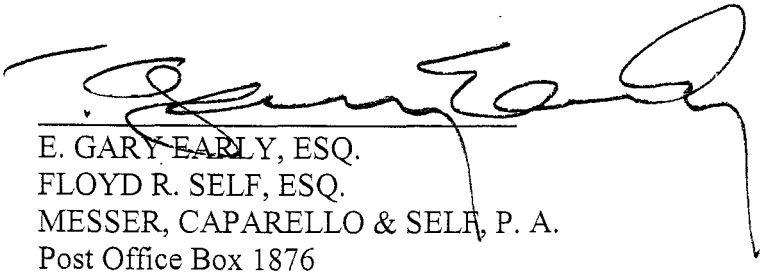
27. Therefore, in order to make a reasoned decision on the technical issues in this proceeding, the Commission should deny the Joint Motion and should consider the technical evidence provided by Mr. King.

VII. Conclusion

28. The Commission has an obligation to the citizens of Florida to take all relevant information into consideration as it develops standards and procedures governing the provision of telecommunications services to consumers. The testimony offered in Mr. Turner's revised testimony, and Mr. King's surrebuttal testimony, constitutes such relevant information. The striking of this prefiled testimony would constitute the imposition of the most severe sanction available, and would constitute an abuse of the Commission's authority. Verizon and Sprint have failed to identify any prejudice that would inure to them as a result of allowing the testimony of Mr. Turner and Mr. King to be heard and considered by the Commission, nor have they cited any statute, rule or decisional authority to support their Joint Motion. Therefore, Verizon and Sprint have failed to demonstrate sufficient grounds for striking the testimony of Mr. Turner and Mr. King. As Verizon and Sprint acknowledge, it is within the Commission's discretion to accept it and the Commission should, with Verizon and Sprint resolving their issues through the remaining discovery time or via cross-examination at the hearing.

WHEREFORE for the reasons set forth herein, the Commission should deny the Joint Motion, should proceed to a determination of the merits of this proceeding based on all of the information available to it, and should enter a Final Order that is most protective of the consumers of the State of Florida.

Respectfully Submitted.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Hand Delivery (*) and/or U. S. Mail this 2nd day of July, 2003.

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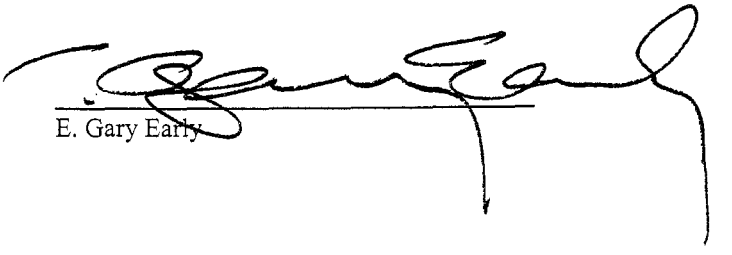

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