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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Implementation of requirements arising from Federal Communications Commission's triennial UNE review: Location-Specific Review for DS1, DS3, and Dark Fiber Loops, and Route-Specific Review for DS1, DS3, and Dark Fiber Transport.

Docket No. 030852-TP
Filed: January 15, 2004

RESPONSE OF NEWSOUTH COMMUNICATIONS CORP. IN
RESPONSE TO BELL SOUTH'S MOTION TO STRIKE TESTIMONY
OF JAKE E. JENNINGS

Pursuant to Rule 28-106.204, Florida Administrative Code, New South Communications Corp. ("NewSouth"), through its undersigned counsel, submits this Response in Opposition to the Motion of BellSouth Telecommunications, Inc. ("BellSouth") to strike the prefiled testimony of NewSouth witness Jake E. Jennings. In its Motion to Strike, BellSouth argues that Mr. Jennings' testimony should be stricken as not relevant to the issues in this docket, and because it does not reference the issues listed in the Second Order on Procedure, Order No. PSC-03-1265-PCO-TP, issued on November 7, 2002, by the Florida Public Service Commission ("Commission"). As discussed herein, Mr. Jennings' testimony is relevant to, and addresses, the issues in this docket and therefore should not be stricken. For the following reasons, the Commission should summarily deny BellSouth's Motion to Strike Mr. Jennings' testimony.

1. The Second Order on Procedure states that prefiled testimony and prehearing statements shall address the issues set forth in the Order. The Order does not require parties to cite in their testimony the specific issues they address. Moreover, there is no Commission rule that imposes such a requirement on parties filing testimony.

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2. As set forth herein, Mr. Jennings' testimony on behalf of NewSouth is directly relevant to the issues in this proceeding. BellSouth cannot contend that the discussion of the Federal Communications Commission's Triennial Review Order is irrelevant to the issues in this proceeding. Mr. Jennings' testimony addresses key issues that state commissions must consider in implementing the Triennial Review Order, including the factual finding made by the FCC in determining the trigger analyses.¹

3. Section I (pages 2, line 21, through page 3, line 8) of Mr. Jennings' testimony should not be stricken because the content addresses the topic headings of Mr. Jennings' testimony. Nothing in the Second Order on Procedure precludes a party from laying a foundation that relates back to the purpose of the proceedings, and, in fact, in that respect, Mr. Jennings' testimony is comprehensive and informative. The purposes of the proceeding are set out in the testimony and address, in relevant part, market definition, market location, factors that affect the ability to serve and target the market, and the variances in those factors.

4. In Section II (Overview of FCCA) of his testimony, Mr. Jennings explains that NewSouth is a member of the FCCA and describes FCCA member companies' participation in the competitive local exchange carriers' ("CLECs") market. Focusing on market definition and ability to serve the market, Jennings describes what unbundled network elements FCCA companies use (citing the companies' reliance on UNE loops and dedicated transport at DS1 capacity, p. 4, lines 8-9) to provide services to enterprise customers, how loop technology, and, specifically, dark fiber

¹ In the first ten pages of Ms. Padgett's testimony filed on behalf of BellSouth, which is only 28 pages in total, Ms. Padgett does not reference a single issue in this proceeding. In those pages, Ms. Padgett – like Mr. Jennings – provides her own background information and addresses her interpretation of the Triennial Review Order triggers.

loops are used by the companies, and, finally, the effect the Commission's decision would have on the companies' use of the incumbents' network elements.

5. Section III (NewSouth's Investment in Facilities Demonstrates that Unbundling Furthers the Goals of the Act) of Mr. Jennings' testimony, as the title suggests, describes NewSouth's technological and financial investments in specific markets. Mr. Jennings outlines where, in the Southeast and in Florida, NewSouth's resource capital and technology are located, including switches and collocations. Mr. Jennings' testimony then speaks to the ultimate reason for the proceedings – i.e., *impairment*. Because NewSouth relies on the incumbent LECs' loop and dedicated transport facilities, the company avoids "sunk costs," which, Mr. Jennings explains, are the unrecoverable costs of deploying loop facilities if a customer terminates service with NewSouth, or any other CLEC – a cost the Commission has long recognized as a market impairment (see Jennings' citation on p. 8, lines 13-15). In addition to describing the sunk costs that NewSouth and similarly situated CLECs incur, this section also is directly relevant to the triggers themselves, in that it demonstrates NewSouth does not deploy loops in BellSouth's territory.

6. Section IV (FCC Triennial Review Order-National Finding of Impairment for High Capacity Loops and Transport) of Mr. Jennings' testimony outlines the federal standard for when an impairment arises and how the Federal Communications Commission delegated to the states the defining of "triggers" for a finding of impairment. Mr. Jennings explains how the defining, and more importantly, applying the "triggers" in a manner that accurately reflects the service and usage of FCCA companies is necessary allow CLECs to continue to provide facilities-based service to customers in the state of Florida.

7. Section V (Transition Issues) is directly related to the transition issue (Issue No. 2) posed by this Commission. Despite characterization of this section as “marginally related,” in this section, Mr. Jennings speaks to the heart of the issue before the Commission-i.e., what would happen if the Commission delisted unbundled loops and transport. The answer is hardly a marginal issue. Mr. Jennings’ testimony spoke to a potentially critical cost increase for NewSouth, which would be unable to extend some of the cost to its customers.

8. Mr. Jennings’ testimony specifically addresses the issues set out in the Second Order on Procedure. The testimony corresponding to the issues in this proceeding is as follows:

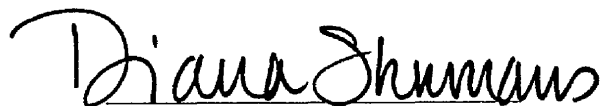
Page/Line Number	Description	Relevant to Issues
Section III, Page 8, lines 5-11, 16-20	Description of New South's entry into local exchange market	2 & 5 (self-deployment of loops); 9 & 14 (self-deployment of transport)
Section III, Page 10, lines 16-17	Description of NewSouth's purchase of DS1s from the ILEC	1 (wholesale loops)
Section IV, Page 11, line 17 through page 14, line 6	Description of the FCC's triggers for loops and transport	1, 2, 3, 5 (self-deployment and wholesale triggers for loops); 7, 9, 11, 16 (self-deployment and wholesale triggers for transport)
Section V, Page 15, line 11 through 16, line 6	Transition issues	20 (transition)

9. BellSouth has not shown any legal or factual basis for the Commission to grant the extremely onerous remedy of striking a witness’s testimony. “The right to call witnesses is one of the most important due process rights of a party.” Pascual v. Dozier, 771 So.2d 552,554 (Fla 3d DCA 2000) quoting Keller Industries v. Volk, 657 So. 2d 1200, 1202-03 (Fla 4th DCA 1995).

10. Finally, relevant evidence is “evidence tending to prove or disprove a material

fact.” §90.401, Fla. Stat.; Florida Emergency Physicians-Kang and Associates v. Parker, 800 So. 2d 631 (Fla. 5th DCA 2001). The Florida Supreme Court has defined relevant evidence as “whatever evidence is offered which will assist in knowing which party speaks the truth of the issues in an action is relevant, and when to admit it does not override the other formal rules of evidence, it should be received.” Prior v. Oglesby, 50 Fla. 248 (1905). Certainly, as set forth above, Mr. Jennings’ testimony goes directly proving or disproving material facts related to the matters before the Commission concerning the CLECs’ ability to serve the mass market.

11. For these reasons, Mr. Jennings’ testimony is material and relevant to the overarching issues in this proceeding, and to the specific issues set forth in the Second Order on Procedure. BellSouth has not demonstrated any factual or legal basis for the extraordinary and extremely onerous measure they seek in attempting to have Mr. Jennings’ testimony stricken. Accordingly, BellSouth’s Motion to Strike must be denied.



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CERTIFICATE OF SERVICE
Docket No. 030852-TP

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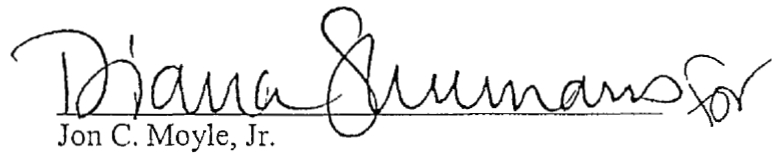
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