

ORIGINAL

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January 23, 2004

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Mrs. Blanca S. Bayó  
Director, Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

**Re: Docket Nos. 981834-TP and 990321-TP (Generic Collocation)**

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of BellSouth's Response to AT&T's Motion to Allow Taking Deposition, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

*J. Phillip Carver*  
J. Phillip Carver (cc)

AUS  
CAF  
CMP  
COM  
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SEC  
OTH

cc: All Parties of Record  
Marshall M. Criser III  
R. Douglas Lackey  
Nancy B. White

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**CERTIFICATE OF SERVICE**  
**Docket No. 981834-TP and 990321-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Hand Delivery (\*), First Class U.S. Mail and Electronic Mail this 23rd day of January, 2004 to the following:

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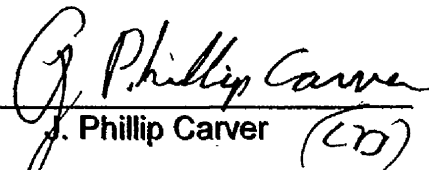
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J. Phillip Carver (LD)

(+) Signed Protective Agreement

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition of Competitive Carriers for Commission Action To Support Local Competition In BellSouth's Service Territory	)	)	Docket No. 981834-TP
In re: Petition of ACI Corp. d/b/a Accelerated Connections, Inc. for Generic Investigation into Terms and Conditions of Physical Collocation	)	)	Docket No. 990321-TP
_____	)	)	Filed: January 23, 2004

**BELLSOUTH'S RESPONSE TO AT&T'S MOTION TO ALLOW TAKING DEPOSITION**

BellSouth Telecommunications, Inc. ("BellSouth"), hereby files its Response to AT&T's Motion to Allow Taking Deposition, and states the following:

1. In AT&T's Motion to Allow Taking Deposition, it presents the situation as one in which it will be prejudiced as a result of the actions of the Commission Staff if it is not granted relief by the Commission. Nothing could be further from the truth. In point of fact, AT&T has not, and will not, suffer any prejudice in the instant situation. More to the point, AT&T finds itself in this situation purely as a result of its own neglect. Finally, AT&T should not be able to remedy its current situation (even if a remedy were needed) by inappropriately imposing upon BellSouth the burden of improper discovery conducted on the eve of the hearing in this matter.

2. AT&T, of course, wishes to depose BellSouth witness, Bernard Shell, in Tallahassee, at 10:00 a.m. on January 26, 2004—two days before the hearing. The Notice for this deposition and AT&T's Motion were sent out electronically on Thursday, January 22, 2004. Mr. Shell filed Direct Testimony in this proceeding on February 4,

2003, and he also filed Surrebuttal Testimony on September 26, 2003. Thus, AT&T has known that Mr. Shell would be a witness in this case for almost a year, and has had ample opportunity to depose Mr. Shell in a timely and proper manner if it wished to do so. Despite this, AT&T did not notice the deposition of Mr. Shell at any time before the discovery cutoff under the Procedural Order in this proceeding, Wednesday, January 22, 2004.

3. In its Motion, AT&T appears<sup>1</sup> to state that it originally attempted to depose a BellSouth employee on January 8. This much is true. AT&T's attempt to do so was completely objectionable for a myriad of reasons. Accordingly, BellSouth filed objections to this deposition, and the deposition did not take place. AT&T's attempt to take this deposition also contained an improper document request, which requested documents that relate to matters that are clearly within the scope of Mr. Shell's testimony. In its objections, BellSouth noted that AT&T was free to depose Mr. Shell, and that Staff had also stated an inclination to take Mr. Shell's deposition as well, although the deposition had not been set at that time. Thus, at this juncture, AT&T still had more than two weeks to schedule Mr. Shell's deposition. Finally, the undersigned also sent to counsel for AT&T a letter stating that AT&T believed it had a legitimate need to depose someone other than Mr. Shell, then to please contact the undersigned to attempt to work out any dispute. AT&T never did so.

4. Staff set Mr. Shell's deposition for January 21, 2004, the last day of the discovery period. In its Motion, AT&T stated that it decided to depose Mr. Shell "in lieu of pursuing the deposition" of any other BellSouth employee (AT&T Motion, p. 2).

AT&T, however, did not communicate this decision to Staff, BellSouth or to any other party.

5. On January 20, 2004, Staff cancelled the deposition of Mr. Shell. Later that evening, counsel for AT&T left a voice message at the office of the undersigned, stating that AT&T wanted to “reschedule” the deposition of Mr. Shell. When the undersigned spoke with counsel for AT&T the next day, the undersigned stated that Mr. Shell had been available for deposition on that day (i.e., at the time at which the deposition was originally noticed), but that the undersigned did not know if Mr. Shell was available on the four remaining business days before the hearing. The undersigned offered to attempt to contact Mr. Shell to see if he was still available to be deposed that afternoon, but also noted that since AT&T had not noticed the deposition for that day, it would be necessary for counsel for AT&T to contact the parties and to insure that none of them objected to the deposition proceeding that day. Counsel for AT&T declined to proceed with the deposition on that day.

6. During this conversation, the undersigned also stated that on the two days immediately before the hearing, Mr. Shell would be traveling to Tallahassee and preparing for the hearing, and that BellSouth would not voluntarily make him available on these days, especially in light of the facts that 1) the discovery cutoff had passed, and 2) AT&T had numerous opportunities to depose Mr. Shell. The undersigned also agreed to inquire as to Mr. Shell’s availability to be deposed on January 22 or January 23. As it turned out, however, Mr. Shell was not available on either of these dates.

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<sup>1</sup> BellSouth can only guess that this is AT&T’s position since the Motion AT&T served electronically was missing the first page. The beginning of the second page of the Motion has what appears to be a fragment of this argument.

7. Perhaps the most astounding aspect of AT&T's Motion is that, despite the facts set forth above, it chooses to cast itself as a victim in this matter. Specifically, AT&T states that it "should not be prejudiced due to its reliance on PSC Staff to notice depositions." (AT&T Motion, p. 2). The fact of the matter is that AT&T could have independently scheduled Mr. Shell's depositions at any time. AT&T also could have taken a number of steps to avoid the instant situation. First, AT&T could have told Staff or BellSouth at some point prior to the deposition that it had changed its mind and wished to depose Mr. Shell. Certainly, the deposition would not have cancelled if AT&T had done so. Second, AT&T could have cross noticed the deposition of Mr. Shell. This fairly common procedural step is taken when a party does not wish for a deposition to be cancelled without its consent, and this would have at least signaled to the other parties that AT&T wished to depose Mr. Shell. Third, when Staff gave the parties electronic notice of the cancellation of the deposition, AT&T could have immediately responded with an e-mail asking that the deposition not be cancelled. Fourth, AT&T could have accepted the offer of the undersigned to at least try to continue with Mr. Shell's deposition as scheduled. AT&T failed to do any of these things and thereby placed itself in the instant situation.

8. AT&T apparently takes the view that despite the fact that the discovery cutoff has passed, and despite the many squandered opportunities that AT&T had to take Mr. Shell's deposition, it should be allowed to depose Mr. Shell on the eve of the hearing in a way that is burdensome to BellSouth in general and to Mr. Shell specifically. Finally, perhaps the most graphic illustration of AT&T's unfortunate, but persistent practice of ignoring the procedural rules in a way that is unduly burdensome to other



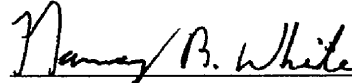
parties is the fact that AT&T has scheduled Mr. Shell's deposition to take place in Tallahassee two days before the hearing. All other depositions scheduled in this matter (all of which were scheduled by Staff) were conducted telephonically. AT&T is the first party in this proceeding that has attempted to take a deposition of anyone by forcing them to appear in person in Tallahassee.

9. Moreover, AT&T's unsupported claim that it will somehow be "prejudiced" if it is not allowed to take Mr. Shell's deposition is specious and should be rejected. AT&T alleges in the Motion, in a cursory way, that it will be prejudiced if it cannot take the deposition, but provides absolutely no facts to support this contention. Further, there are no such facts. AT&T will have ample opportunity to cross-examine Mr. Shell, as will every other party in this proceeding, when he takes the stand during the hearing. AT&T's Motion contains absolutely no clue as to why AT&T believes that it must have an additional opportunity to examine Mr. Shell, and why this need is so compelling that it must be done less than forty eight hours before the hearing.

10. Finally, if AT&T is allowed to take Mr. Shell's deposition, this will prejudice BellSouth. Mr. Shell is BellSouth's only witness in this proceeding. Mr. Shell has set aside Monday, January 26 to prepare for the hearing, including meetings with other BellSouth personnel and with counsel for BellSouth. If AT&T is allowed to go forward with this deposition, Mr. Shell's ability to prepare for the hearing will be compromised. It is bad enough that AT&T is attempting to ignore the procedural rules. It is even worse that AT&T wishes to do so in a way that will impede Mr. Shell's preparation for the hearing, and thereby prejudice BellSouth's ability to put on its case.

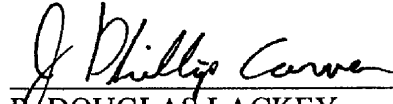
11. For all of the reasons set forth above, AT&T's attempt to depose Mr. Shell two days before the hearing, and five days after the discovery cutoff, should be rejected.

Respectfully submitted this 23rd day of January, 2004.



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