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April 9, 1997

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

RE: Docket Nos. 960833-TP; 960846-TP

Dear Mrs. Bayo:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response To AT&T's Motion To Approve Final Arbitrated Interconnection Agreement. Please file these documents 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 on the parties shown on the attached Certificate of Service.

ACK
AFA
APP
CAF
CMU Norton
CTR
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SEC 1
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OTH

Sincerely,

J. Phillip Carver (BW)

J. Phillip Carver

Enclosures

cc: All Parties of Record
A. M. Lombardo
R. G. Beatty
W. J. Ellenberg

CERTIFICATE OF SERVICE
DOCKET NOS. 960833-TP and 960846-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Federal Express this 9th of April, 1997 to the following:

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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., American Communications Services, Inc. and American Communications Services of Jacksonville, Inc. for arbitration of certain terms and conditions of proposed agreements 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 Order No. PSC-97-0309-FOF-TP

BELLSOUTH TELECOMMUNICATIONS, INC.'S
RESPONSE TO AT&T'S MOTION TO APPROVE
FINAL ARBITRATED INTERCONNECTION AGREEMENT

BellSouth Telecommunications, Inc. ("BellSouth"), hereby files, pursuant to Rule 25-22.037(b), Florida Administrative Code, its Response to the Motion of AT&T Communications of the Southern States, Inc. ("AT&T") To Approve Final Arbitrated Interconnection Agreement, and states the following:

1. BellSouth agrees with AT&T on one point in its Motion: the Final Arbitrated Agreement involves two areas of continuing dispute in which resolution is needed by the Florida Public Service Commission ("Commission"). Because of these disputes, AT&T and BellSouth have each filed a proposed Final Arbitrated Agreement. At the same time, BellSouth disagrees with, and in fact, strenuously objects to AT&T's characterization of these two remaining disputes. AT&T has

painted a distorted picture in its Motion of a situation in which it has innocently negotiated to the best of its ability, while BellSouth has insisted upon unilaterally inserting provisions into the contract without justification or rationale. Nothing could be further from the truth. In each of the two areas of dispute, BellSouth has taken the position in the negotiations that the agreement should reflect completely the Orders of this Commission, i.e., the legally operative portions of the Orders, as well as the spirit of the Orders and the concerns expressed in the Orders. In contrast, AT&T has exhibited a recalcitrant refusal to include in the Agreement provisions that are consistent with the pronouncements of this Commission. Further, AT&T's Motion grossly mischaracterizes those disputes and the pertinent surrounding circumstances in which they occur.

2. AT&T's Motion first addresses the issue of performance standards. AT&T states that Sections 12.1, 12.2 and 12.3 of its Proposed Agreement have been accepted by this Commission in Order PSC-97-0360-FOF-TF. AT&T then implies that BellSouth's proposed Section 12.4 (which AT&T refers to in its Motion as Section 2.5.5 of Attachment 1)[1] is in conflict with Sections 12.1 through 12.3. AT&T also contends that this provision is part of BellSouth's Agreement with MCI, which BellSouth is attempting to arbitrarily force upon AT&T. The facts of the situation, however, are quite different.

3. In the Final Order on Arbitration (Order No. PSC-96-1579-FOF-TP, Issued December 31, 1996 in Docket Nos. 96-833-TP, 960846-TP, and 960916-

[1] A copy of Sections 12.1 - 12.4 of BellSouth's proposed Agreement is attached hereto as Exhibit A.

TP), this Commission stated that it was not "appropriate to arbitrate the specific performance standards and penalties proposed by the parties at this time." (Order, p. 73). Further, this Commission found that it was appropriate "only to require that BellSouth provide to AT&T and MCI telecommunications services for resale and access to unbundled network elements at the same level of quality that it provides to itself and its affiliates". (Order, pp. 73-4).

4. At the same time, this Commission ordered, in the specific context of operational support systems that "each party shall bear its own cost of developing and implementing electronic interface systems, ... If a system or process is developed exclusively for a certain carrier, however, those costs shall be recovered from the carrier who is requesting the customized system". (Order, p. 87).

5. Subsequent to the issuance of this Order, a specific dispute arose between BellSouth and MCI as to performance measures and standards. MCI requested a level of tracking and measurement greater than that which BellSouth conducted for itself. Accordingly, BellSouth declined to offer this measurement and cited to the above-noted requirement of the Order that BellSouth must provide only the same level of quality of services that it provides to itself.

6. On March 21, 1997, the Commission entered its ruling on this point, among others, in the Final Order Approving Arbitration Between MCI Telecommunications Corporation, MCI Metro Access Transmission Services, Inc. and BellSouth Telecommunications, Inc. (Order No. PSC-97-0309-FOF-TP). The Order contained the following language:

With respect to performance measurements and reporting in general, we note that in our Arbitration Order we found:

> If a system or process is developed exclusively for a certain carrier, however, those costs shall be recovered from the carrier who is requesting the customized system. See Order No. PSC-96-1579-FOF-TP, p. 98.

Thus, although we are approving MCIm's language on performance measurements, we note that if MCIm wants BellSouth to track and report specific information for MCIm, there will be a cost associated with those processes. . . . . [T]he parties should endeavor to negotiate the rate to cover the costs associated with those processes.

(p. 32.).

7. Thus, this Commission has made it clear that the subject portion of the Final Arbitration Order is intended to have a broader application than to the context of operational support systems in which it was originally considered. In other words, the Commission utilized the language of the Final Order to resolve a dispute that related to performance standards. Moreover, the vote taken at the Agenda Conference of February 21, 1997 (along with the related discussion on this issue) made it clear that the Commission was applying this standard broadly. Accordingly, BellSouth began shortly after the Agenda Conference to negotiate with both MCIm and AT&T to include in each respective Agreement a provision that applied this language to the broader context intended by this Commission. MCIm agreed to this provision; AT&T refused to agree.

8. Against this background, it is clear that AT&T's Motion mischaracterizes the disputed provision in two important regards. First, AT&T

presents BellSouth's proposed 12.4 as conflicting with Sections 12.1 through 12.3 of the Agreement. In point of fact, these first three sections are based upon the above quoted portion of the Final Arbitration Order that states that BellSouth must provide to AT&T the same quality of service as it provides to its own customers. BellSouth's proposed Section 12.4, however, supplements (rather than contradicts) those sections by stating that in the event that AT&T requests BellSouth to provide a higher level of performance than BellSouth provides to itself, then AT&T must compensate BellSouth for that performance. Thus, this Section is clearly different than 12.1 through 12.3.

9. Second, AT&T mischaracterizes BellSouth's proposed 12.4 by suggesting that BellSouth has arbitrarily taken the provision from the Agreement with MCI and attempted to force it upon AT&T. To the contrary, as stated above, it was clear after the February 21, 1997 Agenda that the Commission had extended the operative principle (that carriers should pay for enhancements that they require beyond that which BellSouth provides to itself and its customers) beyond electronic interfaces and into the area of performance. For this reason, BellSouth began to attempt to negotiate, both with MCI and with AT&T, language that would appropriately capture this requirement. To this end, BellSouth suggested the language in BellSouth's proposed 12.4 to both MCI and AT&T. MCI agreed that this language is appropriate, and it became a part of the Agreement between BellSouth and MCI. AT&T, however, has inexplicably refused to agree to this

provision that if it wishes an enhanced level of performance from BellSouth, then it must pay for it.

10. BellSouth submits that this provision is entirely consistent with the Commission's Final Arbitration Order as well as this Commission's extension of the payment-for enhanced-performance requirement in the above-referenced MCI Order. While AT&T has refused to agree to this provision, in its Motion at least, it has given no reason why it should be allowed to avoid this provision.

11. The Commission has stated the principle that when a carrier demands a higher standard of performance, then it should pay for this performance. BellSouth is simply attempting to encompass this principle within all agreements to which it should apply. While the Commission first applied this principle broadly in the context of a specific dispute between BellSouth and MCI, there is nothing in the March 2, 1997 Order to suggest that this Commission intended to limit the application of this principle to the Agreement between BellSouth and MCI. To the contrary, the Orders that this Commission has entered on the various arbitrations before it have been consistent. There are no situations in which an issue has been resolved between BellSouth and one party in one way, while being resolved between BellSouth and a different party in a different way. Instead, identical issues have always been handled consistently from one arbitrated agreement to another. For the reasons set forth above, BellSouth submits that this Commission should apply this principle consistently as well and approve BellSouth's proposed 12.4.

12. AT&T has similarly mischaracterized the issue on the second point of contention, i.e., instances in which AT&T recombines unbundled network elements ("UNEs") to create a service that is identical to a BellSouth retail service. AT&T inaccurately claims that BellSouth requested the Commission to "reconsider its decision regarding the pricing of unbundled network elements" (Motion, p. 3) (emphasis added) after BellSouth had lost on this issue. In its Motion, AT&T does make token mention of the "Commission's concerns expressed in the Reconsideration order about the possibility that the price of a combination of UNEs used to provide a service may be less than the equivalent resale price". (Motion, p. 4). AT&T then minimizes this concern by contending incorrectly that the Commission "does not believe that it is possible to have this situation because not enough UNEs have been approved to fully duplicate a BellSouth service." (Motion, p. 4). AT&T then dismisses this concern entirely by contending that it is merely speculative. Finally, AT&T argues that the language it has proposed in 36.1 is adequate to provide "for Commission resolution of this issue if it ever arises." (Motion, p. 4).

13. Even a cursory review of the Order, however, is adequate to see that AT&T's rendition of the current status of this issue glosses over every relevant point. First, the Final Order on Motions for Reconsideration and Amending Order No. PSC-96-1579-FOF-TP[2] stated on this point the Commission's conclusion that "[i]n our original arbitration proceeding in this docket, we were not presented with

[2] Order No. PSC-97-0298-FOF-TP, issued March 19, 1997.

the specific issue of the pricing of recombined elements when recreating the same service offered for resale". (Order, p. 7) (emphasis added). Therefore, the Commission specifically noted that it,

> . . . [s]et rates only for the specific unbundled elements that the parties requested. Therefore, it is not clear from the record in this proceeding that our decision included rates for all elements necessary to recreate a complete retail service. Thus, it is inappropriate for us to make a determination on this issue at this time.

(Order at p. 7).

14. Thus, the Commission first noted expressly that it had not ruled upon the issue that AT&T claims has been resolved, the pricing of recombined UNEs. Then the Commission stated that the record is unclear on the issue of whether recombination to recreate an existing service from the elements priced to date is possible, a marked contrast to AT&T's assertion that the Commission determined that such recombination was not possible. Finally, the Order set forth the statement that AT&T would obviously prefer to ignore:

> Nevertheless, we note that we would be very concerned if recombining network elements to recreate a service could be used to undercut the resale price of the service.

(Order, p. 8).

15. In AT&T's Motion, it contends that it has somehow captured the Commission's ruling of this point in the language included in its Section 36.1. In point of fact, the language proposed by AT&T has nothing to do with this specific

issue.[3] Instead, this language goes solely to AT&T's position that when it buys multiple elements, there may be a duplication of charges resulting from the application of nonrecurring and recurring charges that are associated with each element. To prevent this duplication of charges, AT&T has proposed language that if "the parties cannot agree to the total nonrecurring and recurring charges to be paid by AT&T when ordering multiple Network Elements, . . . either party may petition the Florida Public Service Commission to settle the disputed charge or charges." (§36.1). While BellSouth has agreed to the inclusion of this language, it simply does not address the issue of recombining UNEs to create a BellSouth service. Thus, BellSouth has proposed to AT&T the inclusion in the Agreement of two sentences, each of which serves a different purpose. These sentences are as follow:

> Further, negotiations between the parties should address the price of a retail service that is recreated by combining UNEs. Recombining UNEs shall not be used to undercut the resale price of the service recreated.

16. The first sentence is necessary to specifically acknowledge the fact, as set forth in the Commission's Order, that the prices for recombined UNEs used to recreate a BellSouth retail service have not been set and that these prices are subject to future negotiation. The second sentence, which provides that UNEs should not be recombined to undercut the resale price of the service, is entirely

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[3] A copy of BellSouth's proposed 36.1 is attached hereto as Exhibit B. The language in regular type is that which AT&T has proposed, and to which BellSouth has agreed. The two sentences in bold face are those which BellSouth requests this Commission to approve.

consistent with the language of the Order quoted above. Again, this Commission has expressed in the order its concern about the recombination of elements being used in this way. BellSouth has simply suggested that the parties should address this expressed concern in the Agreement by the inclusion of a sentence that mirrors the language of the Order.

17. BellSouth submits that in determining whether to include these two sentences in the approved Agreement, this Commission should consider each separately, since each is designed to serve a different purpose. Again, the first sentence simply acknowledges that recombination is an open issue that has not been ruled upon by the Commission, and that the parties should negotiate on this point. Inclusion of this simple, accurate expression of the current status of the issue should be uncontroversial. Yet the inclusion of this clause is of crucial importance, a conclusion demonstrated by the fact that AT&T is so adamantly opposed to the Agreement's having any direct reference to this issue. This conclusion is also prompted by considering what AT&T can do if the Agreement is silent on this point.

18. Contrary to AT&T's assertion, the concern addressed by this sentence is in no way hypothetical or "speculative". BellSouth believes that AT&T can (and intends to) recombine UNEs that have been priced to date to replicate BellSouth services. It is noteworthy that, although AT&T mischaracterized the Commission's statement on this point to contend that the Commission <u>believes</u> that this can not be done, it has carefully avoided stating its own belief on this point. There is, to

make the most conservative, objective statement possible on this point, a lack of clarity as to whether the unbundled network elements already priced can be recombined to undercut the price of resold service. Put differently, the Commission can not rule out the possibility that AT&T has this capability, and AT&T has elected to remain silent on this point. Therefore, BellSouth believes that it is important for the parties to acknowledge that this pricing issue has not been resolved. Otherwise, if, in fact, AT&T can, as BellSouth believes, recombine elements in this way, then the silence of AT&T's proposed Agreement on this issue would allow AT&T to recombine those unbundled elements.

19. In other words, if this issue is not addressed directly and explicitly, then AT&T may well attempt upon approval of its version of the Agreement to buy unbundled elements and recombine them to replicate an existing service. It would presumably be up to BellSouth to police this purchase and recombination, report it to the Commission, and have the issue dealt with at that time. BellSouth does not believe, however, that it should be forced to apprehend AT&T doing that which the parties have not agreed, and the Commission has not ordered, that AT&T may do. For this reason, BellSouth has proposed a sentence that will specifically acknowledge that this pricing issue has not been resolved.

20. It is noteworthy that AT&T labels this concern as "speculative", but refuses to include even a sentence that simply states the inarguable fact that this issue is still open. If AT&T is correct, and this issue is currently nothing more than hypothetical, then it is unfathomable that AT&T would protest so strenuously a

simple, and seemingly innocuous, statement that this "speculative" issue has not been resolved.

21. As to the second sentence proposed by BellSouth, it is true that BellSouth has proposed language for the agreement that reflects its position, that the recombination of UNEs should not be used to undercut resold service. This language, however, is not merely BellSouth's; it mirrors the language of the Order and the expressed concerns of this Commission. For this reason, BellSouth believes that it is appropriate to include this language.

22. AT&T makes the argument that BellSouth has overreached by "unilaterally" putting its position into the Agreement in the form of the second sentence. BellSouth responds to this contention by making two points. First, BellSouth's statement of its position on this point in the proposed agreement is no different than AT&T submitting a proposed agreement that "unilaterally" includes its position. In other words, AT&T contends that it should be allowed to recombine UNEs in any way that it wants, even if it replicates BellSouth's services in a way that undercuts the price of the resold service. If, as AT&T wishes, the Agreement contains no prohibition of this Act, and in fact, does not even contain an acknowledge that this is an issue, then certainly AT&T will engage in this recombination if it can find a way to do so. Thus, each party has "unilaterally" placed before the Commission a version of the Agreement that is consistent with its position.

23. Nevertheless, even if this Commission determines that the second sentence proposed by BellSouth for inclusion in this section should not be included because this issue has not been arbitrated, this does not in any way affect the necessity of including the first sentence proposed by BellSouth. In fact, if there is no immediate resolution of the recombination issue by the Commission, then there is an even greater need for the inclusion of the first sentence proposed by BellSouth to acknowledge that this issue remains open. The agreement must reflect the fact that the parties have not agreed on this issue, and that the Commission has not ruled upon it. Otherwise, AT&T would be able to begin immediately to surreptitiously recombine unbundled network elements into services that are identical to BellSouth services. This would clearly be improper at this juncture, and the Agreement must have language to prevent this result.

24. As set forth above, BellSouth has made its best effort to include provisions in this Agreement that reflect the rulings and concerns of this Commission, and the spirit of its Orders. In contrast, AT&T has chosen to make arguments that border on the disingenuous to refuse to abide by any provision that it has arguably not been explicitly ordered to accept. BellSouth submits, however, that the language it has proposed is consistent with the letter and spirit of the Orders issued by this Commission, and that the language that it proposes should be approved.

WHEREFORE, BellSouth respectfully requests the entry of an Order approving the Arbitrated Agreement submitted by BellSouth.

Respectfully submitted this 9th day of April, 1997.

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