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November 3, 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 and 960757-TP

Dear Mrs. Bayo:

Enclosed is an original and fifteen copies of BellSouth's Response and Memorandum in Opposition to MCI's Motion to Compel Compliance. We ask that this be filed in the captioned matter.

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.

Sincerely,

*Edward L. Rankin III*  
Edward L. Rankin, III *(HR)*

ACK \_\_\_\_\_ Enclosures

AF: \_\_\_\_\_

cc: A. M. Lombardo  
R. G. Beatty  
W. J. Ellenberg

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11291 NOV-35

FPSC-RECORDS/REPORTING

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. for ) Docket No. 960833-TP  
arbitration of terms and conditions of a ) Docket No. 960846-TP  
proposed agreement with BellSouth )  
Telecommunications, Inc. concerning ) Filed: Nov. 3, 1997  
interconnection and resale under the )  
Telecommunications Act of 1996 )

**BELLSOUTH'S RESPONSE AND MEMORANDUM IN OPPOSITION TO  
MCI'S MOTION TO COMPEL COMPLIANCE**

BellSouth Telecommunications, Inc. ("BellSouth"), hereby files, pursuant to Rule 25-22.037, Florida Administrative Code, its response and memorandum in opposition to MCI's Motion to Compel Compliance, and states the following:

1. MCI's Motion to Compel Compliance should be denied because it is based upon fundamental mischaracterizations of Orders of the Florida Public Service Commission ("Commission") and of the current status of the "rebundling" issue. Further, the arguments raised by MCI in its Motion present perhaps the most obvious example to date of MCI's attempts to misconstrue to its benefit any issue left unresolved by the Commission's previous Orders.

2. MCI has, as set forth in its motion, ordered unbundled network elements in combinations "to provide telecommunications services." (Motion, p. 3). What MCI fails to mention is that

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it has ordered combinations of UNEs that replicate existing BellSouth services. MCI proposes to pay for all BellSouth services recreated through this sham rebundling at the total price of the UNEs that are used. To date, BellSouth has declined to allow MCI to do this because, contrary to MCI's assertions, this Commission has not authorized (and, in fact, has expressed concern about the prospect of) recombination of UNEs at the prices MCI requests. Again, MCI does not wish to simply purchase UNEs, but rather desires the pre-assembled combination of UNEs that comprise an existing BellSouth retail service. MCI's request/demand, thus, does not involve any real unbundling. Instead, MCI desires to simply buy the service at the price of the total UNEs that comprise the service, which is a price far below what it would have paid had it ordered the service for actual resale at the wholesale discount set by this Commission.

3. In its Motion, MCI implies that this Commission's Final Order On Motions For Reconsideration (Order No. PSC-97-0298-FOF-TP, issued March 19, 1997) somehow supports its claim that the price for rebundled network elements has been set. To the contrary, the Commission's Order contained the following language on this point:

In our original arbitration proceeding in this docket, we were not presented with the specific issue of the pricing of recombined elements when recreating the same service offered for resale . . . . .

Furthermore, we set 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, p. 7) (emphasis supplied).

The Commission, however, further stated that it "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) (emphasis supplied).

4. In an effort to avoid any confusion on this point, BellSouth submitted to the Commission for approval a final arbitrated agreement that included language to reflect both the Commission's pronouncement that it had not ruled upon the price of recombined elements and the Commission's stated concern. Specifically, the language proposed by BellSouth would have stated that "[f]urther negotiations between the parties should address the price of a retail service that is recreated by combining UNEs," and that this price should not undercut the resale price of any retail service.

5. On May 27, 1997, the Commission entered an Order (Order No. PSC-97-0602-FOF-TP) in which it required both parties to sign an agreement that included exactly the language prescribed in the Commission's previous Final Order Approving Arbitrated Agreement. As to the language that BellSouth sought to insert into the contract concerning the price of rebundled elements, the Commission stated the following:

We expressed concerns with the potential pricing of UNEs to duplicate a resold service at our Agenda Conference, and we expressed our concerns in our Order in dicta; however, we stated that the pricing issue associated with the rebundling of UNEs to duplicate a resold service was not arbitrated. . . . Accordingly, BellSouth's proposed language shall not be included in the agreement.

(Order, p. 7) (emphasis supplied).

6. As is self-evident from review of the above-referenced Commission orders, MCI has selectively utilized the language from the Commission's original Order, as well as this Commission's decision not to clarify that language in subsequent orders, to argue that it is entitled to order combinations of UNEs that replicate BellSouth services and to have this reconstituted service at the total of the UNE prices. Amazingly, in arguing for this, MCI has characterized all of the Commission's Orders, including those quoted above, as supporting the singularly misguided proposition that it is entitled to recombine UNEs in a way that replicates BellSouth's retail service and to thereby undercut the resale prices of those services.

7. MCI's mischaracterizations notwithstanding, the fact remains that this Commission has not ruled on the price of elements that are recombined to recreate BellSouth services. For this reason, MCI should not be allowed to attempt to utilize the portions of this Commission's rulings that are favorable to its position while ignoring the portions of this Commission's Orders that contradict its argument to bring about a result that is clearly not intended by this Commission's Orders. If MCI wants to purchase recombined services in this manner, it should negotiate with BellSouth to arrive at the appropriate price.

8. Through its recent orders in Iowa Utils. Bd. v. FCC<sup>1</sup>, the Eighth Circuit Court of Appeals has affirmed the FCC rule that allowed ALECs to use network elements in any combination they want (including to replicate a finished telecommunications service) but has vacated the FCC's rules that required ILECs to recombine those unbundled network elements for the ALEC. The Court affirmed that state commissions are vested with exclusive pricing authority over unbundled network elements. Although the Act does not require BellSouth to recombine network elements for a ALEC, BellSouth is free to agree to do so. Indeed, the Eighth Circuit recognized that purchasing unbundled network elements might require a significant up front investment.

9. BellSouth recognizes that the interconnection agreements that have been executed thus far obligate BellSouth to accept and provision UNE combination orders. Thus, until the Eighth Circuit's opinion becomes final and non-appealable, BellSouth will abide by the terms of those interconnection agreements, as BellSouth expects MCI to do. Those agreements, however, do not contain a price of UNEs that are recombined to replicate an existing BellSouth service. Thus, MCI's attempts to torture the language of the contract notwithstanding, the pricing issue remains unresolved.

10. BellSouth has consistently taken the position that ALECs are free to use unbundled network elements recombined by the ILEC in any manner that they choose; however, when they use

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<sup>1</sup> See, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) and Order on Petitions for Rehearing (Slip Opinion), Oct. 14, 1997, in same docket.

recombined elements to duplicate an ILEC retail service, the Commission should exercise its exclusive authority to price that recombination at the resale discount rate.

11. Attachment I, ¶ 8 of the MCI-BellSouth Interconnection Agreement (the pricing schedule) states that "MCI and BellSouth shall work together to establish the recurring and non-recurring charges in situations where MCI is ordering multiple network elements." Therefore, BellSouth is not required to offer combinations of unbundled network elements except as negotiated between BellSouth and MCI. Moreover, "switch as-is" situations should be treated like resale situations, with the pricing rules applicable thereto, not as the sale of unbundled network elements.<sup>2</sup>

12. MCI's attempt (Motion, pp. 5-7) to argue that, even if BellSouth's rebundling position is correct under the Act, the Commission can use state law to reach a result that directly contravenes the provisions of the Act, is absurd on its face. The fact that MCI would even advance this argument reflects the weakness of its position on this matter.

13. In conclusion, this Commission has specifically noted in at least two previous Orders that it has not set the price for recombined services. MCI should not be allowed to misuse a part of this Commission's previous Orders to dictate the result of an

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<sup>2</sup> As stated above, the Commission declined to price recombined UNEs, in part, because it was "not clear from the record" that the decision "included rates for all elements necessary to recreate a complete retail service." (Order, p. 7). MCI's demand for UNEs on a "switch as-is" basis should dispel any doubt as to whether sham rebundled UNEs can be used to recreate a pre-existing retail service.

issue that this Commission has not addressed. Instead, MCI's Motion should be denied, and it should be directed to negotiate with BellSouth the price of the service.

WHEREFORE, BellSouth respectfully requests the entry of an Order denying MCI's Motion and for such other relief as the Commission deems appropriate.

RESPECTFULLY SUBMITTED this 3rd day of November, 1997.

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**CERTIFICATE OF SERVICE**  
**DOCKET NOS. 960833-TP/960846-TP/960757-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by

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