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BEFORE THE PUBLIC SERVICE COMMISSION

Access One Communications, Inc.)
Complainant,)
vs.)
BellSouth Telecommunications, Inc.,)
Respondent,)
_____)

Docket No. 990108-TP
Dated: June ____, 1999

REBUTTAL TESTIMONY OF KEN BARITZ

ON BEHALF OF ACCESS ONE COMMUNICATIONS, INC.

10 Q: Please state your name.

11 A: My name is Ken Baritz.

12 Q: Have you testified previously in this case?

13 A: Yes. I submitted direct testimony on behalf of Access One.

14 Q: Have you reviewed the direct testimony of W. Keith Milner and Susan
15 Arrington submitted on behalf of BellSouth in this case?

16 A: Yes.

17 Issue 1

18 Q: According to Ms. Arrington, the Most Favored Nations Clause of Access
19 One's Resale Agreement does not permit Access One to adopt a provision of another
20 ALEC agreement -- such as Access One wanted to do with respect to the TCCF
21 Provision -- but only allows Access One to adopt another agreement in its entirety.
22 Is this correct?

23 A: No.

24 Q: Why not?

1 A: I am not a lawyer, and I will try not to offer a legal opinion as to the meaning of
2 the Most Favored Nations Clause, which is Section XVI B of the Resale Agreement.
3 However, it appears readily apparent from the plain language of the provision that,
4 whereas BellSouth shall be deemed to have offered to Access One the resale agreements
5 that it entered into with other ALEC's in their entirety, Access One's acceptance of the
6 offer would only apply to the other terms of those agreements that Access One wished to
7 adopt. This can be easily seen by comparing the language of the Most Favored Nations
8 Clause with the language of Section XVI C of the Resale Agreement which immediately
9 follows the Most Favored Nations Clause. Again, the Most Favored Nations Clause
10 provides:

11 B. In the event that BellSouth, either before or after the
12 effective date of this Agreement, enters into an agreement
13 with any other telecommunications carrier (an "Other
14 Resale Agreement") which provides for the provision
15 within the state of Florida of any of the arrangements
16 covered by this Agreement upon rates, terms or conditions
17 that differ in any material respect from the rates, terms or
18 conditions for such arrangements set forth in this
19 Agreement ("Other Terms"), BellSouth shall be deemed
20 thereby to have offered such other Resale Agreement to
21 Other Phone Company in its entirety. In the event that
22 Other Phone Company accepts such offer, such Other
23 Terms shall be effective between BellSouth and Other

1 Phone Company as of the date on which Other Phone
2 Company accepts such offer.

3 By contrast Section XVI C states:

4 C. In the event that after the effective date of this
5 Agreement the FCC or the Commission enters an order (a
6 "Resale Order") requiring BellSouth to provide within the
7 state of Florida any of the arrangements covered by this
8 agreement upon Other Terms, then upon such Resale Order
9 becoming final and not subject to further administrative or
10 judicial review, BellSouth shall be deemed to have offered
11 such arrangements to Other Phone Company upon such
12 Other Terms, in their entirety, which Other Phone
13 Company may only accept in their entirety, as provided in
14 Section XVI.E. In the event that Other Phone Company
15 accepts such offer, such Other Terms shall be effective
16 between BellSouth and Other Phone Company as of the
17 date on which Other Phone Company accepts such offer.
18 (Emphasis added).

19 What is particularly revealing in the comparison of these sections is that Section XVI C
20 specifically states that Access One can only accept the "Other Terms" in their entirety; a
21 statement that is completely absent from the Most Favored Nations Clause.

22 **Q: Other than with regard to your attempt to adopt the TCCF Provision, has**
23 **Access One ever sought to exercise its rights under the Most Favored Nations Clause**
24 **of the Resale Agreement?**

1 A: Yes.

2 **Q: And how has that worked?**

3 A: Well, we identified the provision of another agreement that we wanted to be
4 incorporated into our agreement, and BellSouth amended our agreement to incorporate
5 the requested provision.

6 **Q: Did BellSouth insist that you adopt the entire other agreement as they claim**
7 **you are required to do in this case?**

8 A: Of course not. It wouldn't have made any sense.

9 **Q: What do you mean?**

10 A: Well, this is another problem with BellSouth's interpretation. Ms. Arrington
11 argues that the Most Favored Nations Clause required us to adopt the TCCF Agreement
12 in its entirety, including the expiration date of that agreement. What she appears to have
13 forgotten is that the Most Favored Nations Clause applies not only to other resale
14 agreements existing at the time the Access One Resale Agreement was executed but also
15 to other resale agreements entered into after the Access One Resale Agreement. If we
16 were to accept Ms. Arrington's interpretation, this would mean that when we adopted the
17 provision of the other agreement I was referring to, which in fact was scheduled to expire
18 long after the scheduled expiration of the Access One Resale Agreement, our acceptance
19 of the specific term would have required that we adopt the entire other agreement.
20 According to Ms. Arrington, this, in turn, would have forced BellSouth and Access One
21 to have adopted the later expiration date of the other agreement.

22 **Q: In her testimony Ms. Arrington specifically refers to the Florida Public**
23 **Service Commission's (the "FPSC") comments to the F.C.C. in CC Docket No. 96-**

1 **98 and CC Docket No. 99-68. Are you aware of the FPSC's comments in that**
2 **proceeding?**

3 A: Yes I am, and frankly I was extremely surprised and gratified that BellSouth
4 would bring it to the FPSC's attention in this matter.

5 **Q: Why is that?**

6 A: In its official comments to the F.C.C.'s proposed rulemaking, the FPSC expressed
7 its disagreement with the F.C.C.'s interpretation of the statutory codification of the Most
8 Favored Nations Clause in 47 U.S.C. § 252(i), stating that the FPSC believed that the
9 ability of a CLEC under that statute to adopt terms or rates from a preexisting contract
10 should expire when the original contract expired. The FPSC however, went on to
11 distinguish between what it believed the rights under § 252(i) should be with the rights
12 under Most Favored Nations clauses incorporated into negotiated agreements, such as the
13 Most Favored Nations Clause at issue in the Access One Resale Agreement. It stated:

14 The FPSC believes that MFN clauses in negotiated
15 agreements are different from the Commission's
16 interpretation of Section 252(i). Although MFN clauses
17 may, in some instances, result in the same ability for a
18 CLEC to "pick and choose" terms from other contracts, an
19 MFN clause is a voluntary agreement between parties and
20 therefore is not equivalent to the mandatory terms of
21 Section 252(i). If parties believe that MFN clauses in
22 contracts are too strict or too broad, or are interpreted
23 incorrectly through arbitration, then they have the option to

1 renegotiate those terms with more specificity the next time
2 they enter into a negotiated agreement. In contrast, the
3 Commission's interpretation of Section 252(i), which the
4 FPSC believes grants global MFN rights to all carriers for
5 any term in any contract, may eventually eliminate the need
6 or reason for negotiated contracts altogether.

7 As far as Access One is concerned, the FPSC's comments speak for themselves and,
8 together with the F.C.C.'s interpretation of § 252(i), establish exactly why BellSouth's
9 position is incorrect.

10 **Q: What about BellSouth's claim that Access One lost its right to adopt the**
11 **TCCF Provision because the TCCF Agreement had expired before you sent your**
12 **letter dated August 20, 1998 formally requesting to adopt the provision?**

13 A: There are two problems with this argument. First, it is inconsistent with the Most
14 Favored Nations Clause of the Access One Resale Agreement. This provision states that
15 BellSouth is deemed to have offered to Access One all of the provisions of other resale
16 agreements in effect at any time during the life of the Access One Resale Agreement, and
17 that we could adopt any of these terms at our discretion at any time during the term of our
18 Agreement. There is no limitation on the duration of BellSouth's "offer" or on the time
19 within which Access One had to accept that offer. The only limitation was that the new
20 provision would only be deemed to have gone into effect when Access One accepted the
21 offer. Since the TCCF Agreement was in effect at the time our Agreement was executed,
22 we had the right to accept the TCCF Provision at any time prior to the expiration of our
23 Agreement. We did this on August 20, 1998. Therefore, BellSouth should have put this
24 provision into effect on that date.

1 **Q: You mentioned a second problem with BellSouth's position regarding the**
2 **expiration of the TCCF Agreement. What were you referring to?**

3 A: This is even simpler. Although it is true that the TCCF Agreement had a
4 scheduled expiration date of May 28, 1998 -- which was before we made our request to
5 adopt the TCCF Provision -- TCCF and BellSouth have been in negotiations to renew the
6 TCCF Agreement since that date. In fact, as I am sure BellSouth is well aware, the final
7 negotiations of the terms of the renewal were only recently decided by the FPSC in its
8 order issued May 20, 1999 in Docket No. 981052-TP; Order No. PSC-99-1013-FOF-TP.

9 **Q: Why is it relevant that the renewal of the TCCF Agreement has been under**
10 **negotiation at least through May 20, 1999?**

11 A: Because Section 1 B of the TCCF Agreement specifically provides:

12 The terms of this agreement shall remain in effect after the
13 term of the existing agreement has expired and while a new
14 agreement is being negotiated.

15 In other words, even if BellSouth somehow was correct that Access One's right to adopt
16 the TCCF Provision ended when the TCCF Agreement was no longer in force and effect,
17 the fact is that the TCCF Agreement, including the TCCF Provision, was in effect long
18 after we made our request to adopt the TCCF Provision. The irony is that the TCCF
19 Agreement has actually remained in force and effect past the expiration date of the
20 Access One Agreement which by its terms was April 29, 1999.

21 **Q: What about BellSouth's position that Access One should have been required**
22 **to adopt the TCCF Provision within a reasonable time after the TCCF Agreement**
23 **was filed with the FPSC?**

1 A: There are three things wrong with this argument. First, this position appears to be
2 based not on the terms of the Most Favored Nations Clause of the Access One Resale
3 Agreement, but at most only on interpretations of § 252(i) and the regulations
4 promulgated thereunder. Secondly, I'm not sure I actually understand what BellSouth
5 means when it says "within a reasonable period of time" and what that time is. Because,
6 as I testified in my direct testimony, as soon as we became aware of the TCCF Provision
7 from Michael Wilburn at BellSouth, we immediately requested that it be adopted.
8 Finally, and perhaps most importantly, why should BellSouth care if we have delayed our
9 rights to have adopted the TCCF Provision? How has BellSouth been harmed or
10 prejudiced? If anything, the only party that was harmed or prejudiced is Access One.

11 **ISSUE 3**

12 **Q: Did you review Mr. Milner's testimony regarding your claim that BellSouth**
13 **has failed to provide Access One with the required notification of customers' change**
14 **of local service providers?**

15 A: Yes, and frankly I'm somewhat bewildered. As best as I can understand
16 Mr. Milner's testimony, he states that (1) BellSouth has provided the required
17 notifications, (2) there were problems with BellSouth's notification system that were
18 identified in the summer and fall of 1998, (3) BellSouth corrected these problems, and (4)
19 BellSouth has implemented safeguards to ensure that the problems will not occur again.

20 **Q: Why is this bewildering?**

21 A: Well, we have been complaining about the notification problem for over a year,
22 and for over a year BellSouth keeps saying that it is aware of the problem and is working
23 on it. All I know is that as reflected in Exhibit KB - 8 to my direct testimony, which
24 analyzed the notification of customer deactivations provided by BellSouth to Access One

1 for the period of December 1, 1998 to April 4, 1999, we received notifications of less
2 than 50% of the deactivations that occurred during this period. Furthermore, of the
3 deactivation notifications BellSouth did provide us with, 93% weren't accurate. I cannot
4 imagine that BellSouth would consider these statistics indicative of a solved problem.

5 **Q: Well, according to Ms. Arrington, the Access One Resale Agreement does not**
6 **contain specific requirements as to when BellSouth has to provide notification of**
7 **customers' changes of local service provider?**

8 A: This is true. It only provides that BellSouth shall notify Access One which, under
9 the rules of contract construction, require that BellSouth provide Access One with at least
10 reasonable notification. Putting aside the fact that it takes on average 10 days for Access
11 One to receive any notifications from BellSouth of customers' deactivations, I would
12 assume that even BellSouth would have to agree that its failure to send any notifications
13 over 50% of the time and its accuracy rate of only 7% of the deactivation notifications it
14 does send Access One fails to comport with even minimal standards of notifications.

15 **Q: Does this conclude your testimony?**

16 A: Yes it does.

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BEFORE THE PUBLIC SERVICE COMMISSION

Access One Communications, Inc.)
Complainant,)
vs.)
BellSouth Telecommunications, Inc.,)
Respondent,)
_____)

Docket No. 990108-TP

Dated: June _____, 1999

REBUTTAL TESTIMONY OF KEVIN GRIFFO

ON BEHALF OF ACCESS ONE COMMUNICATIONS, INC.

Q: Please state your name and business address.

A: My name is Kevin Griffio. My business address is 4205 Vineland Road, Suite L -
15, Orlando, Florida 32811.

Q: Have you testified previously in this case?

A: No.

Q: What is your relationship to Access One?

A: I am President and C.O.O. of Access One, and I have held this position since
January 1998.

**Q: Have you reviewed the direct testimony of W. Keith Milner and Susan
Arrington submitted on behalf of BellSouth in this case?**

A: Yes.

Q: What is the purpose of your testimony?

A: To respond to the testimony of Mr. Milner and Ms. Arrington regarding the issue
of BellSouth's solicitation of Access One's customers who switched their local service
from BellSouth.

1 **Q: Do you agree with Ms. Arrington and Mr. Milner's testimony?**

2 A: I do not.

3 **Q: Why?**

4 A: Both Mr. Milner and Ms. Arrington state that BellSouth has neither solicited nor
5 marketed Access One customers who switch their local telephone service from BellSouth
6 to switch back. Mr. Milner testified that all BellSouth does is to mail "a notification
7 letter to the end user. The letter advises that end user that his/her request to switch local
8 services has been completed and that BellSouth hopes to have the opportunity to serve
9 the customer in the future. This notification is mailed after the completion of changing
10 the service from BellSouth to that of an ALEC."

11 **Q: Do you have a problem with this type of letter?**

12 A: No, not at all. In fact, to the extent that it operates as a confirmation to the
13 customer that the customer has indeed switched his local telephone service, we believe
14 the letter serves a useful purpose.

15 **Q: What is it about Mr. Milner or Ms. Arrington's testimony that you disagree
16 with?**

17 A: The fact is the letter that Mr. Milner referred to was not the only communication
18 that BellSouth sent to our customers. And, despite Mr. Milner and Ms. Arrington's claim
19 to the contrary, BellSouth most certainly did market and solicit our customers who had
20 switched their local telephone service from BellSouth to switch back. First, as Ken
21 Baritz testified in his direct testimony in this case, we have been advised by our
22 customers of BellSouth's solicitation efforts. Furthermore, Access One has actually
23 received marketing materials which BellSouth inadvertently mailed to us directly
24 soliciting our customers to switch their service back to BellSouth.

1 **Q: I assume you are referring to Exhibit KB - 7 of Mr. Baritz's deposition?**

2 A: Yes I am.

3 **Q: Neither Mr. Milner nor Ms. Arrington make any reference to this material or**

4 **any other similar materials. Do you know why?**

5 A: Actually I do.

6 **Q: How is that?**

7 A: Because Mr. Baritz and I spoke with our contract representative at BellSouth,

8 Page Miller, about this issue.

9 **Q: When did this occur?**

10 A: This happened during the first week of June 1999.

11 **Q: Do you know if Ms. Miller was aware of Mr. Baritz's testimony when you**

12 **spoke to her?**

13 A: Yes. In fact one of the reasons she called us was to discuss Exhibit KB - 7 to Mr.

14 Baritz's testimony.

15 **Q: So Ms. Miller called you to discuss this issue?**

16 A: Yes.

17 **Q: What did Ms. Miller say?**

18 A: Well, she was very much aware of the marketing material that Ken Baritz attached

19 as Exhibit KB - 7 to his testimony, but said that these were not marketing materials or

20 solicitations to induce Access One customers to switch their local service back to

21 BellSouth. Rather, these materials were only intended to solicit those customers who

22 switched their local toll service to switch the local toll service back to BellSouth.

23 **Q: What was wrong with Ms. Miller's explanation?**

1 A: In all due respect, it's a shell game. The only customers who switch their local
2 long distance service to Access One are the same customers who also switch their local
3 telephone service to Access One. So, the customers who receive the solicitations are our
4 local telephone services customers -- the very customers who we are required to pay a
5 one month minimum for, and who BellSouth claims it does not solicit. To make matters
6 worse, if you are a customer receiving one of these solicitations and you attempt to call
7 BellSouth to switch just your "local toll services" back to BellSouth as advertised,
8 BellSouth will advise you that you cannot do so unless you also switch your local
9 telephone service at the same time.

10 **Q: Why is this?**

11 A: Because only the customer's current local exchange company has the operational
12 capability to change the customer's local toll carrier.

13 **Q: Did you confirm this with BellSouth?**

14 A: In fact we did. Both Ken Baritz and I called separate business offices of
15 BellSouth and were told that in order for BellSouth to effectuate the change of our local
16 toll carrier as set forth in the marketing materials, we would have to also change our local
17 telephone service to BellSouth.

18 **Q: As a matter of curiosity, have you ever had a former BellSouth customer who**
19 **switched their service to Access One switch their local toll service back to BellSouth**
20 **without also switching their local telephone service back to BellSouth?**

21 A: No. Not one. Every single customer who switched their local toll service back to
22 BellSouth also switched their local telephone service at the same time and in the same
23 transaction.

1 **Q: Do you have any other problems with Mr. Milner or Ms. Arrington's**
2 **testimony on the issue of BellSouth's Solicitations of Access One's customers?**

3 A: Yes. First, Ms. Arrington's testimony that there is no provision of the Access One
4 Resale Agreement which prohibits BellSouth from soliciting our customers during the
5 first month - - even though BellSouth claims they don't do it - - is incorrect. According to
6 BellSouth's interpretation of the Agreement, which this Commission has previously
7 accepted, BellSouth is entitled to charge, and Access One is required to pay, a one month
8 minimum for each new customer regardless of whether the customer remains with Access
9 One for an entire month. Pursuant to Section 3C and 3D of the Agreement, Access One
10 is deemed to be BellSouth's customer of record for "all services purchased from
11 BellSouth," and BellSouth "shall have no contact with the end user except to the extent
12 provided for herein." We believe that these provisions, together with the implied duty of
13 good faith and fair dealing which is read into and becomes part of all contracts in the state
14 of Florida, absolutely prohibit BellSouth from soliciting our customers to switch back, at
15 least during the first month.

16 **Q: Is there anything else about Mr. Milner or Ms. Arrington's testimony that**
17 **concerns you?**

18 A: Yes. As Mr. Baritz stated in his direct testimony, Access One was led to believe
19 that BellSouth stopped its "winback program" and was no longer soliciting our customers
20 as they had in the past. Please see Page Miller's February 3, 1999 letter to Ken Baritz
21 which is attached as Exhibit KB - 6 to Mr. Baritz's testimony. Please also see Mary
22 Keyer's letter to Robert Turken dated April 28, 1999, a copy of which is attached hereto
23 as Exhibit KG - 1.

1 In view of the "clarification" from BellSouth in the form of Mr. Milner and Ms.
2 Arrington's testimony and Ms. Miller's comments to us that BellSouth doesn't consider
3 the marketing materials, attached as Exhibit KB - 7 to Ken Baritz's testimony, as
4 solicitation of our customers; we are concerned that BellSouth's representations that it has
5 stopped its winback program and that its marketing staff are no longer given the names of
6 our customers to add to their database is not correct.

7 **Q: Does this conclude your testimony?**

8 **A: Yes, it does.**

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EXHIBIT KG - 1

Mary K. Keyer
General Attorney

BellSouth Telecommunications, Inc.
Legal Department - Suite 4300
875 West Peachtree Street
Atlanta, Georgia 30375-0001
Telephone: 404-335-0729
Facsimile: 404-858-9022

April 28, 1999

VIA FACSIMILE AND U.S. MAIL

Robert W. Turken, Esq.
Stroock & Stroock & Lavan LLP
33rd Floor
200 South Biscayne Boulevard
Miami, Florida 33131

Re: 990108-TP – Access One Communications, Inc.

Dear Bob:

Pursuant to our discussions, I have clarified that BellSouth's marketing department does not receive any information about customers moving from one alternative local exchange company to another alternative local exchange company, nor does the marketing department receive any customer-specific information on customers who have left BellSouth to go to another telephone company. I understand Access One has a concern that BellSouth's marketing department is receiving specific information about customers who are switching telephone companies and are then using that customer-specific information to market those specific customers. Such is not the case. As we agreed, this resolves and eliminates Issue 4 of Access One's Proposed Issues dated April 8, 1999.

I have also clarified that at one time BellSouth did not allow its customers who were leaving BellSouth to go to another telephone company to take their telephone numbers with them if those customers were in a denied or disconnect status. This policy, however, changed in 1997. If there were instances where the policy was not implemented, those instances were in error. As we agreed, this resolves and eliminates Issue 2 of Access One's Proposed Issues dated April 8, 1999.

Finally, I have confirmed that BellSouth does offer ALEC customers the same repair scheduling options that it offers its own customers. As we agreed,

Page 2
Mr. Turken
April 28, 1999

this resolves and eliminates Issue 4 of Staff's Tentative List of Issues faxed on April 19, 1999.

If you have any questions or problems with my representations herein, please let me know.

Sincerely,

A handwritten signature in cursive script that reads "Mary K. Keyer".

Mary K. Keyer

cc: Will Cox
Nancy White