

1 ATLANTIC TELECOMMUNICATIONS SYSTEMS, INC.
2 REBUTTAL TESTIMONY OF JERRY STABLER
3 BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

4 DOCKET NO. 992018-TP

5 March 24, 2000

ORIGINAL

6
7 Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH ATLANTIC
8 TELECOMMUNICATIONS SYSTEMS, INC. ("ATLANTIC") AND YOUR
9 BUSINESS ADDRESS.

10 A. My name is Jerold Stabler, I am President of Atlantic Telecommunications Systems, Inc.
11 ("Atlantic").

12 Q. PLEASE PROVIDE A DESCRIPTION OF YOUR BACKGROUND AND
13 EXPERIENCE.

14 A. Prior to establishing Atlantic Telecommunications Systems, Inc., I founded Atlantic
15 Answering Service, Inc., which has been in business since 1981. I owned and operated
16 several cable television companies in both Florida and Maine. I have twenty-five years
17 of experience in the cable television business including the management of cable
18 television businesses for large multiple systems such as TelePrompTer and Warner
19 Communications. I am formerly a member of the Board of Directors of both Southern
20 Telemessaging Association (STA), and the Association of Telemessaging Services
21 International (ATSI) , an evolving, "all-in-one" resource for telemessaging professionals.
22 I am President and CEO of Atlantic Answering Service, Inc. and President and CEO of
23 Atlantic Telecommunication Systems, Inc.

1 Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

2 A. The purpose of my testimony is to present Atlantic's position on the unresolved issue of
3 whether BellSouth Telecommunications, Inc. ("BellSouth") should agree to respect
4 exclusive arrangements between Atlantic and its customers in the negotiations between
5 BellSouth and Atlantic.

6 ***Issue 1: : Under the Telecommunications Act of 1996, can Atlantic require BellSouth to***
7 ***include a provision in the Resale Agreement whereby BellSouth is precluded from offering***
8 ***service to consumers covered by an exclusive arrangement with Atlantic?***

9 Q. IS THIS ISSUE APPROPRIATE FOR ARBITRATION?

10 A. Yes. BellSouth contends that this issue is not appropriate for arbitration, yet it is the first
11 issue BellSouth chose to present in its Petition for Section 252(b) Arbitration filed on
12 December 23, 1999. The instant action is the result of BellSouth's attempt to exclude
13 Section III, E of the *Agreement Between BellSouth Telecommunications, Inc. and Atlantic*
14 *Telecommunication Systems, Inc. Regarding the Sale of BST's Telecommunications*
15 *Services to Atlantic Telecommunication Systems, Inc. for the Purposes of Resale*
16 approved by the Commission on or about February 9, 1998 ("Resale Agreement") and
17 voluntarily negotiated by the parties according to 47 USC §252(a)(1).

18 Q. DESCRIBE ATLANTIC'S OPERATIONS IN FLORIDA.

19 A. Atlantic has been and is currently a reseller of BellSouth telecommunications services
20 and, at times, its market share has eclipsed 2,000 end users in the State of Florida.
21 According to the BellSouth/Atlantic resale agreement, Atlantic pays BellSouth
22 78.17% or 83.19% of BellSouth's tariffed price for every BellSouth service Atlantic

1 resells. Atlantic hopes to eventually construct its own telecommunications facilities
2 and migrate resale customers its network.

3 Q. DOES ATLANTIC SEEK TO ERECT BARRIERS AROUND ITS CUSTOMERS TO
4 PROTECT THESE CUSTOMERS FROM COMPETITION BY BELLSOUTH?

5 A. No. Atlantic simply seeks freedom from tortious interference with contracts it
6 establishes with end users in a manner that at least gravitates toward equalizing the
7 gross disparity in market powers between the companies. My attorneys inform me
8 that it is illegal to interfere with an existing contract. *See e.g. Ferguson*
9 *Transportation, Inc., vs. North American Van Lines, Inc.* 687 So. 2d 821 (1996).

10 Because of its small size and slender operating margins, Atlantic can little afford the
11 delays and expenses of litigating the validity of customer contracts with BellSouth.
12 For example, Atlantic has had to curtail its participation in this proceeding, initiated
13 by BellSouth, to conserve company resources. It is this disparity in market power that
14 Atlantic sought to redress and BellSouth now seeks to preserve. BellSouth's
15 willingness to arbitrate on this issue demonstrate that the FCC's words in its First
16 Report and Order are just as true today as they were in 1996:

17 *Negotiations between incumbent LECs and new entrants are not analogous to*
18 *traditional commercial negotiations in which each party owns or controls*
19 *something that the other party desires.* Under Section 251, monopoly providers
20 are required to make available their facilities and services to requesting carriers
21 that intend to compete directly with the incumbent LEC for its customers and its
22 control of the local market. Therefore, although the 1996 Act requires incumbent

1 LECs, for example, to provide interconnection and access to unbundled elements
2 on rates, terms and conditions that are just, reasonable, and nondiscriminatory,
3 incumbent LECs have strong incentives to resist such obligations. *The inequality*
4 *of bargaining power between incumbents and new entrants militates in favor of*
5 *rules that have the effect of equalizing bargaining power* in part because many
6 new entrants seek to enter national or regional markets. *Implementation of the*
7 *Local Competition Provisions in the Telecommunications Act of 1996*, First
8 Report and Order 11 FCC Rcd 15499 para. 55 (1996). (emphasis added)

9 Obviously, exclusive customer arrangements are necessary in cases where new market
10 entrants seek to establish a foothold and struggle to compete with entrenched
11 monopoly incumbent carriers. Moreover, exclusive or term contracts are
12 commonplace in highly competitive industries and are utilized widely throughout the
13 telecommunications industry. BellSouth, for example, employs exclusive term
14 contracts in its retail tariffs. BellSouth tariffs also penalize customers for early
15 termination of these exclusive term contracts. While BellSouth is correct to express
16 concerns about the practical effects of such contracts where the customer, “once
17 committed, can be ‘held hostage’ by the service provider, even in the face of poor
18 service or non-competitive pricing,” it inaccurately assumes that a minor reseller like
19 Atlantic, has sufficient market power to adversely affect (a) customer choice (which,
20 incidentally also includes the choice for term of contract) and (b) BellSouth’s and
21 other competitors ability to market and sell service. *See Petition of BellSouth*

1 *Telecommunications, Inc. for Section 252(b) Arbitration*, Florida Public Service
2 Commission, Docket No. 992018, para. 10 (filed December 23, 1999).

3 Q. DID BELLSOUTH AND ATLANTIC BOTH AGREE TO RESPECT EACH
4 PARTY'S EXCLUSIVE SERVICE ARRANGEMENTS?

5 A. Yes. BellSouth recognized Atlantic's position in the Resale Agreement. Section III, E
6 of that agreement provided as follows:

7 The Company [BellSouth] will continue to bill the end user customer for any
8 services that the end user specifies it wishes to receive directly from the
9 company. The parties acknowledge that *each Party may enter exclusive*
10 *arrangements with end users* within each Party's service area. *To the extent*
11 *permitted by law*, for such exclusive arrangements as may exist between a
12 Party and an end user, *each Party maintains the right to market, or bill for, its*
13 *own telecommunications products and services, or otherwise serve directly*
14 *any end user with the Party's service area, and in doing so may establish*
15 *independent relationships with end users of the other Party.* (emphasis added).

16 Section III, E clearly preserves both parties' rights to market, bill and establish
17 independent relationships with the end users of the other parties' customers and that
18 exclusive arrangements are allowed only to the extent permitted by law. Yet
19 BellSouth misconstrues this section and claims this provision may be contrary to FCC
20 rules because it could inhibit BellSouth's ability to market to tenants in multiple-
21 dwelling units ("MDUs"). Atlantic can only surmise that BellSouth's opposition to

1 this provision, which expressly limits itself “to the extent permitted by law,” has more
2 to do with inhibiting Atlantic’s ability to compete than BellSouth’s.

3 Q. DOES SECTION III, E OF THE RESALE AGREEMENT LIMIT BELLSOUTH’S
4 ABILITY TO SELL AND MARKET TELECOMMUNICATIONS SERVICES?

5 A. Section III, E limits BellSouth only to the extent permitted by law. If anything, the
6 provision preserves Atlantic’s ability to market and sell telecommunications services with
7 no practical effect on BellSouth’s ability to do the same. Atlantic unambiguously
8 provides that “each Party maintains the right to market, or bill for, its own
9 telecommunications products and services, or otherwise serve directly any end user
10 within the Party’s service area, and in doing so may *establish independent relationships*
11 *with end users* of the *other* Party.” (emphasis added). BellSouth speculates, since it has
12 no basis in fact, about the potential anticompetitive effects of this provision.

13 Q. DOES ATLANTIC SEEK TO IMPAIR BELLSOUTH’S ABILITY TO SELL
14 SERVICES TO CUSTOMERS IN MULTIPLE-DWELLING UNITS?

15 A. No. How could it? BellSouth is the dominant monopolist and owns or controls
16 virtually every telecommunications facility into every MDU throughout its Florida
17 service territory. If customers in MDUs have no choice of service providers that is
18 because building owners are under no state or federal common carrier obligations to
19 allow nondiscriminatory access to end user customers. BellSouth contends that
20 “limiting a customer’s choice of carriers is not in the spirit of competition, and is not
21 in the public interest” but does not mention its own strong financial incentive to
22 prevent competing carriers, such as Atlantic, from increasing their MDU market share.

1 The carriers excluded from MDUs are those without existing dropwire, NIDs, riser
2 cable, cross connects, and telecommunications closets that allow direct and immediate
3 access to customers in these buildings. Atlantic simply seeks some limited protection
4 from tortious interference with its ability to resell BellSouth's services. BellSouth, in
5 its testimony points out the FCC is actively examining building access issues, but it
6 does not mention that the FCC initiated the proceeding to examine the anticompetitive
7 behavior of building owners *and* ILECs. The Direct Testimony of Beth Shiroshi
8 quotes the FCC, stating, "In several proceedings before the Commission, a number of
9 parties have argued that both building owners *and incumbent LECs have obstructed*
10 *competing carriers from obtaining access on reasonable and nondiscriminatory terms*
11 *to necessary facilities located within multiple unit premises."* (Testimony at Page 4,
12 lines 11 to 15 citing *Promotion of Competitive Networks in Local Telecommunications*
13 *Markets*, Third Further Notice of Proposed Rulemaking, Docket 96-98, FCC 99-141,
14 Para. 31 (Rel. July 7, 1999) (emphasis added). In that same FNPRM at paragraph 21,
15 the FCC noted that "the dominant paradigm for the provision of telephone service in
16 the United States today is the connection of every call through the incumbent LECs.
17 Some industry observers believe that the competitive LECs today serve less than 3
18 percent of the nationwide switched access lines, and that only about a quarter of those
19 are served though competitive LEC's own facilities." (citing the FCC's Common
20 Carrier Bureau Competition Report at 19.) It is precisely this market that Atlantic
21 seeks to enter, first as a reseller and then as a facilities-based carrier. Yet, when
22 viewed through the lens of BellSouth's logic, it is the competing CLECs armed with a

1 provision that gives them some ability to protect exclusive customer arrangements *to*
2 *the extent allowed by law*, that “may be contrary to future FCC rules,” not ILECs or
3 building owners. (Shrioshi Testimony at page 5, lines 7-8). This logic is invalid as it
4 is convenient. By the FCC’s own estimate, ILECs still control 99.25% of the
5 telecommunications infrastructure in this country. *See* FRNPM at paragraph 21.

6 Q. WHAT IS ATLANTIC’S POSITION ON THE PARTIES ABILITY TO
7 RECIPROCALLY RECOVER COSTS INCURRED IN SWITCHING SLAMMED
8 CUSTOMERS TO THE APPROPRIATE LOCAL SERVICE PROVIDER?

9 A. Atlantic welcomes BellSouth’s understanding that the issue has been resolved by the
10 parties and reserves the right to file testimony on the issue should BellSouth’s
11 understanding change.

12 Q. DOES THIS CONCLUDE YOUR TESTIMONY?

13 A. Yes.