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Legal Department

Lisa S. Foshee
General Attorney

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BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(305) 347-5561

RECORDS AND
REPORTING

April 14, 2000

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

Re: Docket No. 991237-TP

Dear Ms. Bayo:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion to Amend Pre-Hearing Statement 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,

Lisa S. Foshee (Paw)

- AFA _____
- APP _____
- CAF _____
- CMU Debra
- CTR _____
- EAG _____
- LEG 1
- MAS 3
- OPC _____
- RRR _____
- SEC 1
- WAW _____
- OTH _____

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

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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint of AT&T)	Docket No. 991237-TP
Communications of the Southern)	
States, Inc. against BellSouth)	
Telecommunications, Inc. for)	
improper application of)	
switched access charges.)	
<hr/>) Filed: April 14, 1999

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO AMEND
PRE-HEARING STATEMENT

BellSouth Telecommunications, Inc. ("BellSouth") hereby moves the Commission to amend the Pre-Hearing Statement in the above-referenced case to add the following sentence to Issues 2(b) and 3(b):

Further, if the Commission concludes that AT&T is entitled to relief (which it should not), the Commission should find that any recovery is barred in whole or in part by the statute of limitations and/or by the doctrine of laches.

In support of this Motion, BellSouth states as follows:

In its Answer, filed September 16, 1999, BellSouth raised the defenses of both statute of limitations and laches. Since that time, BellSouth has raised the defense of statute of limitations in the pre-filed testimony of BellSouth witness Byrd. Moreover, AT&T raised BellSouth's statute of limitations defense in the deposition of Mr. Byrd, taken on March 30, 2000.

While it is true that neither the statute of limitations nor laches defense is explicitly set forth in the Pre-Hearing Statement, there is no question that BellSouth appropriately plead and asserted these defenses and that the defenses are relevant issues in this case. See Fla. R.C.P. 1.110(c) ("in the answer a pleader shall state in short and plain terms the pleader's defenses to each claim asserted...."); Rule 1.110(d) ("in

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pleading to a preceding pleading a party shall set forth affirmatively...laches...[and statute of limitations”). BellSouth properly raised each defense in its Answer, and discussed each defense in its pre-filed testimony. Under the Florida Rules of Civil Procedure, an affirmative defense only is waived if it is not properly plead in a responsive pleading. *See Fla. R.C.P. 1.140(h)(1)* (“a party waives all defenses and objections that the party does not present either by motion...or, if the party has made no motion, in a responsive pleading”). There can be no dispute that BellSouth complied with its obligation to plead affirmative defenses in the Answer.

Moreover, under the Commission’s Procedural Order in this case, an issue is not waived if it is not explicitly set forth in the Pre-Hearing Statement, but rather only is waived if it is “not *raised* by a party prior to the issuance of the prehearing order.” *Order Establishing Procedures*, Order No. PSC-99-2465-PCO-TP, Docket No. 991237-TP, 12/16/99, at 4 (emphasis added). According to the Commission, the scope of the proceeding is not necessarily limited to the Pre-Hearing Statement but rather the “scope of this proceeding shall be based upon the issues raised by the parties and the Commission staff (Staff) *up to and including* the prehearing conference. *Id.* at 1 (emphasis added). Thus, the hearing should include all issues raised prior to the prehearing conference, and the only waiver that can occur is if an issue is not raised by the parties or the Staff in some way at some point prior to the prehearing order. Clearly, BellSouth raised the issues of statute of limitations and laches in its Answer and thus has not waived either defense.

In an effort to ensure that the Pre-Hearing Statement is as complete as possible, despite the fact that BellSouth believes it to be legally unnecessary, BellSouth

respectfully requests that the Commission amend the Pre-Hearing Statement to add the above-referenced phrase. The amendment is appropriate because it will not in any way prejudice AT&T, as the issues raised are legal issues that are most appropriately addressed in post-hearing briefs which are not due until May 18, 2000. Moreover, AT&T has been on notice of BellSouth's legal defenses since September, 1999, and has ample opportunity to explore the defenses through both written discovery and depositions. AT&T demonstrated its awareness of BellSouth's legal defenses by asking BellSouth witness Byrd questions about BellSouth's statute of limitations defense during his deposition on March 30, 2000. The purpose of the pleading rules is to ensure proper notice to opposing parties; there is no dispute that AT&T has more than adequate notice of BellSouth's legal defenses.

BellSouth sincerely regrets any inconvenience this Motion may cause the Commission or the Staff, particularly given that BellSouth believes it has adequately plead and addressed its legal defenses to AT&T's claims. However, in an effort to be as thorough as possible, and because AT&T has advised that it may move to exclude these defenses, BellSouth respectfully requests that the Commission amend the Pre-Hearing Statement in the manner proposed by BellSouth.

This 14th day of April, 2000.

BELLSOUTH TELECOMMUNICATIONS, INC.

Nancy B. White

NANCY B. WHITE
MICHAEL P. GOGGIN

c/o Nancy H. Sims

150 So. Monroe Street, Suite 400

Tallahassee, FL 32301

(305) 347-5555

R. Douglas Lackey

R. DOUGLAS LACKEY

LISA S. FOSHEE

Suite 4300

675 W. Peachtree St., NE

Atlanta, GA 30375

(404) 335-0747

205494


CERTIFICATE OF SERVICE
Docket No. 991237-TP

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

U.S. Mail this 14th day of April, 2000 to the following:

Diana Caldwell
Staff Counsel
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Tracy Hatch, Esq.
AT&T Communications of the
Southern States, Inc.
101 North Monroe Street
Suite 700
Tallahassee, FL 32301
Tel. No. (850) 425-6364
Fax No. (850) 425-6343


Lisa S. Foshee
Lisa S. Foshee (FN)