ORIGINAL

Legal Department

J. PHILLIP CARVER
General Attorney

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0710

November 5, 2001



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

**Re: Docket No. 000121-TP (OSS)**

Dear Ms. Bayó:

Enclosed is an original and 15 copies of Response of BellSouth Telecommunications, Inc. In Opposition To Joint Motion For Clarification, Etc., which we ask that you file 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 to the parties shown on the attached Certificate of Service.

Sincerely,

J. Phillip Carver

J. Phillip Carver (KA)

Enclosures

cc: All parties of record
Marshall M. Criser, III
Nancy B. White
R. Douglas Lackey



AFP
CAF
CMP
COM 5
CTR
ECR
LEG
OPC
PAI
RGO
SEC 1
SER
OTH

**CERTIFICATE OF SERVICE**
**Docket No. 000121-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Federal Express and (*) Hand Delivery this 5th day of November, 2001 to the following:

Jason K. Fudge (*)
Tim Vaccaro
Staff Counsel
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No. (850) 413-6181
Fax. No. (850) 413-6250
jfudge@psc.state.fl.us

AT&T
Marsha Rule (+)
101 North Monroe Street
Suite 700
Tallahassee, FL 32301-1549
Tel. No. (850) 425-6365
Fax. No. (850) 425-6361
mrule@att.com

GTE Florida, Inc.
Kimberly Caswell
P.O. Box 110, FLTC0007
Tampa, FL 33601-0110
Tel. No. (813) 483-2617
Fax. No. (813) 223-4888
kimberly.caswell@verizon.com

Nanette Edwards (+)
Regulatory Attorney
ITC^DeltaCom
4092 S. Memorial Parkway
Huntsville, Alabama 35802
Tel. No. (256) 382-3856
Fax. No. (256) 382-3936
nedwards@itcdeltacom.com

Scott A. Sapperstein
Intermedia Communications, Inc.
One Intermedia Way
M.C. FLT-HQ3
Tampa, Florida 33647-1752
Tel. No. (813) 829-4093
Fax. No. (813) 829-4923
sasapperstein@intermedia.com

Charles J. Pellegrini
Wiggins & Villacorta, P.A.
2145 Delta Boulevard
Suite 200
Post Office Drawer 1657
Tallahassee, FL 32302
Tel. No. (850) 358-6007
Fax. No. (850) 358-6008
Counsel for Intermedia
charlesp@katzlaw.com

Peter M. Dunbar, Esquire
Karen M. Camechis, Esquire
Pennington, Moore, Wilkinson, Bell & Dunbar, P.A.
Post Office Box 10095 (32302)
215 South Monroe Street, 2nd Floor
Tallahassee, FL 32301
Tel. No. (850) 222-3533
Fax. No. (850) 222-2126
pete@penningtonlawfirm.com

Brian Chaiken
Legal Counsel
Supra Telecom
1311 Executive Center Drive
Suite 200
Tallahassee, FL 32301
Tel. No. (850) 402-0510
Fax. No. (850) 402-0522
bchaiken@stis.com

Michael A. Gross
Vice President, Regulatory Affairs
& Regulatory Counsel
Florida Cable Telecomm. Assoc.
246 East 6th Avenue
Tallahassee, FL 32303
Tel. No. (850) 681-1990
Fax. No. (850) 681-9676
mgross@fcta.com

Susan Masterton
Charles J. Rehwinkel
Sprint
Post Office Box 2214
MS: FLTLHO0107
Tallahassee, Florida 32316-2214
Tel. No. (850) 599-1560
Fax. No. (850) 878-0777
susan.masterton@mail.sprint.com

Donna Canzano McNulty (+)
MCI WorldCom, Inc.
325 John Knox Road
The Atrium, Suite 105
Tallahassee, FL 32303
Tel. No. (850) 422-1254
Fax. No. (850) 422-2586
donna.mcnulty@wcom.com

Brian Sulmonetti
MCI WorldCom, Inc.
6 Concourse Parkway, Suite 3200
Atlanta, GA 30328
Tel. No. (770) 284-5493
Fax. No. (770) 284-5488
brian.sulmonetti@wcom.com

Catherine F. Boone, Esq. (+)
Covad Communications Company
10 Glenlake Parkway
Suite 650
Atlanta, Georgia 30328
Tel. No. (678) 579-8388
Fax. No. (678) 320-9433
cboone@covad.com

John Rubino
George S. Ford
Z-Tel Communications, Inc.
601 South Harbour Island Blvd.
Tampa, Florida 33602
Tel. No. (813) 233-4630
Fax. No. (813) 233-4620
gford@z-tel.com

Joseph A. McGlothlin (*)
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Decker, Kaufman, et. al
117 South Gadsden Street
Tallahassee, Florida 32301
Tel. No. (850) 222-2525
Fax. No. (850) 222-5606
jmcglothlin@mac-law.com
vkaufman@mac-law.com
Represents KMC Telecom
Represents Covad
Represents MPower

Jonathan E. Canis
Michael B. Hazzard
Kelley Drye & Warren, LLP
1200 19th Street, N.W., Fifth Floor
Washington, DC 20036
Tel. No. (202) 955-9600
Fax. No. (202) 955-9792
jacanis@kelleydrye.com
mhazzard@kelleydrye.com

Tad J. (T.J.) Sauder
Manager, ILEC Performance Data
Birch Telecom of the South, Inc.
2020 Baltimore Avenue
Kansas City, MO 64108
Tel. No. (816) 300-3202
Fax. No. (816) 300-3350

John D. McLaughlin, Jr.
KMC Telecom
1755 North Brown Road
Lawrence, Georgia 30043
Tel. No. (678) 985-6262
Fax. No. (678) 985-6213
jmclau@kmctelecom.com

Andrew O. Isar
Ascent
3220 Uddenberg Lane, NW
Suite 4
Gig Harbor, WA 98335
Tel. No. (253) 851-6700
Fax. No. (253) 851-6474
aisar@millerisar.com

Richard D. Melson
Hopping Green Sams & Smith
Post Office Box 6526
Tallahassee, FL 32314
Represents Rhythms
Tel. No. (850) 222-7500
Fax. No. (850) 224-8551
rickm@hgss.com

Jeremy Marcus
Elizabeth Braman
Blumenfeld & Cohen
1625 Massachusetts Ave. N.W.
Suite 300
Washington, D.C. 20036
Represents Rhythms
Tel. No. (202) 955-6300
Fax. No. (202) 955-6460
jeremy@technologylaw.com

Norman H. Horton, Jr. (+)
Messer, Caparello & Self
215 South Monroe Street
Suite 701
Post Office Box 1876
Tallahassee, FL 32302-1876
Represents e.spire
Tel. No. (850) 222-0720
Fax. No. (850) 224-4359
nhorton@law.fla.com

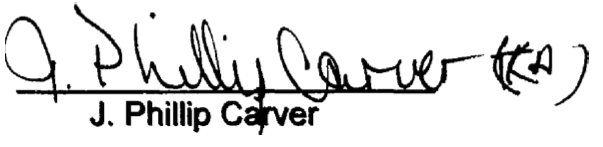
Renee Terry, Esq.
e.spire Communications, Inc.
131 National Business Parkway
Suite 100
Annapolis Junction, MD 20701
Tel. No. (301) 361-4298
Fax. No. (301) 361-4277

John Kerkorian
Mpower Communications, Corp.
5607 Glenridge Drive
Suite 300
Atlanta, GA 30342
Tel. No. (404) 554-1217
Fax. No. (404) 554-0010
jkerkorian@mpowercom.com

Suzanne F. Summerlin, Esq.
1311-B Paul Russell Road
Suite 201
Tallahassee, FL 32301
Tel. No. (850) 656-2288
Fax. No. (850) 656-5589
summerlin@nettally.com

Dulaney O'Roark III (+)
WorldCom, Inc.
Six Concourse Parkway
Suite 3200
Atlanta, GA 30328
Tel. No. (770) 284-5498
De.ORoark@mci.com

William Prescott (+)
AT&T Communications
Senior Attorney
1200 Peachtree Street, N.E.
Atlanta, GA 30309
Tel. No. (404) 810-8990
wprescott@att.com



J. Phillip Carver

**(+) Signed Protective Agreement**

#237366

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

| | | |
|---|---|---|
| In re: Investigation into the Establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies | ) | Docket No. 000121-TP |
| | ) | Filed: November 5, 2001 |

RESPONSE OF BELLSOUTH TELECOMMUNICATIONS, INC. IN OPPOSITION TO JOINT MOTION FOR CLARIFICATION, ETC.

BellSouth Telecommunications, Inc. ("BellSouth") hereby files, pursuant to Rule 25-22.037(b), Florida Admission Code, its Response in opposition to the Joint Motion For Clarification or, in the Alternative, Suggestion For Reconsideration On The Commission's Own Motion ("Motion"), and states the following:

1. The gist of the Joint Motion filed by four ALECs is a request that the Commission reconsider its Final Order, and include in the procedure for calculating remedies what the ALECs refer to as a "severity component". More specifically, the ALEC's advocate now a particular mathematical approach to that component, which they previously advocated through their testimony, and which the Commission unequivocally rejected.

2. This Motion should be denied for three distinct reasons, each of which is sufficient, standing alone, to require denial: (1) the Motion is untimely; (2) the Motion not only fails to meet, but it does not even attempt to meet, the standard for a proper motion for reconsideration; (3) The ALECs' Motion is really nothing more than an attempt to reargue points that they have already argued, and lost. Even if this attempt were procedurally proper at this juncture, the ALECs contention that the Commission somehow erred is wrong. More specifically, the ALECs are wrong in the suggestion that the Commission Order does not take

into consideration in any way the "severity" of BellSouth's failure to comply with any given measure. Moreover, even if the ALECs were correct in this contention, this does not render the Commission's ruling legally erroneous. The Motion is essentially frivolous. Therefore, the ALECs' request for oral argument should be rejected, and the Motion should be summarily denied.

3. Obviously, the motion is untimely. The Final Order in this matter (Order No. PSC-01-0819-FOF-TP) was entered September 10, 2001. Thus, a timely and proper Motion for Reconsideration would have to have been filed by September 25, 2001. (Rule 25-22.060, F.A.C.) Obviously, the ALECs are aware of this, because they have been careful to disingenuously label their Motion as if it is something other than a request for reconsideration. Although, the ALECs label their request as a motion for clarification, or alternatively, a "suggestion," that the Commission reconsider on its own motion, their semantical games do nothing to change the substance of what the ALECs request, or to render their filing timely. Although the ALECs call their filing a Motion for Clarification in an attempt to avoid the deadline for filing a motion for reconsideration, even a cursory review of the ALEC's filing reveals that there is nothing unclear about the Order, and that the ALEC request is not really for clarification at all, but instead that the Commission reach a different decision than the one it obviously reached.

4. As will be discussed in greater detail later, the ALECs' proposed in this case a mathematical calculation whereby the penalty for failure of any measure would be increased, based upon the extent to which BellSouth fails. In other words, the greater BellSouth falls short of the mark, the greater the penalty. The ALECs refer to this calculation in their Motion as a severity Component (p. 6). The ALECs also claim that they only became aware that this component was not included in the Commission's Order at a meeting held October 15, 2001.

(Motion, p 4) However, there is absolutely nothing unclear about the Order. To begin by stating the obvious, a motion for clarification can only be well taken if there is some lack of clarity in the subject Order. In this case, the only confusion arises from the ALECs claimed (but inexplicable) inability to comprehend the plain terms of the Commission's decision. In the Motion itself, the ALECs quote the operative (and crystal clear) language from the Order as follows:

> Remedies shall be measure based, rather than transaction-based, and shall vary by type of measure and duration for Tier 1, and type of measure for Tier 2.

(Motion, p. 3, quoting Order, p. 141), [emphasis added].

The Commission's Order could not have been clearer in its statement that differences in penalties shall be based only on type and duration. If the Commission also intended that there be a mathematical calculation by which penalties would be increased based on severity, it would have been a simple matter to state this. Obviously, the Order contains no such statement.

5. Further, what the Order does state (and which the ALEC's fail to acknowledge), is a clearly expressed rejection of the "severity component" proposed by the ALECs. The Order states the following:

> By using the same method to detect discrimination and measure its severity, witness Taylor believes that the ALEC Coalition's plan confuses the degree of certainty with the degree of severity .... We agree with BellSouth's witness Taylor's assessment that the statistical decision rule is not helpful in assessing severity.

(Order, p. 62).

The ALECs implausible claim that the Order is unclear as to whether some mathematical test for severity is intended is belied by the plain language quoted above.

6. In their Motion, the ALECs abandon at some point the claim that they seek clarification, and move on to the real gravament of their Motion: rearguing the facts in an

improper attempt to have the Commission reconsider its ruling. Again, this attempt to obtain reconsideration is untimely, and, again, the ALECs are perfectly well aware of this. It would be one thing if the ALECs acknowledged the tardiness of their motion, and attempted to show good cause for this tardiness.[1] Instead, they label their motion as a "suggestion," as if this somehow obviates the untimeliness of the motion. One would be hard pressed to argue that there is any practical difference between a motion for reconsideration and a "suggestion" that the Commission determine on its own that reconsideration is appropriate. The fact that the ALECs would fail to acknowledge the lateness of their motion, while simultaneously trying to avoid the applicable rule through such a transparent canard, reflects a troubling lack of respect for the Commission and its rules.

7. Even if the Motion for Reconsideration were timely, the ALECs have failed to satisfy the legal standard that must be met for such a motion to succeed. It is noteworthy that in the Motion, the ALECs do not even cite the legal standard for reconsideration. The reason for this omission is obvious, the Motion falls far short of the legal requirements. The frequently cited cases that set forth the standard to be applied to motions for reconsideration are Diamond Cab Co. of Miami v. King, 146 So. 2nd 889 (Fla. 1962), Stewart Bonded Warehouse Inc. v. Beavis, 294 So. 2nd 315 (Fla. 1974), and Pingree v. Quaintance, 394 So. 2nd 161 (Fla. 1st DCA 1981). As the Supreme Court stated in Diamond Cab:

> The purpose of a petition for rehearing is to bring the attention of the .... administrative agency, some point which it overlooked or failed to consider when it rendered its order in the first instance [Citations omitted.] It is not intended as a procedure for rearguing the whole case merely because the losing party disagrees with the judgment or the order.

(Id., at 891)

---

[1] Presumably, the ALECs did not take this approach because the statements in their Motion show that there is no good cause for their failure to timely file.

Applying this standard, the Court in Pingree affirmed the tried court's denial of a motion for reconsideration because "the motion below merely set forth matters which had previously been considered by the trial court." Pingree, at 162. (emphasis added). Also, in Stewart, the Florida Supreme Court reversed this Commission's grant of a motion for reconsideration because "the only basis for reconsideration noted in the instant cause was the reweighing of the evidence ..." (Stewart, at 317)

8. The ALECs do not raise any point of law or fact that the Commission overlooked. Instead, they simply reargue the assertion that the remedy calculation must include some sort of a statistical test to determine the severity of a violation. Specifically, the bulk of the motion attacks the conclusion of the Commission that the ALEC-proposed severity calculation is flawed, and reargues the evidence in the apparent hope that this Commission will "reweigh" the evidence in precisely the manner prohibited by the Florida Supreme Court in Stewart. As the above-cited cases make clear, there is a difference between an argument that has been overlooked and one (like the ALEC position on severity) that has been considered and rejected. As a matter of law, the ALEC's motion is insufficient to support a decision to reconsider.

9. Finally, even if the ALEC's attempts to reargue were appropriate at this juncture, the ALECs argument still fails for two reasons: (1) The ALECs contention that the Commission's order does not consider the severity of a violation in any way is wrong; (2) even if the ALECs were right on the first part, this provides no basis for the Commission to reverse itself, given the facts of the case and the conclusions the Commission reached.

10. BellSouth and the ALECs presented two marketably different approaches to assessing the relative impact of violations and structuring penalties accordingly. Before stating the above-noted agreement with Dr. Taylor's assessment of the CLECs plan, the Order quotes

extensively Dr. Taylor's assessment of the respective plans of BellSouth and the ALEC's. Specifically,

> Assuming the goal is to ensure that BellSouth has an economic incentive to comply with performance standards, BellSouth witness Taylor believes that the size of the penalty payment should be calibrated to the seriousness of the performance disparities. He goes on to explain that the economic value should be based mostly on business judgment initially and refined based on experience. ....
>
> Witness Taylor believes that the BellSouth plan recognizes the type of transaction, the estimated economic seriousness of the violation, and the duration of the violation.

(Order, at 158, 159).

In other words, the BellSouth plan adopted by the Commission utilizes an exercise of business judgment to set differing penalties for different types of violations, based upon an assessment of their impact, i.e., the seriousness of the violation. The measures which, if violated, would be likely to have a greater impact upon the CLECs and their customers carry larger penalties than do the comparatively less significant measures.

11. In contrast, the ALEC proposal engages in the fiction that the seriousness of failing every single measure would be precisely the same. The ALEC plan then utilizes a mathematical formula to calculate the "severity" of the failure of a measure, and makes the applicable penalty larger or smaller as a consequence. To illustrate, a measurement could have little or no effect on an ALEC customer or their satisfaction with their service, but if missed by a large margin, the ALEC plan would utilize this "severe" miss to generate a potentially huge penalty. However, a relatively "less severe" miss of an extremely important measurement (as judged from the customer's perspective) would result in a much smaller penalty. Thus, the amount of each penalty is completely unrelated to the relative importance of the performance being measured. It is this approach, that Dr. Taylor categorized as "arbitrary, unrelated to

performance metrics or transactions, and unrelated to the economic importance of observed performance disparity". (quoted in Order, at 158).

12. It is true that BellSouth advocated as one component of its plan a mathematical approach to severity in the form of the parity gap calculation, which the Commission also rejected. Although the order states that a transaction-based plan is preferable in concept, the Commission ordered a measure-based plan, in substantial part, because of its reservations about BellSouth's own mathematical approach to the issue of severity. This, however, does not change the fact that the penalty structure advocated by BellSouth, and adopted by this Commission (albeit with different penalty amounts than those proposed by BellSouth), does take into account the "severity" of a violation, by assessing the relative impact of a violation of each different type of measurement. Again, this penalty structure varies the assessed penalties from one measurement to the next based upon business judgment and common sense. Adopting this, the Commission effectively determined that some violations are inherently more severe (i.e., when judged practically on the basis of their impact) than are others. The ALEC approach, while mathematically consistent, is an arbitrary approach that has nothing to do with the reality of the actual real world impact of any given violation. There is absolutely no error in the decision by the Commission to reject this approach in favor of a more practical, common-sense method to determine the penalty for each violation.

13. Moreover, even if the ALECs are correct in ignoring the effect of the Commission's decision to vary penalties by type, that is, if the ALECs are correct that "severity" can only be addressed by a mathematical process, they are still wrong in the conclusion that the Commission erred by not adopting such a process. The ALEC's flawed logic is essentially that the ALECs proposed a severity calculation and BellSouth proposed a severity calculation, but the

Commission did not adopt a plan that has a severity calculation. Therefore, the Commission must have erred. This conclusion simply does not follow. The Commission plainly rejected the ALECs statistical approach to determining severity, and it just as plainly rejected BellSouth's proposal to utilize the parity gap. In doing so, the Commission expressly found both approaches to be fundamentally flawed. (Order, p 102). Given the fact that the Commission found both of these mathematical approaches flawed, it was certainly appropriate for the Commission to adopt a plan that does not raise or lower penalties based on such a mathematical component. In fact, given the Commission's conclusions regarding the evidence before it, it would have been error to do otherwise.

14. Although the stated intention of the ALEC motion is to address the severity issue, the motion is replete with indications of the ALECs' true agenda: dramatically increasing the size of penalty payments. Two examples will suffice. One, the ALECs protest that implementing the plan without their severity component will result in a plan that requires BellSouth to pay penalties that amount to "pennies on the dollar" compared to the ALEC's proposal (Motion, p 6). Thus, the ALECs implicitly advance the strange notion that the Commission-ordered plan must be erroneous because it provides them with so much less in monetary penalties than the amount they originally demanded, and continue to desire.

15. Two, the ALECS contend on the basis of an example so vague that its result is impossible to verify,[2] that under BellSouth's "post order submission" the penalty for a series of

[2] The ALECs provide no explanation whatsoever for how they arrive at the numbers in their example. Moreover, the example is not particularly useful, even if it were accurate, because it begins by hypothesizing that BellSouth is engaged in the intentional refusal to process ALEC orders. This type of conduct is not what is intended to be addressed by a self-effectuating remedy plan. Instead, if BellSouth acted in this sort of intentional bad-faith (hypothetically), then the appropriate remedy would be for the affected ALEC to file a complaint with the Commission to show that BellSouth has violated the Order and/or the Interconnection Agreement between the parties.

failures would be approximately $34,000. According to the Motion, "the ALEC's proposed plan would levy a $6.4 million penalty for the same performance deficiency" (Motion, p. 5). Thus, the ALEC approach would multiply the otherwise applicable penalty by a factor of 188.

16. These examples illustrate the real problem that the ALECs have with the Commission's order: it does not provide them with the massive monetary windfall they seek. No one can convincingly claim at this juncture that they know with mathematical precision the amount at which penalties should be set. Instead, the best that can be done presently is to apply business judgment and good sense to develop penalty amounts that appear reasonable and likely to accomplish their intended purpose. This is precisely what the Commission has done. Although BellSouth certainly does not agree with the interim decision to have a measurement-based plan (just as BellSouth disagrees with other aspects of the Commission's Order), BellSouth does believe that the Commission has ordered in broad strokes a plan that, if administered properly, is likely to result in reasonable penalties that will be adequate to prevent post-271 backsliding, without either unduly punishing BellSouth or rewarding the ALECs with a windfall of unjustified penalty payments. It is precisely this reasonableness and balance that the ALECs cannot abide.

17. Throughout this case, the ALEC's approach has been to argue for an incredibly large number of measurements, coupled with exorbitant penalties, to create a massive (but unjustified) revenue stream to the ALECs. The ALECs demand that the penalties ordered by the Commission be increased by some sort of mathematical severity factor is simply the latest gambit in their seemingly never-ending attempt to pervert the appropriate purpose of a remedy plan and, instead, to create an ALEC cash machine. To date, the Commission has resisted these efforts, and developed an approach that--although certainly not what BellSouth would have

wanted in all its instances--is a reasonable compromise. The Commission should continue along this path and resist the ALEC's avaricious demands for increased penalties.

18. The ALECs request for oral argument should be rejected. Oral Argument is to be granted, or not, solely within the discretion of the Commission (Rule 25-22.060(f), F.A.C.). No party requesting reconsideration is entitled to oral argument. The ALEC motion is untimely, it reflects a complete disregard for the rules of the Commission, and it fails badly when judged by the appropriate legal standard. The motion is simply frivolous. There is no point in further wasting the Commissions' time by allowing the ALECs to augment this regrettable written submission with an oral presentation. Instead, the request for oral argument should be rejected, and the ALEC motion should be summarily denied.

Respectfully submitted this 5th day of November, 2001.

Nancy B White
NANCY B. WHITE (KA)
Museum Tower
150 West Flagler Street
Suite 1910
Miami, Florida 33130

J. Phillip Carver
R. DOUGLAS LACKEY (KA)
J. PHILLIP CARVER
General Attorneys
Suite 4300, BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0710

COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

418784