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December 2, 2002

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

Re: Docket No. 021061-TP
Petition of CNM Network, Inc., for Declaratory Statement Regarding
Florida Public Service Commission Jurisdiction

Dear Ms. Bayo:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Petition for Reconsideration and/or Modification with Regard to The Prehearing Officer's Order Establishing Procedure, 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,

James Meza III
James Meza III (CA)

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

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**CERTIFICATE OF SERVICE
DOCKET NO. 021061-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
First Class U.S. Mail this 2nd day of December, 2002 to the following:

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James Meza III

James Meza III (KRA)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of CNM Network, Inc., for Declaratory Statement Regarding Florida Public Service Commission Jurisdiction)))))	Docket No. 021061-TP Filed: December 2, 2002
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**BELLSOUTH TELECOMMUNICATIONS, INC.'S
OPPOSITION TO CNM NETWORK, INC.'S MOTION TO DISMISS
THE PETITIONS FOR INTERVENTION AND BELLSOUTH'S RESPONSE
TO THE ALTERNATIVE RELIEF REQUESTED**

BellSouth Telecommunications, Inc. ("BellSouth") submits this Opposition to CNM Network, Inc.'s ("CNM") Motion to Dismiss Petitions for Intervention and Request for Alternative Relief ("Motion"). The Florida Public Service Commission ("Commission") should deny CNM's Motion for the following reasons:

1. On October 18, 2002, CNM filed a Petition for Declaratory Statement, wherein it sought a determination from the Commission that phone-to-phone Internet Protocol ("IP") telephony does not constitute "telecommunications" under Florida law and that CNM is not a telecommunications company subject to the Commission's jurisdiction. See Motion at 1.
2. On October 25, 2002, BellSouth filed a Petition to Intervene in this docket. Subsequent to BellSouth's Petition, at least nine (9) other carriers sought to intervene in this proceeding. See Motion at 2. In its Motion, CNM asks the Commission to dismiss the numerous petitions for intervention on the basis that the potential intervenors have not sufficiently demonstrated standing to intervene under Florida law. However, recognizing the superficial nature of this argument and the fact that BellSouth's and the other intervenors' substantial

interests will clearly be affected by any decision this Commission makes in this docket, CNM alternatively argues that the Commission should (1) convert its request for a declaratory statement to a generic proceeding and/or (2) stay this proceeding pending the Federal Communication Commission's ("FCC") ruling on a alleged similar petition raised by AT&T. For the foregoing reasons, CNM's Motion should be denied.

BELLSOUTH HAS STANDING

3. The simple purpose of CNM's declaratory statement and the instant Motion to Dismiss is to obtain a quick ruling from the Commission regarding IP telephony that would support CNM and other ALECs not paying reciprocal compensation or switched access for calls involving IP telephony, without the insight or position of any other carrier.
4. Contrary to CNM's assertions in its Petition, IP telephony is merely a medium used to complete a telephone call. The word "Internet" in Internet Protocol telephony refers to the name of the protocol; it does not mean that the service necessarily uses the World Wide Web. Internet protocol, or any other protocol, is an agreed upon set of technical operating specifications for managing and interconnecting networks. The Internet protocol is the language that gateways use to talk to each other. It has nothing to do with the transmission medium (wire, fiber, microwave, etc.) that carries the data packets between gateways, but rather concerns gateways, or switches, that are found on either end of that medium.

5. The Commission has previously ruled on this issue in the BellSouth/Intermedia arbitration and found that IP telephony was technology neutral, should be treated like any other telecommunications service, and that switched access would be owed for calls completed by IP telephony:

The witness argued that because the FCC has not made a determination on the regulatory classification of phone-to-phone IP Telephony, any suggestion that phone-to-phone IP Telephony is a telecommunications service is premature. We disagree, because as BST's testimony indicates, phone-to-phone IP Telephony is technology neutral. A call provisioned using phone-to-phone IP Telephony but not transmitted over the internet, to which switched access charges would otherwise apply if a different signaling and transmission protocol were employed, is nevertheless a switched access call. *Except for, perhaps, calls routed over the internet, the underlying technology used to complete a call should be irrelevant to whether or not switched access charges apply.* Therefore, like any other telecommunications services, it would be included in the definition of switched access traffic. Therefore, we find that switched access traffic shall be defined in accordance with BellSouth's existing access tariff and include phone-to-phone internet protocol telephony.

BellSouth/Intermedia Order, PSC Order No. 00-1519-FOF-TP at 56-57. (emph. added).

6. Further, while the Commission recently refused to issue a generic ruling on IP telephony in Docket No. 000075-TP, the Commission, in part, did confirm its decision in the BellSouth/Intermedia arbitration. Specifically, in Docket No. 000075-TP, the Commission again found that "a call is determined to be local or long distance based upon the end points of the particular call. As such, the technology used to deliver the call, whether circuit-switching or IP telephony, should have no bearing on whether reciprocal compensation or access

charges should apply.” Id. In addition, the Commission held that parties could request the Commission to make decisions “regarding specific IP telephony services” in an arbitration or complaint proceeding. Id.

7. Notwithstanding the Commission’s previous decision in the BellSouth/Intermedia arbitration or its finding in Docket No. 000075-TP, CNM is essentially asking the Commission to declare that calls completed via IP telephony are not subject to access charges and reciprocal compensation. To increase its chances of having this request granted, CNM is now attempting to limit the participation of numerous other carriers in this docket by raising a superficial Motion to Dismiss. As will be established below, however, BellSouth has standing to intervene in the instant proceeding.
8. “Standing under Chapter 120, Florida Statutes . . . is established by statute.” Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186, 189 (Fla. 1st DCA 1992). Section 120.565, Florida Statutes, provides that any substantially affected person may seek a declaratory statement. Likewise, any substantially affected party can intervene in a declaratory statement proceeding. See Chiles v. Dept. State, Div. Elections, 711 So. 2d 151, 155 (Fla. 1st DCA 1998).
9. A party seeking to establish a substantial interest must demonstrate that (1) he will suffer an injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing or intervene in proceedings already pending; and (2) that his substantial injury is of the type or nature which the proceeding is

designed to protect. Friends of the Everglades, Inc., 595 So. 2d at 189; Florida Optometric Assoc. v. Dept. of Professional Regulation, 567 So. 2d 928, 932 (Fla. 1st DCA 1990). As established below, BellSouth satisfies both of these requirements.

10. As to the first prong of the test, the “immediacy requirement,” a party must establish that he or she will sustain an injury in fact. The focus in this requirement is to the degree of the injury. See Agrico Chem. Co. v. Dept. of Environ. Reg., 406 So. 2d 478, 482 (Fla. 1st DCA 1981). Concerns that are speculative or conjectural will not satisfy this requirement. See Agrico Chem. Co., 406 So. 2d at 482. However, Florida courts have determined that economic injury is sufficient to establish standing.¹
11. For instance, in Florida State Univ. v. Dann, 400 So. 2d 1304 (Fla. App. 1st DCA 1981), faculty members of Florida State University (“University”) challenged the University’s establishment of procedures for the award of merit salaries and other pay increases as an invalid rule. The court determined that the faculty members had standing to raise the challenge because the “procedures were likely to have a continuing impact on determination of their annual salaries.” Id. Similarly, in Florida Med. Center, 484 So. 2d at 1294, the court determined that a hospital had standing to challenge the Department of

¹ The court in Agrico explained that “in licensing or permitting proceedings a claim of standing by third parties solely upon economic interest is not sufficient unless the permitting or licensing statute itself contemplates consideration of such interest.” Florida Med. Center v. Dept. Health & Rehab. Serv., 484 So. 2d 1292, 1294-95 (Fla. 1st DCA 1996).

Health and Rehabilitative Services' award of certificates of need to competing facilities because the award would affect the hospital's economic interest.

12. BellSouth's injury in fact is that BellSouth has an economic interest in the regulation of IP telephony. Namely, the Commission's ruling on CNM's request for a declaratory ruling may affect the level of charges and revenues earned for reciprocal compensation, toll, and/or switched access that BellSouth currently bills and receives. Moreover, BellSouth has an additional potential injury in that any decision by the Commission may impact the treatment of IP telephony in BellSouth's current interconnection agreements. Accordingly, to the extent other ALECs will attempt to implement the Commission's decision from this proceeding into their current interconnection agreements, BellSouth will be harmed as it will alter the parties' current mutually agreed-upon contractual relationship without affording BellSouth its due process rights. Clearly, BellSouth satisfies the "injury in fact" requirement necessary to establish standing.

13. The second prong of the standing test, the "zone of interest" requirement, deals with the nature of the injury. Agrico, 406 So. 2d at 482. This requirement limits standing to those persons that the Legislature intended to be protected by the administrative proceeding. The statutes in question define the scope or nature of the proceeding and thus govern the analysis. Friends of the Everglades, Inc., 595 So. 2d at 189. As with the first requirement, BellSouth satisfies this requirement as well.

14. BellSouth is in the “zone of interest” because it is a telecommunications company whose intercarrier compensation schemes and associated revenues are regulated, in part, by the Commission. Specifically, as a matter of Florida law, BellSouth is entitled to receive switched access revenue from IXCs for originating and terminating long distance calls. Moreover, as a matter of federal law, which the Commission is charged with interpreting and implementing, BellSouth is entitled to receive reciprocal compensation from ALECs for terminating local calls. CNM’s Petition squarely impacts these well-settled laws as it attempts to remove from the intercarrier compensation scheme calls completed via IP telephony. As a result, any interpretation of Florida or federal law by the Commission on these issues will have a substantial affect on the reporting and payment of access charges and reciprocal compensation and the Commission’s ability to regulate telecommunications companies.
15. For all these reasons, BellSouth has standing to intervene in this docket, and CNM’s Motion to Dismiss should be denied.

ALTERNATIVE CLAIMS FOR RELIEF

16. Interestingly enough, CNM, in its original Petition as well as the current Motion, invites the Commission to convert its Petition into a generic proceeding. See Petition at 15; Motion at 5. Somehow this seems at odds with CNM’s stated desire to have all intervenors dismissed from this proceeding. Be that as it may, BellSouth agrees that, if the Commission does not dismiss CNM’s

Petition, a generic proceeding is the appropriate vehicle for the issues raised in this proceeding to be decided. BellSouth, however, does not agree that the Commission should stay CNM's Petition until such time as the FCC resolves AT&T's Petition for Declaratory Statement at the FCC. If CNM truly believes that the AT&T Petition is dispositive of its own request for a declaratory statement, then CNM should simply dismiss its Petition and not waste the parties' and the Commission's time in addressing claims that it believes are properly raised in another forum.

17. Finally, if the Commission denies CNM's Motion to Dismiss and allows BellSouth to intervene, BellSouth requests an opportunity to file dispositive motions, including any procedural motions, on the issues raised in CNM's Petition, regardless of whether the case is styled as a request for a declaratory statement or a generic proceeding. Given the current procedural posture of the case, including the fact that BellSouth has yet to be granted leave to intervene, BellSouth believes that it would be premature to raise these motions at this time.

CONCLUSION

For the foregoing reasons, BellSouth respectfully requests that the Commission deny CNM's Motion to Dismiss, grant BellSouth leave to intervene in this proceeding, and provide BellSouth with an opportunity to raise dispositive motions on the issues raised in CNM's Petition for Declaratory Statement, regardless of how the case is styled.

Respectfully submitted this 2nd day of December 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.

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