

ORIGINAL

MCWHIRTER REEVES
ATTORNEYS AT LAW

TAMPA OFFICE:
400 NORTH TAMPA STREET, SUITE 2450
TAMPA, FLORIDA 33602
P. O. BOX 33350 TAMPA, FL 33601-3350
(813) 224-0866 (813) 221-1854 FAX

PLEASE REPLY TO:
TALLAHASSEE

TALLAHASSEE OFFICE:
117 SOUTH GADSDEN
TALLAHASSEE, FLORIDA 32301
(850) 222-2525
(850) 222-5606 FAX

June 16, 2003

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
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Tallahassee, Florida 32399-0870

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Re: Docket No.: 020507-TP

Dear Ms. Bayo:

On behalf of the AT&T Communications of the Southern States, LLC, (AT&T), MCI WorldCom Communications, Inc. and MCIMetro Access Transmission Services, LLP, (MCI), ACCESS Integrated Networks, Inc., (ACCESS) and ITC^DeltaCom Communications, Inc. (ITC^DeltaCom) enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ AT&T Communications of the Southern States, LLC, MCI WorldCom Communications, Inc. and MCIMetro Access Transmission Services, LLP, ACCESS Integrated Networks, Inc., and ITC^DeltaCom Communications, Inc.'s Motion to Strike Portions of the Rebuttal Testimony and Exhibits WKM-2 and WKM-3 of W. Keith Milner.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman
Vicki Gordon Kaufman

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Enclosure

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of the Florida Competitive Carriers Association Against BellSouth Telecommunications, Inc. Regarding BellSouth's practice of Refusing to Provide FastAccess Internet Service to Customers who Receive Voice Service from a Competitive Voice Provider, and Request For Expedited Relief.

Docket No. 020507-TP

Filed: June 16, 2003

AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC, MCI WORLDCOM COMMUNICATIONS, INC. AND MCIMETRO ACCESS TRANSMISSION SERVICES, LLP, ACCESS INTEGRATED NETWORKS, INC., AND ITC^DELTA COM COMMUNICATIONS, INC.'S, MOTION TO STRIKE PORTIONS OF THE REBUTTAL TESTIMONY AND EXHIBITS WKM-2 AND WKM-3 OF W. KEITH MILNER

AT&T Communications of the Southern States, LLC (AT&T), MCI WorldCom Communications, Inc. and MCIMetro Access Transmission Services, LLP (MCI), ACCESS Integrated Networks, Inc. (AIN), and ITC^DeltaCom Communications, Inc. (ITC^DeltaCom) (collectively, Movants), pursuant to rule 28-106.204, Florida Administrative Code, move to strike portions of the rebuttal testimony of BellSouth Telecommunications, Inc. (BellSouth) witness, W. Keith Milner. Specifically, Movants moves to strike page 8, line 1 – page 11, line 2 and Exhibits WKM-2 and WKM-3 of Mr. Milner's rebuttal testimony. These portions of Mr. Milner's testimony have no evidentiary foundation and are thus inadmissible. In support thereof, Movants state:

Introduction

1. This is a Complaint proceeding in which Movants allege that BellSouth's practice of terminating or refusing to provide its FastAccess service to customers who select a voice provider other than BellSouth is violative of state and federal law, is anticompetitive, and creates a barrier to competition in the local voice market. The issues in this case are ones of customer

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choice — should a customer be *forced* to change DSL providers simply because the customer prefers a different voice carrier?

2. In support of its Complaint, the direct testimony of Joseph P. Gillan was filed.¹

3. On December 23, 2002, BellSouth filed its rebuttal testimony, including the rebuttal testimony and exhibits of Mr. Milner.

Argument

4. Mr. Milner's rebuttal testimony (page 8, line 1 - page 11, line 2 and Exhibits WKM-2, 3) are inadmissible under the Florida Rules of Evidence and the Florida Administrative Procedures Act because they lack any evidentiary foundation. As clearly demonstrated by the discovery conducted in this case, Mr. Milner has no personal knowledge of the information BellSouth seeks to put in the record, and has, for the most part, lifted the information proffered by an unrelated party in an unrelated proceeding in a different jurisdiction.

5. On page 8, line 1 – page 11, line 2 of his testimony, Mr. Milner testifies about a “business case,” which he illustrates in Exhibit WKM-3. Cinergy Communications Corporation (Cinergy), a CLEC, developed this “business case” for an arbitration proceeding in Kentucky in March - April, 2002.² Mr. Milner says the “business case” shows that “it would not be cost prohibitive for any CLEC to deploy its own DSLAMs in offering DSL service.”³ Mr. Milner did not develop the exhibit or any of the assumptions in the exhibit (with one limited exception)⁴ nor does he even know how such assumptions were developed. Cinergy is not a party to this case nor has the preparer of the “business case” been listed by BellSouth as a witness.

¹ Mr. Gillan's testimony was originally filed on behalf of the Florida Competitive Carriers Association. Pursuant to Order No. PSC-03-0611, it is now sponsored by AT&T, MCI and AIN.

² Milner Rebuttal at 8, l.10-11; Attachment A, Milner Deposition transcript at 68.

³ Milner Rebuttal at 8, l.10-11.

⁴ Mr. Milner's one change was to decrease the DSLAM costs Cinergy used so as to improve the bottom line of the “business case.”

6. Mr. Milner's testimony and exhibits fail to meet the required evidentiary standards. Section 90.604, Florida Statutes, provides that "a witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has *personal knowledge* of the matter."⁵ See, *Roseman v. Town Square Association, Inc.*, 810 So.2d 516, 521 (Fla. 4th DCA 2001)("Section 90.604 . . . prohibits testimony by a witness who does not have personal knowledge of a matter"). Mr. Milner lacks personal knowledge of the facts and assumptions in his testimony related to the "business case" and thus it fails the admissibility standard of section 90.604.

7. At his deposition in this case, Mr. Milner admitted that the "business case" was not his work product:

Q [by Ms. Kaufman] I understand that you made a change to this document [WKM-3] in regard to the cost of the DSLAM. But other than that, it is a document that Cinergy provided?

A [by Mr. Milner] Yes. **All the other assumptions and the costs that are here are those that Cinergy developed for its version of its business case.** And you are exactly right, what I did was substitute DSLAM costs and associated costs, such as annual maintenance on the DSLAMs themselves, for those inputs that Mr. Heck had made, and then I recast the rest of the number, the calculations, and developed a different internal rate of return than had Mr. Heck.

Q Okay. So, putting aside for a moment the changes that you made to the DSLAM costs, were these three pages used -- were they an exhibit to Mr. Heck's testimony, were they received in discovery, how were they utilized in this Kentucky case?

A They were attached to his -- I believe to his direct testimony. Let me see if that is correct. They were attached to his testimony either as -- here they are. They were attached to Mr. Heck's revised rebuttal testimony as Exhibit PHR-12.⁶

. . .

⁵ Emphasis added.

⁶ Attachment A, Milner Deposition transcript at 71-72.

Q ...Putting aside the DSLAM costs and your recalculation of the cash operating margin and the numbers that go below that, **Mr. Heck provided all of the numbers that are in WKM-3, right?**

A **That is correct, yes.**⁷

8. Further, at his deposition, Mr. Milner stated that he did not provide any input into any of the costs or assumptions in Cinergy's exhibit that is the basis for Exhibit WKM-3:

Q Did you have any input into any of the costs or assumptions that are used in Mr. Heck's exhibit other than the DSLAM costs and maintenance of the DSLAMs?

A No, I took all of his other inputs at face value. . . .⁸

In fact, when questioned about the assumptions, Mr. Milner admitted that he did not know how Mr. Heck arrived at any of his assumptions:

Q And I think you said that you don't know how [Mr. Heck] arrived at his assumptions, correct?

A No. . . .⁹

9. Information was also sought about the "business case" and Mr. Milner's testimony in its interrogatories directed to BellSouth:

FCCA Interrogatory No. 21. Identify all assumptions used in the "business case" described in Mr. Milner's rebuttal testimony. For each assumption described, provide the name and position of the person responsible for developing the assumption

RESPONSE: The only assumption Mr. Milner developed in rebuttal testimony relative to Cinergy's "business case" was the use of different DSLAM costs than Cinergy had assumed.

RESPONSE PROVIDED BY: W. Keith Milner.

10. Even as to the one piece of information Mr. Milner did contribute to the "business case" — DSLAM costs — Mr. Milner did not make any effort to contact Cinergy or Mr. Heck,

⁷ *Id.* at 75, emphasis added.

⁸ *Id.* at 75.

⁹ *Id.* at 79-80.

the creator of the exhibit, regarding the changes made to the exhibit. In fact, Mr. Milner and BellSouth — at deposition and in response to interrogatories — conceded that Cinergy would not agree with Mr. Milner’s changes to the exhibit:

Q Did you discuss with Mr. Heck whether he was comfortable with the changes you made to his exhibit?

A I filed -- no, I did not discuss with Mr. Heck beforehand what testimony I was going to file in this case. He had filed, you know, his version of his business case, I made adjustments to it. Frankly, I doubt he agrees with my adjustments, so we disagree on that point.¹⁰

* * *

FCCA Interrogatory No. 24: Is the “ALEC in Kentucky” in agreement with the changes in its assumptions made by Mr. Milner?

RESPONSE: See the deposition of W. Keith Milner. Since each of the proceedings identified in Item No. 23 were contested cases, it is BellSouth’s belief that the “ALEC in Kentucky” did not agree with Mr. Milner’s changes to Cinergy’s business case.

11. Mr. Milner’s deposition and BellSouth’s discovery responses reproduced above demonstrate that Mr. Milner did not create Exhibit WKM-3, that he has no knowledge about the assumptions (other than DSLAM costs) and information in the exhibit and his testimony, and that he does not even have the approval of Cinergy to use the information. Mr. Milner’s testimony and Exhibit WKM-3 are inadmissible because they lack any evidentiary foundation.

12. The discussion above refers to the required evidentiary standards for lay witness testimony. Those are the standards applicable to Mr. Milner’s testimony and exhibits because BellSouth has not proffered Mr. Milner as an expert witness.¹¹ However, even if Mr. Milner were to be found to be an expert witness, Mr. Milner lacks knowledge of the data and

¹⁰ *Id.* at 77-78.

¹¹ Movants would object to Mr. Milner’s qualification as an expert in the areas related to the “business case.”

assumptions in Exhibit WKM-3 and the related testimony that is required for admissibility even under the expert witness standard.

13. This standard is set out in section 90.705, Florida Statutes. Section 90.705(2) provides:

*If the party establishes prima facie evidence that the expert does not have a sufficient basis for the opinion, the *opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data.**¹²

14. The court explained this standard in *Husky Industries, Inc. v. Black*, 434 So.2d 988, 992-93 (Fla. 4th DCA 1983):

*It has always been the rule that an expert opinion is inadmissible where it is apparent that the opinion is based on insufficient data. See Martin v. Story, 97 So.2d 343 (Fla. 2d DCA 1957) (opinion of public safety department expert that towed car was a dangerous instrumentality inadmissible where basis for opinion was admittedly incomplete statistics, and expert had no knowledge of the vehicle under discussion). See also Southern Utilities Co. v. Murdock, 99 Fla. 1086, 128 So. 430 (1930); Farley v. State, 324 So.2d 662 (Fla. 4th DCA 1975).*¹³

15. Thus, the statute and case law prohibit the acceptance of Mr. Milner's opinions and inferences, even if testifying as an expert witness, if he does not have a sufficient basis for his opinions and if the underlying facts and data cannot be established. As the discussion above demonstrates, Mr. Milner has no basis for his testimony or for Exhibit WKM-3. And, he cannot establish the facts and data supporting his testimony and Exhibit WKM-3.

16. Mr. Milner's testimony and Exhibit WKM-3 are not based on sufficient data. In fact, the testimony and exhibit are based entirely on data of which Mr. Milner has no knowledge. Mr. Milner did not create the "business case" and has no knowledge of most of the information and assumptions contained in Exhibit WKM-3. As to information that Mr. Milner actually provided —DSLAM costs — Mr. Milner never checked with Cinergy regarding the propriety of

¹² Emphasis added.

¹³ Emphasis added.

his changes to the “business case.” Thus, even were Mr. Milner qualified to render an expert opinion as to the “business case,” his testimony and Exhibit WKM-3 are based on insufficient data and must be excluded.

17. Finally, Mr. Milner’s testimony is inadmissible pursuant to section 120.569(2)(g), which provides that: “irrelevant, immaterial, or unduly repetitious evidence shall be excluded ...” Because Mr. Milner can provide no basis for his testimony or exhibits, they are immaterial and irrelevant. Thus, they can serve no useful purpose in the record and must be excluded pursuant to section 120.59(2)(g).

Conclusion

18. Mr. Milner’s testimony and Exhibits WKM-2, 3 have no evidentiary foundation and therefore are inadmissible in this matter.

WHEREFORE, AT&T, MCI, AIN and ITC^DeltaCom move for an order striking page 8, line 1 – page 11, line 2 and Exhibits WKM-2, 3 of the rebuttal testimony of W. Keith Milner.

Vicki Gordon Kaufman

Virginia Tate
AT&T Communications of the Southern
States, LLC
Law and Government Affairs
1200 Peachtree Street, NE, Suite 8100
Atlanta, Georgia 30309
(404) 810-4922 Telephone
(404) 810-5901 Telefax

Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman & Arnold, PA
117 South Gadsden Street
Tallahassee, Florida 32301
(850) 222-2525 Telephone
(850) 222-5606 Telefax

Attorneys for the AT&T Communications
of the Southern States, LLC

Nanette Edwards / nge

Nanette Edwards
ITC DeltaCom
4092 South Memorial Parkway
Huntsville, Alabama 35802
(256) 382-3856 Telephone
(256) 382-3936 Telefax

Floyd Self
Messer, Caparello & Self
Post Office Drawer 1876
215 South Monroe Street
Suite 701
Tallahassee, Florida 32302
(850) 222-0720 Telephone
(850) 224-4359 Telefax

Attorneys for ITC^Deltacom
Communications, Inc.

Donna Canzano McNulty / nge

Donna Canzano McNulty
MCI WorldCom
1203 Governors Square Boulevard
Suite 201
Tallahassee, Florida 32301
(850) 219-1008 Telephone
(850) 219-1018 Telefax

Richard D. Melson
Hopping, Green, Sams & Smith, P.A.
Post Office Box 6526
123 South Calhoun Street
Tallahassee, Florida 32314
(850) 425-2313 Telephone
(850) 224-8551 Telefax

Dulaney O'Roark, III
MCI WorldCom
6 Concourse Parkway
Suite 600
Atlanta, Georgia 30328
(770) 284-5498 Telephone
(770) 284-5488 Telefax

Attorneys for MCI WorldCom Communications,
Inc. and MCIMetro Access Transmission
Services, LLP

Joseph A. McGlothlin

Joseph A. McGlothlin
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman & Arnold, PA
117 South Gadsden Street
Tallahassee, Florida 32301
(850) 222-2525 Telephone
(850) 222-5606 Telefax

Attorney for the ACCESS Integrated
Networks, Inc.

ATTACHMENT A

Pages 68-80 of the Deposition of W. Keith Milner

1 earlier. I can give it to you again if you would like.

2 Q Would you, please?

3 A Yes. The Kentucky case is 2001-432.

4 Q Okay. Did this case go to hearing?

5 A It did, yes.

6 Q And when was that?

7 A Oh, let's see if I've got my -- I don't have my
8 pocket calendar with me. The testimony was filed in the
9 March/April time frame, and I generally recall it was in the
10 May time frame that it went to hearing, but in 2002.

11 Q So you think March/April '02 for the testimony and it
12 went to hearing May '02 or thereabouts?

13 A Thereabouts. I'm sure of the testimony filing date
14 because I'm looking at a copy of the testimony. It was
15 filed -- well, the legal department in -- our legal department
16 in Kentucky received the over side's testimony on March the 8th
17 to be precise.

18 Q And when was your testimony filed?

19 A We filed the same day, if I recall. Let me see if
20 I've got my testimony. I do not have my testimony in that
21 case, but I'm pretty sure we both filed on the same date.

22 Q Do you have documents from that case in front of you
23 that you are referring to?

24 A Yes.

25 Q Can you tell me what you are looking at, please?

1 A Well, what I have is two sets of testimony. They are
2 both Cinergy Communication Company's witness, Mr. Pat Heck,
3 H-E-C-K, and what I have is his direct testimony, and I believe
4 I also have his -- he has got what he called his revised
5 rebuttal testimony. I have that, as well. And that --

6 Q I'm sorry, go ahead.

7 A I was going to say that was filed on May the 15th, so
8 the hearing would have been sometime after that date.

9 Q Okay. Do you have before you any testimony that Bell
10 filed in that case?

11 A Well, there were a number of witnesses. In front of
12 me I do not have my testimony. But I can tell you that the
13 business case as I adjusted them in Kentucky are the same as I
14 presented here in the FCCA case.

15 Q I understand, Mr. Milner. What Bell witnesses
16 testified in that case?

17 A Let me see if I can do this from memory. Well, I
18 did. I believe that Mr. Tommy Williams was there to talk
19 generally about line sharing, line splitting. I don't recall
20 if Mr. Jerry Latham was there, who is one of BellSouth's
21 product managers. And either Mr. Ruscilli or Ms. Cox, I just
22 can't recall. But none of them addressed this business case,
23 per se.

24 Q What issues did you address in that case, Mr. Milner?

25 A Generally, the issue of whether BellSouth should be

1 required to unbundle its DSLAMs, and then as sort of a part of
2 that, whether a CLEC was impaired in its ability to provide its
3 own DSL services if it had to acquire its own DSLAMs rather
4 than use BellSouth's on an unbundled basis.

5 Q And Cinergy had Mr. Heck. Did they have any other
6 witnesses?

7 A I recall that they did, I don't recall their names,
8 unfortunately.

9 Q Do you know how many other witnesses they had?

10 A I recall that they had at least one other, because
11 they had sort of their policy witness as either Mr. Ruscilli or
12 Ms. Cox would have been for BellSouth. And it seems to me that
13 they had one other person who was -- I can't recall if his job
14 was as their chief financial officer or what role he played
15 within their company. So they had, I seem to recall at least
16 three witnesses.

17 Q And what was Mr. Heck's role in the case?

18 A Well, his role, I guess, and I hate to characterize,
19 you know, what his role was, but basically his position was
20 that his company was impaired in its ability to provide DSL
21 services using their own DSLAMs because it was financially
22 prohibitive for them to do so. In other words, that the cost
23 of their providing their own DSLAMs and associated equipment
24 would not allow them a reasonable rate of return on the
25 investment for having done so.

1 Q What was his position with Cinergy?

2 A He is chief technology officer.

3 Q Now, the exhibit that we have been discussing, or
4 that we are going to discuss, WKM-3, I want to talk to you
5 about that.

6 A Okay.

7 Q This document -- or there are actually three pages to
8 it, was it an exhibit to someone's testimony, or where did it
9 come from?

10 A Let me see if I understand. Do you mean Exhibit
11 WKM-3?

12 Q Right. Let me preface my question and tell you what
13 I understand about this document and you correct me.

14 A Okay.

15 Q I understand that you made a change to this document
16 in regard to the cost of the DSLAM. But other than that, it is
17 a document that Cinergy provided?

18 A Yes. All the other assumptions and the costs that
19 are here are those that Cinergy developed for its version of
20 its business case. And you are exactly right, what I did was
21 substitute DSLAM costs and associated costs, such as annual
22 maintenance on the DSLAMs themselves, for those inputs that Mr.
23 Heck had made, and then I recast the rest of the number, the
24 calculations, and developed a different internal rate of return
25 than had Mr. Heck.

1 Q Okay. So, putting aside for a moment the changes
2 that you made to the DSLAM costs, were these three pages
3 used -- were they an exhibit to Mr. Heck's testimony, were they
4 received in discovery, how were they utilized in this Kentucky
5 case?

6 A They were attached to his -- I believe to his direct
7 testimony. Let me see if that is correct. They were attached
8 to his testimony either as -- here they are. They were
9 attached to Mr. Heck's revised rebuttal testimony as Exhibit
10 PHR-12.

11 Q And you are looking now at Mr. Heck's revised
12 rebuttal that has this document attached to it?

13 A Yes, ma'am.

14 Q I'm going to make a request that you provide that as
15 a late-filed exhibit, Mr. Milner.

16 MS. MAYS: I believe that to the extent it is called
17 for in pending discovery, if it is, I don't have the discovery
18 questions in front of me, that we would do so. But I believe
19 discovery has ended as to FCCA's ability to ask new questions
20 at this point in the proceeding.

21 MS. CHRISTENSEN: Actually discovery terminates a
22 week before the hearing, so --

23 MS. KAUFMAN: The 23rd.

24 MS. CHRISTENSEN: -- which would be 23rd.

25 MS. MAYS: Okay. Well, the only other thing we would

1 say is to the extent this is a public document, FCCA can
2 certainly download it from the Kentucky -- or access it from
3 the Kentucky Commission itself.

4 MS. KAUFMAN: I would ask that it be provided as a
5 late-filed exhibit. Am I hearing that Bell is not willing to
6 do that?

7 MS. MAYS: What you are hearing is to the extent this
8 is a publicly available document we believe you can get the
9 document yourself.

10 MS. CHRISTENSEN: So, in other words, no, you are not
11 going to provide it?

12 MS. MAYS: I will check to see if the document is
13 publicly available. If it is publicly available, I will tell
14 you how you can get the document yourself.

15 MS. KAUFMAN: Just so that the record is clear, Ms.
16 Mays, I am requesting that it be provided. And, you know, I'm
17 not sure that whether or not it is a public document is
18 relevant or not. Mr. Milner has got it in front of him, as I
19 understand it, and he is looking at it right now. We request
20 that it be provided. And I will just ask for a number so that
21 the record is clear, and, you know, if you intend to object or
22 whatever the record will reflect that. So Late-filed Exhibit
23 Number 2 will be the direct -- and I think, Mr. Milner, you
24 said revised rebuttal testimony of Mr. Heck?

25 THE WITNESS: Yes.

1 MS. CHRISTENSEN: Do you want the whole revised
2 rebuttal or just this exhibit?

3 MS. KAUFMAN: I want the whole revised rebuttal and
4 the direct testimony of Mr. Heck.

5 MS. CHRISTENSEN: Okay.

6 (Late-filed Exhibit 2 marked for identification.)

7 BY MS. KAUFMAN:

8 Q Now, back on the same WKM-3, Mr. Heck prepared this
9 exhibit?

10 A No, I prepared this exhibit. I used Mr. Heck's
11 inputs for all lines except for DSLAM costs and maintenance of
12 those DSLAMs, and then I recast the numbers that were related
13 to those costs and other costs.

14 Q I'm sorry, I misspoke. Let's put aside the DSLAM
15 costs. Other than that, is it correct that Mr. Heck was
16 responsible for all the other inputs on this exhibit other than
17 the DSLAM cost and I think you said the recasting of the --
18 what was the second part, I'm sorry?

19 A Well, there are two costs that I substituted for
20 those that he had used. You know, the first cost are the
21 DSLAMs themselves and the annual maintenance costs of those
22 DSLAMs, which the vendors I contacted supplied to me.

23 Q I understand.

24 A All of the other costs inputs he supplied, that is, I
25 didn't change them. Then I recalculated all the numbers below

1 that to show, for example, cash gross margins, cash
2 contribution margins, cash operating margins, and internal rate
3 of returns.

4 Q Okay.

5 A So all the math I reran using my new costs in
6 addition to the costs that he had input.

7 Q Okay, I understand. Putting aside the DSLAM costs
8 and your recalculation of the cash operating margin and the
9 numbers that go below that, Mr. Heck provided all of the
10 numbers that are in WKM-3, right?

11 A That is correct, yes.

12 Q Did you have any input into any of the costs or
13 assumptions that are used in Mr. Heck's exhibit other than the
14 DSLAM costs and maintenance of the DSLAMs?

15 A No, I took all of his other inputs at face value. I
16 don't necessarily agree with them. For example, he had assumed
17 a split between business and residential customers that would
18 take DSL service from Cinergy. I disagreed with that
19 breakdown, but I used it nonetheless.

20 Q What is the status of this case now, has there been a
21 final order rendered?

22 A If there has been, I have not seen it.

23 Q So let me just -- I just want to be clear. For
24 example, there are some assumptions, and I am squinting here
25 because my copy of this is very difficult to read. So if I am

1 hesitating, that is what it is. And everyone in the room is
2 looking at me putting my nose to this document. There are some
3 assumptions made, for example, about how many customers are
4 going to be served in year one, and in year two, and in year
5 three, et cetera, correct?

6 A Yes. And those are Mr. Heck's assumptions.

7 Q Okay. And similarly there are revenue assumptions
8 here, correct?

9 A And those are his assumptions, yes.

10 Q And there are start-up costs, correct?

11 A And except for the DSLAM costs, those are his
12 assumptions.

13 Q Okay. Do you know, for example, why he calculated
14 that he would serve 250 customers in year two?

15 A I heard his explanation that that was the goal of
16 their business was to serve that many customers with DSL
17 service from a given either central office or remote terminal.

18 Q Okay. And similarly, I guess, just to pick another
19 line item that I am squinting at here, there are some numbers
20 given on -- it's about 75 percent of the way down under sales
21 costs?

22 A Yes, I see them.

23 Q And the very first one is a one-time commission.

24 A Correct.

25 Q Again, that was a number that you had no input into,

1 correct?

2 A That is correct. That is what Cinergy said it was
3 willing to pay its salespeople for DSL sales, so I took that at
4 face value.

5 Q Now, you said that you made some changes to the DSLAM
6 costs that Mr. Heck had in his exhibit because you thought his
7 costs -- I think you used the word -- I want to look back and
8 not quote you incorrectly. I thought that you said they were
9 inflated. Yes. At Page 8, Line 18, you said they were
10 significantly inflated, correct?

11 A Yes, I said that.

12 Q So you changed those costs, correct?

13 A I substituted those with costs that I received from
14 three different vendors, and those were their list prices which
15 are generally higher than the price that BellSouth would
16 actually pay because we often get volume discounts from the
17 vendors that we use. So I asked them and received list prices
18 for their equipment to serve 250 customers as Mr. Heck had
19 assumed in his version of this business case.

20 Q Did you discuss with Mr. Heck whether he was
21 comfortable with the changes you made to his exhibit?

22 A I filed -- no, I did not discuss with Mr. Heck
23 beforehand what testimony I was going to file in this case. He
24 had filed, you know, his version of his business case, I made
25 adjustments to it. Frankly, I doubt he agrees with my

1 adjustments, so we disagree on that point.

2 Q Fair enough. Let me ask you if you know, does this
3 scenario, this WKM-3, does it assume that services are being
4 provided from a central office or from a remote terminal?

5 A I presume that he means from a central office because
6 of the fact that he has got loop costs and other things in here
7 that would be different from a remote terminal. Most of the
8 costs would be the same regardless, though. But basically he
9 was using a central office based collocation approach.

10 Q Okay. You said that you presume that, but you don't
11 know for sure, is that correct?

12 A Well, I don't know how he arrived at those costs, no.
13 For the purposes of the business case it really didn't matter.
14 Again, I took his inputs at face value and recast the numbers
15 and rates of return with different lower DSLAM costs.

16 Q And then I think you said that -- I thought you said
17 that you reran his exhibits, is that correct?

18 A Well, yes. Look down, for example, maybe two-thirds
19 of the way down. Do you see a line that says cash gross
20 margin, dollar sign?

21 Q Yes.

22 A Okay. I recalculated that number. Mathematically
23 you derive that answer by taking total direct costs -- do you
24 see that one line above?

25 Q Yes.

1 A Minus -- let's see here. I can't read my own note
2 here. Less total cash inflows, which is about -- towards the
3 top. So basically what this is is you take what you receive in
4 terms of revenue and you subtract out your total direct costs
5 and that is how you get cash gross margin. Because DSLAM cost
6 is one of the direct costs, I had to recalculate that line.
7 And similarly for cash operating margin, which is gross margin
8 minus total sales cost and so on and so forth. So I used the
9 same calculation method that he had, but used different cost
10 inputs.

11 Q And is this some kind of an Excel spreadsheet program
12 or what kind of a program was used to calculate these
13 scenarios?

14 A I don't know what Mr. Heck used. I would presume he
15 did it in Excel, that's what I did. But our math is exactly
16 the same.

17 Q But you don't know what kind of an economic model was
18 used to make these calculations?

19 A Well, yes, I do, because everything about this
20 business case is on this one piece of paper. Apart from
21 however he arrived at his assumption as to what, you know, what
22 he was going to charge his customers per line. But in terms of
23 how this is calculated, it's all right here on this one page.

24 Q And I think you said that you don't know how he
25 arrived at his assumptions, correct?

1 A No. And frankly it's irrelevant to the point I was
2 trying to make. I mean, taking his inputs at face value, using
3 more realistic DSLAM costs resulted in pretty healthy internal
4 rates of return. That is the point I was trying to make.

5 Q Is Cinergy a party to this case to your knowledge?

6 A To the --

7 Q To the case we are here talking about today?

8 A I don't know. I don't believe so.

9 Q Okay. Let me just ask you a couple of more questions
10 about this. And I'm just looking at WKM-3, Page 1 of 3.

11 A Okay.

12 Q And in this scenario, looking at the bottom, the part
13 that is in the box?

14 A Yes.

15 Q Tell me if I am understanding this correctly. The
16 entry a couple of lines up from the bottom, net cash flow to
17 date?

18 A Right.

19 Q And I think we said that -- or you said that the
20 customer, the number of customers served in those things are
21 the assumptions of Cinergy. This would show that -- and I
22 think this is about \$121,000 being lost in year one?

23 A In year one, yes.

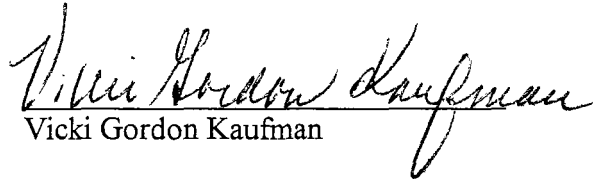
24 Q And in year two, about 73. I can't tell what it is,
25 around \$73,000?

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing AT&T Communications of the Southern States, LLC, MCI WorldCom Communications, Inc. and MCIMetro Access Transmission Services, LLP, ACCESS Integrated Networks, Inc., and ITC^DeltaCom Communications, Inc.'s Motion to Strike Portions of the Rebuttal Testimony and Exhibits WKM-2 and WKM-3 of W. Keith Milner has been furnished by (*) hand delivery, (**) electronic mail, or by U.S. Mail this 16th day of June, 2003, to the following:

(*) (**) Patricia Christensen
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

(*) (**) Nancy White
(**) Meredith Mays
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301-1556


Vicki Gordon Kaufman