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December 18, 2003

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

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COMMISSION
CLERK

Re: Docket No.: 031072-TL

Dear Ms. Bayo:

On behalf of AT&T Communications of the Southern States, LLC, DIECA Communications, Inc. d/b/a Covad Communications Company, ITC^DeltaCom Communications, Inc., MCI metro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. (collectively MCI), and Network Telephone Corporation (hereinafter CLEC Coalition), enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ CLEC Coalition's Response to BellSouth Telecommunications, Inc.'s Motion to Dismiss.

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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MCWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, KAUFMAN & ARNOLD, P.A.

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of CLEC Coalition
To Develop a Process to Evaluate
BellSouth Telecommunications,
Inc.'s Compliance with the
50/50 Plan, a Portion of the
Change Management Process.

Docket No. 031072-TL

Filed: December 18, 2003

**CLEC COALITION'S RESPONSE TO BELLSOUTH
TELECOMMUNICATION, INC.'S
MOTION TO DISMISS**

AT&T Communications of the Southern States, LLC, DIECA Communications, Inc. d/b/a Covad Communications Company, ITC^DeltaCom Communications, Inc., MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. (collectively, MCI), and Network Telephone Corporation (hereinafter CLEC Coalition), pursuant to rule 28-106.204, Florida Administrative Code, files its Response to BellSouth Telecommunications Inc.'s (BellSouth) Motion to Dismiss. Such motion should be denied. As grounds therefore, the CLEC Coalition states:

Introduction

1. On November 21, 2003, the CLEC Coalition filed a petition requesting that the Commission develop a process to ensure that BellSouth's Change Control Process, specifically that portion of the process related to the prioritization of change control requests and BellSouth's 50/50 plan, be appropriately implemented and verified.
2. On December 11, 2003 BellSouth filed an Answer to the CLEC Coalition's Petition and a Motion to Dismiss.
3. BellSouth's grounds for the motion to dismiss, though not entirely clear, appear to be that the Commission should simply trust that BellSouth is appropriately

administering the 50/50 plan, despite the fact that BellSouth hired the a consultant and directed that consultant's work with absolutely no input from the affected parties.

4. BellSouth's argument does not support a motion to dismiss nor can it eliminate this Commission's authority to ensure that competitors are treated fairly and that the provisions of this Commission's directives are appropriately implemented.

Standard for Ruling on a Motion to Dismiss

5. Before responding to BellSouth's argument, a review of the standard to be applied to a motion to dismiss is necessary. As many courts have held:

[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action . . . [T]he trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side Significantly, all material factual allegations of the complaint must be taken as true.¹

6. In its Petition, the CLEC Coalition has alleged that BellSouth's third party verification, to which it committed and which this Commission required, is fatally flawed, because, among other things, the scope of the work requested is exceedingly narrow², critical issues and questions are not evaluated³, software defects are not addressed at all,⁴ and affected parties had absolutely no input into the process.⁵ When the facts set out in the CLEC Coalition's Petition are accepted as true and the well-established standard for a motion to dismiss set forth above is applied to BellSouth's motion, the motion must be denied.

¹ *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993) (citations omitted).

² Petition ¶ 11.

³ Petition ¶ 14.

⁴ Petition ¶ 16.

⁵ Petition ¶ 13.

BellSouth's Motion to Dismiss is Without Merit

A. The CLEC Coalition's Request is Not a "Circumvention" of this Commission's Order

7. The majority of BellSouth's motion is an attempt to suggest that somehow the CLEC Coalition's Petition is an effort to "circumvent"⁶ the Commission's decision on Exception 88 in Order No. PSC-02-1034-FOF-TP (Order) in Docket No. 960786-TL. This argument misses the mark. The CLEC Coalition seeks to ensure that the third party verification to which BellSouth committed, and which this Commission adopted, is meaningful and fulfills the purposes for which it was intended. For the verification to have any value and to implement the Commission order, the verification must measure those items which are critical to issues surrounding the prioritization of and capacity available in software releases. Thus, the CLEC Coalition's Petition does not seek to "circumvent" the Commission's order, but to ensure that the letter and spirit of the order is carried out.⁷

8. BellSouth then argues that there are no "requirements" in the Order such as the CLEC Coalition has requested. What BellSouth overlooks, however, is the genesis of the verification requirement itself. It grew out a flaw which KPMG Consulting identified as a result of the third party test of BellSouth's OSS which this Commission ordered. KMPG found that BellSouth's Change Control Process did "not allow ALECs to be involved in the prioritization of all change requests that impact [ALECs]."⁸ After considering this flaw and various options to address it, the Commission adopted the approach of third party verification. However, such verification must be truly

⁶ BellSouth motion at ¶ 8.

⁷ BellSouth says at ¶ 7 of its motion that the CLEC Coalition "fails to acknowledge" the third party verification requirement. However, this provision is clearly set out in the petition.

⁸ Exception 88 Order at 4.

independent and most appropriately include those topics which flow from Exception 88. If not, any such audit is meaningless.

9. Further, the Commission granted § 271 relief to BellSouth based, in part, on the OSS test and the resolution of exceptions to that test. The Commission may, at any time, on its own motion or upon petition of an affected party, ensure that its directives are being followed or impose additional directives pursuant to its authority under state law.⁹

B. The Issues Raised by the CLEC Coalition Are Appropriate

10. BellSouth next argues that the concerns that the CLEC Coalition has raised in its Petition are outside this Commission's scope of inquiry because they do not relate to "capacity used."¹⁰ However, BellSouth then goes on to contradict itself by asserting that it has "recently expanded" the audit to address issues such as controls and unit sizing. While the CLEC Coalition applauds BellSouth's "voluntary" expansion of the audit scope, such expansion only highlights the need to ensure that the process is open and meaningful, that the appropriate items are evaluated independently by the third party, and that it is not performed at the direction and whim of BellSouth.

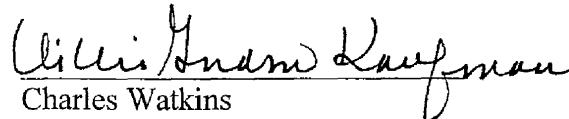
11. As noted above, for the audit to have any meaning within the Commission's Order and pursuant to the Commission's authority, it must encompass those items which are vital to the capacity aspect of the Change Control Process. Those areas have been delineated in the CLEC Coalition's Petition and must be accepted as true for the purposes of ruling on a motion to dismiss.

⁹ See, *ie*, §§ 364.01(4), Florida Statutes.

¹⁰ Apparently, BellSouth seeks to constrain this Commission's broad authority.

12. BellSouth spends the remainder of its motion to dismiss arguing the merits of its case and why the concerns that the CLEC Coalition has raised should be ignored. This attempt at substantive argument is inappropriate in a motion to dismiss and can be raised when the Commission turns to the merits of the case.

WHEREFORE, the CLEC Coalition requests BellSouth's motion to dismiss be denied.



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CERTIFICATE OF SERVICE

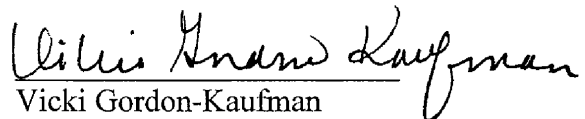
I **HEREBY CERTIFY** that a true and correct copy of the foregoing CLEC Coalition's Response to Motion to Dismiss has been provided by (*) hand delivery and U.S. Mail this 18th day of December 2003, to the following:

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