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January 21, 2004

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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. 030852-TP

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of BellSouth Telecommunications Inc.'s Response in Opposition to FCCA's Motion to Strike, in the above referenced 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,

Nancy B. White
Nancy B. White *RPB*

Enclosure

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Meredith Mays

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**CERTIFICATE OF SERVICE
Docket No. 030852-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail, Hand Delivery* and FedEx® this 21st day of January 2004 to the following:

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising)	
from Federal Communications Commission)	
triennial UNE review: Location-Specific Review)	Docket No. 030852-TP
for DS1, DS3 and Dark Fiber Loops, and)	
Route-Specific Review for DS1, DS3 and Dark)	Filed: January 21, 2004
Fiber Transport)	
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**BELLSOUTH TELECOMMUNICATION, INC.'S RESPONSE IN OPPOSITION
TO FCCA'S MOTION TO STRIKE**

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") files this response in opposition to the Motion to Strike ("Motion") filed by the Florida Competitive Carriers Association ("FCCA"). The FCCA's Motion is based on the incorrect premise that portions of the testimony and exhibits filed by Shelley W. Padgett fail to include "relevant" evidence. The FCCA's Motion misrepresents Ms. Padgett's testimony. Ms. Padgett has explained in detail precisely how she reached her conclusions concerning the locations and routes in Florida that satisfy the wholesale triggers established by the FCC and explains how BellSouth classifies carriers as wholesalers. The FCCA's Motion constitutes nothing more than their flawed interpretation of the wholesale triggers test. Although the FCCA may disagree with Ms. Padgett's conclusions, any such disagreement is not a basis to strike her testimony. Florida law defines "relevant evidence" as "evidence tending to prove or disprove a material fact." Florida Statutes, § 90.401. Ms. Padgett's testimony and exhibits clearly meet the statutory definition. Accordingly, the Motion should be denied.

II. DISCUSSION

As explained above, Florida law defines “relevant evidence.” The statutory definition is straightforward; evidence that tends to prove or disprove a material fact meets the test. Moreover, under Florida law, there is no discretion concerning the admissibility – “all relevant evidence is admissible” Florida Statutes, § 90.402. In this proceeding, neither BellSouth nor the FCCA bears the burden of proof; the FCC explained, “we do not adopt a ‘burden of proof’ approach that places the onus on either incumbent LECs or competitors to prove or disprove the need for unbundling.” *Triennial Review Order* (“TRO”), ¶ 92. In light of the statutory framework concerning relevant evidence and its admissibility, and considering that this proceeding is one in which BellSouth does not bear the evidentiary burden (the FCCA’s suggestion to the contrary being flatly contradicted by the *TRO*), it is apparent that the FCCA’s Motion is without basis.

In this case, BellSouth filed the Direct and Supplemental Direct Testimony of Shelley W. Padgett. Ms. Padgett included with her testimony exhibits that detailed by address and by route the specific customer locations and transport routes for which CLECs are not impaired without access to unbundled network elements from BellSouth. Ms. Padgett included granular evidence, including carrier names, of the competitive carriers that BellSouth contends are present on each route or customer location. This evidence included the specific capacity level. Before counting a carrier toward meeting the wholesale trigger, BellSouth obtained evidence *both* that the carrier deployed its facilities on the route or to the location identified *and* that the carrier is a wholesaler. BellSouth provided the basis for its conclusions, explaining that for evidence of facilities, it used discovery responses, commercially available data, and billing records for fiber-based collocation and dark-fiber loops. This evidence proves that the carriers identified have facilities at the

locations or on the routes specified. Despite the FCCA's contention otherwise, BellSouth's analysis clearly does not in any way constitute seeking relief simply based on a CLEC's presence in a given central office. BellSouth explained further that in classifying carriers as wholesale providers, it relied upon several reliable and reasonable sources (such as discovery responses, the carriers own advertisements, and so forth).

Furthermore, contrary to the FCCA's suggestions, the wholesale trigger does not require that a carrier *currently provide* wholesale service – the triggers require only that a carrier be willing to *offer* access on a wholesale basis. (*TRO*, ¶¶ 337, 412). As BellSouth explained, a carrier's willingness to provide wholesale service is a commercial strategy, not a location- or route- specific choice. Indeed common sense dictates that carriers that advertise wholesale services would not refuse to provide such service on selected routes or to selected buildings where they already have facilities – such an attitude would make no commercial sense, and would be contrary to the internal operations and marketing strategies of any rational firm. Further, the standard that the FCCA suggests is impossible to meet – what carrier would advertise its wholesale offering on a building-by-building or route-by-route basis?

The real difference of opinion between the FCCA and BellSouth is one of interpretation. The FCCA has proffered its interpretation of the *TRO* and how the triggers are to be applied, suggesting that there must be “*actual* alternatives to ILEC services already in use on that route or to that customer location.” (p. 2; emphasis in original). This flawed interpretation is contrary to language in both the *TRO* and the rules. The wholesale trigger does not require that carriers must *actually or currently provide* wholesale service. Instead, in the case of loops, carriers have to *offer* service. (*TRO*, ¶ 337; 47 C.F.R. §51.319(a)(4)(ii); 47 C.F.R. §51.319(a)(5)(i)(B)). With respect to transport, carriers must be *willing to provide* wholesale service. (*TRO*, ¶ 412; 47

C.F.R. §51.319(e)(1)(ii); 47 C.F.R. §51.319(e)(2)(i)(B); 47 C.F.R. §51.319(e)(3)(i)(B)). In light of the *actual* language concerning the application of the wholesale triggers – which is entirely consistent with BellSouth’s approach presented in direct testimony – the entirety of the evidence relied upon by BellSouth (which goes beyond CLEC discovery responses alone) should be admitted into the record and the FCCA’s Motion should be rejected.

Another interpretive disagreement is demonstrated by the testimony of the FCCA witness Gary J. Ball. On p.14 of his testimony, Mr. Ball provides the analogy that if, in a multi-story building, a person standing in the lobby has access to the 12th floor using one elevator, and also to the 40th floor using a different elevator, but cannot directly access the 12th floor from the 40th floor, then there is no “route” between floors 12 and 40. This implication blatantly ignores that the FCC defines route as including intermediate wire centers or switches 47 C.F.R. § 51.319(e) – that is, there is obviously a way to get between floors 12 and 40; the fact that it is indirect is irrelevant. Thus, the fact that any CLEC denies offering wholesale transport *directly* between two central offices does not render other evidence tending to prove otherwise inadmissible.

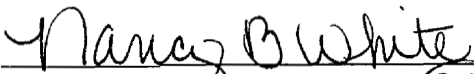
The forum to debate the weight of the evidence is during the hearing and in post-hearing briefs. Moreover, any carrier that BellSouth has classified as a wholesaler has ample opportunity to file rebuttal testimony stating otherwise, or the FCCA can propound discovery of its own. Because the direct testimony and exhibits of Ms. Padgett are supported by evidence that tends to prove carriers are wholesalers, it is clearly relevant, and the FCCA’s disagreement with the conclusions reached based on its view of the FCC’s triggers cannot render the material irrelevant simply because the FCCA wishes it were so. The FCCA’s effort to impose imaginary conditions for relief is – to continue their own analogy – akin to a school child, who, displeased by the

textbook answer, stubbornly insists that his own wrong answer is correct because he wishes it to be the case, despite flaws in logic and fact that are obvious to everyone else.


III. CONCLUSION

As set forth above, BellSouth respectfully requests that the Commission deny the FCCA's Motion to Strike.

Respectfully submitted this 21st day of January 2004.



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