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January 18, 2005

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. 000121A-TP
In Re: Investigation into the establishment of operations support systems permanent incumbent local exchange Telecommunications companies

Dear Ms. Bayó:

In December 2004, the CLEC Coalition filed comments in this docket and in the Georgia performance measurement docket (Docket No. 7892-U) regarding BellSouth's Preliminary Notification for February 2005 PMAP Changes. In its comments, the CLEC Coalition expressed concerns about BellSouth's intent to remove from the SQM/SEEM plan, data regarding services provided to CLECs pursuant to commercial agreements wherein such CLECs agreed not to receive SEEM payments. On January 12, 2005, BellSouth filed it response in the Georgia docket. A copy of BellSouth's response is submitted herein for filing in this docket, and a copy of the same is being provided to all parties of record.

Sincerely,

Robert A. Culpepper

Enclosures

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

CERTIFICATE OF SERVICE
Docket No. 000121A-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and U.S. Mail this 18th day of January, 2005 to the following:

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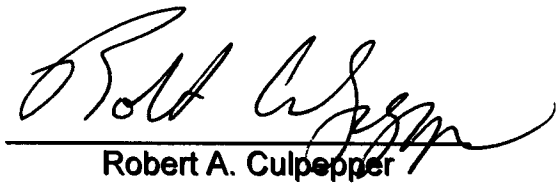

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(+) Signed Protective Agreement

#502166

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January 12, 2005

DELIVERED BY HAND

Mr. Reece McAlister
Executive Secretary
Georgia Public Service Commission
244 Washington Street, S.W.
Atlanta, Georgia 30334-5701

Re: *Performance Measurements for Telecommunications Interconnection, Unbundling and Resale*; Docket No. 7892-U

Dear Mr. McAlister:

Enclosed herein please find an original and seventeen (17) copies, as well as an electronic version, of Response of BellSouth Telecommunications, Inc. to CLEC Coalition's Comments on BellSouth's Preliminary Notification for February 2005 PMAP Changes in the above-referenced docket. I would appreciate your filing the enclosed and returning the two (2) extra copies stamped "filed" in the enclosed self-addressed and stamped envelopes.

Thank you for your assistance in this regard.

Yours very truly,

Lisa S. Foshee /nvd

LSF:nvd
Enclosures

cc: Mr. Leon Bowles (via electronic mail)
Mr. Patrick Reinhardt (via electronic mail)
Parties of Record (via electronic mail)

566928/565099

BEFORE THE
GEORGIA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	
Performance Measurements for Telecommunications Interconnection, Unbundling, and Resale	)	Docket No. 7892-U
	)	
	)	
	)	

RESPONSE OF BELLSOUTH TELECOMMUNICATIONS, INC. TO CLEC COALITION'S COMMENTS ON BELLSOUTH'S PRELIMINARY NOTIFICATION FOR FEBRUARY, 2005 PMAP CHANGES

BellSouth Telecommunications, Inc. ("BellSouth") hereby files this response to the *CLEC Coalition Comments on BellSouth's Preliminary Notification for February, 2005 PMAP Changes* ("*Comments*").[1] In its *Comments*, the CLEC Coalition erroneously asserts that BellSouth is attempting to "unilaterally decide which processes and services are subject to the SQM plan and therefore which performance results are to be reported."[2] As explained herein, the CLECs are incorrect. As a procedural matter, BellSouth fully is complying with the process for PMAP changes as set forth in the Commission's July 19, 2002 Order ("*PMAP Notification Order*"). Accordingly, the CLEC Coalition's *Comments*, which focus solely on an alleged violation of the process, should be dismissed.

Moreover, and more importantly, the Commission should affirm BellSouth's right to make the change in question. The DS0 Platform circuits that BellSouth proposed to remove from SEEMs are those subject to commercial agreements. In those DS0 commercial agreements, the signatory CLECs voluntarily contracted with BellSouth and agreed to opt-out of Tier I

[1] The CLEC Coalition is comprised of AT&T Communications of the Southern States, LLC, DIECA Communications, Inc. d/b/a Covad Communications, Birch Telecom, Inc., ITC^DeltaCom, Inc., and MCImetorAccess TransmissionServices, LLC and MCI WORLDCOM Communication, Inc.

[2] *Comments* at p. 2.

penalties. Thus, the signatory CLECs agreed not to receive SEEMs payments --- the system change does no more than implement the parties' agreements for those specific CLECs that have agreed to waive SEEMs payments for certain elements that previously were reported pursuant to the parties' interconnection agreements.

In addition, it is highly questionable whether AT&T (or other member of the CLEC coalition) even has standing to challenge BellSouth's proposed change. Unless and until a CLEC (like AT&T) signs a commercial agreement, a decision which rests entirely within AT&T's control and business judgment, the CLEC will not be affected by removing the DS0 platform circuits from PMAP in any way. The only Tier I payments that will stop are those payments to CLECs that have determined that a commercial agreement, and the service level guarantees contained in that commercial agreement, better suit its business plan. So long as AT&T is entitled to and continues to purchase UNE-P out of its interconnection agreement (for the period of time that remains lawful), BellSouth will pay AT&T any applicable Tier I penalties.

The CLEC coalition may argue that it is seeking to protect Tier II payments, but this would be a nonsensical argument. For the measures that would be affected by the proposed change, it is axiomatic that Tier II penalties flow from Tier I payments --- if there are no Tier I payments, there are no Tier II payments. Moreover, the purpose of Tier II payments is to protect the industry from alleged poor performance. If a CLEC has voluntarily adopted a different performance plan (such as one that may be outlined in a DSO commercial agreement) and specifically opted-out of the SQM/SEEM plan for a particular service, it is no longer part of the industry that is covered by SQM/SEEM. The Tier II payments only should arise out of services provided to the universe of CLECs operating under interconnection agreements.

I. BellSouth Has Fully Complied With The Procedure Set Forth In The Commission's July 19, 2002 Order Regarding Notification Of PMAP Revisions.

BellSouth's PMAP system produces the majority of the SQM reports that BellSouth generates on a monthly basis. Periodically, PMAP must be modified to assure that performance data is calculated in accordance with the Commission's Orders issued in this docket. Completely consistent with the *PMAP Notification Order*, BellSouth provides monthly notification of all proposed PMAP revisions and holds a monthly industry conference call for all interested parties including, but not limited to, the CLEC Coalition, to discuss the same. As an initial matter, a compelling argument can be made that BellSouth had no obligation to provide PMAP notification that a CLEC and BellSouth had ***affirmatively agreed*** that services provided under a commercial contract are subject to negotiated service level commitments ("SLCs") and are thus not subject to any performance measurement plan. That said, because certain administrative and technical steps are required to remove such CLEC data from the existing SQM and SEEM results, BellSouth erred on the side of caution and provided notice that where the parties have agreed that certain services would be subject to SLCs in lieu of SEEM payments, then such services would be excluded from the SQM and SEEM results. The Commission should decline the CLEC Coalition's attempt to transform the stating of the obvious into something akin to unilateral action as this action was contemplated by BellSouth and the CLEC, a party that would otherwise be entitled to SEEMs payments had it not executed a separate DS0 commercial agreement.

II. The Parties To The Commercial Agreements Have Affirmatively Agreed That Services Provided Under Such Agreement Are Subject To Negotiated Service Level Agreements And Are Not Subject To Any Performance Measurement Plans.

As the Commission is well aware, in March 2004, the D.C. Circuit vacated and remanded certain portions of *Triennial Review Order* ("*TRO*") issued by the Federal Communications Commission ("FCC")[3] In the aftermath of *USTA II,* the FCC encouraged industry participants to enter into commercial agreements such as the one briefly discussed above. Many CLECs in BellSouth's region have entered into commercial agreements with BellSouth. The standard DS0 Services Agreement plainly provides that:

> BellSouth's performance under this Agreement shall be governed by the service level commitments set forth in this Agreement ("SLCs") .... BellSouth's performance of this Agreement shall not be subject to any service quality measurement ("SQM") plan, payment of remedies in any self-effectuating enforcement mechanism ("SEEM") plan or any other penalty plan, performance plan or other similar requirements imposed by a Commission or the FCC.[4]

In short, the standard DS0 Agreement contains a clear and unambiguous agreement that the negotiated SLCs contained in the agreement will replace any and all state or federal performance measurement plans. By refusing to allow BellSouth to remove the services provided under commercial agreements from the SQM/SEEM Plan, the Commission would negate the parties' clear intent and interfere with the terms of a voluntarily negotiated agreement. Such regulation could preclude the operation of the commercial agreements and could require cancellation of the agreements to the detriment of both BellSouth and the signatory CLECs. Rather than starting

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[3] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.,* CC Docket No. 01-338, *et al.,* FCC 03-36, (rel. August 21, 2003)(*"Triennial Review Order"*), *affirmed in part and reversed in part, United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004)(*"USTA II"*).

[4] DS0 Services Agreement, General Terms and Conditions, Section 6.

down a path that it is completely contrary to the parties' express agreement and the urging of the FCC for the industry to enter into commercial agreements, the Commission should disregard the CLEC Coalition *Comments* and permit the parties to implement their negotiated and agreed upon contract terms.

In sum, BellSouth has made no attempt to unilaterally modify the current SQM/SEEM Plan.[5] Rather, BellSouth has abided by the letter of the *PMAP Notification Order* and has provided the requisite PMAP notification in an effort to allow parties to commercial agreements to operate under agreed upon terms and conditions. As such, the Commission should permit parties to affirmatively agree to exempt certain services from the SQM/SEEM results.

III. The Commission Has No Authority To Alter The Terms of The Parties' Voluntarily Negotiated Agreements.

BellSouth has been very clear on its position that the Commission does not have jurisdiction over BellSouth's commercial agreements. Contrary to BellSouth's position, the Commission has argued that it has such authority, pursuant to Section 252 of the Act. Even under the Commission's interpretation of the Act (with which BellSouth continues to strenuously disagree), however, the Commission cannot alter the terms of the agreements. Section 252(e)(2)(A) provides that:

> The State Commission may only reject an agreement (or any portion thereof) adopted by negotiation ... if it finds that – (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity ....

Therefore, even under the Commission's interpretation of the Act, its sole remedy is to reject the agreement (or portions of the agreement) pursuant to Section 252. If the Commission chooses to

[5] BellSouth also disagrees with the assertion that this is an open issue in the current Florida plan review. To the contrary, in Florida the parties have briefed the issue of whether the scope of the Florida SQM/SEEM Plan should be expanded to include Section 271 and State law obligations. Whether a commercial agreement that contains SLCs in lieu of SEEM is subject to the existing Florida SQM/SEE Plan is not an open issue in Florida.

reject the service level agreement portion of any commercial agreement (which presumably it would do if it denies BellSouth the right to implement the provision), the parties to the agreement can void the agreement. Thus, not only would denying BellSouth the right to remove DS0 wholesale platform circuits from SQM/SEEMs as the parties envisioned deprive the parties of the benefit of their bargain, it would deny the industry the benefits the FCC recognized in commercial negotiations.

IV. Conclusion

In conclusion, the Commission should affirm BellSouth's right to remove the DS0 wholesale platform, provided pursuant to commercial agreements, from the SQM/SEEMs plan.

Respectfully submitted, this 12th day of January 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE
Docket No. 7892-U

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