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July 6, 2004

VIA ELECTRONIC FILING

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

Re: Docket No.: 040530 - TP

Dear Ms. Bayo:

The Florida Competitive Carriers Association (FCCA), AT&T Communications of the Southern States, L.L.C., MCI Metro Access Transmission Services, L.L.C. and MCI Worldcom Communications, Inc., hereby submit, for electronic filing, their Response to BellSouth's Motion to Dismiss in the above docket.

Thank you for your assistance.

Yours truly,
s/ Joseph A. McGlothlin

Enclosure

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Re: Petition of Florida Competitive Carriers Association, AT&T and MCI for Expedited Ruling To Require the Filing, Public Review and Approval Of Agreements For the Provision of Wholesale Local Facilities and Services Between ILECs and CLECs	Docket No. 040530-TP Filed: July 6, 2004

PETITIONERS' RESPONSE TO BELLSOUTH'S MOTION TO DISMISS

The Florida Competitive Carriers Association ("FCCA"), AT&T Communications of the Southern States, LLC ("AT&T"), and MCImetro Access Transmission Services, LLC and MCI WORLDCOM Communications, Inc. (collectively "MCI") hereby respond to the "Response in Opposition and Motion to Dismiss"[1] filed on June 28, 2004 by BellSouth Telecommunications, Inc. ("BellSouth"), and state:

BACKGROUND

On June 7, 2004, Petitioners filed their Petition for Expedited Ruling Regarding the Filing, Review and Approval of Wholesale Local Facilities and Services Agreements. Petitioners alleged that BellSouth and Verizon Florida, Inc. (Verizon) have announced that they have entered certain "wholesale agreements" with several competitive local exchange companies, and have also announced that they do not intend to file these agreements with the Commission. Petitioners asserted that the "wholesale agreements" are agreements for interconnection, resale, and access to unbundled elements, that fall within the purview of Section 252(a)(1) of the 1996 Telecommunications Act and Section 364.162, Florida Statutes. Accordingly, Petitioners assert that BellSouth and Verizon must file these agreements with the Commission for review and approval. Further, if approved the "commercial agreements" must

[1] FCCA, AT&T, and MCI respond to BellSouth's pleading only insofar as the Commission treats it as a Motion to Dismiss.

become subject to adoption, pursuant to Section 252(i) of the federal Telecommunications Act of 1996 ("1996 Act"). Petitioners alleged that by refusing to submit the "commercial agreements" for approval, BellSouth and Verizon have violated the above statutory provisions, frustrated the Commission's ability to prohibit discrimination, harmed consumers, and affected Petitioners' substantial interests. Petitioners asserted there are no issues of material fact associated with the Petition. Petitioners requested that the Commission to rule on the Petition on an expedited basis.

On June 28, 2004 BellSouth submitted its "Response In Opposition And Motion to Dismiss Petition for Expedited Ruling Regarding the Filing of Commercial Agreements." In this Response, Petitioners will address BellSouth's pleading *insofar as BellSouth purports to request the Commission to dismiss the Petition.*

CRITERIA GOVERNING CONSIDERATION OF A MOTION TO DISMISS

As the Commission is well aware, the purpose of a motion to dismiss is to test the sufficiency of a complaint or petition to state a cause of action on which relief can be granted. For the purpose of this test, the Commission must take as true all factual allegations contained in the Petition, must limit its review to the four corners of the petition or complaint, and cannot take into consideration any affirmative defenses or evidence that may be presented by the moving party. *Varnes v. Dawkins,* 624 So.2d 349, 350 (Fla. 1st DCA 1993); Order No. PSC-03-1331-FOF-TL, Docket Nos. 030867-TL, 030868-TL, and 030869-TL (November 21, 2003).

Petitioners allege that BellSouth and Verizon have entered agreements relating to interconnection, unbundled elements, and/or resale and have refused to file them with the Commission. Petitioners assert that the "commercial agreements" meet the definition of agreements for interconnection, resale, and access to unbundled elements that must be filed with the Commission pursuant to federal and state law. Petitioners allege that the ILECs' refusal to

submit the "commercial agreements" for approval harm their substantial interests and those of consumers by circumventing Petitioners' legal right to adopt, if they elect to do so, some or all of the agreements pursuant to Section 252(i) of the 1996 Act, which Congress enacted to prevent discrimination and maximize competition. Petitioners state that there are no issues of fact and that Petitioners are entitled to a ruling in their favor as a matter of law. With respect to a motion to dismiss the Petition, the question confronting the Commission is: Taking these allegations these as true, are they sufficient to state a claim for which the Commission could fashion relief? As shown below, BellSouth raises nothing in its pleading that even addresses this question, much less supports dismissal of the Petition.

ARGUMENT

Under the *Varnes* standard and analysis, it is clear that the BellSouth pleading, to the extent it seeks dismissal of the Petition, should not be granted. Even a cursory review of BellSouth's pleading demonstrates that the reference to a "Motion to Dismiss" in the heading is an afterthought—and a complete misnomer. Indeed, following the initial caption, the word "dismiss" appears *nowhere* in the body of BellSouth's pleading. Instead, in its pleading BellSouth argues, in illogical sequence, (1) to require BellSouth to file the "commercial agreements" would have undesirable effects on parties' willingness to negotiate and (2) the "commercial agreements" are unrelated to the obligations the 1996 Act imposes and do not fall within the categories of those agreements that must be submitted to the state commissions for review and approval. In other words, in its pleading, BellSouth contests the *merits* of the Petition. Its arguments do not relate to nor address the criteria governing a motion to dismiss.

BellSouth begins by arguing that Petitioners have not supported their request for *expedited* relief. As an initial observation, this argument—like all others raised in BellSouth's

pleading-- is irrelevant to the purpose of a motion to dismiss. Moreover, BellSouth's (irrelevant) argument is misplaced. BellSouth argues that the Petition does not meet the requirements for expedited relief associated with "interconnection agreement complaints." The requirements that BellSouth recites relate to disputes that arise under interconnection agreements that have been submitted to and approved by the Commission, and are intended to apply to a situation in which one of the parties to an approved contract files a complaint against the other party to enforce the terms of the agreement. Petitioners are not parties to the agreements that are the subject of the Petition and therefore the requirements BellSouth cites are inapplicable.

BellSouth states that the Commission's rules do not expressly contemplate a mechanism for expedited relief. However, the Commission's rules do not prohibit parties from pointing out—or the Commission from recognizing—that rulings can be made far more quickly when there is no need to conduct a fact finding evidentiary hearing prior to entering the ruling. Petitioners' point was—and is—that there is no dispute regarding the essential point that BellSouth and Verizon have entered into "commercial agreements" and have refused to file them for approval. Since there is no dispute regarding these factual assertions, there are no time-consuming factual issues to resolve, and the Commission is positioned to rule on Petitioners' legal assertion expeditiously. Significantly, nowhere in its pleading does BellSouth contest Petitioners' statement that there are no issues of material fact.

BellSouth next argues that the "regulatory oversight" associated with the Petition would hinder negotiations, because parties would have less incentive to participate in "give and take" negotiations if they knew the agreements would be subject to (1) regulatory review and approval and (2) possible adoption by other carriers pursuant to Section 252(i). Again, this argument is a response to the *merits* of the petition and thus irrelevant to the criteria governing a motion to

dismiss. It is in the nature of a response in which BellSouth contests to the *merits* of the Petition, not its *sufficiency*.

Leaving aside the fact that this argument is not germane to a consideration of the sufficiency of the Petition to survive a motion to dismiss, the short answer to BellSouth's argument is that it has been rejected by Congress, which codified the obligation in the "opt in" requirements of Section 252(i) of the 1996 Act, and by the Florida Legislature, which placed a similar requirement in Chapter 364, Florida Statutes. However, so that it is clear that Petitioners do not acquiesce to BellSouth's contention, and so that Petitioners do not appear to depend solely on a legal argument, Petitioners would point out that, with respect to the alleged "vortex of never-ending"[2] burdensome regulation to which BellSouth objects, the action mandated by the 1996 Act is simply a review by the Commission to ensure that the agreement is not discriminatory, and is in the public interest. Even if one views the larger universe of agreements, that includes the arbitrated agreements that must meet the criteria of Section 252(b) of the 1996 Act, a cursory review of the Commission's docket filings proves that the Commission has performed the review function hundreds of times and has rarely, if ever, disapproved an agreement on any of these grounds.

BellSouth asserts that negotiated "commercial agreements" should be immune to adoption pursuant to Section 252(i) of the 1996 Act so that the goal of "market-based" agreements can be realized. BellSouth has it backwards. As BellSouth readily concluded in Docket No. 030851-TP, there are no wholesale commercial alternatives for unbundled local switching - the subject of the "commercial agreements" at issue in the Petition. Therefore, there is no "market" in which arms-length agreements can take place. Since BellSouth both defines and controls the "market",it is necessary for the Commission to exercise regulatory review to

[2] BellSouth's Response at 6.

ensure access by other carriers pursuant to Section 252(i) and thereby to prohibit discrimination and enable competition.

BellSouth next asserts that, despite the desire of the FCC and NARUC, "commercial agreements are proving to be the exception rather than the rule. This is due in no small measure to the threat of the type of regulation espoused by Petitioners." BellSouth's assertion is (in addition to being irrelevant under the *Varnes* criteria and analysis for the disposition of a Motion to dismiss) factually unsupported, self-serving and wrong.[3] Very simply, if truly "commercially acceptable" terms were being offered by BellSouth, the Commission could expect that more carriers would be signing agreements.

BellSouth devotes the remainder of its pleading to arguing that the 1996 Act does not require BellSouth to file the "commercial agreements" with the Commission for approval.[4] Again, this contention is irrelevant under the *Varnes* criteria and analysis for the disposition of a motion to dismiss. BellSouth simply continues to contest the *merits* of the Petition, rather than its sufficiency to state a claim for relief. In their Petition, FCCA, AT&T, and MCI provided the legal claim and support for the proposition that these so-called "commercial agreements" are simply examples of –and in some instances *replacements for*—the agreements for interconnection, resale, and access to elements contemplated by Section 252 of the 1996 Act, and that BellSouth is attempting to avoid its obligations under the 1996 Act through the expedient of calling the agreements by another name. Rather than reiterate those arguments here, as part of this Response Petitioners adopt and incorporate by reference the arguments made in the Petition.

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[3] BellSouth's contention is easily disproved: Some of the very Petitioners who ask the Commission to require BellSouth to submit the agreements for approval are simultaneously participating in negotiations with BellSouth.

[4] Petitioners cited Sections 364.162(1) and 364.01(4)(g) in support of their contention that Florida law requires BellSouth to file the "commercial agreements" with the Commission and empowers the Commission to review them to guard against discrimination and ensure that all carriers are treated fairly. Conspicuously absent from BellSouth's pleading is any mention of Petitioners' *state law* claim.

However, Petitioners cannot let pass without comment two BellSouth's assertions, which severely distort the plain meaning of the 1996 Act and prior FCC orders.

First, at pages 8-9, BellSouth argues that any request for elements "pursuant to Section 251" must necessarily mean an agreement that has been arbitrated under the "impairment" standard of Section 251(d), which governs the determination of which network elements must be made available for purposes of an arbitration under 251(c)(3). BellSouth then extends this argument to assert that unless an agreement has been arbitrated, there is no requirement under Section 252(e) for the Commission to approve it, and no right of another CLEC to adopt it under Section 252(i). BellSouth is badly and demonstrably mistaken when it asserts that the only "251 elements" are those that have been the subject of arbitration. BellSouth must hope the Commission will ignore the clear, irrefutable language of Section 252(a)(1), which states:

> (1) **"Voluntary negotiations**—Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers **without regard to the standards set forth in subsections (b) and (c) of section 251**. The agreement shall include a detailed schedule of itemized charges for interconnection **and each service or network element included in the agreement**. The agreement . . . shall be submitted to the State commission under subsection (e) of this section."

(Emphasis added.)

Thus, Section 252(a)(1) explicitly contemplates a voluntarily negotiated agreement that (1) is a request for elements under Section 251, (2) is not subject to the standards governing access to unbundled elements contained in Section 251(c)(3), which standards are applicable solely to a request for arbitration and thereby involve the application of the criterion of "impairment", but (3) *nonetheless encompasses terms for access to and prices for unbundled elements*. Further, Section 252(e) explicitly provides that negotiated *and* arbitrated agreements

are to be submitted for approval by the state commissions.[5] Similarly, Section 252(i), the statutory source of the ability of a CLEC to opt into part or all of an agreement, specifically encompasses *all* agreements approved by a state commission, without distinguishing between those negotiated voluntarily (such as the so-called "commercial agreements") and those that have been arbitrated by the state commission. In short, the "construct" on which BellSouth premises its chief argument is a house of cards that collapses with the first reading of Section 252(a)(1).

Second, at pages 11-12, BellSouth quotes the FCC's *Qwest ICA Order*[6] as stating that "settlement contracts that do not affect an incumbent LEC's ongoing obligations relating to section 251 need not be filed," and asserts this language supports its restrictive view of the scope of the Act's filing requirement. In choosing language to quote from the *Qwest ICA Order*, BellSouth was selective in the extreme. The result is misleading. The complete passage in the order states:

> We disagree with the blanket statement made by Qwest in its petition that "settlement agreements that resolve disputes between ILECs and CLECs over billing or other matters are not interconnection agreements under Section 252. (citation omitted). Instead, and consistent with the guidance provided above, we find that a settlement agreement *that contains an ongoing obligation relating to section 251(b) or (c) must be filed under section 252(a)(1).* Merely inserting the term "settlement agreement" in a document does not excuse carriers of their filing obligation under section 252(a) or prevent a state commission from approving or rejecting the agreement as an interconnection agreement under section 252(e). However, we also agree with Qwest that those settlement agreements that simply provide for "backward-looking consideration" (e.g., the settlement of a dispute in consideration for a cash payment or the cancellation of an unpaid bill) not be filed. That is, settlement contracts that do not affect an incumbent LEC's ongoing obligation relating to section 251 need not be filed.

[5] At footnote 7 of its pleading, BellSouth states, incompletely and wrongly, that a state may only reject an agreement "if it finds that the agreements do not meet the requirements of Section 251." (citing Section 252(e)(2)(B). Here, BellSouth ignores the distinction that the section makes between negotiated and arbitrated agreements. The Act requires approval of negotiated and arbitrated agreements, and establishes different criteria that the state commission is to apply to each category. In its footnote 7, BellSouth refers only to arbitrated agreements. Section 252(e)(2)(A) states, that the state commission shall reject a *negotiated* agreement only if it discriminates against a telecommunications carrier not a party to the agreement or is not consistent with the public interest, convenience, and necessity. Section 252(e)(A)(i) and (ii).

[6] Memorandum Opinion and Order, 17 FCC Rcd. 19337.

(Emphasis added.)

Conspicuously, when read in context, the language quoted by BellSouth takes on a very different meaning than that which BellSouth tries to impose on it. The thrust of the FCC's decision in the *Qwest ICA* order was to *deny* Qwest's attempt to exclude from the filing requirement any agreement in the nature of a settlement agreement. The language upon which BellSouth seized referred to an *exception* to the FCC's rule. (The exception—a narrow one-- is limited to "backward-looking" *resolutions* of disputes over money, as opposed to an ongoing relationship.) Moreover, throughout the *Qwest ICA Order*, the FCC applied the filing/approval requirement to agreements that had not been the subject of arbitrations—thus undermining BellSouth's entire argument. BellSouth appears to argue that its "commercial agreements" are in lieu of agreements entered to fulfill the requirements of Section 251, and/or that the "commercial agreements" are not offered pursuant to Section 251. By melding its discussion of agreements to include negotiated and arbitrated agreements, the FCC in the *Qwest ICA Order* made clear that any agreement for interconnection and unbundled elements is one made under Section 251. This is consistent with Section 252(a)(1): the only distinction the statute makes is between those agreements that are negotiated voluntarily and those that are arbitrated.[7] If either type of agreement relates to an "ongoing obligation" to provide unbundled elements, under the guidance of the *Qwest ICA Order,* it must be submitted to the state commission for approval. "This standard recognizes the statutory balance between the rights of competitive LECs to obtain

[7] In stating that an agreement that creates an ongoing obligation pertaining to interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1)," the FCC observed that its interpretation ". . .directly flows from the language of the Act. . ."

interconnection terms pursuant to section 252(i) and removing unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs."[8]

CONCLUSION

BellSouth's arguments are irrelevant to the criteria that governs a motion to dismiss (and are misplaced besides). To the extent that the Commission treats BellSouth's pleading as a motion to dismiss, it should be denied. The Commission should proceed expeditiously to rule on the Petition and require BellSouth and Verizon to submit for approval any and all "commercial agreements" that relate to an ongoing requirement to provide such matters as interconnection, resale, collocation, and/or access to unbundled elements.

s/ Joseph A. McGlothlin
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[8] *Qwest ICA Order* at ¶ 8.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioners' Response to BellSouth's Motion to Dismiss has been furnished by (*) electronic mail and U.S. Mail this 6th day of July 2004, to:

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