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October 4, 1996

Ms. Blanca S. Bayo
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Rm. 110
Tallahassee, Florida 32399-0850

RE: Docket Nos. 960658-TP and 930330-TP
InterLATA Presubscription

Dear Mrs. Bayo:

Enclosed please find an original and fifteen copies of BellSouth's Response in Opposition to AT&T's Motion to Quash Notice of Deposition, which we ask that you file in the captioned 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 yours,

J. Phillip Carver

J. Phillip Carver (BW)

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Enclosures

cc: All Parties of Record
R. G. Beatty
A. M. Lombardo
William J. Ellenberg II

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CERTIFICATE OF SERVICE
Docket Nos. 930330-TP and 960658-TP

I HEREBY CERTIFY that a copy of the foregoing has been furnished by **U.S.** Mail this 4th of October, 1996 to:

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* Hand-delivery
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Florida Interexchange Carriers Association, MCI Telecommunications Corporation, and AT&T Communications of the Southern States, Inc., against BellSouth Telecommunications, Inc.	)	Docket No. 960658-TP
In re: Investigation into intraLATA Presubscription	)	Docket No. 930330-TP
	)	Filed: October 4, 1996

BELLSOUTH'S RESPONSE IN OPPOSITION TO AT&T'S MOTION TO QUASH NOTICE OF DEPOSITION

BELLSOUTH TELECOMMUNICATIONS, INC., ("BellSouth") hereby files, pursuant to Rule 25-22.037(b), Florida Administrative Code, its Response In Opposition To AT&T's Motion To Quash Notice Of Deposition and states as grounds in support thereof the following:

1. On September 25, 1996, BellSouth served upon AT&T a Notice Of Deposition for AT&T's Corporate Representative (to be designated pursuant to Rule 1.310(b)(6)) of the Florida Rules of Civil Procedure. This deposition was to inquire into six specifically identified areas, all of which relate directly to materials attached to the deposition notice that AT&T has sent to at least some of its interLATA service customers. The materials purported to describe how AT&T could "automatically" carry their intraLATA toll calls. The deposition was set to occur on October 2, 1996.

2. AT 3:50 p.m. on the afternoon of October 1, 1996, AT&T served upon BellSouth a Motion To Quash Deposition. AT&T raised four grounds for its

motion: (1) that seven days advance notice of taking the deposition is inadequate; (2) that all questions directed to AT&T should be posed to Sandra Seay, an employee of MCI who has filed testimony in this docket that is jointly sponsored by AT&T MCI and FIXCA; (3) that the subject matter of the deposition is not relevant and (4) that the matters about which BellSouth sought to inquire are privileged pursuant to Section 90.506, Florida Statutes. None of these ostensible bases for refusing to provide a witness for deposition have even a modicum of validity. Instead, AT&T is simply engaging in a rather transparent refusal to participate in good faith in the discovery process. AT&T should be ordered to provide a witness, and further appropriate sanctions should be imposed pursuant to Rule 1.380, Florida Rules of Civil Procedure.

3. As to the notice issue, the deposition of Ms. Seay was noticed by the Florida Public Service Commission ("Commission") Staff seven days in advance of the deposition. AT&T apparently had no trouble making arrangements for the witness who they wished to testify on their behalf to appear on seven days notice. At the same time, AT&T claims that seven days is an inadequate time to allow it to locate a deponent who could answer what it mischaracterizes as "a myriad of questions". (AT&T Motion, p. 1). In fact, there were six questions set forth in the attachment to the deposition notice. Moreover, all related in one sense or another to several pages of information attached to the deposition notice. Obviously, there is a great likelihood that a

single witness could have answered all six closely related questions, and it would not have been difficult for AT&T to identify this witness.

4. Finally, if AT&T's true reason for refusing to produce a deponent was that it had inadequate time to find one, then AT&T could have made some good faith effort to reschedule the deposition to obtain more time. Instead, AT&T elected not to contact counsel for BellSouth for this purpose, and further made an affirmative decision to wait until the very last moment to file its motion to quash -- or even to reveal that it intended to do so. At the beginning of the deposition of Sandra Seay, counsel for BellSouth inquired of counsel for AT&T about the logistics of taking the deposition of the AT&T witness the next day. Counsel for AT&T declined to discuss the matter at that time. When counsel for BellSouth raised the issue again late that afternoon, counsel for AT&T then revealed for the first time that AT&T would not produce a witness and that it planned to file a motion to quash. This disclosure came not only at the "eleventh hour", but six days after AT&T received the notice of deposition.

5. AT&T took no good faith steps to attempt to obtain more time to find a witness. AT&T's contention that it did not produce a deponent because the notice was inadequate is nothing more than an attempted subterfuge, although not a particularly plausible one.

6. AT&T next claims that Ms. Seay was the deponent provided to testify on their behalf, and that BellSouth is not entitled to inquire of anyone else. Apparently AT&T is laboring under the mistaken belief that if it designates

someone to testify on its behalf, then it is immune from any further discovery on relevant issues. AT&T, of course, does not cite in its motion to any support for this novel proposition.

7. Also, during the deposition of Ms. Seay questions were propounded to her concerning the documents in question. She was, not surprisingly, unable to address any of these questions. AT&T should not be allowed to hide behind the fact that it jointly sponsored the testimony of an employee of MCI as a way to avoid producing a witness with relevant knowledge about the practices of AT&T.

8. As its third basis, AT&T contends that the subject matter of the deposition is not relevant. Instead, AT&T claims that the subject matter of this docket is limited to the practices of BellSouth. To the contrary, the issues in this docket relate not only to the presubscription practices of BellSouth, but also to the contention of AT&T, MCI and FIXCA that BellSouth has advantages over them as a the local exchange company that preclude them from competing, and that, therefore, BellSouth (and only BellSouth) should be restricted in its marketing practices. The marketing practices of AT&T are relevant both to this allegation, as well as to test the allegation that BellSouth's practices are improper.

9. Further, this comparison between the marketing practices of AT&T and BellSouth was raised by the witness sponsored by AT&T in a very specific

manner. Ms. Seay, after criticizing the marketing practices of BellSouth, stated the following in her prefiled testimony:

> Our point is that BellSouth should market its services in the same manner in which MCI, AT&T and other carriers market their services. This can be done through print advertisements, television commercials, promotions at public events, direct mail, etc. These avenues are equally available to all competitors.

(See Rebuttal Testimony, p. 5)

Thus, the witness sponsored by AT&T not only invited a direct comparison between the marketing methods of BellSouth and of AT&T, but also made an affirmative representation as to how AT&T goes about marketing.

10. It became obvious in Ms. Seay's deposition, however, that she knows virtually nothing about the manner in which AT&T does, in fact, market its services. Thus, AT&T has specifically interjected this marketing comparison into these proceedings (although it was certainly a generally relevant consideration anyway), sponsored the testimony of a witness who makes general assertions about the manner in which AT&T markets, then refused to produce a witness with specific information about examples of these practices. Clearly, the inquiry sought by BellSouth is relevant and calculated to lead to the discovery of admissible evidence, and it should be allowed.

11. Finally, AT&T contends that BellSouth may not take the deposition of this witness because, based on nothing more than the list of areas of inquire in the notice of deposition, AT&T has reached the conclusion that the entire inquiry will elicit nothing but "trade secrets", which AT&T claims are protected

under Section 90.506, Florida Statutes. The 1976 Revision Note to Section 90.506, Florida Statutes, however, states specifically that,

> "[i]t is widely recognized that the trade-secret privilege is not absolute". [citation omitted]. In each case the judge must weigh the importance of protecting the claimants' against the interests in facilitating the trial and promoting a just end to the litigation.

(West Florida Statutes Annotated, Page 521).

Moreover,

> This section permits the judge to order disclosure in any manner designed to protect the secret... [P]ossible means of protecting this secret may include sealing the part of the record describing the secret, prohibiting disclosure of the secret to a witness, omitting details of the secret from the record and wording the [Court's] opinion in terms avoiding disclosure of the secret. [citation omitted].

Id. at 522.

12. In other words, the trade secret "privilege" is frequently applied, not as an entitlement to refuse to testify, but as a protective mechanism that functions much like the procedures for protecting confidential material set forth in Section 364.183, Florida Statutes and in the Rules of this Commission. There is nothing in the statutory provision to suggest that a party may simply make a blanket refusal to answer any questions whatsoever on a topic that it believes may relate to trade secrets.

13. AT&T's overreaching on this point is clearly evidenced by the fact that there is at least some information sought in this discovery that could not possibly be privileged. To give one example, the pages attached to the deposition notice are documents that AT&T not only has disclosed to third

parties but, upon information and belief, has mass mailed to subscribers throughout the state of Florida. It is patently ridiculous for AT&T to claim that to answer any questions about this mass mailing would necessarily entail disclosing trade secrets.

14. Even if there were any validity to AT&T's contention (which there is not), the appropriate action for AT&T would be to produce a witness and to seek confidential and proprietary treatment for any information that is actually disclosed during the course of the deposition. Instead, AT&T has simply looked at the list of topics, made the untenable pronouncement that answering any possible question relating to these topics would necessarily involve disclosing trade secrets, and then refused to produce a deponent. This completely unjustified course of action does not reflect a legitimate fear that trade secrets will be disclosed, but, instead, illustrates, yet again, AT&T's bad faith in this matter.

WHEREFORE, BellSouth respectfully requests that this Commission deny AT&T's Motion to Quash Notice of Deposition, enter an Order requiring AT&T to produce a witness at a mutually convenient time before the commencement of

the hearing in this proceeding, and further issue against AT&T appropriate sanctions for its bad faith refusal to comply with discovery.

Respectfully submitted this 4th day of October, 1996.

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