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J. Phillip Carver
General Attorney

BellSouth Telecommunications, Inc.
c/o Nancy H. Sims
Suite 400
150 So. Monroe Street
Tallahassee, Florida 32301
Telephone: 305 347-5558

August 6, 1996

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

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RE: Docket Nos. 960833-TP and 960846-TP
AT&T and MCImetro's Arbitration with BellSouth

Dear Mrs. Bayó:

Enclosed please find an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response To Joint Motion For Consolidation, 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 (BL)

J. Phillip Carver

Enclosures

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

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CERTIFICATE OF SERVICE
DOCKET NO. 960833-TP and 960846-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Federal Express this 6th day of August, 1996 to the following:

Donna Canzano
Staff Counsel
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
(904) 413-6202

Tracy Hatch, Esq.
Michael W. Tye, Esq.
101 N. Monroe Street
Suite 700
Tallahassee, Florida 32301
Attys. for AT&T
Tel. (904) 425-6364

Robin D. Dunson, Esq.
1200 Peachtree Street, N.E.
Promenade I, Room 4038
Atlanta, Georgia 30309
Atty. for AT&T
Tel. (404) 810-8689

Mark A. Logan, Esq.
Brian D. Ballard, Esq.
Bryant, Miller & Olive, P.A.
201 S. Monroe Street
Tallahassee, Florida 32301
Attys. for AT&T
Tel. (904) 222-8611

Richard D. Melson, Esq.
Hopping Green Sams & Smith
123 South Calhoun Street
P.O. Box 6526
Tallahassee, Florida 32314
Tel. (904) 222-7500
Fax. (904) 224-8551
Atty. for MCImetro

J. Phillip Carver (BL)
J. Phillip Carver

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by AT&T Communications of the Southern States, Inc., for arbitration with BellSouth Telecommunications, Inc. concerning interconnection and resale under the Telecommunications Act of 1996.	Docket No. 960833-TP
In re: Petition by MCI Metro Access Transmission Services, Inc. for arbitration with BellSouth Telecommunications, Inc. concerning interconnection and resale under the Telecommunications, Act of 1996.	Docket No. 960846-TP
	Filed: August 6, 1996

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BELLSOUTH'S RESPONSE TO JOINT MOTION FOR CONSOLIDATION

BellSouth Telecommunications, Inc. ("BellSouth" or "Company") hereby responds, pursuant to Rule 22.037(b), Florida Administrative Code, to the Joint Motion of AT&T Communications of the Southern States, Inc. ("AT&T") and MCI Access Transmission Services, Inc. ("MCImetro" or "MCI") to consolidate the two proceedings initiated by their respective Petitions and states as grounds in support thereof the following:

1. On July 16, 1996 Tracy Hatch, as counsel for AT&T, sent a letter to Ms. Donna Canzano of the Staff of Florida Public Service Commission ("Commission") in which AT&T requested leave to deviate from the Commission's usual requirement that direct testimony be filed at the same time as a Petition seeking arbitration (a copy of this letter is attached as Exhibit A). Mr. Hatch stated that for AT&T to comply with this requirement would "create an extremely difficult logistical problem" (letter, p. 1). AT&T requested that, if it filed its Petition at any time between

July 17, and July 31, it be allowed to delay filing its testimony until July 31st.

2. The Commission granted AT&T's request in the Initial Order Establishing Procedure (Order No. PSC-96-0933-PCO-PTP, issued July 17, 1996). The Order also set the hearing in this matter for October 9 - 11, 1996. Finally, the Order Establishing Procedure stated specifically that the only parties to this case would be BellSouth and AT&T. After analyzing the pertinent portions of the Federal Telecommunications Act of 1996 ("Act"), the Order stated the following:

> Section 252(b)(4) requires this Commission to limit its consideration to the issues raised by the petition and the response. None of these statutory provisions provides for intervenor participation. Accordingly, only BellSouth and AT&T shall be granted full party status for purposes of arbitration of the issues set forth in AT&T's Petition. It follows, therefore, that only AT&T and BellSouth shall be bound by the agreement resulting from the AT&T Petition filed in this proceeding.
>
> (Order, p. 2)

3. AT&T filed its Petition on July 17, 1996. The Petition numbers forty-four pages, has seven Attachments, and was filed along with seventeen volumes of supporting material. AT&T filed its testimony on July 31, 1996, the last day for it to do so under the Order. This filing included the testimony of nine witnesses, which totaled two hundred and thirty-five pages and included thirty-two exhibits. The hearing in this matter will take place little more than two months after this massive filing.

4. On July 30, 1996 AT&T and MCI jointly filed the instant motion. This motion recites that MCI commenced negotiations with

BellSouth on March 26, 1996, that these negotiations continue, and that MCI is acting in good faith. At the same time, the Motion also states that MCI expects that no agreement will be reached and that MCI will file a Petition at some point to request the Commission to arbitrate whatever items remain in dispute.

5. Under the Federal Act, arbitration petitions are to be filed between 135 and 160 days after negotiations commence. § 252(b)(1). Thus, MCI's Petition is due to be filed between August 8 and September 2. In the Joint Petition, MCI provides no further information as to when its Petition might be filed, stating only that it will be sometime on or after August 9, 1996. Nevertheless, AT&T and MCI jointly request in the Motion that, regardless of when this Petition is filed, the docket for the MCI Petition be consolidated with the AT&T docket that is set to be heard October 9 through 11.

6. The Federal Act contains a provision that appears to allow, yet not require, consolidation of proceedings brought pursuant to the Act (Section 252 (1)(g)). This provision of the Federal Act, however, provides little guidance as to when consolidation is appropriate. It is, therefore, logical to look to the guidelines for consolidation that exist in the rules of this Commission. Under the pertinent Commission rule, (Rule 25-22.035(2), Florida Administrative Code), the standard for consolidation of cases is as follows:

> If there are separate matters before the presiding officer which involves similar issues of law or fact, or identical parties, the matters may be consolidated if it appears that consolidation would promote the just, speedy

and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party.

7. Given this standard, the Joint Motion should be denied for three reasons: (1) if granted, the resulting truncated schedule would unduly prejudice BellSouth; (2) The requirements for consolidation have not been met; (3) The motion, if granted, would accomplish the same result as intervention, which has already been denied.

8. First, consolidation would unquestionably prejudice the rights of BellSouth, in that it would be virtually impossible for BellSouth to adequately prepare for a consolidated proceeding to begin on October 9. The motion has at its substantive core the unreasonable request that MCI be guaranteed a hearing date in little more than two months, regardless of when it files its Petition. Assuming that MCI elects not to file until the beginning of September -- which is its right -- there would remain less than forty days until the beginning of the Hearing. During this time, BellSouth would have to prepare both direct and rebuttal testimony (to address first the Petition and the testimony of MCI) and conduct all necessary discovery. Of course, at the same time BellSouth would also have to prepare for the AT&T arbitration. While certainly the timeframe to comply with the federal requirements is short, it is not so short as to warrant placing an untenable burden upon BellSouth.

9. It is equally inappropriate to structure the hearings on these separate petitions so that the burden of the time constraints is placed disproportionaly upon BellSouth. Obviously, the

consolidation of the cases will have little or no effect on AT&T. At the same time, MCI will have only a slight burden. MCI has joined in the making of this motion more than a month before the deadline for filing its petition and testimony. Therefore, MCI will have up to an additional month to determine what it believes to be the issues, to analyze them, and to craft its testimony. Thus, the burden of this limited timeframe would unquestionably fall most heavily on BellSouth.

10. Moreover, as set forth above setting the MCI Petition for an October 9 hearing would also create an extraordinary situation whereby MCI is guaranteed a hearing date no matter when it files its petition and testimony. Therefore, the more of the remaining time to file its petition MCI takes, the less time BellSouth will have to respond and to prepare for the hearing. MCI would, if it so desired, be able to time the filing of its petition to maximize the prejudice to BellSouth.

11. Second, the Joint Motion to Consolidate should also be denied because, even if there were no prejudice to BellSouth, the standard for consolidation has not been met. In many cases, consolidation is deemed appropriate when the parties are identical, a requirement clearly not met in this case. The reason for this was discussed in the administrative context in City of Palm Bay v. Department of Transportation, 588 So. 2d 624 (Fla. 1st D.C.A. 1991). After stating the general rule for consolidation in administrative proceedings (which is the same as Rule 25-22.035(2)), the Court in Palm Bay stated:

> Generally, the administration of justice is best served by consolidation of actions between the same parties involving common questions of law or fact. Consolidation is favored in such situations in the interest of judicial economy, and to avoid the possibility of inconsistent verdicts.

The need to avoid inconsistent results is obvious when the parties are identical. To the extent, however, that each of the instant proceedings arises from negotiations that are distinct, separate and involve different parties, there is no need to make the result of each arbitration exactly like every other. Further, given the fact that each proceeding is to resolve the specific issues raised in arbitration between two specific parties, it is doubtful that it is appropriate, or even possible, to create results that are exactly the same in every instance. All of which leads to another reason that the motion is not well taken.

12. The entire notion of "common" issues in two dockets of this sort is at odds with the nature of an arbitration proceeding. This is not a generic hearing in which a number of parties intervene to state their respective positions, after which the Commission makes a decision that applies to all. Instead, each arbitration is a defined, limited process whereby the Commission attempts to choose a method to best handle the specific issues that the two parties to the arbitration have been unable to resolve on their own.

13. The only way, for example, that the wholesale discount for resold services would truly be a common issue is if AT&T and MCI both have precisely the same position on this issue. Unless these parties intend to jointly prepare their cases, the chances of

this commonality occurring seem extremely remote. AT&T has presented its own recommended discounts based on a model it developed. If MCI has its own model, then MCI and AT&T do not have common positions. If, on the other hand, MCI's model is precisely the same as AT&T's then it is, in effect, simply attempting to intervene (which should not be allowed for the reasons set forth below in Paragraphs 17 and 18).

14. Again, although the wholesale discount may well be a topic that arises in some fashion in each case, one would assume that MCI and AT&T will have taken different positions in their respective negotiations, and that their respective positions will now be supported by separate sets of witnesses who will independently give testimony that will differ in some regards. Thus, the independent positions of these two parties will almost certainly not be truly common, even though both will be at odds with the position of BellSouth on some disputed issues. Again, the purpose of the arbitration is to settle disputes between individual parties. It is not appropriate to triangulate the proceeding so that the position of one party (BellSouth) is pitted against the similar, but not identical positions of two or more opposing parties.

15. Finally, even if one were to accept the movants' definition of a common issue, it is simply impossible at this juncture to know whether any common questions of law and fact outweigh the dissimilar questions that would militate against consolidation. A tribunal has a great deal of discretion in

determining whether a consolidation will serve judicial economy. For example in the previously-cited Palm Bay case, the decision of an administrative agency not to consolidate was upheld even though "the controversy between the parties ... satisfie[d] the criteria for consolidation". Palm Bay at 629. This discretion is typically exercised to weigh the benefits and detriments of consolidation. This balancing cannot occur in any meaningful way, however, when MCI has not yet filed its Petition.

16. The movants state that there are a "large number of common issues anticipated" and they assert (seemingly with little justification) that judicial economy will be served by consolidation. However, there is no credible argument that the parties can know at this point what the ultimate issues between BellSouth and MCI will be because negotiations between these parties continue. Although general areas of disagreement may have been identified, it is simply unknown at this point which issues will ultimately need to be arbitrated.

17. BellSouth submits that it would be inappropriate to order consolidation based on the self-serving "assumption" of the movants that there will be predominant common issues. Moreover, if consolidation were granted at this juncture based on this conjection, then the cases would be heard together on October 9 through 11, even if upon the filing of MCI's Petition, it becomes clear that there are so many factual dissimilarities between the two cases that hearing them together proves cumbersome and wasteful of judicial economy. BellSouth has been unable to find a single

case in Florida in which a tribunal has consolidated cases when one of the cases has not even been filed. For the movants to request the Commission to do so in this instance on nothing more than their self-serving conjecture as to the common issues that might exist in the future is not only inappropriate under the consolidation rule, it would be grossly unfair to BellSouth.

18. Moreover, even before MCI has filed its petition, it is possible to know that the movants' proposal is unworkable in one respect. AT&T has filed the testimony of nine witnesses. BellSouth will have numerous witnesses as well. It will likely be difficult to conclude the hearing as currently structured within the three days that have been provided. The addition of witnesses for MCI, and its participation generally, will make the hearing of this matter within the time provided much more difficult.

19. Third, even if the movants are correct that the common issues will outweigh the dissimilar issues, this does not militate in favor of consolidation in the instant circumstances. Instead, this provides yet another reason that consolidation is inappropriate. As stated previously, the Commission has already ruled that each arbitration is to occur between the two parties involved in a single negotiation. There is to be no intervention. The movant's proposal for consolidation would entail allowing each of them to address all aspects of each and every issue that would (through some process) be determined to be "common" to both MCI and AT&T. If, as they assert, all or most of the issues will be common, then the result would be a proceeding that is

indistinguishable from one in which limited intervention is allowed.

20. In other words, if AT&T and BellSouth have an arbitratable dispute regarding, for example, the price of a particular network element, MCI cannot intervene in this dispute. Under the movant's proposed procedure, however, MCI could assert that to the extent it has a "similar" pricing dispute with BellSouth, the price issue is common and both parties should be allowed to participate fully in the other dispute's with BellSouth on this issue. Again, this would amount to nothing more than a limited version of the intervention that has already been denied.

21. Based on the foregoing, it is clear that there should be no consolidation. As it stands now, it is impossible to know whether the disputed issues raised by AT&T and those that will be raised by MCI are mostly common or mostly dissimilar (although for the reasons stated above the former seems highly unlikely). If the issues are mostly dissimilar, then consolidation is obviously not proper. If the issues are mostly common, then consolidation cannot be ordered without effectively allowing these parties the functional equivalent of the intervention that has already been denied them. Either way, compacting the joint proceeding into an extremely tight time schedule so that MCI's Petition, no matter when filed, would go to hearing in little more than two months from now is not only patently unworkable, it is obviously prejudicial to BellSouth.

WHEREFORE, based on the foregoing, BellSouth respectfully

requests that the Commission deny the Joint Motion To Consolidate. Alternatively, BellSouth requests that the Commission defer ruling on the motion until after MCI has filed its petition.

Respectfully submitted this 6th day of August, 1996.

BELLSOUTH TELECOMMUNICATIONS, INC.

Robert G. Beatty (BL)

ROBERT G. BEATTY
J. PHILLIP CARVER
c/o Nancy H. Sims
150 So. Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 347-5555

William J. Ellenberg (BL)

WILLIAM J. ELLENBERG II
NANCY B. WHITE
Suite 4300
675 W. Peachtree St., NE
Atlanta, GA 30375
(404) 335-0747