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LAW OFFICES
McWHIRTER, REEVES, McGLOTHLIN, DAVIDSON, RIEF & BAKAS, P.A.

100 NORTH TAMPA STREET, SUITE 2800
TAMPA, FLORIDA 33602-512

MAILING ADDRESS: TAMPA
P.O. BOX 3350, TAMPA, FLORIDA 33601-3350

TELEPHONE (813) 224-0866
FAX (813) 221-1854
CABLE GRANDLAW

PLEASE REPLY TO:
TALLAHASSEE

TALLAHASSEE OFFICE
117 S. GADSDEN
TALLAHASSEE, FLORIDA 32301

TELEPHONE (850) 222-2525
FAX (850) 222-5606

LYNWOOD F. ARNOLD, JR.
JOHN W. BAKAS, JR.
C. THOMAS DAVIDSON
STEPHEN O. DECKER
LINDA E. JORGE
VICKI GORDON KAUFMAN
JOSEPH A. McGLOTHLIN
JOHN W. McWHIRTER, JR.
RICHARD OLIVER
RICHARD W. REEVES
FRANK J. RIEF, III
DAVID W. STERN
PAUL A. STRASKE

July 10, 1998

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VIA HAND DELIVERY

Ms. Blanca Bayó
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 971056-TX - In re: Application for certificate to provide alternative local exchange telecommunications service by BellSouth BSE, Inc.

Dear Ms. Bayó:

Enclosed are the original and 15 copies of FCCA, MCI, and AT&T's Response to BSE's Supplemental Justification for Confidentiality to be filed in the above docket.

I have enclosed an extra copy of the above document for you to stamp and return to me. Please contact me if you have any questions. Thank you for your assistance.

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Sincerely,

Joseph A. McGlothlin

JAM/jg
Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for certificate to provide alternative local exchange telecommunications service by BellSouth BSE, Inc.	)	Docket No. 971056-TX Filed: July 10, 1998

RESPONSE OF FCCA, MCI AND AT&T TO BSE'S SUPPLEMENTAL JUSTIFICATION FOR CONFIDENTIALITY

The Florida Competitive Carriers Association (FCCA), MCI Telecommunications Corporation (MCIT) and MCImetro Access Transmission Services, Inc. (MCIm) (hereafter MCI), and AT&T Communications of the Southern States, Inc. (AT&T), by and through their undersigned counsel, respond to the justification for confidentiality that was submitted by BellSouth BSE, Inc. (BellSouth BSE) on July 2, 1998[1], and state:

In its July 2 pleading, BellSouth BSE submits its justification for its claim of confidentiality for an excerpt from a document (the Andersen study) provided to FCCA, MCI, and AT&T during discovery, subject to a Protective Agreement. Astonishingly, in the course of the pleading BellSouth BSE attempts to assign to FCCA, MCI, and AT&T the burden of claiming and providing confidentiality of

[1] While BellSouth BSE captioned its pleading "Response to Correction By FCCA, AT&T, and MCI to BellSouth BSE, Inc.'s 'Request for Confidential Treatment' and Request for Determination That Certain Pages of Supplemental Exhibit Are Not Confidential," within the pleading BSE supplements its Request for Confidential Classification, filed on June 15, 1998. In its June 29, 1998, response, FCCA, MCI, and AT&T noted that BSE's initial request was preliminary in nature and reserved the right to respond to supplemental justification. Rule 25-22.006(3)(b), F.A.C., provides that any party may respond to such a pleading within 14 days.

BellSouth BSE's own document. Contrary to BellSouth BSE's assertions, this burden rests firmly with BellSouth BSE.

BACKGROUND

On May 22, 1998, FCCA filed a Motion to Compel and a Motion to Supplement the Record based on BellSouth BSE's failure to provide a document (the Andersen study) in response to FCCA's Request to Produce prior to the hearing. BellSouth BSE responded to FCCA's motions on May 29. On the same date, all parties entered a Stipulation that provided for access to and the potential use of relevant portions of the document as a supplement to the record. The Stipulation called for an extension of time in which to file briefs, which extension was granted by the Commission on June 3, 1998, and for the preparation of a Protective Agreement, which the parties signed on June 3-4, 1998. In the Protective Agreement, BellSouth BSE and the parties "agreed to disagree" as to the scope of objections available to BellSouth BSE under the circumstances. Protective Agreement, ¶ 5. Pursuant to the Protective Agreement, BellSouth BSE made the Andersen study available to the parties for review.

On June 15, 1998, FCCA, MCI, and AT&T filed a Joint Brief and a Renewed Motion to Supplement Evidentiary Record. Attached to the motion was a 29-page excerpt from the Andersen study and a separate section of arguments relating to the excerpt to the Renewed Motion. A separate section of the Joint Brief contained argument relating the excerpt to the positions of FCCA, MCI, and AT&T on the merits of the issues before the Commission. The excerpt and the arguments relating to the excerpt were submitted in a sealed envelope pending the Commission's ruling on

BellSouth BSE's request for confidentiality. Counsel for FCCA coordinated the identification and sequence of the selected pages with counsel for BSE beforehand, and confirmed with BSE before filing the material on June 15 that BSE would file a pleading seeking confidential handling on the same day. On that date, BellSouth BSE filed a pleading entitled "BellSouth BSE's Request for Confidential Treatment." Within the pleading, BellSouth BSE noted that the excerpt was being filed with a Request for Confidential Treatment as contemplated by the Protective Agreement. However, BellSouth BSE erroneously attributed the claim of confidentiality -- not to BSE -- but to FCCA, MCI, and AT&T.

On June 29, FCCA, MCI, and AT&T filed their Correction to BSE's Request for Confidential Treatment and Request for Determination That Certain Pages of Supplemental Exhibit Are Not Confidential. The purpose of the first section of the pleading was to clarify that, while FCCA, MCI, and AT&T were shielding the excerpts in their pleadings under the terms of the Protective Agreement pending the Commission's ruling on confidentiality, BellSouth BSE -- not FCCA, MCI, and AT&T -- was the entity claiming that the excerpt was confidential. In the second section of the pleading, FCCA, MCI, and AT&T asserted that pages 1 and 2 of the 29-page excerpt from the Andersen study do not meet the statutory requirements for confidential classification. Inasmuch as it appeared to FCCA, MCI, and AT&T that BellSouth BSE's Request for Confidentiality was preliminary in nature and BSE would therefore be filing additional justification, they reserved the right to respond to any supplemental justification offered by BellSouth BSE.

On July 2, BellSouth BSE filed a pleading entitled "Re ponse to Correction by FCCA, AT&T, and MCI to BellSouth BSE, Inc.'s Request fo Confidential Treatment and Request for Determination That Certain Pages of Supplemental Exhibit Are Not Confidential." In the pleading, BellSouth BSE supplemented the justification it offered to support its request for confidential classification.

THE PARTIES HAVE COMPLIED WITH THE PROTECTIVE AGREEMENT

The Protective Agreement of the parties states that the material to be included in posthearing briefs shall be submitted "pursuant to the PSC's rules and procedures governing the use of confidential material." Protective Agreement, ¶ 8. Thus, the Protective Agreement adopted and incorporated the mechanisms of the PSC's rule on confidentiality, rule 25-22.006. In its July 2 pleading, BellSouth BSE acknowledges that FCCA, MCI, and AT&T accurately described the manner in which Commission rule 25-22.006 places the burden of satisfying the rule on the entity claiming confidentiality. BellSouth's Response, p. 3. Despite ti is acknowledgement, in its July 2 pleading BellSouth BSE asserts that FCCA, MCI, an J AT&T have "disavowed" their obligations under the Protective Agreement. BellSouth BSE's claim that the Protective Agreement somehow obligated FCCA, MCI, and A T&T to carry BellSouth BSE's burden of satisfying the confidentiality requirements is as astounding as it is wrong. As the Commission is well aware, rule 25-22.006 is designed to provide an opportunity for the entity who owns the information being filed with the Commission to demo strate that such material should be exempted from the otherwise applicable

public records law, Chapter 119, Florida Statutes. Section 25-22.006(8)(c) governs material submitted in a party's brief. It states:

> When information subject to a claim of confidentiality pursuant to Section 364.183(1) or a request is contained in a party's brief or other post-hearing filing filed with the Commission, the party filing such information shall notify the owner of the information at least three working days prior to the date that the filing will be made. To maintain continued confidential treatment, the party to whom the information belongs shall file, on the same date the brief or other post-hearing filing is filed, either a notice of intent to request confidentiality treatment pursuant to (b) of this subsection, a request for confidential treatment, or a statement that the information is already subject to a request for confidentiality that has been filed with the Commission and the date that the request was filed.

(emphasis supplied)

However, under the rule confidential treatment is available only if the owner of the information provides the Commission with the basis for a reasoned analysis and demonstrates the confidential nature of the material to the Commission's satisfaction. See rule 25-22.006(4).

In its pleading at page 4, BellSouth BSE states that it is difficult to reconcile the care with which FCCA, MCI, and AT&T have guarded the excerpt and related pleadings, on the one hand, with their request that the Commission determine pages 1 and 2 are not entitled to confidentiality, on the other. Contrary to BellSouth BSE's assertion, the actions are perfectly consistent. FCCA, MCI, and AT&T submitted sealed copies of the excerpt and related pleadings on June 15 because that is the mechanism the rule provides (when combined with a claim of confidentiality from the party owning the document) for the temporary shielding of information claimed to be

confidential. That action does not conflict in the least with the June 29 pleading of FCCA, MCI, and AT&T, because the Protective Agreement states that:

> Participation in this Protective Agreement . . . shall not be construed as an admission that the Confidential Information in fact contains confidential, proprietary information. This Protective Agreement is not intended to preclude the PSC from exercising its authority to rule on the confidentiality or admissibility of the Confidential Information.

Thus, the Protective Agreement makes it clear that FCCA, MCI, and AT&T did not acquiesce to BellSouth BSE's contention that the document (which, of course, they had not even seen when they executed the Protective Agreement) was entitled to confidentiality. Indeed, the Protective Agreement explicitly contemplates the possibility of "disputes over confidentiality." Protective Agreement, p. 1. Further, rule 25-22.006, which is incorporated in the Protective Agreement, provides mechanisms and procedural rights designed to enable a party to contest a request for confidentiality.[2]

Therefore, the actions of FCCA, MCI, and AT&T are not "difficult to reconcile." On the other hand, it is <u>impossible</u> to reconcile BellSouth BSE's claim that FCCA, MCI, and AT&T were obligated to <u>claim permanent</u> confidentiality (as opposed to cooperating with BellSouth BSE in the initial maintenance of confidentiality of the information pending a ruling by the Commission) with the terms of the Protective

---

[2] In fact, an early version of the Protective Agreement did not purport to reserve to FCCA, MCI, and AT&T the right to contest the confidentiality of the BellSouth BSE material. FCCA objected to this version. It was replaced with language that explicitly stated they did not concede confidentiality and that also incorporated the procedural mechanisms and procedural rights of rule 25-22.006 by reference.

Agreement, the rules that were embraced by the Protective Agreement, or common sense. For instance, the Protective Agreement required parties to give BellSouth BSE notice of their planned use of the material five days in advance of the filing. Protective Agreement, ¶ 5. The notice provision was obviously intended to give BellSouth BSE adequate time to coordinate the preparation of a notice or request that corresponded to the selected material.

More fundamentally, as the owner of the material, only BellSouth BSE possesses the knowledge/information that would bear on the grounds (or lack thereof) for confidential handling of the information. Only BellSouth BSE is in a position to provide the detailed justification the PSC rule requires. By seeking information in discovery and by advocating the use of the information as evidence, FCCA, MCI, and AT&T acquired neither the responsibility for asserting confidentiality nor the knowledge needed to assert the position. Their obligation under the Protective Agreement is to cooperatively shield the information in pleadings pending a ruling on BSE's claim, and, as BSE acknowledges, they have complied with that obligation.

BELLSOUTH BSE HAS NOT SUPPORTED ITS CONFIDENTIALITY CLAIM FOR PAGES 1 AND 2

As an initial matter, it must be recognized that while genuinely sensitive material must be treated with care, the measures that are designed to guard confidential information obviously and necessarily create obstacles to the deliberative and decision-making processes. Therefore, it is important to assure that a claim of confidentiality is legitimate. The objections of FCCA, MCI, and AT&T to confidential classification relate only to pages 1 and 2 of the excerpt from the Andersen study that is attached

to their Renewed Motion to Supplement Evidentiary Record. BellSouth BSE has not supported its claim that pages 1 and 2 of the supplemental exhibit warrant confidential treatment.

In its July 6 pleading, BellSouth BSE asserts that pages 1 and 2 are protected by section 364.183, Florida Statutes. BellSouth BSE states that the pages contain a discussion of decisions by the FCC and the Eighth Circuit and the potential ramifications of those decisions.

As to the assertion that section 364.183 controls, FCCA, MCI, and AT&T would observe that the section delineates very specific types of information, such as trade secrets, internal audit reports, and bid information. The Andersen study, by BellSouth BSE's own admission, is a voluminous document encompassing more than 1,000 pages. One cannot assume that every page of a 1,000-page study falls within the ambit of the categories listed in section 364.183. BellSouth BSE's entire justification consists of the following sentence: "The pages that Petitioners and Intervenors now assert should be public involve Andersen Consulting's analysis of and [sic] FCC ruling and an 8th Circuit Court of Appeal opinion and the implications arising from that analysis, an analysis which may or may not be representative of BSE's analysis of those rulings and opinions." This does not meet the rule's requirements. BellSouth BSE has simply failed to demonstrate how a discussion of the FCC and Eighth Circuit decisions constitute a proprietary confidential business material.

Finally, while BellSouth BSE argues that the material was prepared by a consultant, that, in and of itself, does not make it confidential. Additionally, it is clear

on the face of page 1 that a portion of page 1 recites a determination regarding BellSouth BSE that was made by BellSouth, not the consultant.

CONCLUSION

BellSouth BSE has not met the requirements for confidential treatment of pages 1 and 2 of the Andersen study. The Commission should deny confidential treatment of those two pages.

Susan J. Berlin /JAM
Susan J. Berlin
MCI Telecommunications Corporation
708 Johnson Ferry Road, Suite 700
Atlanta, Georgia 30342
404/267-6315

Attorneys for MCI Telecommunications Corporation

Joseph A. McGlothlin
Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin, Davidson, Rief & Bakas
117 South Gadsden Street
Tallahassee, Florida 32301
850/222-2525

Attorneys for Florida Competitive Carriers Association

Marsha E. Rule /JAM
Marsha E. Rule
Tracy Hatch
101 North Monroe Street, Suite 700
Tallahassee, Florida 32301
850/425-6365

for AT&T Communications of the Southern States, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of FCCA, MCI, and AT&T's **Response to BSE's Supplemental Justification for Confidentiality** has been furnished by United States mail or hand delivery(*) this 10th day of July, 1998, to the following:

Catherine Bedell*
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Gunter Building, Room 370
Tallahassee, Florida 32399-0850

Martha Carter Brown*
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 390-M
Tallahassee, Florida 32399-0850

Mark Herron*
E. Gary Early*
Akerman, Senterfitt & Eidson, P.A.
216 South Monroe Street
Suite 200
Tallahassee, FL 32301

John Ellis*
Rutledge Law Firm
215 South Monroe Street
Suite 420
Tallahassee, FL 32301

Barbara D. Auger*
Peter Dunbar
Pennington, Moore, Wilkinson
& Dunbar, P.A.
215 South Monroe Street
Tallahassee, FL 32301

Michael McRae
Teleport Communications Group, Inc.
Two Lafayette Centre
1133 Twenty-First Street, N.W.
Suite 400
Washington, D.C. 20036

Carolyn Marek
Time Warner Communications
Post Office Box 210706
Nashville, Tennessee 37221

Joseph A. McGlothlin