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September 22, 1999

Mrs. Blanca S. Bayó
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Florida Public Service Commission
2540 Shumard Oak Boulevard
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Re: Docket No. 990649-TP

Dear Ms. Bayó:

Enclosed are an original and 15 copies of BellSouth Telecommunications, Inc.'s Response to Joint Motion to Strike Testimony. Please file this document in the captioned matter.

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,

J. Phillip Carver (KE)

J. Phillip Carver

AFA
APP
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CMU
CTR
EAG
LEG 2
MAS 5
OPC
PAI
SEC 1
WAW
OTH

Enclosures

cc: All parties of record
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N. B. White
R. Douglas Lackey

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ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	Docket No. 990649-TP
In Re: Investigation into pricing of unbundled network elements	)	Filed: September 22, 1999

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO JOINT MOTION TO STRIKE TESTIMONY

BellSouth Telecommunications, Inc. ("BellSouth") hereby responds, pursuant to Commission Rule 25-22.037(b) to the Joint Motion of nine different parties to this docket (collectively referred to as "Joint Movants") to Strike certain testimony filed by BellSouth witnesses, Varner and Emmerson, and states as follows:

1. In support of the Motion to Strike the testimony of BellSouth witnesses Alphonso J. Varner and Dr. Richard D. Emmerson, the Joint Movants contend: 1) that the testimony should be stricken as irrelevant; 2) that the exhibits to Mr. Varner's testimony should be stricken as hearsay. Joint Movants' contentions regarding hearsay are essentially frivolous. The contentions regarding relevance should ultimately be rejected, but the Motion does raise points that bear consideration by this Commission.

2. Specifically, Joint Movants argue that the testimony at issue is not relevant because it concerns the necessary and impair standard that the FCC must apply to determine the list of unbundled network elements (UNEs) that are to be offered by incumbent LEC. Joint Movants claim that since this determination is to be made by the FCC, testimony of Mr. Varner and Dr. Emmerson that addresses this issue is not relevant. At least some of the identified portions of testimony, however, is of a different sort, and

Joint Movants are wrong to categorize this testimony in the manner described above. Specifically, Mr. Varner's testimony (page 4, lines 17-24) states as follows:

> Q. WHAT IS THE RELEVANCE OF THE 319 PROCEEDING TO THIS DOCKET?
>
> A. The FCC's 319 proceeding is relevant to this docket because the 319 proceeding will ultimately determine the list of UNEs that BellSouth will be required to provide to CLECs. Thus, the pricing standards of the Act and the FCC's pricing rules for UNEs will only apply to those capabilities that the FCC determines should be unbundled.

Obviously, the relationship of the FCC's docket to this docket is pertinent to the inquiry before this Commission. Likewise, Mr. Varner's testimony on page 40, line 22 through page 41, line 12, is similar in nature. More to the point, this particular testimony is given in specific response to the identified issues 3(c) and 3(d). Therefore, this testimony is not as the Joint Movants have categorized it. It is one thing to testify regarding the standards that the FCC should apply, which is what Joint Movants contend that BellSouth has done. It is entirely different to opine as to the relationship between the issues before this Commission and before the FCC. Even if Joint Movants argument concerning the FCC's identification of UNEs were correct, that argument does not apply to the above-identified portions of Mr. Varner's testimony.

3. A portion of the identified testimony of Dr. Emmerson likewise differs from Joint Movants' general characterizations. Specifically, on page 6 of Dr. Emmerson's testimony (lines 6-19), the question is framed in terms of the necessary and impair standard. The answer given by Dr. Emmerson, however, relates to principles of unbundling and the pricing of UNEs that are pertinent to this docket. These specific

portions of the testimony of Mr. Varner and Dr. Emmerson are clearly relevant to the issues in this proceeding.

4. Beyond this, BellSouth agrees that the remaining portions of the testimony of Mr. Varner and Dr. Emmerson identified by Joint Movants do relate to the application of the necessary and impair standard. BellSouth is concerned not only that these issues will find their way in this docket, but they will do so in a way that prejudices BellSouth. The subject testimony on this point is designed to avoid any such prejudice. The Motion charges that "rather than awaiting the FCC's decision, as contemplated by issues 3(c) and 3(d) above, Mr. Varner attempts to involve this Commission in a parallel—and likely pointless—consideration of the issues regarding UNE availability now being debated before the FCC, for resolution by the FCC." (Motion at p. 5). This language seems to imply that Joint Movants believe that the only available UNEs will be those that the FCC requires in its Order. If, indeed, this is the position of these parties, and all other parties to this proceeding agree, then BellSouth will be happy to stipulate to this, and withdraw the testimony at issue (except, of course, for the portions noted above that would remain relevant).

5. The sticking point is that the FCC's Order, when issued, may contain language to the effect that states can identify UNEs in addition to those that will be required by the FCC. If the FCC Order does, in fact, contain this language, then any inquiry along these lines by this Commission must observe the dictates of the Telecommunications Act and the Supreme Court's interpretation of the Act. The testimony of Mr. Varner and Dr. Emmerson is directly relevant to any such inquiry. The procedural difficulty lies in the fact that surrebuttal testimony may be filed by parties on

October 11, 1999 in response to the not yet issued FCC Order. There is no opportunity given in the procedural schedule to respond to this testimony. BellSouth is concerned that other parties will file surrebuttal testimony requesting that this Commission identify additional UNEs beyond those required by the FCC. If this occurs, BellSouth would have no opportunity to file further testimony to respond to these contentions.

6. Joint Movants make much of the fact that they have previously consented to withdraw an issue that would have identified UNEs in advance of the issuance of the FCC's Order. (Motion, p. 3). Their argument strongly implies that they are not going to attempt to have this Commission identify in this proceeding additional UNEs beyond those on the FCC's list. If this is the case, then BellSouth believes that the Joint Movants should have no difficulty stipulating to this effect. Again, in this event, BellSouth would agree to withdraw the subject testimony and exhibits. If Joint Movants refuse to stipulate, then only one inference can be drawn from this refusal: that the Motion to Strike is a stratagem to prevent BellSouth from commenting on the standard that should be applied in considering whether any particular item is a UNE in order to clear the way for the filing by Joint Movants in the surrebuttal phase of what would then be uncontroverted testimony. The prejudice to BellSouth if this stratagem is allowed is obvious.

7. Beyond this, Joint Movants also make the rather odd argument that Mr. Varner, a BellSouth policy witness, should not be allowed to attach to his testimony written statements of BellSouth policy that have been filed with the FCC because this somehow constitutes hearsay. If Joint Movants are willing to stipulate as BellSouth suggests, then BellSouth will voluntarily withdraw the testimony at issue as well as these

exhibits, and this contention regarding admissibility will be moot. If, as BellSouth suspects, the Joint Movants are not willing to stipulate, then the legal issue of whether the exhibits to Mr. Varner's testimony are appropriate must be addressed.

8. Assuming for the sake of argument that the identified exhibits are hearsay, they nevertheless should be admitted. The Joint Movants pay lip service to the fact that the rules of evidence are construed liberally in administrative matters, then proceed to argue for a harsh, essentially nonsensical application of these rules. Moreover, the approach urged by Joint Movants simply ignores the common practice before this Commission.[1] It is common practice for witnesses to appear before this Commission on behalf of a corporate entity and to act, in effect, as a corporate representative. Under the approach typically employed by this Commission, these witnesses are allowed to testify about facts that are within their general knowledge, even if they do not in every instance have this knowledge first hand. Again, this is a routine practice that all parties are aware of, and, in fact, utilize in the development and filing of testimony with this Commission. It is also a sensible practice because it allows hearings on complex issues with numerous intervening parties to be conducted in a manageable fashion. Joint Movants simply ignore this standard practice and argue that an extremely strict application of the hearsay rule should be applied in this single instance. If Joint Movants prevail, this will result in holding BellSouth to an unprecedented standard that is never observed in Commission proceedings, either by the moving parties, or, for that matter, by anyone.

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[1] It is noteworthy that in the cases cited by the Joint Movants in ostensible support of the extremely general proposition that hearsay may be disallowed in some administrative cases, not a single Public Service Commission case is cited.

9. To give an example of how Joint Movants approach would function, in Phase II of this proceeding, many of the parties, including presumably a number of the Joint Movants, will submit cost studies. Cost studies are typically supported by the testimony of as few as one witness and generally no more than three or four witnesses. If Joint Movants' argument for a strict construction of the hearsay rule in Commission proceedings were sustained, then this approach would become impossible. Cost studies would have to be supported by the testimony of tens, and perhaps hundreds, of witnesses for each party. Every input would have to be sponsored by the person who has direct personal knowledge of the facts that underlie the input. The developers of every pertinent piece part of the cost model would have to file testimony, as would those persons responsible for running the respective model, compiling the results, and filing them with the Commission.

10. Testimony concerning cost models is only one example of the ridiculous results that would occur if the Joint Movants approach to hearsay were adopted. The matters before this Commission are too complex, and the information considered by the Commission and by the Staff too voluminous and complicated, to insist upon a slavish adherence to a strict interpretation of the hearsay rule. This has never been done in the past, and BellSouth submits that if Joint Movants have their way, even they will find it impossible to comply with this rule in Phase II of the proceeding (or in any future proceeding).

11. Perhaps one of the few points in Joint Movants' hearsay argument with which BellSouth agrees is the statement that issues concerning hearsay should be governed by "common sense." (Motion, p. 9). Regrettably, common sense is sorely

lacking in the approach urged by Joint Movants. From a "common sense" standpoint, the general difficulty with admitting hearsay is that it sometimes entails unreliable information about which opposing parties have no opportunity to conduct cross examination. In the cost study scenario discussed above, evidence that Joint Movants would label as hearsay is allowed because the witness that takes the stand is expected to be knowledgeable enough to speak on behalf of both the corporate entity sponsoring his or her testimony and the other persons involved in the development of the cost study. Our situation is fundamentally the same. Mr. Varner can be cross examined about any exhibit that he has attached to his testimony. Moreover, if discovery conducted during the almost three months between now and the date of the hearing reveals that Mr. Varner lacks knowledge of some attachment to his testimony, then the Joint Movants have the opportunity to file a proper Motion to Strike at that time. Alternatively, they may conduct discovery from representatives of BellSouth who are more knowledgeable. The practical "common sense" concerns that generally support barring from admission hearsay evidence are notably lacking in our case.

12. Further, the fallacy of Joint Movants' position is even more evident given the fact that Mr. Varner is a policy witness. Mr. Varner is a witness that is knowledgeable about BellSouth's policy; his testimony has been prefiled to set forth that policy. Attached to his testimony is a written, somewhat more detailed, rendition of BellSouth's policy[2] as filed before another tribunal. The contention of Joint Movants that attaching these comments to Mr. Varner's testimony somehow makes it hearsay is ridiculous. In point of fact, Mr. Varner directly participated in the development of the

documents identified as Exhibits 1, 2 and 4. Mr. Varner has simply attached to his testimony a more detailed version of BellSouth's policy (of which he is knowledgeable and which he helped develop) rather than including this voluminous information in the body of his testimony. If the exact BellSouth policy positions contained in the attachments were included in the body of Mr. Varner's testimony, this would effectively moot Joint Movants' argument--but the reality of what has been filed, Mr. Varner's knowledge concerning what has been filed and Joint Movants' opportunity to conduct discovery regarding these filings would remain precisely the same. This fact demonstrates conclusively that the argument of Joint Movants is an implausible attempt to elevate form over substance—and common sense.

13. For the reasons set forth above, the Joint Movants' hearsay contention is totally lacking in merit. As to their contention that BellSouth has filed testimony on matters that go beyond the issues in the case, that contention depends completely upon what issues are ultimately before this Commission, i.e., what is raised on surrebuttal. Again, if Joint Movants are willing to agree to stipulate that the only UNEs that are at issue in this docket are those required by the FCC in its soon-to-be-published Order, then BellSouth will voluntarily withdraw the subject testimony and exhibits. Otherwise, it is necessary to allow this testimony to remain in the docket in order to prevent the very real possibility that BellSouth will be prejudiced by testimony that these Joint Movants (or other parties) may file on surrebuttal.

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[2] One attachment (Exhibit 3) includes Comments of an organization of which BellSouth is a member, and with which BellSouth concurs. All other Exhibits have been filed either individually or jointly by BellSouth.

14. As to Joint Movants' request for Oral Argument, BellSouth believes that the Commission has before it adequate written filings to allow it to make a well informed decision. For this reason, Oral Argument is not necessary. If the Commission, however, believes that Oral Argument would be helpful, then BellSouth has no objection to appearing for this purpose.

WHEREFORE, BellSouth respectfully requests the entry of an order denying Joint Movants' Motion to Strike.

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