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January 12, 2000

Ms. Blanco Bayo, Director
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Re: Petition of BellSouth Telecommunications, Inc. for Arbitration of the Interconnection Agreement Between Time Warner Telecom of Florida, L.P., pursuant to Section 252 (b) of the Telecommunications Act of 1996 -- Docket No. 991605 -TP

Dear Ms. Bayo:

Enclosed for filing please find an original and fifteen copies of Time Warner Telecom of Florida, L.P.'s Rebuttal Testimony of Don J. Wood for the above-referenced docket. You will also find a copy of this letter enclosed. Please date-stamp this copy to indicate that the original was filed and return a copy to me.

If you have any questions regarding this matter, please feel free to contact me. Thank you for your assistance in processing this filing.

Respectfully,

PENNINGTON, MOORE, WILKINSON,
BELL & DUNBAR, P.A.

Peter M. Dunbar
Peter M. Dunbar

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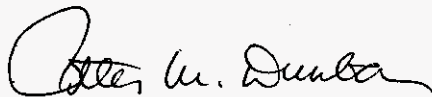
CERTIFICATE OF SERVICE
DOCKET NO. 991605-TP

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been served
by U.S. Mail on this 12th day of January, 2000, to the following parties of record:

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TIME WARNER TELECOM OF FLORIDA, L.P.
REBUTTAL TESTIMONY OF DON J. WOOD
BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
DOCKET NO. 991605-TP
JANUARY 12, 2000

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Don J. Wood. My business address is 914 Stream Valley Trail, Alpharetta, Georgia 30022.

Q. ARE YOU THE SAME DON J. WOOD WHO PRESENTED DIRECT TESTIMONY ON BEHALF OF TIME WARNER IN THIS PROCEEDING?

A. Yes.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. The purpose of my rebuttal testimony is to respond to the position of BellSouth as set forth in the direct testimony of Alphonso J. Varner. In his testimony, Mr. Varner asks this Commission to reach a conclusion that (1) completely ignores substantial portions of the FCC's ISP Order, even though Mr. Varner holds the FCC Order out as dispositive of the issue in this proceeding, and (2) would, in a discriminatory and completely arbitrary fashion, treat Time Warner differently than other CLECs operating in Florida pursuant to interconnection agreements with BellSouth (notably Media One Florida Telecommunications, Inc. and ICG Telecom Group, Inc.). In direct contrast, Time Warner is asking this Commission to reach a decision in this proceeding that (1) considers the

1 FCC ISP Order in its entirety, without Mr. Varner's selected omissions of
2 numerous relevant passages, and (2) would treat Florida CLECs consistently,
3 permitting Time Warner to operate on the same footing as other CLECs when
4 dealing with BellSouth on this issue. In addition, Time Warner's proposal has
5 the advantages of being fully consistent with both the applicable legal
6 requirements and sound public policy.

7

8 Q. AT PAGE 4 OF HIS TESTIMONY, MR. VARNER ARGUES THAT THE
9 ISSUE OF THE APPLICABILITY OF RECIPROCAL COMPENSATION
10 TO CALLS THAT ARE MADE TO ISPS "IS NOT AN APPROPRIATE
11 ISSUE FOR A SECTION 252 ARBITRATION." IS HE CORRECT?

12 A. No. Mr. Varner's argument on this point illustrates a central theme of his
13 testimony: While citing to selected portions of the FCC's ISP Order that, in
14 isolation, support certain of his arguments (though not his conclusions), Mr.
15 Varner completely ignores the bulk of the FCC ISP Order. When the complete
16 ISP Order is considered, it becomes clear that Mr. Varner's conclusions are
17 inconsistent with the FCC's decision.

18

19 In direct contrast to Mr. Varner's assertion, the FCC has stated that this issue
20 has been previously addressed in Section 252 arbitrations, and that this forum
21 is the correct one for resolution of the issue going forward. At paragraph 26,
22 the FCC specifically notes that the issue has been addressed by the states:

23 *[T]he Commission currently has no rule addressing the*
24 *specific issue of inter-carrier compensation for ISP-bound*
25 *traffic. In the absence of a federal rule, state commissions*

1 *that have had to fulfill their statutory obligation under section*
2 *252 to resolve interconnection disputes between incumbent*
3 *LECs and CLECs have had no choice but to establish an*
4 *inter-carrier compensation mechanism and to decide whether*
5 *and under what circumstances to require the payment of*
6 *reciprocal compensation...A state commission's decision to*
7 *impose reciprocal compensation obligations in an arbitration*
8 *proceeding – or a subsequent state commission decision that*
9 *those obligations encompass ISP-bound traffic – does not*
10 *conflict with any Commission rule regarding ISP-bound*
11 *traffic.*

12
13 The FCC is also clear how the issue is to be addressed going forward. In
14 paragraph 28, the FCC states that “Until adoption of a final [federal] rule, state
15 commissions will continue to determine whether reciprocal compensation is
16 due for this traffic.” The FCC goes on in paragraph 30 to make it clear that
17 “[w]e tentatively conclude that, as a matter of federal policy, the inter-carrier
18 compensation for this interstate telecommunications traffic should be governed
19 prospectively by interconnection agreements negotiated and arbitrated under
20 sections 251 and 252 of the Act” (emphasis added).

21
22 As a result, Mr. Varner’s assertion that this issue is not “appropriate” for a
23 section 252 arbitration is simply wrong. Time Warner’s requested resolution
24 of the issue is fully consistent with the language of FCC ISP Order, however:
25 Time Warner is asking this Commission to determine that, until an FCC rule

1 regarding this traffic takes effect, that the existing reciprocal compensation rate
2 should continue to be applied and that no exclusion be created for calls that
3 happen to be made to ISPs.

4
5 Q. AT PAGE 6 OF HIS TESTIMONY, MR. VARNER STATES THAT
6 “PAYMENT OF RECIPROCAL COMPENSATION FOR ISP-BOUND
7 TRAFFIC IS INCONSISTENT WITH THE LAW.” IS HE RIGHT?

8 A. No. While Mr. Varner offers no citation to any authority to support this
9 sweeping conclusion, he does refer repeatedly to the FCC’s ISP Order in his
10 testimony. In fact, in the second question and answer on page 6 of his
11 testimony, Mr. Varner states that BellSouth’s position -- including,
12 presumably, his assertion that “payment of reciprocal compensation for ISP-
13 bound traffic is inconsistent with the law” -- is “supported by” the FCC’s ISP
14 Order.

15
16 Even a cursory review of the FCC ISP Order reveals that this is simply not the
17 case. The FCC has been quite clear that (1) parties may agree that
18 compensation is to apply to traffic that is bound for an ISP, and that, (2) absent
19 such an agreement, a state commission may order that reciprocal compensation
20 apply to these calls. Rather than being “unlawful,” payment of reciprocal
21 compensation is specifically contemplated by the FCC under these
22 circumstances.

23
24 In paragraphs 21 through 24, the FCC’s language reveals Mr. Varner’s error
25 regarding voluntary agreements and the interpretation of those agreements by

1 state commissions:

2 *Currently, the Commission has no rule governing inter-*
3 *carrier compensation for ISP-bound traffic. In the*
4 *absence of such a rule, parties may voluntarily include*
5 *this traffic within the scope of their interconnection*
6 *agreements...Where parties have agreed to include this*
7 *traffic within their section 251 and 252 agreements,*
8 *they are bound by those agreements, as interpreted and*
9 *enforced by the state commissions ...[I]n the absence*
10 *of any contrary Commission rule, parties entering into*
11 *interconnection agreements may reasonably have*
12 *agreed, for the purposes of determining whether*
13 *reciprocal compensation should apply to ISP-bound*
14 *traffic, that such traffic should be treated in the same*
15 *manner as local traffic. When construing the parties'*
16 *agreements to determine whether the parties so agreed,*
17 *state commissions have the opportunity to consider all*
18 *the relevant facts, including the negotiation of the*
19 *agreements in the context of this Commission's*
20 *longstanding policy of treating this traffic as*
21 *local...For example, it may be appropriate for state*
22 *commissions to consider such factors as whether*
23 *incumbent LECs serving ESPs (including ISPs) have*
24 *done so out of intrastate or interstate tariffs; whether*
25 *revenues associated with those services were counted*

1 as intrastate or interstate revenues; whether there is
2 any evidence that incumbent LECs or CLECs made any
3 effort to meter this traffic or otherwise segregate it
4 from local traffic, ...and whether, if the ISP traffic is not
5 treated as local and subject to reciprocal
6 compensation, incumbent LECs and CLECs would be
7 compensated for this traffic (emphasis added).

8
9 The language of paragraph 25 of the FCC ISP Order reveals the error in Mr.
10 Varner's assertion regarding decisions (including prospective decisions) by a
11 state commission in the absence of such an agreement by the parties:

12 *Even where parties to interconnection agreements do*
13 *not voluntarily agree on an inter-carrier compensation*
14 *mechanism for ISP-bound traffic, state commissions*
15 *nonetheless may determine in their arbitration*
16 *proceedings at this point that reciprocal compensation*
17 *should be paid for this traffic...However, any such*
18 *arbitration must be consistent with governing federal*
19 *law. While to date the Commission has not adopted a*
20 *specific rule governing the matter, we note that our*
21 *policy of treating ISP-bound traffic as local for*
22 *purposes of interstate access charges would, if applied*
23 *in the separate context of reciprocal compensation,*
24 *suggest that such compensation is due for that traffic.*

25

1 In summary, Mr. Varner's assertion that payment of reciprocal compensation
2 for calls that happen to be made to an ISP would somehow be "unlawful" flies
3 in the face of the FCC ISP Order which describes in detail two scenarios in
4 which such compensation may be ordered by a state commission. In addition,
5 the FCC points out that, while a federal rule is not yet in effect, the application
6 of the FCC's "longstanding policy of treating this traffic as local" by a state
7 commission suggests a conclusion that reciprocal compensation is due for calls
8 made to ISPs.

9
10 Q. AT PAGES 6 AND 7 OF HIS TESTIMONY, MR. VARNER ARGUES
11 THAT THE FCC'S DETERMINATION THAT IT HAS JURISDICTION
12 OVER THE TRAFFIC IN QUESTION ALSO DISPOSES OF THE ISSUE
13 OF WHETHER RECIPROCAL COMPENSATION IS APPLICABLE. IS HE
14 CORRECT?

15 A. No. This is perhaps the most significant flaw both in Mr. Varner's testimony
16 and in the logical basis for BellSouth's position. It is certainly no secret that
17 the FCC has sought to establish and retain jurisdiction of information services
18 generally and the Internet specifically. In paragraph 6 of the ISP Order, the
19 FCC made its objectives clear:

20 *The Internet also is developing into a powerful instrumentality*
21 *of interstate commerce. In 1997, we decided that retaining the*
22 *ESP exemption would avoid disrupting the still-evolving*
23 *information services industry and advance the goals of the*
24 *1996 Act to 'preserve the vibrant and competitive free market*
25 *that presently exists for the Internet and other interactive*

1 *computer services.’ This Congressional mandate underscores*
2 *the obligation and commitment of this Commission to foster*
3 *and preserve the dynamic market for Internet-related services.*
4 *We emphasize the strong federal interest in ensuring that*
5 *regulation does nothing to impede the growth of the Internet.*

6

7 It is unclear whether the FCC could have met its “Congressional mandate” to
8 oversee and foster the growth of the Internet without declaring that calls that
9 happen to be made to ISPs -- calls that otherwise would have been defined as
10 local and intrastate -- should be considered instead as interstate traffic that is
11 nevertheless being treated as local and intrastate for all purposes other than
12 establishing regulatory jurisdiction. Fortunately, this commission can set aside
13 this issue and focus on the conclusion that BellSouth and Mr. Varner seek to
14 draw from the FCC’s assertion of jurisdiction. Specifically, the question
15 before the commission is: Does the FCC’s assertion of jurisdiction over ISP-
16 bound traffic mandate that this traffic not be subject to reciprocal
17 compensation? BellSouth’s entire case is based on a presumed FCC mandate
18 of an answer in the affirmative. The answer, however, both in terms of
19 common sense and the explicit language of the ISP Order, is “no”.

20

21 BellSouth’s position is undermined by the language of the very first paragraph
22 of the FCC’s ISP Order: “[W]e conclude that ISP-bound traffic is
23 jurisdictionally mixed and appears to be largely interstate. This conclusion,
24 however, does not in itself determine whether reciprocal compensation is due
25 in any particular instance” (emphasis added). The FCC continues at paragraph

1 20 to state that “Our determination that at least a substantial portion of dial-up
2 ISP-bound traffic is interstate does not, however, alter the current ESP
3 exemption....Nor, as we discuss below, is it dispositive of interconnection
4 disputes currently before state commissions.”

5
6 The FCC ultimately reaches two main conclusions in its ISP Order. First, it
7 concludes that while jurisdictional analysis is less than “straight-forward” in
8 the context of the Internet because of the uncertainties created by packet
9 switching (paragraph 18), it has nevertheless determined that ISP-bound traffic
10 is “largely” interstate. As the FCC points out in paragraph 18, “Section 2(a)
11 of the Act grants the Commission jurisdiction over ‘all interstate and foreign
12 communication by wire’.”

13
14 Second, however, the FCC ISP Order makes it quite clear that the issue of
15 whether reciprocal compensation is due for this traffic need not be decided by
16 a state commission simply based on the FCC’s assertion of jurisdiction. As
17 described above, paragraphs 21 through 25 of the ISP Order give the state
18 commissions explicit authority to require the payment of reciprocal
19 compensation for this traffic, and even note that the application of the FCC’s
20 “longstanding policy of treating this traffic as local” by a state commission
21 would suggest that reciprocal compensation should apply. There is no basis
22 in the FCC’s ISP Order for Mr. Varner’s and BellSouth’s conclusion that
23 because of the FCC’s determination that ISP-bound traffic is “largely
24 interstate” for purposes of establishing jurisdiction, reciprocal compensation
25 cannot be appropriate or cannot legally be applied to this traffic. In fact, the

1 FCC ISP Order plainly states the opposite.

2

3 Q. IN SUPPORT OF BELLSOUTH'S STRAINED INTERPRETATION OF
4 THE FCC'S ISP ORDER, MR. VARNER MAKES A NUMBER OF
5 STATEMENTS THAT ARE PURPORTEDLY FACTUAL REGARDING
6 THE NATURE OF ISP-BOUND TRAFFIC. ARE HIS STATEMENTS
7 ACCURATE?

8 A. No. Mr. Varner makes several statements that are factually incorrect.

9 First, he states at page 7 that "[t]he FCC makes plain that no part of an ISP-
10 bound communication terminates at the facilities of an ISP." In fact, the FCC
11 makes no such statement. Mr. Varner is confusing "ISP bound traffic" with
12 "Internet bound traffic." In reality, a significant portion of ISP-bound traffic
13 does terminate at the ISP, simply because the user is utilizing services provided
14 by the ISP and is not attempting to access the Internet. In addition, an end
15 user's "connection" to a "distant web site" will also terminate at the ISP if the
16 end user has accessed that web site before and does not refresh the page.
17 While I have not performed a study of a large number of users, the experience
18 in my office indicates that a significant portion (greater than 50%) of ISP-
19 bound traffic probably does terminate at the ISP (this discussion sets aside the
20 issue, as addressed by the FCC, of whether the packet switching on the far side
21 of the ISP's server can ever be meaningfully defined as a "call"). For these
22 same reasons, Mr. Varner's statement (also at page 7) that "ISP-bound traffic
23 'terminates' only at distant websites" is likewise simply wrong, although it is
24 perhaps revealing that even Mr. Varner felt the need to qualify his statement
25 by placing the word "terminates" in quotation marks.

1 At page 6, Mr. Varner also argues that the nature of ISP-bound traffic must be
2 determined by examining both the originating location and the point of “final
3 termination.” As even the FCC correctly points out, the identification of such
4 a point of “final termination” is elusive, unless, of course, it is identified as the
5 ISP’s server. Paragraph 18 of the FCC’s ISP Order observes that “[a]n Internet
6 communication does not necessarily have a point of ‘termination’ in the
7 traditional sense. An Internet user typically communicates with more than one
8 destination point during a single Internet call, or ‘session,’ and may do so
9 either sequentially or simultaneously...Further complicating the matter of
10 identifying the geographical destinations of Internet traffic is that the contents
11 of popular websites are being stored in multiple servers throughout the
12 Internet, based on ‘caching’ or website ‘mirroring’ techniques.” Mr. Varner’s
13 point of “final termination” is simply meaningless in the context of packet
14 switching and the Internet.

15

16 Q. AT PAGE 6 OF HIS TESTIMONY, MR. VARNER ARGUES THAT THE
17 PAYMENT OF RECIPROCAL COMPENSATION FOR ISP-BOUND
18 TRAFFIC IS “NOT SOUND PUBLIC POLICY.” IS HIS REASONING
19 VALID?

20 A. It is impossible to evaluate Mr. Varner’s reasoning regarding the issue of
21 public policy, because his testimony includes no discussion whatsoever in
22 support of this statement. Public policy is a valid concern of the commission
23 when resolving this issue in this proceeding, however. As I described in my
24 direct testimony, public policy concerns dictate the payment of reciprocal
25 compensation for this traffic. If reciprocal compensation does not apply to this

1 traffic, CLECs like Time Warner will be required to complete calls originated
2 by BellSouth end users, incur the cost of doing so, and receive no
3 compensation from BellSouth for providing this service. It is probably for this
4 reason that when listing possible factors that a state commission might
5 consider when deciding this issue, the FCC explicitly including the following
6 in paragraph 24: "For example, it may be appropriate for state commissions to
7 consider...whether, if ISP traffic is not treated as local and subject to reciprocal
8 compensation, incumbent LECs and CLECs would be compensated for this
9 traffic."

10

11 In addition, since reciprocal compensation rates are to have been based on the
12 underlying cost, BellSouth should be indifferent whether it incurs the cost of
13 completing a call on its own network or incurs the cost through a cost-based
14 rate paid to a CLEC, such as Time Warner. As long as reciprocal
15 compensation is applicable to all such traffic, it also serves as an important
16 check on the incumbent LEC's cost studies; BellSouth will not have the
17 incentive to overstate the cost if, but only if, reciprocal compensation is applied
18 to this traffic.

19

20 Q. PLEASE SUMMARIZE YOUR REBUTTAL TESTIMONY.

21 A. Mr. Varner makes a series of arguments while citing the FCC's ISP Order as
22 the primary authority. A careful review of that Order, however, reveals that it
23 does not support the basic tenets of Mr. Varner's testimony or the BellSouth
24 position on the single issue in this proceeding. Contrary to Mr. Varner's
25 assertion, the FCC has concluded that section 252 arbitrations before state

1 commissions are the proper forum for the resolution of this issue, including its
2 resolution on a prospective basis. Mr. Varner's assertion that the payment of
3 reciprocal compensation for ISP-bound traffic is unlawful is directly at odds
4 with the FCC Order, which describes how a state commission may find that
5 such compensation is applicable (on a retrospective or prospective basis), and
6 ignores a clear statement by the FCC that if its "longstanding policy of treating
7 this traffic as local" is applied by a state commission in this context, the
8 payment of reciprocal compensation is suggested. The factual foundation of
9 Mr. Varner's arguments are flawed in part because he improperly equates
10 "ISP-bound traffic" with "Internet-bound traffic," and in part because his
11 testimony does not accurately reflect how the Internet works. Finally, Mr.
12 Varner's argument that the payment of reciprocal compensation for traffic that
13 happens to be bound for an ISP is not sound public policy is unsupported and
14 unsupportable. As I described in some detail in my direct testimony, the
15 application of reciprocal compensation to this traffic serves to further several
16 important public interest goals.

17
18 Most importantly, however, Mr. Varner's assertion -- the linchpin of
19 BellSouth's position -- that the conclusion by the FCC that it had jurisdiction
20 over this traffic somehow constituted a summary judgement of the issue of the
21 applicability of reciprocal compensation ignores clear language in the FCC's
22 Order that it did not intend for this to be the case. The FCC made it clear at
23 several points in the ISP Order that state commissions like this one currently
24 have, and will continue to have, the responsibility and authority to determine
25 whether such compensation should be paid. This state authority is constrained

1 by federal rules, and the commission will have to apply any FCC rule
2 regarding reciprocal compensation for ISP-bound traffic when such rule takes
3 effect. In the interim, the Commission is free, pursuant to the FCC, to exercise
4 its judgement and require that compensation be paid. As I stated in my direct
5 testimony, the most prudent course of action is to apply, as an interim measure,
6 the most likely outcome of the FCC's rulemaking. As described above, the
7 FCC has clearly stated that if this Commission applies the FCC's longstanding
8 policy of treating ISP-bound traffic as local (as identical calls that do not
9 happen to be made to ISPs are treated), it will reasonably conclude that
10 reciprocal compensation should be applied.

11

12 Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

13 A. Yes.