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January 19, 2000

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket No.: 991838-TP

Dear Ms. Bayo:

On behalf of BlueStar Networks, Inc., enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ **BlueStar Networks, Inc.'s Response to BellSouth Telecommunications, Inc.'s Motion to Remove Issues [sic] from Arbitration**

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me in the envelope provided. Thank you for your assistance.

Yours truly,

Vicki Gordon Kaufman

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Vicki Gordon Kaufman

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MCWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, DECKER, KAUFMAN, ARNOLD & STEEN, P.A.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re:

Petition for Arbitration of BlueStar
Networks, Inc. with BellSouth
Telecommunications, Inc. Pursuant to the
Telecommunications Act of 1996

Docket No. 991838-TP

Filed: January 19, 2000

**BLUESTAR NETWORKS, INC.'S RESPONSE TO
BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION
TO REMOVE ISSUES [sic] FROM ARBITRATION**

BlueStar Networks, Inc. (BlueStar), through its undersigned counsel, submits its response to BellSouth's Motion to Remove Issues [sic] from Arbitration and states that such motion should be denied.

On December 7, 1999, BlueStar filed its Petition asking the Commission to arbitrate disputes that had arisen during negotiations between BlueStar and BellSouth Telecommunications, Inc. (BellSouth) regarding the terms and conditions of an interconnection agreement. Among the items that the parties could not negotiate was BlueStar's request that the interconnection agreement provide for consequences in the event BellSouth failed to adhere to appropriate performance measures.¹

Issue No. 14 in BlueStar's Petition relates to BellSouth's refusal to include in the agreement consequences for its failure to perform under the agreement. Originally, BlueStar had asked BellSouth to include the liquidated damages provision recently approved and adopted by the Public Utility Commission of Texas. Subsequently, BlueStar learned that BellSouth has voluntarily offered

¹ Originally, the parties could not agree on the inclusion of performance measures in the interconnection agreement. However, BellSouth has now agreed to include its Service Quality Measures (SQMs) in the interconnection agreement.

such a provision in a Tennessee arbitration.² It is that provision which BlueStar seeks to include in its agreement.³

On January 14, 2000, BellSouth filed its motion to exclude this issue. BellSouth bases its motion on previous rulings by the Commission that it has no authority to award damages.

With regard to the Commission's orders cited by BellSouth, BlueStar acknowledges that the Commission has determined that it cannot award damages. However, to the extent this tenet has served as a basis to exclude issues relating to BellSouth's refusal to negotiate terms, BlueStar respectfully submits that the current situation poses a different question. BlueStar is not asking the Commission to award damages; BlueStar is asking the Commission to require that the parties include terms and conditions in an interconnection agreement that will deter BellSouth from non-performance.

The distinction lies in the difference between adjudicating the damages occasioned by a past breach and the Commission's authority to prevent anti-competitive behavior. In this arbitration, the Commission is implementing the Telecommunications Act of 1996, the objective of which is to facilitate competition in the local exchange market. New entrants who avail themselves of an ILEC's facilities as they attempt to build relationships with customers are dependent on the quality of the response they receive from the ILEC. The ILEC has every incentive to frustrate the intent of the Act by favoring its own operations over that of the new entrant. Unless the interconnection agreement has teeth, the new entrant will be exposed to the possibility of activities designed to place the ALEC at a competitive disadvantage. Standard consequences are needed to counter that incentive and to facilitate the competition that is the objective of the Act. Section 364.01(4)(g), Florida Statutes,

² It is BlueStar's understanding that the damages provision which BellSouth offered in Tennessee is the same one it has offered to the Federal Communications Commission (FCC).

³ BlueStar suggests this issue: Should the interconnection agreement include the liquidated damages provisions filed by BellSouth in Tennessee in Docket Nos. 99430 and 99377 as Exhibit No. AJV-1 which relate to BellSouth's Service Quality Measurements (SQMs)?

empowers the Commission to ensure that all telecommunications companies are treated fairly, by preventing anti-competitive behavior. The Commission can exercise that power by requiring the parties to incorporate standards and effective remedies in their agreement.

Further, the damages provision which BlueStar seeks to include in its interconnection agreement has been proffered by BellSouth in at least two other forums of which BlueStar is aware-- the state of Tennessee and the FCC. Thus, it would appear that BellSouth itself recognizes the necessity of including provisions which will help ensure performance in interconnection agreements.

Finally, ordinary principles of contract law provide that a contract may include liquidated damages. Therefore, the federal Telecommunications Act permits liquidated damages.

WHEREFORE, BlueStar requests that the Commission deny BellSouth's Motion to Remove Issues [sic] from Arbitration.



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Attorneys for BlueStar Networks, Inc.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of BlueStar Networks, Inc.'s foregoing Response to BellSouth Telecommunications, Inc.'s Motion to Remove Issues [sic] From Arbitration has been furnished by (*) hand delivery this 19th day of January, 2000, to the following:

(*) Donna Clemons
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Gunter Building, room 370
Tallahassee, Florida 32399-0850

(*) Phil Carver (also served by fax)
(*) Michael Goggin (also served by fax)
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, #400
Tallahassee, Florida 32301-1556


Vicki Gordon Kaufman