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Marceil Morrell*
Assistant Vice President &
Associate General Counsel
Region Operations-East

Anthony P. Gillman*
Assistant General Counsel

Florida Region Counsel**
Kimberly Caswell
M. Eric Edgington
Ernesto Mayor, Jr.
Elizabeth Biemer Sanchez

* Certified in Florida as Authorized House Counsel
** Licensed in Florida

GTE SERVICE CORPORATION

One Tampa City Center
201 North Franklin Street (33602)
Post Office Box 110, FLTC0007
Tampa, Florida 33601-0110
813-483-2606
813-204-8870 (Facsimile)

November 18, 1999

Ms. Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 990649-TP
Investigation into Pricing of Unbundled Network Elements

Dear Ms. Bayo:

Please find enclosed an original and 15 copies of the Joint Motion of GTE Florida Incorporated and BellSouth Telecommunications, Inc. To Strike the Surrebuttal Testimony of Don J. Wood on Behalf of AT&T Communications of the Southern States, Inc. and MCI WorldCom, Inc. for filing in the above matter. Service has been made as indicated on the Certificate of Service. If there are any questions regarding this matter, please contact me at 813-483-2617.

Sincerely,

Ernesto Mayor Jr for

Kimberly Caswell

KC:tas
Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into pricing of unbundled network elements	Docket No. 990649-TP Filed: November 18, 1999

JOINT MOTION OF GTE FLORIDA INCORPORATED AND BELLSOUTH TELECOMMUNICATIONS, INC. TO STRIKE THE SURREBUTTAL TESTIMONY OF DON J. WOOD ON BEHALF OF AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC. AND MCI WORLDCOM, INC.

GTE Florida Incorporated (GTE) and BellSouth Telecommunications, Inc. (BellSouth) (together, Joint Movants) ask the Commission to strike the Surrebuttal Testimony of Don J. Wood, submitted on behalf of AT&T Communications of the Southern States, Inc. (AT&T) and MCI WorldCom, Inc. (MCI). Mr. Wood's testimony is not proper surrebuttal. It is, rather, direct testimony, and must be stricken as procedurally improper. Allowing the testimony into the record would violate the Joint Movants' due process rights, as reflected in the Florida Administrative Procedure Act (APA).

The purpose of surrebuttal testimony is, obviously, to allow parties to respond to other parties' rebuttal testimony. Mr. Wood's testimony does not do that. Instead, Mr. Wood states that AT&T and MCI have asked him to describe "in detail" the cost methodology these companies support. (Wood Testimony at 3.) Mr. Wood's purpose, as he candidly admits, is to "go beyond the theoretical discussions previously presented in this proceeding by providing tangible illustrations" of the concepts described by AT&T and MCI witness Ankum and witness Gillan for the Florida Competitive Carriers Association. (Wood Testimony at 3-4.)

In other words, Mr. Wood's testimony is intended to address matters presented in Mr. Ankum's (and Mr. Gillan's) direct testimony, but in more detail. And that is exactly what he does. Mr. Wood attempts to buttress Dr. Ankum's testimony by expanding upon Dr. Ankum's arguments about the appropriate methodology for costing and pricing UNEs. While Mr. Wood repeats some of Dr. Ankum's points, he goes beyond repetition to providing the "detail" and "examples" Dr. Ankum declined to include in his direct (or rebuttal) testimony. Indeed, except for one weak reference to a point reiterated in a BellSouth witness' rebuttal testimony, Mr. Wood makes no attempt to characterize his answers as responses to particular points made in other parties' rebuttal. Mr. Wood does not "respond" to the ILECs' testimony just because he presents a different view of UNE costing than the GTE or BellSouth witnesses do. If the Commission allows the standard for legitimate rebuttal to be subverted in this way, then no party will have any incentive to present its direct case in direct testimony, where it is vulnerable to attack by opponents.

Mr. Wood's extensive discussion of inputs serves nicely to illustrate the impropriety of his "surrebuttal." In accordance with Staff's instructions at the issues identification conference, GTE and BellSouth witnesses discussed their respective companies' "philosophy" behind several key inputs, including, among others, fill factors, structure sharing, material and labor prices, cost of capital and capital recovery. AT&T and MCI chose not to submit specific input testimony on direct and offered no rebuttal to Mr. Tucek's or Ms. Caldwell's input discussions. Instead, Dr. Ankum maintained a high-level, conceptual approach to UNE costing issues.

Now, after having submitted both direct and rebuttal testimony, AT&T and MCI have changed their minds as to the level of detail they wish to provide on input development. Mr. Wood's "surrebuttal" testimony includes an input section over 20 pages long, plus a 178-page portfolio of inputs for the HAI model. (Wood Testimony at 37-48.) This material is not a response to any opposing (or even friendly) testimony and is not presented as such. It is, rather, direct testimony (and improper direct testimony, at that) discussing, for the first time, AT&T's and MCI's positions on specific inputs. Thus, while GTE and BellSouth properly discussed key inputs and other cost methodology details in their direct testimony–thus giving other parties the opportunity to respond--AT&T and MCI waited until the last round of testimony to treat these issues. Indeed, Mr. Wood's testimony and attachments introduce, at this late stage, a specific cost model--the HAI Model–and model attributes and capabilities (e.g., geocoding and clustering) that have been intensely debated in earlier proceedings. By waiting until the last round of testimony to mention these subjects, AT&T and MCI have avoided the otherwise certain, vigorous critique by the Joint Movants and have curtailed the Joint Movants' ability to fashion meaningful discovery in response to AT&T's and MCI's newly disclosed positions. This kind of conduct offends any reasonable concept of fair play.

Before the direct testimony was submitted, all of the parties knew that a key issue in this proceeding was the nature of the guidelines and specific requirements that are to govern the cost studies to be filed in Phase II of this docket. (Issue 3(a).) MCI and AT&T, which appear regularly before the Commission, know well that direct testimony is the time to set forth their positions on the issues designated for resolution. Consistent with this

understanding, Dr. Ankum presented testimony on the appropriate method for determining UNE costs. His direct testimony explains the AT&T/MCI view of forward-looking costs and discusses at length his sponsors' views of the virtues of TELRIC and the attributes of a proper TELRIC study. (See generally Ankum Direct Testimony (DT).)

Other parties, likewise, presented their positions on the appropriate UNE costing methodology. (See, e.g., Tucek DT; Caldwell DT.) Each party determined the degree of specificity of its response to the cost study issue. To the extent that AT&T and MCI or other parties wished to respond to cost model or input discussions in others' direct testimony, they were obliged to do so in rebuttal.

AT&T and MCI have apparently concluded that Dr. Ankum's previously filed testimony is so inadequate that they need to introduce a new witness and submit voluminous new testimony on the same issues. If MCI and AT&T have decided they made strategic mistakes in presenting their case to the Commission, they must suffer the consequences. Allowing Mr. Wood's testimony to stand will, in effect, make Joint Movants pay for MCI's and AT&T's lapses. GTE and BellSouth will have had no opportunity to respond to Mr. Wood's testimony. This is an unfair and legally impermissible result.

This is a formal proceeding under section 120.57 of the APA. The APA requires that in such cases, "[a]ll parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence." (Fla. Stat. Ch. 120.57((1)(b)4.) These specific requirements are rooted in constitutional due process guarantees. The APA reflects the basic tenet that an agency cannot determine a party's "substantial interests" without giving that party a meaningful

opportunity to respond to opposing evidence. As such, the Commission always accords parties the right to submit direct and rebuttal evidence. If Mr. Wood's testimony is not stricken, however, Joint Movants will be denied the right to "submit rebuttal evidence" in response to what is plainly new direct testimony.

On October 1, 1999, Staff and parties held a teleconference to discuss procedural matters. At that point, direct and rebuttal testimony had been filed. Staff expressed concern regarding the lack of detail in some parties' testimony, but did not provide any specifics as to what further information Staff might desire. Instead, Staff indicated that it hoped to see a more detailed discussion of the issues in surrebuttal and stated that it planned to use discovery to discern information that did not appear in the prefiled testimony. Staff did not, at any time, indicate that the typical boundaries for surrebuttal would be eliminated, or that parties would be permitted to supplement their direct testimony. In fact, in response to inquiries by GTE, Staff confirmed that parties would be expected to present any additional evidence within the framework of proper surrebuttal–that is, a response to the rebuttal of others.

During the teleconference, GTE and BellSouth voiced their support for Staff's use of discovery to solicit specific information. Joint Movants continue to believe that this is the most appropriate means for Staff to gather the data it may need to answer particular questions it may have about parties' positions. Joint Movants do not believe that Staff expressed any intent to relax guidelines on surrebuttal to the extent of approving additional direct testimony, such as Mr. Wood's. Further, if this were Staff's intent, Joint Movants do not believe Staff has the authority to authorize such an approach--which, as noted, cannot

be squared with APA requirements.

Again, Joint Movants are confident that Staff intended no such thing. In fact, Mr. Wood has submitted exactly the kind of information Staff said it did not want in this proceeding. As noted, Mr. Wood's testimony includes a 178-page "HAI Model Inputs Portfolio." This document sets forth an extensive catalogue of input values for the HAI model. This testimony directly contravenes Staff's admonitions against submissions on specific input values. Those values will not be determined in this phase of the docket. Indeed, at Staff's request, BellSouth withdrew its direct testimony on cost of capital and capital recovery inputs and their underlying rationale. If BellSouth's detailed, but limited, testimony on these inputs was improper, then there is no question that Mr. Wood's detailed testimony about several hundreds (or thousands) of specific inputs must be stricken–even if it otherwise qualified as true surrebuttal.

All parties in this docket had an equal opportunity to present direct and rebuttal evidence. Each party decided which points to emphasize and how detailed its direct case should be. No party is entitled to rehabilitate a weak direct case in the guise of surrebuttal testimony. It is not the Commission's role to help parties correct their strategic mistakes–especially not parties like AT&T and MCI, which are well-seasoned participants in Commission proceedings. Mr. Wood's testimony is unlawful and must be stricken to avoid disadvantaging Joint Movants, which did follow the rules.

Respectfully submitted on November 18, 1999.

Ernesto Mayor Jr. for
Kimberly Caswell
GTE Service Corporation
P. O. Box 110, MC FLTC0007
201 N. Franklin Street
Tampa, FL 33601
(813) 483-2617

/s/
J. Phillip Carver
Nancy B. White
BellSouth Telecommunications, Inc.
150 South Monroe Street, Room 400
Tallahassee, FL 32301
(404) 335-0710

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the Joint Motion of GTE Florida Incorporated and BellSouth Telecommunications, Inc. To Strike the Surrebuttal Testimony of Don J. Wood on Behalf of AT&T Communications of the Southern States, Inc. and MCI WorldCom, Inc. in Docket No. 990649-TP were sent via overnight delivery on November 17, 1999 to the parties on the attached list.

Ernesto Mayor Jr. for
Kimberly Caswell

Will Cox, Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Nancy White c/o Nancy Sims
BellSouth Telecomm. Inc.
150 S. Monroe Street, Suite 400
Tallahassee, FL 32301-1556

Tracy Hatch
AT&T
101 N. Monroe Street
Suite 700
Tallahassee, FL 32301-1549

Joseph McGlothlin
McWhirter Reeves
117 S. Gadsden Street
Tallahassee, FL 32301

Angela Green
Fla. Public Telecomm. Assn.
125 S. Gadsden Street
Suite 200
Tallahassee, FL 32301-1525

Laura L. Gallagher
101 E. College Avenue
Suite 302
Tallahassee, FL 32301

Peter M. Dunbar
Marc W. Dunbar
Pennington Law Firm
215 S. Monroe Street, 2nd Floor
Tallahassee, FL 32301

Carolyn Marek
Time Warner Communications
233 Bramerton Court
Franklin, TN 37069

Charles J. Beck
Office of Public Counsel
c/o The Florida Legislature
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

Richard D. Melson
Gabriel E. Nieto
Hopping Law Firm
123 S. Calhoun Street
Tallahassee, FL 32314

Jeremy Marcus
Kristin Smith
Blumenfeld & Cohen
1625 Massachusetts Avenue, NW
Suite 300
Washington, DC 20036

Donna Canzano McNulty
MCI WorldCom
325 John Knox Road
Suite 105
Tallahassee, FL 32303

Bruce May
Holland Law Firm
315 S. Calhoun Street
Suite 600
Tallahassee, FL 32301

Floyd R. Self
Norman H. Horton
Messer Caparello & Self
215 S. Monroe St., Suite 701
Tallahassee, FL 32302-1876

Patrick Wiggins
Charles Pellegrini
Wiggins & Villacorta, P.A.
2145 Delta Blvd., Suite 200
Tallahassee, FL 32303

Andrew O. Isar
Telecomm. Resellers Assn.
4312 92nd Avenue, NW
Gig Harbor, WA 98335

Terry Monroe
CompTel
1900 M Street, NW, Suite 800
Washington, DC 20036

David Dimlich
Supra Telecommunications
2620 SW 27th Avenue
Miami, FL 33133

James Falvey
e.spire Communications Inc.
133 National Business Pkwy.
Suite 200
Annapolis Junction, MD 20701

Scott Sapperstein
Intermedia Comm. Inc.
3625 Queen Palm Drive
Tampa, FL 33619

Michael Gross
FCTA
310 N. Monroe Street
Tallahassee, FL 32302

Susan Huther
MGC Communications Inc.
3301 Worth Buffalo Drive
Las Vegas, NV 89129

Dulaney L. O'Roark
MCI Telecomm. Corp.
780 Johnson Ferry Road
Suite 700
Atlanta, GA 30342

Monica Barone
Sprint
3100 Cumberland Circle
Suite 802
Atlanta, GA 30339

Charles Rehwinkel
Sprint-Florida
1313 Blairstone Road
MC FLTLHO0107
Tallahassee, FL 32301

Glenn Harris
NorthPoint Comm. Inc.
222 Sutter Street, 7th Floor
San Francisco, CA 94108

Christopher Goodpastor
Covad Communications Co.
9600 Great Hills Trail
Suite 150 W
Austin, TX 78759

Brian Sulmonetti
MCI WorldCom Inc.
6 Concourse Parkway
Suite 3200
Atlanta, GA 30328

James P. Campbell
MediaOne
101 E. College Avenue
Suite 302
Tallahassee, FL 32301

Eric J. Branfman
Morton J. Posner
Swidler Berlin et al.
3000 K Street NW, Suite 300
Washington, DC 20007-5116

John McLaughlin
KMC Telecom Inc.
Suite 170
3025 Breckenridge Blvd.
Duluth, GA 30096

Bettye Willis
Alltel Comm. Services Inc.
One Allied Drive
Little Rock, AR 72203-2177

J. Jeffry Wahlen
Ausley & McMullen
227 S. Calhoun Street
Tallahassee, FL 32302