Tracy Hatch
Senior Attorney
Law and Government Affairs
Southern Region

Suite 700
101 N. Monroe Street
Tallahassee, FL 32301
850-425-6360

December 6, 2004

BY ELECTRONIC FILING
Ms. Blanca Bayó, Director
The Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 000121A-TP

Dear Ms. Bayó:

Pursuant to Staff's request, attached please find the CLEC Coalition's Response to Issues raised at the November 4, 2004, telephone workshop addressing BellSouth's SQM obligations and the Commission's continued activity in the above-referenced docket. Pursuant to the Commission's Electronic Filing Requirements, this version should be considered the official copy for purposes of the docket file. Copies of this document will be served on all parties via electronic and U.S. Mail.

Thank you for your assistance with this filing.

Sincerely yours,

s/ Tracy W. Hatch

Tracy W. Hatch

TWH/scd
Attachment
cc: Parties of Record

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the Establishment of Operations Support System Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies (BellSouth Track)	)	Docket No. 000121A-TP Filed: December 6, 2004

CLEC COALITION'S RESPONSE TO ISSUES

The Competitive Local Exchange Carrier Coalition ("CLEC Coalition"), consisting of ACCESS Integrated Networks Inc. ("AIN"), AT&T Communications of the Southern States, LLC ("AT&T"), Birch Telecom, Inc., MCImetro Access Transmission Services, LLC ("MCI"), DIECA Communications Company d/b/a Covad Communications Company ("Covad"), ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom/BTI"), NewSouth Communications, Corp., and Nuvox Communications Inc., hereby submits its response to the issues identified during telephone workshop held November 4, 2004, addressing BellSouth's SQM obligations and the Commission's continued activity in this docket.

During the SEEM conference call held on November 4, 2004, the parties discussed, among other things, proposed revisions to the non-technical portion of the SEEM Administrative Plan submitted by BellSouth Telecommunications, Inc. ("BellSouth"). In connection with three of BellSouth's proposed SEEM revisions, the Florida Public Service Commission Staff ("Staff"), Staff requested the parties to brief the legal issues associated with the proposed language regarding Items 20, 30 and 38 on the Staff's SEEM Non-Technical Matrix. The CLEC Coalition's responses to the issues are

set forth below. For clarity and to avoid confusion, the text of BellSouth's proposed changes is also set forth below in conjunction with the Coalition's response.

ISSUES

> **Proposed Language (SEEM, § 4.2.2):** The payment of any Tier-1 Enforcement Mechanism to a CLEC shall be credited against any liability associated with or related to BellSouth's service performance.

Issue 1: For liability arising from "out- of-service" performance or deficient performance, should the SEEM Plan contain a provision allowing BellSouth to offset from amounts owed to a CLEC, amounts paid to such CLEC in the form of SEEM payments?

> **Proposed Language (SEEM, § 4.4.6):** BellSouth may set off any SEEM payments to a CLEC against undisputed amounts owed by a CLEC to BellSouth pursuant to the Interconnection Agreement between the parties which have not been paid to BellSouth within ninety (90) days past the Bill Due Date as se forth in the Billing Attachment of the Interconnection Agreement.

Issue 2: Should the SEEM plan contain a set off provision? If so, under what circumstances should the set off provision apply?

CLEC Coalition Position for Issues 1 and 2: No. The Commission should reject both of BellSouth's proposals to offset SEEMs payments for the same reasons it rejected offsetting provisions previously. Allowing BellSouth to offset amounts would defeat the self-effectuating nature of the Plan and would diminish the effectiveness of the penalty.

ARGUMENT

BellSouth has proposed two provisions that would allow it to offset certain SEEM payments to CLECs. First, BellSouth proposes that it be able to offset SEEM payments for liability arising from "out-of-service" or deficient performance. Second, BellSouth proposes to offset SEEM payments against undisputed amounts owed by a CLEC to BellSouth pursuant to their interconnection agreement which have not been paid within ninety days. Essentially, BellSouth seeks to defeat the very nature of the self-effectuating plan and the reason the plan was established by this Commission.

The Commission has ruled in *this* docket that BellSouth is prohibited from offsetting penalty payments to Supra from the amounts in dispute that Supra owed to BellSouth. (Order No. PSC-02-1082-FOF-TP, p. 9). The Commission explained that the purpose of the Performance Assessment Plan (PAP) is to encourage BellSouth to provide nondiscriminatory service by compensating CLECs for additional costs they incur when BellSouth's performance falls short. Specifically, the Commission stated that:

> [a]llowing BellSouth to offset would defeat the self-effectuating nature of the Plan. ***The self-effectuating provision of the Plan was established to provide timely incentives to correct non-compliant behavior.*** Allowing BellSouth to offset the amount would diminish the effectiveness of the penalty. Moreover, a determination of the appropriate amount to offset would have to be made." (*Id.* at 10, emphasis added.)

By prohibiting offsets, BellSouth will have to make timely payments for the purposes of motivating it to correct behavior that is discriminatory.

The Commission's rationale is equally applicable to both of BellSouth's proposed provisions. BellSouth's first proposal that it be able to offset SEEM payments for

liability arising from "out-of-service" or deficient performance should be rejected. SEEM payments were established by this Commission to encourage BellSouth to provide nondiscriminatory service. Further, the Commission does not have the jurisdiction to limit remedies available to CLECs in a court of equity. It does, however, have the authority to require that BellSouth provide nondiscriminatory service, as discussed in greater detail in Issue 3. BellSouth's second proposal that it be able to offset SEEM payments against undisputed amounts owed by a CLEC to BellSouth pursuant to their interconnection agreement should also be rejected for the same reasons the Commission rejected BellSouth's attempt to offset SEEM payments for disputed amounts. Further, whenever BellSouth is the sole arbiter of determining whether there is an undisputed amount or whether there are outstanding liabilities, the potential for conflict substantially increases. As the Commission pointed out, "(t)his would ultimately enmesh us in an administrative quagmire not contemplated when we established the "self-effectuating" penalty plan." (*Id.* at 10).

The Commission has addressed the issue of offsetting and found that it should avoid "on a generic basis, establishing a method of offsetting payments due under the Performance Assessment Plan." Indeed, the Commission found that "the most effective way for BellSouth to avoid payments....is by ensuring that it meets all its performance metrics." (*Id.* at 10).

Accordingly, the Commission should reject both of BellSouth's proposals to offset SEEM penalties.

Proposed Language (SEEM, § 4.6.1): If a change in law relieves BellSouth of the obligation to provide any UNE or UNE combination pursuant to Section 251 of the Act, then upon providing the Commission with 30 days written notice, BellSouth will cease reporting data or paying remedies in accordance with the change of law.

Issue 3: If there is a change of law regarding BellSouth's obligation to provide any UNE or UNE combinations pursuant to Section 251 of the Act, should BellSouth be allowed to cease reporting data or paying remedies upon providing 30 days notice?

CLEC Coalition Position: No. BellSouth should not be allowed to unilaterally cease reporting data or making SEEM payments simply because there is a change in law that may relieve BellSouth of any of its obligations to provide any UNE or UNE combinations pursuant to Section 251.

ARGUMENT

BellSouth should not be allowed to unilaterally cease reporting data or making SEEM payments simply because there is a change in law that may relieve BellSouth of any of its obligations to provide any UNE or UNE combinations pursuant to Section 251. Separate from its obligations under Section 251, BellSouth continues to be obligated to provide non-discriminatory access to certain elements and services under Section 271 of the Telecommunications Act of 1996 and Florida statutes. To ensure BellSouth's compliance with these requirements of non-discriminatory access, performance measures such as those implemented by this Commission are crucial.

I. The Purpose of the SQM is to Discourage Anti-Competitive Behavior, Encourage Fair and Effective Competition, and Enforce BellSouth's Section 271 Obligations.

Both federal and state law require BellSouth's continued adherence to the performance measures plan established by this Commission. Yet, BellSouth's position, evident from BellSouth's discussions at the workshop and based on past filings, is that the SQM is narrowly tailored to enforce BellSouth's section 251 obligations without regard to its 271 obligations or other requirements of the Telecommunications Act of 1996 and Florida law. BellSouth's position is contrary to this Commission's established authority to implement performance measures under both federal and state law and is contrary to BellSouth's own previous position that performance measures are to ensure no backsliding occurs once it was granted Section 271 interLATA authority.

A. This Commission Has Authority To Enforce Performance Measures Under Both State and Federal Law.

In its first Performance Measures Order, this Commission acknowledged that state and federal law requires the Commission to ensure the incumbent opens its network to competitors.

> Authority to Implement Measures and Benchmarks:
> Both Chapter 364, Florida Statutes, as amended in 1995, and the Telecommunications Act of 1996 mandate the opening of local telecommunications markets to competition. Both statutes require incumbent local exchange companies to provide access to and interconnection with their facilities to competitive carriers.
> Both statutes contemplate a central role for the state commission in implementing these requirements. Both statutes authorize state commission review and authority over interconnection agreements between incumbents and competitors.
>
> **See** also Section, **364.19,** Florida Statutes, (stating that [t] he commission may regulate, by reasonable rules, the terms of telecommunications service contracts between telecommunications companies and their patrons.") In this proceeding, the appropriate terms to encourage non-discriminatory access are adequately defined measures, benchmarks and

> analogs. Consequently, we have the authority under state and federal law to implement the measures, benchmarks, and analogs contained in this Order. (Emphasis Supplied)[1]

Further, this Commission has emphasized that its authority to implement performance measures is based on its duty to ensure "the development of fair and effective competition" ((F.S.A. §364.01(3)) and to preclude anticompetitive behavior (F.S.A. §364.01(4)(g)).

> We are vested with jurisdiction over this matter pursuant to Sections 364.01(3) and (4)(g), Florida Statutes. Pursuant to Section 364.01(3), Florida Statutes, the Florida legislature has found that regulatory oversight is necessary for the development of fair and effective competition in the telecommunications industry. To that end, Section 364.01 (4) (g), Florida Statutes, provides, in part, that we shall exercise exclusive jurisdiction in order to ensure that all providers of telecommunications service are treated fairly by preventing anticompetitive behavior. Furthermore, it is noted that the FCC has encouraged the states to implement performance metrics and oversight for purposes of evaluating the status of competition under the Telecommunications Act of 1996.[2]

---

[1] FPSC Order No. PSC-01-1819-FOF-TP in Docket No. 000121-TP issued on September 10, 2001.

[2] Order No. PSC-04-0511-PAA-TP issued in Docket No. 000121A-TP on May 19, 2004.

B. BellSouth Acknowledges That The Purpose of Performance Measures Is To Ensure BellSouth's Continuing Compliance With Section 271 Obligations.

Indeed, BellSouth has acknowledged that performance measures are to ensure its own continued compliance with Section 271 obligations. In addition to discouraging anti-competitive behavior and encouraging fair and effective competition, in BellSouth's own words, "the purpose of the enforcement provisions of the [SEEM] plan is to prevent 'backsliding' after BellSouth obtains authority to provide interLATA service."[3]

In its original Performance Measures Order, this Commission discusses BellSouth's position that performance measures are needed after BellSouth was granted Section 271 relief.

> XV. EFFECTIVE DATE
> Here, we address when the Performance Assessment Plan becomes effective. BellSouth believes it should not become effective until interLATA authority is granted to BellSouth. However, the **ALECs** believe it should be effective immediately. (Emphasis Supplied).
>
> Arguments
>
> BellSouth witness *Cox* states that it is appropriate that no part of the enforcement mechanism proposal take effect until the plan is necessary to serve its purpose – that is, until BellSouth receives interLATA authority. (Emphasis Supplied).[4]

BellSouth is now anxious to scrap the very plan it endorsed in order to obtain its much desired long distance approval. When presented to the FCC, BellSouth touted the Florida SEEM plan as including "clearly articulated, pre-determined measurements and standards that encompass a comprehensive range of carrier-to-carrier performance. The

---

[3] BellSouth Telecommunications, Inc. Brief of the Evidence, FPSC Docket 000121-TP, filed May 31, 2001, p. 1.

[4] FPSC Order No. PSC-01-1819-FOF-TP in Docket No. 000121-TP issued on September 10, 2001.

SEEM encompasses measurements of key outcomes where a failure to produce that outcome would have a direct, significant effect on competition."[5] Indeed, the FCC relied on the existing plan in its Order granting BellSouth 271 authority in Florida and Tennessee and recognized the need for compliance with those measures to continue:

> The state commissions also adopted a broad range of performance measures and standards, as well as Performance Assurance Plans **designed to create financial incentives for BellSouth's post-entry compliance with section 271.** Moreover, the state commissions have committed themselves to actively monitor BellSouth's continuing efforts to open the local markets to competition.[6]

The FCC also noted that:

> The Florida plan structure was developed with input from the Florida Commission's staff, BellSouth, and the competitive LECs. We believe that competitive LECs had sufficient opportunity to raise any issues in the Florida proceeding, and that the issues were appropriately handled by the workshops and the Florida Commission...In addition, we note that both the Florida Commission and the Tennessee Authority have the ability to modify BellSouth's SEEMs. We anticipate that the parties will continue to build on their own work and the work of other states **to ensure that such measures and remedies to accurately reflect actual commercial performance in the local marketplace.** (Emphasis Supplied)[7]

This Commission should therefore deny BellSouth's attempt to shed its 271 obligations.

Further, when the FCC granted BellSouth interLATA authority in Georgia and Louisiana, it again emphasized the necessity of BellSouth's compliance with performance measures post Section 271 approval. The FCC stated:

---

[5] BellSouth Application, Affidavit of Alphonso J. Varner at para. 184.

[6] *Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee,* (BellSouth Application), WC Docket No. 02-307, Memorandum Opinion and Order, 17 FCC Rcd 25828 (2002) at para.2 (citations omitted).

[7] *Id.* at para. 170 (*sic*) (citations omitted).

> In prior Orders, the [Federal Communications] Commission has explained that one factor it may consider as part of its public interest analysis is whether a BOC would have adequate incentive to continue to satisfy the ***requirements of Section 271*** after entering the long distance market. Although it is not a requirement for Section 271 Authority that a BOC be subject to such performance assurance mechanisms, the Commission previously has found that the existence of the satisfactory performance monitoring and enforcement mechanisms is probative evidence that the BOC will continue to meet its ***271 obligations*** after grant of such authority.[8]

Indeed, Section 251 obligations are not even mentioned by the FCC. Manifestly then, performance measures are intended to enforce BellSouth's 271 obligations following the grant of 271 authority.

In contravention of its own previous advocacy and FCC precedent, BellSouth now attempts to avoid any relationship to its 271 obligations or the jurisdictional basis of the SQM. However, the law is clear that BellSouth remains obligated to provide non-discriminatory access to UNEs and other services and performance measures are crucial to ensure BellSouth's compliance with those obligations.

II. BellSouth's Obligation to Provide Non-Discriminatory Access to UNEs Under Section 271 is Independent of its Obligation to Provide Access Under Section 251.

BellSouth's argument that the delisting of a UNE under Section 251 means it has no further obligations concerning those UNEs is without merit. BellSouth continues to have obligations pursuant to Section 271 and state law. Despite BellSouth's reasoning, the FCC expressly held that "BOC obligations under section 271 are not necessarily relieved based on any determination we make under section 251 unbundling analysis."

---

[8] *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc. And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, Memorandum Opinion and Order, 17 FCC Rcd 9018, 9181082, ¶ 291 (2002) (emphasis added).

TRO at ¶ 655. Moreover, the FCC expressly addressed the question of the apparent illogic of a statutory scheme in which the FCC could cease the requirement of an RBOC to provide access to a UNE under 251, and yet continue the identical requirement under section 271:

> 659. In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. So if, for example, pursuant to section 251, competitive entrants are found not to be "impaired" without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271 (c)(2)(B)(vi). In order to read the provisions so as not to create a conflict, we conclude that **section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251**, but does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

TRO at ¶ 659 (emphasis added).

In short, although the *price* for a "de-listed" UNE may change, if that UNE falls under 271(c)(2)(B)(iii)-(vi) and (x), the obligation to provide non-discriminatory *access* remains. BOCs who continue to sell long distance must continue to provide non-discriminatory access to all checklist items "de-listed under 251."[9] Whether BellSouth thinks that statutory scheme is illogical or not, it is the law.

III. Because BellSouth Remains Obligated to Provide Non-Discriminatory Access to Wholesale Elements and Services Pursuant to Section 271 and State Law, BellSouth's Performance Measures Obligations Continue.

In accordance with the purposes of the SQM and the continuing obligation of BellSouth to provide non-discriminatory access to certain wholesale elements and

[9] With the exception of checklist item numbers 1 and 2, as these items are directly tied to section 251 UNEs.

services, BellSouth's obligation to comply with the existing SQM requirements continues and is unaffected by any de-listing of UNEs under Section 251. It is strongly in the public interest that the customers of competitive carriers are protected from discriminatory treatment by BellSouth. Further, the Florida Commission has authority under Section 364.161(1) F.S. to impose an independent state obligation upon ILECs to unbundle their networks upon request by a CLEC.

What BellSouth is really asking this Commission to do is grant BellSouth unfettered discretion to abandon its obligations under the Telecommunications Act of 1996 and state law. The SQM is necessary for the very reasons that underlie the Commission's jurisdiction: discouraging anti-competitive behavior and encouraging fair and effective competition. As long as BellSouth is obligated to provide non-discriminatory treatment to its competitors and its competitors' customers, performance measures are required to enforce that obligation.

Respectfully filed this the 6th day of December 2004.

COUNSEL FOR THE CLEC COALITION

s/ Tracy Hatch
Tracy Hatch
AT&T Communications of the Southern States, LLC
101 N. Monroe St., Suite 700
Tallahassee, FL 32301

s/ Mark Ozanick
Mark A. Ozanick, Senior Analyst, Regulatory
ACCESS Integrated Networks, Inc.
4885 Riverside Drive
Macon, GA 31210-1148

s/ Joe McGlothlin
ACCESS Integrated Networks, Inc.
Joe McGlothlin
McWhirter Reeves
117 S. Gadsden St.
Tallahassee, FL 32301

s/ Rose Mulvany Henry
Rose Mulvany Henry
Vice President of Regulatory Affairs
Birch Telcom, Inc.
2020 Baltimore Avenue
Kansas City, MO 64108

s/ Gene Watkins
Charles E. (Gene) Watkins
Senior Counsel, DIECA Communications,
Inc. d/b/a Covad Communications Co.
1230 Peachtree Street, N.E.
19th Floor
Atlanta, Georgia 30309

s/ Nanette Edwards
ITC^Deltacom/BTI
Nanette S. Edwards
4092 South Memorial Parkway
Huntsville, AL 35802-4343

s/ De O'Roarke
Dulaney L. O'Roark
MCI Law and Public Policy
#6 Concourse Parkway, Suite 600
Atlanta, GA 30328

s/ Floyd Self
Counsel for MCI
Floyd Self
Messer, Caparello & Self
215 South Monroe St Ste 701
PO Box 1876
Tallahassee Fl 32302-1876

s/ Hamilton Russell

Hamilton E. Russell
Vice President of Legal Affairs
NuVox Communications, Inc.
Two North Main Street
Greenville SC 29601

s/ Hamilton Russell

Hamilton E. Russell
Vice President of Legal Affairs
NewSouth Communications, Corp.
Two North Main Street
Greenville SC 29601

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the CLEC's Presentation was served by U.S. Mail this 6th day of December 2004 to the following:

(*) Blanca S. Bayo
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 3239-0850

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

Michael A. Gross
Florida Cable Telecommunications Assoc.
246 E. 6th Avenue, Suite 100
Tallahassee, FL 32302

Nanette Edwards
ITC Deltacom
4092 South Memorial Parkway
Huntsville, AL 35802

Donna C. McNulty
MCI WorldCom
325 John Knox Road, Suite 105
Tallahassee, FL 32302-4131

John D. McLaughlin, Jr.
KMC Telecom, Inc.
1755 North Brown Road
Lawrenceville, GA 30043

Messer Law Firm
Floyd Self
Norman Horton
P.O. Box 1867
Tallahassee, FL 32302

Pennington Law Firm
Peter Dunbar
Karen Camechis

P.O. Box 10095
Tallahassee, FL 32302-2095

Rutledge Law Firm
Kenneth Hoffman
John Ellis
P.O. Box 551
Tallahassee, FL 32302-0551

McWhirter Law Firm
Joseph McGlothlin/Vicki Kaufman
117 S. Gadsden St.
Tallahassee, FL 32301

Wayne Stavanja/Mark Buechele
Supra Telecom
1311 Executive Center Drive, Suite 200
Tallahassee, FL 32301

Kimberly Caswell
Verizon Select Services, Inc.
P.O. Box 110, FLTC0007
Tampa, FL 33601-0110

John Rubino
George S. Ford
Z-Tel Communications, Inc.
601 S. Harbour Island Blvd.
Tampa, FL 33602-5706

Renee Terry
e.spire Communications, Inc.
131 National Business Parkway, #100
Annapolis Junction, MD 20701-10001

William Weber
Covad Communications Company
19th Floor, Promenade II
1230 Peachtree Street, NE
Atlanta, GA 30309-3574

WorldCom, Inc.
Dulaney O'Roark, III
Six Concourse Parkway, Suite 3200
Atlanta, GA 30328

IDS Telecom, LLC
Angel Leiro/Joe Millstone
1525 N.W. 167th Street, Second Floor
Miami, FL 33169-5131

Katz, Kutter Law Firm
Charles Pellegrini/Patrick Wiggins
106 East College Avenue, 12th Floor
Tallahassee, FL 32301

Mpower Communications Corp.
David Woodsmall
175 Sully's Trail, Suite 300
Pittsford, NY 14534-4558

ALLTEL Communications, Inc.
C/O Ausley Law Firm
Jeffrey Whalen
PO BOX 391
Tallahassee, FL 32302

BellSouth Telecom., Inc.
Patrick W. Turner/R. Douglas Lackey
675 W. Peachtree Street, Suite 4300
Atlanta, GA 30375

Sprint Communications Company
Susan Masterton/Charles Rehwinkel
PO BOX 2214
MS: FLTLHO0107
Tallahassee, FL 32316-2214

Miller Isar, Inc,
Andrew O. Isar
7901 Skansie Ave., Suite 240
Gig Harbor, WA 98335-8349

Birch Telecom of the South, Inc.
Tad J. Sauder
Manager, ILEC Performance Data
2020 Baltimore Ave.
Kansas City, MO 64108

Suzanne F. Summerlin
2536 Capital Medical Blvd.
Tallahassee, FL 32308-4424

Kelley Drye & Warren, LLP
Jonathan E. Canis/Michael B. Hazzard
1200 19th Street, N.W., 5th Floor
Washington, DC 20036

David Benck
Momentum Business Solutions, Inc.
2700 Corporate Drive
Suite 200
Birmingham, AL 35242

Russell E. Hamilton, III
Nuvox Communications, Inc.
301 N. Main Street, Suite 5000
Greenville, SC 29601

s/ Tracy W. Hatch