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September 1, 1999

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Ms. Blanca Bayo, Director
Division of Records and Reporting
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 990970-TP

Dear Ms. Bayo:

Enclosed for filing on behalf of Association for Local Telecommunications Services, ("ALTS"), the Commercial Internet Exchange Association ("CIX"), the Competitive Telecommunications Association ("CompTel"), ACSI Local Services, Inc. d/b/a e.spire Communications, Inc., on behalf of its affiliates ("e.spire"), the Florida Competitive Carriers Association ("FCCA"), the Florida Internet Service Providers Association ("FISPA"), and the Telecommunications Resellers Association ("TRA") are an original and fifteen copies of e.spire's Reply to BellSouth's Motion to Dismiss or in the Alternative to Strike the Petition or for Summary Judgment the above captioned docket.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely,

Norman H. Horton, Jr.
Norman H. Horton, Jr.

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APP _____
CAF _____
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cc: James C. Falvey, Esq.
Parties of Record

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Complaint by Association for Local)
Telecommunications, Services, Commercial)
Internet Exchange Association, Competitive)
Telecommunications Association, ACSI)
Local Services, Inc. d/b/a e.spire Communications,) Docket 990970-TP
Inc., Florida Competitive Carriers Association,) Filed: September 1, 1999
Florida Internet Service Providers Association,)
and Telecommunications Resellers Association)
Against BellSouth Telecommunications, Inc.)
regarding promotional practices and petition)
for expedited relief.)
_____)

**RESPONSE TO MOTION TO DISMISS OR IN THE
ALTERNATIVE TO STRIKE THE PETITION
OR FOR SUMMARY JUDGMENT**

Comes now the Association for Local Telecommunications Services, (“ALTS”), the Commercial Internet Exchange Association (“CIX”), the Competitive Telecommunications Association (“CompTel”), ACSI Local Services, Inc. d/b/a e.spire Communications, Inc., on behalf of its affiliates (“e.spire”), the Florida Competitive Carriers Association (“FCCA”), the Florida Internet Service Providers Association (“FISPA”), and the Telecommunications Resellers Association (“TRA”) (collectively, “Joint Respondents”). For their response, Joint Respondents would state:

1. On August 16, 1999, BellSouth filed its Motion to Dismiss or in the Alternative to Strike the Petition or for Summary Judgment. Although the introduction to the Motion cites Rule 28-106.204, Florida Administrative Code, and Rules 1.140 and 1.150, Florida Rules of Civil Procedure, as the basis for the Motion, it would appear that what BellSouth is seeking to have this Commission do is strike the pleading as a sham pleading pursuant to Rule 1.150, Florida Rules of Civil Procedure (page 9, paragraphs 17, 18, 19, Motion).

2. Other than the initial references to the rules, BellSouth has not explained their applicability or presented argument with respect to those rules. Consequently, rather than attempting to guess as to how these other rules are applicable, Joint Petitioners herein respond to BellSouth's request that the Joint Complaint be denied as a sham pleading pursuant to Rule 1.150. BellSouth has failed to demonstrate any basis on which the pleading should be stricken and the Motion should accordingly be denied. For a pleading to be stricken under Rule 1.150, Florida Rules of Civil Procedure, the pleading must be shown to be inherently false and, based on plain or conceded facts, clearly known to be false at the time the pleading was made. Importantly, it must appear to be clearly false in order to be stricken. Conversely, a pleading should not be stricken as a sham unless the falsity is clearly and undisputedly apparent. *Guarantee Life Insurance Company Florida v. Hall Brothers Press, Inc.*, 189 So. 243 (1939), *Menke v. Southland Specialities Corp.*, 637 So. 2nd 285 (2nd DCA, 1994), *Aider v. Temple Ner Tamid*, 339 So. 2nd 268 (3rd DCA, 1976), *Destiny Construction Co. v. Martin K. Eby Construction*, 662 So. 2nd 388 (5th DCA 1995). If any part of the pleading is true the Motion to Strike should be denied. *Spaienza v. Carland, Inc.*, 154 So. 2nd 204 (3rd DCA 1963).

3. BellSouth urges the Commission to strike the pleading asserting that the Complaint is not based on facts and that the facts set forth in the Complaint are false. A comparison of the complaint and BellSouth's Motion and Affidavits reveal significant similarities with respect to the events however.

4. In the Complaint, Joint Petitioners allege that for a period of time BellSouth offered special promotions of its BellSouth.net Internet access to BellSouth customers who also subscribed to the tariffed Complete Choice® offering and who had the Internet access charged to their bill. This

is precisely what was promoted at the BellSouth.net website in June (Attachment 1) and the offerings are even acknowledged in both the Motion and Affidavits. There is nothing false about the facts recited by Joint Petitioners that would warrant striking all or any portion of the pleading.

5. BellSouth, predictably, disagrees with the position of the Joint Petitioners that the promotions constitute an abuse of the monopoly position held by BellSouth in the local exchange market and is the type of anticompetitive behavior that should be investigated and is an illegal rebate under Chapter 364, Florida Statutes. That BellSouth disagrees with Joint Petitioners does not, however, mean the assertions are false though. BellSouth provided local service to more than 90% of residential and business customers in its service area and the bundling of the Internet access only slows competitive growth that much more. Further, to offer “rewards” to regulated customers is an enticement to remain — or become — a regulated customer which adds to the impediment to competition. BellSouth denies that there has been monopoly leveraging or rebates or “other similar anticompetitive behavior” clearly these are issues for the Commission to decide. Unsupported denials by BellSouth can not carry the day on a Motion to Dismiss..

6. The Commission has the jurisdiction and charge to investigate allegations of anticompetitive behavior by LECs. Section 364.3381, Florida Statutes. The conduct of BellSouth with this promotion falls squarely within that jurisdiction. BellSouth is combining local exchange services with competitive services to enhance their position in both markets — precisely the behavior that should be investigated. The reduced Internet access price is available only to BellSouth customers and only to those who also subscribe to the Complete Choice Plan®.

7. The bundling, reduction of price, and listing on the local bill also gives rise to the allegation that the reduction constitutes a rebate, prohibited by §§364.08 and .09, Florida Statutes.

BellSouth attached an example of a bill to its motion (KMM Ex. 1). The bill is similar to one sent to customers of the LEC and on page 2 is an entry for Internet access. Interesting — and telling — is that the entry identifies the credit as “Reward under BellSouth.net Complete Choice® Plan.” This characterization of the reduction as a “reward” is carried over from the website promotions (See Attachment 1). Those customers receiving a bill similar to the hypothetical bill would receive a \$7.00 (or more) reduction — or reward — on this bill. BellSouth makes much ado about the fact that this reward is a separate line item and that “at no time have customers been allowed to apply the BellSouth.net discount toward any aspect of their regulated local service” (pg. 3) yet, only BellSouth’s local service customers can receive this reward which is part of the single BellSouth bill and the customer’s single payment to BellSouth.

8. The complaint places legal and factual issues before the Commission, which is where they belong. BellSouth’s argument that the pleading is a sham is without any support or merit whatsoever and should be denied. Moreover, BellSouth should be directed to file its answer to the Complaint within 5 days of the Commission decision rather than from the Order. BellSouth’s Motion to Dismiss is merely an attempt to delay resolution of the complaint and they should not benefit from further delay.

WHEREFORE, Joint Petitioner's urge the Commission to deny the Motion and direct BellSouth to answer the Complaint.

Respectfully submitted this 1st day of September, 1999.



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**BELLSOUTH.net**

Special Promos

Unlimited Internet Access* for as low as \$12.95 per month!

For a limited time, BellSouth.net is offering unlimited Internet access* for as low as \$12.95 per month or Fast Access service for as low as \$49.95 per month. To receive this special offer, you must:

- Subscribe to the BellSouth Complete Choice® bill plan option;
- Charge your BellSouth.net Service to the same residential BellSouth telephone number as your Complete Choice® service; and
- Subscribe to one of the following BellSouth.net Service bill plans that qualifies for this promotion:
 - \$19.95 Unlimited Analog Access* (receive a \$7/month reward)
 - \$215.40 Term Pricing Analog Access (receive a \$7/month reward)
 - FastAccess (available in select areas only, receive a \$10/month reward)

How Do I Sign Up For the Offer?

Just [click here](#) to sign-up for BellSouth.net service. If you meet all the above qualifications, the promotional reward will appear automatically within 30 to 60 days on the BellSouth.net portion of your telephone bill.

© BellSouth Telecommunications, Inc. All Rights Reserved. - Questions and Comments:
feedback@bellsouth.net - Help/Technical Support: call 1-800-4DOTNET (1-800-436-8638).
[Legal Info.](#)



Attachment 1

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery (*) to the following parties of record this 1st day of September, 1999:

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c/o Nancy H. Sims
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