BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for arbitration concerning complaint of AT&T Communications of the Southern States, LLC, Teleport Communications Group, Inc., and TCG South Florida for enforcement of interconnection agreements with BellSouth Telecommunications, Inc.	DOCKET NO. 020919-TP ORDER NO. PSC-03-0528-FOF-TP ISSUED: April 21, 2003

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER GRANTING BELLSOUTH'S MOTION FOR PARTIAL SUMMARY FINAL ORDER AND AT&T'S CROSS MOTION FOR PARTIAL SUMMARY FINAL ORDER ON ISSUE 1(A) AND DENYING AT&T'S MOTION TO STRIKE BELLSOUTH'S "EXTRINSIC" TESTIMONY

BY THE COMMISSION:

BACKGROUND

On August 26, 2002, AT&T of the Southern States, LLC, Teleport Communications Group, Inc. and TCG of the Carolinas, Inc. (collectively "AT&T") filed its Complaint for enforcement of its Interconnection Agreement against BellSouth Telecommunications, Inc. (BellSouth). AT&T in its Complaint alleges that BellSouth breached, and continues to breach, its obligation to charge AT&T local reciprocal compensation rates for transport and termination of all "Local Traffic," including all "LATAwide traffic," in accordance with the terms of the parties' two interconnection

agreements.[1] On September 20, 2002, BellSouth filed its response to AT&T's Complaint.

On November 14, 2002, an issue identification meeting was held. By Order No. PSC-02-1652-PCO-TP, issued November 26, 2002 (Order Establishing Procedure), the Prehearing Conference has been scheduled for April 21, 2002, and the Hearing has been scheduled for May 7, 2003.

On January 27, 2003, BellSouth filed its Motion for Partial Summary Final Order on Issue 1(a).[2] On February 19, 2003, AT&T filed its Response to BellSouth's Motion for Partial Summary Final Order on Issue 1(a) and its Cross Motion for Partial Summary Final Order on Issue 1(a).

AT&T also filed a Motion to Strike BellSouth's "Extrinsic" Testimony and AT&T Brief Supporting AT&T's Motion to Strike BellSouth's "Extrinsic" Evidence on February 12, 2003. BellSouth filed its Response to AT&T's Motion to Strike on February 24, 2003.

This Order addresses the Motions for Partial Summary Final Order on Issue 1(a), as well as AT&T's Motion to Strike and BellSouth's response to that motion.

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[1]The First Interconnection Agreement was approved by this Commission on June 19, 1997 by Order No. PSC-97-0724-FOF-TP. The Second Interconnection Agreement was approved by this Commission on December 7, 2001, by Order No. PSC-01-2357-FOF-TP, effective as of October 1, 2001.

[2]**ISSUE 1:** (a) Do the terms of the Second Interconnection Agreement as defined in AT&T's complaint apply retroactively from the expiration date of the First Interconnection Agreement as defined in AT&T's complaint, June 11, 2000, forward? (b) If the answer to Issue 1(a) is "yes," is AT&T entitled to apply the reciprocal compensation rates and terms of the Second Interconnection Agreement only from July 1, 2001, forward?

BELLSOUTH'S MOTION FOR PARTIAL SUMMARY FINAL ORDER ON ISSUE 1(A) AND AT&T'S CROSS MOTION FOR PARTIAL SUMMARY FINAL ORDER ON ISSUE 1(A)

As noted in the Background, on January 27, 2003, BellSouth filed its Motion for Partial Summary Final Order on Issue 1(a). On February 3, 2003, BellSouth requested that no action be taken on its Motion since BellSouth and AT&T were discussing the Motion. Subsequently, AT&T filed its Cross Motion for Partial Summary Final Order on Issue 1 (a) on February 19, 2003. We note that BellSouth and AT&T appear to be in agreement on Issue 1(a).

BellSouth's Motion

In support of its Motion, BellSouth requests that we find that pursuant to the First Interconnection Agreement between BellSouth and AT&T, the terms, conditions, and prices of the Second Interconnection Agreement between BellSouth and AT&T, except for the reciprocal compensation rates, apply from July 11, 2000, forward. In a footnote, BellSouth states that the reciprocal compensation rates of the Second Interconnection Agreement apply from June 1, 2001 forward in accordance with a settlement agreement between the parties.

BellSouth states that Rule 28-106.204(4), Florida Administrative Code, provides that "[a]ny party may move for summary final order whenever there is no genuine issue of material fact." BellSouth asserts that the purpose of summary judgement or of a summary final order is to avoid the expense and delay of trial when no dispute exists as to the material facts. See Order No. PSC-01-1427-FOF-TP at p. 13. BellSouth states that when a party establishes that there is no material fact on any issue that is disputed, then the burden shifts to the opponent to demonstrate the falsity of the showing. Id. BellSouth cites to Order No. PSC-01-1427-FOF-TP which states that "[i]f the opponent does not do so, summary judgement is proper and should be affirmed." Id. BellSouth states that there are two requirements for a summary final order: (1) there is no genuine issue of material fact; and (2) a party is entitled to judgement as a matter of law. Id. at 14-15.

BellSouth further contends that there is no dispute as to any material fact regarding Issue 1(a). BellSouth asserts that both it

and AT&T have testified that the First Agreement expired on June 10, 2000. BellSouth states that both parties testified that because the Second Agreement was not in effect on the date the First Agreement terminated, the parties were obligated under Section 2.3 of the First Agreement to continue to operate under the terms, conditions, and prices of the First Agreement until the Second Agreement became effective. Further, BellSouth states that both parties testified that the Second Agreement became effective in 2001 and the parties are obligated to apply the terms, conditions, and prices of the Second Agreement from June 11, 2000 forward, pursuant to Section 2.3 of the First Agreement. BellSouth argues that accordingly there is no genuine issue of material fact as both AT&T and BellSouth contend that the terms, conditions, and prices of the Second Agreement apply from June 11, 2000 forward. BellSouth also states that pursuant to a settlement agreement between the parties, the compensation at issue in the AT&T Complaint only applies from July 1, 2001 forward and that AT&T is only seeking to apply the reciprocal compensation rates of the Second Agreement from July 1, 2001 to May 31, 2002.

BellSouth also contends that it is entitled to final summary order on this issue as a matter of law. BellSouth argues that the guiding force in the interpretation of contracts is to determine and enforce the parties' intent.[3] BellSouth asserts that when a contract is clear and unambiguous, the court is required to enforce the contract according to its plain meaning.[4]

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[3]BellSouth cites to St. Augustine Pools, Inc. v. James M. Baker, Inc., 687 So. 2d 957 (Fla. 5th DCA 1997); and Royal Oaks Landing Homeowner's Assc. v. Pelletier, 620 So.2d 786, 788 (Fla. 4th DCA 1993) ("Generally, the intentions of the parties to a contract govern its construction and interpretation. When determining intent, the best evidence is the plain language of the contract.")

[4]Feldman v. Kritch, 824 So.2d 274, 277(Fla. 4th DCA 2002); See also, Jacobs v. Petrino, 351 So.2d 1036, 1039 (Fla. 4th DCA 1976)("The words found in a contract are to have a meaning attributed to them, and are the best possible evidence of the intent and meaning of the contracting parties.")(citations omitted).

BellSouth asserts that here, the clear, unambiguous provisions of the First Agreement, as buttressed by the testimony of both AT&T and BellSouth, make it clear that the parties intended for the terms, conditions, and prices of the First Agreement to expire on June 10, 2000, and that the terms, conditions and prices of the Second Agreement would apply from June 11, 2000 forward. BellSouth contends that under Florida contract interpretation principles, we are required to enforce the express terms of the First Agreement and find as a matter of law that the terms, conditions, and prices of the Second Agreement apply from June 11, 2000 forward.

BellSouth contends that the integration clause in the Second Agreement reinforces this conclusion as it applies only to the subject matter expressly set forth in the Second Agreement. BellSouth asserts that, as testified by BellSouth witness Shiroishi and as confirmed by a review of the agreement, the Second Agreement is entirely silent on the parties' obligations under Section 2.3 of the First Agreement to apply the terms, conditions, and prices of the Second Agreement from June 11, 2000 forward. BellSouth states that pursuant to the express terms of the integration clause, that provision has no effect on the parties' obligations to comply with the obligations set forth in Section 2.3 of the First Agreement.[5] BellSouth contends that the fact that the Second Agreement contains an effective date of October 26, 2001, is of no consequence because the obligation to apply the terms, conditions, and prices from June 11, 2000 forward lies under the First Agreement and not the Second Agreement. BellSouth further contends that the only relevant fact is that the Second Agreement is effective, not when it became effective.

BellSouth states that the entirety of the First Agreement is outside the scope of the integration clause because it is clearly not a prior agreement concerning the express subject matter of the Second Agreement. BellSouth asserts that the express subject matter of the Second Agreement is the terms, conditions, and prices

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[5]See, Feldman at 277; see also, Sugar Cane Growers Co-Op of Florida, Inc. v. Pinnock, 735 So.2d 530, 538 (Fla. 4th DCA 1999)(stating that court's "interpretation is based solely on the language in the contract, the best evidence of the intent of the parties.")

under which BellSouth will provide the referenced services to AT&T (and under which AT&T will provide certain services to BellSouth) during the time to which the Second Agreement applies.

BellSouth contends that the fact that the First Agreement expired also does not change this conclusion. BellSouth asserts that the First Agreement contained a survival provision, which provided that

> [a]ny liabilities or obligations of a Party for acts or omissions prior to the cancellation or termination of this Agreement, any obligation under the provisions regarding indemnification, Confidential Information, limitations on liability, and any other provisions of this Agreement which, by their terms, are contemplated to survive (or to be performed after) termination of [the First Agreement], shall survive cancellation or termination thereof.

See First Agreement, General Terms & Conditions(GTC) at Section 22.11. BellSouth contends that as made clear by the express terms of Section 2.3 of the First Agreement, the parties were required to perform certain obligations after the June 10, 2000 termination of the First Agreement. BellSouth asserts that the obligation to apply the terms, conditions, and prices from the day following expiration forward is undoubtedly a provision contemplated to survive the First Agreement's expiration. BellSouth argues that absent its survival, it would be a meaningless clause, because the First Agreement must end before the Second Agreement can be given application. BellSouth contends that the parties' obligations under Section 2.3 survived the termination of the First Agreement. BellSouth asserts that notwithstanding the fact that the First Agreement has expired, as a matter of law, BellSouth and AT&T are obligated to apply the terms of the Second Agreement from June 11, 2000 forward, except for the reciprocal compensation rates, which apply from June 1, 2001 forward pursuant to a separate settlement agreement.

BellSouth concludes that for all of the reasons stated above, there is no genuine issue of material fact and BellSouth is entitled to judgement as a matter of law on the issue of whether the terms, conditions, and prices of the Second Agreement apply

from June 11, 2000 forward. BellSouth requests that this Commission grant its Motion for Partial Summary Final Order and find that, pursuant to Section 2.3 of the First Agreement, BellSouth and AT&T are required to apply the terms, conditions, and prices of the Second Agreement (except for the reciprocal compensation rates) from June 11, 2000 forward.

AT&T Response and Cross Motion

As noted above, AT&T filed its Response and Cross Motion for Partial Summary Final Order on Issue 1(a)(Cross Motion). AT&T states that it does not dispute that the terms, conditions, and prices of the Second Agreement apply between BellSouth and AT&T from June 11, 2000 forward, except for the reciprocal compensation rates which apply from July 1, 2001 forward. AT&T asserts that in filing its Motion, BellSouth agreed with the allegations first raised by AT&T in its Complaint, as well as in AT&T witness King's testimony, that the terms, conditions, and prices of the Second Agreement apply between BellSouth and AT&T from June 11, 2000, forward, except for the reciprocal compensation rates which apply from July 1, 2001, forward. AT&T contends that it agrees that there is no genuine issue of material fact as to Issue 1(a).

AT&T asserts that by virtue of the fact that AT&T previously pled all of the material facts which BellSouth now agrees are not at issue relative to Issue 1(a) in both its Complaint and AT&T witness King's testimony, AT&T filed its Cross Motion. AT&T contends that its Cross Motion is appropriate given that the relief requested by BellSouth relative to Issue 1(a) is the relief initially and only requested by AT&T in this proceeding. AT&T states that in this respect, BellSouth asked for no such relief in its answer, and filed no counterclaim against AT&T in this proceeding seeking such relief.

AT&T states that given that both parties agree there is no genuine issue of material fact relative to Issue 1(a) and this Commission now has pending before it a Cross Motion regarding the same matter, therefore, AT&T requests that this Commission issue a single order finding that the terms, conditions, and prices of the Second Agreement apply between BellSouth and AT&T from June 11, 2000 forward, except for the reciprocal compensation rates.

Decision

Pursuant to Section 120.57(1)(h), Florida Statutes, a summary final order shall be rendered if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. Under Florida law "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgement is sought." Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993)(citing Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). Furthermore, "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore v. Morris, 475 So. 2d 666 (Fla. 1985). Further, the purpose of a summary final order is to avoid the expense and delay of trial. See National Airlines, Inc. v. Florida Equipment Co. of Miami, 71 So. 2d 741, 744 (Fla. 1954) (The function of the rule authorizing summary judgments is to avoid the expense and delay of trials when all facts are admitted or when a party is unable to support by any competent evidence a contention of fact). See also, Pearson v. St. Paul Fire & Marine Insurance Co., 187 So. 2d 343 (Fla. 1st DCA 1966).

We note that both BellSouth and AT&T agree that the terms, conditions, and prices of the Second Agreement apply between BellSouth and AT&T from June 11, 2000 forward, except for the reciprocal compensation rates, which apply from July 1, 2001 forward. Therefore, it appears that there is no genuine issue of material fact regarding Issue 1(a). Further, we note that since there is no genuine issue in dispute regarding Issue 1(a), granting partial summary final order regarding this issue will avoid time and expense at hearing.

We agree that the clear, unambiguous provisions of the First Agreement, which are demonstrated by the testimony of AT&T and BellSouth witnesses, make it clear that the parties intended for the terms, conditions, and prices of the Second Agreement to apply from June 11, 2000 forward, with the exception of reciprocal compensation. We concur with BellSouth, that under the principles

of Florida contract interpretation, when a contract is clear and unambiguous, the court is required to enforce the contract according to its plain meaning.[6] Therefore, we find as a matter of law that the terms, conditions, and prices of the Second Agreement apply from June 11, 2000 forward, except for the reciprocal compensation rates.

We shall grant BellSouth's Motion for Partial Summary Final Order and AT&T's Cross Motion for Partial Summary Final Order on Issue 1(a), finding that the terms, conditions, and prices of the Second Agreement apply between BellSouth and AT&T from June 11, 2000 forward, except for the reciprocal compensation rates.

AT&T'S MOTION TO STRIKE BELLSOUTH'S "EXTRINSIC" TESTIMONY

As noted in the Background, AT&T filed its Motion to Strike BellSouth's "Extrinsic" Testimony and its Brief supporting its Motion to Strike on February 12, 2003. BellSouth filed its response to AT&T's Motion to Strike on February 24, 2003.

AT&T Motion and Brief

Motion

In its Motion, AT&T contends that because BellSouth has attempted to use "extrinsic" or parol evidence to modify the unambiguous terms of the Interconnection Agreement between AT&T and BellSouth in contravention of Georgia Law, this Commission should strike the "extrinsic" testimony offered by BellSouth. AT&T asserts that there are two reasons that BellSouth's "extrinsic" testimony should be stricken. First, AT&T contends that because the interconnection agreement contains an "entire agreement" or merger clause, parol evidence is inadmissible to alter the terms of the agreement. Second, AT&T asserts that because the definitions of "Local Traffic" and "Switched Access Traffic" in the Interconnection Agreement are clear and unambiguous, the consideration of evidence of prior or contemporaneous oral arguments to alter, vary, or change this language is prohibited. AT&T argues that the Interconnection Agreement is governed by

[6]See, Feldman at 277.

Georgia law, which provides only limited circumstances when "extrinsic" evidence can be considered and those circumstances are not present in this case.

AT&T states that on January 15, 2003, BellSouth filed the Direct Testimony of Elizabeth R.A. Shiroishi. AT&T argues that contrary to BellSouth's Answer, the vast majority of Ms. Shiroishi's testimony discusses the history of the negotiations between the parties and what the parties intended when they negotiated and executed the express contract provisions in the Interconnection Agreements. AT&T argues that contrary to Ms. Shiroishi's testimony regarding the discussions of the parties, there are no provisions in the interconnection agreements that the language "except for those calls that are originated or terminated through switched access arrangements as established by the State Commission or FCC" meant "switched access tariffs." AT&T states that this is Ms. Shiroishi's "revisionist" history, based on extrinsic evidence, which she included in her testimony because the express contract provisions of the interconnection agreements are as otherwise set forth in AT&T witness King's Direct Testimony. AT&T contends that because there is no ambiguity in the express contract provisions of the interconnection agreements, AT&T should not be required to rebut Ms. Shiroishi's testimony.

AT&T argues that Ms. Shiroishi's Direct Testimony is replete with examples of inappropriate extrinsic testimony. AT&T contends that the use of extrinsic testimony would be inconsistent with the Answer filed by BellSouth on September 20, 2002. Further, AT&T asserts that the Interconnection Agreement is governed by Georgia law and consistent with applicable Georgia law, and to protect AT&T's due process rights in this proceeding, this Commission should strike those portions of Ms. Shiroishi's Direct Testimony which AT&T underlined in its Exhibit 1 attached to its Motion to Strike.

Brief

AT&T argues, that consistent with the express provisions of the Interconnection Agreement and applicable law, it made no allegations regarding any "prior agreements, representations, statements, negotiations, understandings, proposals or undertakings, oral or written," or other "extrinsic" evidence,

regarding the history of the negotiations between AT&T and BellSouth. AT&T states that neither did it offer evidence of "what the parties intended" when they negotiated and executed the Interconnection Agreement.

AT&T states that in its Answer, BellSouth asserted the proverbial defense that the agreement speaks for itself. AT&T notes that it was careful to limit its witness King's testimony to a discussion of the express provisions of the Interconnection Agreement and to avoid introduction of parol evidence. AT&T contends that the Direct Testimony of Ms. Shiroishi focused primarily on the negotiations between the parties that led to the execution of the Interconnection Agreement and the "intent" in agreeing to the terms of the Interconnection Agreement.

AT&T argues that Georgia state law is the applicable law to be applied to the contract. AT&T states that under Section 24.6.1. of the Agreement the parties agreed that "the validity of this Agreement, the construction and enforcement of its terms, and the interpretation of the rights and duties of the Parties shall be governed by the laws of the State of Georgia . . . except insofar as federal law may control any aspect of this Agreement, in which case federal law shall govern such aspect."

AT&T argues that in accordance with Georgia law, the merger clause, such as the one included in the First Interconnection Agreement, precludes the admission of parol evidence to add to, take from, or vary a written contract. See, First Data POS, Inc. v. Willis, 273 Ga. 729, 546 S.E.2d 781 (2001). AT&T contends that under the applicable rules of contract construction, parol evidence is prohibited in the absence of a determination that an agreement is ambiguous and otherwise unresolvable under the rules of contract construction. AT&T also cites First Data for the proposition that the Georgia Supreme Court held that the "rational basis for merger clauses is that where parties enter into a final contract, all prior negotiations, understandings, and agreements on the same subject are merged into the final contract, and are accordingly extinguished." Id. at 795. AT&T states that the Georgia Supreme Court in First Data noted that "[i]t has long been the law of this State that the parol evidence rule prohibits the consideration of evidence of a prior or contemporaneous oral agreement to alter, vary or change the unambiguous terms of a written contract." Id.

AT&T asserts that it is well-established in Georgia law that a merger clause precludes the admission of parol evidence. See, Cook v. Regional Communications, Inc., 224 Ga. App. 869, 539 S.E. 2d 171 (2000); Choice Hotels Intern., Inc. v. Ocmulgee Fields, Inc., 222 Ga App. 185, 474 S.E. 56 (1996). AT&T contends that the unambiguous merger clause states that it was the parties' intention that the Second Agreement supersede any prior agreements, written or verbal. AT&T argues that those portions of Ms. Shiroishi's direct testimony that are offered to explain the intent of the parties should be stricken. Specifically, AT&T contends that to allow the testimony would effectively eliminate the unambiguous "entire agreement" provision contained in the Second Agreement and violates "well-established" Georgia law regarding contract construction.

AT&T contends the construction of a contract is a question of law for the court, citing O.C.G.A. §13-2-1[7]. AT&T also cites to Estate of Sam Farkas, Inc. v. Clark, 238 Ga. App. 115, 517 S.E. 826 (1999), that "where the language of a contract is clear, unambiguous, and capable of only one reasonable interpretation, no construction is necessary or even permissible by the trial court." AT&T asserts that in accordance with Georgia law, a trial court must first decide whether the contract language is ambiguous. See Municipal Elec. Authority of Georgia v. City of Calhoun, 227 Ga. App. 571, 489 S.E.2d 599 (1997). Then, if the court determines that the contract is ambiguous, the court must then apply the appropriate rules of construction, which are found in O.C.G.A. §13-2-2. Id. at 572. AT&T contends that only after these steps, if the court thereafter determines that an ambiguity still exists, should the trier of fact resolve the ambiguity. Id.

AT&T argues that in accordance with the O.C.G.A. §13-2-2(2), there are several rules to be used in arriving at the true interpretation of contracts. AT&T contends that, first, parol evidence is inadmissible to add to, take from, or vary a written contract. See O.C.G.A. §13-2-2(1). AT&T asserts that, second, the words generally bear their usual and common significance, but technical words, words of art, or words used in a particular trade or business will be construed, generally, to be used in reference

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[7]Official Code of Georgia Annotated.

to this particular meaning. See O.C.G.A. §13-2-2(2). AT&T states that, third, the construction which will uphold a contract in whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part. See O.C.G.A. §13-2-2(4). AT&T argues that thus in accordance with O.C.G.A. §13-2-2, the Commission should ignore BellSouth's parol evidence because it seeks to vary the Second Agreement, specifically the definitions of "Local Traffic" and "Switched Access Traffic."

AT&T states that under federal and Georgia law "extrinsic" evidence is not admissible to contradict the terms of an unambiguous contract. See Stewart v. KHD Deutz of America, Corp., 980 F.2d 698 (11th Cir. (Ga.) 1993). AT&T argues that extrinsic evidence is not admissible to establish ambiguity; any ambiguities must be created by the language of the contract itself. Id. at 702. AT&T argues that BellSouth's attempt to create an ambiguity fails as a matter of law if the language is clear and unambiguous. AT&T states that a contract is ambiguous only when it is reasonably susceptible to more than one interpretation. Id.

AT&T contends that this Commission should be concerned about the public policy implications of allowing parties to file "intent" testimony that contradicts the clear and unambiguous terms of an interconnection agreement. AT&T argues that this Commission should not establish the undesirable precedent of allowing the parties an unqualified opportunity to testify about discussions regarding the intent of the parties without this Commission first determining that the interconnection agreement contains ambiguous terms. AT&T asserts that furthermore, with respect to determining whether certain terms are ambiguous, this Commission should be equally leery of any party that alleges it had a different "intent" or "understanding" than the other party in the negotiating an interconnection in order to insure that it has a guaranteed opportunity to offer "extrinsic" evidence about the interconnection agreement.

BellSouth's Response

BellSouth contends that this Commission should deny AT&T's motion for the simple reason that the motion is predicated on a "straw man" argument that BellSouth is attempting through the use

of extrinsic evidence, to vary the terms of an unambiguous contract. BellSouth states that is not true.[8] BellSouth contends that the parties agree that the interconnection agreement is clear with respect to the treatment, for intercarrier compensation purposes, of intraLATA calls that traverse switched access arrangements. BellSouth states that the rub is that, although the agreement expressly and unambiguously excludes from the definition of "Local Traffic" intraLATA calls that traverse switched access arrangements, AT&T stridently maintains, nevertheless, that such traffic is "clearly and unambiguously" included within the contract's definition of "Local Traffic." BellSouth argues that should this Commission conclude that the agreement is unambiguous in either respect, there will be no need for this Commission to consider any extrinsic evidence to determine the parties' intent. BellSouth states that, if this Commission concludes that the contract is ambiguous, then it is, as AT&T acknowledges, wholly appropriate and required that this Commission consider evidence of the parties' intent. BellSouth states that for these reasons the North Carolina Utilities Commission denied this same motion in an identical case pending before them. BellSouth asserts that, likewise, this Commission should deny AT&T's motion.

BellSouth states that the only issue before this Commission is the meaning of the definition of "Local traffic" in the parties' interconnection agreement. BellSouth asserts that its position is that the plain meaning of the language excludes calls that traverse switched access arrangements from the "LATAwide" local traffic definition and AT&T claims the language means the exact opposite.

BellSouth notes that AT&T offered only the conclusory opinion of a lay "witness" rather than the testimony of the person that negotiated the disputed language on behalf of BellSouth, Elizabeth Shiroishi. BellSouth contends that Ms. Shiroishi's testimony explained the contract provision at issue and its plain meaning. BellSouth states that Ms. Shiroishi also testified that she had explicit discussions with AT&T negotiators about the contract language, and that they specifically discussed the fact that

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[8]BellSouth asserts that AT&T did not comply with Rule 28-106.204(3), Florida Administrative Code, because it never asked whether BellSouth objected to the motion.

pursuant to the clause, intraLATA calls that traversed switched access arrangements were excluded from the definition of "Local Traffic."

BellSouth argues that AT&T's motion contains two erroneous allegations. BellSouth contends that Ms. Shiroishi's testimony is in no way inconsistent with its Answer. BellSouth asserts that it is not required to plead an "extrinsic" evidence defense. BellSouth contends that under Georgia law, which governs this dispute, the cardinal rule of [contract] construction is to ascertain the intention of the parties.

BellSouth states that AT&T is not required to attempt to rebut Ms. Shiroishi's testimony about her specific discussions with AT&T's contract negotiators regarding the meaning of the express exclusion from LATAwide definition of "Local traffic" for termination of switched access arrangements. BellSouth argues that if AT&T is confident in its interpretation of the plain meaning of the contract, then there is no need for it to put on any testimony. See Strozzo v. Sea Island Bank, 521 S.E. 2d 392, 396 (Ga. App. 1999). BellSouth asserts that AT&T filed 50 pages of rebuttal testimony in the North Carolina proceeding, which suggests that AT&T is not so confident in its position that the contract is clear and unambiguous.

BellSouth states that AT&T's only legal argument in support of its motion is based on the parol evidence rule. BellSouth argues that AT&T incorrectly claims that the parol evidence rule bars Ms. Shiroishi's testimony regarding the parties' discussions about the contract terms at issue here, but it does not. BellSouth contends that AT&T's argument is predicated on an erroneous conclusion that interconnection agreement's definition of "Local Traffic" clearly and unambiguously includes intraLATA traffic that traverses switched access arrangements. BellSouth asserts that AT&T's after-the-fact twisted interpretation is based on its allegation that a term specifically defined in one place in the agreement means the same thing as a different, undefined term in a separate provision. BellSouth contends that, in addition, AT&T's interpretation violates a fundamental principle of contract construction, because it renders the express exception of intraLATA calls that traverse switched access arrangements set forth in paragraph 5.3.1.1 of Attachment 3 meaningless. BellSouth concludes that without AT&T's

straw man premise that the agreement "clearly" means something different than the plain words of that provision, the parol evidence rule does not apply.

BellSouth states that it believes that the plain words of the agreement - "except those calls that are originated or terminated through switched access arrangements" - unambiguously excludes from the definition of "Local traffic" intraLATA calls terminated over switched access arrangements. BellSouth asserts that no extrinsic evidence is needed for this Commission to conclude that the agreement is clear that calls terminated over switched access arrangements are subject to switched access rates and not local reciprocal compensation rates. BellSouth argues that if, however, this Commission determines, based on AT&T's inventive arguments, that the agreement is ambiguous on this point, then the parol evidence rule does not apply, because "parol evidence is admissible to explain an ambiguity in a written contract." Andrews v. Skinner, 279 S.E. 2d 523, 525 (Ga. App. 1981).

BellSouth contends that it does not offer Ms. Shiroishi's testimony to alter or vary the terms of the agreement, but because it is appropriate for this Commission to consider extrinsic evidence in the event this Commission finds the contract ambiguous. BellSouth contends that the parol evidence rule, as even AT&T acknowledges, does not bar the testimony in that situation. BellSouth argues that given that the parties must submit pre-filed testimony before this Commission rules with respect to whether the contract term at issue is ambiguous, it would be error to strike the testimony. BellSouth concludes that this Commission should deny AT&T's Motion to Strike.

Decision

It appears that both parties agree that if there is ambiguity in the wording of the contract, then testimony regarding the parties' intent is appropriate. It also appears clear that both parties agree that if the language of the agreement is clear and unambiguous, any testimony regarding the parties' intent is unnecessary and should not be considered. However, the parties disagree as to whether the plain meaning of the agreement's language includes or excludes a certain type of traffic which utilizes a certain type of arrangement. Thus, we find that at this

point in time there is enough uncertainty as to the application or meaning of this language that the Motion to Strike should be denied.

We further note that, if after receiving all the evidence, we conclude that the language is in fact clear and unambiguous, then we need not consider any "extrinsic" testimony. The inclusion of this testimony will not prejudice either party since we can clearly differentiate what testimony we can and cannot consider when rendering our final determination. Therefore, we find it appropriate to deny AT&T's Motion to Strike BellSouth's "Extrinsic" Testimony.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunication Inc.'s Motion for Partial Summary Final Order and AT&T of the Southern States, LLC, Teleport Communications Group, Inc. and TCG of the Carolinas, Inc.'s Cross Motion for Partial Summary Final Order on Issue 1(a) are hereby granted finding that the terms, conditions, and prices of the Second Agreement apply between BellSouth and AT&T from June 11, 2000 forward, except for the reciprocal compensation rates. It is further

ORDERED that AT&T of the Southern States, LLC, Teleport Communications Group, Inc. and TCG of the Carolinas, Inc.'s Motion to Strike BellSouth's "Extrinsic" Testimony is hereby denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 21st day of April, 2003.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

PAC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and

Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.