BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: AT&T Communications of the Southern States, LLC, Teleport Communications Group, Inc. and TCG of the Carolinas, Inc. For Enforcement of Interconnection Agreements with BellSouth Telecommunications, Inc.	)	**Docket No. 020919-TP** **Filed: February 12, 2003**

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

COMES NOW AT&T of the Southern States, LLC, Teleport Communications Group, Inc., and TCG of the Carolinas, Inc. (collectively "AT&T") and hereby file this Brief in Support of AT&T's Motion to Strike BellSouth's "Extrinsic" Testimony. Because BellSouth Telecommunications, Inc.'s ("BellSouth") attempt to use "extrinsic" or parol evidence to modify the unambiguous terms of the Interconnection Agreement between AT&T and BellSouth is in contravention of Georgia law, this Commission should strike the "extrinsic" testimony offered by BellSouth.

SUMMARY OF THE ARGUMENT

This Commission should strike BellSouth's "extrinsic" testimony for two reasons. First, because the Interconnection Agreement contains an "entire agreement" or merger clause, parol evidence is inadmissible to alter the terms of the agreement. Second, 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 agreements to alter, vary, or change this language is prohibited. The Interconnection Agreement is governed by Georgia law which provides only limited circumstances when "extrinsic" evidence can be considered and those circumstances are not present in this case. Thus the Commission should strike BellSouth's "extrinsic" evidence in its entirety. However, in the event the Commission concludes that certain provision(s) in the Interconnection Agreement are ambiguous, and that such ambiguity cannot be resolved through application of the rules of contract construction discussed below, AT&T directs the Commission to AT&T's Direct Testimony filed by Jeffrey A. King on January 15, 2003.

PROCEDURAL BACKGROUND

On August 26, 2002, AT&T filed a Complaint alleging that BellSouth had breached, and continues to breach, its obligation to charge AT&T local reciprocal compensation rates for the transport and termination of all "Local Traffic," including all "LATAwide Traffic," in accordance with the terms of two interconnection agreements ("Interconnection Agreements") entered into by AT&T and BellSouth pursuant to Section 252 of the Telecommunications Act of 1996, 47 U.S.C. § 252, and approved by this Commission.[1]

In its Complaint, AT&T relied only upon the express provisions of the Interconnection Agreement to support its allegations that BellSouth had

[1] As explained in AT&T's Motion, from a "time period" perspective, two Interconnection Agreements are relevant to this proceeding. However, only one of the Interconnection Agreements relates to the substantive dispute in this proceeding.

breached, and continues to breach, its obligations to charge AT&T local reciprocal compensation rates for the transport and termination of all "Local Traffic," including all "LATAwide Traffic." Consistent with the express provisions of the Interconnection Agreement and applicable law, AT&T 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. Nor did AT&T offer evidence of "what the parties 'intended'" when they negotiated and executed the Interconnection Agreement.

On September 20, 2002, BellSouth filed its Answer to AT&T's Complaint and asserted the proverbial defense that the agreement speaks for itself. On January 15, 2003, AT&T filed the Direct Testimony of Jeffrey A. King in support of its Complaint. AT&T was careful to limit Mr. King's testimony to a discussion of the express provisions of the Interconnection Agreement and to avoid the introduction of parol evidence.

On January 15,2003, BellSouth filed the Direct Testimony of Elizabeth R. A. Shiroishi. Despite the facts that (a) the Interconnection Agreement contains an "entire agreement" or merger clause and (b) BellSouth already had asserted that Interconnection Agreement spoke for itself, Ms. Shiroishi's Direct Testimony focused primarily on the negotiations between the parties that led to the execution of the Interconnection

Agreement. Further, Ms. Shiroishi offered "extrinsic" evidence regarding the parties' "intent" in agreeing to the terms of the Interconnection Agreement.

ARGUMENT AND CITATION OF AUTHORITY

The Commission should strike the "extrinsic" evidence offered by BellSouth in the form of the Direct Testimony of Ms. Shiroishi because it is parol evidence being offered to vary or change the unambiguous terms of the Interconnection Agreement at issue. In accordance with Georgia law, merger clauses, such as the one contained in the Interconnection Agreement, preclude the admission of parol evidence to add to, take from, or vary a written contract. Further, 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. Therefore, AT&T respectfully requests that the Commission exclude those portions of the Ms. Shiroishi's Direct Testimony.

The Merger Agreement Prohibits the Introduction of Extrinsic Evidence.

In Section 24.9 of the Second Interconnection Agreement between BellSouth and AT&T dated December 7, 2001, the parties agreed that:

> This agreement, which shall include the Attachments, Appendices, and other documents referenced herein, constitutes the entire Agreement between the Parties concerning the subject matter hereof and supersedes any prior agreements, representations, statements, negotiations, understandings, proposals or undertakings, oral or

> written, with respect to the subject matter expressly set forth herein.

See Agreement at Section 24.9.1. Additionally, 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." Id. at Section 24.6.1.

However, ignoring the clear and unambiguous language of the merger clause, BellSouth has offered testimony expressly for the purposes of introducing evidence of "statement, negotiations, understandings, proposals, or undertakings." The Georgia Supreme Court has held that, "in written contracts containing a merger clause, prior or contemporaneous representations that contradict the written contract cannot be used to vary the terms of a valid written agreement purporting to contain the entire agreement of the parties . . ." See First Data POS, Inc. v. Willis, 273 Ga. 792, 546 S.E.2d 781 (2001). The Supreme Court also 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. Finally, the Supreme Court noted that, "It 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.

It is well-established that a merger clause precludes the admission of parol evidence to add to, take from, or vary the written contract. See Cook v. Regional Communications, Inc., 244 Ga. App. 869, 539 S.E.2d 171 (2000), citing Choice Hotels Intern., Inc. v. Ocmulgee Fields, Inc., 222 Ga. App. 185, 186-87(1), 474 S.E.2d 56 (1996). "Particularly when a contract contains a merger clause, parol evidence is inadmissible to challenge the unambiguous terms of the contract, and parol evidence of collateral oral agreements is properly excluded." Choice Hotels, 222 Ga. App. at 187.

Here, the Interconnection Agreement's unambiguous merger clause states that it was the parties' intention that the Interconnection Agreement supersede any "prior agreements, representations, statements, negotiations, understandings, proposals or undertakings, oral or written, with respect to the subject matter expressly set forth" therein. As such, those portions of Ms. Shiroishi's Direct Testimony which are offered to vary or change the unambiguous terms of the Interconnection Agreement by explaining BellSouth's alleged "intent" in agreeing to Interconnection Agreement, should be stricken.

Because the vast majority of Ms. Shiroishi's Direct Testimony is, on its face, BellSouth's attempt to resurrect "statements, negotiations, understandings, proposals or undertakings, oral or written" with respect to

subject matter of the Interconnection Agreement, specifically, the clear and unambiguous definitions of "Local Traffic" set forth in Section 5.3.1.1 and "Switched Access Traffic" set forth in Section 5.3.3, the Commission should strike those portions of Ms. Shiroishi's Direct Testimony which attempt to alter these definitions. Allowing those portions of Ms. Shiroishi's Direct Testimony to be admitted would, in essence, effectively eliminate the unambiguous "entire agreement" provision contained in the Interconnection Agreement and violate "well-established" Georgia law regarding contract construction.

A. Georgia Law on Contract Construction Mandates the Exclusion of the Extrinsic Evidence Offered by BellSouth.

The construction of a contract is a question of law for the court. O.C.G.A. § 13-2-1. However, "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. See Estate of Sam Farkas, Inc. v. Clark, 238 Ga. App. 115, 517 S.E.2d 826 (1999) (holding that where contract was plain, clear, certain in its terms, and not ambiguous, there was nothing for either the trial court or jury to construe). Thus, 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). This is the first step in contract construction. If the court concludes that the contract is ambiguous, the trial court must then apply the applicable

rules of construction which are found in O.C.G.A. § 13-2-2. Id. at 572. Only after doing so, and the trial court thereafter determines that an ambiguity still exists, should the trier of fact resolve the ambiguity. Id.

Here the language of the provision at issue is clear and unambiguous. Specifically, Section 5.3.1.1 states that:

> Additionally the parties agree to apply "LATAwide" local concept to this Attachment 3, meaning that traffic that has traditionally been treated as intraLATA toll traffic will now be treated as local for intercarrier compensation purposes, except those calls that are originated or terminated through switched access arrangements established by the State Commission or FCC.

Thus, the clear language demonstrates that the parties intended that all "LATAwide Traffic" would be treated as "Local Traffic." Moreover, Section 5.3.3 (which is explicitly "interrelated" to Section 5.3.1.1) defines "Switched Access Traffic" as being limited to "Intrastate InterLATA" and "Interstate InterLATA" calls and does not include other types of calls, including any "IntraLATA" or "LATAwide Traffic." In other words, the parties clearly and unambiguously agreed to the local reciprocal compensation rate structure that AT&T has applied to all of BellSouth's "LATAwide Traffic," but which BellSouth has failed to apply to all of AT&T's "LATAwide Traffic."

Assuming arguendo that the Commission determines that the language is ambiguous, extrinsic parol evidence should not be considered under Georgia law unless and until the rules of construction are applied

and the Commission concludes that the ambiguity remains. See Municipal Elec., 227 Ga. App. at 572. According to O.C.G.A. § 13-2-2(2), there are several rules to be used in arriving at the true interpretation of contracts. First, "parol evidence is inadmissible to add to, take from, or vary a written contract." O.C.G.A. § 13-2-2(1). Second, "words generally bear their usual and common signification; but technical words, words of art, or words used in a particular trade or business will be construed, generally, to be used in reference to this particular meaning." O.C.G.A § 13-2-2(2). 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." O.C.G.A. § 13-2-2(4).

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 Interconnection Agreement, specifically the definitions of "Local Traffic" in Section 5.3.1.1 and "Switched Access Traffic" in Section 5.3.3. Instead, the Commission should concentrate on giving meaning to the unambiguous provisions in the Interconnection Agreement (including the "entire agreement" clause contained therein). Even if otherwise subject to some exceptions to the general rule prohibiting the consideration of parol evidence, in view of the merger clause, allowing BellSouth to introduce the "extrinsic" evidence would violate the rule of contract construction that prefers the construction of a contract which will uphold the contract in

whole. Ochs v. Hoerner, 235 Ga. App. 735, 510 S.E.2d 107 (1998) (holding that parol evidence is inadmissible to alter terms of the unambiguous sales contract in view of the merger clause, even if otherwise subject to some exception to the general rule).

Under both 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). Moreover, "extrinsic" evidence is not admissible to establish ambiguity; any ambiguities must be created by the language of the contract itself. Id. at 702. Thus, BellSouth's attempt to "create an ambiguity" fails as a matter of law if the language is clear and unambiguous. Moreover, a contract is ambiguous when it is ***reasonably*** susceptible to more than one interpretation. Id. (emphasis added).

The Commission also should be concerned about the public policy implications of allowing parties to file "intent" testimony which contradicts clear and unambiguous terms of an interconnection agreement. In this respect, the Commission should not establish the undesirable precedent that parties will have an unqualified opportunity to testify about discussions outside of an interconnection agreement without the Commission first determining that the interconnection agreement contains ambiguous terms. Furthermore, with respect to determining whether certain terms are ambiguous, the Commission should be equally leery of the party which

alleges it had a different "intent" or "understanding" than the other party in negotiating an interconnection in order to insure that it has a guaranteed opportunity to offer "extrinsic" evidence about the interconnection agreement.

Here, the Interconnection Agreement is unambiguous and susceptible to only one interpretation. The parties explicitly agreed to the application of local reciprocal compensation rates to all "LATAwide Traffic" in Section 5.3.1.1 and limited the application of switched access rates to "Switched Access Traffic" as defined in Section 5.3.3 of the Interconnection Agreement. This Section limits the definition of "Switched Access Traffic" to Intrastate InterLATA and Interstate InterLATA traffic. Thus the definition of "Switched Access Traffic" in Section 5.3.3 does not include any intraLATA or "LATAwide Traffic." Because there is no ambiguity in this definition, there is no need to apply "extrinsic" evidence.

However, in the event the Commission (a) concludes that the language in the Interconnection Agreement is ambiguous and (b) further concludes that the Interconnection Agreement is ambiguous even after applying the rules of contract construction (which prohibit the consideration of parol evidence and prefer the construction which upholds all portions of the contract, including the "entire agreement" clause), then AT&T directs this Commission to AT&T's Direct Testimony of Mr. King filed January 15, 2003. The detailed and fact intensive Direct Testimony of Mr. King, in contrast to

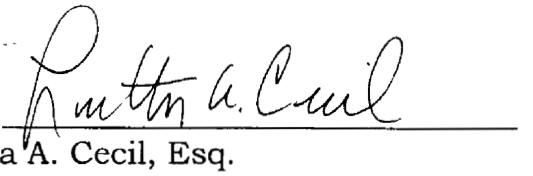
the vague and conclusory testimony of Ms. Shiroishi, explains the genesis of the unambiguous provisions in the Interconnection Agreement. AT&T's position is supported by both the plain and unambiguous provisions of the Interconnection Agreement and the negotiations that resulted in the agreed-upon language.

CONCLUSION AND PRAYER FOR RELIEF

The Interconnection Agreement at issue in this Complaint is unambiguous and contains an "entire agreement" or merger provision. Under Georgia law, parol evidence, such as the "extrinsic" evidence offered by BellSouth through Ms. Shiroishi's testimony, must be excluded absent a finding of ambiguity and a conclusion that the rules of contract construction, which themselves prohibit the introduction of parol evidence, establish ambiguity. BellSouth is attempting to avoid the clear and unambiguous language of the Interconnection Agreement by filing testimony regarding its "intent" in negotiating the Interconnection Agreement in hopes of justifying its past and continuing breach of the Interconnection Agreement. This Commission should strike the Ms. Shiroishi's improper "extrinsic" testimony and prevent BellSouth from breaching the Interconnection Agreement by ignoring the plain and unambiguous language contained therein.

This 12th day of February, 2003.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served a copy of the AT&T'S BRIEF SUPPORTING AT&T'S MOTION TO STRIKE BELLSOUTH'S "EXTRINSIC" TESTIMONY on behalf of AT&T Communications of the Southern States, LLC, Teleport Communications Group, Inc., and TCG of the Carolinas, Inc. (collectively "AT&T") on all parties in the U.S. Mail, postage prepaid. This the 12th day of February, 2003

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