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February 19, 2003

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No.: 020919-TP
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.

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response in Opposition to AT&T's Motion to Strike, which we ask that you file in the captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Andrew D. Shore (ADS)

Andrew D. Shore

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

CERTIFICATE OF SERVICE
DOCKET NO. 020919-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via First Class U.S. Mail this 19th day of February 2003 to the following:

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Andrew D. Shore (KA)
Andrew D. Shore

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	Docket No. 020919-TP
AT&T Communications of the	)	
Southern States, LLC, Teleport	)	Filed: February 19, 2003
Telecommunications Group, Inc.,	)	
And TCG South Florida for	)	
Enforcement of Interconnection	)	
Agreements with BellSouth	)	
Telecommunications, Inc.	)	

BELLSOUTH'S RESPONSE IN OPPOSITION TO AT&T'S MOTION TO STRIKE

BellSouth Telecommunications, Inc. ("BellSouth"), by and through its undersigned counsel, hereby files this Response in Opposition to AT&T's Motion to Strike.[1]

INTRODUCTION

The Commission should deny AT&T's motion for one simple and straightforward reason – it is predicated upon a "straw man" argument that BellSouth is attempting through the use of extrinsic evidence to vary the terms of an unambiguous contract.

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[1] In footnote no. 1 of its motion, AT&T states: "As required by Rule 28-106.204(3), Florida Administrative Code, BellSouth was advised in advance of AT&T's filing of this motion." It is true that on the day before it filed the motion, AT&T "advised" BellSouth that it would be filing the motion. Merely telling opposing counsel that you will file a motion does not, however, constitute compliance with the Rule. Rule 28-106.204(3) requires that motions "include a statement that the movant has conferred with all other parties of record and shall state as to each party whether the party has any objection to the motion." As evidenced by its own words, AT&T did not even purport to comply with the Rule. AT&T's motion contains no statement that it conferred with BellSouth regarding the motion or whether BellSouth objects. In fact, AT&T never asked BellSouth whether it objected to the motion.

BellSouth does believe that the motion is inappropriate and that is should be denied for the reasons set forth herein. AT&T's failure to abide by the Rule is notable, nevertheless, because AT&T misrepresented the substance of the Rule to conform to AT&T's (non-complying) conduct, and because AT&T was quick to quote the actual Rule and to point out BellSouth's inadvertent noncompliance in another docket recently.

That is not true. The parties agree that the interconnection agreement is clear on its face with respect to the treatment for inter-carrier compensation purposes of intraLATA calls that traverse switched access arrangements. 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." Should the Commission conclude that the agreement is unambiguous in either respect, there will be no need for the Commission to consider any extrinsic evidence to determine the parties' intent. If, however, the Commission concludes that the contract is ambiguous, then it is, as AT&T acknowledges, wholly appropriate and, in fact, it is required, that the Commission consider evidence of the parties' intent to determine the meaning of the contractual provision at issue. For these reasons, the North Carolina Utilities Commission denied this same motion in an identical case pending before the North Carolina Commission. This Commission should likewise deny AT&T's motion to strike.

ARGUMENT

I. Each Party Alleges that the Agreement is "Unambiguous," But the Parties Reach Different Conclusions With Respect to the "Plain Meaning" of the Contract.

The sole issue before the Commission for determination in this proceeding is the meaning of the following definition of "Local Traffic" in the parties' interconnection agreement:

> The Parties agree to apply a "LATAwide" local concept to this Attachment 3, meaning 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 as established by the State Commission or FCC.

Att. 3, § 5.3.1 (emphasis added). BellSouth's position is that the exclusion of calls that traverse switched access arrangements from the "LATAwide" local traffic definition means exactly what it says; AT&T claims that it means just the opposite – that such calls should be treated as local notwithstanding the express exclusion.

In support of its case, AT&T offered the conclusory opinion of a lay "witness" that, based on the supposed "rules of contract construction and interpretation," the contract does not mean what it says, but rather, means something else that would reduce substantially certain payments AT&T is required to make to BellSouth pursuant to the agreement.[2] BellSouth, by contrast, filed the testimony of the person that negotiated the disputed language on behalf of BellSouth, Elizabeth Shiroishi. Ms. Shiroishi explained the contract provision at issue and its plain meaning, which has not been contested by other ALECs that have the same definition in their interconnection agreements with BellSouth. Ms. Shiroishi also testified that she had explicit discussions with AT&T's negotiators (who have not filed testimony) about the contract language, and that they specifically discussed the fact that pursuant to the clause, intraLATA calls that traversed switched access arrangements were excluded from the definition of "local traffic."

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[2] AT&T's characterization of Mr. King's testimony in its brief in support of its motion to strike as "detailed and fact intensive" is not mere hyperbole, it is dead wrong. Mr. King "testimony" contains nothing other than a recitation of portions of the agreement and arguments in support of AT&T's twisted interpretation. There is no fact or other information regarding the meaning of the agreement in the testimony Mr. King is sponsoring that is not already in the record by virtue of the filed interconnection agreement and AT&T's complaint.

II. AT&T's Motion Contains Two False Allegations.

Before addressing the (straw man) legal argument that AT&T makes in its supporting brief, it is necessary to first correct two erroneous assertions in AT&T's motion to strike. AT&T contends in its motion that Ms. Shiroishi's testimony is inconsistent with BellSouth's Answer, and that AT&T should not be required to rebut the portion of Ms. Shiroishi's testimony addressing the parties' discussions about the contract's definition of "local traffic" because the contract is unambiguous. See Motion at ¶¶9, 12. First, Ms. Shiroishi's testimony is in no way inconsistent with BellSouth's Answer. BellSouth asserted in its Answer that the definition of "local traffic" in the parties' interconnection agreement clearly and unambiguously excludes intraLATA traffic that traverses switched access arrangements. Notwithstanding AT&T's attempt to invent one in its motion, there is no "extrinsic evidence" affirmative defense. AT&T fails to cite any authority in support of its argument that BellSouth was required to assert AT&T's newly created affirmative defense of "extrinsic evidence" in its Answer, because there is no such requirement. The reason parties are required to plead certain, enumerated defenses affirmatively is so that the other party has adequate notice of and is not surprised by any legal theories asserted by its adversary. It makes no sense for AT&T to argue that it was somehow surprised that BellSouth intended for the agreement to be applied in the manner that BellSouth plead was clear from the contract itself. Under Georgia law, which governs this dispute, the "cardinal rule of [contract] construction is to ascertain the intention of the parties." Ga. Code Ann. § 13-2-3.

Second, 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 the LATAwide definition of "local traffic" for traffic terminated over switched access arrangements. Indeed, if AT&T is so confident in its theory that the contract is clear and unambiguous in the manner AT&T claims that it is, there is no need for AT&T to concern itself at all with that testimony, because applicable law, as AT&T points out in its brief, requires the Commission to give the contract its plain meaning *if* the language of the contract is susceptible to only one reasonable interpretation. *See, e.g., Strozzo v. Sea Island Bank*, 521 S.E.2d 392, 396 (Ga. App. 1999). The fact that AT&T filed over 50 pages of testimony in the North Carolina case attempting to rebut the same 10 pages of testimony Ms. Shiroishi filed here suggests that AT&T is not so confident in its strategy of seeking to get the Commission to conclude that the agreement is unambiguous in the manner alleged by AT&T based on AT&T stating over and over again that the contract so "clearly and unambiguously" means what AT&T would like it to mean.

III. AT&T's Contention that Testimony Should be Stricken Based on the Parol Evidence Rule is a "Straw Man." The Parol Evidence Rule Does Not Bar Extrinsic Evidence of the Meaning of the Interconnection Agreement if the Commission Determines that the Agreement is Ambiguous.

AT&T's only legal argument in support of its motion to strike is based on the parol evidence rule. AT&T correctly cites the rule, which "prohibits the consideration of evidence of a prior or contemporaneous oral agreement to *alter, vary or change* the *unambiguous* terms of a written contract." AT&T brief, at 5 (quoting Georgia case) (emphasis added). AT&T incorrectly claims, however, that the parol evidence rule bars Ms. Shiroishi's testimony regarding the parties' discussions about the contract term at issue here. It does not.

AT&T's argument is predicated on AT&T's self-serving (and erroneous) conclusion that the interconnection agreement "clearly and unambiguously" includes within the contract's definition of "local traffic" intraLATA traffic that traverses switched access arrangements. AT&T's after-the-fact twisted interpretation is based on its allegation that a term specifically defined in one place in the parties' agreement means the same thing as a different, undefined term in a separate provision. Moreover, AT&T's "interpretation" violates a fundamental principle of contract construction, because it renders the express exception for intraLATA calls that traverse switched access arrangements set forth in paragraph 5.3.1.1 of Attachment 3 meaningless. Without AT&T's straw man premise that the agreement "clearly" means something different than the plain words of that provision state, the parol evidence does not even arguably apply.

BellSouth 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, and that no extrinsic evidence is needed for the 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. If, however, the 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 does not offer Ms. Shiroishi's testimony regarding the parties' discussions on this contract provision to alter or vary the terms of the agreement. Rather, BellSouth offers the testimony because it is appropriate for the Commission to consider extrinsic evidence in the event the Commission finds that the contract is ambiguous. The parol evidence rule, as even AT&T acknowledges, does not bar the testimony in that situation. Given that the parties must submit pre-filed testimony before the Commission will rule with respect to whether the contract term at issue is ambiguous, it would be error to strike the testimony. Consequently, the Commission should deny AT&T's motion.

CONCLUSION

The North Carolina Utilities Commission denied the identical motion on these exact facts on the two separate occasions AT&T made the motion in the North Carolina case. The motion is no more valid here than it was in North Carolina. Consequently, this Commission should deny AT&T's motion to strike.

Respectfully submitted this 19th day of February, 2003.

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