

ORIGINAL

Matilda Sanders

From: Jones, Carol A [Carol.Jones@BELLSOUTH.COM]
Sent: Tuesday, April 20, 2004 2:57 PM
To: Filings@psc.state.fl.us
Subject: FPSC 031046-TP; BellSouth Long Distance, Inc.'s Informal Response to Staff's Request for Additional Information
Importance: High

<<RESPONSESTOSTAFF'SREQUESTFORADDITIONALINFO.doc>> <<BSLDresponse.pdf>>

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B. Docket No. 031046-TP; Petition and Complaint of AT&T Communications of the Southern States, LLC against BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Anticompetitive Pricing of Long Distance Service
C. BellSouth Long Distance, Inc.
on behalf of Harris R. Anthony
D. 8 pages total (including letter and certificate of service)
E. BellSouth Long Distance, Inc.'s Informal Response to Staff's Request for Additional Information

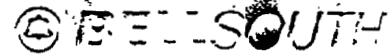
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April 20, 2004

Ms. Blanca S. Bayó  
Director, Division of the Commission Clerk  
and Administrative Services  
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**Re: Docket No. 031046-TP: Petition and Complaint of AT&T  
Communications of the Southern States, LLC against  
BellSouth Telecommunications, Inc. and BellSouth Long  
Distance, Inc. for alleged anticompetitive pricing of long  
distance service**

Dear Ms. Bayó:

Pursuant to the agreement among the Florida Public Service Commission Staff, AT&T, BellSouth Long Distance, Inc. and BellSouth Telecommunications, Inc., attached please find BellSouth Long Distance's informal response to Staff's request for additional information 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 by electronic and U.S. Mail.

Thank you for your assistance in this matter.

Sincerely,

Harris R. Anthony

HRA/caj  
Attachment

cc: All Parties of Record

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**CERTIFICATE OF SERVICE**  
**Docket No. 031046-TP**

I HEREBY CERTIFY that a true and correct copy of BellSouth Long Distance, Inc.'s Informal Response to Staff's Request for Additional Information was served via Electronic Mail and U. S. Mail this 20<sup>th</sup> day of April 2004 to the following:

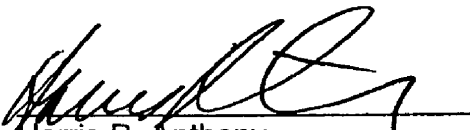
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition and Complaint of AT&T )  
Communications of the Southern States, LLC ) Docket No. 031046-TP  
against BellSouth Telecommunications, Inc. )  
and BellSouth Long Distance, Inc. for alleged )  
Anticompetitive Pricing of Long Distance ) Filed: April 20, 2004  
Service )

**BELLSOUTH LONG DISTANCE, INC.'s INFORMAL RESPONSE**  
**TO STAFF'S REQUEST FOR ADDITIONAL INFORMATION**

1. During the course of an informal conference call held among the Florida Public Service Commission Staff ("Staff"), AT&T Communications of the Southern States, LLC ("AT&T"), BellSouth Telecommunications, Inc. ("BST"), and BellSouth Long Distance, Inc. ("BellSouth Long Distance"), in the above-referenced docket, the Staff asked each party to address the question of whether or not Florida Statute Section 364.051(5)(c) applies to either BST or BellSouth Long Distance under the circumstances set forth in AT&T's complaint in this matter. In its complaint, AT&T alleges that BellSouth Long Distance's promotional offering in which it offered customers who signed up for a particular long distance plan a penny a minute rate for the first three months of the customers' subscription to the plan<sup>1</sup> was unlawful, allegedly because the rate during that promotional period failed to cover associated access charges. On January 15, 2004, BellSouth Long Distance filed a Motion for Summary Order in which it demonstrated that BellSouth Long Distance did pay access charges to BST for all relevant minutes and that, between the per minute rate charged to customers as well as the monthly recurring charge paid by those customers, BellSouth Long Distance more than covered its access costs during the entire period that subscribers purchased the plan in question. AT&T has never

<sup>1</sup> After the first three months, the per-minute rate became \$0.05. In addition, there was and is a monthly recurring charge of \$3.95 for the plan.

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filed a response to BellSouth Long Distance's Motion for Summary Order controverting BellSouth Long Distance's facts.

2. In response to the Staff's informal request, AT&T, on April 6, 2004, filed an "Informal Response" in which it argues that BST and BellSouth Long Distance are "indistinguishable to a subscriber" and that, for purposes of 364.051(5)(c), the two companies should be viewed as one. As described below, AT&T's argument fails both as a matter of fact and as a matter of law.

3. By its terms, Section 364.051 applies to local exchange companies that have elected price regulation. *Florida Statute 364.051(1)*. Section 364.051(5)(c) then provides:

The price charged [by a price regulated local exchange company] to a consumer for a nonbasic service shall cover the direct costs of providing the service and shall, to the extent a cost is not included in the direct cost, include as an imputed cost the price charged by the company to competitors for any monopoly component used by a competitor in the provision of its same or functionally equivalent service.

Thus, by its very terms, Section 364.051(5)(c) requires that a local exchange telecommunications company that has elected price regulation must cover the direct cost of providing a non-basic service and, to the extent the cost is not included in the direct cost, include as an imputed cost the price charged by the company to competitors for any monopoly component. Since this section applies, by its specific terms, to local exchange telecommunications companies that have elected price regulation, it does not apply to BellSouth Long Distance, which is an interexchange carrier in Florida. By the same token, while BST is a local exchange telecommunications company that has elected price regulation, BST does not provide the long distance plan and promotion that were the subject of AT&T's Complaint. Accordingly, the requirements of Section 364.051(5)(c) apply to neither BellSouth Long Distance nor BST.

4. In an effort to circumvent this fundamental flaw in its complaint, AT&T now argues that the separate corporate structures of BellSouth Long Distance and BST are “a corporate fiction” (AT&T Informal Response, paragraph 5) and that “BSLD is the inseparable alter ego of BellSouth” (AT&T Informal Response, paragraph 6). The plain fact of the matter, however, is that BellSouth Long Distance and BST are two structurally separate entities from both a legal and a factual perspective. AT&T’s effort to have this Commission ignore that separation should be rejected.

5. In support of its argument, AT&T quotes Medivision of East Broward County, Inc. v. Department of Health and Rehabilitative Services, 488 So.2d 866, (Fla. 1<sup>st</sup> DCA 1986) as well as an Order of this Commission in Docket Nos. 920260-TL, 910163-TL, 910727-TL and 900960-TL. Those decisions, though, are inapposite to the present facts. The court in Medivision held that a non-party affiliate could be subject to discovery when corporate affiliates “act as one.” In Order No. PSC-93-0812-FOF-TL, as quoted by AT&T, this Commission stated “the separate corporate identities were presumably created as a matter of convenience.” In the case of BellSouth Long Distance and BST, the separate corporate affiliates neither “act as one” nor were they created as “a matter of convenience.” To the contrary, these two entities are “separate affiliates” as required by Section 272 of the Telecommunications Act of 1996, with all of the requirements that attach to such status.

6. Section 272 of the Telecommunications Act requires that BellSouth may not provide, *inter alia*, origination of interLATA telecommunications services “unless it provides that service through one or more affiliates that – (a) are separate from any operating company entity that is subject to the requirements of Section 251(c)[BST in the case of BellSouth]; and (b) meet the requirements of Subsection (b).” 47 USC 272(e). Section 272 (b) then imposes the following requirements:

**Structural and transactional requirements. – [T]he separate affiliate [BellSouth Long Distance in the case of BellSouth] required by this Section –**

- (1) shall operate independently from the Bell Operating Company [BST];**
- (2) shall maintain books, records, and accounts in a manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell Operating Company of which it is an affiliate;**
- (3) shall have separate officers, directors and employees from the Bell operating company of which it is an affiliate;**
- (4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse of the assets of the Bell operating company; and**
- (5) shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.**

**Section 272 further requires, in Subsection (c), that BST may not discriminate between BellSouth Long Distance and any other entity in the provision or procurement of goods, services, facilities, and information or in the establishment of standards.**

**7. BST is further required to account for all transactions with BellSouth Long Distance in accordance with accounting principles designated or approved by the FCC. In addition, Section 272 imposes a biennial audit requirement to ensure that BST and BellSouth Long Distance comply with all the requirements of that section.**

**8. This brief summary of the conditions imposed upon BellSouth Long Distance and BST by Section 272 of the Telecommunications Act makes it clear that the existence of BellSouth Long Distance as a separate entity from BST is not a mere "legal fiction" nor is BellSouth Long Distance the "inseparable alter ego" of BST as claimed by AT&T. To the contrary, BellSouth Corp. created BellSouth Long Distance because it was legally and unequivocally required to do so by Section 272 of the Telecommunications Act. And, also directly contrary to AT&T's assertion that BellSouth Long Distance is BST's "alter ego", both**

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BellSouth Long Distance and BST must operate under statutorily imposed structural separation requirements. Not only must they operate independently, have separate officers, employees and directors, as well as separate books, records and accounts and conduct all transactions with one another on an arm's length basis, etc., but BST must further treat BellSouth Long Distance in a non-discriminatory manner with respect to the provision or procurement of goods, services, facilities and information and in the establishment of standards. Far from being a legal fiction, the separate structures of BellSouth Long Distance and BST are mandated by Congress under quite onerous conditions.

9. To ensure that BellSouth Long Distance and BST comply with the requirement that they operate as separate affiliates, Section 272(d) requires that the companies be subject to an audit, conducted by an independent auditor, every two years. The first such independent audit of the companies has just been concluded without any finding that either BellSouth Long Distance or BST has violated the structural separation requirements.<sup>2</sup>

10. In further support of the fact that BellSouth Long Distance is a totally separate entity from BST, especially in the context of AT&T's allegations, are the requirements of 47 U.S.C. 272(e)(3). In that paragraph, Congress required that BST charge BellSouth Long Distance an amount for access charges no less than the amount charged to unaffiliated interexchange carriers. Again, Congress has made it clear that BellSouth Long Distance and BST must conduct themselves as truly separate corporate entities.

11. In summary, BellSouth Long Distance and BST are, by law, two separate entities that are required to act independently of one another. They were not created as separate corporate entities as a matter of "convenience" nor is BellSouth Long Distance merely the "alter

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<sup>2</sup> There was a finding that a third corporate affiliate, that was treated by BellSouth as a 272 entity in all respects except for the fact that it did not provide interLATA services, did provide operation, installation and maintenance services for BellSouth Long Distance. That affiliate was not BST.



ego" of BST. They exist under conditions far more onerous than typically applied to corporate affiliates and should be recognized and treated for what they are: two separate entities. For this reason, AT&T's argument that Section 364.051(5)(c) applies to BellSouth Long Distance should be rejected as a matter of law.

12. In addition, AT&T's Complaint fails as a matter of fact. In its Motion for Summary Order, filed with this Commission on January 15, 2004, BellSouth Long Distance showed without contravention by AT&T that: (1) BellSouth Long Distance pays to BST the latter company's tariffed access charges; and (2) when the monthly recurring charge paid by BellSouth Long Distance's subscribers to the plan in question is combined with the penny-a-minute promotional rate or the five-cent per-minute rate that applies after the promotional period, BellSouth Long Distance covers the cost of access every month that it provides service to its subscribers. Therefore, even if Section 364.051(5)(c) did apply to BellSouth Long Distance, the price charged by BellSouth Long Distance to its customers for its service more than covers the cost of access charges it must and does pay to BST.

13. For all these reasons, BellSouth Long Distance respectfully requests that the Commission dismiss AT&T's Complaint with prejudice.

Respectfully submitted this 20<sup>th</sup> day of April, 2004.

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