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Sent: Monday, December 20, 2004 1:17 PM
To: Filings@psc.state.fl.us
Cc: Fatooi, Vicki; Peters, Evelyn; Linda Hobbs; Nancy Sims; Holland, Robyn P; Bixler, Micheale; Slaughter, Brenda ; Mays, Meredith
Subject: Docket No. 040533-TP BellSouth's Response in Opposition and Motion to Dismiss Amended Petition for Mediation and/or Arbitration

- a. Lynn Barclay
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b. Docket No. 040533-TP (Interconnection Agreement between Saturn Telecommunication Services, Inc., d/b/a STS Telecom and BellSouth Telecommunications, Inc.)
c. BellSouth Telecommunications, Inc.
on behalf of Meredith E. Mays
d. 10 pages total
e. BellSouth Telecommunications, Inc.'s Response in Opposition and Motion to Dismiss Amended Petition for Mediation and/or Arbitration.

<<040533 response in opposition.pdf>> <<word version of response in opposition.DOC>>

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December 20, 2004

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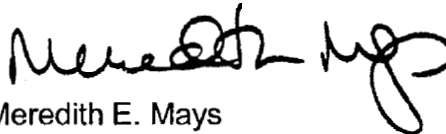
**Re: Docket No. 040533-TP; Interconnection Agreement between
Saturn Telecommunication Services, Inc., d/b/a STS Telecom
and BellSouth Telecommunications, Inc.**

Dear Ms. Bayo:

Enclosed is a copy of BellSouth Telecommunications, Inc.'s, Response in Opposition and Motion to Dismiss the Amended Petition for Mediation and/or Arbitration, which we ask that you file in the above referenced docket.

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,



Meredith E. Mays

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White
564153

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**CERTIFICATE OF SERVICE
DOCKET NO. 040533-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
Electronic Mail and Federal Express this 20th day of December, 2004 to the following:

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Meredith E. Mays

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In Re: Interconnection Agreement between)	
Saturn Telecommunication Services, Inc.)	040533-TP
d/b/a STS Telecom and)	Filed: December 20, 2004
BellSouth Telecommunications, Inc.)	
)	

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
RESPONSE IN OPPOSITION AND MOTION TO DISMISS
AMENDED PETITION FOR MEDIATION AND/OR ARBITRATION**

I. INTRODUCTION

On June 28, 2004, BellSouth Telecommunications, Inc. ("BellSouth") filed its Response in Opposition and Motion to Dismiss the June 9, 2004 Petition filed by Saturn Telecommunication Services, Inc. d/b/a STS Telecom ("STS"). That Motion remains outstanding, and should be addressed prior to STS' Motion to Amend and Amended Petition. In the event the Commission elects to consider the Amended Petition, however, BellSouth updates and reiterates its prior arguments to specifically address to STS' counts seeking mediation and arbitration.¹

STS seeks an order from this Commission requiring BellSouth to either mediate the terms of a commercial agreement or to arbitrate such terms. STS' Amended Petition relies solely upon the terms of 47 U.S.C. § 252 and presupposes that when parties seek to discuss terms and conditions for services that are no longer subject to mandatory unbundling that action from this Commission is needed. STS' supposition cannot withstand scrutiny and STS' requested relief should be denied. Dismissal is warranted for the following reasons: (1) STS fails to state a claim for which relief can be granted; (2) BellSouth has negotiated in good faith with STS; (3) this

¹ BellSouth has not separately filed a response to STS' Motion to Amend. This Commission has discretion to grant or deny such a motion. BellSouth has simply elected to respond to STS' Amended Petition; however, if the Commission denies STS' Motion and grants BellSouth's previously filed Motion to Dismiss, this response will become moot.

Commission is without authority to compel negotiation of a commercial agreement; (4) both parties must consent to mediation; and (5) STS is not entitled to Section 252 arbitration in these circumstances.

II. DISCUSSION

A. **STS' Amended Petition Fails to State a Claim for Which Relief Can Be Granted**

STS has fundamentally confused negotiation under the terms of the parties existing interconnection agreement and the type of negotiation encouraged by the Federal Communications Commission ("FCC"). Concerning the parties' existing interconnection agreement, which does not expire until February 4, 2006, the relevant dispute resolution language states "if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party shall petition the Commission for resolution of the dispute." Resolution of Disputes, General Terms and Conditions, § 10, p. 10. STS has not alleged a dispute concerning the interpretation of any particular provision within the parties' agreement. Likewise, STS has not claimed a dispute exists concerning the proper implementation of the parties' existing agreement.² Any concerns STS may have relating to the negotiation of a commercial agreement do not fall within the dispute resolution language contained in the parties' agreement. Accordingly, STS' Petition should be denied for failure to state a cause of action for which relief can be granted. *See Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993).

B. **BellSouth Has Negotiated with STS in Good Faith.**

The gist of STS' complaint is that STS has attempted to negotiate a commercial

² STS previously filed a separate petition against BellSouth, which it withdrew, concerning changes of law. STS has not couched this petition as a dispute arising from proposed amendments to the parties' existing interconnection agreement. To the extent that STS has any concerns arising out of changes of law that impact the terms of the existing agreement, then such concerns should be raised in Docket No. 041269-TL.

agreement with BellSouth, and that BellSouth has refused to enter into good faith negotiations. Amended Petition, ¶ 9. STS previously explained that it relied upon language contained within 47 USC § 251 as setting forth BellSouth's legal duty to negotiate. *See* STS' July 16, 2004 Response to BellSouth's Motion to Dismiss. STS' reliance is misplaced, however, because it is attempting to bootstrap BellSouth's § 251 obligations into the commercial agreement context. While BellSouth has been and remains willing to negotiate with STS, neither STS nor this Commission can dictate the manner in which such a negotiation will proceed.³ As Chairman Powell recognized "while commercial agreements can be established to offer UNE-P services, such services are no longer legally compelled." *See* Separate Statement of Chairman Michael K. Powell, FCC Docket No. 01-338 (Dec. 15, 2004). Similarly, this Commission cannot legally compel BellSouth to negotiate in a particular manner. Because STS fails to allege the existence of a legal duty that BellSouth has breached, this Commission need not expend its resources to address the underlying factual background underlying STS' specious Amended Petition. Nonetheless, to ensure a complete record, BellSouth briefly highlights key facts that STS failed to include in its Amended Petition.

Specifically, BellSouth provided STS with information concerning BellSouth's proposed terms for a commercial agreement in April 2004. As recently as October 25, 2004, STS advised that it was "in the process of redlining" BellSouth's proposed terms. On December 7, 2004, BellSouth contacted STS to follow-up and to ascertain when STS' promised redlines would be provided. STS responded later that day, advising that its response had "slip[ped] through the cracks." STS promised its redlines "the first part of next week." Most recently, on December 15, 2004, STS apologized for its delayed response but did not provide a date certain when

³ BellSouth's willingness to enter into commercial agreements does not mean this Commission has the authority to dictate the terms and conditions that apply to such arrangements.

BellSouth could expect to receive redlines. To date, no such redlines have been received. To file an amended petition when STS has admittedly let its response to BellSouth “slip through the cracks” is unacceptable.

In addition, STS seems to be operating under a misguided notion of what constitutes “good faith negotiations.” The fact that parties may have different positions or views does not mean that parties are not acting in good faith. Likewise, that parties seek to conduct some negotiations by telephone and seek to reach agreement on the overall framework or guidelines under which both parties will operate before addressing specific terms and conditions also does not translate into a finding of bad faith.⁴ BellSouth has many wholesale customers with which it desires to enter into commercial agreements and must manage the negotiation process in a manner that allows it to effectively allocate resources among all of its customers.

In summary, BellSouth has negotiated with STS and remains willing to do so in the future. Future negotiations require both parties to act reasonably, which STS has not done by filing its frivolous amended petition. BellSouth remains willing to communicate with STS, but cannot do so without STS’ participation.

C. This Commission Cannot Require That BellSouth Conduct Negotiations for the Purpose of creating a Commercially Viable Agreement with STS.

Because BellSouth is willing to negotiate with STS, there is no need for this Commission to take action or grant the relief that STS seeks. Nonetheless, even if this Commission were inclined to intercede in this matter (which it should not), STS’ Petition has confused BellSouth’s

⁴ In Docket No. 911103-EI, *Re: Complaint of Consolidated Minerals, Inc. v. Florida Power and Light Co. for Failure Negotiate Cogeneration Contract*, this Commission addressed a complaint in which, unlike this Petition, the complaining party alleged a violation of a Commission Rule. The applicable rule, 25-17.0834, requires electric utilities to negotiate in good faith for the purchase of capacity and energy. In finding that Florida Power and Light did not fail to negotiate in good faith, this Commission explained that “the requirement to negotiate in good faith does not mean that an agreement must be reached, or that either side must surrender any of its duties and responsibilities.” Instead, this Commission explained the rule at issue meant “all parties to the negotiation should show a willingness and effort to reach a prudent and reasonable agreement for needed and cost-effective generating capacity.” See Order No. PSC-92-0703-FOF-EI.

willingness to voluntarily participate in commercial negotiations with BellSouth's legal obligations to negotiate pursuant to Section 251 and 252. BellSouth fully supports commercial negotiations, and has and continues to negotiate commercial agreements on a voluntary basis. BellSouth's willingness to negotiate on a voluntary basis, however, does not mean that this Commission or STS can dictate the manner in which such discussions will occur – doing so would negate the voluntary aspect of such negotiations.

By its terms, Section 252 applies only to interconnection agreements negotiated after the ILEC receives “a request for interconnection, services, or network elements *pursuant to Section 251.*”⁵ With respect to the discussions that have taken place between BellSouth and STS, there was never a Section 251 request made to initiate negotiations. STS' Petition shows that negotiations took place after the FCC encouraged such action between carriers. Petition, ¶¶ 7-8; Amended Petition, ¶¶ 7-8. STS' Petition also acknowledges that it has attempted to negotiate a “commercially” acceptable arrangement.” *Id.*

With respect to Section 251, subsection (c)(1) explains that ILECs have an obligation to negotiate “in accordance with Section 252 the particular terms and conditions of the agreements to fulfill the duties described in paragraphs (1) through (5) of subsection [251] (b) and this subsection [251(c)].”⁶ Accordingly, if the agreement does not include the ILEC's “duties” in Sections 251(b)(1-5) or Section 251(c), it falls outside the ILEC's Section 252 duty to negotiate and corresponding Section 252 obligations.

⁵ 47 U.S.C. §252(a)(1) (emphasis added). The fact that Section 252(a)(1) provides that such agreements may be negotiated “without regard to the standards set forth in subsections (b) and (c) of Section 251” does not impact the necessary precondition: the request for interconnection must be for network elements and services required under Section 251 of the 1996 Act. If the contract is not requested pursuant to Section 251, Section 252(a)(1) does not apply.

⁶ 47 U.S.C. § 251(c)(1).

Negotiating the terms of a commercial agreement that reflect BellSouth's § 271 obligations differs from negotiating an interconnection agreement that reflects BellSouth's duties pursuant to §§ 251 and 252. The power to enforce compliance with section 271 rests with the FCC, with respect to terms and conditions and with respect to pricing. See § 271(d)(6); *Triennial Review Order*⁷ at ¶ 656. Enforcement of sections 201-02 obviously rests with the FCC. Consequently, this Commission cannot enter orders that govern the manner in which BellSouth negotiates any agreements concerning section 271 elements, because such agreements are federal agreements.

D. This Commission Cannot Require Mediation Between the Parties In These Circumstances.

STS' Amended Petition includes a Court for Mediation. STS also requests that the Commission "mediate all matters" and enter an order requiring BellSouth to "enter face-to-face meaningful negotiations with STS before the PSC as mediator on a Interconnect Agreement pursuant to 47 U.S.C. Sec. 252(a)(1)." Amended Petition, ¶ 13. This request cannot stand. While the Commission has previously encouraged parties to "voluntarily avail themselves of . . . mediation" it has explicitly recognized that "mediation . . . is available *on a strictly voluntary basis.*" Order No. PSC-03-0773-PCO-EQ, p. 5; see also Section 120.573, Florida Statutes and Rule 28-106.111. Because mediation can occur only when both parties consent, this Commission cannot enter an order at STS' sole request that requires BellSouth to submit to such a process. Moreover, because BellSouth remains willing to meet face to face with STS after this Petition has been dismissed there is no need for mediation in any event. Finally, STS completely ignores the fact that it is not seeking mediation concerning the terms of a Section 252 Agreement

⁷ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), reversed in part on other grounds, *United States Telecom. Ass'n v. FCC*, Nos. 00-1012, et al. (D.C. Cir. Mar. 2, 2004) ("*USTA IP*").

– STS, by its own pleadings, claims it desires a “commercially acceptable arrangement,” a matter that is beyond this Commission’s authority to compel.

E. This Commission Cannot Require Arbitration Between the Parties In These Circumstances.

STS’ Amended Petition includes a new count for arbitration. This count cannot survive scrutiny. The underlying premise of STS’ Amended Petition is that BellSouth has refused to negotiate. As a threshold matter, this premise is simply wrong – any delay in current discussions between the parties results from STS’ failure to respond to BellSouth. Moreover, STS wrongly suggests that negotiations over the terms of a commercial agreement fall within the scope of 47 U.S.C. § 252. As set forth in Section C above, STS’ alleged dispute with BellSouth revolves around the terms of a commercial agreement, rather than a Section 251 interconnection agreement, a matter over which this Commission has no authority to regulate. Because the parties do not have a dispute over the terms of a Section 251 interconnection agreement, STS cannot invoke this Commission’s arbitration jurisdiction under Section 252.⁸

CONCLUSION

There is no basis whatsoever for this Commission to order mediation or arbitration as STS has requested. BellSouth has attempted to negotiate with STS in the past and remains willing to do so in the future, however it is STS, rather than BellSouth, that has prevented the parties from making any progress over the terms of a commercial agreement. Moreover, neither STS nor this Commission has the authority to dictate the terms governing any such voluntary discussions. If STS is truly willing to negotiate in good faith, then it should promptly dismiss its

⁸ Even if STS had requested interconnection, services or network elements under Section 251 and negotiations over such terms had reached an impasse, a party must still comply with the procedural requirements of Section 252. STS has not done so. Section 252 includes express time frames within which a party may file a petition and also requires a petitioning party to provide documentation regarding unresolved issues and each party’s position concerning such issues. STS’ Amended Petition provides no such information and as such it is procedurally deficient as a matter of law.

amended petition so that the parties can dedicate themselves to negotiation rather than litigation.

This Commission should summarily dismiss STS' Amended Petition.

Respectfully submitted, this 20th day of December, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.

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