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Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

050171-TP

**Re: Emergency Petition of Ganoco, Inc. d/b/a American Dial Tone, Inc.
for a Commission Order Directing BellSouth Telecommunications,
Inc. to Continue to Accept New Unbundled Network Element Orders**

Dear Sir or Madam:

On behalf of our client, Ganoco, Inc. d/b/a American Dial Tone, Inc., we submit an original and fifteen (15) copies of the enclosed "Emergency Petition of American Dial Tone, Inc."

Please date-stamp the "Receipt" copy of this filing and return it in the enclosed self-addressed, stamped envelope. Please contact the undersigned if you have any questions or concerns.

Sincerely,

Glenn Richards
Jarrett Taubman
Counsel for Ganoco, Inc. d/b/a
American Dial Tone, Inc.

DOCUMENT NUMBER - DATE
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**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In the Matter of)	
)	
)	
Emergency Petition of)	
Ganoco Inc. d/b/a American Dial Tone, Inc.)	Case No. _____
For a Commission Order Directing BellSouth)	
Telecommunications, Inc. to Continue to)	
Accept New Unbundled Network Element Orders)	
)	

EMERGENCY PETITION OF AMERICAN DIAL TONE, INC.

Ganoco Inc. d/b/a American Dial Tone, Inc. ("American Dial Tone"), by and through its attorneys, hereby files the instant Emergency Petition for a Commission Order directing BellSouth Telecommunications Inc. ("BellSouth") to continue to accept new unbundled network element orders until American Dial Tone and BellSouth have completed the negotiations required by the "change of law" provisions of their interconnection agreement ("Agreement")¹ in order to address the FCC's recent *Triennial Review Remand Order* ("TRRO").²

On February 11, 2005, BellSouth informed American Dial Tone by letter of BellSouth's intent to discontinue its provision of certain unbundled network elements ("UNEs") pursuant to BellSouth's unilateral interpretation of the TRRO. American Dial Tone understands BellSouth's letter to reflect the mistaken view that BellSouth can unilaterally discontinue its provision of

¹ The American Dial Tone-BellSouth Interconnection Agreement adopts the substantive terms of the AT&T-BellSouth Interconnection Agreement dated October 21, 2001. See *Interconnection Agreement Between BellSouth Telecommunications, Inc. and Ganoco, Inc.* at § 1. Hereinafter, references to specific sections in the Agreement refer to the sections as enumerated in the original AT&T-BellSouth agreement.

² *Triennial Review Remand Order, Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 04-290 (Feb. 4, 2005).

these UNEs, raise rates for existing services, and refuse to accept orders for new UNEs without first concluding good faith negotiations with American Dial Tone. In fact, the Agreement bars BellSouth from taking any of these actions.

The existing Agreement between American Dial Tone and BellSouth requires BellSouth to engage in good faith negotiations with American Dial Tone before implementing any change in law that BellSouth believes may have occurred. Section 9.3 provides that:³

In the event that any final legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of [American Dial Tone] or BellSouth to perform any material terms of this Agreement, [American Dial Tone] or BellSouth may, on ninety (90) days' written notice (delivered not later than ninety (90) days following the date on which such action has become legally binding and has otherwise become final) require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the dispute shall follow the dispute resolution procedures set forth in Section 16 of the General Terms and Conditions of this Agreement.

Thus, to the extent that BellSouth believes that the Applicable Law governing the Agreement has changed in a material way as a result of the *TRRO*, Section 9.3 of the Agreement requires BellSouth to engage in good faith negotiations with American Dial Tone on a contractual amendment that reflects this purported change of law. For these reasons, if BellSouth were to unilaterally discontinue its provision of UNEs as specified in its letter to American Dial Tone, BellSouth would be in breach of the Agreement. BellSouth's letter does not constitute an attempt to negotiate in good faith, but rather an attempt to unilaterally circumvent BellSouth's obligations under the Agreement.

³ See Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and AT&T Communications of the Southern States, Inc., d/b/a AT&T at § 9.3.

Moreover, the *TRRO* does not purport to abrogate the Agreement's "change of law" provisions. Rather, the *TRRO* confirms that the FCC expects that "incumbent LECs and competing carriers will implement the [FCC's] findings as directed by Section 252 of the Act" by "implement[ing] changes to their interconnection agreements consistent with [the FCC's] conclusions in this Order."⁴ The FCC further establishes that parties "must negotiate in good faith regarding any rates, terms and conditions necessary to implement [the FCC's] rule changes," and threatens that "the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action."⁵ The FCC also clearly states that the *TRRO* transition mechanisms are "simply a default process" that could be superceded by prior or subsequent contractual obligations.⁶

Thus, the *TRRO* does not permit BellSouth to unilaterally circumvent the change of law process, but rather requires BellSouth to engage in good faith negotiations with American Dial Tone pursuant to the "change of law" provisions of the Agreement. Any contrary reading would not only conflict with the plain language of the *TRRO*, but would also render it null and void. Under the *Sierra-Mobile* doctrine, while federal agencies like the FCC may revise the terms of a private contract between two carriers concerning communications services, they may do so only when the contract's terms "adversely affect the public interest" to a degree that is "much higher than the threshold for demonstrating unreasonable conduct under sections 201(b) and 202(a) of

⁴ *TRRO* at ¶ 233.

⁵ *Id.*

⁶ *TRRO* at ¶ 228.

the Act.”⁷ Agencies must make a “particularized finding that the public interest requires modification.”⁸ The threshold for this finding is “more exacting” than the ordinary public interest standard, and “is sufficiently more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract’s deleterious effect.”⁹ The *TRRO* contains no such particularized showing, and as such cannot be interpreted to supercede the existing “change of law” provisions in the Agreement.¹⁰

Accordingly, American Dial Tone respectfully requests that the Commission (1) order BellSouth to comply with the “change of law” provisions of the Agreement in order to implement the *TRRO*; and (2) order BellSouth to continue to accept and process American Dial Tone’s orders for UNEs under the rates, terms, and conditions of the Agreement, until the parties complete the process envisioned by the “change of law” provisions of the Agreement.

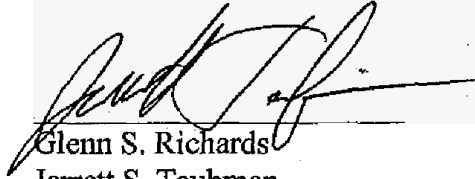
⁷ See, e.g., *IDB Mobile Communications, Inc. v. COMSAT Corporation*, 16 FCC Rcd 11474 at ¶¶ 14-16 (2001).

⁸ See *Atlantic City Electric Company v. FERC*, 295 F.3d 1, 40-41 (2002).

⁹ *Texaco Inc. v. FERC*, 148 F.3d 1091 (1998).

¹⁰ This reasoning has been adopted in at least one other state to block BellSouth’s unilateral decision to discontinue its provision of these UNEs, raise rates for existing services, and refuse to accept orders for new UNEs without first concluding good faith negotiations with CLECs. See Georgia Public Service Commission, *Generic Proceeding to Examine Issues Related to BellSouth’s Obligation to Provide Unbundled Network Elements: Consideration of Staff’s Recommendation regarding MCI’s Motion for Emergency Relief Concerning UNE-P Orders*, Docket No. 19341-U (March 1, 2005).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Melanie Gamble, a secretary in the law firm of Shaw Pittman LLP, do hereby certify that a copy of the foregoing "Emergency Petition of American Dial Tone, Inc." was sent via U.S. mail, first-class or by hand-delivery, on this 7th day of March 2005, to the following:

Nancy B. White
General Counsel - Florida
BellSouth Telecommunications, Inc.
150 South Monroe Street, Room 400
Tallahassee, FL 32301

Melanie Gamble sec
Melanie Gamble