ORIGINAL

RUTLEDGE, ECENIA, PURNELL & HOFFMAN

PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

STEPHEN A. ECENIA
RICHARD M. ELLIS
KENNETH A. HOFFMAN
LORENA A. HOLLEY
MICHAEL G. MAIDA
MARTIN P. McDONNELL
J. STEPHEN MENTON

POST OFFICE BOX 551, 32302-0551
215 SOUTH MONROE STREET, SUITE 420
TALLAHASSEE, FLORIDA 32301-1841

TELEPHONE (850) 681-6788
TELECOPIER (850) 681-6515

R. DAVID PRESCOTT
HAROLD F. X. PURNELL
MARSHA E. RULE
GARY R. RUTLEDGE
MAGGIE M. SCHULTZ

GOVERNMENTAL CONSULTANTS
PARSONS B. HEATH
MARGARET A. MENDUNI
M. LANE STEPHENS

October 10, 2006

Ms. Blanca S. Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

HAND DELIVERY

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Re: Docket Nos. 050119-TP and 050125-TP

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket on behalf of Quincy Telephone Company, d/b/a TDS Telecom, Northeast Florida Telephone Company, d/b/a NEFCOM, GTC, Inc., d/b/a GT Com, Smart City Telecommunications, LLC d/b/a Smart City Telecom and Frontier Communications of the South, LLC ("Small LECs") are the original and fifteen copies of the Small LECs' Response to BellSouth Telecommunications, Inc.'s Motion for Clarification and Cross-Motion for Clarification and Reconsideration of Order No. PSC-06-0776-FOF-TP.

Please acknowledge receipt of these documents by stamping the extra copy of this letter filed and returning the copy to me. Thank you for your assistance with this filing.

Sincerely,

Kenneth A. Hoffman

KAH/rl
Enclosures
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CMP
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OTH Kim P.
Wang

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Joint Petition of Quincy Telephone Company d/b/a TDS Telecom, ALLTEL Florida, Inc., Northeast Florida Telephone Company d/b/a NEFCOM, GTC, Inc. d/b/a GT Com, Smart City Telecommunications, LLC d/b/a Smart City Telecom, ITS Telecommunications Systems, Inc. and Frontier Communications of the South, LLC, ("Joint Petitioners") objecting to and requesting suspension of Proposed Transit Traffic Service Tariff filed by BellSouth Telecommunications, Inc.	)	Docket Nos. 050119-TP and 050125-TP
	)	Filed: October 10, 2006

SMALL LECS' RESPONSE TO BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR CLARIFICATION AND CROSS-MOTION FOR CLARIFICATION AND RECONSIDERATION OF ORDER NO. PSC-06-0776-FOF-TP

Quincy Telephone Company d/b/a TDS Telecom, Northeast Florida Telephone Company, d/b/a NEFCOM, GTC, Inc. d/b/a GT Com, Smart City Telecommunications, LLC d/b/a Smart City Telecom and Frontier Communications of the South, LLC (hereinafter referred to collectively as the "Small LECs"), by and through their undersigned counsel, and pursuant to Rule 25-22.060, Florida Administrative Code, hereby file their Response to BellSouth Telecommunications, Inc.'s ("BellSouth") Motion for Clarification and Cross-Motion for Clarification and Reconsideration of Order No. PSC-06-0776-FOF-TP issued September 18, 2006 (the "Final Order"), and states as follows:

I. SMALL LECS' RESPONSE TO BELLSOUTH'S MOTION FOR CLARIFICATION

In this proceeding, the Commission addressed and resolved a host of issues raised in response to challenges filed by the Small LECs and AT&T to BellSouth's proposed Transit Traffic Tariff.

The Commission's determinations are reflected in the Final Order.

The Commission invalidated BellSouth's Transit Traffic Tariff on the grounds that the Tariff violates or is inconsistent with the requirements of Sections 364.16(1) and (2) and 364.162, Florida Statutes, and because the Tariff is inconsistent with federal policy as reflected in the *T-Mobile Order*[1] and the amendment to Section 20.11 of the FCC's rules adopted pursuant to the *T-Mobile Order*. On October 3, 2006, BellSouth filed a Motion for Clarification requesting the Commission to remove the discussion of the *T-Mobile Order* from the Final Order, or alternatively, to "clarify that *T-Mobile* involves a Section 251 dispute (reciprocal compensation) and thus is not applicable (not necessary) to reach the decisions rendered in the *Order*."[2]

BellSouth correctly states the standard applicable to a Motion for Clarification. Under the applicable standard, the question before the Commission is whether the order requires further explanation or clarification to fully make clear the Commission's intent.[3] BellSouth's Motion for Clarification is, in fact, a motion for reconsideration. BellSouth's Motion essentially rehashes its arguments in its Posthearing Brief regarding the applicability of the *T-Mobile Order* and asks the Commission to either remove the *T-Mobile Order* discussion or find that *T-Mobile* is not applicable. The Commission should deny BellSouth's attempt to take a second bite on its *T-Mobile* arguments

---

[1]Order No. FCC 05-42, released February 24, 2005, CC Docket No. 01-92, In Re: Developing a Unified Intercarrier Compensation Regime and T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, Declaratory Ruling and Report and Order.

[2]BellSouth's Motion for Clarification, at 5-6.

[3]BellSouth's Motion for Clarification, at 2, fn. 3, citing *In re: Investigation into the establishment of operations support systems permanent performance measures for incumbent local exchange telecommunications companies.* Docket No. 000121-TP, Order No. PSC-01-2449-FOF-TP, issued December 14, 2001, at 9.

in the guise of a Motion for Clarification.

In its Motion for Clarification, BellSouth emphasizes that the Petitioners in *T-Mobile* sought a declaratory ruling that wireless termination tariffs are not the proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of traffic.[4] The assertion has a familiar ring. In its Posthearing Brief, BellSouth pointed out that "*T-Mobile* involves a tariff that was designed to establish **reciprocal compensation** arrangements between CMRS providers and LECs."[5]

In making its argument, again, that the *T-Mobile Order* is inapplicable because transit service has not been determined by the FCC to be a Section 251 obligation, BellSouth places particular emphasis in its Motion on the absence of the *T-Mobile Order* from the FCC's Further Notice of Proposed Rulemaking in the pending Intercarrier Compensation docket:[6]

> Tellingly, in the transit service section of the *Intercarrier Compensation FNPRM*, the FCC does not even mention the *T-Mobile* decision. This is not by oversight. Separate and distinct from transit service issues, the FCC specifically mentions the *T-Mobile* decision in the next section of the *Intercarrier Compensation FNPRM*, a section that deals with CMRS issues.[7]

The above passage from BellSouth's Motion mirrors, almost verbatim, the same argument

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[4]BellSouth's Motion for Clarification, at 3, citing the *T-Mobile Order*, at ¶1.

[5]BellSouth's Posthearing Brief, at 6.

[6]*In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, 20 FCC 05-33 (released March 3, 2005) ("*Intercarrier Compensation FNPRM*") at ¶¶120-133.

[7]BellSouth's Motion for Clarification, at 4-5.

raised by BellSouth in its Posthearing Brief.[8]

Clearly, and quite obviously, BellSouth's Motion for Clarification is actually a motion for reconsideration which violates the well accepted standard for reconsideration by trotting out arguments that have previously been raised and rejected by the Commission. The Commission's findings and conclusions regarding the *T-Mobile Order* provide valuable precedent and guidance for telecommunications companies as to the appropriate circumstances under which a tariff may or may not be used as a substitute for intercarrier negotiations and, if necessary, arbitration to establish intercarrier compensation. Accordingly, BellSouth's Motion for Clarification should be denied.

II. SMALL LECS' CROSS-MOTION FOR CLARIFICATION

In the Final Order, the Commission determined that the originating carrier shall compensate BellSouth for providing the transit service. Final Order, at 24. In the hearing and through its Posthearing Brief, the Small LECs took a different position, asserting that the CLECs and CMRS providers should pay for the transit service because these carriers have a statutory obligation to interconnect on the Small LECs' networks and their affirmative decision to *indirectly* interconnect with the Small LECs through the use of BellSouth's transit service should not result in the Small LECs paying costs that lawfully rest with and are caused by the CLECs and CMRs providers. The Small LECs are not attempting to revisit or rehash those arguments through this Motion.

It is important to refocus on the agreed standard for a motion for clarification. That standard, as applied herein, is whether the Final Order requires further explanation or clarification to fully make clear the Commission's intent. The Small LECs respectfully submit that the Final Order should indeed be clarified to capture the comments and opinions expressed by Commissioner Deason

[8]BellSouth's Posthearing Brief, at 6.

at the August 29, 2006 Agenda Conference, which were embraced (or certainly not disputed) by the other members of the Commission and to provide guidance and efficiency to the interconnection negotiations and potential arbitrations that arise from the Final Order.

At the August 29, 2006 Agenda Conference, Commissioner Deason articulated his concerns with the Staff Recommendation that the originating party pays ultimately approved by the Commission:

> COMMISSIONER DEASON: Let me get to my concern, and maybe now is a good time to address it. I don't fault the CLECs for choosing to interconnect with BellSouth. Obviously that's the most efficient way, and we want carriers to do things efficiently. And one of the underlying themes here is that we need to put cost on the cost-causer, and that is a good valid - - it makes legal sense and it makes walking around sense, as well. But it seems to me that the CLECs choosing to interconnect the way they do, and trying to configure their networks in the most efficient way possible, are they not causing costs to be placed on the small LECs?
>
> * * *
>
> I'm just concerned that - - I'm just concerned that the small LECs are having costs incurred, I mean, placed upon them as a result of this docket and this recommendation. Is that not a concern of staff's?
>
> MS. LEE: It is a concern. You are correct, as a result of this recommendation small LECs are having a cost imposed on them. This is not a new cost though. BellSouth has been incurring these costs since the '96 act.
>
> * * *
>
> COMMISSIONER DEASON: Let me ask you this question, and its kind of theoretical, but does the Commission have the authority to basically determine that the reciprocal compensation between the small LEC and BellSouth, when it comes to transit traffic, that it's just going to be on a bill and keep basis, and that if there ever were a situation where a CLEC decides to interconnect

directly with a small LEC and let that small LEC be the transiting agent to BellSouth, that there just wouldn't be any flow of dollars, it would just be a bill and keep arrangement?

Is that fair compensation? Is that something this Commission can do from a policy perspective? First of all, do you understand the question? I know it's kind of a convoluted question.

MS. LEE: I think what you're asking is if the compensation for BellSouth's transit service could be through bill and keep rather than - -

COMMISSIONER DEASON: Through bill and keep arrangement with the small LECs.

MS. LEE: - - rather than assessing a rate.

COMMISSIONER DEASON: Instead of assessing a rate.

MS. LEE: If I'm correct, some of the transiting arrangements that currently exist are with the bill and keep.

COMMISSIONER DEASON: And if the parties cannot negotiate an arrangement, they can bring it here and we can develop the merits of bill and keep, is that correct?

MS. SCOTT: That's correct, Commissioner.

COMMISSIONER DEASON: I'm trying my best to send a message to the people that are listening out there that it may not be worth pursuing, but nevertheless - -

MS. LEE: Under state law - -

COMMISSIONER DEASON: Under state law that would be an acceptable arrangement, and we would be meeting our legal obligations.

MS. SCOTT: That's correct.

See Transcript from August 29, 2006 Agenda Conference, pages 12-13, 15-16, attached hereto as

Exhibit A.

In the Final Order, the Commission specifically refrained from establishing a specific transit rate. Final Order, at 44. However, here again, the comments of Commissioner Deason at the Agenda Conference were instructive:

> COMMISSIONER DEASON: If people are kind of looking for some guidance as to where different Commissioners are, my preference would be to have no rate. And, once again, I think it would be educational to have the costs. And if we get to an arbitration, maybe we are going to have a cost proceeding, which is another incentive not to bring an arbitration, but to negotiate it, what is fair and reasonable. I hope I'm sending another message.
>
> * * *
>
> And I'm quite serious. To some extent tongue in cheek, but to another extent quite serious about if we find ourselves in arbitration, it probably would be helpful to know what it costs to provide transit service. And I know that that is a difficult process to go through and ascertain, but if we are pushed in that direction, maybe that's information we are going to need. And I would - - based upon information that is in the record, and it could be proven either right or wrong in a full hearing, but based upon the information, it has been asserted that costs are much lower than this number. And if we were to arbitrate a rate that at least recovers costs, that's just and reasonable, too. And that may be where we are. So I just think it is preferable not to include a rate.

See Exhibit A, pages 36-38.

The Small LECs do not take issue with the fact that the Commission determined that the originating party shall pay the transit rate and declined to establish a specific rate. However, the record and sentiment of the Commission was clear - - the negotiating parties should recognize that the failure to reach an agreement may result in an arbitration proceeding that focuses on the establishment of a cost-based rate, or alternatively, a bill and keep mechanism. In order to provide

the guidance to negotiations clearly desired by the Commission, the Small LECs respectfully request that the Commission clarify its intent by further ruling that any further arbitration proceeding involving BellSouth's transit rate will, at minimum, consider BellSouth's costs to provide transit service and the prospect of establishing a bill and keep mechanism for transit service.

III. SMALL LECS' CROSS-MOTION FOR RECONSIDERATION

As the Commission is well aware, the purpose of a motion for reconsideration is to bring to the forefront a material point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Diamond Cab Company of Miami v. King, 146 So.2d.2d 889, 891 (Fla. 1962); Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981). In this instance, the Small LECs seek reconsideration of the Commission's decision requiring BellSouth to issue partial refunds, including interest, based on the difference between the tariffed rate and the rate resulting from negotiations or, if necessary, arbitration. Final Order, at 58-59.

The prospect of a partial rather than full refund was never placed at issue in this proceeding. In the early stages of this proceeding, the Commission consolidated challenges to the Tariff filed by the Small LECs and AT&T and denied the request for the Small LECs and AT&T to suspend the tariff. However, the Commission further ruled that the revenues from the tariff would "be held by BellSouth subject to refund pending the outcome of this proceeding. " Order No. PSC-05-0517-PAA-TP, issued May 11, 2005, at 4, (Consummating Order No. PSC-05-0623-CO-TP issued June 6, 2005).

No party, including BellSouth, contemplated that anything other than a full refund would result from a Commission decision invalidating the tariff. Indeed, there is nothing in BellSouth's prehearing statement, testimony, exhibits or post-hearing brief advocating a partial refund in the

event the Tariff was invalidated. There is simply no evidence in the record supporting the Commission's decision which is understandable but not supportable since the issue was not even raised until staff issued its post-hearing recommendation to the Commission. This sequence of events underscores two fundamental legal defects with the Commission's decision. First, the Commission's partial refund decision violates the Small LECs' fundamental rights of due process as the prospect of a partial refund was never placed at issue. Second, there is no competent and substantial evidence supporting the Commission's decision.

In light of the fact that a potential partial refund was never placed at issue and the parties logically failed to address that possibility through testimony and argument, the Commission's decision on this issue is particularly appropriate for reconsideration. The legal arguments which the Commission failed to consider because the matter was never placed at issue are substantial and support an order on reconsideration requiring BellSouth to make a full refund to parties who have paid and continue to pay the transit rate under the Tariff.

First, the Commission's decision is inconsistent with prior Commission precedent and reflects a change in Commission policy that is not supported by competent, substantial evidence. In In Re: Investigation to Determine Whether BellSouth Telecommunications, Inc.'s Tariff Filing to Restructure its Late Payment Charge is in violation of Section 364.051, F.S., Order No. PSC-01-1769-FOF-TL issued August 30, 2001 (the "Late Payment Charge Order"), the Commission invalidated a tariff filing by BellSouth to restructure its late payment charge.[9] In the Late Payment Charge Order, after determining that the tariff violated Section 364.051(5)(a), Florida Statutes, the

[9]The Commission's decision was affirmed on appeal. BellSouth Telecommunications, Inc. v. Jacobs, 834 So.2d 855 (Fla. 2002).

Commission ordered BellSouth to refund all amounts collected through a restructured interest charge of 1.50% on all unpaid balances in excess of $6.00, with interest, to all affected customers. Like the Transit Traffic Tariff at issue in this proceeding, the Commission held that the late payment charge tariff violated a Florida Statute and recognized that BellSouth had incurred certain costs in connection with the tariffed charge. Nonetheless, contrary to the Commission's decision in this proceeding, the Commission ordered a full refund of the invalidated portion of the late payment charge tariff - - the restructured interest charge of 1.50% on all unpaid balances in excess of $6.00. The Commission's partial refund decision in the Final Order cannot be reconciled with the precedent established in the Late Payment Charge Order. Any such change in policy must be supported by "expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue involved . . ." to withstand legal scrutiny. Florida Cities Water Company v. State Public Service Commission, 705 So.2d 620 (Fla. 1st DCA 1998) quoting Manasota-88, Inc. v. Gardinier, Inc., 481 So. 2d 948, 950 (Fla. 1st DCA 1986); Southern States Utilities v. Florida Public Service Commission, 714 So.2d 1046, 1055-1056 (Fla. 1st DCA 1998). In this case, there is no evidence of record supporting or otherwise providing an explanation for the Commission's abandonment of its precedent and shift in policy. Accordingly, the Commission must reconsider its partial refund decision and Order on Reconsideration that BellSouth refund in full, with interest, amounts paid under the Transit Traffic Tariff.

Second, the Commission predicated its partial refund decision on "principles of equity" noting that if a full refund were ordered, parties who had paid under the tariff would be unjustly enriched. According to the Commission, BellSouth should receive the reasonable value of the services it has rendered under the legal theory of *quantum meriut.* Final Order, at 58.

In relying upon equitable remedies to order a partial refund, the Commission has unlawfully strayed into remedies that are the sole and exclusive province of the judiciary. The Commission, itself, recognized that *quantum meriut* is an equitable remedy. Final Order, at 58, fn. 39. Similarly, an action for unjust enrichment is a remedy that is equitable in nature. Sharp v. Bowling, 511 So.2d 363, 365 (Fla. 5th DCA 1987); Moore Handley, Inc. v. Major Realty Corp., 340 So.2d 1238, 1239 (Fla. 4th DCA 1976).

The Commission is a creature of statute and only possesses such powers that are expressly or impliedly granted by the Legislature. City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493 (Fla. 1973). The Commission lacks the statutory authority to grant an equitable remedy to BellSouth. As the First District stated in Biltmore Construction Company v. Florida Department of General Services, 363 So.2d 851, 854 (Fla. 1st DCA 1978):

> While an administrative agency may exercise quasi-judicial power when authorized by statute, it may not exercise power which is basically and fundamentally judicial such as the grant of an equitable remedy. Such action violates Article II, s. 3 of the Florida Constitution. . . .[10]

Accordingly, because the Commission lacks the statutory authority to grant the equitable remedies underlying the partial refund decision and because such remedies exclusively rest under

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[10]See also Colonnade Medical Center, Inc. v. Agency for Health Care Administration, 2001 WL 1472708, par. 26 (Recommended Order entered November 14, 2001, adopted in entirety by Final Order entered February 8, 2002) ("An agency has no inherent authority to apply the doctrine of unjust enrichment to what Petitioner characterizes as a contractual dispute, and the Legislature has conferred no such power upon (an administrative law judge) by statute."); Rodriguez v. Agency for Health Care Administration, 2003 WL 22827474, par. 88 (Recommended Order entered November 26, 2003, adopted in entirety by Final Order entered May 4, 2004) (The Division of Administrative Hearings lacks jurisdiction to provide equitable relief based on the judicial doctrines of equitable estoppel or waiver which, under Article V, section 20(c)(3) of the Florida Constitution, are the sole province of the circuit courts.)

the Florida Constitution with the circuit court, the Commission must reconsider its partial refund decision and order BellSouth to pay full refunds.

Finally, the Small LECs submit that the partial refund decision violates the prohibition against retroactive ratemaking. The Final Order invalidated the Tariff as of its effective date, February 11, 2005. Consequently, as a matter of law, it is as though the Tariff never took effect. By ordering a partial refund, the Commission would effectively put into effect as of February 11, 2005, a transit charge that was never filed by BellSouth and apply that through the cancellation date of the Tariff. The practical effect of the Commission's decision - - to retroactively put into effect a reduced transit charge - - violates the well accepted prohibition against retroactive ratemaking. City of Miami v. Public Service Commission, 208 So.2d 249 (Fla. 1968); Gulf Power Co. v. Cresse, 410 So.2d 492 (Fla. 1982).

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, the Small LECs respectfully request that the Commission:

A. Deny BellSouth's Motion for Clarification;

B. Grant the Small LECs' Cross-Motion for Clarification by further ordering that any arbitration proceeding concerning BellSouth's transit rate will, at minimum, consider BellSouth's costs to provide transit service and the prospect of establishing a bill and keep mechanism for transit service; and

C. Grant the Small LECs' Cross-Motion for Reconsideration and order BellSouth to pay full refunds as a result of the Commission's invalidation of the Transit Traffic Tariff.

Respectfully submitted,

Kenneth A. Hoffman, Esq.
Martin P. McDonnell, Esq.
Rutledge, Ecenia, Purnell & Hoffman, P.A.
P.O. Box 551
Tallahassee, FL 32302
850-681-6788 (Telephone)
860-681-6515 (Telecopier)

- - and - -

Benjamin H. Dickens, Jr., Esq.
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, Northwest
Washington, DC 20037
(202) 828-5510 (Telephone)
(202) 828-5568 (Telecopier)

CERTIFICATE OF SERVICE

I HEREBY certify that a copy of the foregoing was furnished to the following this 10th day of October, 2006, by Electronic Mail and U. S. Mail(*) to the following:

Nancy B. White, Esq.
c/o Nancy H. Sims
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301

Stephen B. Rowell, Esq.
ALLTEL
One Allied Drive, B5F11
Little Rock, AR 72202

John Tyler, Esq.
Robert Culpepper, Esq.
BellSouth Center - Suite 4300
675 West Peachtree Street, N.E.
Atlanta, GA 30375

Mr. James White
ALLTEL Florida, Inc.
6867 Southpoint Drive, N.
Suite 103
Jacksonville, FL 32216-8005

Felicia Banks, Esq.
Michael Barrett, Esq.
Laura King, Esq.
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Tracy Hatch, Esq.
AT&T Communications of the Southern States, LLC
315 South Calhoun Street, Suite 750
Tallahassee, Florida 32301

J. Jeffry Wahlen, Esq.
Ausley Law Firm
127 Calhoun Street
Tallahassee, Florida 32301

Vicki Gordon Kaufman, Esq.
Moyle Flanigan Katz Raymond & Sheehan, P.A.
118 North Gadsden Street
Tallahassee, FL 32301

Mr. Robert M. Post, Jr.
ITS Telecommunications Systems, Inc.
16001 SW Market Street
Indiantown, FL 32956-0277

Susan J. Berlin
NuVox Communications, Inc.
Two North Main Street
Greenville, SC 29601

William R. Atkinson
Sprint Nextel
3065 Cumberland Circle, SE
Mailstop GAATLD0602
Atlanta, GA 30339

Ronald W. Gavilett, Esq.
Neutral Tandem
One South Wacker, Suite 200
Chicago, IL 60606

Floyd R. Self, Esq.
Messer, Caparello & Self, P.A.
2618 Centennial Place
P. O. Box 15579
Tallahassee, FL 32317

Charles V. Gerkin, Jr.
Friend, Hudak & Harris, LLP
Three Ravinia Drive, Suite 1450
Atlanta, GA 30346

Michele K. Thomas, Esq.
T-Mobile
60 Wells Avenue
Newton, MA 02459

Charles F. Palmer, Esq.
Troutman Sanders LLP
600 Peachtree Street, N.E.
Suite 5200
Atlanta, GA 30308-2216

Elaine Critides
Verizon Wireless
1300 I Street, N.W.
Suite 400
Washington, DC 20005

Michael A. Gross, Esq.
Florida Cable Telecommunications, Assn.
246 E. 6th Avenue, Suite 100
Tallahassee, FL 32303

Holly Henderson(*)
Southern Communications Services, Inc.
d/b/a SouthernLINCWireless
5555 Glenridge Connector, Suite 500
Atlanta, GA 30342

Todd D. Daubert(*)
Kelley Drye & Warren LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036

Leigh A. Hyer
Verizon Access Transmission Services
P. O. Box 110
Tampa, FL 33601-0110

By: _____
Kenneth A. Hoffman, Esq.
nftc\transi.traffic\responsetomotionforclarification

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT PETITION BY TDS TELECOM D/B/A TDS TELECOM/QUINCY TELEPHONE; ALLTEL FLORIDA, INC.; NORTHEAST FLORIDA TELEPHONE COMPANY D/B/A NEFCOM; GTC, INC. D/B/A GT COM; SMART CITY TELECOMMUNICATIONS, LLC D/B/A SMART CITY TELECOM; ITS TELECOMMUNICATIONS SYSTEMS, INC.; AND FRONTIER COMMUNICATIONS OF THE SOUTH, LLC ["JOINT PETITIONERS"] OBJECTING TO AND REQUESTING SUSPENSION AND CANCELLATION OF PROPOSED TRANSIT TRAFFIC SERVICE TARIFF FILED BY BELLSOUTH TELECOMMUNICATIONS, INC.

Docket No. 050119-TP

PETITION AND COMPLAINT FOR SUSPENSION AND CANCELLATION OF TRANSIT TRAFFIC SERVICE TARIFF NO. FL2004-284 FILED BY BELLSOUTH TELECOMMUNICATIONS, INC., BY AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC.

Docket No. 050125-TP

_____/

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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 4

EXHIBIT
A

BEFORE:	CHAIRMAN LISA POLAK EDGAR COMMISSIONER J. TERRY DEASON COMMISSIONER ISILIO ARRIAGA COMMISSIONER MATTHEW M. CARTER, II COMMISSIONER KATRINA J. TEW
DATE:	Tuesday, August 29, 2006
PLACE:	Betty Easley Conference Center Room 148 4075 Esplanade Way Tallahassee, Florida
REPORTED BY:	JANE FAUROT, RPR Official Commission Reporter (850) 413-6732

whatever direction of traffic, they are going to be the transiting agent for the other, and it's a form of reciprocal compensation?

MS. LEE: Certainly.

COMMISSIONER DEASON: Can that be developed in the arbitration proceeding?

MS. LEE: It can be developed in negotiations.

COMMISSIONER DEASON: Well, assuming negotiations are not fruitful.

MS. LEE: I hesitate -- well, under state law, yes, it could with arbitration.

COMMISSIONER DEASON: Let me get to my concern, and maybe now is a good time to address it. I don't fault the CLECs for choosing to interconnect with BellSouth. Obviously that's the most efficient way, and we want carriers to do things efficiently. And one of the underlying themes here is that we need to put cost on the cost-causer, and that is a good valid -- it makes legal sense and it makes walking around sense, as well. But it seems to me that the CLECs choosing to interconnect the way they do, and trying to configure their networks in the most efficient way possible, are they not causing costs to be placed on the small LECs?

Because before the advent of competition, before there were CLECs, the small LECs and BellSouth, they had their arrangements. They carried traffic back and forth. There may

be some settlements in place, but I think it was basically mainly for long distance services. Mostly the local traffic was just transported back and forth, and it was basically -- I'll call it bill and keep, maybe there is a better adjective to describe it, I'm not sure.

And now with the advent of competition and the CLECs connecting to BellSouth, and BellSouth having to carry the traffic, there is a cost there, you know, I don't deny that there is a cost on BellSouth for providing the service, it's just that the traffic seems to be flowing one direction because of the CLEC's choice of where they interconnect, which is the efficient thing to do.

I'm just concerned that -- I'm just concerned that the small LECs are having costs incurred, I mean, placed upon them as a result of this docket and this recommendation. Is that not a concern of staff's?

MS. LEE: It is a concern. You are correct, as a result of this recommendation small LECs are having a cost imposed on them. This is not a new cost though. BellSouth has been incurring these costs since the '96 Act.

COMMISSIONER DEASON: BellSouth has been incurring the cost, but they also have got the benefit of the interconnections with the CLECs that choose to connect with them for very valid engineering, economic reasons. I don't dispute that one bit. But BellSouth, by them being the

traffic that there would be an economic basis for there to be an agreement reached between the CLEC and the small LEC?

MS. LEE: For direct interconnection. Transiting is a means to establish indirect interconnection. You have indirect interconnection and you have direct interconnection. Both of those, under the Act, the two forms of interconnection were direct and indirect.

COMMISSIONER DEASON: Let me ask you this question, and it's kind of theoretical, but does the Commission have the authority to basically determine that the reciprocal compensation between the small LEC and BellSouth, when it comes to transit traffic, that it's just going to be on a bill and keep basis, and that if there ever were a situation where a CLEC decides to interconnect directly with a small LEC and let that small LEC be the transiting agent to BellSouth, that there just wouldn't be any flow of dollars, it would just be a bill and keep arrangement?

Is that fair compensation? Is that something this Commission can do from a policy perspective? First of all, do you understand the question? I know it's kind of a convoluted question.

MS. LEE: I think what you're asking is if the compensation for BellSouth's transit service could be through bill and keep rather than --

COMMISSIONER DEASON: Through bill and keep

arrangement with the small LECs.

MS. LEE: -- rather than assessing a rate.

COMMISSIONER DEASON: Instead of assessing a rate.

MS. LEE: If I'm correct, some of the transiting arrangements that currently exist are with the bill and keep.

COMMISSIONER DEASON: And if the parties cannot negotiate an agreement, they can bring it here and we can develop the merits of bill and keep, is that correct?

MS. SCOTT: That's correct, Commissioner.

COMMISSIONER DEASON: I'm trying my best to send a message to the people that are listening out there that it may not be worth pursuing, but nevertheless --

MS. LEE: Under state law --

COMMISSIONER DEASON: Under state law that would be an acceptable arrangement, and we would be meeting our legal obligations.

MS. SCOTT: That's correct.

CHAIRMAN EDGAR: Commissioner Tew.

COMMISSIONER TEW: I have one follow-up to something, Commissioner Deason's question about the small LECs and their ability to pursue options other than paying the transit rate arranging with BellSouth. And I understood that they did have options to directly interconnect with the CLECs. But is that their decision to make, or is it the CLECs? I just wanted to make sure I understand.

is reasonable for me may not be reason for you. And Commissioner Tew just pointed out we can call it something like staff's suggested rate for them to negotiate above and beyond, and we need to include a phrase that says you can go above and beyond, and don't feel that you are being unjust and unreasonable, in either case.

So, to me, having a number in there, I really don't like it, but if that is what the majority wants, fine, as long as we don't call it just and reasonable. That is the problem that I have with that.

MS. LEE: I understand your concern, and certainly you can say an appropriate rate, or an appropriate rate based on the evidence before you, or any other adjective you would like to put with it.

CHAIRMAN EDGAR: Commissioner Deason.

COMMISSIONER DEASON: If people are kind of looking for some guidance as to where different Commissioners are, my preference would be to have no rate. And, once again, I think it would be educational to have the costs. And if we get to an arbitration, maybe we are going to have a cost proceeding, which is another incentive not to bring an arbitration, but to negotiate it, what is fair and reasonable. I hope I'm sending another message.

CHAIRMAN EDGAR: Commissioner Carter.

COMMISSIONER CARTER: Madam Chairman, I think that

that is the perspective, what Commissioner Deason has said, that is the perspective that we have all voiced. And if that gets us where we need to be then maybe the rate is not so significant. Because the goal is to have these matters resolved by the parties that are directly affected. And I think that he said it very eloquently. I mean, it doesn't give me heartburn to leave the number out, but we certainly want to have these matters resolved. But if they resolve, he is correct, we will come up with a number. So I could defer to Commissioner Tew with her eloquence in forming a motion.

CHAIRMAN EDGAR: Commissioners, I think we have -- I think there's actually some precedent both ways, in individual circumstances where we have, in some orders, have put a number out there based upon evidence and facts that were before us and said this may be a good starting point or a range, recognizing individual circumstances and the give and take, as our staff has pointed out of negotiations. And, you know, as we have discussed there certainly have been items where this Commission has said the parties should negotiate it. And as long as we are recognizing the jurisdiction of this Commission in steps down the road, should this come book to us in one form or another, I don't truly feel strongly one way or the other.

COMMISSIONER DEASON: Madam Chairman.

CHAIRMAN EDGAR: Commissioner Deason.

COMMISSIONER DEASON: Another reason I'm

uncomfortable with actually stating a rate is I wouldn't want it -- and I think this kind of alludes to what Commissioner Arriaga said, that somehow we are putting our stamp of approval on this and that we are telling people to go reach an agreement, but that it, in essence, becomes a default rate. And when they actually negotiate, that is going to be the rate.

And I'm not saying that that is a bad rate. That may be -- if we were to go through a full arbitration, maybe that's the rate we would come out with, I don't know. But it just strikes me that it would not be beneficial to the negotiation process in this situation to put that number out there.

And I'm quite serious. To some extent tongue in cheek, but to another extent quite serious about if we find ourselves in arbitration, it probably would be helpful to know what it costs to provide transit service. And I know that that is a difficult process to go through and ascertain, but if we are pushed in that direction, maybe that's information we are going to need. And I would -- based upon information that is in the record, and it could be proven either right or wrong in a full hearing, but based upon the information, it has been asserted that costs are much lower than this number. And if we were to arbitrate a rate that at least recovers costs, that's just and reasonable, too. And that may be where we are. So I just think it is preferable not to include a rate.

CHAIRMAN EDGAR: I sense a few rounds of discovery,