



ORIGINAL

295 North Maple Avenue
Room 7123 M1
Basking Ridge, NJ 07920

January 6, 2000

Mr. Richard Tudor
Proposals Review Committee Chairman
c/o Ms. Blanca Bayo
Division of Records and Reporting
The Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

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RE: Docket No. 991222-TP

Dear Mr. Tudor:

The purpose of this letter is to address apparent misunderstandings with respect to AT&T's Response to the FPSC's Request for Proposals in the above docket. AT&T respectfully requests that the Commission consider this letter and its attachment on January 11, 2000, when it selects the bidder that will best serve consumers of the Florida Telecommunications Relay Service.

In a Memorandum issued in this docket on December 30, 1999, the Staff recommended that AT&T be disqualified from bidding on several grounds. As clarified in the attachment to this letter, AT&T respectfully submits that not a single ground for disqualification exists. *Although AT&T's bid was rated by the FSPC Staff as technically superior to the bid endorsed by the Staff and priced more than \$1,000,000 lower over the life of the contract*, the Memorandum focused on the peripheral matter of AT&T's responses to the RFP provisions granting the FPSC the right to assess liquidated damages.

In several instances, the Memorandum reflects a misunderstanding of AT&T's bid, as explained in the attachment to this letter. The remaining ground for disqualification – AT&T's proposed liability limit for liquidated damages – is well within allowable parameters of an affirmative response to the terms of the RFP, and is consistent with the Commission's treatment of RFP proposals received in the past. Therefore, consistent with the standard bid-letting procedure and the FPSC's past practices in reviewing and accepting bids for the Telecommunications Relay System, the issues raised in the Memorandum should, at most, be treated as minor irregularities which may be addressed and corrected by AT&T pursuant to RFP section A.14,¹ rather than forming the basis of a decision by the FSPC to accept a higher priced and technically inferior bid.

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¹ Section A.14 provides: "The PRC Chairman and the FPSC also reserve the right to accept proposals despite minor irregularities and to allow a bidder to correct such minor irregularities."

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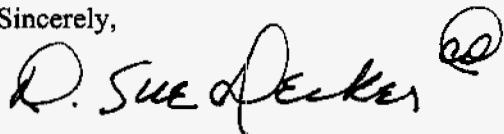
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AT&T strongly believes that with the minor clarifications set forth in the attachment to this letter, AT&T's RFP Response should be considered by Staff and the Commission to be in compliance with the RFP. AT&T's proposal was ranked higher than those of other bidders and would save Florida consumers well over \$1,000,000 over the life of the contract. We hope that the information provided to you in this letter will enable the Staff and the Commission to bring those cost savings, and the many other benefits of AT&T's Telecommunications Relay Service, to the citizens of Florida.

Sincerely,

A handwritten signature in black ink that reads "D. Sue Decker" followed by a circled "D" symbol.

D. Sue Decker
ACS General Manager
(908) 221-8144
sdecker@att.com

1. Liquidated Damages – "Contracted Services"

The Memorandum raised several grounds for disqualification of AT&T's bid. As discussed in this Letter, the only real issue focuses on one of part of the liquidated damages provisions contained in the RFP, and AT&T's issues with respect to that provision are appropriate and should be recognized as such by the FPSC.

Among other things, Section B.47 includes a list of four liquidated damages provisions. AT&T stated it would "agree to the liquidated damage provisions set forth in sub-sections (a), (b) and (c) above." However, whereas subsections (a), (b) and (c) specified certain liquidated damages and amounts, RFP section B.47(d) provided generally:

For failure to provide contracted services for the life of the contract, the FPSC reserves the right to require the payment by the Provider of liquidated damages in an amount commensurate with the duration and extent of the system deficiencies.

In response, AT&T stated "AT&T is willing to negotiate further mutually agreeable liquidated damage provisions based on specifically identified material system deficiencies." On page 5 of the Memorandum, however, the Staff concluded that AT&T "specifically disagreed with the liquidated damage provision relating to damages for not providing other contracted services." AT&T believes that this position represents a misunderstanding of its response to this clause, and wishes to reiterate its willingness to agree to payment of liquidated damages for failure to provide contracted services.

The reason that AT&T believed further negotiation is necessary is that the language in section (d) appears to grant one party to the contract, the FPSC, the unilateral right to impose liquidated damages in amounts it deems appropriate. AT&T believes that such a provision may be unenforceable under traditional doctrines of contract law, because it gives one party a unilateral right to establish penalties. The language of subsection (d) is not self-implementing; that is, a bidder's agreement to this provision would not give the Commission specific mutually agreed upon and enforceable contract rights. The FPSC's "right to require the payment by the Provider of liquidated damages" would have to be spelled out in detail in a contract, since liquidated damages, by definition, are stipulated by the parties in advance of a specified breach. Further, the RFP specifically contemplates such clarifying language. Thus, AT&T does not believe its response constitutes a variation from the terms and conditions of the RFP. It was AT&T's intention, in accordance with standard bid-letting procedure, to communicate that further clarifying language would be necessary to conclude a contract.

2. Liquidated Damages – Answer Time / In-Service Date

The Memorandum states at page 5 in Item (1A) that “AT&T did not indicate its agreement with the specific liquidated damages amount related to: (a) answer time requirements or (b) failing to have the service operating by June 1, 2000.” As referenced above, AT&T did agree to abide by these provisions and reiterates that commitment in this letter.

First, AT&T stated in its response: “If awarded this contract, AT&T will agree to a liquidated damage provision for a material breach of its commitment to implement service by June 1, 2000, or an appropriate later date if award of the bid is delayed.” Implicit in AT&T’s affirmative agreement was its acquiescence to the \$25,000 a day amount of liquidated damages for failure to meet the service date. Second, AT&T neither objected to nor rejected the liquidated damages requirement for failure to meet answer time requirements. To clarify any misunderstanding, AT&T hereby affirms its acceptance of up to a \$25,000 a month in liquidated damages for failure to meet answer time requirements.

Finally, although the Memorandum did not address this issue, AT&T’s additional recital in its response to section B.47, indicating the need to negotiate collateral terms and conditions is well within standard bid-letting practice, and therefore does not constitute a variation from the terms of the RFP. Further, MCI included language in its Response to the last Telecommunications Relay Service RFP that limited its liability for liquidated damages.¹ Not only was MCI not disqualified, but it was awarded the contract. The Commission should similarly accept such language in AT&T’s Response.

Accordingly, because AT&T agreed to these two specific liquidated damages provisions, there is no basis for a disqualification.

3. Liquidated Damages – Limitation of Liability

The Memorandum states at page 5 in Item (1B) that “AT&T proposed a limitation of liability over the life of the contract in the amount of \$1,000,000.” Again, the Staff did not consider this to be a ‘minor irregularity’ because AT&T’s potential liability could “be more limited than the potential liability of other bidders and AT&T would have a significant advantage over other bidders.” Consistent with standard practice in government bid submissions, AT&T remains willing to discuss and negotiate these types of damage caps but can only do so in the context of the specific contractual terms that will be proposed by the FPSC and only upon resolution of the issues raised above with respect to Section B.47(d).

Language limiting liability is commonly acceptable in bid-letting practice. The contract awarded to MCI as Florida’s current relay service provider, included the following limiting language:

[P]rovided that MCI shall have no liability for damages to the FPSC or any other person for any claim arising out of this Agreement, unless such claim results from the intentional or negligent misconduct of MCI. In no event shall MCI be liable for any indirect, incidental or consequential damages sustained or incurred in connection with MCI’s performance under this Agreement, regardless of the

¹ Specifically, MCI’s Response to the liquidated damages section included the following language: “Liquidated damages set forth in this provision shall not be applicable when the failure to implement the service is due to Force Majeure events as described below in MCI’s Response to this RFP or is a result of an act or omission on the part of the State of Florida, the FPSC, their employees or agents.”

form of action, whether in contract, tort (including negligence), strict liability or otherwise; whether or not such damages are foreseen or unforeseen.

This language was inserted by MCI in Section A.22 of its Response to the RFP. As explained above, AT&T reviewed and reasonably relied upon the current contract to determine whether its responses would be acceptable to the Commission. Applying a different standard now would be unfair to current bidders, such as AT&T, who reviewed and relied upon the current contract to determine whether their responses would be acceptable to the Commission.

Additionally, as noted in the Memorandum at page 6, there was explicit discussion about liquidated damages at the bidder's conference on October 14, 1999. Much of that discussion focused on the circumstances under which liquidated damages would be assessed. The Staff pointed out that it was neither the Commission's intent nor desire automatically to impose liquidated damages, noting that "our goal is not to collect liquidated damages and that our emphasis is not on this section of the RFP." Further, the parties discussed the fact that liquidated damages had never been assessed against the present relay service provider, despite occasions when it would have been possible to do so. Contrary to the suggestion on page 6 of the Memorandum that AT&T should have taken an opportunity at the bidder's conference to convince the Commission to delete the liquidated damages provisions of the RFP, AT&T was reassured by the information it received at the bidders conference, and remained willing to agree to liquidated damages consistent with the terms of its bid. AT&T's response --which agreed to liquidated damages and sought only to establish appropriate terms for them to ensure their enforceability for the Commission-- is well within the allowable parameters of an affirmative response to the terms of the RFP.

4. Bid Bond Issues

On page 7 of the Memorandum, the Staff noted two issues with respect to the bid bond. One was previously corrected by AT&T at the Staff's request. The Staff concluded that AT&T complied with its second issue regarding the bid bond language-- albeit inadvertently. If the Commission is not reassured about AT&T's inadvertent compliance with the bid bond language requirement, AT&T stands willing to correct it as a minor irregularity.