

State of Florida



Public Service Commission

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TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (CHRISTENSEN) *RC*
DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (MARSH) *cm*

RE: DOCKET NO. 020919-TP - REQUEST FOR ARBITRATION CONCERNING
COMPLAINT OF AT&T COMMUNICATIONS OF THE SOUTHERN STATES,
LLC, TELEPORT COMMUNICATIONS GROUP, INC., AND TCG SOUTH
FLORIDA FOR ENFORCEMENT OF INTERCONNECTION AGREEMENTS WITH
BELLSOUTH TELECOMMUNICATIONS, INC.

AGENDA: 04/15/03 - DECISION PRIOR TO HEARING - MOTION TO STRIKE
TESTIMONY - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020919.RCM

CASE BACKGROUND

On August 26, 2002, AT&T of the Southern States, LLC, Teleport
Communications Group, Inc. and TCG of the Carolinas, Inc.
(collectively "AT&T") filed its Complaint for enforcement of its
Interconnection Agreement against BellSouth Telecommunications,
Inc. (BellSouth). AT&T in its Complaint alleges that BellSouth
breached, and continues to breach, its obligation to charge AT&T
local reciprocal compensation rates for transport and termination
of all "Local Traffic," including all "LATAwide traffic," in
accordance with the terms of the parties' two interconnection

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agreements.¹ On September 20, 2002, BellSouth filed its response to AT&T's Complaint.

On November 14, 2002, an issue identification meeting was held. By Order No. PSC-02-1652-PCO-TP, issued November 26, 2002 (Order Establishing Procedure), the Prehearing Conference has been scheduled for April 21, 2003, and the Hearing has been scheduled for May 7, 2003.

On January 27, 2003, BellSouth filed its Motion for Partial Summary Final Order on Issue 1(a).² On February 19, 2003, AT&T filed its Response to BellSouth's Motion for Partial Summary Final Order on Issue 1(a) and its Cross Motion for Partial Summary Final Order on Issue 1(a).

AT&T also filed a Motion to Strike BellSouth's "Extrinsic" Testimony and AT&T Brief Supporting AT&T's Motion to Strike BellSouth's "Extrinsic" Evidence on February 12, 2003. BellSouth filed its Response to AT&T's Motion to Strike on February 24, 2003. At the April 1, 2003, Agenda Conference, the Commission granted the Motions for Partial Summary Final Order on Issue 1(a), and denied AT&T's Motion to Strike.

On March 21, 2003, AT&T filed its Response to BellSouth's Opposition to its First Motion to Strike BellSouth's Extrinsic Testimony and its Second Motion to Strike Additional BellSouth Testimony. On March 28, 2003, BellSouth filed its Response to AT&T's Unauthorized Reply Brief and to AT&T's Second Motion to Strike.

¹First Interconnection Agreement approved by the Commission on June 19, 1997 by Order No. PSC-97-0724-FOF-TP. Second Interconnection Agreement approved by the Commission on December 7, 2001, by Order No. PSC-01-2357-FOF-TP, effective as of October 1, 2001.

²**ISSUE 1:** (a) Do the terms of the Second Interconnection Agreement as defined in AT&T's complaint apply retroactively from the expiration date of the First Interconnection Agreement as defined in AT&T's complaint, June 11, 2000, forward? (b) If the answer to Issue 1(a) is "yes," is AT&T entitled to apply the reciprocal compensation rates and terms of the Second Interconnection Agreement only from July 1, 2001, forward?

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This recommendation addresses AT&T's Response to BellSouth Opposition to its First Motion to Strike BellSouth's Extrinsic Testimony and its Second Motion to Strike Additional BellSouth Testimony and BellSouth's Response to AT&T's Unauthorized Reply Brief and to AT&T's Second Motion to Strike.

DATE: April 3, 2003

ISSUE 1: Should the Commission grant AT&T's Second Motion to Strike Additional BellSouth Testimony?

RECOMMENDATION: No, the Commission should deny AT&T's Second Motion to Strike Additional BellSouth Testimony. (CHRISTENSEN)

STAFF ANALYSIS: As noted in the Case Background, on March 21, 2003, AT&T filed its Second Motion to Strike Additional BellSouth Extrinsic Testimony (Motion) and AT&T's Response to BellSouth's Opposition to AT&T's First Motion to Strike BellSouth's Extrinsic Testimony. BellSouth filed its Response to AT&T's Unauthorized Reply Brief and to AT&T's Second Motion to Strike (Response) on March 28, 2003. Since the Commission has addressed AT&T's first Motion to Strike and BellSouth's response to the motion at the April 1, 2003, Agenda Conference, AT&T's responses to BellSouth previous arguments will be addressed in the context of its second Motion.

AT&T Motion

AT&T argues that BellSouth witness Shiroishi's rebuttal testimony again relies on extrinsic testimony to vary the express terms of the contract where no ambiguity exists. AT&T argues that witness Shiroishi's rebuttal testimony is trying to fill the evidentiary gap regarding the interrelationship of Sections 5.3.1.1 and 5.3.3. AT&T argues that BellSouth tries to limit the interrelationship of these sections to VOIP traffic, which is an example of BellSouth trying to use extrinsic evidence to vary the terms of the contract.

AT&T argues that witness Shiroishi's rebuttal testimony contains other improper extrinsic testimony. AT&T states that it incorporates the legal arguments raised in its first Motion to Strike into its Second Motion. In its first motion, AT&T basically argues that under Georgia law extrinsic or parol evidence is impermissible when the language of the contract is clear and unambiguous. AT&T contends in its first Motion that the contract language in dispute is clear and unambiguous. Thus, AT&T argues that certain portions of witness Shiroishi's testimony should be stricken.

In its Response to BellSouth's first motion to strike, AT&T contends that its motion was not based on a straw man argument. AT&T asserts that BellSouth is attempting to use extrinsic evidence

to vary the terms of the contract and that this assertion is not a "straw man" argument. AT&T asserts that this is readily apparent from reviewing the express terms of the contract. AT&T cites to several sections of the Second Agreement to support this position. Specifically, AT&T cites to Sections 5.3.1.1 and 5.3.3 of Attachment 3 of the Second Agreement. AT&T contends that in Section 5.3.1.1 the parties agreed that:

. . . to apply a "LATAwide" local concept, meaning that traffic that has traditionally been treated as intraLATA toll would now be treated as local for intercarrier compensation, except for those calls that are originated and terminated through switched access arrangements as established by the State Commission or FCC.

AT&T also contends that Section 5.3.3 contains the following definition for "Switched Access Traffic" to which switch access rates would apply:

. . . telephone calls requiring local transmission or switching services for the purpose of the origination or termination of Intrastate InterLATA and Interstate InterLATA traffic.

AT&T contends that these sections are interrelated. AT&T asserts that because of the interrelatedness of these sections the only logical interpretation of the Second Agreement makes clear that all traffic "within a LATA" would be transported and terminated as "Local Traffic," except for those calls originated or terminated through switched access arrangements. AT&T argues that the parties agreed that the language "switched access arrangements as established by the state commission or FCC" is limited to "Switched Access Traffic" which includes only intrastate interLATA and interstate interLATA traffic as set forth in Section 5.3.3.

Thus, AT&T contends that the rub between the parties regarding the definition of "Local Traffic," lies not with AT&T, but with BellSouth in its attempts to argue that "Switched Access Traffic" includes traditional intraLATA traffic despite the clear words in Sections 5.3.1.1 and 5.3.3 to the contrary.

AT&T also argues in its Response that witness Shiroishi's testimony clearly attempts to alter, vary, or change the unambiguous terms of the Second Agreement. AT&T argues that due to

the interrelatedness of the sections which discuss "Local Traffic" and "Switched Access Traffic," these sections clearly tie together what constitutes "Local Traffic" with what constitutes "Switched Access Traffic." AT&T asserts that BellSouth can point to no provisions in the Second Agreement where "switched access arrangements" are defined to mean traffic which is subject to BellSouth's intrastate intraLATA tariff rates. AT&T contends that the express language of section 5.3.3 limits "Switched Access Traffic" to only interLATA traffic. AT&T claims that BellSouth is in a serious hole regarding the express terms of the contract and this is why witness Shiroishi filed her testimony referring to extrinsic evidence.

Also in its response, AT&T states that BellSouth mischaracterizes the North Carolina Commission decision on its motion to strike. AT&T states that in North Carolina, while the motion was denied, AT&T was granted additional time to conduct discovery regarding the extrinsic evidence. AT&T also asserts that the North Carolina Commission specifically determined (for "evidential purposes" only) that various provisions of the contract were ambiguous before it would admit witness Shiroishi's "extrinsic" testimony into the record. AT&T states that the North Carolina Commission acknowledged the requirement of Georgia law to determine the ambiguity of the contract language before admitting the evidence and ruled accordingly. AT&T argues that while it disagrees with the finding that the contract is ambiguous, an affirmative finding of ambiguity is required before the Commission can consider such extrinsic evidence from BellSouth.

BellSouth's Response

In its Response, BellSouth contends that it is well settled that reply memoranda are not recognized by Commission rules or by the Administrative Procedure Act and, therefore, cannot be considered by the Commission.³ BellSouth also contends that AT&T

³See Order No. PSC-00-1777-PCO-TP, issued September 28, 2000, in Docket No. 980119-TP, In re: Complaint of Supra Telecommunications and Information Systems, Inc. Against BellSouth Telecommunications, Inc.; Order No. PSC-00-2233-FOF-TP, issued November 22, 2000, in Docket No. 990705-TP, In Re: Petition by ITC^DeltaCom Communications, Inc. d/b/a ITC^DeltaCom For Arbitration of Certain Unresolved Issues in Interconnection

did not seek permission to file its unauthorized reply brief. BellSouth asserts that AT&T simply filed its brief without regard to the applicable rules of procedure. BellSouth argues that the Commission should refuse to consider AT&T's unauthorized brief. BellSouth contends that failure to reject the unauthorized filing will set a dangerous precedent of allowing parties, rather than the Legislature and this Commission, to establish the rules of practice and procedure before the Commission.

BellSouth states that even if the Commission decides to consider AT&T's unauthorized reply brief, the Commission should still deny the motion. BellSouth argues that the AT&T brief does nothing more than present the same arguments that were set forth in its original brief in support of its motion. Further, BellSouth argues that AT&T's unauthorized brief casts aspersions at BellSouth and attempts to argue the merits of the case while disregarding the facts and the sworn testimony of AT&T's own witnesses in the identical proceeding in North Carolina.

BellSouth argues that AT&T devotes several pages of its brief to arguing that the contract clearly means what AT&T wants it to mean so that AT&T can get a multi-million dollar refund of switched access payments made to BellSouth over the last year and a half. BellSouth also contends that AT&T is seeking to reduce substantially the payments due to BellSouth on a going forward basis for terminating intraLATA traffic that AT&T sends BellSouth over switched access arrangements that AT&T purchases out of BellSouth's Florida Switched Access Tariff. BellSouth contends that the ultimate issue to be decided is whether the parties agreed to treat that traffic as local for purposes of inter-carrier compensation. BellSouth asserts that this should not even be an

Negotiations Between ITC^DeltaCom and BellSouth Telecommunications, Inc., (finding that the Uniform and Commission rules do not provide for a reply to a Response for Motion for Reconsideration); Order No. PSC-01-1168-TP, issued May 22, 2001, in Docket No. 010098-TP, In re: Petition by Florida Digital Network, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement With BellSouth Telecommunications, Inc. Under the Telecommunications Act of 1996., (refused to address arguments raised in reply memorandum because reply memoranda are not contemplated by rules).

issue since the interconnection agreement expressly and specifically states that intraLATA calls that are carried over switched access arrangements are not local.

BellSouth contends that AT&T is attempting to side step the "Local Traffic" provision by arguing that the meaning of the term at issue - switched access arrangements - is limited by the specific definition of a different term - Switched Access Traffic - in a separate provision of the contract. BellSouth asserts that AT&T is dead wrong in asserting that the parties agreed that the exclusion in a provision addressing solely intraLATA traffic excludes only interLATA traffic from the definition of local traffic, which is the nonsensical interpretation AT&T is asking the Commission to adopt. BellSouth states that it looks forward with confidence to arguing the merits of the case at the appropriate time.

BellSouth contends that the issue is whether, upon determining that the pertinent contract language is ambiguous, the Commission should consider extrinsic evidence of its meaning. BellSouth asserts that AT&T agrees that extrinsic evidence is appropriate in such circumstance, as noted by the 50 pages of AT&T rebuttal testimony which contains extrinsic evidence. BellSouth contends that AT&T is incorrect that BellSouth is attempting to vary the definition of "Switched Access Traffic." BellSouth asserts that the term at issue is not that specifically defined term, but the term "switched access arrangement" in the definition of local traffic. BellSouth argues that to the extent extrinsic evidence is appropriate, it is to explain the meaning of "switched access arrangement."

BellSouth also contends that AT&T mischaracterizes what transpired in the North Carolina case. BellSouth states that its assertion that AT&T's motion to strike was denied in its entirety is fair because the North Carolina Commission did, in fact, deny AT&T's motion in its entirety. BellSouth asserts that the North Carolina Commission also ruled that portions of the testimony which AT&T claimed were extrinsic evidence were not in fact extrinsic, which AT&T fails to mention in its brief.

BellSouth asserts that, moreover, AT&T leads this Commission to believe that the North Carolina Commission requested further oral argument on its motion to strike following discovery. BellSouth contends that this is not accurate. BellSouth states

that the North Carolina Commission denied by written order AT&T's motion after considering only the motion and BellSouth's response. BellSouth continues that AT&T subsequently filed a "renewed" motion, and specifically asked the Presiding Commissioner to rule on that motion at the hearing to ensure that AT&T would preserve its appellate rights with respect to the motion. BellSouth concludes that again the motion was denied in its entirety.

BellSouth states that since AT&T is basing its Second Motion on the arguments AT&T raised in its First Motion to Strike, BellSouth incorporates its arguments in its first response in its second response. In summary, BellSouth asserts that witness Shiroishi's testimony is appropriate. BellSouth contends that it does not offer Ms. Shiroishi's testimony to alter or vary the terms of the agreement, but because it is appropriate for the Commission to consider extrinsic evidence in the event the Commission finds the contract ambiguous. BellSouth contends that the parol evidence rule, as even AT&T acknowledges, does not bar the testimony in that situation. BellSouth argues that given that the parties must submit pre-filed testimony before the Commission rules with respect to whether the contract term at issue is ambiguous, it would be in error to strike the testimony. BellSouth concludes that the Commission should deny AT&T's Motion to Strike.

Analysis

For the reasons stated in the recommendation considered at the April 1, 2003, Agenda Conference, staff believes that AT&T's Second Motion to Strike should be denied. Both parties agree that if there is ambiguity in the wording of the contract, then testimony regarding the parties' intent is appropriate. Although the parties both assert that their interpretation of the contract language is clear, the parties disagree as to whether the plain meaning of the agreement's language includes or excludes a certain type of traffic which utilizes a certain type of arrangement. Specifically, staff believes that the meaning of "switched access arrangement" as used in the "Local Traffic" section is not clear on its face at this time from simply reading the agreement. Thus, consistent with the Commission's vote on the recommendation considered at the April 1, 2003, Agenda Conference, staff believes that at this point in time there is **sufficient ambiguity** as to the application or meaning of this language such that AT&T's Second Motion to Strike should be denied.

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Further, staff believes that AT&T's Response to BellSouth's Response is an inappropriate pleading. As noted by BellSouth, in previous cases where a party has filed a pleading not contemplated by Commission rules or the uniform rules, the Commission has not considered the pleading.⁴ Specifically, in the Supra case, the Commission found that ". . .neither the Uniform Rules nor our rules contemplate a reply to a response to a Motion." Staff believes that AT&T's response is such a pleading. Thus, staff believes that the Commission should not consider the arguments raised in AT&T's Response to BellSouth's Response.

Staff notes that the North Carolina Commission as quoted in AT&T's motion states that ". . . the relevant contract language is sufficiently ambiguous to permit the introduction of extrinsic evidence . . ." AT&T Motion at p. 10. Although the North Carolina Commission's decision is not binding on this Commission, staff believes that it is persuasive. We note that the North Carolina Commission found too that Georgia law was satisfied by a preliminary finding for evidentiary purposes that the contract language was "sufficiently ambiguous" to permit the introduction of the extrinsic evidence.

Staff further notes that, if after receiving all the evidence, the Commission concludes that the language is, in fact, clear and unambiguous, then the Commission need not consider any "extrinsic" testimony. The inclusion of this testimony will not prejudice either party since the Commission can clearly differentiate what testimony it can and cannot consider when rendering its final determination.

Therefore, staff recommends that the Commission deny AT&T's Motion to Strike Additional BellSouth Extrinsic Testimony.

⁴Order No. PSC-00-1777-PCO-TP (Supra case); Order No. PSC-00-2233-FOF-TP (ITC^DeltaCom case); Order No. PSC-01-1168-TP, (Florida Digital Network, Inc. case).

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open pending further proceedings. (CHRISTENSEN)

STAFF ANALYSIS: This matter is currently scheduled for hearing. Thus, this docket should remain open pending further proceedings.