

NANCY B. WHITE
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BellSouth Telecommunications, Inc.
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December 2, 2003

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 031046-TP
In re: Petition and Complaint of AT&T Communications of the
Southern States, LLC against BellSouth Telecommunications,
Inc. and BellSouth Long Distance, Inc. for Anticompetitive
Pricing of Long Distance Service

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion to Dismiss Petition and Complaint, or in the Alternative, Motion for Summary Judgment, which we ask that you file in the captioned 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,



Nancy B. White (KA)

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey

DOCUMENT NUMBER-DATE

12262 DEC-23

FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE
Docket No. 031046-TP

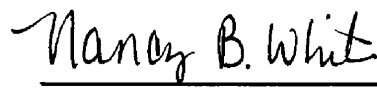
I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail, First Class U. S. Mail and FedEx (*) this 2nd day of December, 2003 to the following:

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Nancy B. White (KA)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition and Complaint of AT&T) Docket No.: 031046-TP
Communications of the Southern States, LLC)
against BellSouth Telecommunications, Inc.) Filed: December 2, 2003
and BellSouth Long Distance, Inc. for)
Anticompetitive Pricing of Long Distance)
Service)

**BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS PETITION
AND COMPLAINT ,OR IN THE ALTERNATIVE, MOTION FOR SUMMARY
JUDGMENT**

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Motion to Dismiss, or in the alternative, Motion for Summary Judgment regarding the Petition and Complaint filed by AT&T Communications of the Southern States, LLC ("AT&T") against BellSouth and BellSouth Long Distance, Inc. ("BellSouth Long Distance"). While it seems patently clear that AT&T has no genuine complaint against BellSouth Long Distance, who has filed a promotion not unlike the types of activities AT&T engages in when it suits AT&T's purposes, there is absolutely no basis at all to include BellSouth in a complaint based upon the alleged improper promotion filed by BellSouth Long Distance. In support of its motions, BellSouth states the following:

1. AT&T filed its Petition and Complaint alleging that a promotion filed by BellSouth Long Distance was anticompetitive and contrary to Florida law. Evidently this promotion provided subscribers to BellSouth Long Distance with a "promotional" usage rate of 1 cent per minute in lieu of the normal 5 cent per minute charge for a period from the time the end user signed up for the service until January 31, 2004. According to BellSouth Long Distance's tariff, attached to AT&T's complaint, the customers would continue to pay the monthly recurring charge of \$3.95 each month for the service. Therefore, at bottom, AT&T's complaint is about a promotion, which was evidently scheduled to last for three months, where subscribers, in

addition to paying the normal monthly recurring rate for service, were only required to pay 1 cent per minute for service, rather than 5 cents per minute. The tariff attached to AT&T's complaint made it clear that the per minute rate would revert to the 5 cent a minute charge at the end of the promotion period.

2. AT&T made no specific complaints against BellSouth other than to assert, without any factual support at all, that this was an "attempt by BellSouth to do indirectly through its affiliate, BSLD, that which BellSouth is prohibited by law to do directly." Petition at pg.4. AT&T did make accusations against BellSouth Long Distance, but interestingly, the law cited by AT&T that BellSouth Long Distance supposedly violated, F.S. §364.051 (5)(c), does not apply to BellSouth Long Distance, but rather only applies to local exchange companies who have elected price regulation.

3. As the affidavit of Thomas F. Lohman, attached hereto as Attachment 1 indicates, BellSouth Long Distance does in fact pay BellSouth the access charges that BellSouth Long Distance incurs when it uses BellSouth's facilities, just as any other long distance company is required to do. There are no "intra-corporate accounting transactions" to account for these payments as AT&T alleges in its ill-founded complaint.

4. Rule 28-106.204(40), Florida Administrative Code, provides that "any party may move for summary final order whenever there is no genuine issue as to any material fact." Pursuant to Section 120.57(1) (b), Florida Statutes, a summary final order shall be rendered if it is determined from the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order.

5. Under Florida law, it is well established that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom a summary judgment is sought. Moore v. Moore, 475 So. 2d 666,668 (Fla. 1985). A summary judgment cannot be granted unless the facts are so crystallized that nothing remains but question of fact. Id.

6. As demonstrated by the attached affidavit of Thomas F. Lohman, there is no issue of material fact within the four corners of the Petition and Complaint filed by AT&T with regard to BellSouth. BellSouth is thus entitled to the entry of a final summary order dismissing it from the Petition and Complaint.

7. A motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In disposing of a motion to dismiss, the Commission must assume all of the allegations of the complaint to be true. Id. In determining the sufficiency of a complaint the Commission should confine its consideration to the complaint and the grounds asserted in the motion to dismiss. Flyle v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958). Applying these principles to the case at hand mandates that the Commission dismiss AT&T's Petition and Complaint as to BellSouth.

8. Section 272 of the Telecommunications Act of 1996 governs the relationship between BellSouth and BellSouth Long Distance. Specifically, Section 272 required the establishment of BellSouth Long Distance as a separate company that operates independently from BellSouth. See Section 272 (a) and (b). Section 272 requires that BellSouth cannot give preferential treatment to BellSouth Long Distance over any other entity. AT&T in its Petition does not allege that BellSouth has in any way violated Section 272 of the Telecommunications

Act. Since AT&T has made no claim that BellSouth is engaging in providing any preferential treatment to BellSouth Long Distance, even if all of the facts alleged or implied by AT&T were true, and the transaction between BellSouth and BellSouth Long Distance were an “intra-company accounting” transaction, there would be no basis for AT&T’s complaint against BellSouth.

9. At bottom, the promotional tariff complained of by AT&T was filed by BellSouth Long Distance, not BellSouth. The discount offered in the promotion is for services offered by BellSouth Long Distance, not BellSouth. No BellSouth service is discounted in connection with the promotion complained about. All BellSouth services required as a condition of the BellSouth Long Distance promotion are sold by BellSouth at the rates tariffed in the Florida General Subscriber Services Tariff on file with the Florida Public Service Commission. Nothing in the Petition and Complaint allege otherwise. AT&T has alleged no facts that even if true would state a cause of action against BellSouth. For this reason, AT&T’s Petition and Complaint should be dismissed as to BellSouth.

Wherefore, BellSouth respectfully prays that the Florida Public Service Commission grant the instant motions and render a judgment in favor of BellSouth, dismissing AT&T’s Petition and Complaint.

Respectfully submitted this 2nd day of December, 2003.

BELLSOUTH TELECOMMUNICATIONS, INC.

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Nancy B. White (CA)

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition and Complaint of AT&T)	Docket No.: 031046
Communications Of The Southern States, LLC)	
against BellSouth Telecommunications, Inc.)	
and BellSouth Long Distance, Inc. for)	
Anticompetitive Pricing of Long Distance)	
<u>Service</u>)	

State of Georgia
County of Dekalb

AFFIDAVIT OF THOMAS F. LOHMAN

Before me, the undersigned authority, personally appeared Thomas F. Lohman, who stated that he is currently a Senior Director – Finance for BellSouth Telecommunications, Inc. (“BellSouth”), and further states the following:

1. My title is Senior Director – Finance for BellSouth. I have held that title or a similar one since 1991.
2. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.
3. BellSouth sells intrastate switched access services to BellSouth Long Distance, Inc. from the Florida Switched Access Services Tariff on file with the Florida Public Service Commission.
4. BellSouth sells interstate switched access services to BellSouth Long Distance, Inc. from the Interstate Switched Access Services Tariff on file with the Federal Communications Commission (“FCC”).
5. BellSouth sells interstate and intrastate switched access services to BellSouth Long Distance, Inc. at the tariffed rates.
6. BellSouth bills BellSouth Long Distance for interstate and intrastate switched access services sold from the BellSouth Florida tariff and the FCC tariff.

7. BellSouth Long Distance pays for the interstate and intrastate access services purchased from the BellSouth Florida tariff and the BellSouth FCC tariff by check or draft.

8. Further Affiant sayeth not.

Dated this 1st day of December, 2003.

Thomas F. Lohman
Thomas F. Lohman

Sworn to and subscribed
before me this 1st day December, 2003

R. A. Moore
Notary Public (Signature)

R. A. Moore
Notary Public (Printed Name)

Personally Known or Produced Identification

Identification Produced _____