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December 9, 2003

BY HAND DELIVERY

Ms. Blanca Bayó, Director
The Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket Nos. 031046-TP

Dear Ms. Bayó:

Enclosed for filing are an original and 15 copies of AT&T's Response to BellSouth's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment and AT&T's Motion for Summary Final Order in the above-referenced docket.

Please acknowledge receipt of this letter by stamping the extra copy of this letter "filed". Thank you for your assistance with this filing.

Sincerely yours,

Tracy W. Hatch

TWH/las
Enclosure
cc: Parties of Record

DOCUMENT NUMBER-DATE

12678 DEC-98

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition and Complaint of AT&T)
Communications of the Southern States, LLC) Docket No. 031046-TP
Against BellSouth Telecommunications, Inc.)
And BellSouth Long Distance, Inc. For) Filed: December 9, 2003
Anticompetitive Pricing of Long Distance)
Service)

**RESPONSE OF AT&T TO
BELLSOUTH'S MOTION TO DISMISS, OR
IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT
AND
AT&T'S MOTION FOR SUMMARY FINAL ORDER**

AT&T Communications of the Southern States, LLC (hereinafter "AT&T"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby provides its Response to BellSouth Telecommunications, Inc.'s (hereinafter "BellSouth") Motion to Dismiss, or in the Alternative, Motion for Summary Judgment and AT&T's Motion for Summary Final Order.

BellSouth moves to dismiss AT&T's Petition and Complaint apparently on the grounds that the Petition and Complaint fails to state a cause of action. (BellSouth Motion, page 3) Alternatively, BellSouth requests the Commission to grant BellSouth a summary judgment based upon the affidavit of a BellSouth employee affirming that BellSouth Long Distance, Inc. (hereinafter "BSLD") pays BellSouth for switched access services in accordance with BellSouth's applicable intrastate and interstate tariffs. (BellSouth Motion, pages 1-2) Both Motions advanced by BellSouth are inadequate to support a summary disposition of AT&T's Petition and Complaint and should therefore

be denied. Indeed, the affidavit attached to BellSouth's Motions is supportive of AT&T's complaint that BellSouth and BSLD are offering a service package that does not properly impute the price of switched access in violation of Florida law and, therefore, the Commission should enter a summary judgment in favor of AT&T.

MOTION TO DISMISS

1. In its Motion to Dismiss BellSouth cites case law concerning failure to state a claim, and argues that AT&T has not alleged facts that, even if true, would state a cause of action against BellSouth. The only argument put forth by BellSouth in support of its Motion is that BSLD is offering the promotion, not BellSouth. (Motion, page 4) Therefore, BellSouth concludes that AT&T has no legitimate complaint against BellSouth. Importantly, BellSouth points out that when considering a motion to dismiss, the Commission must assume all of the allegations of the complaint to be true. (Motion, page 3)

2. Contrary to statements in BellSouth's Motion, AT&T clearly articulated in its Petition and Complaint that BellSouth is a willing participant in the promotional package being offered by its affiliate, BSLD:

8. The 1 cent price scheme is an attempt by BellSouth to do indirectly through its affiliate BSLD, that which BellSouth is prohibited by law to do directly. It is essential that the Commission recognize that to be eligible for the 1 cent long distance promotion, the customer must also be a subscriber to BSLD's affiliated incumbent local exchange carrier, BellSouth *and* must subscribe to BellSouth's Complete Choice® plan, BellSouth Area Plus® plan or Flat Rate Residential Individual lines.

3. AT&T recognizes that F.S. § 364.051(5)(c) applies only to local exchange carriers. However, BellSouth's attempt to distinguish its operations for that of its

affiliate, BSLD, in the context of this promotional offering is disingenuous at best and without merit. BellSouth simply cannot be viewed as a disinterested party to this promotional package. As pointed out in the Petition and Complaint and the BSLD tariff, a customer cannot get the BSLD Savings Plan and its promotional rate of 1 cent per minute unless that customer also subscribes to BellSouth's services. Subscription to BellSouth's service is a precondition to and an integral part of the promotional package. In addition, BellSouth and BSLD are both 100% owned by BellSouth Corporation. Thus, in this context, BSLD is the alter ego of BellSouth for purposes of this promotion and for purposes of interpreting F.S. § 364.051(5)(c).

4. To view the relationship between BellSouth and BSLD in any other light would allow BellSouth to thwart its legal obligations under F.S. § 364.051(5)(c) simply by having BSLD provide all of its long distance services at rates that do not properly impute the excessively high switched access charges that its competitors must pay. This was not the intent of the legislature when it enacted F.S. § 364.051(5)(c) and it should not be allowed by the Commission. Consequently, if the Commission assumes that AT&T's allegation that BellSouth is unlawfully attempting to avoid its obligation under F.S. § 364.051(5)(c) through its affiliate BSLD is true (*Varnes v. Dawkins*, 624 So2d 349, 350 (Fla. 1st DCA 1993)), it must deny the Motion to dismiss.

5. Another reason why it would be inappropriate to dismiss AT&T's Petition and Complaint is that BellSouth's Motion does not even address that part of the Petition and Complaint that alleges that BellSouth's participation in the 1 cent promotion package is a violation of F.S. § 364.01(4)(g). (See Petition and Complaint, page 5) That section requires the Commission to "ensure that all providers of telecommunications services are

treated fairly, by preventing anticompetitive behavior.” The 1 cent per minute price established in the promotional package is below the price of switched access provided by BellSouth. Thus, as set out in paragraph 9 of the Petition and Complaint, the promotional offering is predatorily priced and therefore anticompetitive. If the Commission assumes that allegation to be true (*Varnes v. Dawkins, supra.*), it must deny the Motion to Dismiss.

6. Likewise, BellSouth’s Motion does not address that part of AT&T’s Petition and Complaint that seeks alternative relief:

11. Alternatively, if the Commission determines not to invalidate the 1 cent promotional offering, it should address the root cause of this abuse of monopoly position by reducing BellSouth’s intrastate switched access rates to cost-based levels immediately...(AT&T Petition and Complaint, page 5)

Because BellSouth did not see fit to seek dismissal of this portion of the Petition and Complaint, it would be improper for the Commission to grant a motion to dismiss regarding the alternative relief requested by AT&T.

MOTION FOR SUMMARY FINAL ORDER

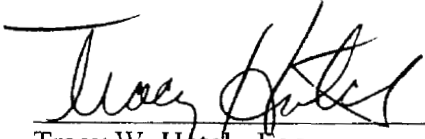
7. AT&T incorporates by reference its responses in paragraphs 2-4 herein regarding the Motion to Dismiss.

8. BellSouth’s Motion for Summary Judgment is based on the affidavit of Thomas F. Lohman. The only information provided by Mr. Lohman is that BellSouth charges BSLD for access services at tariffed rates. Rather than supporting a summary judgment in favor of BellSouth, this affidavit is supportive of AT&T’s Petition and Complaint.

9. AT&T alleges in its Petition and Complaint that the rate for two ends of switched access in Florida is approximately \$0.046 per minute of use. BSLD also admits to this rate in its Answer to AT&T's Petition and Complaint. The Lohman affidavit merely confirms that the BellSouth/BSLD promotional package offers long distance calling at a rate that does not cover the applicable access services being provided. Therefore, the promotion is anticompetitive and in violation of F.S. § 364.01(4)(g) and F.S. § 364.051(5)(c). On that basis, AT&T respectfully requests the Commission to deny BellSouth's Motions and to grant AT&T a summary judgment regarding the matters set forth in its Petition and Complaint.

WHEREFORE, based on the foregoing reasons, AT&T requests the Commission to enter an order denying BellSouth's Motion to Dismiss Petition and Complaint, or in the Alternative, Motion for Summary Judgment and to grant AT&T's Motion for Summary Final Order and the relief set out in its Petition and Complaint.

Respectfully submitted this 9th day of December 2003


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CERTIFICATE OF SERVICE
Docket No. 031046

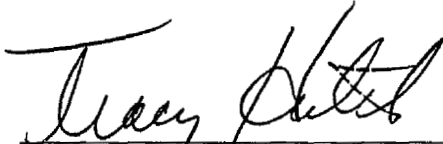
I HEREBY CERTIFY that a true and correct copy of the foregoing Response of AT&T to Bellsouth's Motion to Dismiss or In the Alternative, Motion for Summary Judgment and AT&T's Motion for Summary Final Order was served via Electronic Mail and U.S. Mail this 9th day of December 2003 to the following:

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