

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: January 29, 2004  
Anticompetitive Pricing of Long Distance )  
Service )

**AT&T'S RESPONSE IN OPPOSITION TO  
BELLSOUTH LONG DISTANCE, INC.'S  
MOTION FOR SUMMARY ORDER**

Petitioner/Complainant, AT&T Communications of the Southern States, LLC (AT&T), pursuant to Rule 28-106.204(4), Fla. Admin. Code, hereby files this response in opposition to the Motion for Summary Final Order filed by BellSouth Long Distance, Inc. (BSLD), and requests that the Florida Public Service Commission deny the Motion. In support of its response, AT&T states:

1. On November 7, 2003 AT&T filed a Petition and Complaint against BellSouth Telecommunications, Inc. and BSLD alleging anticompetitive pricing of long distance services. BSLD filed its Answer on December 2, 2003, requesting the Florida Public Service Commission (the Commission) to deny the relief sought by AT&T and to dismiss the Petition and Complaint. In addition to filing an Answer, BSLD filed a Motion for Summary Order pursuant to Rule 28-106.204(4), Fla. Admin. Code on January 15, 2004. Counsel for AT&T and BSLD have conferred, and inasmuch as AT&T did not receive a service copy of the Motion for Summary Order, counsel for BSLD has stated that BSLD does not object to AT&T responding the Motion for

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Summary Order until January 29, 2004.

### **Standard for Summary Relief**

2. Rule 28-106.204, Fla. Admin. Code provides that “[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact.” That standard is substantively identical to that for a summary judgment, in which, upon consideration of the pleadings, affidavits, evidence, etc. “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 1.510(c), Fla.R.Civ.P.

3. There is a dearth of case law as to the standard to be applied in deciding a motion for Summary Final Order under Rule 28-106.204(4), Fla. Admin. Code. However, as the standard for summary relief is the same for both a summary final order and a summary judgment, the standards established by the courts for a summary judgment are applicable and should be applied in determining whether to grant the BSLD’s Motion for Summary Final Order.

4. It is undisputed that “[f]or purposes of summary judgment, a court is to treat the allegations of the complaint as true.” *University Nursing Care Center, Inc. v. First Union National Bank*, 835 So.2d 1186, 1189, (Fla. 1st DCA 2002); see also *Moore v. Morris*, 475 So.2d 666 (Fla. 1985). As set forth by the First District:

Under Florida law, however, the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and the court must draw every possible inference in favor of the party against whom a summary judgment is sought. *Wills v. Sears, Roebuck & Co.*, 351 So.2d 29 (Fla.1977). The movant's unsworn motion for summary judgment is not sufficient to rebut the allegations of an unsworn complaint, which must be accepted as true for the purposes of a motion for summary judgment, unless conclusively

disproven.

*Green v. CSX Transportation, Inc.*, 626 So.2d 974, 975 (Fla. 1st DCA 1993).

5. Even in cases where reasonable persons might justifiably make different inferences and deductions to reach different conclusions as to whether a genuine issue of material fact exists, the issue should be submitted to fact finding entity. *Mecier v. Broadfoot*, 584 So.2d 159, 160 (Fla. 1st DCA 1991).

6. In support of its Motion for Summary Order BSLD asserts that AT&T does not consider revenue associated with the \$3.95 monthly recurring charge. This allegation has no factual basis in the Motion or the affidavit attached to the Motion. In addition, the allegation wrong. Thus, from the beginning, BSLD rests its Motion for Summary Order on a disputed material fact.<sup>1</sup>

7. The question of whether the promotional offering at issue is priced below cost is a function of the relevant costs and relevant revenues. The flaw in BSLD's request for summary disposition is that the Motion and accompanying affidavit do not consider all of the relevant costs. For example, there is no mention of other (non-access related) costs of providing long distance service or the marketing costs associated with this particular promotion. Therefore, BSLD's calculations supporting its Motion are incomplete and its analysis flawed. This shortcoming results in a disputed issue of material fact regarding a critical piece of equation – the actual cost of the promotional offering. Because there are disputed issues as to material facts, the Commission must, pursuant to Rule 28-106(4) and applicable case law, deny the Motion for Summary Order.

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<sup>1</sup> In the first paragraph of its Motion, BSLD characterizes the \$3.95 monthly recurring charge as “an important rate element of BSLD's promotion...”.

8. The BSLD Motion for Summary Judgment also seeks dismissal of the Petition and Complaint on the grounds that it fails to state a claim upon which relief can be granted.<sup>2</sup> In support of its request BSLD merely points out that it could find “no case [that] has been interpreted Florida Statutes, Section 364.01(4)(g) as giving rise to an independent cause of action.”<sup>3</sup> Section 364.01 provides:

(1) The Florida Public Service Commission *shall* exercise over and in relation to telecommunications companies the powers conferred by this chapter.

\* \* \*

(4) The commission *shall* exercise its exclusive jurisdiction in order to:

...(g) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint. (emphasis added)

The legislature, in enacting these provisions, has placed a duty on the Commission to assure the fair treatment of all telecommunications companies and to prevent anticompetitive behavior. In its Petition and Complaint, AT&T has alleged that BSLD and its affiliate BellSouth Telecommunications, Inc. have engaged in pricing behavior that is unfair and anticompetitive. The statute is clear and unambiguous – the Commission has the jurisdiction and the duty to exercise that jurisdiction in order to prevent the kind of conduct alleged by AT&T and protected by Section 364.01(4)(g). The Petition and Complaint asks the Commission to exercise its jurisdiction under the statute. The fact that BSLD has not been able to find a case interpreting this particular section of the law is of no consequence in determining whether the allegations are sufficient to state a claim upon which relief can be granted. Moreover, the Florida

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<sup>2</sup> Motion for Summary Order, p. 2.

<sup>3</sup> *Id.* at p. 5.

Supreme Court has construed the language in a related provision in Section 364.01(3)(a), Florida Statutes (1993), as providing authority for the Commission to act to prevent unlawful behavior.<sup>4</sup> The Court's finding the language in current Section 364.01(4)(a) provides authority for the Commission to act to prevent unlawful behavior, leads inexorably to the conclusion that Section 364.01(4)(g) must equally provide the Commission authority to act to prevent anticompetitive behavior. Assuming the allegations of the Petition and Complaint are correct, the Commission is charged with the duty of assuring fair treatment and granting the relief AT&T seeks. As is the case with motions for summary judgment, for purposes of motions to dismiss, a court is to treat the allegations of the complaint as true. See *Fox v. Professional Wrecker Operators of Florida, Inc.*, 801 So.2d 175, 178, (Fla. 5th DCA 2001):

The primary purpose of a motion to dismiss is to request the trial court to determine whether the complaint properly states a cause of action upon which relief can be granted and, if it does not, to enter an order of dismissal. In making this determination, the trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations. It is not for the court to speculate whether the allegations are true or whether the pleader has the ability to prove them. Thus, "[t]he question for the trial court to decide is simply whether, assuming all the allegations in the complaint to be true, the plaintiff would be entitled to the relief requested." " (Citations omitted

9. Looking within the four corners of AT&T's Petition and Complaint, it is clear that AT&T has alleged that BSLD has engaged in below cost pricing with regard to its 1 cent promotion plan and that such conduct is unfair and anticompetitive. Further, AT&T has alleged that the Commission is charged with the duty to prevent such unfair

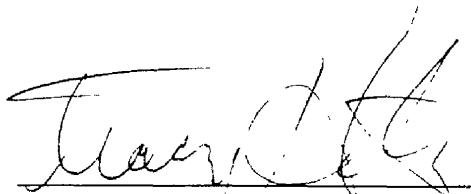
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<sup>4</sup> See *Teleco Communications Company v. Susan F. Clark, etc., et.al.*, 695 So.2d 304 (1997). The language cited by the Court in Section 364.01(3)(a), Florida Statutes (1993), is now found in Section 364.01(4)(a), Florida Statutes 2002.

and anticompetitive conduct pursuant to Section 364.01(4)(g), Florida Statutes. Thus, taking those allegations as true, AT&T has indeed stated a claim upon which relief can be granted. Therefore, BSLD's request for dismissal must be denied.

**WHEREFORE**, based on the foregoing reasons, AT&T respectfully requests the Commission to enter an order denying BSLD's Motion for Summary Order and denying the request included in said Motion to dismiss AT&T's Petition and Complaint for failure to state a cause of action upon which relief can be granted.

Respectfully submitted this 29<sup>th</sup> day of January 2004.



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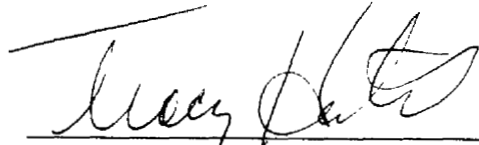
**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of AT&T's Response in Opposition the BellSouth Long Distance, Inc.'s Motion for Summary Order was served by U.S. Mail this 29<sup>th</sup> day of January 2004 to the following:

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