

ATTACHMENT B

**BellSouth Long Distance, Inc.
FPSC Docket No. 031046-TP
Request for Specified Confidential Classification
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02/02/04**

**REQUEST FOR CONFIDENTIAL CLASSIFICATION OF BSLD'S MOTION FOR
SUMMARY ORDER AND THE LAUTER AFFIDAVIT AND THE ATTACHMENTS TO
THE LAUTER AFFIDAVIT**

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PROPRIETARY
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 alleged)	
Anticompetitive Pricing of Long Distance)	Filed: January 15, 2004
Service)	

BELLSOUTH LONG DISTANCE, INC.'S
MOTION FOR SUMMARY ORDER

COMES NOW, BellSouth Long Distance, Inc. ("BSLD") and respectfully submits this, its Motion for Summary Order regarding the Petition and Complaint filed by AT&T Communications of the Southern States, LLC ("AT&T") against BSLD and BellSouth Telecommunications, Inc. In support of its Motion for Summary Order, BSLD states the following:

1. On November 12, 2003, AT&T filed with the Florida Public Service Commission (the "Commission") its "Petition and Complaint" in which AT&T alleged that a particular promotion offered by BSLD to its residential customers failed to cover its associated access charges and, therefore, violated Florida Statutes, Section 364.01(4)(g). As BSLD demonstrates in more detail below, AT&T's Petition and Complaint must be denied, as it ignores an important rate element of BSLD's promotion, a \$3.95 monthly recurring charge that applies to all customers who subscribe to the long distance plan in question and who are thus eligible to receive the promotional price. When all rate elements of the long distance plan and its associated promotion are taken into consideration, it is clear that the revenues received by BSLD more than cover the associated access costs. For this reason, BSLD's Motion for Summary Order should be granted. In the alternative, even if BSLD's revenues did not cover their associated access

costs (which as shown below, they do), AT&T's Petition and Complaint would still have to be dismissed, as it fails to state a claim upon which relief can be granted. The section of the Florida Statutes relied upon by AT&T, Section 364.01(4)(g), does not create an independent cause of action upon which AT&T can file a complaint and, even if it did, BSLD has in no way engaged in anticompetitive behavior.

2. The particular promotion about which AT&T complains is associated with BSLD's "BellSouth Savings Plan" (the "Plan"). As described in pages 6 and 7 of Exhibit 1 to AT&T's Petition and Complaint, the Plan is offered to residential customers who meet certain eligibility criteria. Eligible customers who subscribe to the Plan are charged a monthly recurring charge ("MRC") of \$3.95 and a per-minute rate of five cents. In addition, customers who subscribe to the Plan between October 16, 2003 and January 31, 2004 (the "Promotion Period") receive a per-minute rate of one-cent for each of their domestic calls made through January 31, 2004. It is this "Penny Promotion" that is the subject of AT&T's Petition and Complaint.

3. Contrary to AT&T's assertion in Paragraph 8 of its Petition and Complaint, BSLD does pay access charges to BellSouth Telecommunications, Inc., as well as to all other local exchange companies that originate or terminate its traffic. See Affidavit of James E. Lauter, attached hereto as Exhibit 1, Paragraph 5 ("Lauter Affidavit"). In addition, a portion of BSLD's traffic is carried "off-net". Off-net traffic is passed from BSLD to other interexchange carriers ("IXCs") who are paid by BSLD, pursuant to contractual arrangements between them and BSLD, to carry that traffic on BSLD's behalf. A portion of the fees charged by the IXCs to BSLD represents the charges that the IXCs must pay to terminate BSLD's traffic. Lauter Affidavit, Paragraph

5. Thus, either directly or indirectly, BSLD pays originating and terminating access charges for all of its traffic, including all traffic generated by subscribers to the Plan.

4. AT&T's Petition and Complaint asserts that BSLD's Penny Promotion fails to cover its relevant access costs based upon a simple comparison of the one-cent a minute promotional rate to the cost of access. AT&T's assertions are inherently flawed in that they fail to factor in the \$3.95 MRC charged by BSLD to all customers of the Plan. The Lauter Affidavit presents a detailed analysis of BSLD's revenues from the Plan, both during the Penny Promotion period, as well as thereafter. It also sets forth the associated access costs incurred by BSLD during the same periods. (Lauter Affidavit Paragraphs 7-10).

5. As shown on Attachment 1 to the Lauter Affidavit, during the period of October 16, 2003 and January 31, 2004, the Penny Promotion period, BSLD's average revenue per customer is \$[REDACTED] per month, while its average access charge costs (including off-net traffic) per customer is \$[REDACTED] per month. The per customer revenue is a combination of one-cent for each minute of calling, plus the MRC of \$3.95, for a monthly total of \$[REDACTED]. Thus, even during the Penny Promotion period of October 16, 2003 through January 31, 2004, the revenues derived from the Plan more than pay for the associated access costs. For this reason alone, BSLD's Motion for Summary Order should be granted and AT&T's Petition and Complaint dismissed. This conclusion is reaffirmed in its entirety when the total revenues received by BSLD from a customer who subscribes to the Plan is compared to the total access costs incurred by BSLD for that same customer during the entire time period the customer subscribes to the Plan.

6. Based upon industry experience, BSLD anticipates that the average Plan subscriber will remain a subscriber of the Plan for a period of [REDACTED] months. For at least [REDACTED] months of that period and perhaps for as long as [REDACTED] months, depending upon when the customer subscribed to the Plan and thus how long he receives the penny per minute rate, BSLD's total revenue per month for the average customer is anticipated to be \$[REDACTED] versus average customer monthly access costs of \$[REDACTED]. Accordingly, a typical Plan subscriber who receives four months of Penny Promotion benefits and remains on the Plan for another [REDACTED] months will provide BSLD with a total revenue of \$[REDACTED] but will cost BSLD access charges of only \$[REDACTED]. In other words, the total revenue value of a typical customer will exceed the access costs he creates by \$[REDACTED]. AT&T's assertion that the Plan does not cover its access costs is simply incorrect and must be rejected on its face. Thus, BSLD's Motion for Summary Order should be granted.

7. Rule 28-106.204(4), 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, based on the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue 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.

8. Under Florida law, it is well established that a party moving for summary judgment must show the absence of any genuine issue of material fact and that the court

must draw every possible inference in favor of the party against whom the summary judgment is sought. *Moore vs. Moore*, 475 So.2d 666, 668 (FL 1985).

9. As demonstrated by the Lauter Affidavit, there is no issue of material fact within the four corners of the Petition and Complaint filed by AT&T with regard to BSLD. BSLD's analysis clearly demonstrates that the revenues it receives from subscribers to the Plan far exceed the associated access costs. BSLD is therefore entitled to the entry of a final summary order dismissing it from the Petition and Complaint.

10. In addition, AT&T's Petition and Complaint fails as a matter of law. The Petition and Complaint, insofar as it relates to BSLD, relies upon Section 364.01(4)(g), Florida Statutes.¹ Petition and Complaint, Paragraph 9. That section states that the Commission "shall ensure that all providers of telecommunication services are treated fairly, by preventing anticompetitive behavior." However, no case has interpreted Florida Statutes, Section 364.01(4)(g) as giving rise to an independent cause of action. Moreover, no other section of Florida law, nor any rule or order of this Commission, requires that every single aspect of every single offering of an interexchange company must cover its access costs. Many IXCs in Florida have made promotional offerings in an effort to attract customers, during which they have offered rates that may not cover their access charges. Indeed, as recently as December of 2002, AT&T offered its residential customers "thirty minutes of free domestic long distance calling on us [AT&T] for a month." AT&T News Release, dated Wednesday, December 11, 2002.²

¹ To the extent that AT&T relies upon Florida Statutes, Section 364.05(5)(c), such reliance is entirely misplaced. That section applies only to local exchange companies that operate under price regulation and not to interexchange companies such as BSLD.

² <http://www.att.com/news/item/0,1847,11159,00htm/>. (A copy of the complete news release is attached hereto as Exhibit 2.)

11. At best, it seems disingenuous of AT&T to assert that a BSLD short term promotion that offers callers on one of many calling plans a penny a minute rate is unlawful when it itself offered all of its Florida residential customers thirty minutes of “free” long distance calling. Rather, it is clear that such an offer is not anticompetitive, nor is it unlawful in any other respect.

12. In summary, AT&T’s Petition and Complaint should be viewed for what it is: simply an effort on its part to prevent a competitor from offering a new and innovative plan to customers. AT&T’s inherently flawed analysis, which ignores the \$3.95 monthly recurring charge and thus the fact that, during both the Penny Promotion period as well as thereafter, the revenue derived by BSLD from subscribers to the Plan exceeds BSLD’s associated access costs, demonstrates the baseless nature of AT&T’s assertions. For these reasons, BSLD’s Motion for Summary Order should be granted and AT&T’s Petition and Complaint should be dismissed with respect to BSLD.

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

Respectfully submitted, this ____ day of January 2004.

BELLSOUTH LONG DISTANCE, INC.

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AFFIDAVIT OF JAMES E. LAUTER

Before me, the undersigned authority, personally appeared James E. Lauter, who states that he is currently Director – Financial & Business Planning for BellSouth Long Distance, Inc. and further states the following:

1. My title is Director – Financial and Business Planning for BellSouth Long Distance, Inc. (“BSLD”). I have had this responsibility, or a similar one, since November 1, 2000.
2. In my current job, my responsibilities include financial analysis, budgeting and financial operations for BSLD.
3. My business address is 400 Perimeter Center Terrace, Suite 350, Atlanta, GA 30346.
4. On October 15, 2003, BSLD filed with the Florida Public Service Commission a promotion pursuant to which eligible customers who subscribed between October 16, 2003, and January 31, 2004, to the BellSouth Savings Plan (the “Plan”) would be charged one-cent per minute for both their intrastate and interstate direct dial calls made on or before January 31, 2004. After January 31, 2004, all such calls are to be

billed at five cents per minute. In addition, during both the one-cent per minute promotional period and the subsequent five cents per minute period, each Plan customer is billed a monthly recurring charge of \$3.95.

5. BSLD pays BellSouth Telecommunications, Inc., as well as all other local exchange companies (collectively "LECs") who originate or terminate BSLD's traffic, the LECs' intrastate and interstate access charges. In addition, for certain traffic referred to as "off-net" traffic, *i.e.*, traffic that is not terminated by BSLD itself, BSLD pays other interexchange carriers a per minute rate to carry such traffic. Some portion of the amount charged by those underlying interexchange carriers represents the access charges they must pay to terminate such traffic on behalf of BSLD.

6. As shown on the spreadsheet attached hereto as Attachment 1, BSLD more than covers the access costs it pays to originate and terminate traffic in Florida. This is true throughout the entirety of the period that a purchaser of the Plan subscribes to the Plan, including both the one-cent per minute promotional period and the subsequent five cents per minute period.

7. As shown on Attachment 1, during November and December of 2003, the average subscriber to the Plan made [REDACTED] minutes of calls per month. This actual call volume was very similar to the number of minutes, [REDACTED], that BSLD had forecast the average subscriber to the Plan would make during the penny promotion period. At a per minute rate of one-cent per minute, plus the MRC of \$3.95, BSLD receives, on average, total monthly revenues of \$ [REDACTED] from each subscriber to the Plan.

8. BSLD's corresponding monthly access costs (including amounts paid to other interexchange carriers) for the average subscriber during the period through January 31, 2004 is \$ [REDACTED]. This is based on [REDACTED]% of the average user's minutes being intrastate minutes, at per minute access and egress charge costs of \$ [REDACTED] and \$ [REDACTED] respectively, and [REDACTED]% of the minutes being interstate at per minute access and egress charge costs of \$ [REDACTED] and \$ [REDACTED] respectively. In addition, [REDACTED]% of such average user's intrastate minutes is "off-net", *i.e.*, carried by another carrier with whom BSLD has a contract for carriage of such traffic at an average per minute rate of \$ [REDACTED], and [REDACTED]% of such average user's interstate terminating minutes is "off-net" at an average per minute rate of \$ [REDACTED]. When these numbers are combined, they result in an overall per minute access cost of \$ [REDACTED]. See Attachment 2. Thus, BSLD's total monthly revenues per average customer are \$ [REDACTED] more than its corresponding access and off-net costs during the one-cent promotional period.

9. After January 31, 2004, the per minute rate paid by Plan subscribers will be five cents. Assuming that the average Plan subscriber makes [REDACTED] minutes of calling a month (a reasonable assumption based on BSLD's actual experience), the average revenue per customer will be \$ [REDACTED], while the average access costs and off-net costs per customer will be \$ [REDACTED]. BSLD's monthly revenues per average customer would cover its associated access costs by \$ [REDACTED].

10. Based upon industry averages and BSLD's experience to date, BSLD anticipates that the average Plan subscriber will remain on the Plan for [REDACTED] months and

that, over that [redacted] month period, BSLD's revenues for the average Plan subscriber will exceed its corresponding access and off-net costs by \$ [redacted].

11. Further Affiant sayeth not.

Dated this _____ day of _____, 2004.

James E. Lauter

Sworn to and subscribed before me
this ___ day of _____, 2004

Notary Public

My Commission Expires: