

Matilda Sanders

ORIGINAL

From: Fatool, Vicki [Vicki.Fatool@BELLSOUTH.COM]
Sent: Tuesday, April 20, 2004 10:48 AM
To: Filings@psc.state.fl.us
Subject: 031046-TP BST's Informal Response to Staff's Request for Additional Information
Importance: High

[Redacted] <<031046-T.pdf>>

- A. Vicki Fatool
Legal Secretary to Nancy B. White
BellSouth Telecommunications, Inc.
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B. Docket No. 031046-TP: 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
C. BellSouth Telecommunications, Inc. on behalf of Nancy B. White
D. 9 pages total (including letter and certificate of service)
E. BellSouth Telecommunications, Inc.'s Informal Response to Staff's Request for Additional Information

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NANCY B. WHITE
General Counsel - Florida

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April 20, 2004

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

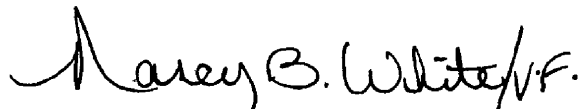
Re: Docket No. 031046-TP
**In re: Petition and Complaint of AT&T Communications of the
Southern States, LLC against BellSouth Telecommunications,
Inc. and BellSouth Long Distance, Inc. for Anticompetitive
Pricing of Long Distance Service**

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Informal Response to Staff's Request for Additional Information, 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

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

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CERTIFICATE OF SERVICE
Docket No. 031046-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

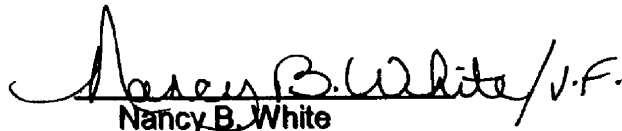
Electronic Mail and First Class U. S. Mail this 20th day of April, 2004 to the following:

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Nancy B. White

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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)

Docket No.: 031046-TP

Filed: April 20, 2004

**BELLSOUTH TELECOMMUNICATIONS, INC.'S INFORMAL RESPONSE TO
STAFF'S REQUEST FOR ADDITIONAL INFORMATION**

The issue at the February 11, 2004 status meeting that Staff requested the parties to address concerned the application of Section 364.051(5)(c), Florida Statutes to BellSouth Telecommunications, Inc. ("BellSouth") and BellSouth Long Distance, Inc. ("BellSouth Long Distance") in the situation complained of by AT&T Communications of the Southern States, LLC ("AT&T") in the above captioned docket.

AT&T's Complaint concerns a promotion offered by BellSouth Long Distance between October 16, 2003 and January 31, 2004. The BellSouth Long Distance promotion was available to residential customers who met certain eligibility criteria. Eligible customers were charged a monthly recurring charge of \$3.95 for the service and a usage rate of one cent per minute for calls made from the time the customer signed up for the service until January 31, 2004. At the end of the promotion period, the usage rate reverted to five cents per minute.

The gravamen of AT&T's Complaint is that Section 364.051(5)(c), Florida Statutes applies to BellSouth and BellSouth Long Distance and that the promotion was a violation of the statute by BellSouth, and therefore, by BellSouth

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Long Distance. These contentions are not only factually incorrect, they are legally incorrect.

There is no doubt that Section 364.051(5)(c), Florida Statutes applies to BellSouth. Section 364.051(5)(c), Florida Statutes is contained in the price regulation section of Chapter 364 and by its own terms applies to local exchange telecommunications companies of which BellSouth is one. Section 364.051(5)(c), Florida Statutes provides:

The price charged to a consumer for a nonbasic service shall cover the direct costs of providing the service and shall, to the extent a cost is not included in the direct cost, include as an imputed cost the price charged by the company to competitors for any monopoly component used by a competitor in the provision of its same or functionally equivalent service. (Emphasis added.)

There is no doubt that Section 364.051(5)(c), Florida Statutes does not apply to BellSouth Long Distance. Note that the section speaks of the price for nonbasic services. Nonbasic services are not offered by long distance providers. As defined by Section 364.02(9), Florida Statutes, "nonbasic service means any telecommunications services provided by a local exchange telecommunications company other than a basic local telecommunications service, a local interconnection arrangement described in Section 364.16, or a network access service described in Section 364.163." (emphasis added). Therefore, by its own terms, Section 364.051(5)(c), Florida Statutes does not apply directly to BellSouth Long Distance.

Moreover, Section 364.051(5)(c), Florida Statutes does not apply to BellSouth's sale of network access service to BellSouth Long Distance. Network

access service is specifically excluded from the definition of nonbasic service and, therefore, this section is irrelevant to the issues raised in AT&T's complaint.

AT&T argues that Section 364.051(5)(c), Florida Statutes must be applied to BellSouth Long Distance because BellSouth Long Distance is the "inseparable alter ego of BellSouth" and therefore BellSouth Long Distance is subject to the same prohibitions as BellSouth. (AT&T's Informal Comments, p. 4). The only support that AT&T has for this argument are examples of occasions in which the Commission required BellSouth to provide affiliate information in response to data requests.

AT&T's argument, quite simply, is bogus and its examples are easily distinguishable. First, to assert that BellSouth Long Distance is the "inseparable alter ego of BellSouth" is to ignore the very real requirements of Section 272 of the Telecommunications Act of 1996. Specifically, Section 272 required the establishment of BellSouth Long Distance as a separate company that operates independently from BellSouth. Section 272 contains structural and transactional obligations, as well as nondiscrimination safeguards, in order to maintain the very separateness of the two companies. These obligations are investigated every two years by the Federal Communications Commission to ensure compliance. Noncompliance will subject a company to fines and a possible withdrawal of 271 authority. Nowhere in any of its filings does AT&T allege that BellSouth or BellSouth Long Distance have violated Section 272 of the Telecommunications Act of 1996.

Second, the examples cited by AT&T are irrelevant to the issue at hand. They deal solely with the issue of access to documents of affiliates. There is a vast difference between a holding that a nonparty affiliate may be subject to discovery and a holding that a statute that specifically applies only to a local exchange telecommunications company also applies to an affiliate long distance provider solely based on the fact that the long distance provider is an affiliate of the local exchange telecommunications company.

One of the two cases cited by AT&T, Medivision of East Broward County, Inc. v. Department of Health and Rehabilitative Services, 488 So. 2d 866 (Fla. 1st DCA 1986) held that a nonparty affiliate may be subject to discovery "where corporate affiliates act 'as one'." 488 So. 2d 888. (Emphasis added). In the context of the promotion at issue, BellSouth and BellSouth Long Distance did not "act as one." The discount offered was on the services provided by BellSouth Long Distance, not BellSouth. All of BellSouth's services, including both local exchange service and network access service, were sold at the tariffed rates. In addition, the requirements of Section 272 of the Telecommunications Act of 1996 forbid BellSouth and BellSouth Long Distance from acting as one and again, AT&T has not claimed Section 272 has been violated.

AT&T also cites Commission Order No. PSC-93-0812-FOF-TL, issued May 26, 1993 for the proposition that Section 364.051(5)(c), Florida Statutes should be applied to BellSouth Long Distance. In this case, the Commission issued the holding cited by AT&T in connection with the production of affiliate

records in response to an audit data request. For ease of discussion, following is the section of the Order cited by AT&T:

There are transactions between these affiliates as well as between and among regulated and unregulated activities. At the center stands BellSouth Corporation (Bell), the parent company. Given the high level inter-corporate activity, it is difficult to believe that there is not an equally high degree of horizontal and vertical integration between Bell and its various subsidiaries, including SBT or that Bell does not or cannot exert control over its subsidiaries. Moreover, as the parent company, it is Bell's choice how to arrange its corporate structure, including what activities to spin off into separate corporate identities. The separate corporate identities were presumably created as a matter of convenience. Although it may be proper to use the separate corporate identities to limit the liability of the parent and/or its shareholders, we do not believe that evading lawful, effective regulation is a legitimate use of the corporate fiction.

Order No. PSC-93-0812-FOF-TL, issued May 26, 1993, in Dockets Nos. 920260-TL, 910163-TL, 910727-TL and 900960-TL.

First, it should be noted that AT&T omitted a crucial sentence from the beginning of the quotation, i.e. "most of the affiliates from which records are sought provide products and services to SBT, some of which are indispensable with regard to its provision of telecommunications services." Such is not the case in the instant situation. Second, the Commission's holding was based, in part, on the fact that it was BellSouth Corporation's choice how to arrange its corporate structure, a choice based on convenience. Once again, that is not the case in the instant situation. The structure of BellSouth Long Distance is based solely on the requirements of Section 272 of the Telecommunications Act of 1996. Thus,

the cases cited by AT&T in support of their argument that Section 364.051(5)(c), Florida Statutes is applicable to BellSouth Long Distance do not in fact do so.

Likewise, AT&T's contention that BellSouth and BellSouth Long Distance violated Section 364.051(5)(c), Florida Statutes is without merit. With regard to BellSouth, at no time did BellSouth provide any services, local exchange telecommunications or network access, in connection with the BellSouth Long Distance promotion, at anything less than the tariffed rates. The only allegation made by AT&T against BellSouth is that BellSouth sold network access to BellSouth Long Distance at prices less than that charged to other long distance providers. This is simply not true. As noted in the Affidavit of Thomas F. Lohman attached to BellSouth's Motion to Dismiss Petition and Complaint, or in the Alternative, Motion for Summary Judgment filed in this docket on December 2, 2003, BellSouth sells BellSouth Long Distance interstate and intrastate switched access service at the rates contained in the Interstate Switched Access Services Tariff on file with the Federal Communications Commission and the Florida Switched Access Services Tariff on file with the Florida Public Service Commission. These charges are billed to and paid by BellSouth Long Distance. This, Section 364.051(5)(c), Florida Statutes is not relevant to BellSouth's provision of services to BellSouth Long Distance.

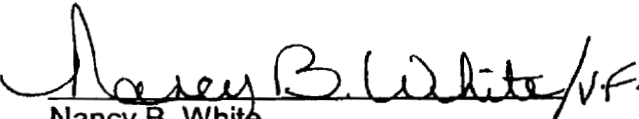
Moreover, as discussed above, BellSouth Long Distance cannot violate a statute that is not applicable to it. Even if the statute applied to BellSouth Long Distance, which is denied, BellSouth Long Distance is not in violation. As shown by the Affidavit of James E. Lauter attached to BellSouth Long Distance's Motion

for Summary Order, BellSouth Long Distance's promotion in question covered all its direct costs.

There is no question that the sole purpose of AT&T's Complaint is to harass a competitor. AT&T's arguments are frivolous and without merit.

Respectfully submitted this 20th day of April, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.

Handwritten signature of Nancy B. White in cursive, followed by the initials "VF." in a smaller, less cursive font.

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Handwritten signature of R. Douglas Lackey in cursive, followed by the initials "VF." in a smaller, less cursive font.

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