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 Sent: Monday, June 28, 2004 1:09 PM
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 Cc: Fatool, Vicki; Peters, Evelyn; Linda Hobbs; Nancy Sims; Holland, Robyn P.; Bixler, Micheale; Slaughter, Brenda; Mays, Meredith
 Subject: RE: Docket No. 040533-TP BellSouth's Response in Opposition and Motion to Dismiss

- a. Lynn Barclay
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- b. Docket No. 040533-TP (Interconnection Agreement between Saturn Telecommunication Services, Inc., d/b/a STS Telecom and BellSouth Telecommunications, Inc.)
- c. BellSouth Telecommunications, Inc.
 on behalf of Meredith E. Mays
- d. 9 pages total (including attachment)
- e. BellSouth Telecommunications, Inc.'s Response in Opposition and Motion to Dismiss the Petition to Require BellSouth to Negotiate in Good Faith and/or Require Mediation

<<040533 Response.pdf>>

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June 28, 2004

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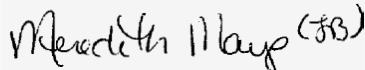
**Re: Docket No. 040533-TP; Interconnection Agreement between
Saturn Telecommunication Services, Inc., d/b/a STS Telecom
and BellSouth Telecommunications, Inc.**

Dear Ms. Bayo:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s, Response in Opposition and Motion to Dismiss the Petition to Require BellSouth to Negotiate in Good Faith and/or Require Mediation, which we ask that you file in the above referenced 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,



Meredith E. Mays

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

542633

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**CERTIFICATE OF SERVICE
DOCKET NO. 040533-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
Electronic Mail and Federal Express this 28TH day of June, 2004 to the following:

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Meredith E. Mays

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In Re: Interconnection Agreement between)
Saturn Telecommunication Services, Inc.) 040533-TP
d/b/a STS Telecom and) Filed: June 28, 2004
BellSouth Telecommunications, Inc.)

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
RESPONSE IN OPPOSITION AND MOTION TO DISMISS PETITION TO REQUIRE
BELLSOUTH TELECOMMUNICATIONS, INC.
TO NEGOTIATE IN GOOD FAITH AND/OR REQUIRE MEDIATION**

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Response in Opposition and this Motion to Dismiss the Petition filed by Saturn Telecommunication Services, Inc. d/b/a STS Telecom ("STS"). STS seeks an order from this Commission requiring BellSouth to negotiate a commercial agreement in good faith, or, in the alternative, requiring BellSouth to mediate the terms of a commercial agreement. The Commission should deny STS's Petition. As a preliminary matter, STS' Petition fails to satisfy the procedural requirements for complaints under Florida law. Moreover, notwithstanding the procedurally defective nature of STS' petition, dismissal is also appropriate because: (1) BellSouth has negotiated in good faith with STS and is willing to continue such negotiations; (2) this Commission is without authority to require commercial negotiations; and (3) this Commission is without authority to compel mediation in these circumstances.

II. DISCUSSION

A. STS' Petition is Procedurally Flawed

In its Petition, STS has not cited to or alleged any act or omission by BellSouth that affects its substantial interest and which violates any statute, Commission rule or Commission

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order. Instead, STS claims only that its inability to obtain “facilities and service . . . would seriously impair the ability of STS to provide the services that it is offering to the public”, that this Commission has jurisdiction pursuant to an existing interconnection agreement between the parties, and that the public and STS “will suffer great harm unless BellSouth is compelled to negotiate an agreement in good faith.” Petition, ¶¶ 5, 9, 10. STS’ allegations fail to satisfy the applicable standards for filing complaints set forth in rules 25-22.036 and 28-106.201, Florida Administrative Code, both of which require the petitioning party to identify a specific rule or statute that is in dispute. Because STS’ Petition is devoid of a claimed violation of any Florida rules or statutes, it should be summarily dismissed.

As to the parties’ existing interconnection agreement, the relevant dispute resolution language provides “if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party shall petition the Commission for resolution of the dispute.” Resolution of Disputes, General Terms and Conditions, § 10, p. 10. STS has not alleged a dispute concerning the interpretation of any particular provision within the parties’ agreement. Likewise, STS has not claimed a dispute exists concerning the proper implementation of the parties’ existing agreement. Any concerns STS may have relating to the negotiation of a commercial agreement do not fall within the dispute resolution language contained in the parties’ agreement. Accordingly, STS’ Petition should be denied for failure to state a cause of action for which relief can be granted. *See Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993).

B. BellSouth Has Negotiated with STS in Good Faith.

The gist of STS’ complaint is that STS has attempted to negotiate a commercial agreement with BellSouth, and that BellSouth has refused to enter into good faith negotiations.

Petition, ¶ 8. Nothing could be farther from the truth.¹ BellSouth has communicated extensively with STS; however, the details concerning such communications as well as the substance of such discussions fall with the terms of an Information Exchange Agreement (“Agreement”). The Agreement requires BellSouth to use information it receives from STS solely for the purpose of evaluating a potential business relationship. Because the details surrounding communications between the parties would require BellSouth to disclose information that it has received from STS, and thus fall within the terms of the parties’ Agreement, BellSouth does not intend to provide such particulars here.²

As a general matter, however, STS seems to be operating under a misguided notion of what constitutes “good faith negotiations.” The fact that parties may have different positions or views does not mean that parties are not acting in good faith. Likewise, that parties seek to conduct some negotiations by telephone and seek to reach agreement on the overall framework or guidelines under which both parties will operate before addressing specific terms and conditions also does not translate into a finding of bad faith.³ BellSouth has many wholesale customers with which it desires to enter into commercial agreements and must manage the negotiation process in a manner that allows it to effectively allocate resources among all of its

¹ In addition, BellSouth’s willingness to enter into voluntary negotiations does not grant this Commission with jurisdiction to dictate the terms and conditions that apply to such discussions as addressed more fully herein.

² BellSouth will provide such details if STS consents to such disclosure or if it is ordered to do so. Absent such consent or an order that compels disclosure, however, BellSouth cannot specify what has transpired between the parties.

³ In Docket No. 911103-EI, *Re: Complaint of Consolidated Minerals, Inc. v. Florida Power and Light Co. for Failure Negotiate Cogeneration Contract*, this Commission addressed a complaint in which, unlike this Petition, the complaining party alleged a violation of a Commission Rule. The applicable rule, 25-17.0834, requires electric utilities to negotiate in good faith for the purchase of capacity and energy. In finding that Florida Power and Light did not fail to negotiate in good faith, this Commission explained that “the requirement to negotiate in good faith does not mean that an agreement must be reached, or that either side must surrender any of its duties and responsibilities.” Instead, this Commission explained the rule at issue meant “all parties to the negotiation should show a willingness and effort to reach a prudent and reasonable agreement for needed and cost-effective generating capacity.” *See* Order No. PSC-92-0703-FOF-EI.

customers.

In summary, BellSouth has negotiated with STS and remains willing to do so in the future. Future negotiations require both parties to act reasonably, which STS has not done by filing its frivolous petition. BellSouth will schedule a face to face meeting and reestablish negotiations with representatives of STS when this petition is dismissed so that negotiations do not take place under the auspices of litigation.

C. This Commission Cannot Require That BellSouth Conduct Negotiations for the Purpose of creating a Commercially Viable Agreement with STS.

Because BellSouth is willing to negotiate with STS, there is no need for this Commission to take action or grant the relief that STS seeks. Nonetheless, even if this Commission were inclined to intercede in this matter (which it should not), STS' Petition has confused BellSouth's willingness to voluntarily participate in commercial negotiations with BellSouth's legal obligations to negotiate pursuant to Section 251 and 252. BellSouth fully supports commercial negotiations, and has and continues to negotiate commercial agreements on a voluntary basis. BellSouth's willingness to negotiate on a voluntary basis, however, does not mean that this Commission or STS can dictate the manner in which such discussions will occur – doing so would negate the voluntary aspect of such negotiations.

By its terms, Section 252 applies only to interconnection agreements negotiated after the ILEC receives “a request for interconnection, services, or network elements *pursuant to Section 251.*”⁴ With respect to the discussions that have taken place between BellSouth and STS, there was never a Section 251 request made to initiate negotiations. STS' Petition shows that

⁴ 47 U.S.C. §252(a)(1) (emphasis added). The fact that Section 252(a)(1) provides that such agreements may be negotiated “without regard to the standards set forth in subsections (b) and (c) of Section 251” does not impact the necessary precondition: the request for interconnection must be for network elements and services required under Section 251 of the 1996 Act. If the contract is not requested pursuant to Section 251, Section 252(a)(1) does not apply.

negotiations took place after the FCC encouraged such action between carriers. Petition, ¶¶ 7-8. STS' Petition also acknowledges that it has attempted to negotiate a "commercially" acceptable arrangement." *Id.*

With respect to Section 251, subsection (c)(1) explains that ILECs have an obligation to negotiate "in accordance with Section 252 the particular terms and conditions of the agreements to fulfill the duties described in paragraphs (1) through (5) of subsection [251] (b) and this subsection [251(c)]."⁵ Accordingly, if the agreement does not include the ILEC's "duties" in Sections 251(b)(1-5) or Section 251(c), it falls outside the ILEC's Section 252 duty to negotiate and corresponding Section 252 obligations.

Negotiating the terms of a commercial agreement that reflect BellSouth's § 271 obligations differs from negotiating an interconnection agreement that reflects BellSouth's duties pursuant to §§ 251 and 252. The power to enforce compliance with section 271 rests with the FCC, with respect to terms and conditions and with respect to pricing. *See* § 271(d)(6); *Triennial Review Order*⁶ at ¶ 656. Enforcement of sections 201-02 obviously rests with the FCC. Consequently, this Commission cannot enter orders that govern the manner in which BellSouth negotiates any agreements concerning section 271 elements, because such agreements are federal agreements.

D. This Commission Cannot Require Mediation Between the Parties In These Circumstances.

STS' Petition includes a request that the Commission "enter its order requiring both STS and BellSouth to mediate the issues of a Commercial Agreement before a representative of the

⁵ 47 U.S.C. § 251(c)(1).

⁶ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), reversed in part on other grounds, *United States Telecom. Ass'n v. FCC*, Nos. 00-1012, et al. (D.C. Cir. Mar. 2, 2004) ("*USTA IP*").

Florida Commission” This request cannot stand. While the Commission has previously encouraged parties to “voluntarily avail themselves of . . . mediation” it has explicitly recognized that “mediation . . . is available *on a strictly voluntary basis.*” Order No. PSC-03-0773-PCO-EQ, p. 5; *See also* Section 120.573, Florida Statutes *and* Rule 28-106.111. Because mediation can occur only when both parties consent, this Commission cannot enter an order at STS’ sole request that requires BellSouth to submit to such a process. Moreover, because BellSouth remains willing to meet face to face with STS after this Petition has been dismissed there is no need for mediation in any event.

CONCLUSION

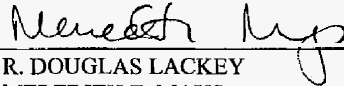
There is no basis whatsoever for this Commission to order BellSouth to negotiate with STS. BellSouth has attempted to negotiate with STS in the past and remains willing to do so in the future, however neither STS nor this Commission has the authority to dictate the terms governing any such voluntary discussions. Moreover, BellSouth is not willing to negotiate under the shadow of litigation. If STS is truly willing to negotiate in good faith, then it should promptly dismiss its petition so that the parties can dedicate themselves to negotiation rather than litigation. Likewise, this Commission cannot compel mediation; mediation is a viable option only when both parties consent to such a process, not when one party forces it upon the other. In the event STS does not voluntarily dismiss its petition upon its receipt of this response, this Commission should exercise its authority to do so on STS’ behalf because the petition lacks merit, fails to satisfy the procedural requirements of Florida law, and fails to state a cause of action for which relief can be granted.

Respectfully submitted, this 28th day of June, 2004.

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