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COMMISSION
ERK

July 16, 2004

Ms. Blanca Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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04 JUL 19 AM 9:50

Dear Ms. Bayo:

040533-TP

Enclosed with this letter on behalf of STS Telecommunication Services, Inc. ("STS") are the original and fifteen copies of the " STS Response To BellSouth's Response and Motion To Dismiss".

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me.

Thank you for your assistance with this filing.

Very truly yours,

ALAN C. GOLD

CMP _____

COM _____ Enclosure:

CTR _____ ec:

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SEC 1 _____

OTH _____

Mr. R. Douglas Lackey
Ms. Meredith Mays
Ms. Nancy B. White
STS Telecommunications

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FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Interconnection Agreement between)
Saturn Telecommunication Services, Inc.) 040533-TP
d/b/a STS Telecom and BellSouth) Filed: July 16, 2004
Telecommunications, Inc.)
_____)

STS TELECOM'S RESPONSE TO BELL SOUTH'S RESPONSE AND MOTION TO DISMISS

Petitioner, Saturn Telecommunication Services, Inc., d/b/a STS Telecom ("STS") by and through the undersigned counsel, hereby files its response to BellSouth Telecommunications, Inc.'s ("BellSouth") Response In Opposition and Motion to Dismiss Petition to Require BellSouth Telecommunications, Inc. to Negotiate In Good Faith And/or Require Mediation, and states as follows:

A. **STS HAS MET THE PROCEDURAL REQUIREMENTS IN ITS PETITION**

BellSouth's claim that STS's petition fails to satisfy the procedural requirements for complaints under Florida law is without merit. STS has satisfied the procedural requirements for complaints before the Public Service Commission under Florida law. BellSouth argues in its Response and Motion to Dismiss that STS failed to follow procedure by not citing a statute that BellSouth violated. BellSouth misstates Rule 25-22.036 by claiming that the citation of a statute is required. BellSouth's contention is simply not true. Reading the plain language of Rule 25-22.036(3)(b)(1), it is clear that citing a specific statute is not mandatory. The Rule provides that a Complaint should contain "the rule, order **or** statute that has been violated." See *id.* (emphasis added). The "or" language in the statute renders the necessity to provide a specific statute an option as opposed to a requirement. In any event, STS's Complaint is sufficient in that it states that

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the “rule” of law violated by BellSouth is that BellSouth has failed to negotiate in good faith the terms of its contracts. Even assuming BellSouth’s statement is true, the problem is easily remedied by stating the specific rules or statutes and a Motion to Dismiss is not appropriate. It is clear from the Petition that BellSouth has breached its duty to negotiate in good faith and duty to provide facilities, equipment and services pursuant to 47 U.S.C. § 251(c)(1) and (2). Furthermore, Fla. Stat. § 364.14(2) states that whenever the Commission finds that the practices of any ILEC are unjust or unreasonable, inefficient, improper, or insufficient, the Commission shall determine the just, reasonable, proper, adequate, and efficient practices to be thereafter observed, and used and shall fix the same by order or rule.

B. BELL SOUTH HAS FAILED TO NEGOTIATE IN GOOD FAITH

BellSouth’s claim that it has negotiated with STS in good faith is without merit. BellSouth is doing everything possible to avoid the involvement of the Florida Public Service Commission. Had BellSouth negotiated in good faith, STS would never have filed a petition. Furthermore, whether or not BellSouth has negotiated in good faith with STS and is willing to continue such negotiations is a factual matter that must be determined by the Commission based upon the evidence and not on a Motion to Dismiss. BellSouth cannot claim that a Motion to Dismiss is appropriate because it has allegedly negotiated in good faith. This is exactly the factual determination that must be made by the Commission.

In any event, BellSouth in its Response to the Petition and Motion to Dismiss offers to negotiate with STS in good faith. Given BellSouth’s past track record, intervention and supervision by the Florida Public Service Commission is required.

BellSouth disingenuously alleges in its Response that STS's Petition is groundless, and that upon dismissal of the Petition, it will meet with STS face to face in order to negotiate in good faith.¹ If BellSouth had negotiated in good faith in the first place, the Petition would not have been filed. In fact, prior to STS's filing of the Petition, BellSouth adamantly refused to negotiate in good faith. In fact, BellSouth representatives could not even appear on time for several telephone conferences to which they had previously agreed. The representatives, after being late for the teleconferences, had the audacity to place arbitrary and unrealistically low time constraints on the calls, claiming that they needed to leave early. BellSouth refused to negotiate in person, and they consistently rejected any proposals by STS without giving any meaningful counterproposals. BellSouth's attitude throughout the discussions was "take it or leave it"-BellSouth made unreasonable proposals and STS could either accept it or reject it without negotiation. This is not negotiation in good faith; in fact it is not negotiations at all.

Thus, STS believes that any further negotiations without the assistance of the Commission **would be a waste of time and effort**. If BellSouth were so opposed to mediation (a non-binding process), STS would have no objection to a short abatement, to allow the parties to negotiate face to face with a representative of the Florida Public Service Commission present as an observer and/or facilitator. There should be no objection, since the negotiation of an agreement including local exchange service in the state of Florida would require the Florida Public Service Commission's approval in any event; however STS believes BellSouth is doing everything possible to avoid the involvement of the Florida Public Service Commission, claiming that a commercial

¹ See *BellSouth's Response and Motion to Dismiss STS's Petition*, at page 4.

agreement, even though it provides for local exchange service in the state of Florida, is beyond the Commission's jurisdiction.

C. **BELLSOUTH'S CLAIM THAT THE COMMISSION HAS NO AUTHORITY IS WITHOUT MERIT**

BellSouth's contentions that the Commission is without authority to require commercial negotiations and to compel mediation, are without merit. The United States Court of Appeal, Eleventh Circuit has ruled that state public service commissions have broad authority to settle disputes between Competitor Local Exchange Carriers ("CLEC") such as STS and Incumbent Local Exchange Carriers ("ILEC") such as BellSouth. *See MCI Telecommunications Corporation, et al. v. BellSouth Telecommunications, Inc, et al.*, 298 F.3d 1269 (11th Cir. 2002). The Eleventh Circuit stated that the 1996 federal Telecommunications Act requires ILECs to negotiate "interconnection agreements" with new, competitive local carriers. *See 47 U.S.C. § 251(c)(2)*. Both parties are required to negotiate in good faith to achieve the Act's goal of increasing competition for local telephone service. *See 47 U.S.C. § 51(c)(1)*. In essence, the Act requires incumbents to give competitors access to their telephone networks in exchange for a fair price for that access. *See 47 U.S.C. § § 251(c)(3), 252(d)(1)*. Negotiation is the preferred method for determining the proper level of access and price, *see 47 U.S.C. § 252(a)(1)*, but if the parties cannot agree on all issues mandated by the Act, a state commission is empowered to arbitrate the remaining disputes. *See 47 U.S.C. § 252(b)(1)*.

Under 47 U.S.C. § 252(b)(4)(C), "[t]he State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement" an interconnect agreement. *See MCI Telecommunications Corp.*

et al. v. BellSouth Telecommunications, Inc., 298 F.3d 1269. Clearly, negotiating terms in good faith fall within the realm of “conditions...required to implement” the agreement. For example, 47 U.S.C. § 252(b)(5) provides that “[t]he refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.” 47 U.S.C. § 252(b)(5). A State commission’s inability to enforce this provision would render it meaningless, and enforcement of this provision is clearly contemplated by the Act and within the Commission’s authority. See *MCI Telecommunications Corp. et al. v. BellSouth Telecommunications, Inc.*, 298 F.3d 1269.

Furthermore, in light of Fla. Stat. § 364.14, BellSouth’s claim that the Florida Public Service has no jurisdiction is without merit. Section 364.14(2) states that whenever the Commission finds that the practices of any telecommunications company are unjust or unreasonable; the Commission shall determine the just, reasonable, proper, adequate, and efficient practices to be observed and used, and shall fix the same by order or rule. Negotiating in good faith clearly falls under “practice” of a telecommunications company, in relation to rates, charges and service. Section 364.12 is another clear indication of the Florida Public Service Commission’s jurisdiction over the instant case.

D. WAIVER OF CONFIDENTIALITY

In its Response, BellSouth claims that it would disclose the details surrounding the communication between the parties upon consent by STS.² While STS believes that

² See BellSouth’s Response and Motion to Dismiss STS’s Petition, at Footnote 2, Page 3

the filing of the Petition waived any privilege to confidentiality which STS possesses and that if BellSouth truly desired to deliver documents to this Commission, it could have done so, STS desires the full release of all information concerning the negotiation of the Commercial Agreement to the Commission, and gladly consents to the mutual release of both parties to fully disclose the information. STS is confident that once the Commission reviews the full context of the proposed Commercial Agreement and the correspondence between the parties, the only possible conclusion is that BellSouth is not negotiating in good faith and that the proposed Commercial Agreement is a barrier to entry in violation of State and Federal law.

D. NEGOTIATION WITH RESPECT TO BELLSOUTH'S § 271 DUTIES CANNOT BE SEPARATED FROM NEGOTIATING AN INTERCONNECTION AGREEMENT THAT REFLECTS BELLSOUTH'S DUTIES PURSUANT TO § § 251 AND 252.

BellSouth makes an incorrect assumption when it states that 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. Section 252 provides that state commissions have the power to oversee the arbitration of disputes, including those dealing with the offering of elements required under § 271.³ The Act is crystal clear: each and every § 271 network element must be offered through interconnection agreements that are subject to the § 252 review process.

Section 271(c)(2)(A) links an ILEC's obligations under the competitive checklist to its providing that access through an interconnection agreement.

³ Even though the FCC has the power to enforce § 271, that enforcement authority does not take away the state's obligation to arbitrate interconnection agreements required by § 271.

BellSouth meets the requirements of § 271(c)(2)(A) if it is providing access and interconnection pursuant to an interconnection agreement, and such access and interconnection meets the requirements of § 271(c)(2)(B). Thus, the specific interconnection obligations of § 271's competitive checklist must be provided pursuant to the "agreements" described in § 271(c)(1)(A) or (B). By directly referencing § 271(c)(1)(A) and (B), the Telecommunications Act of 1996 explicitly ties compliance with the competitive checklist to the review process described in § 252. Indeed, § 271(c)(1) states:

(1) AGREEMENT OR STATEMENT – a Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) PRESENCE OF A FACILITIES-BASED COMPETITOR – A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers.⁴

It is clear from the above that § 271 network elements must be offered pursuant to the same review process as other (i.e. § 251) network elements. The goal of the Act is to

⁴ Section 271(c)(1)(A), emphasis added.

prevent discrimination, and the main mechanisms to detect and prevent discrimination are the state-review and opt-in provisions of § 252.

The FCC has already addressed ILEC attempts to circumvent the disclosure, review, and opt-in protections of § 252.⁵ In its *Qwest Declaratory Ruling*, the FCC decided that any agreement addressing ongoing obligations pertaining to unbundled network elements – and the access and unbundling obligations of § 271 are clearly within that definition – must be filed in interconnection agreements subject to § 252 and, if any question remains regarding those obligations, the state commissions are to decide the issue.

Furthermore, BellSouth is incorrect when it states that the power to enforce compliance with section 271 rests with the FCC, with respect to terms and conditions and with respect to pricing.⁶ The FCC did not conclude in the *TRO* that § 271 network elements were directly subject to sections 201 and 202 of the Act. Rather, the FCC adopted the just and reasonable rate standard that “has historically been applied under most federal and state statutes,” and pointed out that § 201 and 202 are an embodiment of that traditional standard. The *TRO* did not make a statement of jurisdiction, i.e. it does not state that § 271 network elements are interstate services subject to § 201 and 202. Instead, the *TRO* describes the correct standard of review.⁷

⁵ See *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section (252(a)(1) WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd 19337 (2002) (“Qwest Declaratory Ruling”)*

⁶ See BellSouth’s Response and Motion to Dismiss, at page 5, citing § 271(d)(6); *Triennial Review Order at paragraph 656*.

⁷ See *TRO at paragraph 663*.

E. **BELLSOUTH'S CLAIM THAT THE COMMISSION CANNOT REQUIRE MEDIATION IS WITHOUT MERIT.**

BellSouth argues that the Commission cannot require mediation, and cites Fla. Stat. 120.573 and Rule 28-106.11.⁸ STS is not asking for mediation pursuant to Florida Statutes, but rather pursuant to 47 U.S.C. § 252(a)(2) of the Act, which states that “[a]ny party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.” As such, BellSouth’s contention that the Commission is without power to mediate the differences between the parties is without merit.

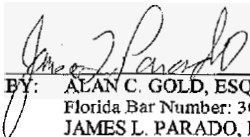
CONCLUSION

Based on the foregoing, it is clear the Florida Public Service Commission clearly has jurisdiction over all claims raised in STS’s Petition, and granting a Motion to Dismiss based on BellSouth’s arguments are inappropriate. Furthermore, if the Commission finds a technical omission in the Petition, the Commission should allow STS to amend its Petition setting forth the statutory basis for the Commission’s jurisdiction.

Respectfully submitted,

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⁸ See BellSouth’s Response and Motion to Dismiss at pages 5-6.


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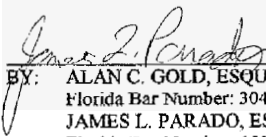
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been

mailed on this 16th day of July, 2004, to:

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