

**ORIGINAL**

**Timolyn Henry**

**From:** Barclay, Lynn [Lynn.Barclay@BELLSOUTH.COM]  
**Sent:** Thursday, September 09, 2004 2:42 PM  
**To:** Filings@psc.state.fl.us  
**Cc:** Fatool, Vicki; Peters, Evelyn; Linda Hobbs; Nancy Sims; Holland, Robyn P; Bixler, Micheale; Slaughter, Brenda ; Mays, Meredith  
**Subject:** Docket No. 040927-TP BellSouth's Response in Opposition and Motion to Dismiss Complaint for Declaratory Relief

- a. Lynn Barclay  
 Legal Secretary to Meredith E. Mays  
 BellSouth Telecommunications, Inc.  
 c/o Nancy Sims  
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 Tallahassee, Florida 32301  
 (404) 335-0788  
[lynn.barclay@bellsouth.com](mailto:lynn.barclay@bellsouth.com)
- b. Docket No. 040927-TP (Interconnection Agreement between Saturn Telecommunication Services, Inc. d/b/a STS Telecom  
 and BellSouth Telecommunications, Inc.; Complaint Regarding Change of Law)
- c. BellSouth Telecommunications, Inc.  
 on behalf of Meredith E. Mays
- d. 7 pages total (including attachment)
- e. BellSouth Telecommunications, Inc.'s Response in Opposition and Motion to Dismiss Request for Amendment Pursuant to  
 Change of Law.

<<040927 Response in Opposition and Motion to Dismiss.pdf>>

***Lynn Barclay***  
**Legal Department**  
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**Suite 4300**  
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OTH *Kim P*

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Legal Department

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September 9, 2004

Mrs. Blanca S. Bayó  
Division of the Commission Clerk and  
Administrative Services  
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Tallahassee, FL 32399-0850

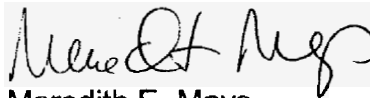
**Re: Docket No. 040927-TP (Saturn)**

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Response in Opposition and Motion to Dismiss Complaint for Declaratory Relief Regarding BellSouth's Request for Amendment Pursuant to Change of Law, 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,



Meredith E. Mays

Enclosures

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

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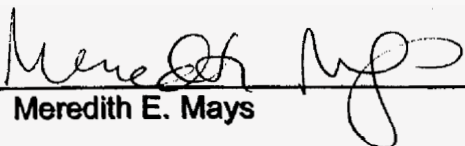
**CERTIFICATE OF SERVICE  
DOCKET NO. 040927-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and Federal Express this 9th day of September, 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. ) Docket No.: 040927-TP  
d/b/a STS Telecom and )  
BellSouth Telecommunications, Inc.; ) Filed: September 9, 2004  
Complaint Regarding Change of Law )

**BELLSOUTH TELECOMMUNICATIONS, INC.'S  
RESPONSE IN OPPOSITION AND MOTION TO DISMISS  
COMPLAINT FOR DECLARATORY RELIEF REGARDING BELLSOUTH'S  
REQUEST FOR AMENDMENT PURSUANT TO CHANGE OF LAW**

**I. INTRODUCTION**

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Response in Opposition and Motion to Dismiss the Complaint filed by Saturn Telecommunication Services, Inc. d/b/a STS Telecom ("STS"). STS seeks to avoid its contractual obligation to renegotiate changes of law by making the preposterous assertion that "no material change in law has occurred" as a result of *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"). Not only is STS' complaint completely unbelievable, it is also frivolous. This Commission should summarily dismiss the complaint and admonish STS from engaging in such tactics in the future.

**II. DISCUSSION**

A motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1<sup>st</sup> DCA 1993). In disposing of a motion to dismiss, the Commission must assume all of the allegations of the complaint to be true. *Heekin v. Florida Power & Light Co.*, Order No. PSC-99-10544-FOF-EI, 1999 WL 521480 \*2 (citing to *Varnes*, 624 So. 2d at 350). In determining the sufficiency of a complaint, the Commission should confine its consideration to the complaint and the grounds

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asserted in the motion to dismiss. *See Flye v. Jeffords*, 106 So. 2d 229 (Fla. 1<sup>st</sup> DCA 1958). Applying these principles to the case at hand mandates that the Commission dismiss STS' Complaint.

A cursory examination of STS' Complaint demonstrates clearly that it is legally infirm. Paragraphs 8 and 9 of the Complaint state that BellSouth sent it formal notice invoking the change of law provisions of the parties' interconnection agreement ("Agreement") pursuant to *USTA II*. Paragraph 11, in describing *USTA II*, provides "[t]he D.C. Circuit ruled that the FCC failed to follow the law when it allowed the States to determine 'impairment' pursuant to 47 U.S.C. § 251 . . . ." This Commission can dismiss this Complaint by reviewing paragraphs 8, 9, and 11 alone. It is difficult to fathom a decision that could be more "material" than one in which the FCC's impairment test was criticized. In any event, when considering the four corners of the complaint, it is abundantly clear that *USTA II*, an effective legal decision, falls squarely within the terms of the Agreement and precludes the relief that STS seeks here.

Further consideration of STS' Complaint demonstrates additional legal deficiencies. For example, STS cites Section 14.3 of the parties' Agreement, which is the change of law provision, and conceded that BellSouth sent it a letter that invoked that section. STS has not alleged, however that Section 14.3 is ambiguous or that BellSouth has failed to comply with the notice provisions contained therein. Instead, STS requests that this Commission "interpret" Section 14.3 to mean "no material change in law has occurred."

In reality, STS is not seeking an interpretation of contractual language. Instead, STS seeks to *avoid* its contractual obligation to renegotiate terms of the Agreement impacted by *USTA II*. STS wants this Commission to declare that unambiguous contractual language has not been triggered because without "effective legislative, regulatory, judicial or other legal action"

that affects material terms of the Agreement STS has no duty to renegotiate. Thus, the relief that STS seeks – “rule on the interpretation of Section 14.3 . . . that no material change of law has occurred” is not an interpretation of what the contract actually means. STS knows full well what the contract means because STS seeks as alternative relief a delay in the change of law negotiation commencement date. **In the final analysis, STS’ Complaint is simply a badly disguised ploy intended to delay contract renegotiations so that STS can benefit from an unbundling regime that has been rejected three times.**

STS’ Complaint also mistakenly claims that the FCC has somehow restricted change of law negotiations. While STS correctly notes the FCC has indicated it intends to have permanent rules in place at some unknown point in the future, the FCC also acknowledged the right of BellSouth and other ILECs to invoke change of law proceedings in its recent *Order and Notice of Proposed Rulemaking* in Docket Nos. WC 04-313 and CC 01-338 (“*Interim Order*”). In fact, in mentioning that some ILECs have initiated proceedings to “curtail UNE offerings immediately,” the FCC admitted that “such actions are permitted under the court’s holding in *USTA II*.” *Interim Order*, ¶ 17. Moreover, the *Interim Order* “expressly preserve[s] incumbent LECs’ contractual prerogatives to initiate change of law proceedings . . . presuming an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to [switching, enterprise market loops, or dedicated transport].” *Interim Order*, ¶ 22. Thus, STS’ implication that BellSouth is somehow acting “contrary to the express wishes of the FCC” is completely without foundation.

In addition to the foregoing defects in STS’ Complaint, it also fails to comply with certain procedural rules. For example, STS couched its Complaint as seeking “Declaratory Relief.” As this Commission explained in Order No. 21277, *In re: Petition of Tampa Electric Co. for*

*Declaratory Statement*, Docket No. 881267-EI (May 23, 1989), it is inappropriate to seek a declaration concerning a relationship between two parties. Instead, pursuant to Rule 25-22.021, Florida Administrative Code, a declaratory statement is intended to apply “a statute, rule, or order.” *See also* Order No. PSC-99-2439-FOF-TP, *In re: Petition by GTE Florida Inc. for Declaratory Ruling*, Docket No. 991414 (Dec. 13, 1999) (Commission denied petition for declaratory ruling because GTE improperly sought a unilateral resolution to a contract dispute and raised a question that could not be resolved in a declaratory statement proceeding). STS does not cite to any statute, rule, or order that applies to the circumstances set forth in its Complaint and therefore fails to demonstrate any basis upon which this Commission can issue a declaratory statement.

Finally, STS implies that this Commission can enter a “stay” prohibiting BellSouth from invoking the terms of Section 14.3 of the Agreement. While this Commission has authority to grant a stay of its own orders pending judicial review,<sup>1</sup> STS has not cited any legal authority that would authorize the relief it apparently seeks, which is to prevent application of an automatic trigger requiring negotiation that appears in unambiguous contractual language approved by this Commission. Incredibly, STS’ stay request is linked to *USTA II* – it seeks a stay prohibiting the invocation of Section 14.3 of the Agreement “based upon the rulings of the United States Court of Appeal for the District of Columbia Circuit . . .” STS’ request for a stay is based solely upon its intransigent refusal to acknowledge that *USTA II* has a material impact on the parties’ contractual relationship, which is a completely unreasonable position and this request should be summary dismissed.

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<sup>1</sup> See Rule 25-22.061.

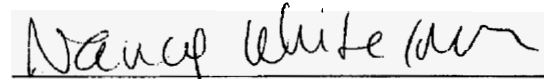


**CONCLUSION**

BellSouth requests the Commission dismiss STS' Complaint as frivolous and without legal foundation.

Respectfully submitted, this 9<sup>th</sup> day of September, 2004.

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