ORIGINAL

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March 3, 2005

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

Re: Docket No. 040732-TP

Dear Ms. Bayo:

Enclosed are an original and fifteen copies of STS Telecom's Response in Opposition to Bellsouth Telecommunications, Inc. Motion for Summary Final Order, 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.

CMP ____
COM ____
CTR ____
ECR ____
GCL ____
OPC ____
MMS ____
RCA ____
SCR ____
SEC 1
OTH ____

Very truly yours,

Leanne Brown

Leanne Brown
For Alan C. Gold

Enclosure

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

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Interconnection Agreement between Saturn Telecommunication Services, Inc. d/b/a STS Telecom and BellSouth Telecommunications, Inc.	)))))	04-0732 TP Filed March 3, 2005

STS TELECOM'S RESPONSE IN OPPOSITION TO BELLSOUTH TELECOMMUNICATIONS, INC. MOTION FOR SUMMARY FINAL ORDER

Comes now the Petitioner, SATURN TELECOMMUNICATION SERVICES, INC. d/b/a STS Telecom ("STS"), by and through its undersigned counsel, and files their Response in Opposition to BellSouth Telecommunication Inc.'s (BellSouth") Motion For Summary Final Order as follows:

BellSouth's Motion For Summary Judgment should be denied because there are disputed matters of fact and issues of law. This case should be permitted to proceed on the merits on the basis of any or all of the following factual disputes:

1. Even if one assumes that BellSouth is entitled to bill at the market base rates as set forth in the Interconnect Agreement, BellSouth improperly billed for those rates and the amount owing to BellSouth is disputed.
2. BellSouth billed STS on a monthly basis for all services it was providing and STS paid those monthly billing amounts in full. The bills upon which BellSouth is now attempting to collect for retail customers with four or more lines are amounts which BellSouth did not previously bill in its regular monthly billings. Instead BellSouth is retroactively and subsequently changing amounts that were billed in the past from the billed cost basis to a much higher market rate and expecting STS to pay the enormous difference. *The Interconnection Agreement does not*

provide for this rebilling. Additionally, equitable principals of waiver and estoppel preclude BellSouth from rebilling the same.

3. The charges by BellSouth in its market based rates to CLECs, including STS, is, in many instances, far greater than the retail rate BellSouth charges to its retail customer. The market base rates in the Interconnection Agreement are unfair, unreasonable and discriminatory. As such, it constitutes a barrier to entry and an attempt to drive STS and similar CLECs out of business.

STATEMENT OF FACTS

4. STS is a competitive local exchange carrier ("CLEC"), certified by the Florida Public Service Commission to provide local telephone service in January 2003. In order to commence business, STS reviewed several interconnection agreements and determined that the Interconnection Agreement between BellSouth and IDS Telcom, LLC, was in STS's best interest. Had STS negotiated a new interconnection agreement with BellSouth or resorted to arbitration before the Florida Public Service Commission, the time delay and cost would have been prohibitive and precluded the entry of STS into the marketplace as a competitive local exchange carrier.

5. On the date that the Interconnection Agreement was adopted, STS had not previously been involved in providing local telecommunication services in Florida and was not aware of the great disparity in rates for retail customers that have four or more lines, between what BellSouth provided in the Interconnection Agreement and represented as wholesale market rates, and the retail rates it offered the general public.

6. The Interconnection Agreement with BellSouth and STS provided in Section 29.1 of the "General Terms and Conditions" the following: "This section applies to network interconnection and/or unbundled network element and other service rates that are ***expressly subject to true-up*** under this Agreement." (*emphasis added*) BellSouth could have chosen to subject all rates in the Interconnection Agreement to true-up, but failedto so. BellSouth choose to subject only certain rates to true-up, which are those rates made "expressly subject to true-up" Thus, Section 29.1 of the relevant agreement only gave BellSouth the ability to correct or rebill (true-up) those charges which the agreement expressly allowed to be rebilled.

7. STS only accepted the Florida rates found in Attachment 2 of the Interconnection Agreement which stated "BellSouth is currently developing the billing capability to mechanically bill the recurring and non-recurring Market Rates in this Section except for nonrecurring charges for not currently combined in FL and NC. In the interim,where BellSouth cannot bill market." There is absolutely no provision in the Interconnection Agreement allowing BellSouth to true-up or subsequently adjust these market rates.

8. BellSouth billed STS on a monthly basis and STS paid those amounts in full. There was nothing in the bills indicating the charges for retail customers with 4 or more lines were subject to change or true-up; and as stated previously, there was nothing in the Interconnection Agreement subjecting this aspect of the bill to subsequent change by BellSouth. STS billed its customers and took action based upon its belief on the accuracy of the BellSouth billings and the plain language of

the Interconnection Agreement. Some of the actions taken by STS in reliance on the billing and actions of BellSouth are set forth in the Affidavit of Keith Kramer. It was only much later that BellSouth attempted to true-up its rates by going back as far as 6 months in adjusting billing upwards for "market rates". Not only did BellSouth inaccurately bill the rates, it had no authority under the Agreement to rebill and true-up the rates. Moreover, the rates are not based upon market, but in many instances, are far greater than the rates BellSouth charges to the retail customer. The market rates are unfair, unreasonable and constitute a barrier to entry. Moreover, BellSouth's market base rates are discriminatory and improper.

ARGUMENT

STS agrees with the standards of summary judgment stated in BellSouth's Memorandum; namely, that summary final order **cannot** be given if there are genuine issues of material fact. This standard is a very high standard with the facts viewed in the light most favorable to STS, as the non-moving party, and all inferences from those facts made in favor of STS. It is clear that BellSouth's Motion For Summary Final Order does not meet the stringent requirement for a summary judgment and BellSouth's Motion must be denied.

MATERIAL FACTS ARE IN DISPUTE AS TO AMOUNT OF BILL

Even if one assumes for the sake of argument that BellSouth is entitled to bill the market based rates according to the Interconnection Agreement, STS disputes the amounts billed by BellSouth. (See Affidavit of Jonathan Krutchik). The dispute regarding the amount of bills is sufficient to defeat BellSouth's Motion For Summary Final Order.

Additionally, the manner in which BellSouth is attempting to true-up is in violation of the express terms of the Agreement. Section 29.2 of the Interconnection Agreement provides, "The designated true-up rates shall be trued-up, either up or down, based on final prices determined either by further agreement between the parties, or by a final order (including any appeals) of the Commission." BellSouth has not followed this procedure, there has been no further agreement of the parties, and no final order of the Commission.

THE INTERCONNECTION AGREEMENT DOES NOT PERMIT REBILLING

The Interconnection Agreement is a document prepared in its entirety by BellSouth. Although STS asserts that the Interconnection Agreement, in clear and unequivocal language, sets forth the circumstance in which true-ups are permissible, and did not include the ability to true-up the billings in controversy herein. Never-the-less, if the Interconnection Agreement is found to be ambiguous, any ambiguities must be construed against BellSouth, the drafter. See, *Ware Else v. Ofstein, 856 So.2d 1079 (Fla. 5th DCA 2003); Maines v. Davis, 491 So.2d 1233, (Fla. 1st DCA 1986); Inguez v. American Hotel Register Company, 820 So.2d 953 (Fla. 3rd DCA 2002.)*

The respective rights and obligations of BellSouth and STS are as expressly set forth by BellSouth under the Interconnection Agreement which it drafted. In Section 29 of the Interconnection Agreement entitled "Rate True-Up" BellSouth provides that certain specified rates can be later adjusted up or down, and in Section 29.1, BellSouth limits those adjustable rates to those "expressly subject to true-up under this Agreement." Thus, BellSouth had the ability to expressly designate which rates are subject to true-up under the Interconnection Agreement. BellSouth chose not to subject the rates in issue to

true-up. STS accepted the agreement drafted by BellSouth which did not allow the rates for retail customers with four or more lines to be changed retroactively. If BellSouth wanted to bill STS for services to these customers at market rates, it was required to do so in the regular billing. It cannot retroactively rebill or true-up the rates. Whether it is an error or intentional, the Interconnection Agreement was drafted by BellSouth, and should be interpreted according to its plain language. In *Walgreen Company v. Habitat Development Corp, 655 So2d 164 AT 165 (Fla. 3rd DCA 1995)*, the Court stated; "When a contract is clear and unambiguous, the court is not at liberty to give the contract 'any meaning beyond that expressed'....Further, when the language is clear and unambiguous, it must be construed to mean 'just what the language therein implies and nothing more.' (citations omitted). See Also: *Winn-Dixie Stores v. 99 Cent Stuff-Trail Plaza LLC., 811 So2d 719 at 722 (Fla. 3rddDCA 2002)* ; "Parties are bound by the clear words of their agreements ..." Pursuant to the clear and unambiguous language of BellSouth's Interconnection Agreement, the rates for these services are <u>not</u> subject to true-ups.

BellSouth claims that section 17 of the Interconnection Agreement somehow gives it the right to true-up these rates. (See letter from BellSouth to STS' attorneys attached hereto as Exhibit "A") . This is a desperate attempt by BellSouth to find some justification in the Interconnection Agreement for their outrageous and unconscionable billing practices. Section 17 of the agreement is a boilerplate "waiver" provision, which basically states that BellSouth does not waive any rights it has under the Interconnection Agreement, by not taking immediate action. BellSouth does not have a right to true-up under the agreement for the rates in issue. It is axiomatic that one cannot waive a right one never had.

BellSouth's arguments in support of its motion are contradictory. BellSouth claims that STS should not be able to object to the market rates as unfair and unreasonable, because STS signed the agreement containing these rates. BellSouth urges this Commission to enforce the agreement against STS as written. Then, in the same breath, BellSouth urges this Commission to ignore the clear and unambiguous language of the agreement, and enforce, not what the contract says, but rather what BellSouth intended the contract to say. This Commission should ignore the conflicting positions advanced by BellSouth. The Interconnection Agreement does not allow BellSouth to True-up the rates for retail customers with 4 or more lines. BellSouth's Motion For Summary Final Order should Be denied.

Moreover, even if these rates were subject to true-up, equitable principles of waiver and estoppel requires that these rates not be subject to true-up. STS has taken actions based upon the regular billing by BellSouth and would be harmed if BellSouth could change its position. It has long been recognized in the law that the parties to an agreement may, by their actions, indicate an abandonment of one of the contractual terms. See *Gustafson v. Jenson, 515 So.2d 1298 (Fla. 3rd DCA 1987), Painter v. Painter, 823 So.2d 268 (Fla. 2nd DCA 2002).* In the affidavit of Keith Kramer attached hereto, Mr. Kramer sets forth the actions of BellSouth which indicate that BellSouth abandoned the right to true-up for these services. Moreover, the affidavit of Mr. Kramer proves that BellSouth by its actions waived or is estopped from being able to true-up the rates charged to STS for retail customers with four or more lines to a higher market rate. The issues of abandonment, waiver and estoppel are issues which are not appropriate for summary disposition. See, *Scheibe v. Bank of America, 822 So.2d 575(Fla 5th DCA*

2002) and *Woodruff v. Government Employees Insurance Company, 669 So.2d 1114 at 1115 (Fla. 1st DCA 1996)*. BellSouth billed for rates and were paid for those rates. BellSouth cannot rebill for these services at higher rates.

THE RATES ARE BARRIER TO ENTRY

After entering the market and receiving the true-up bill on market based rates from BellSouth, STS discovered that in many instances these market based rates which were supposed to be wholesale rates promulgated to certified local exchange carriers were in many instances substantially higher than BellSouth would sell to its retail customers. It would be impossible to effectively compete with BellSouth when it charges wholesale rates at a substantially higher price than retail rates. This is in violation of 47 U.S.C. § 251, which requires BellSouth to provide access to their network at a fair price for that access. The argument that STS could have discovered the same, if it was more experienced in the market or had spent hundreds of thousands of dollars in analyzing the rates has no bearing on the issues before this Commission. The statutes require BellSouth to provide access at fair rates. The fact that it might have been discovered earlier does not eliminate the duty of BellSouth to provide fair rates. Furthermore, rates such as the inflated market based rates creates an "economic barrier" to entry in violation of Section 251 of the Act. The Florida Public Service Commission should not enforce unfair rates.

Moreover, if the Commission considers the equities of the situation, the equities lie with STS. At the time the Interconnection Agreement was adopted by STS, BellSouth had not billed CLECS for market rates for retail customers having four or more lines. STS did not know when, if ever, those rates would be billed. STS bills its

customers on a monthly basis. BellSouth waited long periods of time and then billed for 6 months in arrears. This is designed to hurt the CLECS and their relationship with their customers. In fact, many customers were lured back to BellSouth by BellSouth's programs designed to win customers back at rates much lower than these supposedly wholesale "market rates". It is not practical to bill these customers or even rebill existing customers retroactively for six months. Thus, the actions of BellSouth and its delayed billing caused hardship to STS. If BellSouth has the right to charge market rates for retail customers with four or more lines, it must do so in a prudent and responsible manner for existing bills and not retroactively charge substantial amounts for periods which are long past.[1]

BellSouth's practice of back billing of these charges is an unreasonable billing practice. In The Peoples Network Inc. v. American Telephone and Telegraph co., Docket No. E-92-99 (FCC April 1997), the FCC ruled that the back billing of charges over a several month period of time may be deemed an unreasonable billing practice in violation of 47 U.S.C. 201(b). The back billings in this case presently before the Commission occurred over a six month period of time, and constitutes an unreasonable billing practice.

THE COMMISSION IS AUTHORIZED TO ADJUST RATES

This proceeding concerns the charges that BellSouth is making to STS for local circuit switching services for end users with four or more DSO equivalent lines within Density Zone 1 in Miami, Fort Lauderdale and Orlando. STS is petitioning for an order

[1] Despite diligent search, STS was unable to verify the accuracy of the citation. However, the same was cited before this Commission in the case of BellSouth v. IDS Telcom, LLC, Docket No. 031125-TP, Direct Testimony of Angel Leiro, page 9 (filed July 22, 2004).

from the Commission finding the charges for those services to be unlawfully high and replace them with just and reasonable rates. BellSouth is seeking summary judgment on the sole ground that the charges in question are contained in the Interconnection Agreement voluntarily negotiated between the parties and that STS has no alternative to paying the contract rates.[2]

BellSouth's Motion should be denied and this case should be permitted to proceed on the merits. Genuine issues of material fact remain between the parties on the following matters:

1. The Interconnection Agreement between the parties that BellSouth relies upon is a contract of adhesion, which STS was forced to accept without modification in order to enter the market as a competitive local exchange carrier. It was unable to obtain the necessary facilities from any third party, and it could not afford the expense or delay in attempting to negotiate a different agreement with BellSouth or asking the Commission to arbitrate the charges.[3]

2. Although the charges at issue are denominated as "market based rates", they were arbitrarily determined and were not based upon any charges prevalent in the relevant markets. In fact, the only rates for comparable services that can be found in those markets are the rates that BellSouth charges its retail customers, and the interconnection agreement rates are in

[2] BellSouth has also filed a Counterclaim seeking to recover certain amounts that it has backbilled STS relating to the same services. STS is seeking summary judgment on the counterclaim in a separate document.

[3] Kramer affidavit, ¶ 9.

many instances higher than the rates BellSouth charges its retail customers for the same services.

3. Since entering into the Interconnection Agreement, BellSouth has undertaken an aggressive policy of reducing its retail rates for business line installations to significantly less than the rates contained in the Interconnection Agreement and has also instituted a "Rewards Program" that enables retail customers to obtain these services at lower rates from BellSouth than STS is able to charge if it must pay BellSouth the market base charges contained in the Interconnection Agreement. Thus, BellSouth has used its Inconnection Agreements to eliminate competition in these important markets.[4]

4. As a result, the charges in question in the Interconnection Agreement are unjust, unreasonable, discriminatory and constitute a barrier to entry into the telecommunications market, in violation of Florida and Federal law.

BellSouth's argument that STS has no choice other than to pay the rates contained in the Interconnection Agreement has no merit if the Commission is empowered to change those rates if it finds them to be unreasonable and a barrier to entry. If the Commission finds it is empowered to adjust these rates in an appropriate case, it must deny the Motion for Summary Judgment and set the matter for hearing on the merits.

The Florida Public Service Commission has ample authority to make such an adjustment under a number of the statutes that determine its powers and duties.

[4] Kramer Affidavit, ¶ 11.

The Commission is directed in Section 364.01 of Florida Statutes to exercise its jurisdiction for the following purposes among others:

- to encourage competition to ensure the widest possible range of consumer choice in the provision of all telecommunication services (364.01(4)).
- to promote competition by encouraging new entrants into telecommunications markets. (364.01(4)(d)).
- to ensure that all providers of telecommunications services are treated fairly and to prevent anticompetitive behavior (364.01(4)(g)).

In addition, Section 364.03 specifically requires that "all...charges...of telecommunication companies for...equipment and facilities...shall be fair, just and reasonable."

Further, Section 364.07 requires all telecommunication companies to file all contracts with other telecommunication companies relating to joint provision of intrastate telecommunications facilities. In that provision, the Commission is specifically empowered to adjudicate all disputes among the telecommunication companies regarding such contracts. The instant proceeding is just such a dispute between STS and BellSouth.

Section 364.07 was reinforced in 1995 by Section 364.162, relating specifically to prices for interconnection and the resale of services and facilities. That section restates the authority of the Commission to arbitrate "any dispute regarding interpretation of interconnection or resale prices and terms and conditions." It is just such an arbitration that STS is seeking in this case.

Another relevant statutory provision is Section 364.16, which directs each competitive local exchange telecommunications company to provide access to, and interconnection with its services to any other provider of local exchange telecommunication services requesting such access (such as STS) "at nondiscriminatory

prices, terms and conditions." Subsection (b) of that section specifically allows "any party with a substantial interest", which clearly would include STS, to petition the commission for an investigation of any suspected violation of the above interconnection duties. This proceeding can also be considered as a 364.16(b) petition.

STS finally notes that Section 364.27 directs the Commission to investigate any acts relating to interstate rates and charges to determine whether any act that takes place in Florida is "excessive or discriminatory" or violates the Communications Act of 1934 and to petition the Federal Communications Commission for relief. STS asserts that the charges and practices complained of in this proceeding are also in violation of 47 U.S.C. §251 and impliedly asks that Florida Commission institute an appropriate proceeding before the FCC with respect thereto.

BellSouth's Motion for Summary Judgment has no merit. It is based on the erroneous premise that a telecommunications carrier that has signed an interconnection agreement with it cannot petition this Commission for relief even if that agreement was entered into because the carrier was forced to sign it if it wished to enter the telecommunications business and that agreement contains charges that are unjust, unreasonable and discriminatory and has been utilized by BellSouth to create a barrier to the entry of competitive carriers and to retain its entrenched monopoly. BellSouth's position is contrary to law and sound public policy and the motion based upon it should be denied.

CONCLUSION

STS has demonstrated that there are substantial matters of fact in dispute and that BellSouth is not entitled to a summary final order.

Respectfully submitted,

ALAN C. GOLD, P.A.
Gables One Tower
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(305) 667-0475 (office)
(305) 663-0799 (telefax)

BY: ALAN C. GOLD, ESQUIRE
Florida Bar Number: 304875
JAMES L. PARADO, ESQUIRE
Florida Bar Number: 0580910

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail and Federal Express on this 3 day of March 2005, to:

Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

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Meredith E. Mays
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February 24, 2005

Via Electronic and U.S. Mail

Alan Gold, Esq.
James L. Parado, Esq.
Alan C. Gold, P.A.
Gables One Tower
1320 South Dixie Highway
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Coral Gables, FL 33146

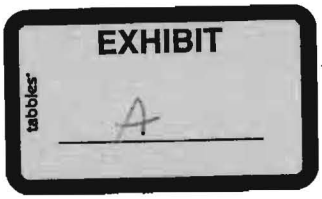
Re: Docket No. 040732-TP (Saturn Complaint)

Dear Alan and James:

On Monday, February 21, 2005, STS filed its Motion for Extension of Time. That filing included a "preliminary" response in opposition to BellSouth's Motion for Summary Final Order.

The purpose of this letter is to raise a concern with two arguments STS raised in its "preliminary" response. In relevant part, you have taken "preliminary" positions that conflict with the parties' interconnection agreement. In the event STS maintains these preliminary positions in its "final" response, then BellSouth reserves its rights to raise its concerns with these arguments with the Commission; including, but not limited to, filing a motion to strike.

First, your "preliminary" response suggests that any ambiguities in the agreement must be construed against BellSouth. BellSouth disputes that any such ambiguities exist; nonetheless *STS has agreed otherwise at Section 21 of the Agreement.* Second, you contend that BellSouth has somehow waived its rights to true-up market based billing. BellSouth disputes this also; notwithstanding this dispute *STS has also agreed otherwise at Section 17 of the Agreement.*



As indicated earlier, if STS maintains these arguments in its "final" response to the Commission, then BellSouth will respond accordingly. If this is unclear or you would like to discuss this in more detail, let me know.

Regards,

Meredith Mays

573886

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Interconnection Agreement between Saturn Telecommunication Services, Inc. d/b/a STS Telecom and BellSouth Telecommunications, Inc.	)))))	04-0732-TP Filed:

AFFIDAVIT IN OPPOSITION TO BELLSOUTH'S MOTION FOR SUMMARY FINAL ORDER

STATE OF FLORIDA }
}ss
COUNTY OF BROWARD }

BEFORE ME the undersigned authority personally appeared, JONATHAN KRUTCHIK who, after being first duly sworn, deposes and says:

1. The following information is true and correct and based upon my personal knowledge.

2. I was a co-founder of Saturn Telecommunication Services, Inc. d/b/a STS Telecom ("STS") and has served as its President since its inception.

3. Part of my duties as President includes the responsibility for overseeing all computers and billing functions of STS.

4. I was instrumental in developing and customizing STS's billing system.

5. I reviewed the documents from BellSouth regarding the disputed market based rates and I am familiar with the Interconnect

Agreement and issue and what the amount of appropriate billing should be.

6. Even if BellSouth had the right to bill for the market based rates set forth in the Interconnect Agreement, the bills presently submitted by BellSouth and the amount which BellSouth claims STS owes it are erroneous and incorrect.

7. The bills that BellSouth claims are due and owing from STS are substantially less than the amount that BellSouth claims.

8. Documentation supporting the fact that BellSouth has overbilled is being forwarded simultaneously with this Affidavit.

FURTHER AFFIANT SAYETH NAUGHT.

JON KRUTCHIK

BEFORE ME the undersigned authority of this _____ day of February 2005 personally appeared, JON KRUTCHIK, who is personally known to me and who after being first duly sworn deposes and says, that he had read the foregoing Affidavit, that the information contained therein, is true and correct and based upon his personal knowledge.

Andrew T. Silber
Commission # DD 061821
Expires Nov. 5, 2005
Bonded Thru
Atlantic Bonding Co., Inc.

NOTARY PUBLIC
Print Name: ANDREW T. SILBER
Commission No.: DD 061821
Expiration: NOV 5, 2005