

ORIGINAL

Timolyn Henry

From: Barclay, Lynn [Lynn.Barclay@BellSouth.com]
Sent: Thursday, March 17, 2005 2:55 PM
To: Filings@psc.state.fl.us
Cc: Fatool, Vicki; Linda Hobbs; Nancy Sims; Holland, Robyn P; Bixler, Micheale; Slaughter, Brenda ; Mays, Meredith
Subject: 040732-TP BellSouth's Motion to Strike and Response in Opposition to Motion for Summary Final Order
Attachments: 040732 Motion to Strike.pdf; 040732 BST's Motion to Strike.DOC

- a. Lynn Barclay
 Legal Secretary to Meredith E. Mays
 BellSouth Telecommunications, Inc.
 c/o Nancy Sims
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- b. Docket No. 040732-TP (In re: 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. 45 pages total
 14 pages total (word version of pleading, in lieu of disk)
- e. BellSouth Telecommunications, Inc.'s Motion to Strike and Response in Opposition to Motion for Summary Final Order.

<<040732 Motion to Strike.pdf>>

<<040732 BST's Motion to Strike.DOC>>

Lynn Barclay
 Legal Department
 675 West Peachtree Street
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SEC 1 *03/18/05*

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FPSC-COMMISSION CLERK

ORIGINAL

Legal Department

MEREDITH E. MAYS
Senior Regulatory Counsel
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March 17, 2005

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

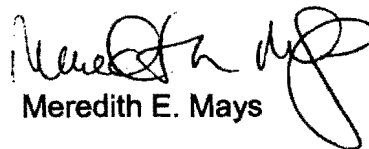
Re: Docket No. 040732-TP

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Motion to Strike and Response in Opposition to 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.

Sincerely,


Meredith E. Mays

Enclosures

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

577446

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**CERTIFICATE OF SERVICE
DOCKET NO. 040732-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
Electronic Mail and Federal Express this 17th day of March, 2005 to the following:

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Division of Legal Services
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Meredith E. Mays

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Interconnection Agreement between)	
Saturn Telecommunication Services, Inc.)	Docket No.: 040732-TP
d/b/a STS Telecom and)	
BellSouth Telecommunications, Inc.)	Dated: March 17, 2005

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

INTRODUCTION

In the last year, Saturn Telecommunications Services, Inc. d/b/a STS Telecom, LLC ("STS") has initiated three separate proceedings against BellSouth – this docket, Docket No. 040732-TP, and Docket No. 040927-TP. STS dismissed the latter two dockets, yet this case remains open. As a general matter, in this and prior dockets, BellSouth has not objected to reasonable modifications to filing dates and procedural matters. At this juncture, however, STS's latest filings and its failure to comply with procedure simply cannot be tolerated and BellSouth is compelled to file this Motion to Strike. Specifically, after obtaining an extension of time to file a response in opposition to BellSouth's Motion for Summary Final Order ("BellSouth's Motion"), STS filed a late, incomplete, and defective response ("STS's Response"). STS's Response included arguments that BellSouth had previously objected to; by letter dated February 24, 2005, BellSouth had provided STS with notice that the inclusion of these arguments would trigger a motion to strike. STS's failure to follow procedure combined with its disregard of BellSouth's objections to its invalid arguments demonstrate unequivocally that its Response should be stricken in its entirety and BellSouth's Motion should be granted.

In addition to explaining more fully below the reasons this Commission should grant BellSouth's Motion to Strike, BellSouth also includes its opposition to STS's Motion for Summary Final Order on BellSouth's counterclaim ("STS's Motion"), which motion was filed

DOCUMENT NUMBER-DATE

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on March 11, 2005. STS's Motion cannot withstand scrutiny. BellSouth requested, on the first page of its Motion, "that this Commission enter an order granting its counterclaim and requiring STS to promptly pay for the switching services it received." In STS's March 4, 2005 response to BellSouth's Motion, STS claimed that "there are substantial matters of fact in dispute" (STS's Response, p. 13).¹ STS has now filed its own motion for summary final order in its favor on BellSouth's counterclaim, in which it now contends "there is no genuine issue of material fact as to any issues . . ." (STS's Motion, p. 1). STS's positions are flatly contradictory and simply cannot be reconciled. Notwithstanding STS's contradiction, BellSouth agrees that this matter should be resolved as a matter of law. The only reasonable, logical, and legal outcome is to enter an order in favor of BellSouth.

MOTION TO STRIKE

A. STS's Response In Opposition to BellSouth's Motion for Summary Final Order Should be Stricken in its Entirety

On July 29, 2004, BellSouth filed its Answer and Counterclaim in this docket. As BellSouth has explained in prior filings, this docket involves a billing complaint filed by STS. STS claims BellSouth overbilled it for switching; however, the switching rates it complains of were agreed to by the parties and are contained in the parties' applicable interconnection agreement. BellSouth included a counterclaim, explaining that STS had failed to pay for amounts that it had been billed, and had breached the terms of the parties interconnection agreement.

Although BellSouth was served by mail with a copy of STS' Response to its Affirmative Defenses and Counterclaim, no such response was properly filed with this Commission. Notably, STS's Response to BellSouth's Affirmative Defenses and Counterclaim included a

¹ While BellSouth disagrees that this matter involves factual disputes, STS apparently believed at one time that factual issues existed.

notation "Filed: July 29, 2004," the certificate of service notes that it was served by mail on August 19, 2004, and the actual response itself was never filed with the Division of Commission Clerk and Administrative Services.

Pursuant to Commission Rule 25-22.028, when a party files a document with this Commission such filing "shall be accomplished by submitting the original document and the appropriate number of copies, as provided by rule, *to the Division of the Commission Clerk and Administrative Services.*" Thus, in order for a party to comply with the Commission's filing requirements, a party must mail, hand deliver or send via courier an original and copies with Ms. Blanca S. Bayo, Commission Clerk and Administrative Services.² Failure to submit a document to the Commission Clerk means that a document has not been filed with this Commission.

To BellSouth's knowledge, STS' Response to BellSouth's Affirmative Defense and Counterclaim was never properly submitted by STS to the Division of the Commission Clerk and Administrative Services. Indeed, by memo dated January 6, 2005, Mr. Lee Fordham with the Office of the General Counsel submitted a copy of STS' Response to Ms. Bayo, noting that the Response "was not properly filed with the office of the PSC Clerk." As a matter of law, therefore, STS has not responded to BellSouth's Affirmative Defenses and Counterclaim, which are therefore deemed admitted. *See Fla. R. Civ. Proc. 1.110 (3) and 1.500(a).*

Notwithstanding STS's failure to properly file its response to BellSouth's counterclaim, BellSouth elected to file a substantive, rather than a procedural, motion to resolve this matter.³ Consequently, on February 14, 2005, BellSouth filed its Motion for Summary Final Order in this

² The Commission also began to accept filings submitted electronically as of April 1, 2004, so long as the appropriate guidelines are followed.

³ BellSouth hereby requests leave to amend its Motion for Summary Final Order to add, as additional grounds for granting its motion, STS's failure to file a response to BellSouth's counterclaim and affirmative defenses. *See Fla. R. Civ. Proc. 1.110 (e) and 1.500(a).*

docket. BellSouth served the foregoing motion pursuant to electronic mail and federal express. Pursuant to Florida Administrative Code 28-106.103 and 28-106.204 (4), any response in opposition to BellSouth's motion was due on February 21, 2005 (because BellSouth's motion was served electronically, STS should have calculated its response as due 7 days thereafter, or February 21, 2005).

STS' counsel contacted BellSouth requesting its consent to a ten-day extension of time to file a response in opposition to BellSouth's Motion for Summary Final Order. BellSouth agreed to the requested extension. Pursuant to Florida Administrative Code 28-106.103 and 28-106.204 (5), STS' Motion for extension of time to file its response was due on February 21, 2005 (again, because BellSouth's motion was served electronically, STS should have calculated the date for seeking additional time to respond as due 7 days thereafter, or February 21, 2005).

To BellSouth's knowledge, STS did not file its Motion for Extension of Time on February 21, 2005. STS's cover letter to its Motion for Extension of Time is dated January 24, 2005, referencing in an incorrect docket number -- Docket No. 040533-TP. STS's certificate of service is dated February 21, 2005. This Commission's records show a filing date of February 22, 2005, which means that STS filed its Motion for Extension of Time one day late.⁴ STS included with that motion, a "preliminary" response in opposition to BellSouth's Motion for Summary Final Order, which included the affidavits of Keith Kramer and Jonathan Krutchik. STS specifically stated that its preliminary response was filed in an abundance of caution and was "only intended to be utilized in the event the Commission denies STS's Motion For an Extension of Time."

⁴ While Commission Rule 25-22.028 governs filings and does not expressly include the timing of filings; Florida Administrative Code, 28-106.104, outlines the common practice and procedure, which is to construe "filing" as "received by the office of the agency clerk *during normal business hours.*" Likewise, documents "received by the office of the agency clerk after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day." See 28-106.104, Florida Administrative Code, (1) and (3).

On February 24, 2005, this Commission issued Order No. PSC-05-0224-PCO-TP (“Extension Order”) granting STS’ request for a ten day extension of time to file its response in opposition to BellSouth’s Motion for Summary Final Order. In light of the issuance of the Extension Order, STS’s “preliminary” response, including the affidavits of Keith Kramer and Jonathan Krutchik was not “intended to be utilized.” Moreover, based on the original due date of February 21, 2005, the Extension Order, by its terms, meant that STS’s response in opposition to BellSouth’s Motion for Summary Final Order was due to be filed with the Commission on March 3, 2005.

On March 3, 2005, BellSouth received, via electronic mail, STS’s response in opposition to BellSouth’s Motion for Summary Final Order. The email included an unsigned pleading only, without any supporting affidavits or other documentation.⁵ Based on the Commission’s records, STS failed to file any response in opposition to BellSouth’s Motion for Summary Final Order on March 3, 2005, which it was required to do pursuant to the Extension Order.

On March 4, 2005, BellSouth received, via federal express, one large box and a smaller box of billing records. These records were bound in 19 separate volumes, titled “BellSouth MBR Invoices.”⁶ No affidavits or other explanatory documents were included with these records. Also on March 4, 2005, STS filed with the Commission (based upon the Commission’s records) its response in opposition to BellSouth’s Motion for Summary Final Order, together with the Affidavit of Jonathan Krutchik. STS’s March 4, 2005 filing was untimely and did not satisfy the terms of the Extension Order. Because STS’s Response in Opposition to BellSouth’s

⁵ See Exh. 1, STS’s March 3, 2005 email.

⁶ See composite Exh. 2, copies of Federal Express packing slips showing deliveries on March 4, 2005 and March 7, 2005 respectively.

Motion for Summary Final Order was not timely filed with the Division of the Commission Clerk, it should be stricken in its entirety.

On March 7, 2005, BellSouth received, via federal express, another large box of billing records.⁷ These records were bound in 12 volumes, titled "BellSouth MBR STS Dispute Report." The Affidavit of Jonathan Krutchik was included with these billing records. BellSouth also received, on March 7, 2005, a signed copy of STS's Response in Opposition to BellSouth's Motion for Summary Final Order, with Exhibit A (consisting of a February 24, 2005 letter from BellSouth's counsel to STS's counsel), and a second copy of the Affidavit of Jonathan Krutchik. BellSouth must presume that, on March 7, 2005, it finally received the entirety of STS's purported response in opposition to its Motion. BellSouth must further presume that STS's Response consists of Exhibit A, the Krutchik Affidavit, and a total of 31 volumes of billings records.

As stated above, the Commission should strike the entirety of STS's untimely response to BellSouth's Motion for Summary Final Order for failure to comply with the terms of the Extension Order. While BellSouth acknowledges that it received a partial response from STS on March 3, 2005, the partial response BellSouth received lacked supporting documentation and thus could not be utilized. In addition, once BellSouth received what it presumes to be the entirety of STS's response, it remained incomplete. In relevant part, STS's response refers to an affidavit of Mr. Keith Kramer. BellSouth received no such affidavit on March 3, 2005 or March 7, 2005. The Kramer affidavit STS had previously filed with its February 22, 2005 Motion for Extension of Time was effectively withdrawn when this Commission entered its Extension Order because STS expressly stated its intent was to submit that affidavit only if an extension order was

⁷ See Exh. 2.

not granted. Consequently, STS's failure to provide a complete response to BellSouth's Motion at any time provides additional grounds for striking STS's deficient response in its entirety.

Finally, just over one month ago, this Commission admonished STS to heed Florida's procedural requirements. In relevant part, the Commission reprimanded STS for late filings in Order No. PSC-05-0139-PCO-TP, stating "[w]hile I acknowledge that our staff counsel received STS' Reply via e-mail on January 20, 2005, e-mail service upon staff counsel does not constitute filing with this Commission. Thus . . . STS' Reply is untimely. *For the remainder of this case, any similar demonstrations by STS of inability to comply with proper procedural requirements and inattention to the timeliness of filings will not be looked upon favorably.*" (emphasis supplied). Considering that STS has had an express warning to take this Commission's procedural requirements seriously, its incomplete and late filings in this proceeding are simply inexcusable and further support BellSouth's Motion to Strike STS's Response *in toto*.

B. In the Alternative, Certain Portions of STS's Response In Opposition to BellSouth's Motion for Summary Final Order Should be Stricken

In the alternative, if, despite STS's procedural shortcomings, the Commission accepts any portion of STS's late-filed response in opposition, BellSouth respectfully requests that the Commission strike designated portions of STS's response. In relevant part, the parties' Agreement includes specific provisions concerning waiver and the rule of construction. These provisions are included at Section 17, Waivers, and Section 21, Rule of Construction.⁸

Section 17 of the Agreement provides: "[a] failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter

⁸ BellSouth previously filed the entire agreement between it and STS as Exhibit KER-2 to the Affidavit of Kristen E. Rowe.

to insist upon the performance of any and all of the provisions of this Agreement.” Section 21 of the Agreement states: “[n]o rule of construction requiring interpretation against the drafting Party hereof shall apply in the interpretation of this Agreement.”

In STS’s Motion for an Extension, it included its “preliminary” response in opposition to BellSouth’s Motion, alleging, in part, that the Parties’ Agreement should be construed against BellSouth, as the drafter of the contract. STS also claimed that BellSouth’s actions waived its ability to reconcile market based switching rates. Both arguments flatly conflict with STS’s contractual commitments in Sections 17 and 21 of the Agreement. Counsel for BellSouth wrote STS explaining this problem, which letter was attached as Exhibit A to STS’s March 4, 2005 response to BellSouth’s Motion. Despite putting STS on clear notice of this problem, STS chose to include these arguments in its late-filed March 4, 2005 response. Based on STS’s contractual obligations, it has no reasonable basis to assert any arguments of waiver or arguments alleging the Agreement must be construed against BellSouth. Thus, if the Commission accepts STS’s late filed response (which it should not), it should strike any and all arguments of waiver as well as arguments alleging the Agreement must be construed against BellSouth.

Likewise, because STS failed to include the Affidavit of Keith Kramer with its March 4, 2005 Response, it has no reasonable basis to cite to or assert arguments relying upon such an affidavit. Consequently, if the Commission accepts STS’s late filed response (which it should not), it should strike any and all references to the Affidavit of Keith Kramer.

The specific portions of STS’s March 4, 2005 response that should be stricken (in the event the Commission accepts that filing) are as follows:

- a. Page 4, the sentence reading “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.”
- b. Page 5, the paragraph beginning “The Interconnection Agreement is a document prepared in its entirety by BellSouth” and ending with citations. The citations, which improperly support an argument that STS has contractually abandoned, should also be stricken.
- c. Page 6, beginning with the sentence reading “STS accepted the agreement drafted by BellSouth” and continuing through sentence ending “the Interconnection Agreement was drafted by BellSouth, and should be interpreted according to its plain language.”
- d. Page 7, the second paragraph, beginning with the word “[m]oreover” and continuing over to page 8, and ending with the word “rates.”
- e. Page 10, in the paragraph numbered 1, the last sentence in that paragraph, beginning “[i]t was unable . . .” Also, the footnote reference to the unfiled Kramer affidavit.
- f. Page 11, in the paragraph numbered 3, the last sentence in that paragraph, beginning “[t]hus, BellSouth . . .” Also, the footnote reference to the unfiled Kramer affidavit.

In summary, if the Commission considers any portion of STS’s March 4, 2005 Response (which it should not), it should strike the above-listed portions, which contradict the terms of the parties’ Agreement and which are unsupported.

RESPONSE IN OPPOSITION TO STS' MOTION FOR SUMMARY FINAL ORDER

On March 11, 2005, STS filed a Motion for Summary Final Order ("STS's Motion") seeking an order in its favor on BellSouth's Counterclaim. As a matter of procedure, STS's failure to properly file any answer to BellSouth's counterclaim renders STS's Motion moot and untimely as a matter of law. Because STS never responded to BellSouth's counterclaim, the allegations therein are deemed admitted and STS has no reasonable basis to assert a motion now. Moreover, as explained above, STS's Motion contradicts its March 4, 2005 response. If however, the Commission chooses to consider STS's Motion (which it should not), denial is appropriate.

In essence, STS argues that despite that fact that it contractually agreed to certain rates in the Agreement, BellSouth is precluded from adjusting bills after such bills are rendered. Using illustrative numbers for the Commission's convenience and for simplicity, STS argues that notwithstanding the fact that it agreed to pay \$10 per month for a service, that if BellSouth charged it \$1 per month instead, BellSouth has no ability whatsoever to rectify the under-billing in order to obtain the full benefit of the contractual rates that the parties agreed to. Such a result is not only illogical, it is flatly contradicted by the entirety of the parties' Agreement and the internet notification process BellSouth utilized to advise STS and other CLECs of its billing process, which is explained fully in BellSouth's Motion and supporting affidavits. Moreover, as explained in detail below, STS's Motion is simply unfounded.

A. STS's Reliance Upon Section 29.1 of the Agreement Cannot Stand

The gist of STS's Motion relies upon a tortured reading of Section 29.1 of the parties' Agreement. Section 29.1 of the Agreement states, in relevant part, that only designated true-up rates shall be reconciled "*based on final prices determined either by further agreement between*

the Parties, or by a final order (including any appeals) of the Commission." (emphasis supplied).⁹ Stated simply, Section 29.1 of the Agreement is intended to address certain rates that are not truly final; that is, the parties, anticipate changes to the underlying rates and seek to protect their rights by agreeing to a true-up process.¹⁰ Section 29.1 of the Agreement has no bearing whatsoever on the market based switching rates in the Agreement, which rates were not subject to change.¹¹

The meaning of Section 29.1 is clear by referring to Attachment 2. Rates for certain services are contained in rate sheets. In the Agreement between BellSouth and STS the Florida rate sheets begin at page 171, and contain a column denoted "Interim." At the end of the Florida rate sheets, the notes describe both the purpose of the "interim" column as well as the language set forth in Section 29.1. The notes explain "Rates displaying an "R" in Interim column are interim and subject to rate true-up *as set forth in the General Terms and Conditions.*" (emphasis supplied). Thus, by its clear terms, Section 29.1 of the Agreement, which section is part of the General Terms and Conditions, governs the true-up process for only those *rates that are expressly referred to as interim in the column on Attachment 2.*¹²

The "Interim" column in Attachment 2, the notes to the Attachment 2 rate sheet, and Section 29.1 of the Agreement, when construed in their entirety mean that carriers can enter into an agreement with assurance that rates subject to later modification can be incorporated into the contract. As a practical matter, this means that carriers can enter into an interconnection agreement when a cost proceeding is underway or anticipated during the life of the agreement.

⁹ See Exh. 3, March 17, 2005 Affidavit of Kristen E. Rowe ("Rowe Affid."), ¶ 3.

¹⁰ *Id.*, ¶ 4.

¹¹ *Id.*

¹² *Id.*, ¶¶ 5-6.

The parties will expressly designate those rates that are the subject of litigation or that the parties anticipate litigating, and by including contract language that explains how a later order will be implemented both parties have a clear understanding of the reconciliation process.¹³ Section 29.1 stands in stark contrast to the agreed upon market based switching rates that STS is contractually bound to pay.¹⁴ The market based switching rates were not part of any cost proceeding or any ongoing negotiation. The market based switching rates were not designated as “interim” with a notation in the “interim” rates column on the Attachment 2 rate sheet. The only “interim” aspect to the market based switching rates concerned the capabilities of BellSouth’s billing system, which did not nullify, modify, or negate BellSouth’s expectation of receiving and STS’s agreement to pay the rates contained in the Agreement. STS’s twisted reading of Section 29.1 cannot be squared with reality, and the Commission should deny STS’s Motion.

B. STS Cannot Avoid its Contractual Obligations to Pay Market Switching Rates

As explained above, STS’s reliance upon Section 29.1 of the Agreement is misplaced and fails to justify its motion for relief on BellSouth’s counterclaim. STS’s remaining assertions regarding its motion are likewise without foundation.

STS makes much of BellSouth’s formatting error in the rate sheet to the Agreement, claiming that a missing line of text effectively forecloses any effort by BellSouth to collect the amounts that STS promised to pay for the switching services its received. STS’s arguments, however, disregard completely that it agreed to rates in the Agreement, and that it has been billed rates lower than what the parties agreed to on a monthly basis. Assuming for the sake of argument that the Agreement never contained any language that would allow STS to determine what the missing text stated, (which is not the case; rate sheets from other states included that

¹³ Rowe Affid., ¶ 7.

¹⁴ Rowe Affid., ¶ 8.

language), and assuming further that STS never checked or reviewed BellSouth's numerous internet postings and notifications on this subject (the first of which predates the parties' Agreement), BellSouth is still entitled to receive the contract rates STS promised to pay. Commission Rule 25-4.110, subsection (10) is instructive, and provides that "where any undercharge in billing of a customer is the result of a Company mistake, the company may not backbill in excess of 12 months." Thus, even assuming the Agreement *lacked any language whatsoever*, BellSouth is entitled, by Commission rule, to backbill customers for undercharges so long as such backbilling is limited to 12 months. STS admits that BellSouth only attempted to backbill for 6 months. Consequently, STS cannot legitimately complain about BellSouth's billing practices.¹⁵

STS also relies upon the Affidavit of Keith Kramer to support its motion; however, such reliance is misplaced. STS cites to Mr. Kramer's affidavit for the general proposition that "[s]ome of the action [sic] taken by STS in reliance on the billing and actions of BellSouth are set forth in the Affidavit of Keith Kramer." (STS's Motion for Summary Final Order, p. 3). STS's Motion and Mr. Kramer's affidavit, however, are devoid of any legal support that allows STS to ignore its bills. STS has not denied that the Agreement contains market rates for switching and that it executed the Agreement through an adoption. Setting aside its exaggerated rhetoric, Mr. Kramer's affidavit makes two points – STS claims that BellSouth's market based bills are "inaccurate, to BellSouth's favor" and that STS never agreed to a six month true-up. The matter of the true-up has been discussed previously. With respect to purported inaccuracies in the billing, STS has failed whatsoever to quantify any alleged inaccuracy or irregularity that responds to BellSouth's specific detail of the billing amounts owed to it. STS's blanket denial is

¹⁵ See also *Independent Mort. and Finance, Inc. v. Deater*, 814 So.2d 1224, 1225 (Fla. 3rd DCA 2002) ("[s]imply because a contract is unclear as to when payment must be made does not relieve a party of an obligation to make payment.").

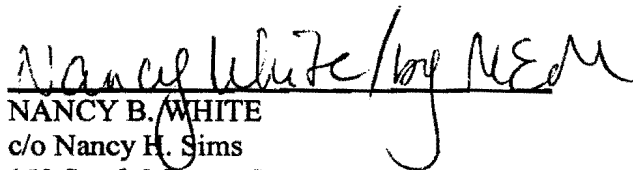
simply insufficient to defeat BellSouth's Motion for Summary Final Order. *See, e.g., Landers v. Milton*, 370 So.2d 368, 370 (Fla. 1979) (affidavits, based largely on supposition, were clearly inadequate to create an issue of fact).¹⁶ Consequently, STS's motion for summary final order on BellSouth's counterclaim should be denied.

CONCLUSION

BellSouth requests that the Commission grant its Motion to Strike and deny STS' Motion for Summary Final Order. BellSouth reiterates its prior request that the Commission order STS to promptly submit payment for the outstanding and unpaid market based switching charges that it has been billed or face the discontinuance of service.

Respectfully submitted, this 17th day of March 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.


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577147

¹⁶ *See also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (setting forth summary judgment standard and burden of responding party generally).

Exhibit 1

Barclay, Lynn

From: agold@kcl.net
Sent: Thursday, March 03, 2005 1:47 PM
To: Barclay, Lynn
Subject: STS Telecommunications / Bellsouth

Attached please find document filed today.

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1320 South Dixie Highway
Suite 870
Coral Gables, FL 33146
305-667-0475, ext. 1. (office)
305-663-0799 (fax)

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3/16/2005

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

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 failed to do so. BellSouth chose 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. 3rd DCA 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 not 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

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 Telecom, LLC*, Docket No. 031125-TP, Direct Testimony of Angel Leiro, page 9 (filed July 22, 2004).

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 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

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.

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 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.

⁴ Kramer Affidavit, ¶ 11.

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.

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
1320 South Dixie Highway
Suite 870
Coral Gables, FL 33146
(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 ___ day of March 2005, to:

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

NANCY B. WHITE
C/O Nancy H. Sims
150 South Monroe Street
Suite 400
Tallahassee, FL 32301

R. DOUGLAS LACKEY
MERIDITH E. MAYS
Suite 4300, BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, GA 30375
Lynn.Barclay@BellSouth.com

BY: ALAN C. GOLD, ESQUIRE

Florida Bar Number: 304875
JAMES L. PARADO, ESQUIRE
Florida Bar Number: 0580910

Exhibit 2

1 From This portion can be removed for Recipient's records.

Date: 3/3/05 FedEx Tracking Number: 847257781924

Sender's Name: STARR AMARANT Phone: 772-372-3110

Company: STS

Address: 12233 SW 55TH ST STE B11

City: COOPER CITY State: FL ZIP: 33030-3303

2 Your Internal Billing Reference

3 To

Recipient's Name: MURIDITH E MAY Phone: _____

Company: BELL SOUTH CENTRAL

Recipient's Address: SUITE 400

Address: 675 WILMINGTON ST, NE

City: ATLANTA State: GA ZIP: 30275



4a Express Package Service

FedEx Priority Overnight Next business day* FedEx Standard Overnight Next business day* FedEx First Overnight Delivery next business morning delivery to select locations*

FedEx 2Day Next business day* FedEx Express Saver Next business day* FedEx Envelope rate not available. Minimum charge: One-pound rate.

4b Express Freight Service

FedEx 1Day Freight* Next business day** FedEx 2Day Freight Second business day** FedEx 3Day Freight Third business day**

* Call for Confirmation. ** Declared value limit \$500

5 Packaging

FedEx Envelope* FedEx Pak* Includes FedEx Small Pak, FedEx Large Pak, and FedEx Sturdy Pak. FedEx Box FedEx Tube Other

6 Special Handling

SATURDAY Delivery Available ONLY for FedEx Priority Overnight, FedEx 2Day, FedEx 1Day Freight, and FedEx Easy Post to select ZIP codes. HOLD Weekday at FedEx Location Not available for FedEx First Overnight. HOLD Saturday at FedEx Location Available ONLY for FedEx Priority Overnight and FedEx 2Day to select locations.

Does this shipment contain dangerous goods? One box must be checked.

No Yes (see attached Shipper's Declaration) Yes Shipper's Declaration not required Dry Ice Dry Ice, 6 UN 1845 Cargo Aircraft Only

Dangerous goods (excluding Dry Ice) cannot be shipped in FedEx packaging.

7 Payment Bill to: Sender Acct. No. in Section 7 will be billed. Recipient Third Party Credit Card Cash/Check

Enter FedEx Acct. No. or Credit Card No. below. Obtain Recp. Acct. No.

Total Packages: 1 Total Weight: _____ Total Charges: _____

Your liability is limited to \$100 unless you declare a higher value. See the FedEx Service Guide for details.

8 Sign to Authorize Delivery Without a Signature

0285653931

By signing you authorize us to deliver this shipment without obtaining a signature and agree to indemnify and hold us harmless from any resulting claims. (See our Terms of Service for details.)

466

FedEx STANDARD OVERNIGHT FRI

Deliver By: **04MAR05 A2**

TRK# **8472 5778 1924** FORM 0215

30375 -GA-US **ATL AT QFEA**

RT: **5** BL: _____

MS: **4300** FL: _____

For: **MAYS MEREDITH**

Track # **33037563510000028472577819242156**

Received at: LD

03/04/2005

Carr: FEX

Pkg ID: **3063AB0366061**

NO POUCH NEEDED. See back for peel and stick application instructions.

FEDEX. US MAIL Express 8472 5778 1913

1 From: This portion can be removed by Recipient's records
 Date: 3/3/23 FedEx Tracking Number: 847257781913
 Sender's Name: JANE BARNETT Phone: 404-252-1100
 Company: STS
 Address: 12233 SW 55TH ST STE 311
 City: COOPER CITY State: FL ZIP: 33096-3903

2 Your Internal Billing Reference

3 To
 Recipient's Name: MEREDITH L MAYS Phone:
 Company: PINE SOUTH CTN
 Recipient's Address: SUITE 4300
 Address: 675 W PENNINGTON ST NE
 City: ATLANTA State: GA ZIP: 30375

8472 5778 1913

Recipient's Copy

4a Express Package Service
 FedEx Priority Overnight Next business day*
 FedEx Standard Overnight Next business day*
 FedEx 2Day Second business day*
 FedEx Express Saver Third business day*
 Packages up to 150 lbs. *To most locations. Excludes most hazardous materials. Allowance for select locations.

4b Express Freight Service
 FedEx 1Day Freight* Next business day*
 FedEx 2Day Freight Second business day*
 FedEx 3Day Freight Third business day*
 Packages over 150 lbs. *To most locations.

5 Packaging
 FedEx Envelope*
 FedEx Pak* Includes FedEx Small Pak, FedEx Large Pak, and FedEx Heavy Pak.
 FedEx Box
 FedEx Tube
 Other
 *Declared value less than \$500

6 Special Handling
 SATURDAY Delivery Available only for Priority Overnight, FedEx 2Day, FedEx 3Day Freight, and FedEx 2Day Freight to select ZIP codes.
 HOLD Monday at FedEx LOC only Not available for FedEx Priority Overnight and FedEx 2Day to select locations.
 HOLD Saturday at FedEx LOC only Not available for FedEx Priority Overnight and FedEx 2Day to select locations.
 Does this shipment contain dangerous goods? See back panel for details.
 No Yes Yes (Shipper's Declaration required)
 Dangerous goods including Dry Ice must be shipped in FedEx packaging. Dry Ice Dry Ice, 4 UN 1845 Cargo Aircraft Only

7 Payment Method
 Sender Recipient Third Party Credit Card Cash/Check
 Enter FedEx Acct. No. or Credit Card No. below. Open Acct. No.
 Total Packages: 1 Total Weight: Total Charges: Credit Card Acct. No.

8 Sign to Authorize Delivery Without a Signature

By signing your signature on the delivery slip, you authorize us to deliver this shipment without obtaining a signature. Recipient's signature may be used only on shipments from any receiving office. Maximum liability may be limited to the actual value of the contents. © 2003 FedEx Corporation. All rights reserved. FedEx and the FedEx logo are trademarks of FedEx Corporation.

***** PRIORITY SATURDAY
 Deliver By: 05MAR05 A2
 FedEx SAVINGS
 TRK# 8472 5778 1913 FORM 9215
 30375 -GA-US 37 QFEA
 ATL

RT: 5 BL: 1
 NS: A300 FL: 1
 For: MAYS MEREDITH
 Received at: LD
 03/07/2005
 CARR: FEDEX
 Pkg ID: 3064003-2033
 Track # 3363756410000424472577819132159

FedEx Express
SDR
 FedEx Saturday Delivery 151967 REV 10/04 MVM

DR
151967 REV 10/04 MVM

Exhibit 3

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

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

AFFIDAVIT OF KRISTEN E. ROWE

I, Kristen E. Rowe, being of lawful age, and duly sworn upon my oath, do hereby depose and state:

1. My name is Kristen E. Rowe. I am employed by BellSouth as Director - CLEC Negotiations in the Interconnection Services group. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.
2. I previously filed an Affidavit dated February 10, 2005 in support of BellSouth's Motion for Summary Final Order in this docket. My educational background and professional experience is detailed in my February 10, 2005 affidavit. The purpose of this Affidavit is to discuss additional language contained in the interconnection agreement between BellSouth and STS and explain BellSouth's intent in entering into an Agreement with that language.
3. Section 29.1 of the Agreement between BellSouth and STS applies only to Network Interconnection and/or Unbundled Network Elements and other Services Rates that are expressly subject to true-up. Such rates shall be reconciled "based on final prices determined either by further agreement between the Parties, or by a final order (including any appeals) of the Commission." See Attachment A to this Affidavit (which is an excerpt of the Agreement with this language).

4. Section 29.1 of the Agreement is intended to address certain rates that are not truly final; that is, the parties, anticipate changes to the underlying rates and seek to protect their rights by agreeing to a true-up process. Section 29.1 of the Agreement has no bearing whatsoever on the market based switching rates in the Agreement, which rates were not subject to change.
5. The rate sheet included in Attachment 2 of the Agreement refers to Section 29.1 and provides the information necessary to determine which rates “are expressly subject to true-up.” The Florida rate sheet of the Agreement between BellSouth and STS has a column titled “Interim.” At the end of the Florida rate sheets, the notes describe both the purpose of the “interim” column as well as the language set forth in Section 29.1. The notes explain: “Rates displaying an ‘R’ in Interim column are interim and subject to rate true-up as set forth in the General Terms and Conditions.” See Attachment B to this Affidavit (which is an excerpt from Attachment 2 of the Agreement with the explanatory notes and that shows the interim column).
6. Section 29.1 of the Agreement, referred to in Paragraph 3, is the language contained in the General Terms and Conditions. Section 29.1 is intended to govern the true-up process for only those rates that are expressly marked as interim in the column on Attachment 2.
7. The “Interim” column in Attachment 2, the notes to the Attachment 2 rate sheet, and Section 29.1 of the Agreement, are intended to mean that carriers can enter into an agreement with assurance that rates subject to later modification can be incorporated into the contract. As a practical matter, this means that carriers can enter into an interconnection agreement when a cost proceeding is underway or when a cost

proceeding is anticipated during the life of an agreement. The parties will expressly designate those rates that are the subject of litigation or that the parties anticipate litigating, and by including contract language that explains how a later order will be implemented both parties have a clear understanding of the reconciliation process.

8. Section 29.1 does not apply to the market based switching rates that STS contractually agreed to pay BellSouth. The market based switching rates were not part of any cost proceeding or any ongoing negotiation. The market based switching rates were not designated as "interim" with a notation in the "interim" column on the Attachment 2 rate sheet.
9. BellSouth entered into the Agreement with STS with the expectation and intention of receiving payment at the rates contained in the Agreement for the market based switching rates.
10. This concludes my Affidavit.


I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.



KRISTEN E. ROWE

SWORN TO AND SUBSCRIBED BEFORE ME

This 17th day of March, 2005.



NOTARY PUBLIC

My Commission Expires:

577288

Lynn J. Barclay
Notary Public, DeKalb County, Georgia
My Commission Expires August 13, 2006.

Attachment A

27. Good Faith Performance

Each Party shall act in good faith in its performance under this Agreement and, in each case in which a Party's consent or agreement is required or requested hereunder, such Party shall not unreasonably withhold or delay such consent or agreement.

28. Nonexclusive Dealings

This Agreement does not prevent either Party from providing or purchasing services to or from any other person nor, except as provided in Section 252(i) of the Act, does it obligate either Party to provide or purchase any services (except insofar as the Parties are obligated to provide access to Interconnection, services and Network Elements to IDS Telcom as a requesting carrier under the Act).

29. Rate True-Up

29.1 This section applies to Network Interconnection and/or Unbundled Network Elements and Other Services rates that are expressly subject to true-up under this Agreement.

29.2 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. The Parties shall implement the true-up by comparing the actual volumes and demand for each item, together with the designated true-up rates for each item, with the final prices determined for each item. Each Party shall keep its own records upon which the true-up can be based, and any final payment from one Party to the other shall be in an amount agreed upon by the Parties based on such records. In the event of any disagreement as between the records or the Parties regarding the amount of such true-up, the Parties shall submit the matter to the Dispute Resolution process in accordance with the provisions of Section 10 of the General Terms and Conditions of this Agreement.

29.3 An effective order of the Commission that forms the basis of a true-up shall be based upon cost studies submitted by either or both Parties to the Commission and shall be binding upon BellSouth and IDS Telcom specifically or upon all carriers generally, such as a generic cost proceeding.

30. Survival

The Parties' obligations under this Agreement which by their nature are intended to continue beyond the termination or expiration of this Agreement shall survive the termination or expiration of this Agreement.

31. Entire Agreement

Attachment B

UNBUNDLED NETWORK ELEMENTS - Florida										Attachment: 2		Exhibit: B			
CATEGORY	RATE ELEMENTS	Interim	Zone	BCS	USOC	RATES(\$)				Svc Order Submitted Elec per LSR	Svc Order Submitted Manually per LSR	Incremental Charge - Manual Svc Order vs. Electronic-1st	Incremental Charge - Manual Svc Order vs. Electronic-Add'l	Incremental Charge - Manual Svc Order vs. Electronic-Disc 1st	Incremental Charge - Manual Svc Order vs. Electronic-Disc Add'l
						Rec	Nonrecurring		Nonrecurring Disconnect						
							First	Add'l	First	Add'l	SOME C	SOMAN	SOMAN	SOMAN	SOMAN
	2-Wire Voice Grade Port (Centrex from diff Serving Wire Center)?			UEP9E	UEPHM	14.00	180.00	110.00	85.00	20.00		11.90			
	2-Wire Voice Grade Port, Diff Serving Wire Center - 800 Service Term			UEP9E	UEPHZ	14.00	180.00	110.00	85.00	20.00		11.90			
	2-Wire Voice Grade Port terminated in on Megalink or equivalent			UEP9E	UEPH9	14.00	70.00	35.00	35.00	10.00		11.90			
	2-Wire Voice Grade Port Terminated on 800 Service Term			UEP9E	UEPH2	14.00	70.00	35.00	35.00	10.00		11.90			
	Local Switching														
	Centrex Intercom Functionality, per port			UEP9E	URECS	0.7384									
	Local Number Portability														
	Local Number Portability (1 per port)			UEP9E	LNPCC	0.35									
	Features														
	All Standard Features Offered, per port			UEP9E	UEPVF	0.00									
	All Select Features Offered, per port			UEP9E	UEPVS	0.00	370.70					11.90			
	All Centrex Control Features Offered, per port			UEP9E	UEPVC	0.00									
	NARS														
	Unbundled Network Access Register - Combination			UEP9E	UARCX	0.00	0.00	0.00				11.90			
	Unbundled Network Access Register - Inldial			UEP9E	UAR1X	0.00	0.00	0.00				11.90			
	Unbundled Network Access Register - Outdial			UEP9E	UAROX	0.00	0.00	0.00				11.90			
	Miscellaneous Terminations														
	2-Wire Trunk Side														
	Trunk Side Terminations, each			UEP9E	CEND6	8.81									
	4-Wire Digital (1.544 Megabits)														
	DS1 Circuit Terminations, each			UEP9E	M1HD1	54.95									
	DS0 Channel Activated Per Channel			UEP9E	M1HD0	0.00	15.69					11.90			
	Interoffice Channel Mileage - 2-Wire														
	Interoffice Channel Facilities Termination			UEP9E	MIGBC	25.32									
	Interoffice Channel mileage, per mile or fraction of mile			UEP9E	MIGBM	0.0091									
	Feature Activations (DS0) Centrex Loops on Channelized DS1 Service														
	D4 Channel Bank Feature Activations														
	Feature Activation on D-4 Channel Bank Centrex Loop Slot			UEP9E	1PQWS	0.66									
	Feature Activation on D-4 Channel Bank FX line Side Loop Slot			UEP9E	1PQW6	0.66									
	Feature Activation on D-4 Channel Bank FX Trunk Side Loop Slot			UEP9E	1PQW7	0.66									
	Feature Activation on D-4 Channel Bank Centrex Loop Slot - Different Wire Center			UEP9E	1PQWP	0.66									
	Feature Activation on D-4 Channel Bank Private Line Loop Slot			UEP9E	1PQWV	0.66									
	Feature Activation on D-4 Channel Bank Tjls Line/Trunk Loop Slot			UEP9E	1PQWQ	0.66									
	Feature Activation on D-4 Channel Bank WATS Loop Slot			UEP9E	1PQWA	0.66									
	Non-Recurring Charges (NRC) Associated with UNE-P Centrex														
	NRC Conversion Currently Combined Switch-A6-Is with allowed changes, per port			UEP9E	USAC2		21.50	8.42				11.90			
	Conversion of Existing Centrex Common Block, each			UEP9E	USACN		5.17	8.32				11.90			
	New Centrex Standard Common Block			UEP9E	M1ACS	0.00	618.82					11.90			
	New Centrex Customized Common Block			UEP9E	M1ACC	0.00	618.82					11.90			
	NAR Establishment Charge, Per Occasion			UEP9E	URECA	0.00	66.48					11.90			
	Note 1 - Required Port for Centrex Control in TAESS, 6ESS & EWSD														
	Note 2 - Requires Interoffice Channel Mileage														
	Note 3 - Requires Specific Customer Premises Equipment														
	Note: Rates displaying an "R" in Interim column are interim and subject to rate true-up as set forth in General Terms and Conditions.														