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Matilda Sanders

From: Barclay, Lynn [Lynn.Barclay@BellSouth.com]
Sent: Friday, May 20, 2005 2:47 PM
To: Filings@psc.state.fl.us
Cc: Fatool, Vicki; Linda Hobbs; Nancy Sims; Holland, Robyn P; Bixler, Micheale; Slaughter, Brenda ; Mays, Meredith
Subject: RE: 040732-TP BellSouth's Motion to Strike and Response in Opposition to Motion for Summary Final Order
Attachments: 040732-TP response in opposition to STS's supplemental response.doc; 040732 response in opposition to STS's Emergency Motion.pdf

A. Lynn Barclay
Legal Secretary to Meredith Mays
BellSouth Telecommunications, Inc.
c/o Nancy Sims
150 South Monroe Street
Room 400
Tallahassee, Florida 32301

B. Docket No. 040732-TP (In re: Interconnection Agreement between Saturn Telecommunications Services, Inc. d/b/a STS Telecom and BellSouth Telecommunications, Inc.)

C. BellSouth Telecommunications, Inc.
on behalf of Meredith E. Mays:

D. 8 pages total pdf
6 pages total (word version of pleading, in lieu of disk)

E. BellSouth Telecommunications, Inc.'s Response in Opposition to STS's Emergency Motion to File Supplemental Response

<<040732-TP response in opposition to STS's supplemental response.doc>> <<040732 response in opposition to STS's Emergency Motion.pdf>>

Lynn Barclay
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Legal Department

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May 20, 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 Response in Opposition to STS's Emergency Motion to File Supplemental Response, 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
586386

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 20th day of May, 2005 to the following:

Staff Counsel
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Meredith E. Mays

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Interconnection Agreement between Saturn Telecommunication Services, Inc. d/b/a STS Telecom and BellSouth Telecommunications, Inc.	)	Docket No.: 040732-TP
	)	Dated: May 20, 2005

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE IN OPPOSITION TO STS'S EMERGENCY MOTION TO FILE SUPPLEMENTAL RESPONSE

INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Response in Opposition to the Emergency Motion to File Supplemental Response ("Motion") filed by Saturn Telecommunication Services, Inc. d/b/a STS Telecom ("STS") on May 13, 2005.[1]

STS's latest attempt to avoid payment to BellSouth, through the guise of a "supplemental memorandum," lacks merit and should be denied. First, STS cannot file a supplemental memorandum pursuant to applicable Commission procedure. Consequently, the Commission should deny STS's emergency motion and strike STS's "supplemental" memorandum. Second, STS has refused to pay BellSouth market based rates for switching services that BellSouth has provided, despite its promise to do so. STS, therefore, has no legitimate argument that BellSouth must continue accepting switching orders for services that STS has no intention whatsoever of paying for at the contractually agreed upon rate. Indeed, STS has expressly stated that, despite FCC rulings to the contrary, it is impaired without access to switching in the Miami and Ft. Lauderdale Metropolitan Statistical Areas ("MSAs").[2] STS has also asked the Commission to set aside the market based rates it agreed to pay, under the theory that it has "objected" to these

[1] BellSouth has received a copy of the staff recommendation in this docket, which recommendation would render STS's Motion moot. Because that recommendation will not be addressed until after the deadline for responding to STS's Motion, BellSouth files this response. BellSouth will withdraw this response if necessary after the Commission addresses staff's recommendation.

[2] Complaint, ¶ 19.

rates as "unfair."[3] Consequently, STS has benefited from switching *at TELRIC rates* for over a year in areas the FCC has previously found unimpaired, and now that BellSouth has implemented the *TRRO* and Order No. PSC-05-0492-FOF-TP ("Order"), both of which unambiguously provide that "as of March 11, 2005, requesting carriers may not obtain new local switching as a UNE," STS has the audacity to suggest that BellSouth cannot refuse its orders. STS's arguments are misguided, its motion is flawed, and STS's circuitous attempt to continue receiving switching services at UNE prices when the FCC and this Commission have unambiguously rejected the continuation of the illegal UNE-P regime should be rejected out of hand.

DISCUSSION

A. The Commission Should Deny STS's Motion and Strike STS's Supplemental Response

The Commission should deny STS's motion to file a "supplemental response." Instead, the Commission should strike STS's supplemental pleading from the record. STS has previously filed its opposition to BellSouth's Motion for Summary Final Order (although such response was procedurally and substantively defective), and has also filed a Motion for Summary Final Order (which response was also procedurally and substantively flawed). This Commission has consistently recognized that the Florida Administrative Code does not allow parties to file additional replies to a response in opposition to a Motion.[4] Because STS's "supplemental" memorandum is actually a reply, which is a pleading disallowed by well-established Commission procedure, its motion should be denied.

B. STS's Supplemental Response Supports BellSouth's Motion for Summary Final Order

[3] *Id.*, ¶ 25.
[4] *See* Order No. PSC-04-0636-FOF-TL (neither the Uniform Rules nor the Commission's rules contemplate a reply to a response to a motion); *accord* Order No. PSC-00-1777-PCO-TP; *and* Order No. PSC-04-0511-PAA-TP.

If the Commission grants STS's Motion and considers its supplemental filing (which it should not), the arguments STS makes do not defeat BellSouth's Motion for Summary Final Order.

STS's fundamental premise is that BellSouth must either: (1) accept its orders for new switching services for customers with four or more lines in the Miami and Ft. Lauderdale Metropolitan Statistical Areas ("MSAs") because the parties' interconnection agreement contains market based rates; or (2) that BellSouth must ignore the market based rates contained in the parties' interconnection agreement and effectively provide STS with switching at TELRIC rates despite the FCC's rulings to the contrary. Neither argument passes muster.

STS's theory concerning market based rates ignores the entirety of the parties' interconnection agreement. Language at the beginning of the parties' interconnection agreement provides the contract is intended "to interconnect . . . facilities and exchange traffic *pursuant to Sections 251 and 252 of the Act.*"[5] Although BellSouth included in the parties' agreement *market rates* for switching services that BellSouth was not required to provide pursuant to Section 251 of the Act,[6] any *orders* STS submits to BellSouth are submitted under the terms and conditions of a Section 251/252 interconnection agreement that has been modified pursuant to federal law. Under federal law, BellSouth is not required to accept and provision switching under Section 251. Therefore, although the *market rates* contained in the agreement are acceptable to BellSouth, the terms and conditions by which STS places orders have been changed under federal law (a change this Commission acknowledged in its Order). Thus, BellSouth has no obligation to provide switching when STS orders such services under the guise of a Section

[5] *See* Exhibit KER-2 to the Affidavit of Kristen E. Rowe filed February 14, 2005 (General Terms and Conditions, fourth "Whereas" clause).
[6] BellSouth no longer includes market based rates in its Section 251/252 Interconnection Agreements.

251/252 contract.

STS also ignores its actions. STS has consistently refused to pay the market based switching rates contained in the agreement. If the Commission accepted STS's argument, however, STS would continue placing orders that would result in an increase to the underlying billing dispute. STS would be rewarded for its breach of contract to BellSouth's detriment. STS's arguments might generate some passing, trivial appeal had STS actually been paying BellSouth the market based rates in the contract, but STS has not done so, has never done so, and shows no indication of ever planning to do so absent a Commission order.

If STS has reversed its position, and is now willing to pay BellSouth for switching services at market based rates, STS can enter into a commercial agreement for such services, as over one hundred other carriers have done. What STS cannot do, however, is continue placing new orders for switching under the terms and conditions of a Section 251/252 interconnection agreement, dispute the market based rates it agreed to pay, and then claim BellSouth's failure to accept and provision its orders has any bearing on a billing dispute that was filed in July 2004, well before the issuance of the *TRRO* and the Order.

STS makes a number of additional superfluous and unsupported allegations that BellSouth must briefly address.

First, STS asserts that BellSouth intends to eliminate competition "by refusing to supply . . . non-UNE services." (Memorandum, ¶ 3). STS's assertion is plainly wrong. BellSouth has entered into over one hundred commercial agreements that provide for the continued provision of switching.

Second, STS claims that a portion of the parties' Section 251/252 interconnection agreement constitutes "alternative arrangements," unaffected by the *TRRO* and the Order. *See,*

e.g., Memorandum, ¶ 12. This claim cannot stand. The parties' contract contains an indivisibility clause, by which the Agreement is "indivisible and nonseverable . . . [and] intended to constitute a single transaction" with "interdependent" obligations."[7] This unambiguous language defeats STS's contention that BellSouth's agreement to provide switching at market based rates (which STS has refused to pay), satisfies the FCC's expectation of a commercial (i.e., non Section 251/252) agreement.

Third, STS's allegations concerning unfair solicitation of customers, coercion, and the SQM/SEEM plans are readily dispelled. With respect to STS's claims that BellSouth has attempted to improperly solicit its customers, BellSouth is ready and willing to review any such claims if provided sufficient information. STS has not provided BellSouth with the names of its customers or the dates of any alleged improper solicitation; instead, STS has filed a hodge-podge of marketing materials none of which has any obvious link to STS or its customers. STS's unsubstantiated claims must be rejected.

Likewise, STS's claim of coercion is similarly misplaced. If STS does not wish to enter into a commercial agreement, then it can serve its customers using resale arrangements, or by entering into an agreement with another carrier, or by investing in its own switch. BellSouth is in no way seeking to compel STS to enter into an agreement; rather, BellSouth seeks only to compel STS to pay for those services it has already received at the agreed upon contractual rates.

Finally, it is entirely appropriate to remove services that are no longer UNEs from BellSouth's performance monitoring plans, which plans were designed to ensure that ILECs were "meeting their obligation to provide *unbundled access* . . . to [C]LECs . . . ." *See* Order No. PSC-01-1819-FOF-TP (emphasis supplied). There is nothing "unconscionable" about removing

[7] *See* Exhibit KER-2 to the Affidavit of Kristen E. Rowe filed February 14, 2005 (General Terms and Conditions, Section 16, Indivisibility).

services that are no longer UNEs from plans that address BellSouth's unbundling obligations.

CONCLUSION

BellSouth asks the Commission to deny STS's emergency motion and to strike STS's supplemental memorandum. BellSouth reiterates its 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 20th day of May 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.

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