BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint against BellSouth Telecommunications, Inc. seeking resolution of monetary dispute regarding alleged overbilling under interconnection agreement, and requesting stay to prohibit any discontinuance of service pending resolution of matter, by Saturn Telecommunications Services, Inc. d/b/a STS Telecom.	DOCKET NO. 040732-TP ORDER NO. PSC-05-0702-FOF-TP ISSUED: June 29, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
LISA POLAK EDGAR

ORDER GRANTING MOTION TO STRIKE AND MOTION FOR SUMMARY FINAL ORDER

BY THE COMMISSION:

Case Background

On July 12, 2004, Saturn Telecommunications Services, Inc. d/b/a STS Telecom, LLC. (STS) filed a complaint against BellSouth Telecommunications, Inc. (BellSouth) for overbilling and to stay any discontinuance of service. STS claims that it timely objected to the over billings and that on July 2, 2004, BellSouth advised STS that it was rejecting the objections. In addition, STS believes that the manner in which BellSouth bills STS and other CLECs for the market based rates creates additional burdens on STS.

On July 29, 2004, BellSouth filed its Answer and Counterclaim, urging that STS' complaint is a blatant attempt to circumvent agreed upon rates, terms, and conditions contained within the parties' Interconnection Agreement (IA or Agreement)[1]. BellSouth requested that we enter an order denying the relief sought by STS and order STS to immediately pay the amount owed in full, plus interest and late fees.

[1] STS adopted in its entirety the IDS Telecom, LLC Interconnection Agreement dated February 5, 2003; the adoption was deemed approved by the Commission on September 5, 2003, in Docket No. 030487-TP. The agreement expires on February 4, 2006.

On August 19, 2004, STS provided its response to BellSouth's Affirmative Defenses and Counterclaim, denying them, but providing no detail or argument. That response was not filed with our FPSC Clerk, but, rather, mailed directly to the Office of the General Counsel. STS was advised that all pleadings should be filed with Commission Clerk.

On February 14, 2005, BellSouth filed its Motion for Summary Final Order. On February 22, 2005, STS filed its Motion for a 10-day extension of time to file its response to the BellSouth Motion, and on March 4, 2005, STS filed its Response in Opposition to BellSouth's Motion for Summary Final Order.

On March 17, 2005, BellSouth filed its Motion to Strike STS' Response. On March 24, 2005, a FedEx package from STS was delivered to the our General Counsel's Office, addressed to Douglas Lackey, an attorney serving in the Atlanta offices of BellSouth. However, the package contained the address of the office of the General Counsel of the FPSC. The package contained STS' Response to BellSouth's Motion to Strike. Once again, this STS pleading should have been filed with the Division of the Commission Clerk, but was not. Also, though there was a certificate of service showing copies to our staff and BellSouth, our staff did not receive its copy and BellSouth advised that it did not receive its copy.

At the June 21, 2005, Agenda Conference, we heard and considered oral argument from both parties regarding the issues contained in our staff's recommendation.

Motion to Strike

BellSouth's Motion

BellSouth first notes that:

> . . . in the last year, STS has initiated three separate proceedings against BellSouth – this docket, Docket No. 040533-TP, and Docket No. 040927-TP. STS voluntarily dismissed the latter two dockets, but this case remains open. BellSouth states that up to this point it has restrained itself, in this and prior dockets, from objecting to reasonable modifications to filing dates and procedural matters. At this juncture, however, BellSouth advises that STS' 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, STS filed a late, incomplete, and defective response.

BellSouth emphasizes that although it 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' Response to BellSouth's Affirmative Defenses and Counterclaim included a notation "Filed: July 29, 2004," the certificate of service notes that it was served by mail on August 19, 2004, and BellSouth urges that 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, notes BellSouth, by memo dated

January 6, 2005, Mr. Lee Fordham with the Office of the General Counsel submitted a copy of STS' Response to Ms. Bayó, noting that the Response "was not properly filed with the office of the PSC Clerk." As a matter of law, claims BellSouth, STS has not responded to BellSouth's Affirmative Defenses and Counterclaim, which are therefore deemed admitted.

Pursuant to Florida Administrative Code 28-106.103 and 28-106.204(4), BellSouth argues that any response in opposition to BellSouth's Motion for Summary Final Order was due on February 21, 2005. STS' Motion for Extension of Time to file its response was due on February 21, 2005. BellSouth states that, to its knowledge, STS did not file its Motion for Extension of Time on February 21, 2005. STS' cover letter to its Motion for Extension of Time is dated January 24, 2005, referencing an incorrect docket number -- Docket No. 040533-TP. STS' certificate of service is dated February 21, 2005. Commission records show a filing date of February 22, 2005, which means that STS filed its Motion for Extension of Time one day late.[2] BellSouth notes that 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' Motion For an Extension of Time."

On February 24, 2005, this Commission issued Order No. PSC-05-0224-PCO-TP, granting STS' request for a ten day extension of time to file its response in opposition to BellSouth's Motion for Summary Final Order. BellSouth notes that in light of the issuance of the Extension Order, STS' "preliminary" response, including the affidavits of Keith Kramer and Jonathan Krutchik was not "intended to be utilized." Moreover, claims BellSouth, based on the original due date of February 21, 2005, the Extension Order, by its terms, meant that STS' 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 states it received, via electronic mail, STS' 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. Based on the Commission's records, BellSouth notes that STS failed to file any response in opposition to BellSouth's Motion for Summary Final Order on March 3, 2005.[3]

On March 4, 2005, BellSouth relates, it received, via federal express, one large box and a smaller box of billing records. These records were bound in 19 separate volumes, titled

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[2] 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).

[3] With regard to the reliance on Commission records, we understand this to be a reference to the Commission's Case Management System (CMS).

"BellSouth MBR Invoices." No affidavits or other explanatory documents were included with these records. Also, according to BellSouth, on March 4, 2005, STS filed with the Commission its Response in Opposition to BellSouth's Motion for Summary Final Order, together with the Affidavit of Jonathan Krutchik. STS' March 4, 2005, filing was untimely and did not satisfy the terms of the Extension Order. BellSouth reports that on March 7, 2005, it received, via federal express, another large box of billing records. 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 states it also received, on March 7, 2005, a signed copy of STS' 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' counsel), and a second copy of the Affidavit of Jonathan Krutchik.

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, claims BellSouth, once it received what it presumed to be the entirety of STS' response, it remained incomplete. In relevant part, STS' response refers to an affidavit of Mr. Keith Kramer. BellSouth reiterates that it received no such affidavit on March 3, 2005, or March 7, 2005. According to BellSouth, 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 not granted. Consequently, BellSouth argues, STS' failure to provide a complete response to BellSouth's Motion at any time provides additional grounds for striking STS' deficient response in its entirety.

Finally, urges BellSouth, 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 Docket No. 040533-TP, 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). Accordingly, BellSouth argues, 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 BellSouth's Motion to Strike STS' Response *in toto* should be granted.

STS' Response

STS first disputes BellSouth's contention that STS' Response to BellSouth's Affirmative Defenses and Counterclaim was not filed properly with the Commission. In any event, STS argues, even if the Response was not properly filed, failure to respond should be treated as a general denial. STS then argues that if BellSouth insists on enforcing a deadline for STS to file its Response, then BellSouth should also be subject to the same treatment, i.e., BellSouth is estopped from filing a Motion to Strike, since it failed to timely file the Motion to Strike within 7 days of discovering STS' alleged failure to file timely.

STS further urges that BellSouth waived any objections to STS' alleged untimely filing when BellSouth filed a Motion For Summary Final Order on February 14, 2005. STS argues that Florida law requires responsive pleadings should not be stricken without leave to amend. Also, litigants should be allowed to amend pleadings freely in order that causes of action may be tried on their merits and in the interest of justice; any doubts should be resolved in favor of allowing amendments. Van Valkenburg v. Chris Craft Industries, Inc., 252 So.2d 280 (Fla. 4th DCA 1971). Further, striking of a party's pleadings resulting in dismissal or default is the most severe sanction. It should be used sparingly and reserved for those instances where conduct is flagrant, willful, or persistent. Barnes v. Horan 841 So.2d 472 (Fla. 3rd DCA 2003).

STS argues it filed its Answer and Affirmative Defenses, Responses In Opposition to BellSouth's Summary Final Order (sic), and STS' Motion For Summary Final Order, in good faith. According to STS, BellSouth is in no way prejudiced, as all of STS' filings have been served on BellSouth and are all before the Commission. With respect to the Affidavit of Keith Kramer, the same was served on BellSouth and the Commission with STS' preliminary Response on March 3, 2005. With all of the Responses and supporting documentation being served on BellSouth and the Commission, STS claims there is no valid reason as to why the Commission cannot make its rulings on all motions before it on the merits. STS claims BellSouth is unfairly attempting to deny STS' right to have judgments before the Commission on the merits of the case because BellSouth realizes that its Counterclaim and Motion For Summary Final Order are without merit.

Analysis

The striking of a pleading based on procedural defects is a harsh penalty. However, in the present instance, it is warranted because STS has demonstrated a continuing and flagrant disregard of the rules and procedures necessary to properly plead its case before this Commission. Therefore, STS' conduct in not timely or properly filing virtually everything meets the criteria for striking set forth in Barnes v. Horan ". . . where conduct is flagrant, willful, or persistent." Below are some of the filings in this Docket which highlight examples of STS' apparent inability to comply:

August 19, 2004	Response to BellSouth's Affirmative Defenses and Counterclaim. This Document has never been properly filed with the FPSC Clerk, but, rather provided only to GCL, in spite of previous instruction from our staff on proper filing. On January 6, 2005, our staff placed a copy in the Docket file.
February 22, 2005	STS' Motion for Extension of Time to File Response. This Motion was filed outside of the 10-day response period. The cover letter for that filing contained an incorrect docket number and required research by the FPSC clerk, who subsequently identified the present Docket and corrected the number.

March 4, 2005	STS filed its Response, outside of the 10-day extension which had previously been granted.
February 28, 2005	STS filed its Notice of Intent to Request Specified Confidential Classification, but did not state the Document Number to be protected, leaving our staff to speculate as to the document number. STS never followed up with an appropriate request. Our staff called STS on April 1, 2005 and reminded them the request must be filed.
March 4, 2005	Our GCL staff received 2 large and 1 small box containing numerous volumes of raw billing data. There were no pleadings or explanations regarding the data and, as of the filing of this recommendation, we are unaware of the purpose of that data.
March 21, 2005	STS filed its Request for Specified Confidentiality of DN 02273-05. However, the document for which protection was sought had been filed as a public record 13 days earlier, on March 4, and was not amenable to retroactive protection.
March 24, 2005	A FedEx package from STS was received in our GCL section, addressed to Douglas Lackey, who is an attorney for BellSouth in Atlanta, but containing the mailing address of the FPSC General Counsel. On March 28, our staff called STS and determined that they had once again erred and the package was intended as a filing in the present Docket. As an accommodation to STS, our staff filed the pleading with the office of the clerk on behalf of STS. However, as a result of the STS errors the response was again not timely filed.
April 25, 2005	STS filed a Request for Specified Confidentiality, but again failed to specify the Document Number of the document for which protection is sought, leaving our staff to speculate based on a general description given by STS.

Over the months spanned by these problematic pleadings, our staff had a number of telephonic communications with STS wherein proper procedures were explained to counsel for STS.[4] Despite the verbal instruction from our staff, the same departures from proper procedure persisted. These examples alone are sufficient to justify disallowing any further pleadings that are not in strict compliance. However, STS' conduct in this Docket is made all the more egregious by the fact that it has occurred immediately after being admonished by this Commission in a separate docket for similar conduct. STS was told in Order No. PSC-05-0139-PCO-TP, filed February 4, 2005 in Docket No. 040533-TP, that:

[4] We note that STS is represented by Counsel, who is a Florida Bar member.

> 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.

Yet, even following that admonition, STS continued in the present Docket to demonstrate an "inability to comply with proper procedural requirements" for practice before this Commission.

Conclusion

Based on the above, we grant BellSouth's Motion to Strike STS' Response in Opposition to Motion for Summary Final Order for failure to comply with Order No. PSC-05-0224-PCO-TP. STS' Response in Opposition to BellSouth's Motion for Summary Final Order shall not be considered in the disposition of BellSouth's Motion for Summary Final Order, nor shall STS' Supplemental Response. Further, the May 16, 2005, Emergency Motion filed by STS is rendered moot.

Motion for Summary Final Order

BellSouth's Motion

BellSouth urges that STS has no right to avoid its contractual obligations, and respectfully requests that we enter an order granting its counterclaim and requiring STS to promptly pay for the switching services it received. BellSouth claims there is no genuine issue of material fact as to any issues, and it is entitled to a summary final order in its favor as a matter of law. BellSouth alleges that the following facts are undisputed:

1. STS adopted in its entirety an interconnection agreement between IDS Telecom, LLC and BellSouth, which was originally approved in Docket No. 030158-TP. The parties' Agreement became effective on May 30, 2003, and will expire on February 4, 2006.

2. The adoption went into effect by operation of law as set forth in Commission staff's memorandum to Docket No. 030487-TP, filed on September 5, 2003. No party filed any objection to any of the terms of either the BellSouth-STS Agreement or the BellSouth-IDS interconnection agreement.

3. The provisions of the parties' interconnection agreement, as set forth below, govern this dispute:

Section 1.7.1 of Attachment 2 –

> [t]he prices that [STS] *shall pay* to BellSouth for Network Elements and Other Services are set forth in Exhibit B to this Attachment." (emphasis supplied).

Section 4.2.2 of Attachment 2 of the Agreement –

> Notwithstanding BellSouth's general duty to unbundle local circuit switching, BellSouth shall not be required to unbundle local circuit switching for [STS] when [STS] serves an end-user with four (4) or more voice-grade (DS-0) equivalents or lines served by BellSouth in one of the following MSAs: . . . Miami, FL; Orlando, FL; Ft. Lauderdale, FL . . . .

Section 4.2.3 of Attachment 2 –

> In the event that [STS] orders local circuit switching for an end user with four (4) or more DS0 equivalent lines within Density Zone 1 in an MSA listed above, BellSouth shall charge [STS] the market based rates in Exhibit B for use of the local circuit switching functionality for the affected facilities.

Section 5.5.4 of Attachment 2 –

> BellSouth is not required to provide combinations of port and loop network elements on an unbundled basis where, pursuant to FCC rules, BellSouth is not required to provide circuit switching as an unbundled network element.

Section 5.5.5 of Attachment 2 -

> BellSouth shall not be required to provide local circuit switching as an unbundled network element in density Zone 1, as defined in 47 CFR 69.123 as of January 1, 1999 of the . . . Miami, FL; Orlando, FL; Ft. Lauderdale, FL . . . MSAs to [STS] if [STS's] customer has 4 or more DS0 equivalent lines.

Section 5.5.6 of Attachment 2 –

> BellSouth shall provide combinations of port and loop network elements on an unbundled basis where, pursuant to FCC rules, BellSouth is not required to provide local circuit switching as an unbundled network elements and shall do so at the market rates in Exhibit B.

BellSouth also believes that the rate sheet accompanying Attachment 2 clearly establishes non-recurring and recurring "Unbundled Port Loop Combinations – Market Rates" for a variety of switching services, while the Florida rate sheet also includes the following sentence (apparently cut off in the formatting or printing process), "BellSouth currently is 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 [sic – words missing in original]." Although STS adopted the underlying BellSouth-IDS interconnection agreement for the state of Florida only, the printed rate sheets from other states include this sentence in its entirety in the hard copy printout. This sentence, in its entirety, includes the italicized language below: "BellSouth currently is 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 *Rates, BellSouth shall bill the rates in the Cost-Based section preceding in lieu of the Market Rates and reserves the right to true-up the billing difference.*" (emphasis supplied).

BellSouth contends that it is provisioning certain switching services at market rates in accordance with the FCC's *UNE Remand Order.*[5] Specifically, BellSouth maintains that prior federal rules did not require BellSouth to provide unbundled switching at cost-based rates to customers with four or more lines in certain density zone 1 central offices in the Fort Lauderdale, Miami, and Orlando Metropolitan Statistical Areas ("MSAs").[6] These rules were invalidated and remanded to the FCC in *United States Telecom. Ass'n. v. FCC.*[7] Consistent with the resulting rules, BellSouth asserts it included language in the Agreement with STS to comply with the switching exemption.

Prior to STS' adoption of the Agreement, BellSouth explains that it had already entered into interconnection agreements in Florida, which agreements, like the Agreement between the parties, contain market based switching rates applicable to CLECs for end user customers with four or more DS0 lines in the density zone 1 central offices located within the Fort Lauderdale, Miami, and Orlando MSAs. These agreements uniformly provide that BellSouth will initially bill carriers at cost-based rates, subject to a later true-up. On August 30, 2002, BellSouth posted Carrier Notification Letter SN91083301 to its interconnection website explaining the different rates in its interconnection agreements. This letter also explained BellSouth's implementation of billing reconciliation efforts; specifically, where UNE-P market rates should apply, CLECs would be billed accordingly beginning with October 2002 billing records.

BellSouth maintains that it continued to advise the CLEC community of its billing reconciliation efforts to charge market-based switching rates, where appropriate, by posting letters on its interconnection website. Carrier notification letters were posted on April 9, 2003, May 23, 2003, and November 6, 2003. Carrier Notification letter SN91083885, posted November 6, 2003, specifically explained that BellSouth would true-up under-billed UNE-P market rates every six months, in December and June.

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[5] 15 FCC Rcd 3696, ¶ 293 (1999); also Rowe Affid. ¶ 15.

[6] 65 FR 2551, Jan. 18, 2000; 65 FR 19334, Apr. 11, 2000; 47 C.F.R. § 51.319(c)(2), prior to October 2, 2003.

[7] 290 F.3d 415 (D.C. Cir. 2002) ("USTA I"), cert. denied, 538 U.S. 940 (2003).

BellSouth adds that it has reconciled STS' billing by charging it the difference between the cost-based rates billed monthly and the applicable market rates from the parties' Agreement every six months. BellSouth has charged STS the following amounts, which represent consolidated billing for three separate billing account numbers:

May 2003:	$858.86
December 2003:	$148,587.54
June 2004:	$206,840.54
December 2004:	$359,864.05
Total:	$715,292.13

The total amount billed represents the true-up amount that represents the difference between the cost-based switching rates previously charged to STS and the market-based switching rates that STS agreed to pay pursuant to the Agreement, according to BellSouth. BellSouth emphasizes that STS has disputed and has refused to pay these charges. STS' most recently submitted Billing Adjustment Request forms did not dispute that the Agreement contains market based switching rates that it agreed to pay. Instead, STS claims it "seeks a more equitable rate structure" and that it is disputing market-based switching until it "can negotiate a fair and equitable 'Market Based' rate structure."

While the main thrust of STS' objection is that such rates "are higher than what BellSouth provides to their end-users" and therefore constitute a barrier to entry,[8] BellSouth urges that STS ignores completely that it *elected to adopt the rates, terms and conditions of the Agreement.* BellSouth maintains its contractual relationship with STS is governed by the terms of that Agreement. BellSouth's retail rates have no bearing whatsoever on the rates that STS agreed to pay; moreover, BellSouth's tariffed retail rates are available as a matter of public record – STS could have reviewed these rates prior to adopting the Agreement, and, had STS found the market based rates objectionable, it could have elected not to adopt the Agreement.[9] Although STS implies that the market based rates were not agreed to by the parties,[10] BellSouth argues that STS adopted an existing interconnection agreement, which contains the rates it now apparently contests. BellSouth notes STS did not seek to arbitrate any of the terms in the Agreement, and as such, cannot complain or undo its choice now.

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[8] Complaint, ¶¶ 16, 24-25, 27.

[9] Moreover, the FCC recently released its Triennial Review Remand Order ("TRRO") in CC Docket Nos. 01-338 and 04-313 (rel. Feb. 4, 2005). On remand, in responding to the D.C. Circuit's questions regarding how the Commission's impairment analysis should take account of state universal service cross-subsidies, the FCC elected to exercise its "at a minimum authority" to eliminate unbundled access to mass market local circuit switching without separately addressing the interaction between such unbundling and any cross-subsidies in state retail rates. TRRO, n. 39, 592. See also United States Telecom Ass'n. v. FCC, 359 F.3d 554, 573 (D.C. Cir. 2004) ("USTA II"), cert. denied, 125 S. Ct. 313 (2004).

[10] Complaint, ¶¶ 13, 19. In STS' view, BellSouth has apparently simply "propose[d]" or "established" market rates for "administrative ease." The only "administrative" objective served by the parties' Agreement was to avoid the need for multiple contracts by including in the Agreement rates for services that BellSouth is not required to provide to STS pursuant to Section 251 of the Act, a practice that BellSouth has discontinued.

STS also objects to the manner in which BellSouth bills market-based switching,[11] but BellSouth argues STS' displeasure with BellSouth's billing simply does not allow it to refuse to pay its bills altogether. That STS would prefer monthly billing does not mean that it can refuse to pay its bills – at a minimum, if it continues to refuse to pay its bills, BellSouth claims this Commission should permit BellSouth to discontinue providing services to STS. Moreover, by entering into an Agreement that explicitly provided BellSouth with contractual "true-up" rights, STS has no legitimate basis to complain.

While STS apparently believes it remains "impaired" in the Miami and Ft. Lauderdale MSAs,[12] BellSouth argues STS' belief is flatly contradicted by controlling legal decisions; indeed, the FCC has recently found that incumbent LECs have no obligation to provide CLECs with unbundled access to local circuit switching nationwide, according to BellSouth.[13] BellSouth also disputes STS' further assertion that the market-based rates contained in the Agreement should be equivalent to switching rates BellSouth has allegedly proposed for commercial agreements,[14] contending that STS' claim provides no legal basis to set aside contractual language and contractual rates. STS adopted an Agreement, with applicable rates, and cannot ignore its duties now.

According to BellSouth, STS' purported reasons for disputing the market based rates as set forth in its January 2005 Billing Adjustment Request Form fail for similar reasons as those set forth above—there is no legal basis to ignore contract terms. STS never disputes that it entered into a contract containing the rates it has been billed or claims there was any calculation error in the rates it was charged – instead, STS is trying to avoid its obligations altogether, according to BellSouth.

Finally, BellSouth notes that in STS' own Motion for Summary Final Order on BellSouth's counterclaim, STS asks that the Commission grant STS' request for Summary Final Order, claiming that there are no disputed facts. However, in STS' March 4, 2005, response to BellSouth's Motion, STS claimed that "there *are* substantial matters of fact in dispute . . . ." (STS' Response, p. 13)(emphasis added).[15] Thus, BellSouth argues that STS' positions are flatly contradictory as to the propriety of a summary decision in this matter. Notwithstanding STS' contradictory arguments, BellSouth argues that this matter should be resolved as a matter of law; thus, a summary final order is appropriate.

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[11] Complaint, ¶¶ 17-18.

[12] Complaint, ¶ 19.

[13] USTA II, 359 F.3d 554; also TRRO.

[14] Complaint, ¶ 20.

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

For these reasons, BellSouth asks that this Commission grant its Motion for Summary Final Order and order STS to promptly submit payment for the outstanding and unpaid market based switching charges that it has been billed. BellSouth also requests that the Commission require STS to submit payment or face the discontinuance of service.

Standard of Review

Under Rule 28-106.204(4), Florida Administrative Code, "[a]ny party may move for summary final order whenever there is no genuine issue of material fact." A summary final order shall be rendered if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order.[16] The purpose of a summary final order is to avoid the expense and delay of trial when no dispute exists as to the material facts.[17] When a party establishes that there is no material fact relating to any disputed issue, the burden shifts to the opponent to demonstrate the falsity of the showing.[18] "If the opponent does not do so, summary judgment is proper and should be affirmed."[19] There are two requirements for a summary final order: (1) there is no genuine issue of material fact; and (2) a party is entitled to judgment as a matter of law.[20]

Analysis

In this instance, the parties' Interconnection Agreement squarely addresses the matter in dispute, and thus, should be viewed as governing the resolution of this dispute. As such, it is appropriate for this Commission to apply and enforce the terms of the parties' Agreement, which clearly require STS to pay the market-based switching rates it has been billed. There is no dispute as to any fact, let alone a material fact, regarding the terms of the agreement. The Agreement provides market-based nonrecurring and recurring switching rates. Florida law clearly provides that "the construction of all written instruments is a question of law to be determined by the court where the language used is clear, plain, certain, undisputed, unambiguous, unequivocal and not subject to conflicting inferences."[21] To interpret contracts,

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[16] See Order No. PSC-03-0528-FOF-TP, p. 8.

[17] See Order No. PSC-01-1427-FOF-TP, p. 13; and Order No. PSC-03-1469-FOF-TL.

[18] Order No. PSC-01-1427-FOF-TP, p. 13.

[19] Id.

[20] Id.

[21] Royal Am. Realty Inc. v. Bank of Palm Beach, 215 So.2d 336, 337 (Fla. 4th DCA 1968) (citations omitted); also Okeelanta Corp. v. Bygrave, 660 So. 2d 743, 747 (Fla. 4th DCA 1995) (citations omitted); and Feldman v. Kritch, 824 So. 2d 274, 277 (Fla. 4th DCA 2002); Jacobs v. Petrino, 351 So. 2d 1036, 1039 (Fla. 4th DCA 1976) (the words found in a contract are to have a meaning attributed to them, and are the best possible evidence of the intent and meaning of the contracting parties) (citations omitted).

the guiding principle is to determine and enforce the parties' intent.[22] The best evidence of the parties' intent is the plain language of the contract, which we should consider while taking care not to give the contract any meaning beyond that expressed.[23] When the language is clear and unambiguous, it must be construed to mean "just what the language therein implies and nothing more."[24] Consequently, "no word or part of an agreement is to be treated as a redundancy or surplusage if any meaning, reasonable and consistent with other parts can be given to it."[25]

The relevant contractual language between the parties authorizes nonrecurring and recurring rates that BellSouth "shall charge" for switching services provided to STS' end user customers with four or more DS0 lines served from Zone 1 central offices located in the Ft. Lauderdale, Miami, and Orlando MSAs. The rates that apply are the market rates in the Agreement. No contractual language negates STS' contractual obligation to pay for such services, yet the Complaint alleges "overbilling" without a single citation to the Agreement. STS' unsupported assertions do not circumvent its contractual obligations.

Conclusion

Accordingly, based on the express terms of the Agreement, we find as a matter of law that the parties' contractual terms, conditions, and prices – including the market based switching rates – apply. Therefore, BellSouth's Motion for Summary Final Order shall be granted. BellSouth shall be allowed to disconnect STS for non-payment should STS fail to render the amount due within 30 days following issuance of this Order, unless some other payment plan is agreed upon by the parties. STS' Motion for Summary Final Order on BellSouth's Counterclaim is hereby rendered moot.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that BellSouth Telecommunications, Inc.'s Motion to Strike is hereby granted. It is further

ORDERED that BellSouth Telecommunications, Inc.'s Motion for Summary Final Order is hereby granted. It is further

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[22] St. Augustine Pools, Inc. v. James M. Barker, Inc., 687 So. 2d 957, 957 (Fla. 5th DCA 1997); also Royal Oaks Landing Homeowners Ass'n. v. Pelletier, 620 So. 2d 786 (Fla. 4th DCA 1993).

[23] Royal Oaks Landing Homeowners Ass'n., 620 So.2d at 788; and Walgreen Co. v. Habitat Dev. Corp., 655 So. 2d 164, 165 (Fla. 3d DCA 1995)(citations omitted).

[24] Id.

[25] Royal Am. Realty Inc., 215 So.2d at 337.

ORDERED that BellSouth Telecommunications, Inc. shall be allowed to disconnect STS for non-payment should STS fail to render the amount due under the terms of the Agreement within 30 days following issuance of this Order, unless some other payment plan is agreed upon by the parties. It is further

ORDERED that all other pending motions in this Docket shall be rendered moot and that all materials being held by this agency under claim of confidentiality shall be returned to the filing party. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 29th day of June, 2005.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(SEAL)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.