

ORIGINAL

Matilda Sanders

040732-TP

From: Nmsamry@aol.com
Sent: Wednesday, July 13, 2005 5:05 PM
To: Filings@psc.state.fl.us
Cc: Lee Fordham; meredith.mays@bellsouth.com
Subject: Docket Number 049732-TP
Attachments: STS TELECOM MTN FOR RECONSIDERATION 7-13-05.doc

Attached for filing please find STS Telecom's Motion For Reconsideration

Nancy M. Samry
Paralegal to Alan C. Gold
1320 South Dixie Highway
Suite 870
Coral Gables, FL 33146
305-728-4827 (direct number)
251-217-9131 (direct fax)
305-667-0475 (office number)
305-663-0799 (office fax)

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FPSC-COMMISSION CLERK

Law Offices of Alan C. Gold, P.A.

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

ORIGINAL

Alan C. Gold, Esquire
305-667-0475, ext 1.
e-mail: agold@kcl.net

James L. Parado, Esquire
305-667-0475, ext. 25
e-mail: jlp@kcl.net

July 13, 2005

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

RE: Docket No.:049732-TP
**In re: Interconnection Agreement between Saturn Telecommunication
Services, Inc. d/b/a STS Telecom and BellSouth Telecommunications, Inc.**

Dear Ms. Bayo:

Enclosed for filing on behalf of Saturn Telecommunication Services, Inc. d/b/a STS Telecom ("STS") are the original and 15 copies of STS's Motion For Reconsideration in the above- referenced docket.

Copies are being served on the parties in this docket pursuant to the attached certificate of service.

Please acknowledge receipt of this filing by stamping and initialing a copy of this letter and returning same to me in the stamped, self-addressed envelope provided. If you have any questions, please do not hesitate to contact me.

Thank you for your assistance with this filing.

Very truly yours,

ALAN C. GOLD, PA

Enclosure:

cc: STS Telecom
All Parties of Record

DOCUMENT NUMBER-DATE

06650 JUL 14 05

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Interconnection Agreement between)
Saturn Telecommunication Services, Inc.) 040732-TP
d/b/a STS Telecom and BellSouth) Filed: July 13, 2005
Telecommunications, Inc.)
_____)

MOTION FOR RECONSIDERATION

The Petitioner, SATURN TELECOMMUNICATION SERVICES, INC. d/b/a STS Telecom (“STS”), by and through the undersigned counsel, pursuant to Rule 25-22.060, Florida Rules of the Public Service Commission, requests that this Honorable Commission reconsider its Order entered on June 29, 2005, entitled “Order Granting Motion To Strike and Motion For Summary Final Order” Order Number PSC-05-0702-FOF-TP, and states that said Order is erroneous as a matter of law, and in support thereof states as follows:

1. Rule 25-22.060 (1)(a), states: “Any party to a proceeding who is adversely affected by an order of the Commission, may file a motion for reconsideration of that order”.
2. While STS asserts the Order is erroneous for all reasons set forth in its Response in Opposition To BellSouth’s Motion For Summary Final Order, in its Supplemental Memorandum and in the oral arguments presented before the Commission at the Agenda Conference, all of which are incorporated by reference in this Motion For Reconsideration, STS will only concentrate on a few points which clearly and indisputably demonstrate that the Order Granting Summary Judgment is erroneous and should be set aside.

3. In its simplest form, this Docket boils down to a billing dispute. BellSouth billed STS for services for market based rates. STS disputed the amount of the bills and claims that the bills were not calculated correctly. This was brought up during the Agenda Conference. It was also contained in the Affidavits filed in this case, which were not stricken by the Order of the Commission.
4. This Commission erroneously stated at page 12 of its Order “STS never disputes that it entered into a contract containing the rates that 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*”.¹ That finding by this Honorable Commission, is clearly false and contrary to the record as well as the arguments made by STS during the Agenda Conference.
5. From the inception, STS disputed the calculations of the rates and disagrees that the billing is correct. (See Affidavit of Jon Krutchik).
6. This Commission allowed STS to speak before the Commission. It cannot now ignore the point that STS made during that argument. The plain fact is the mathematical calculations by BellSouth are incorrect. STS has made numerous arguments regarding the market base rates and that the same are contrary to law and to the Interconnect Agreement. In addition to those arguments, STS has always maintained, as evidenced by the docket entries, that BellSouth’s billing is simply incorrect. As this Commission noted in its Order “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

¹ STS strenuously objects to the characterization that it simply attempting to avoid its obligation, as STS is current in payment with all of its regular monthly billings by BellSouth and only disputes the market based rate bills, which are billed retroactively six months in arrears.

judgments as a matter of law”. Summary Final Order is inappropriate in this case because there is a dispute about the amount of the bills. The dispute regarding the amount of the bill creates a material issue of fact. SEE: *Mercado v. Lions Enterprises, Inc.*, 800 So2d 753 (Fla. 5th DCA 2001), *Hyder v. Demsey and Goldsmith*, 497 So2d 984 (Fla. 5th DCA 1986), *Myrick v. St. Catherine Laboure Manor, Inc.*, 529 So2d 369 (Fla. 1st DCA 1988) and *O’Melveny and Myers, LLP v. Adams* (764 So2d 747 (Fla. 2d DCA 2000)

7. In a motion for summary final order, the Commission is not allowed to weigh the credibility of the testimony. All reasonable inferences are in favor of the non-moving party. See: *Gerard v. Scott Crane Rental Corp.*, 754 So.2d 896 (Fla.1st DCA 2000) and *Sierra v. Shevin*, 767 S.o2d 534 (Fla.3rd DCA 2000) Based upon the billing disputes alone, the grant of a summary final order was inappropriate.
8. This Commission also erroneously granted the striking of STS’s Response to BellSouth’s Motion For Summary Final Order as sanctions for the same being filed one day late with the Commission. The late filing was an attorney’s error and not attributable to STS. Neither BellSouth nor the Commission could show any prejudice suffered by anyone by the filing of the one-day late Response.
9. The Commission attempts to justify its finding of a flagrant and willful disregard by pointing to an instance in which documents were mistakenly filed with the General Counsel’s office at the Public Service Commission instead of the Clerk of the Commission. This error after being brought to the attention of STS’s counsel never occurred again and did not cause any

harm to anyone. The filing of the Response a day late was based upon an erroneous assumption by STS's attorney that filing was accomplished upon mailing, which is the practice in both state and federal court. After late filing was brought to STS's counsel's attention, all future filings were timely.

10. The fact that in an abundance of caution STS filed a Preliminary Response and Affidavits in Opposition to BellSouth's Motion For Summary Judgment at the same time it filed its Motion For an Extension of Time to Respond, proves that STS's counsel did not disregard the Commission and was attempting to comply with the Rules. STS's Response to BellSouth's Motion for Final Summary Order, was placed with the carrier for overnight delivery the date they were, in fact, due, and a copy of the Memorandum absent its attachments were e-mailed to BellSouth on the due date. Neither BellSouth nor the Commission can point to any prejudice whatsoever.
11. If sanctions are to be imposed, they should be imposed against the attorney and not STS who has done absolutely nothing wrong.
12. The Florida Supreme Court in the case of *Kozel v. Ostendorf*, 629 So.2d 817 (Fla. 1993) recognized that the dismissal of the case is an extremely harsh penalty and is inappropriate when the client (party) is not at fault, but rather the fault lies with the attorney. The Court in *Kozel, Id.* stated at page 818:

In our view, though, the court's decision to dismiss the case based solely on the attorney's neglect unduly punishes the litigant and espouses a policy that this Court does not wish to promote. The purpose of the Florida Rules of Civil Procedure is to encourage the orderly movement of

litigation. Fla.R.Civ.Pro. 1.010. This purpose usually can be accomplished by the imposition of a sanction that is less harsh than dismissal and that is directed toward the person responsible for the delayed filing of the complaint.

The Florida Supreme Court then discussed the test that should be used in such a case, stating at page 818:

However, a fine, public reprimand or contempt order may often be appropriate sanctions to impose on an attorney in those situations where the attorney, not the client is responsible for the error. To assist the trial court in determining whether dismissal with prejudice is warranted, we have adopted the following set of factors set forth in large part by Judge Altenbernd: 1) whether the attorney's disobedience was willful, deliberate, or contumacious, rather than an act of neglect or inexperience; 2) whether the attorney has been previously sanctioned; 3) whether the client was personally involved in the act of disobedience; 4) whether the delay prejudiced the opposing party through undue expense, loss of evidence, or in some other fashion; 5) whether the attorney offered reasonable justification for noncompliance; and 6) whether the delay created significant problems of judicial administration. Upon consideration of these factors, if a sanction less severe than dismissal with prejudice appears to be a viable alternative, the trial court should employ such an alternative.

In the instant case, the court's ruling is tantamount to a dismissal with prejudice.

13. Furthermore, not a single element of the six-prong Florida Supreme Court test was met. The striking of the pleadings as a sanction with the ultimate entry of a summary final order was too harsh and contrary to the law in Florida as set forth by the Florida Supreme Court. The disobedience of the attorney was not willful, deliberate or contumacious. This was an area in which the attorney had not previously practiced and was inexperienced with the rules. The attorney believed that service of the pleading was accomplished upon the mailing. See Rule 1.010. *Florida Rules of Civil*

Procedure. STS's attorney attempted to comply with the Rules as evidenced by BellSouth receiving the body of the Memorandum on the due date. Additionally STS's attorney filed a preliminary response 10 days to the final response, in the event that the Commission did not grant the requested extension. The Clerk, PSC's General Counsel, and BellSouth received the Response with all attachments a day late. Although there were other procedural errors made in the case, the minute the attorney discovered the error, the same never reoccurred. While no error should have occurred, the conduct was clearly not willful, deliberate or contumacious, but rather an act of neglect or inexperience.

14. No court, agency or public body has ever sanctioned STS's attorney in 25 years of practice. In fact, there has never been any prior issue with any untimely filing in all of the years of practice. Moreover, STS was not involved in the disobedience. Furthermore, neither the PSC nor BellSouth were prejudiced nor suffered any problems or expense due to the late filing. Both the PSC and BellSouth received the documents the very next day. There was absolutely no prejudice to anyone.
15. The attorney offered a reasonable justification for his non-compliance to the Commission as well as Staff Counsel. The attorney sincerely apologized for the non-compliance which was based in part on the difference in Rules between the PSC and the Federal and State Court system as well as the fact that the due date for filing is not clearly set forth in the PSC's rules.
16. Finally, the delay did not cause a single problem of judicial administration.

17. The Sanction imposed by this Honorable Commission is clearly too harsh and erroneous. The question arises: is this Commission punishing STS because its attorney filed a Response a day late or is punishing STS because it opposed BellSouth. See also: *Ham v. Dunmire*, 891 So2d 492 (Fla. 2004) and *Town of Manalapan v. Florida Power and Light, Co.* 815 So2d 670 (Fla. 4thDCA 2002)
18. Finally, the Commission's Order in allowing BellSouth to disconnect all of STS's lines is an inappropriate Order and constitutes a violation of the FCC's recent Triennial Review Remand Order ("TRRO"). At all times relevant hereto, STS was current and paid all of its regular bills to BellSouth, which included those customers on its embedded UNE base. The FCC designated a twelve month transition period to prevent the disconnection of UNE-P embedded base of customers by the ILEC.
19. The instant dispute was only regarding those customers on market based rates, which were billed retroactively, six months in arrears. The TRRO does not permit the carrier to disconnect the embedded UNE base or charge prices higher than TELRIC plus \$1.00 during the transition period (i.e. March 2006).
20. This Commission's ruling in effect, allows BellSouth to disconnect services to STS's UNE customers because STS did not pay market based rates. This is clearly inappropriate and contrary to the TRRO.

WHEREFORE, STS requests that this Honorable Commission enter its Order reversing the decision Granting Summary Final Order in favor of BellSouth and for such other relief as appropriate.

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)

/s/ Alan C. Gold

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 Federal Express on this ___ day of July 2005, to:

Staff Counsel
Florida Public Service Commission
Division of Legal Services
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

/s/ Alan C. Gold

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