BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

Petition of TDS Telecom d/b/a TDS Telecom/Quincy Telephone, ALLTEL Florida, Inc., Northeast Florida Telephone Company d/b/a NEFCOM, GTC, Inc. d/b/a GT Com, Smart City Telecommunications, LLC d/b/a Smart City Telecom, ITS Telecommunications Systems, Inc. and Frontier Communications of the South, LLC, concerning BellSouth Telecommunications, Inc.'s Transit Service Tariff	Docket No. 050119-TP
Petition and Complaint of AT&T Communication of the Southern States, LLC for suspension and cancellation of Transit Traffic Service Tariff brNo. FL2004-284 filed by BellSouth Telecommunications, Inc.	Docket No. 050125-TP Filed: October 10, 2006

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JOINT RESPONSE IN OPPOSITION TO BELLSOUTH'S MOTION FOR CLARIFICATION

Sprint Spectrum Limited Partnership, Nextel South Corporation, and Sprint Communications Company Limited Partnership (collectively, Sprint Nextel), T-Mobile, USA, Inc., MetroPCS Florida, LLC, Competitive Carriers of the South, Inc., NuVox Communications, Inc., and the Florida Cable Telecommunications Association (collectively, Joint Respondents) file this response in opposition to BellSouth Telecommunications, Inc.'s (BellSouth) Motion for Clarification. Such motion should be denied. As grounds therefore, Joint Respondents state:

The Commission entered Order No. PSC-06-0776-FOF-TP (*Final Order*) in this case on September 18, 2006, following an evidentiary hearing. In the *Final Order*, the Commission found, among other things, that BellSouth's transit tariff was not the

appropriate mechanism by which to address transit service. In making its decision, the Commission looked appropriately to "both Florida and federal law, as well as recent FCC decisions and rule changes."[1]

BellSouth has filed what it labels a "Motion for Clarification" (Motion). This Motion should be denied for both procedural and substantive reasons.

In describing a motion for clarification, in the order on which BellSouth relies, the Commission stated:

> We note that neither the Uniform Rules of Procedure nor our rules specifically make provision for a motion for clarification. However, we have typically applied the Diamond Cab standard in evaluating a pleading titled a motion for clarification when the motion *actually sought reconsideration of some part of the substance* of a Commission order.[2]

BellSouth's motion seeks reconsideration of the *substance* of the Commission's order. BellSouth is not asking the Commission to "clarify" anything; it is asking the Commission to reconsider a pertinent basis for its decision. It seeks to have the Commission change (that is, reconsider) its *Final Order* and to remove[3] its discussion of the highly relevant *T-Mobile Order*[4] or declare the *T-Mobile* case inapplicable.

That this is not a motion for clarification is clear from the *Performance Order*, upon which BellSouth seeks to rely. That order related to BellSouth's performance measures plan. In the *Performance Order*, the Commission clarified that Staff could not

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[1] *Final Order* at 16.

[2] *In re: Investigation into the establishment of operations support systems permanent performance measures for incumbent local exchange telecommunications companies*, Docket No. 000121-TP, Order No. PSC-01-2449-FOF-TP (*Performance Order*) at 9, emphasis supplied.

[3] BellSouth says: ". . . [T]he Commission should clarify its *Order* to remove its discussion of the *T-Mobile* decision, or alternatively, clarify that T-Mobile . . . is not applicable . . . ." Motion at 5-6.

[4] *In the Matter of Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, FCC Declaratory Ruling and Report and Order; FCC 05-42, 20 FCC Rcd 4855; 2005 FCC LEXIS 1212; 35 Comm. Reg. (P & F) 291. February 24, 2005 ("*T-Mobile Order*").

order specific changes to the plan and confirmed that the number of submetrics had been correctly calculated.[5] There was no change in the substance of the order.

Therefore, despite the nomenclature BellSouth has chosen for its Motion, it is a motion for reconsideration and must be reviewed under the reconsideration standard.[6] This well-known standard is described in the *Performance Order* on which BellSouth relies:

> Rule 25-22.060(1)(a), Florida Administrative Code, governs Motions for Reconsideration and states, in pertinent part: "Any party to a proceeding who is adversely affected by an order of the Commission may file a motion for reconsideration of that order." The standard of review for a Motion for Reconsideration is whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering our Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981).[7]

Thus, to prevail, BellSouth must prove that the Commission failed to consider or overlooked a point of law or fact in making its decision. While BellSouth apparently disagrees with the Commission's view of the *T-Mobile* decision, it has not pointed out anything that the Commission overlooked or failed to consider.

BellSouth's complaint appears to be that the Commission should not have discussed, referred to, or relied upon *T-Mobile* because the traffic at issue in the *T-Mobile* case was not transit traffic.[8] BellSouth spends much of its Motion describing what the *T-Mobile* case does and does not say.

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[5] *Performance Order* at 9-10.
[6] Even if the Commission were to find that BellSouth's motion is a motion for clarification, it should be denied, as there is nothing to clarify. The Commission's discussion of the *T-Mobile* case is clear.
[7] *Performance Order* at 2-3.
[8] Motion at 3.

However, a review of BellSouth's Post-Hearing Brief in this matter demonstrates conclusively that BellSouth's Motion does not request "clarification" of the Commission's *Final Order* but is rather simply reargument of points on which it did not prevail. Compare pages 5-6 of BellSouth's Brief with the arguments made on pages 3-5 of its Motion regarding the *T-Mobile* decision. The arguments are the same, and, in some instances, whole sentences are simply lifted from BellSouth's Brief verbatim or with minor changes. Thus, the Commission had the very same arguments before it when it reached is original decision and did not overlook or fail to consider them.

The Commission recognized and *explicitly* considered the applicability of *T-Mobile* decision to the circumstances of this case. It noted that transit traffic was not the subject of the *T-Mobile* case and it did not rely on the case to determine reciprocal compensation issues. Rather, the Commission made it clear that *T-Mobile* was important for the well-established federal policy that negotiations and mutual contract arrangements are preferable to one party unilaterally attempting to set a rate, as BellSouth tried to do with its transit tariff:

> An important question is whether the decision in the T-Mobile Order applies to the dispute in this proceeding. We recognize that the T-Mobile decision addresses non-access CMRS traffic specifically; however, the T-Mobile decision is significant in its overarching principle that contractual arrangements are preferred to a default mechanism. The compensation arrangements as issue in T-Mobile were for transport and termination of traffic, which include[s] transit traffic. Our goal is to stay consistent with this policy. As the Joint CMRS Carriers point out, the FCC based its rule change on the rationale that "[p]recedent suggests that the Commission intended for compensation arrangements to be negotiated agreements and […] that [such] agreements are

> more consistent with the procompetitive process and policies reflected in the 1996 Act.[9]

Further, the Commission's approach is amply supported by the record in this matter. Numerous witnesses explicitly discussed the applicability of the *T-Mobile Order* and made clear the facts of that case as well as the relevance of the *T-Mobile Order* to the issues before the Commission. *See*, *i.e.*, Tr. 495[10]; Tr. 628[11]; Tr. 710, n.8.[12] Therefore, the Commission was fully informed regarding the *T-Mobile Order* and neither overlooked nor failed to consider its implications.

Nor does *T-Mobile's* clear preference for negotiation and mutual agreement raise any "inconsistency" ("apparent"[13] or otherwise) between the Commission's invalidation of the BellSouth tariff and its decision that the transit rate should be negotiated. The Commission's discussion of *T-Mobile* is not directed toward section 251. Rather, the *T-Mobile* decision supports the Commission's decision, that as a policy matter, the imposition of a unilateral rate by one party is inappropriate.

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[9] *Final Order* at 18.

[10] "The same reasoning the FCC used in the *T Mobile Decision* supports the rejection of BellSouth's Florida transit tariff and supports the continued use of negotiated agreements to address the terms for BellSouth's transit service." (Gates rebuttal testimony).

[11] "In this [*T-Mobile*] proceeding the FCC amended its rules going forward to make clear its preference for contractual arrangements for non-access traffic." (Pruitt rebuttal testimony).

[12] "While the rule changes referred to by the FCC [in the *T-Mobile Order*] apply specifically to the termination of traffic from CMRS carriers, the same fundamental principle is completely valid in the context of this case." (Wood rebuttal testimony).

[13] Motion at 5.

WHEREFORE, BellSouth has failed to meet the standard for reconsideration and its motion should be denied.

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CERTIFICATE OF SERVICE
Docket No. 050119-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing Joint Response in Opposition to BellSouth's Motion for Clarification was served via electronic mail and first class United States mail this 10th day of October, 2006, to the following:

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