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July 6, 2009

Ms. Ann Cole, Commission Clerk  
Office of the Commission Clerk  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: **Docket No. 090246-TP: Notice of Adoption of Existing Interconnection Agreement between BellSouth Telecommunications, Inc. and Cbeyond Communications, Inc. by Clective Florida, LLC**

Dear Ms. Cole:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Response in Opposition to Clective's Motion for Sanctions, which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Manuel A. Gurdian

cc: All parties of record  
Jerry Hendrix  
Gregory R. Follensbee  
E. Earl Edenfield, Jr.

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

Notice of Adoption of Existing Interconnection ) Docket No. 090246-TP  
Agreement between BellSouth )  
Telecommunications, Inc. and Cbeyond )  
Communications, Inc. by Clective Florida, LLC ) Filed: July 6, 2009

**AT&T FLORIDA'S RESPONSE IN OPPOSITION TO  
CLECTIVE'S MOTION FOR SANCTIONS**

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida") hereby files its Response in Opposition to Clective Telecom Florida, LLC's ("Clective Florida") Motion for Sanctions ("Motion") and states the following:

1. The Florida Public Service Commission ("Commission") should deny Clective Florida's request that it impose sanctions and award monetary damages to it because of four reasons: (1) AT&T Florida has not misrepresented Clective Georgia's (or Clective Florida's) willingness to pay the requested deposit; (2) entering into an "escrow agreement" is not an option under the Interconnection Agreement that Clective Florida is attempting to adopt; (3) Clective Florida has not incurred a "reasonable attorneys fee and damages"; and (4) the Commission cannot award monetary damages.

2. On or about May 8, 2009, AT&T Florida filed its Objection to Notice of Adoption and Petition to Cancel Clective Florida, LLC's CLEC Certificate No. 8736 ("AT&T Florida's Objection and Petition" or "Objection and Petition"). In its Objection and Petition, AT&T Florida requests the Commission to reject Clective Florida's Notice of Adoption, open an investigation into Clective Florida's capability to provide CLEC services and cancel Clective Florida's CLEC Certificate No. 8736 for its failure to maintain "sufficient technical, financial, and managerial capability" pursuant to Florida Statutes § 364.337 to provide CLEC services in Florida.

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3. On or about June 22, 2009, Clective Florida filed its Motion, pursuant to Section 57.105(5), Florida Statutes, with the Commission<sup>1</sup>. In its Motion, Clective Florida alleges that "AT&T Florida has falsely accused Clective Georgia of not agreeing to the absurd deposit" and "that when it became clear that AT&T Georgia would not accept a reasonable settlement, Clective Florida decided that its only choice to generate revenue was to capitulate to AT&T Florida's absurd demands. Thus, on morning of May 8, 2009, Clective Georgia's counsel sent a letter to AT&T indicating that it would agree to the deposit requirements." Clective Florida further alleges that after AT&T Florida filed its Objection and Petition it "failed to amend [its] filing to indicate that Clective is willing to pay the deposit."

4. AT&T Florida vehemently disagrees with the assertion in the Motion that it has misrepresented Clective Georgia's (or Clective Florida's) willingness to pay the requested deposit to AT&T Florida.

5. In AT&T Florida's Objection and Petition at paragraph thirty (30), AT&T Florida states as follows:

On or about February 26, 2009, AT&T requested that Clective provide an initial deposit of \$██████ based upon Clective's likely billing for two months of service. *See* February 26, 2009 correspondence from AT&T to Clective attached hereto as Confidential Exhibit "M". However, to date, Clective has not indicated that it will agree to such deposit, and indications from the financial information AT&T has obtained regarding Clective Georgia clearly reflect an inability to pay such deposit.<sup>2</sup>

6. In its May 8, 2009 correspondence from Brad N. Mondschein, Esq., Clective Florida's counsel, to Michael M. Turbes, Esq. of AT&T Southeast, Clective

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<sup>1</sup> AT&T Florida was not provided with a copy of the Motion on June 22, 2009. The Motion was sent by Clective to the undersigned on June 25, 2009 via next day air carrier and received on June 26, 2009. In addition, the Motion does not comply with Rule 28-106.104, as it does not contain a certificate of service.

<sup>2</sup> As provided for in AT&T Florida's Objection and Petition, in paragraph 30, the reference to "Clective" is to Clective Telecom Florida, LLC and the reference to "Clective Georgia" is to Clective Georgia, Inc.

Florida indicated that it “needs to enter into an escrow agreement for the \$ [REDACTED] deposit being requested by AT&T Florida pursuant to the February 26, 2009 letter from Ann Frye...” See May 8, 2009 correspondence from Clective Florida’s counsel to AT&T Southeast’s counsel attached hereto as Exhibit “A”.

7. It is clear from reviewing the above language from AT&T Florida’s Objection and Petition, that AT&T Florida has not made a misrepresentation to the Commission in its Objection and Petition, as Clective Florida indicating its willingness to enter into an “escrow agreement” for the deposit is not the same as it agreeing to the requested deposit.<sup>3</sup>

8. Moreover, escrowing a deposit is not contemplated by the Interconnection Agreement between AT&T Florida and Cbeyond Communications, LLC (“Interconnection Agreement”) that Clective Florida has attempted to adopt via its April 29, 2009 Notice of Adoption as the Interconnection Agreement clearly provides that “[t]he security required by BellSouth shall take the form of cash, an Irrevocable Letter of Credit (BellSouth Form), or Surety Bond (BellSouth Form).” See Section 1.10.2 of Attachment 7, Billing at p. 7 of Interconnection Agreement between BellSouth Telecommunications, Inc. and Cbeyond Communications, LLC attached hereto as Exhibit “B”.

9. As provided in Section 1.10.2, Clective Florida’s options for providing a deposit under the Interconnection Agreement are cash, surety bond or irrevocable letter of credit and Clective Florida’s indication that it “needs to enter into an escrow agreement” in its May 8<sup>th</sup> correspondence is clearly not one of Clective Florida’s options under the Interconnection Agreement.

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<sup>3</sup> Clective Georgia is not mentioned in counsel’s letter attached hereto as Exhibit “A.”

10. Another independent reason to deny Clective Florida's Motion is that it does not meet the standard under 57.105(5) for the imposition of sanctions.<sup>4</sup>

Specifically, Section 57.105(5), Florida Statutes, provides:

In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

11. Thus, under the express provisions of the Section 57.105(5), even if Clective Florida were to prevail on its Motion, the Commission could only award "a reasonable attorney's fee and damages." In the instant docket, Clective Florida does not have an attorney who has appeared and participated in this docket. Thus, there would be no attorneys' fee to award as there have been no attorneys' fees incurred by Clective Florida via its participation in the docket.

12. With regard to "damages", Clective Florida's Motion fails to allege any "damages" incurred by it. Moreover, pursuant to Commission precedent and Florida law, the Commission does not have the authority to "award monetary damages". *See In re: Complaint and petition of John Charles Heekin against Florida Power & Light Company*, Docket No. 981923-EI, Order No. PSC-99-1054-FOF-EI (May 24, 1999) ("The Commission may not award monetary damages in resolving utility related disputes. *Southern Bell Tel. Co. v. Mobile America Corp, Inc.*, 291 So.2d 199 (Fla. 1974). The

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<sup>4</sup> Clective Florida fails to cite to any case law or precedent that supports its request.

Supreme Court of Florida has decreed that ‘Nowhere. . . is the PSC granted authority to enter an award of money damages. . . ; this is a judicial function within the jurisdiction of the circuit court pursuant to Art. V, s 5(b), Fla. Const.’ *Southern Bell* at 202.”); *In re: Petition of AT&T Communications of the Southern States, LLC Requesting Suspension of and Cancellation of Switched Access Contract Tariff No. F12002-01 Filed by BellSouth Telecommunications, Inc.*, Docket No. 020738-TP, Order No. PSC-03-0031-FOF-TP (Issued January 6, 2003) (“This Commission lacks any legal authority to award the type of money damages sought by AT&T.”)

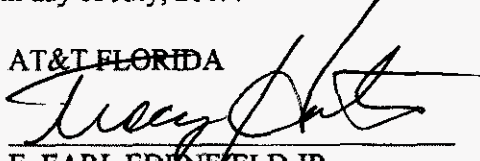
13. Thus, there are no attorneys’ fees or damages for the Commission to award under Section 57.105(5) to Clective Florida and Clective Florida has failed to meet its burden under the statute.

14. In conclusion, based upon the foregoing, the Commission should deny Clective Florida’s request that it impose sanctions and award monetary damages because of four reasons: (1) AT&T Florida has not misrepresented Clective Georgia’s (or Clective Florida’s) willingness to pay the requested deposit; (2) entering into an “escrow agreement” is not an option under the Interconnection Agreement that Clective Florida is attempting to adopt; (3) Clective Florida has not incurred a “reasonable attorneys fee and damages”; and (4) the Commission cannot award monetary damages.

WHEREFORE, AT&T Florida respectfully requests that the Commission enter an Order denying Clective’s Motion for Sanctions.

Respectfully submitted this 6th day of July, 2009.

AT&T FLORIDA

A handwritten signature in black ink, appearing to read "Tracy Hatch", written over a horizontal line.

E. EARL EDENFIELD JR.  
TRACY W. HATCH  
MANUEL A. GURDIAN  
c/o Gregory R. Follensbee  
150 South Monroe Street, Ste. 400  
Tallahassee, FL 32301  
(305) 347-5558

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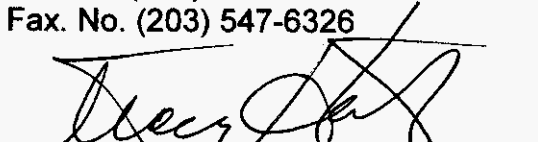
**CERTIFICATE OF SERVICE**  
**Docket No. 090246-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

(\*) Electronic Mail, (\*\*) Facsimile and First Class U.S. Mail this 6th day of July, 2009 to  
the following:

Teresa Tan (\*)  
Victor McKay (\*)  
Staff Counsels  
Florida Public Service  
Commission  
Division of Legal Services  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850  
[vmckay@psc.state.fl.us](mailto:vmckay@psc.state.fl.us)  
[ltan@psc.state.fl.us](mailto:ltan@psc.state.fl.us)

Clective Telecom Florida, LLC (\*\*)  
2090 Dunwoody Club Drive, #106-257  
Atlanta, GA 30350  
Tel. No. (404) 272-0445  
Fax. No. (203) 547-6326

  
\_\_\_\_\_  
Manuel A. Gurdian



**Docket No. 090246-TP**

**AT&T Florida's Response in Opposition to  
Clective's Motion for Sanctions**

**Exhibit A  
(Entire document is Confidential)**

**Docket No. 090246-TP**

**AT&T Florida's Response in Opposition to  
Clective's Motion for Sanctions**

**Exhibit B**



Jerry D. Hendrix  
Vice President  
Regulatory Relations

AT&T Florida  
150 South Monroe St.  
Suite 400  
Tallahassee, FL 32301

T: 850-577-5550  
F: 850-224-5073  
Jerry.Hendrix@att.com  
www.att.com

March 28, 2007

**ORIGINAL**

Mrs. Ann Cole  
Director, Division of the Commission Clerk and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399

070220-10

Re: Approval of Interconnection, Unbundling, Resale and Collocation Agreement  
between AT&T Florida f/k/a "BellSouth" and Cbeyond Communications, LLC.

Dear Mrs. Cole:

Please find enclosed for filing and approval, the original and two copies of the  
Interconnection, Unbundling, Resale and Collocation Agreement between AT&T  
Florida f/k/a "BellSouth" and Cbeyond Communications, LLC.

If you have any questions please do not hesitate to contact Robyn Holland at (850) 577-  
5551.

Very truly yours,

*Jerry D. Hendrix* /RKH  
Regulatory Vice President

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# **BELLSOUTH / CLEC Agreement**

**Customer Name: Cbeyond Communications, LLC**

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Note: This page is not part of the actual signed contract/amendment, but is present for record keeping purposes only.

**Interconnection Agreement**

**Between**

**BellSouth Telecommunications, Inc.**

**and**

**Cbeyond Communications, LLC**

BellSouth is cured 100%, Cbeyond shall be treated as an existing CLEC for purposes of establishing security on its accounts.

- 1.10.2 The security required by BellSouth shall take the form of cash, an Irrevocable Letter of Credit (BellSouth Form), or Surety Bond (BellSouth Form). The amount of the security shall not exceed two (2) month's estimated or actual billing for new CLECs; or one (1) month's estimated or actual billing for services billed in advance and two (2) month's estimated or actual billing for services billed in arrears under the Agreement for existing CLECs, based on average monthly billings for the most recent six (6) month period. Interest shall accrue per the appropriate BellSouth tariff on cash deposits.
- 1.10.3 Any such security shall in no way release Cbeyond from its obligation to make complete and timely payments of its bills, subject to the bill dispute procedures set forth in Section 2.
- 1.10.4 BellSouth may secure the accounts of existing CLECs where an existing CLEC does not meet all of the following factors. Application of and analysis to determine a reasonable amount of deposit based on such factors shall be reasonable and not arbitrary, and must take into account the totality of financial circumstances. Failure to meet one (1) or more of the following factors shall not automatically trigger, but may trigger, upon review, a maximum deposit.
  - 1.10.4.1 Cbeyond must have a good payment history, based upon the preceding twelve (12) month period. A good payment history shall mean that less than ten per cent (10%) of the non-disputed receivable balance is received past the Due Date.
  - 1.10.4.2 The existing customer's liquidity status, based upon a review of EBITDA, is EBITDA positive for the prior four quarters of financials (reported, if a publicly traded company) excluding any nonrecurring charges or special restructuring charges.
  - 1.10.4.3 If the existing CLEC has a current bond rating of BBB or above, or if the existing CLEC has no bond rating or a current bond rating between CCC and BB and meets the following criteria for the last Fiscal Year End and for the prior four quarters of financials (reported, if a publicly traded company):
    - 1.10.4.3.1 Free cash flow positive;
    - 1.10.4.3.2 Positive tangible net worth; and
    - 1.10.4.3.3 Debt/tangible net worth rating of 2.5 or better.
- 1.10.5 Upon notice of default of a bank (or other loan provider's) debt covenant and upon Cbeyond's failure to either cure or obtain a waiver from such default within seven (7) calendar days of such notice of default, BellSouth may utilize the remedies set forth in subsection 1.10.6 unless Cbeyond can demonstrate to the reasonable satisfaction of BellSouth that Cbeyond has ample liquidity to fund said debt should the debt payment obligation become accelerated.
- 1.10.6 If, at any time during the term of this Agreement, Cbeyond fails to comply with the requirements of Section 1.10.5, BellSouth shall provide notice to Cbeyond of