

Ruth Nettles

100019-TP

From: WOODS, VICKIE (Legal) [vf1979@att.com]
Sent: Monday, February 22, 2010 1:49 PM
To: Filings@psc.state.fl.us
Subject: 100019-TP AT&T Florida's Answer and Affirmative Defenses to Sprint Nextel's Counterclaim
Importance: High
Attachments: Document.pdf

- A. Vickie Woods
BellSouth Telecommunications, Inc. d/b/a AT&T Florida
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- B. Docket No. 100019-TP: Enforcement of Interconnection Agreements between BellSouth Telecommunications, Inc. d/b/a AT&T Florida and Sprint Spectrum, L.P., WirelessCo, L.P. and SprintCom, Inc. (jointly d/b/a Sprint PSC) and Nextel South Corp.
- C. BellSouth Telecommunications, Inc. d/b/a AT&T Florida

on behalf of Tracy W. Hatch
- D. 8 pages total (includes letter, pleading and certificate of service)
- E. BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Answer and Affirmative Defenses to Sprint Nextel's Counterclaim

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DOCUMENT NUMBER-DATE

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2/22/2010



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February 22, 2010

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

In re: Docket No. 100019-TP: Enforcement of Interconnection Agreements between BellSouth Telecommunications, Inc. d/b/a AT&T Florida and Sprint Spectrum, L.P., WirelessCo, L.P. and SprintCom, Inc. (jointly d/b/a Sprint PCS) and Nextel South Corp.

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, Inc. d/b/a AT&T Florida's Answer and Affirmative Defenses to Sprint Nextel's Counterclaim, 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,

 for
Tracy W. Hatch

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

**Certificate of Service
Docket No. 100019-TP**

I HEREBY CERTIFY that a true and correct copy was served via (*) Electronic Mail and First Class U. S. Mail this 22nd day of February, 2010 to the following:

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DOCUMENT NUMBER-DATE

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**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In re:)
)
Enforcement of Interconnection Agreements) Docket No.: 100019-TP
between BellSouth Telecommunications, Inc. d/b/a)
AT&T Florida and Sprint Spectrum, L.P.,) Filed: February 22, 2010
WirelessCo., L.P. and SprintCom, Inc. (jointly d/b/a)
Sprint PCS) and Nextel South Corp.)
_____)

**ANSWER AND AFFIRMATIVE DEFENSES OF BELL SOUTH
TELECOMMUNICATIONS, INC. D/B/A AT&T FLORIDA TO SPRINT NEXTEL'S
COUNTERCLAIM**

BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T Florida"), pursuant to Rule 28-106.203 of the Florida Administrative Code, files its Answer and Affirmative Defenses to the Counterclaim of Sprint Spectrum, L.P. and SprintCom, Inc. ("Sprint") and Nextel South Corp. ("Nextel").

Introduction

As set forth in AT&T Florida's complaint, Sprint and Nextel (collectively "Sprint Nextel") have violated their respective interconnection agreements ("ICAs") with AT&T Florida by failing to appropriately compensate AT&T Florida for its termination of interMTA traffic. In response, Sprint Nextel suggests that AT&T Florida did not identify and bill interMTA traffic based on an actual traffic measurement, and that as a result the ICAs permit AT&T Florida to bill only whatever "surrogate" Sprint Nextel agrees to pay. That suggestion is baseless. AT&T Florida billed interMTA traffic charges to Sprint Nextel using AT&T Florida's measurement of interMTA traffic, based on data supplied by Sprint Nextel. And even if AT&T Florida's analyses did not constitute a measurement of interMTA traffic, the ICAs do not permit Sprint Nextel to avoid paying access charges for interMTA traffic by unilaterally refusing to negotiate an appropriate methodology for identifying such traffic.

In addition to answering AT&T Florida's complaint, Sprint Nextel has asserted a counterclaim, seeking a "declaration" that Sprint Nextel is entitled to bill and collect previously unbilled charges. Sprint Nextel's counterclaim fails to state a claim. If Sprint Nextel believes it is entitled to bill AT&T Florida for charges it has not previously billed, nothing prevents it from billing those charges. Once AT&T Florida learns what specific charges Sprint Nextel seeks to collect (a matter on which AT&T Florida currently is in the dark, since Sprint Nextel has not billed the charges), AT&T Florida will have to decide to pay the charges or contest them. Only if AT&T Florida contests the billed charges and the parties do not resolve the issue will there be a dispute ripe for the Commission to decide.

Answer to Sprint Nextel's Counterclaim

AT&T Florida further responds to the allegations of Sprint Nextel's counterclaim as follows:

35. AT&T Florida incorporates by reference and re-alleges each of the statements and allegations in its Complaint.

AT&T Florida denies the additional matter set forth in Sprint Nextel's Introduction and Answer, and incorporated by reference into its Counterclaim. Sprint Nextel alleges that AT&T Florida cannot "unilaterally" use a new factor to bill interMTA traffic, without Sprint Nextel's prior agreement to the factor, because the ICAs provide that "[i]f . . . either party cannot measure traffic in each category, then BellSouth and [Sprint Nextel] shall agree on a surrogate method." See Sprint Nextel Answer at p.2 (citing Sprint ICA, Att. 3, § 6.7.3; Nextel ICA, § VI.C). Sprint Nextel is wrong.

Contrary to Sprint Nextel's suggestion, AT&T Florida "measure[d] traffic in each category" to develop the factor that it used beginning in 2007 to classify and bill interMTA traffic. As set forth in AT&T Florida's complaint, AT&T Florida used information populated by

Sprint Nextel and passed in the signaling stream of the traffic, in particular the Jurisdictional Information Parameter (the "JIP"), to measure the traffic. The new interMTA factor that AT&T Florida used is thus an "[a]ctual traffic measurement," which under the ICAs "is the preferred method of classifying and billing traffic." Sprint ICA, Att. 3, § 6.7.3; Nextel ICA, § VI.C.

While Sprint Nextel takes issue with the *accuracy* of using JIP data to measure traffic, an analysis of that data plainly is an actual "measure" of traffic, even if (as Sprint Nextel contends) it is not 100% accurate. Indeed, Sprint Communications Company L.P. recently submitted testimony to the Kentucky commission stating that while "no jurisdiction methodology is 100% accurate," "Sprint uses the industry standard method of identifying the originating location of wireless calls, which is the NPA-NXX assigned to the wireless switch (which is the functional equivalent of Jurisdictional Information Parameter *i.e.* JIP)." Rebuttal Testimony of Julie A. Walker, *In the Matter of Complaint of Sprint Communications Company L.P. Against Brandenburg Telephone Company for the Unlawful Imposition of Access Charges*, Case No. 2008-00135 (Ky. Pub. Serv. Comm'n Aug. 6, 2009), at pp. 7-8. Based on Sprint's testimony that "use of the JIP field is the most appropriate method for verifying the jurisdiction of a wireless call," the Kentucky commission ordered the parties to use JIP data for their interMTA billing. Order, Case No. 2008-00135 (Nov. 6, 2009), at pp. 9, 11.

Moreover, even if AT&T Florida's analyses of JIP data were not an actual measurement of traffic (though it is), Sprint Nextel's suggestion that neither AT&T Florida nor this Commission could require a new interMTA billing methodology or factor without Sprint Nextel's express agreement is baseless. While the ICAs contemplate that the parties "shall agree on a surrogate method" where no traffic measurement is possible, if the parties are unable to

reach agreement on a surrogate method, nothing in the ICAs prevents the Commission from resolving that dispute.

In addition, nothing in the ICAs permits Sprint Nextel to unreasonably withhold consent to the adoption of a surrogate method. To the contrary, a duty of good faith and fair dealing is implied in every contract. *See, e.g., Cox v. CSX Intermodal, Inc.*, 732 So.2d 1092 (Fla. 1st DCA 1999); *Sepe v. City of Safety Harbor*, 761 So.2d 1182 (Fla. 2d DCA 2000). While AT&T Florida long attempted to engage Sprint Nextel in a good faith effort to modify the factor used to bill interMTA traffic, based upon AT&T Florida's measurement of the traffic using the JIP data delivered by Sprint Nextel, Sprint Nextel refused, notwithstanding that it and/or its affiliates were using their JIP data to develop interMTA traffic billing factors with other carriers.¹

36. The first sentence of paragraph 36 purports to characterize provisions of the parties' ICAs; AT&T Florida responds that the ICAs speak for themselves, admits that the ICAs contain provisions regarding the compensation to be paid, if any, for interMTA traffic; and denies that Sprint Nextel's characterization of those provisions is full or complete. AT&T Florida lacks sufficient information at this time to admit or deny the allegations in the second sentence of paragraph 36, and therefore denies same. AT&T Florida denies the third sentence of paragraph 36.

37. As to the first sentence of paragraph 37, AT&T Florida admits that the ICAs contain provisions regarding the billing of previously unbilled charges, but denies that Sprint Nextel's characterization of these provisions is full or complete. AT&T Florida lacks sufficient

¹ Sprint Nextel also asserts that it provided AT&T Florida traffic study information for AT&T Florida's consideration, but AT&T Florida "ignored" that data. *See, e.g., Answer* ¶ 20. In fact, Sprint refused to provide data to AT&T Florida, and while Nextel provided some data, it did not provide enough information for AT&T Florida to reconcile that data with AT&T Florida's measurement of interMTA traffic based on Nextel's JIP data.

information at this time to admit or deny the allegations in the second sentence of paragraph 37, and therefore denies same. AT&T Florida denies the third sentence of paragraph 37.

All allegations of Sprint Nextel's counterclaim not expressly admitted are denied.

Affirmative Defenses

1. Sprint Nextel's counterclaim fails to state a claim or a cause of action on which the Commission may grant relief. For example, and without limitation, Sprint Nextel has failed to allege facts showing there exists any ripe dispute between the parties over which the Commission may exercise jurisdiction and enter the declaration sought by Sprint Nextel. Sprint Nextel alleges that it has "terminated AT&T interMTA traffic for which AT&T has incurred an obligation to pay Sprint Nextel during the past year but Sprint Nextel has not billed AT&T for such charges." Even assuming that allegation were true, Sprint Nextel is not entitled to collect charges that it has never billed to AT&T Florida. Moreover, there is no ripe dispute between the parties for the Commission to resolve, because there are no charges that AT&T Florida has refused to pay. If and when Sprint Nextel bills the charges it claims to be entitled to collect, setting forth the type, bases and amount of charges, AT&T Florida may or may not contest those charges. Only until Sprint Nextel bills the charges, AT&T Florida refuses to pay them, and the parties cannot resolve the issue might there be any ripe dispute for the Commission to resolve.

2. Sprint Nextel's counterclaim is barred by its failure to meet the conditions precedent of the agreements between the parties. Among other things, under the agreements Sprint Nextel must bill the charges it seeks to collect, and comply with the agreements' dispute resolution provisions should AT&T Florida dispute the billed charges.

3. Sprint Nextel's counterclaim is barred by waiver, laches, estoppel and unclean hands.

4. AT&T Florida reserves the right to designate additional defenses as they become apparent throughout the course of discovery, investigation and otherwise.

Respectfully submitted this 22nd day of February, 2010.



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