



Tracy W. Hatch
General Attorney

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

T: (850) 577-5508
th9467@att.com

FILED APR 14, 2014
DOCUMENT NO. 01658-14
FPSC - COMMISSION CLERK

April 14, 2014

Carlotta Stauffer, Commission Clerk
Office of the Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

**Re: Docket No.: 140055-TP: Complaint of FLATEL, Inc. against
BellSouth Telecommunications, Inc. d/b/a AT&T Florida**

Dear Ms. Stauffer:

Enclosed is BellSouth Telecommunications, LLC d/b/a AT&T Florida's Response to FLATEL, Inc.'s Complaint, which we ask that you file in the captioned docket.

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

Sincerely,

s/Tracy W. Hatch

Tracy W. Hatch

cc: All Parties of Record
Gregory R. Follensbee
Brian W. Moore

1102658

CERTIFICATE OF SERVICE
Docket No. 140055-TP

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

Electronic Mail and First Class U.S. Mail this 14th day of April, 2014 to the following:

Charles W. Murphy
Adam Teitzman
Staff Counsel
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No.: (850) 413-6183
pevans@psc.state.fl.us

FLATEL, Inc.
Mr. Abby Matari
Executive Center, Suite 100
2300 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409-3307
Tel. No.: (561) 688-2525 ext
Fax No.: (561) 688-7334
AMatari@FLATEL.net

s/Tracy W. Hatch
Tracy W. Hatch

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of FLATEL, Inc.) Docket No. 140055-TP
Against BellSouth Telecommunications,)
Inc. d/b/a AT&T Florida) Filed: April 14, 2014

AT&T FLORIDA’S RESPONSE TO FLATEL’S COMPLAINT

BellSouth Telecommunications, LLC d/b/a AT&T Florida (“AT&T Florida”) respectfully submits its Response to the Complaint filed by FLATEL, Inc. (“FLATEL”) styled as an “Amended Complaint.”¹ The amended complaint was served for the first time on AT&T Florida by the Commission on March 24, 2014. Notwithstanding FLATEL’s failure to serve its amended complaint, AT&T Florida previously responded to the amended complaint on February 13, 2014 in Docket 110306-TP. AT&T Florida adopts and incorporates by reference in the instant Docket its previous response in Docket 110306-TP. In addition, AT&T Florida notes for the Commission’s benefit additional actions that have occurred in the ongoing federal litigation. On March 20, 2014, the court denied FLATEL’s Motion to Stay and Refer. *See* Attachment C. On March 24, 2014, AT&T Florida filed its Motion for Summary Judgment. *See* Attachment D. On April 10, 2014, FLATEL filed its response to AT&T Florida’s Motion for Summary Judgment. *See* Attachment E.

¹ Upon information and belief, AT&T Florida does not believe that the Complaint was properly filed by Abby Matari, FLATEL’s CEO, as Mr. Matari is not a Florida Bar licensed attorney nor has he been designated a qualified representative by this Commission. *See In re: Applications for Qualified Representative Status*, Dockets Nos. 130008-TP and 140008-TP and www.flabar.org.

WHEREFORE, in consideration of the above, AT&T Florida respectfully requests that the Commission dismiss FLATEL's Amended Complaint with prejudice.

Respectfully submitted this 14th day of April, 2014.

AT&T FLORIDA

 s/Tracy W. Hatch
Manuel A. Gurdian
Tracy W. Hatch
BellSouth Telecommunications, LLC d/b/a
AT&T Florida
c/o Gregory R. Follensbee
150 South Monroe Street
Suite 400
Tallahassee, FL 32301
Tel. No. (305) 347-5558
Fax. No. (305) 577-4491
th9467@att.com
mg2708@att.com

ATTACHMENT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-80766-CIV-MIDDLEBROOKS/BRANNON

BELLSOUTH TELECOMMUNICATIONS,
LLC,

Plaintiff,

vs.

FLATEL, INC.,

Defendant.

ORDER ON MOTION TO STAY CASE

THIS CAUSE comes before the Court upon Defendant Flatel, Inc.'s ("Defendant") Motion to Stay Case and to Refer this Matter to Florida's Public Service Commission to Determine Certain Facts Regarding Plaintiff's Alleged Improper Business and Billing Practices ("Motion") (DE 25), filed on January 28, 2014. Plaintiff filed a Response (DE 28) on February 11, 2014. Defendant did not file a Reply. I have reviewed the Motion and the Response in this matter, and I am otherwise fully advised in the premises.

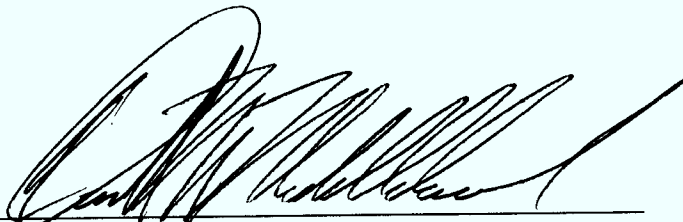
This is a breach of contract action in which Plaintiff alleges Defendant owes over \$1 million in unpaid charges for telecommunications services provided to Defendant for resale pursuant to the terms of an interconnection agreement between the parties. (*See* DE 1). Defendant seeks to stay this matter so that the Florida Public Service Commission ("FPSC") can determine whether the interconnection agreement was fair, and to make certain factual determinations that would resolve or streamline the issues in this case.

After reviewing the arguments from both sides, the Court is not inclined to stay this matter. A stay would only delay this case even further, and the Court is not convinced that the

FPSC cannot simultaneously adjudicate Defendant's credit disputes while the instant case is litigated. Accordingly, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion to Stay (DE 25) is **DENIED**.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 20 day of March, 2014.



DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record

ATTACHMENT D

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

BellSouth Telecommunications, LLC d/b/a)
AT&T Florida, d/b/a AT&T Kentucky,)
d/b/a AT&T North Carolina, and d/b/a)
South Carolina,)
)
Plaintiff,)
)
v.)
)
Flatel, Inc.,)
)
Defendant.)

Case No. 9:13-cv-80766-DMM
MIDDLEBROOKS/BRANNON

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AND INCORPORATED MEMORANDUM OF LAW**

Manuel A. Gurdian
Florida Bar No.: 162825
Attorney for Plaintiff
BellSouth Telecommunications, LLC
150 W. Flagler St., Ste. 1910
Miami, FL 33130
T: (305) 347-5561
F: (305) 375-0209
manuel.gurdian@att.com

J. Tyson Covey
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
T: (312) 701-8600
F: (312) 706-9175
jcovey@mayerbrown.com

Plaintiff, BellSouth Telecommunications, LLC d/b/a AT&T Florida, d/b/a AT&T Kentucky, d/b/a AT&T North Carolina, and d/b/a AT&T South Carolina (collectively, "AT&T"), respectfully submits its Motion for Summary Judgment on all four counts of its Complaint. In support of this Motion, AT&T submits the following memorandum of law.

MEMORANDUM OF LAW

INTRODUCTION

Flatel has refused to pay AT&T more than \$1.2 million for services AT&T supplied to Flatel under the parties' contract, called an interconnection agreement ("ICA"). That breaches the ICA, which expressly required Flatel to pay all charges by each bill's due date, including any disputed charges, with no exceptions. Flatel's affirmative defenses allege a right to various setoff credits against the amount it owes AT&T, but even if those disputes were valid (and they are not) it would make no difference, for the contract requires Flatel to *first* pay all amounts billed and address disputes later. The Florida Public Service Commission ("FPSC") and state utility commissions in Kentucky, North Carolina, and Alabama have interpreted similar or identical contract language (referred to in the industry as a "pay then dispute" provision) to require carriers to pay their bills in full when due, regardless of any pending disputes. AT&T asks this Court to enforce the express terms of the parties' contract by requiring Flatel to pay the full amount billed by AT&T. Flatel can pursue its credit claims in the proper forum, but those claims do not affect Flatel's contractual duty to pay its bills first.

STATEMENT OF FACTS

The relevant facts and history of this dispute are set forth in AT&T's Complaint (DE 1), the Affidavit of David J. Egan filed on behalf of AT&T in support of its Motion for Default Final

Judgment (DE 16-1),¹ and the attached statement of undisputed facts (**Exhibit 1** hereto), and need not be repeated at length.

In brief, AT&T and Flatel entered into an interconnection agreement in 2005 pursuant to Section 252 of the federal Telecommunications Act of 1996 (47 U.S.C. § 252).² (DE 1, ¶ 7; DE 16-1, ¶ 2). Under the ICA, AT&T provided Flatel with, among other things, telecommunications services for resale in the states at issue here (Florida, Kentucky, North Carolina, and South Carolina). The ICA expressly required Flatel to pay all monthly billed charges on or before the next bill date, including disputed amounts. (DE 16-1, ¶ 3; Ex. 1 at §§ 1.4 and 1.4.1). The ICA also required Flatel to pay late payment charges if bills were not paid when due. (Ex. 1 at § 1.4.1.2).

Beginning in late 2009, Flatel began withholding payment of a portion of its bills from AT&T for services provided under the ICA. (DE 16-1, ¶ 3; Burgos Dep. at 12-14 (**Exhibit 5** hereto)³). Flatel continued to breach the ICA by refusing to pay the full amount due each month until AT&T eventually terminated service to Flatel in the states at issue here in 2011 and 2012. (DE 16-1, ¶¶ 9-16).

In April 2012, after disconnecting all services in Florida and applying all approved credits and security deposits, AT&T issued its final bills to Flatel for its three resale accounts in Florida, totaling \$1,040,074 (later reduced to \$1,040,051 after applying a \$23 credit). (DE 16-1,

¹ In the affidavit attached hereto as **Exhibit 4**, Mr. Egan reaffirms and reasserts all of the facts set forth in his prior affidavit filed with AT&T's Motion for Default Final Judgment (DE 16-1). For the Court's convenience, the affidavit filed as DE 16-1 and Exhibits B through F to that affidavit are attached to Mr. Egan's affidavit here (Ex. 4).

² The relevant portions of the ICA are attached. **Exhibit 2** hereto is the "Billing" section of the ICA, which was Attachment 7 to the ICA itself and Exhibit 1 in the deposition of Flatel witness Lobsang Burgos. **Exhibit 3** is the "General Terms and Conditions" portion of the ICA, which was Exhibit 1 to the deposition of Flatel witness Adriana Solar. Both of these documents also were previously filed in this case as part of Exhibit A to DE 16-1.

³ Exhibit 5 contains excerpts from the transcript of the deposition of Lobsang Burgos in this case on March 4, 2014. Mr. Burgos was Flatel's designated Rule 30(b)(6) witness.

¶ 12 and Exs. C and F). In or around September, 2012, after disconnecting all resale services in North Carolina, South Carolina, and Kentucky, and applying all approved credits and security deposits, AT&T issued its final bills to Flatel for resale services provided in those states in the following amounts:

North Carolina	\$61,430
South Carolina	\$93,832
Kentucky	\$22,360

(DE 1, ¶¶ 17, 24, 27, 30; DE 16-1, ¶ 17 and Ex. E). Thus, Flatel has failed to pay AT&T a total of \$1,217,673. (DE 16-1, ¶ 22 and Ex. F).

AT&T filed its Complaint on August 6, 2013, seeking a judgment for the more than \$1.2 million that Flatel owes. (DE 1). Flatel later moved to stay this case while it pursued its claims for setoff credits at the FPSC. (DE 25). The Court denied that motion, finding that Flatel could pursue any setoff issues at the FPSC simultaneously with this case. (DE 35).

ARGUMENT

I. THE ICA REQUIRED FLATEL TO PAY THE FULL AMOUNT BILLED EACH MONTH, REGARDLESS OF ANY DISPUTES

The following facts are undisputed:

- Pursuant to the parties' ICA, AT&T provided telecommunications services to Flatel for resale in the states at issue from at least 2009 until the services were terminated for nonpayment in 2011 or 2012. (DE 16-1, ¶¶ 2, 5; Burgos Dep. at 9 (Ex. 2)).
- AT&T sent bills to Flatel for those services each month, with each payment being due on or before the next bill due date. (DE 16-1, ¶ 5; Ex. 1 at §§ 1.4 and 1.4.1; Burgos Dep. at 9 (Ex. 5)).
- The parties' ICA expressly required Flatel to pay the full amounts billed under the ICA when they were due, including any disputed amounts, with no exceptions. Specifically, the

ICA provided as follows:

Payment Responsibility. Payment of all charges will be the responsibility of FLATEL ... FLATEL shall make payment to [AT&T] for all services billed including disputed amounts....

Payment Due. Payment for services provided by [AT&T], including disputed charges, is due on or before the next bill date....

(Ex. 1 at §§ 1.4 and 1.4.1) (emphasis added). Indeed, AT&T's Complaint stated that "[t]he ICA expressly requires Flatel to make timely payments to AT&T for all services billed, including disputed amounts, on or before the next billing date," and Flatel admitted that was correct. (Complaint, ¶ 8 (DE 1); Answer, ¶ 8 (DE 33)).

- Despite the ICA's requirements, Flatel did not pay the full amount due under the bills AT&T sent between late 2009 and termination of service in 2011 and 2012, even after AT&T demanded payment. (DE 16-1, ¶¶ 9-16 and Exs. B-F; Burgos Dep. at 12-14 (Ex. 2); Solar Dep. at 11 (Exhibit 6)⁴).

- The total unpaid amount of the bills, after including late payment charges pursuant to the ICA and subtracting payments made by Flatel, billing credits AT&T provided to Flatel, the proceeds of Flatel's security deposit, and approved promotional requests submitted by Flatel, is \$1,217,673. (DE 16-1, ¶ 22 and Ex. F).

Given these facts, there is no doubt that Flatel has breached the ICA and that AT&T is entitled to a judgment against Flatel for \$1,217,673. "Where the language of the contract is plain and unambiguous, no construction is required or permissible and the terms of the contract must be given an interpretation of ordinary significance." *Fernandes v. Manugistis Atlanta, Inc.*, 582

⁴ Exhibit 6 contains excerpts from the transcript of the March 4, 2014 deposition of Flatel's CFO during the period at issue, Ms. Adriana Solar.

S.E.2d 499, 502 (Ga. Ct. App. 2003) (citation omitted).⁵ This is true even if the provision is perceived to be harsh to one party to the contract, and the Court is not permitted to rewrite the terms. *See Berry v. Travelers Ins. Co.*, 14 S.E.2d 196, 202 (Ga. Ct. App. 1941).

II. FLATEL HAS NO DEFENSE TO ITS DUTY TO PAY

Flatel's Answer asserts certain affirmative defenses (numbers 1-3, 5, and 11) that appear to be aimed at avoiding its contractual duty to pay its bills when due. (DE 33). None of these defenses excuses Flatel's failure to pay its bills, and Flatel has produced no facts to support them.

Flatel's first affirmative defense contends that AT&T has failed to mitigate damages and therefore is not entitled to interest and/or attorneys' fees. (DE 33 at 3-4). AT&T's Complaint, however, does not seek attorneys' fees. (DE 1 at 6-7). Moreover, the \$1,217,763 that Flatel owes for services rendered does not include any interest or costs. The Complaint does seek any additional "interest and court costs as allowed by the Rules of this Court" (*id.* at 7), but Flatel has presented no basis for denying allowable interest and costs. Flatel's theory is that AT&T "failed to take prompt action to collect the alleged debt." (DE 33 at 4). That is baseless, for AT&T sent bills to Flatel every month that included the full amount due (DE 16-1, ¶ 5; Burgos Dep. at 20 (Ex. 5)), and also gave Flatel an opportunity to pay the debt before AT&T terminated service. (DE 16-1, ¶¶ 9, 14). AT&T billed Flatel consistently with the ICA; Flatel simply refused to pay.

As became clear during the deposition of Flatel's corporate representative, Flatel's second, third, fifth, and eleventh affirmative defenses⁶ all rest on the idea that AT&T somehow

⁵ The ICA requires that Georgia law govern the Agreement. (Ex. 3 at § 17). In any event, Florida law is in accord with Georgia law on this point. *See Applica Inc. v. Newtech Electronics Indus., Inc.*, 980 So. 2d 1194, 1194 (Fla. 3d DCA 2008) ("[W]here an agreement is unambiguous . . . we enforce the contract as written, no matter how disadvantageous the language might later prove to be."); *Medical Ctr. Health Plan v. Brick*, 572 So. 2d 548, 551 (Fla. 1st DCA 1990) ("A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract.") (citation omitted); *Paddock v. Bay Concrete Indus., Inc.*, 154 So. 2d 313, 316 (Fla. 2d DCA 1963) (holding that "an unambiguous agreement must be enforced in accordance with its terms").

⁶ Flatel has withdrawn its fourth affirmative defense. (DE 33 at 4).

acted improperly by not immediately giving credits on bills to Flatel to mirror promotional offerings made to AT&T's own end-user customers, and instead evaluating Flatel's requests for bill credits after the requests were submitted. (Burgos Dep. at 12-14, 22-26 (Ex. 5)). But nothing in the ICA authorized Flatel to withhold payments simply because it thinks it may be entitled to bill credits that had not yet been approved. (*Id.* at 9, 25, 30; Solar Dep. at 8 (Ex. 6)). Thus, Flatel's apparent disagreement with how AT&T processed credit requests is irrelevant to Flatel's contractual duty to pay its bills in full when due, regardless of any disputes.

III. FLATEL'S CREDIT CLAIMS IN AFFIRMATIVE DEFENSES SIX THROUGH TEN DO NOT AFFECT ITS PAYMENT OBLIGATION

Flatel's sixth through tenth affirmative defenses allege that it is entitled to credits against the \$1.2 million in unpaid charges. (DE 33 at 4-9; Burgos Dep. at 28-40 (Ex. 5)). Flatel filed a motion to stay this case and sever those issues from this case to have them addressed by the FPSC (DE 25), but the Court denied the request for stay. (DE 35).

Flatel still may elect to pursue the bill credits it seeks in affirmative defenses six through ten at the FPSC, but whatever Flatel does makes no difference to AT&T's claims here, for Flatel admits that all of the credits it seeks relate to *disputed* charges. (Burgos Dep. at 38, 51-53, 61 (Ex. 5)). The existence of disputed charges does not relieve Flatel from its contractual duty to pay its bills in full when due, and AT&T is therefore entitled to a judgment *now* requiring Flatel to pay those amounts. Indeed, when Flatel asked the FPSC to enjoin AT&T from disconnecting service in Florida in 2011, the FPSC rejected any claim that a dispute over bills excuses Flatel from paying those bills:

We articulated in Order No. PSC-10-0457-PCO-TP, issued on July 16, 2010, that carriers can enforce ICAs including the disconnection of services for violation of the ICAs where the payment terms are clear and unambiguous. Here the ICA provides that FLATEL should make payments for services provided by AT&T Florida including disputed charges on or before the next bill date. The ICA also provides that services can be discontinued for nonpayment of bills. ...

FLATEL's statement that the disputed balance includes promotions that should be offset against amounts it owes to AT&T Florida is not a cause of action as it relates to granting an emergency stay. The ICA requires that all services billed should be paid including disputed amounts, and FLATEL's petition is for an emergency stay to prevent disconnection of its service for nonpayments of bills. Therefore, FLATEL's assertion regarding the promotions failed to satisfy the requirements for a cause of action for an emergency stay.

In re Request for emergency relief and complaint of Flatel, Inc., Docket No. 110306-TP, Order No. PSC-12-0085-FOF-TP, at 4 (Fla. Pub. Serv. Comm'n, Feb. 24, 2012) (emphasis added).⁷

And this is not the only time the FPSC has interpreted such language in an interconnection agreement.⁸ In another case dealing with identical contract language, the FPSC similarly held that a reseller could not withhold disputed amounts from AT&T:

The parties' conduct is governed by an ICA with clear terms. The terms and conditions of the Parties' ICA are clear and unambiguous. Specifically, that Express Phone shall make payments for all services billed including disputed amounts. Furthermore, we already ruled in *LifeConnex*, with identical language in the ICA, that the billed party is required to pay all sums billed, including disputed amounts, pursuant to the terms and conditions in the ICA. Express Phone must

⁷ All state commission and court decisions cited herein are collected in **Exhibit 7** hereto.

⁸ As the FPSC noted in its February 24, 2012 Order, it has ruled that these identical provisions are unambiguous and enforceable in prior cases. *See In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swiftel, LLC by BellSouth Telecommunications, Inc.*, Docket No. 100021-TP, Order No. PSC-10-0457-PCO-TP, at 6 (Fla. Pub. Serv. Comm'n, July 16, 2010) (The FPSC found "that AT&T is entitled under the plain terms of the ICA to prompt payment of all sums billed; and in the absence of such payment, is entitled to proceed with the actions outlined in the Notice of Commencement of Treatment" and "the plain language of these provisions is clear that while [the CLEC] can dispute amounts billed by AT&T, it must pay those amounts as billed within the time specified by the ICA.") (emphasis added). State public utility commissions in Kentucky, North Carolina, and Alabama have reached similar conclusions regarding interconnection agreements with language that is identical to the ICA provisions here. *See In the Matter of BellSouth Telecomms., Inc. v. LifeConnex Telecom, LLC f/k/a Swiftel, LLC*, Case No. 2010-00026, 2010 WL 3373550, at 3 (Ken. Pub. Serv. Comm'n, Aug. 20, 2010) ("[A]lthough the underlying question of whether LifeConnex is entitled to receive certain credits when it resells services that are the subject of certain promotional offers has not been resolved, that fact cannot be used to supersede LifeConnex's existing payment obligations for services rendered, as outlined in the current interconnection agreement.") (emphasis added); *In the Matter of Disconnection of LifeConnex Telecom, Inc. f/k/a Swiftel, LLC by BellSouth Telecomm., Inc.*, Docket No. P-55, Sub 1817, 2010 WL 3736591 (N.C. Utils. Comm'n, Sept. 22, 2010); *Petition of LifeConnex Telecom, LLC, f/k/a Swiftel, LLC Concerning Implementation of its Interconnection Agreement with BellSouth Telecomm., Inc.*, Docket No. 31450, 2010 Ala. LEXIS 441, at *11-*12, *15 (Ala. Pub. Serv. Comm'n, Aug. 20, 2010) ("The [commission] staff surmised that, given the plain language of Attachment 7, Sections 1.4 and 1.41 of the Parties' ICA, LifeConnex is required to timely pay all charges on invoices submitted by AT&T, including charges that are disputed. LifeConnex has the latitude to dispute amounts billed by AT&T under the Parties' ICA, but LifeConnex must pay all amounts billed, including disputed amounts, within the time specified by the ICA"; the commission "adopt[ed] and ratif[ied] all of the findings and determinations reached by the staff").

pay all disputed amounts. Dispute of promotion credits does not affect the billing time frame or payment obligations established by the ICA. AT&T Florida is entitled under the clear terms of the ICA to prompt payment of all sums billed; and in the absence of such payment, is entitled to proceed with the actions outlined in the Notice of Commencement of Treatment; and that AT&T Florida appropriately disconnected Express Phone on March 30, 2011.⁹

In another decision the FPSC held, based upon identical ICA language, that a carrier's failure to pay AT&T's bills when due was "a material breach of the binding agreement."¹⁰ A federal district court affirmed that decision, holding that the FPSC "appropriately determined [that] Express Phone's failure to pay the disputed amounts to AT&T was a material breach of its ICA." *Express Phone Service Inc. v. Florida Public Service Com'n*, 2013 WL 6536748 (N.D. Fla., Dec. 12, 2013). The district court noted the binding nature of ICAs and held that "[o]nce an interconnection agreement is approved by the state commission, the Act requires the parties to abide by its terms." 2013 WL 6536748 at *5.

Thus, the FPSC has already determined that the unambiguous terms of the parties' ICA require Flatel to pay AT&T for all services billed, including disputed amounts, with no exceptions. Flatel therefore breached the ICA by not paying \$1,217,673 when billed, and the Court should order Flatel to promptly pay that amount now. Should Flatel prevail on any of its claims for credits before the FPSC, it would be entitled to a credit against the amount of any unsatisfied portion of that Judgment or a refund of any excess monies paid to AT&T; however, pursuant to the express terms of the ICA, Flatel must pay AT&T first.

⁹ *In re: Emergency Complaint of Express Phone Service, Inc. against BellSouth Telecommunications, Inc.; In re: Notice of Adoption of existing interconnection, unbundling, resale and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a NewPhone, Inc. by Express Phone Service, Inc.*, Docket No. 110071-TP; Docket No. 110087-TP; Order No. PSC-11-0291-PAA-TP, 2011 Fla. PUC LEXIS 210, at 10 (Fla. Pub. Serv. Comm'n, July 6, 2011) (emphasis added).

¹⁰ *In re: Notice of Adoption of existing interconnection, unbundling, resale and collocation agreement between BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast and Image Access, Inc. d/b/a NewPhone, Inc. by Express Phone Service, Inc.*, Docket No. 11087-TP, Order No. PSC-12-0390-FOF-TP, 2012 Fla. PUC LEXIS 374 at 6-7 (Fla. Pub. Serv. Comm'n, July 30, 2012).

CONCLUSION

For the reasons stated, the Court should grant summary judgment on all of AT&T's claims and order Flatel to promptly pay AT&T \$1,217,673, plus any applicable interest and costs.

Respectfully submitted,

By: /s/ Manuel A. Gurdian

Manuel A. Gurdian
Florida Bar No. 162825
Attorney for Plaintiff
BellSouth Telecommunications, LLC
150 W. Flagler St., Ste. 1910
Miami, FL 33130
T: (305) 347-5561
F: (305) 375-0209
manuel.gurdian@att.com

J. Tyson Covey
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
T: (312) 701-8600
F: (312) 706-9175
jcovey@mayerbrown.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been served on March 24, 2014 via CM/ECF on all counsel or parties of record on the service list below:

s/Manuel A. Gurdian
Manuel A. Gurdian

SERVICE LIST

Stephen A. Smith, Esq.
Pallo, Marks, Hernandez, Gechijian & DeMay, P.A.
4100 RCA Blvd., Suite 100
Palm Beach Gardens, FL 33410
Attorneys for Defendant, Flatel, Inc.

LIST OF EXHIBITS TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

<u>Exhibit</u>	<u>Description</u>
1	AT&T's Statement of Undisputed Facts
2	"Billing" attachment to parties' interconnection agreement
3	General Terms and Conditions from parties' interconnection agreement
4	Affidavit of David J. Egan
5	Excerpts from deposition of Flatel witness Lobsang Burgos
6	Excerpts from deposition of Flatel witness Adriana Solar
7	Cited decisions of courts and state commissions

ATTACHMENT E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO.: 13-CV-80766-DMM

BELLSOUTH TELECOMMUNICATIONS,
LLC, doing business as AT&T Florida,
doing business as AT&T Kentucky, doing
business as AT&T North Carolina, doing
business as AT&T South Carolina,

Plaintiff,

vs.

FLATEL, INC.,

Defendant.

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND SUPPORTING MEMORANDUM OF LAW**

Defendant, FLATEL, INC., ("FLATEL"), by and through undersigned counsel, pursuant to Federal Rule of Civil Procedure 56; the Local Rules of the United States District Court for the Southern District of Florida, and other applicable Rules, hereby files its Opposition to Plaintiff's Motion for Summary Judgment, based on the record evidence, because the Plaintiff has failed to carry its burden to show the absence of a genuine dispute of material fact on its affirmative relief the Court should deny the Plaintiff's Motion and states:

MEMORANDUM OF LAW

SUMMARY JUDGMENT STANDARD

Summary judgment is proper if following discovery, the pleadings, depositions, answers to interrogatories, affidavits and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Celotex Corp. v.

Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); Fed. R. Civ. P. 56. "An issue of fact is 'material' if, under the applicable substantive law, it might affect the outcome of the case." Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1259-60 (11th Cir. 2004). "An issue of fact is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party." Id. at 1260. All the evidence and factual inferences reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); Jackson v. BellSouth Telecomms., 372 F.3d 1250, 1280 (11th Cir. 2004).

BRIEF BACKGROUND

The parties have been involved in various business dealings for nearly twenty years. In or about 2005, BELLSOUTH amended its contract with FLATEL - the interconnection agreement ("ICA"). Bellsouth moves for summary judgment asserting FLATEL breached the ICA, and that its damages of approximately \$1.2 million dollars are undisputed. For the reasons set forth herein, and based on the deposition testimony and Affidavit of Adriana Solar (See Affidavit of Adriana Solar attached as **Exhibit "A"**), BELLSOUTH is not entitled to summary judgment because a dispute of material fact exists.

STATEMENT OF UNDISPUTED FACTS

BELLSOUTH has submitted its statement of undisputed facts as Exhibit 1 to its Motion for Summary Judgment (DE 36-2). FLATEL disputes many of the alleged key "Undisputed" facts as follows:

In Undisputed Fact No. 3, BELLSOUTH asserts that FLATEL was responsible for paying all charges including "disputed amounts". Unfortunately, for BELLSOUTH it did not define 'disputed amounts' in the ICA. Under an objective interpretation and common sense reading of the

contract and based on prevailing contract law, 'promotions' are not 'disputes'. Yet, BELLSOUTH is trying to mis-characterize its promotions and credits as 'disputes'. Accordingly, there is a material dispute of fact concerning which charges and alleged unpaid amounts are 'promotions and credits' versus actual billing 'disputes'.

In Undisputed Fact No. 5 BELLSOUTH asserts as an undisputed fact that beginning in 2009, FLATEL began withholding payment of a portion of its bills from AT&T. In fact, Ms. Solar testified that she thought the ICA had been modified in 2009, but BELLSOUTH's counsel clarified the modification was in 2005. In point of fact, BELLSOUTH accepted FLATEL's payments - *without* the promotions and credits included in the payments from the date of modification - 2005- through 2011/2012 when BELLSOUTH suddenly notified FLATEL that it owed several hundred thousand dollars and would no longer accept partial payments. See **Exhibit "B"**, Solar deposition at page 11, 14, and E-mail attached as **Exhibit "C"**. Accordingly, whether BELLSOUTH waived the full payment provision or modified the contract by its conduct is a disputed issue and mixed question of law and fact. Therefore, BELLSOUTH is not entitled to summary judgment.

In Undisputed Fact No. 7, BELLSOUTH asserts as undisputed fact that it applied all credits and promotions and FLATEL owes \$1,040,074.00. FLATEL disputes this fact. Indeed, the majority of the submitted 'disputes' remain open and BELLSOUTH has not provided any substantive response to the submitted 'disputes', which has prevented FLATEL from availing itself of the ICA's appeal or escalation provision. See Affidavit of Adriana Solar attached as Exhibit "A".

And because BELLSOUTH admits the \$1,040,074.00 (\$1,217,673.00 with late charges etc) it seeks relates to 'disputed' charges, which have not been resolved, a dispute of material fact exists. Finally, it is undisputed that the Florida Public Service Commission has not ruled on whether BELLSOUTH is properly allocating credits and promotions to ILEC's such as FLATEL.

Accordingly, a dispute of material fact exists whether FLATEL owes any money to BELLSOUTH, and BELLSOUTH has not defeated FLATEL's affirmative defenses.

A. **THE ICA TERM 'DISPUTE' IS NOT DEFINED AND THEREFORE THE TERM IS AMBIGUOUS AND BELLSOUTH IS NOT ENTITLED TO SUMMARY JUDGMENT**

BELLSOUTH asserts that given the alleged facts [in its motion] "there is no doubt that FLATEL has breached the contract and that BELLSOUTH is entitled to a judgment for \$1,217,673.00: (DE 36, page 4, last paragraph). As set forth above, FLATEL disputes BELLSOUTH's 'undisputed facts' and further asserts that the contract terms are ambiguous and susceptible to more than one interpretation. It is well settled that the actual language used in the contract is the best evidence of the intent of the parties and, thus, the plain meaning of that language controls. Rose v. M/V "GULF STREAM FALCON", 186 F.3d 1345, 1350 (11th Cir. 1999). Only when the terms of a contract are ambiguous or susceptible to different interpretations is parol evidence admissible to "explain, clarify or elucidate" the ambiguous term. See e.g., Tingley Sys., Inc. v. HealthLink, Inc., 509 F. Supp. 2d 1209, 1218 (M.D. Fla. 2007); Friedman v. Va. Metal Prods. Corp., 56 So. 2d 515, 517 (Fla. 1952); McInerney v. Klovstad, 935 So. 2d 529, 531-32 (Fla. 5th DCA 2006).

Therefore, in analyzing a contract under Florida law, the court must first look at the words used on the face of the contract to determine whether the contract is ambiguous. Rose, 186 F.3d at 1350. The initial determination of whether a contract term is ambiguous is a question of law. Strama v. Union Fidelity Life Ins. Co., 793 So. 2d 1129, 1132 (Fla. 1st DCA 2001); Arriaga v. Fla. Pac. Farms, Inc., 305 F.3d 1228, 1246-47 (11th Cir. 2002). If the facts of the case are not in dispute, the ambiguity may be resolved as a matter of law. Id. On the other hand, "[w]here the terms of the written instrument are disputed and reasonably susceptible to more than one construction, an issue

of fact is presented as to the parties' intent which cannot properly be resolved by summary judgment." Strama, 793 So. 2d at 1132 (*quoting Univ. Underwriters Ins. Co. v. Steve Hull Chevrolet, Inc.*, 513 So.2d 218, 219 (Fla. 1st DCA 1987)). Here, the facts are in dispute and the contract's terms are ambiguous -- "disputed charges or disputes". Therefore, BELLSOUTH is not entitled to summary judgment.

B. BELLSOUTH HAS NOT ESTABLISHED IT IS ENTITLED TO THE MONETARY DAMAGES OF \$1,217,673.00, THEREFORE, IT IS NOT ENTITLED TO SUMMARY JUDGMENT

BELLSOUTH asserts the amount it claims it is owed -- \$1,217,673.00 -- is undisputed. FLATEL disputes this 'undisputed fact'. As set forth above, it is undisputed that the Florida Public Service Commission, nor this Court, has not determined that BELLSOUTH is properly allocating credits and promotions to ILEC's such as FLATEL. See deposition and Affidavit of Adriana Solar. Second, FLATEL asserts that the 'promotions and credits' have not been reviewed by BELLSOUTH and in fact remain open, placing BELLSOUTH in breach and not permitting FLATEL to further resolve the alleged credits and promotions. See Affidavit of Adriana Solar.

C. BELLSOUTH HAS NOT CARRIED ITS BURDEN ON FLATEL'S AFFIRMATIVE DEFENSES, THEREFORE, BELLSOUTH IS NOT ENTITLED TO SUMMARY JUDGMENT

BELLSOUTH has essentially admitted in its summary judgment motion that FLATEL's affirmative defenses are potentially valid because FLATEL may pursue the credits with the Florida Public Service Commission. (DE 36 page 6, last paragraph). And if the affirmative defenses are potentially valid and can be pursued with the FPSC, then certainly they can be pursued in this court. BELLSOUTH has not shown an absence of a genuine dispute over the credits. Indeed, it has established just the opposite. In fact, if FLATEL establishes that BELLSOUTH accepted payments for four or five years before forcing FLATEL to adhere to the ICA's terms, which it believes are not

ambiguous, -- which FLATEL disputes -- then BELLSOUTH will owe FLATEL approximately \$365,000. Nevertheless, because there remains a dispute of a material fact regarding FLATEL's asserted affirmative defenses, BELLSOUTH is not entitled to summary judgment.

Respectfully submitted,

/s/ Stephen A. Smith, Esquire

Stephen A. Smith, Esquire

Florida Bar No. 0488194

E-Mail: ssmith@pallolaw.com

Pallo, Marks, Hernandez,

Gechjian & DeMay, P.A.

4100 RCA Blvd., Suite 100

Palm Beach Gardens, FL 33410

Telephone: (561) 624-1051

Facsimile: (561) 624-7441

Attorneys for Defendant, FlaTel, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of April, 2014, I electronically filed the foregoing with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of notices of electronic filing generated by CM/ECF and/or U.S. Mail or in some other authorized manner for those counsel or parties who are not authorized to receive notices of electronic filing.

/s/Stephen A. Smith, Esquire
Stephen A. Smith, Esquire
Florida Bar No. 0488194
E-Mail: ssmith@pallolaw.com
Pallo, Marks, Hernandez,
Gechjian & DeMay, P.A.
4100 RCA Blvd., Suite 100
Palm Beach Gardens, FL 33410
Telephone: (561) 624-1051
Facsimile: (561) 624-7441
Attorneys for Defendant, FlaTel, Inc.

SERVICE LIST

Scott A. Marcowitz, Esquire
Demahy Labrador Drake Victor & Cabeza
6400 N. Andrews Ave., Suite 500
Fort Lauderdale, FL 33409
E-Mail: smarkowitz@dldlawyers.com
Co-Counsel for Plaintiff, Bellsouth Telecommunications, LLC, et al.

J. Tyson Covey, Esquire
E-Mail: jcovey@mayerbrown.com
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
Telephone: (312) 701-8600
Co-Counsel for Plaintiff, Bellsouth Telecommunications, LLC, et al.

Stephen A. Smith, Esquire
Florida Bar No. 0488194
E-Mail: ssmith@pallolaw.com; vickie@pallolaw.com
Pallo, Marks, Hernandez,
Gechijian & DeMay, P.A.
4100 RCA Blvd., Suite 100
Palm Beach Gardens, FL 33410
Telephone: (561) 624-1051
Facsimile: (561) 624-7441
Counsel for Defendant, FlaTel, Inc.