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

June 26, 2015

Re: Docket No.: 140156-TP: Opposition to AT&T's Motion to Strike and for Attorney's Fees

Dear Ms. Stauffer:

Please find the attached Opposition to AT&T's Motion to Strike and for Attorney's Fees filed on behalf of Communications Authority, Inc. and file in the above referenced docket.

Electronic copies have been served to the Parties shown on the attached Certificate of Service.

Respectfully submitted,

/s/
Kristopher E. Twomey
Counsel to Communications Authority, Inc.

cc: All Parties of Record

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CERTIFICATE OF SERVICE
Docket No. 140156-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail this 26th day of June 2015, to the following:

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/s/
Kristopher E. Twomey

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Re: Petition for Arbitration of Interconnection Agreement Between BellSouth Telecommunications, LLC d/b/a AT&T Florida and Communications Authority, Inc.	))))	Docket 140156-TP

COMMUNICATIONS AUTHORITY, INC.'S OPPOSITION TO AT&T'S MOTION TO STRIKE AND FOR ATTORNEY'S FEES

Communications Authority, Inc. ("CA") respectfully submits this opposition to AT&T's Motion to Strike and for Attorney's Fees pursuant to Rule 28-106.204 of the Florida Administrative Code. For the reasons detailed below, the Commission should refuse to consider and deny this motion in its entirety. CA states as follows:

1. As a result of its failure to rebut CA's arguments in its pleadings and at hearing, AT&T filed this motion seeking to restrict the information available to the Commission for consideration in its decision. AT&T's arguments suffer from a significant procedural flaw in that the motion is simply not allowed under the Florida Administrative Code.

2. AT&T argues that "The only facts a party may properly assert in a post-hearing brief are those for which there is evidence of record."[1] Although CA does not quibble with the assertion, AT&T did not bother to provide any citation to that argument. In administrative practice, a post-hearing brief should complete the evidentiary record for the

[1] AT&T Motion to Strike and for Attorney's Fees at p. 1.

Commission's decision. Rule 28-106.307 of the Florida Administrative Code provides the following regarding post-hearing submittals:

> The presiding officer may permit all parties to submit proposed findings of fact, conclusions of law, orders, and memoranda on the issues within a time designated by the presiding officer. Unless authorized by the presiding officer, proposed orders shall be limited to 40 pages.

In this case, the presiding officer increased the page limits but otherwise made no additional limitations to the post-hearing brief. CA's post-hearing brief provides its legal analysis and factual arguments gleaned from all the evidence produced in this docket, including rebuttals of the statements proffered by AT&T's witnesses at hearing.

Because it comes after a hearing has been concluded, the post-hearing brief provides an opportunity to rebut the arguments made during the hearing. It is illogical for AT&T to argue that its less than compelling witnesses' testimony should be allowed to stand without challenge by the post-hearing brief. Moreover, AT&T's Motion is a thinly veiled attempt to file a reply post-hearing brief that was not authorized by the Commission. Consideration of AT&T's Motion as part of the record would therefore prejudice CA as CA has not had an opportunity to rebut AT&T's claims in its own post-hearing brief. AT&T's Motion should be rejected.

3. Resolution of AT&T's motion is governed by Rule 28-106.211, Florida Administrative Code, which provides that the presiding officer "may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case . . . ." Under that rule, the question is what resolution of AT&T's motion will promote the "just ... resolution of all aspects of the case." The details sought to be stricken by AT&T provides the Commission with

additional information that is helpful for the Commission's decision in this case. Nothing AT&T cites as inappropriate constitutes a change in position by CA.[2] CA argues that under this rule, the appropriate course is to deny AT&T's motion to strike.

4. AT&T's motion is offered pursuant to Rule 28-106.204 which states:

> (1) All requests for relief shall be by motion. All motions shall be in writing unless made on the record during a hearing, and shall fully state the action requested and the grounds relied upon. The original written motion shall be filed with the presiding officer. When time allows, the other parties may, within 7 days of service of a written motion, file a response in opposition. No reply to the response shall be permitted unless leave is sought from and given by the presiding officer. Written motions will normally be disposed of after the response period has expired, based on the motion, together with any supporting or opposing memoranda. The presiding officer shall conduct such proceedings and enter such orders as are deemed necessary to dispose of issues raised by the motion.

Motion practice at the Commission, however, is governed by the Florida Rules of Civil Procedure. It is well-settled under Florida law that a motion to strike may only be offered against a pleading. Rule 1.140(f), Florida Rules of Civil Procedure states:

> (f) Motion to Strike. A party may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time.

However, a post-hearing brief is not a "pleading." [3] A pleading is defined as only a complaint or petition, an answer to a crossclaim, a third party complaint, and a third party

[2] This distinguishes these facts from a similar argument in Docket 011666-TP. In that case, Verizon filed a motion to strike portions of GlobalNAPs, Inc.'s post-hearing brief because it contained new substantive argument. AT&T does not make such a claim. In the Matter of GNAPs, Inc.'s Petition for Arbitration Pursuant to 23 U.S.C. 5 232(b) of Interconnection Rates, Terms and Conditions with Verizon Florida, Inc., f/k/a GTE Florida, Inc.

[3] See, Rule 1.100(a), Florida Rules of Civil Procedure.

answer.[4] As such, AT&T is procedurally barred from filing a motion to strike against a post-hearing brief.

5. As CA has argued throughout this proceeding, AT&T is arguing from both sides of its mouth. AT&T is doing so again here. AT&T made a similar argument to that in paragraph four opposing a motion to strike to the Commission in in Case 040353-TP. In its opposition to a motion to strike, AT&T argued:

> Rule 1.140 provides that "[a] party may move to strike or the court make strike redundant, immaterial, impertinent or scandalous matter from **any pleading** at any time." (emph. added). Rule 1.110(a) provides that the term "pleadings" is limited to complaints, answers, cross claims and counter claims.[5]

AT&T's argument in its pending motion ignores this plain rule that it cited in its own filing. The Commission agreed with AT&T's position and denied Supra's motion to strike.[6]

> According to Supra, Rule 1.140(f), Florida Rules of Civil Procedure authorizes a party to move to strike certain matter "from any pleading at any time." However, neither motions nor responses in opposition thereto are "pleadings". See, Rule 1.100(a), Florida Rules of Civil Procedure. See also, Harris v. Lewis State Bank, 436 So. 2d 338, 340, n. 1 (Fla. 1st DCA 1983); Motzner v. Tanner, 561 So. 2d 1336 (Fla. 5th DCA 1990). See also, Order No. PSC-02-799-PCO-TP, issued June 12, 2002, in Docket 001305-TP. Therefore, Supra's Motion to Strike Portions of BellSouth's Opposition Response will not be considered.

6. Because AT&T's motion should be denied based upon the foregoing CA believes the Commission's analysis should end there. However, to the extent that

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[4] *Id.*

[5] Exhibit 1, BELLSOUTH TELECOMMUNICATIONS, INC.'S OPPOSITION TO SUPRA'S MOTION TO STRIKE, In re: Petition of Supra Telecommunications, And Information Systems, Inc. to Review And Cancel BellSouth's Promotional Offering Tariffs Offered in Conjunction With its New Flat Rate Service Known as Preferred Pack, Docket No. 040353-TP (August 31, 2004). ("Supra Case")

[6] Exhibit 2, ORDER DENYING SUPRA'S MOTION TO STRIKE, Supra Case (September 22, 2004).

the Commission does not reject and instead decides to consider the motion, CA will now respond to each specific assertion that AT&T seeks to strike. Given the Staff's statement regarding the attachment of CA's four exhibits as being inadmissible for purposes of the Commission's decision, AT&T seeks to strike four items. CA does not oppose removal of those statements and the four exhibits from the post-hearing brief as already noted by Staff. AT&T is merely piling on far more than what is related to the issues raised by Staff.

7. AT&T seeks to strike CA's reference to cageless collocation on page 25 of the brief. As evidenced throughout this case, AT&T's counsel and expert witnesses appear to be ill-informed of how CLECs provide service. Cageless collocation, as distinct from caged or virtual collocation, is current standard industry practice. Inclusion of the clarifying language provided on page 25 provides further explanation of CA's position and rationale supporting it and does not prejudice AT&T in any way.

8. Regarding page 54, CA's citation was in error and should have referenced AT&T's response to CA's First Set of Interrogatories. In response to CA's interrogatory #38, AT&T stated, "The Lockbox Team will utilize their tools to obtain the information to post the payment. If unsuccessful, the payment will be posted to the Unassociated work list in AT&T's payment gateway; at that point, AT&T Florida has deposited the funds into its account." In response to interrogatory #39, AT&T responded to the question regarding ACH payments, "…the answer is yes, if the funds are immediately available." AT&T has admitted that whether payments are received via mail or ACH, they do have the funds as of

the date received and not as of the date that they apply the remittance information later on. CA's brief language is supported by the record.

9. Regarding page 60, AT&T misidentifies CA's statement. CA noted that it is standard AT&T practice to have a "Joint Planning Meeting," not a "Joint Prehearing Conference." CA discussed this in its detailed response to #70 of AT&T's second set of interrogatories. The response therein supports CA's statement in the post-hearing brief. Also, in her deposition, Ms. Pellerin (01758 @ 2) confirmed that CA's description of the process is accurate. Although she chose to frame her response only as it relates to trunk servicing, CA has clearly stated that the issue applies to all Local Interconnection Orders. Given that Ms. Pellerin did not refute CA's statement because she instead chose to only talk about trunk servicing, CA's response to interrogatory #70 is the proper citation to the statement on page 60 of the post-hearing brief. CA's brief language is supported by the record.

10. Regarding page 66, AT&T argues that the statement, "However, most collocators do not operate a fiber-optic network…" is unsupported. The statement is not only plainly obvious in the reality of the industry, but the statement is also just background for the next sentence. "CA intends to operate throughout the State of Florida, and certainly does not intend to install a fiber optic network of its own into hundreds of central offices where it might collocate." This is the statement that CA relies upon and CA is entitled to state its intentions to clarify its opposition to AT&T's proposed ICA language and the harm that CA believes AT&T's language would cause to CA if implemented. CA's brief language is supported by the record.

11. Regarding page 69, footnote 79, CA provided Internet citations regarding the central office accidents cited by AT&T's witnesses. During cross-examination at the hearing, AT&T's witnesses admitted that the accidents they cited pre-dated the existence of CLECs but stated she was unsure of the dates the accidents occurred. CA produced the citations to further rebut AT&T's witness testimony. As such, CA's brief language is supported by the record.

11. Again on page 69, AT&T seeks to strike CA's arguments used to rebut AT&T's witness testimony. It is clear that the current NEBS standards were developed well after the incidents cited by AT&T. CA produced the citations to further rebut AT&T's witness testimony at 000325 @ 1. As such, CA's brief language is supported by the record.

12. Regarding page 71, AT&T's testimony under cross-examination (000326 @ 2) makes clear that their own expert testified that no such incidents have occurred that they are aware of. If any did exist, AT&T certainly would have cited any instead of relying upon incidents like Hinsdale that occurred decades ago. CA's brief language is supported by the record.

13. Regarding page 71, AT&T has refused to acknowledge the relationship between TCG Florida and the Uverse product. AT&T refused to respond to CA's discovery requests on the issue and at hearing, and its expert witnesses claimed a lack of knowledge (000638 @ 8). Now AT&T seeks to strike the accurate language cited in CA's brief on pages 71 and 72. Through deception and a lack of cooperation in discovery, AT&T has sought to duck this issue. AT&T has failed to produce any testimony or evidence to refute CA's claims regarding TCG because they cannot. CA has consistently maintained its position and it should be allowed in the post-hearing brief.

14. Regarding the language on page 92, CA should have cited its response to Staff interrogatory #44:

> "CA's specific objections are that CA is a small company with limited resources. It would harm CA if it were required to raise a limitless amount of capital to fund a reserve intended to cover a potentially huge AT&T billing error. CA could be forced to borrow money on unfavorable terms on short notice to fund such a reserve, through no fault or error of its own. In such a case, CA could be forced to pay fees in order to obtain the financing along with high interest charges for the borrowed funds. In such a case, AT&T's language does not propose any compensation for such costs incurred by CA nor for the resources consumed by this adventure. For a small company, monopolizing its limited financial resources as well as time attention of its executives operating in crisis mode for this sort of thing is a tremendous burden. AT&T's language sets up a lose/lose proposition for CA, where if AT&T prevails, CA loses. If CA prevails, CA loses there too. And so AT&T gets to submit CA to a 'death of a thousand paper cuts' by bullying its smaller competitor and running up its costs."

CA's brief language is supported by the record.

15. Regarding page 99, the testimony cited by AT&T does not explain why it would be impossible. CA cited Ms. Pellerin's direct testimony in its brief regarding her claim that AT&T should not be "contractually obligated to do the impossible" and provide CA with billing credit details. Her rebuttal testimony cited by AT&T in its Motion essentially argued that it would be impossible because the parties might later agree that it is not required in a specific instance. This does not mean that it would be impossible, and assumes a future agreement which may or may not occur. Thus, Ms. Pellerin did not explain why it would be impossible to provide the detail sought by CA but only illustrated a hypothetical future case where the parties might mutually agree to waive the obligation later. This has no bearing upon whether or not AT&T can provide the detail absent such an agreement. CA's brief language is supported by the record.

16. Regarding page 108, Hearing Exhibit 01839 submitted by AT&T provides a Florida Department of Revenue form. It states:

> What is Exempt?
> Dealers should not collect taxes on exempt sales of communications services.
> Exempt transactions include:
> • Sales for resale
> • Sales or purchases of Internet access

Because CLECs are only entitled to purchase services under the ICA for the purpose of providing communications services to end users, this document clearly shows that all CLECs are exempt from taxes for services purchased under the ICA. As such, CA's brief is supported by AT&T's own evidence and is supported by the record.

17. Regarding page 114, AT&T's hearing exhibit described in the paragraph above supports CA's brief.

18. Regarding page 125, CA cited Mr. Ray's rebuttal testimony and it fully supports CA's statement in its brief. CA's brief language is supported by the record. Further regarding page 125, CA should have cited its response to Staff interrogatory #77. CA stated:

> From the KMC Data ICA which AstroTel adopted, and which Terra Nova later adopted and currently has in force, section 3.3.1 reads "With the exception of transit traffic, the parties shall institute a "bill and keep" compensation plan under which neither party will charge the other party recurring and non-recurring charges for trunks (i.e. one-way or two-way), trunk ports and associated dedicated facilities for the exchange of local traffic (non-transit) and ISP-bound traffic (non-transit) and 911 traffic." It seems pretty clear in this example that 911 is treated as local interconnection.

This supports the statement made by CA on page 125 of its brief regarding the existence of two existing ICAs with this language—the KMC Data ICA and Terra

Nova ICA adoption. AT&T noted in its response to Staff's interrogatory #39, "Earlier vintage ICAs, including relatively recent adoptions of earlier ICAs, do not contain specific language addressing the financial responsibility for these facilities." That supports CA's contentions as well and CA's brief language is supported by the record.

19. Regarding page 140, Mr. Ray testified in his direct testimony at page 38, line 6-7 that "AT&T has an anti-competitive motive for keeping CLECs interconnected using legacy technology because legacy TDM trunks are less scalable and more expensive for the CLEC." AT&T has not rebutted the technological fact that TDM trunking is less scalable than IP trunking because it is obviously true. CA's brief language is supported by the record.

20. Regarding page 142, Mr. Ray's rebuttal testimony at page 40 @ 17, including footnotes 7 and 8 support CA's brief. CA's brief language is thus supported by the record.

21. Regarding page 158, CA's response to AT&T interrogatory #6 states: "AT&T refused to engage with CA in any discussion of the pricing schedule during the negotiation period, and so there is no agreement as to the pricing schedule." Moreover, also in response to AT&T interrogatory #89, CA stated, "AT&T refused to discuss the issue (or any pricing issues) during the pre-arbitration period normally reserved for negotiations, and so the issue is now part of this arbitration." Those facts are in the record and have not been rebutted by AT&T. As such, CA's brief language is supported by the record.

22. Regarding page 160, CA maintained from the outset that AT&T did not engage in meaningful negotiations with CA. Paragraph 8 of CA's Petition for Arbitration stated, "AT&T failed to negotiate any pricing issues during the course of negotiations." AT&T has never argued the opposite and has effectively acknowledged it. CA's opening statement at hearing also made the same argument. CA's brief language is supported by the record.

23. Regarding pages 180-181, CA showed that AT&T sells to its own affiliates who then sell to end users in Mr. Ray's rebuttal testimony at page 1, line

24. AT&T seeks to deny CA that ability, claiming as its basis solely that such a restriction is reasonable. CA argues it is not reasonable and places CA at a competitive disadvantage to AT&T. CA's brief language is supported by the record.

25. Regarding page 182, AT&T cites hearing exhibits @ 1475. However, their exhibit, which they claim supports their position, does not. AT&T quoted 47 CFR §64.2400(a), which makes no mention of wholesale or retail services. Ms. Pellerin then drew conclusions not supported by the citation, and those conclusions are what AT&T relies upon. That is not evidence of anything and CA has consistently contested those assertions repeatedly in this proceeding. CA's brief language is supported by the record.

26. In a footnote, and without any legal support, AT&T argues that the Commission should penalize CA by awarding AT&T attorneys' fees for its Motion. The citation is incorrect and should be 120.569(2)(e). It states:

> All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

For the "improper purpose" cited in the statute, AT&T appears to be alleging that CA relied on "purported evidence that is not in the record." That argument is purely vindictive and unsupportable. In this Opposition, CA has conclusively shown that the existing evidence in the record supports its post-hearing brief. For this reason, in addition to the fact that AT&T's Motion is barred as CA cited in #4 above, imposition of any penalty is unwarranted.

For the foregoing reasons, AT&T's motion should not be considered and denied in its entirety.

Respectfully submitted this 26th day of June, 2015.

By: /s/
Kristopher E. Twomey
Attorney for Communications Authority, Inc.