

State of Florida



**Public Service Commission**

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TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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**DATE:** June 24, 2004

**TO:** Director, Division of the Commission Clerk & Administrative Services (Bayó)

**FROM:** Office of the General Counsel (Rojas, Christensen)  
Division of Competitive Markets & Enforcement (Pruitt)

**RE:** Docket No. 031046-TP – Petition and complaint of AT&T Communications of the Southern States, LLC against BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for alleged anticompetitive pricing of long distance service.

**AGENDA:** 07/06/04 – Regular Agenda – Decision Prior to Hearing – Motion to Dismiss/Motions for Summary Judgment/Summary Final Order – Interested Persons May Participate

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\031046.RCM.DOC

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**CASE BACKGROUND**

On November 12, 2003, AT&T Communications of the Southern States, LLC (AT&T) filed a formal Petition and Complaint (Petition) against BellSouth Telecommunications, Inc. (BellSouth) and BellSouth Long Distance, Inc. (BSLD). Therein, AT&T asserts anti-competitive pricing of long distance service related to the BellSouth Saving Plan® Promotion #31 (the 1-cent promotion) and asks for suspension and cancellation of the promotion filed by BSLD.<sup>1</sup> AT&T contends that the promotion is unlawful, because BSLD is offering service at a rate that does not cover the cost that AT&T and other carriers must cover in order to provide a like service due to the intrastate switched access rate that AT&T and other carriers must pay BellSouth.

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<sup>1</sup> Promotion #31 provided that customers who subscribed to BSLD's BellSouth Savings Plan would pay 1-cent per minute (rounded up to the next minute) during the promotional period of October 16, 2003, to January 31, 2004, plus a monthly fee of \$3.95. After January 31, 2004, the monthly rate would be 5 cents per minute. Although the specific promotion about which AT&T complains has terminated, a similar promotion has been filed by BSLD.

AT&T's Petition includes three Counts based primarily upon alleged violations of Section 364.051(5)(c), Section 364.01(4), and Sections 364.08, 364.09, and 364.10, Florida Statutes. AT&T seeks the following relief for these alleged violations:

- immediately suspend the 1-cent promotion filed by BSLD;
- commence an expedited hearing/review regarding the matters alleged in the Petition;
- cancel BSLD's 1-cent promotional tariff;
- require BSLD to establish per minute rates for each of its intrastate long distance plans that satisfy the imputation safeguards of Section 364.051(5)(c), Florida Statutes;
- in the alternative, find that BellSouth's intrastate switched access rates are excessive, unjust and unreasonable and reduce those rates to cost-based levels immediately; and
- grant such other relief as the Commission may deem appropriate.

On December 2, 2003, BellSouth filed a Motion to Dismiss Petition and Complaint or in the Alternative Motion for Summary Judgment. That same day, BSLD filed an Answer to the Complaint. On December 9, 2004, AT&T filed its Response to BellSouth's Motion, along with its own Motion for Summary Final Order. Thereafter, on January 15, 2004, BSLD also filed a Motion for Summary Order. On January 29, 2004, AT&T filed a Response in Opposition to BSLD's Motion.

On February 11, 2004, Commission staff held an informal status meeting and requested that the parties file additional comments regarding the application of Section 364.051(5)(c) to the issues presented in this docket. On April 20, 2004, staff received the last of the informal comments from the parties.

This is staff's recommendation on the Motion to Dismiss, as well as the Motions for Summary Judgment or Summary Final Order. Staff ultimately agrees with BellSouth that AT&T has failed to state a cause of action upon which the Commission can grant relief, and as such, staff recommends that BellSouth's Motion to Dismiss be granted.

BellSouth neglected to address AT&T's alternative request that BellSouth's access charges be reduced. Staff is recommending that the Commission dismiss this claim on its own motion, as the requested relief appears to be beyond the Commission's authority to grant.

Finally, staff has addressed the Motions for Summary Judgment/Summary Final Order/Summary Order. Staff notes that if the Commission approves staff's recommendation in Issue 1, these remaining Motions will be rendered moot; however, should the Commission deem it necessary to address the Motions for Summary Order/Summary Final Order, staff recommends that they be denied, as they do not meet the strict standard for a summary final order, because there are factual disputes outstanding.

## **DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant BellSouth's motion to dismiss AT&T's Petition?

**RECOMMENDATION:** Yes. Staff recommends that BellSouth's Motion to Dismiss be granted. Staff further recommends that the Commission, on its own motion, dismiss with prejudice AT&T's request for reduction of BellSouth's access charges. In addition, staff recommends that AT&T be granted leave to amend its Petition within 20 days of issuance of the Commission's Order for the limited purposes of: (1) alleging specific facts and identifying specific violations that may constitute a cause of action arising under Sections 364.08, 364.09, and 364.10; and (2) alleging specific facts to support its assertion that BellSouth and BSLD are acting in concert to enable BellSouth to do that which it is otherwise prohibited by law from doing. **(ROJAS)**

### **STAFF ANALYSIS:**

#### **I. Standard of Review**

In reviewing a motion to dismiss, the Commission should take all allegations in the petition as though true, and consider the allegations in the light most favorable to the petitioner in order to determine whether the petition states a cause of action upon which relief may be granted. See, e.g., Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So.2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA, 1968); Ocala Loan Co. v. Smith, 155 So.2d 711, 715 (Fla. 1st DCA, 1963).

Furthermore, a motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1<sup>st</sup> DCA 1993). In disposing of a motion to dismiss, the Commission must assume all of the allegations of the complaint to be true. Id. In determining the sufficiency of a complaint, the Commission should limit its consideration to the complaint and the grounds asserted in the motion to dismiss. Flye v. Jeffords, 106 So.2d 229 (Fla. 1<sup>st</sup> DCA 1958).

#### **II. Arguments**

##### **A. AT&T's Complaint**

In its Complaint, AT&T alleges that BellSouth and BSLD are wholly-owned subsidiaries of BellSouth Corp. and that the 1-cent promotion is an attempt by BellSouth to do indirectly through its affiliate, BSLD, that which BellSouth is prohibited from doing directly. AT&T asserts that other long distance providers are unable to compete with the 1-cent pricing plan because the \$0.04649 switched access rate is a direct cost to them, but not to BellSouth and BSLD. AT&T further asserts that the only access payments between BSLD and BellSouth that occur are merely intra-corporate transactions and have no real consequence on the overall bottom line of BellSouth Corp. AT&T asserts that the failure of BSLD to impute the full price of

switched access in its promotional offering is as clear a violation of Section 364.051(5)(c), as if BellSouth itself had filed the tariff. As such, the 1-cent promotional offering results in an anti-competitive pricing squeeze that is detrimental to the development of competition. AT&T further asserts that if, in fact, BSLD does not pay access charges to BellSouth, then BellSouth is in violation of Sections 364.08, 364.09, and 364.10, Florida Statutes, which prohibit discriminatory assessment of access charges on different IXCs.

AT&T emphasizes that this practice is intentional and, as such, also constitutes anticompetitive behavior as proscribed by Section 364.01(4)(g), Florida Statutes. AT&T also asserts that Section 364.051(5)(c), Florida Statutes, regarding price regulation for Local Exchange Companies (LECs), does not preclude the Commission from exercising its jurisdiction to investigate and take any action necessary to eliminate detected anticompetitive actions and practices of BSLD, which is a wholly-owned subsidiary of BellSouth Corp.

AT&T concludes that if the Commission does not invalidate the 1-cent promotional offering, it should address the underlying cause of the monopoly position by reducing BellSouth's intrastate switched access rates to cost-based levels immediately.

B. BellSouth's Motion to Dismiss

BellSouth argues that AT&T has no genuine complaint against BSLD and does not properly allege that BellSouth has violated any Commission rule or provision of Florida Statutes.

First, BellSouth asserts that AT&T's interpretation of Section 364.051(5)(c), Florida Statutes, is simply incorrect and inapplicable to BSLD as an IXC. BellSouth contends that the promotion offered by BSLD is not unlike something that AT&T or any other IXC could have offered. Thus, BellSouth maintains that AT&T has not stated a cause of action against BSLD.

BellSouth then argues that AT&T has also not identified a cause of action against BellSouth. BellSouth emphasizes that the only direct claim made by AT&T against BellSouth is the statement at page 4 of AT&T's Petition that BellSouth ". . . is attempting to do indirectly through its affiliate, BSLD, that which it is prohibited by law to do directly." BellSouth argues that AT&T does not indicate what it is that BellSouth has done that is in violation of the law, nor does AT&T identify which law it is that BellSouth has violated.<sup>2</sup>

BellSouth further emphasizes that Section 272 of the Telecommunications Act of 1996 governs the relationship between BellSouth and BSLD, and that AT&T fails to allege that BellSouth has in any way violated Section 272. Finally, BellSouth contends that no BellSouth service is discounted in connection with the 1-cent promotion at issue.

For these reasons, BellSouth asks that the Petition be dismissed as to BellSouth, or that, alternatively, summary judgment be granted in BellSouth's favor.

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<sup>2</sup> In support of its alternative request for summary judgment, BellSouth included the affidavit of Thomas F. Lohman to demonstrate that BSLD does in fact pay BellSouth the access charges that BSLD incurs when it uses BellSouth's facilities. BellSouth further offers that there are no intra-corporate transactions to account for these payments as AT&T alleges.

C. AT&T's Response to the Motion to Dismiss

In its response, AT&T argues that Section 364.051(5)(c), Florida Statutes, must be read in conjunction with Section 364.01(4)(g), Florida Statutes. AT&T contends that this section requires the Commission to "ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior." AT&T argues that the 1-cent promotional offering is predatorily priced and, therefore, is anticompetitive. Thus, AT&T contends that it would be improper for the Commission to dismiss AT&T's Petition.

AT&T also notes that BellSouth failed to address the alternative relief requested by AT&T. Thus, if the Commission does not invalidate the 1-cent promotional offering, AT&T argues that the Commission should address the underlying cause of the monopoly position by reducing BellSouth's intrastate switched access rates to cost-based levels immediately. AT&T concludes that because BellSouth did not seek dismissal of this portion of the Complaint, it would be improper for the Commission to grant a motion to dismiss. Staff agrees that this portion of AT&T's Petition does not appear to be addressed within BellSouth's Motion to Dismiss; thus, staff has addressed this request for alternative relief as a separate matter.

**III. Staff's Analysis -- Motion to Dismiss**

A. Section 364.051(5)(c)

Section 364.051, Florida Statutes, which is entitled Price Regulation, applies only to local exchange telecommunications companies that have elected price regulation. The provisions of Section 364.051 do not apply to BSLD, an IXC. Section 364.051(5)(c), Florida Statutes, the specific provision at issue here, provides:

The price charged to a consumer for a nonbasic service shall cover the direct costs of providing the service and shall, to the extent a cost is not included in the direct cost, include as an imputed cost the price charged by the company to competitors for any monopoly component used by a competitor in the provision of its same or functionally equivalent service.

This subsection sets forth a pricing requirement for nonbasic services. As indicated by the definition set forth in Section 364.02(9), nonbasic services are services provided by ILECs, not services provided by IXCs:

"Nonbasic service" means any telecommunications services provided by a local exchange telecommunications company other than a basic local telecommunications service, a local interconnection agreement described in s. 364.16, or a network access service described in s. 364.163.

Additionally, Section 364.051(5)(c) does not apply to BellSouth's sale of network access services to BSLD, because network access service is specifically excluded from the definition of nonbasic service. Rather, the provision of network access services is governed by Sections 364.163 and 364.164, Florida Statutes.

Based on the foregoing analysis, staff believes that Section 364.051(5)(c), Florida Statutes, cannot be construed in the expansive manner contemplated by AT&T in its complaint. Therefore, staff recommends that AT&T has failed to state a cause of action arising under Section 364.051(5)(c). Thus, staff recommends that the Petition on this point be dismissed.

B. Section 364.01(4)(g)

As for the allegation that the 1-cent promotion constitutes predatory pricing in violation of Section 364.01(4)(g), Florida Statutes, the arguments on this point appear to raise a case of first impression for the Commission. Section 364.02(13)(g), Florida Statutes, specifically sets forth the statutory provisions to which IXC's are subject. Section 364.01(4)(g) is not one of the identified provisions; thus, BSLD, as an IXC, is not directly subject to Section 364.01(4)(g). As such, staff recommends that AT&T's allegations of predatory pricing fail to state a cause of action upon which relief can be granted. Staff, therefore, recommends that the Petition on this point be dismissed with prejudice. Nevertheless, under a different factual and legal scenario, it may be possible that a cause of action could be established against an IXC under this provision. Therefore, if the Commission agrees with staff on this point, the decision should be strictly limited situation presented here.

C. Sections 364.08, 364.09, and 364.10

As for AT&T's related argument that BellSouth, the LEC, may have violated Sections 364.08, 364.09, and 364.10, Florida Statutes, by not assessing access charges on BSLD, staff believes that this is a closer call, primarily because AT&T does not appear to actually be asserting this as a separate cause of action, but rather as support for its claim that BSLD is in violation of Section 364.051(5)(c). Because AT&T believes that BSLD has not properly imputed the cost of intrastate switched access, AT&T assumes that BSLD has been able to do this, because either: (1) the cost is covered by an intra-corporate account; or (2) BSLD is simply not charged intrastate switched access, thereby giving rise to a possible secondary violation. Specifically, AT&T states that, "If BSLD does not actually pay switched access charges to BellSouth, then BellSouth is in violation of Sections 364.08, 364.09, and 364.10, Florida Statutes, that prohibit discriminatory assessment of switched access charges among similarly situated IXC's." (Emphasis added by staff). AT&T does not actually allege that BellSouth does not assess access charges to BSLD; thus, AT&T has failed to adequately plead this as a cause of action against BellSouth. Staff finds additional support for this analysis in the fact that AT&T has not requested relief for possible violations by BellSouth, the LEC, of Sections 364.08, 364.09, and 364.10. Instead, the specific relief AT&T has requested is directed primarily at BSLD's actions.

In what appears to be a related assertion, AT&T claims that BellSouth is attempting to do through BSLD that which it is otherwise prohibited by law from doing. AT&T has not,

however, identified what it is that BellSouth is doing, nor what provision of law is being violated with respect to this allegation. Staff infers that the above cited statutes may be part of what AT&T is referring to, and if so, the pertinent analysis set forth above would be applicable on this point as well. Otherwise, staff notes that Section 272 of the federal Act is also applicable to affiliate transactions between BellSouth and BSLD; however, AT&T has not alleged any violation of this provision.<sup>3</sup>

The only specific remedy directed at BellSouth, the LEC, appears to be AT&T's request that BellSouth's intrastate switched access rates be reduced – an argument separate and apart from AT&T's assertions that BellSouth may be improperly assessing its current intrastate switched access charges in a discriminatory manner. Therefore, staff believes that AT&T has also failed to identify a cause of action arising under Section 364.08, 364.09, and 364.10, Florida Statutes.<sup>4</sup>

While staff emphasizes again that this does appear to be a close call, for all the foregoing reasons, staff recommends that AT&T has failed to identify a cause of action upon which relief can be granted on this point. As such, staff recommends that AT&T's Petition on this point be dismissed.

### **Summary**

Based on the foregoing, staff recommends that BellSouth's motion to dismiss AT&T's Petition be granted as to all counts and as to both BellSouth and BSLD. Staff believes, however, that AT&T might be able to state a cause of action by pleading more specific facts and identifying specific violations. Therefore, staff recommends that AT&T be granted leave to amend its Petition within 20 days of issuance of the Commission's Order for the limited purposes of: (1) alleging specific facts and identifying specific violations that may constitute a cause of action arising under Sections 364.08, 364.09, and 364.10; and (2) alleging specific facts to support its assertion that BellSouth and BSLD are acting in concert to enable BellSouth to do that which it is otherwise prohibited by law from doing.

## **IV. Staff's Analysis -- Request to Reduce Access Charges**

AT&T argues that if the Commission decides not to invalidate the 1-cent promotional offering, it should address the underlying cause of the monopoly position of BellSouth by reducing BellSouth's intrastate switched access rates to cost-based levels immediately. BellSouth did not address this allegation and request for relief in its Motion to Dismiss. Nevertheless, staff believes the requested relief is beyond the scope of the Commission's authority over intrastate access charges, as set forth in the following analysis.

### **A. Statutory Analysis**

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<sup>3</sup> Staff adds that it is questionable whether this Commission would even have authority to address a Section 272 violation as that provision does not specifically provide an enforcement role for the state commissions. However, this question need not be resolved here.

<sup>4</sup> While not pertinent within the context of a Motion to Dismiss, staff notes for informational purposes that BellSouth submitted an uncontroverted affidavit that BSLD does, in fact, pay BellSouth intrastate switched access.

Having reviewed the statutory provisions in question, staff does not believe that the Commission can grant the ultimate relief requested by AT&T. The specific provisions of Sections 364.163 and 364.164, Florida Statutes, clearly limit the Commission's authority to act with regard to switched access rates.

Specifically, Sections 364.163 and 364.164, Florida Statutes, provide a specific and detailed process for the reduction of access charges, the capping of those rates, and the flow-through of access charge reductions. The Commission has been given regulatory oversight over this process.

However, neither of these provisions authorizes the Commission to reduce intrastate switched access rates outside the scope of the specific process delineated in the statutes, which involves offsetting increases in basic local rates. Instead, Section 364.164, Florida Statutes, provides that ILECs may petition the Commission to reduce their access charges in a revenue neutral manner. Thereafter, Section 364.163, Florida Statutes, clearly states that once the intrastate switched access rates are reduced to parity, they are then capped for a period of 3 years. Pursuant to Section 364.163(3), the Commission's ongoing authority is limited to "... determining the correctness of any rate decrease by a telecommunications company resulting from the application of s. 364.164 and making any necessary adjustments to those rates." Staff interprets this provision as limiting the Commission's authority over intrastate switched access rates to ensuring proper implementation of the reductions and flow-throughs required by Sections 364.163 and 364.164.

The maxim *expressio unius est exclusio alterius* is applicable in this case. Under this principle, the mention of one thing implies the exclusion of another. It follows from this principle that when a statute specifies a certain process by which something must be done, it implies that it shall not be done in any other manner. See, Botany Worsted Mills v. US, 278 US 282; 73 L. ED. 379, 385 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.") See also, In re Investigation of a Circuit Judge of the Eleventh Judicial Circuit of Florida, 93 So. 2d 601, 606 (Fla. 1957) ("... where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner.") In accordance with this principle, the express enumeration of the process for reducing and capping access rates set forth in Sections 364.163 and 364.164, Florida Statutes, precludes reduction of access rates in any other manner.

It is also well-established that administrative agencies only have the power conferred upon them by statute and must exercise their authority in accordance with the controlling law. 1 Fla. Jur. § 71, p. 289. As such, grants of authority to an administrative body are generally limited to those powers either expressly enumerated or clearly implied by necessity. See Sutherland, Statutory Construction, 5th Ed., Volume 3, §65.02; and Keating v. State ex rel. Ausebel, 167 So. 2d 46 (Fla. 1st DCA 1964). If there is reasonable doubt as to the scope of a power, it should be resolved against the exercise of that power. State ex rel. Burr et al., State Railroad Commissioners v. Jacksonville Terminal Co., 71 So. 474 (Fla. 1916). See also, Deltona Corp. v. Mayo, 342 So. 2d 510 (Fla. 1977), citing City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493 (Fla. 1973) (stating that any doubt as to the existence of a particular power must be



resolved against the Commission). As stated in Edgerton v. International Company, 89 So. 2d 488, 490 (Fla. 1956):

A commission may not assert the general power given it and at the same time disregard the essential conditions imposed upon its exercise. Officers must obey a law found upon the statute books until in a proper proceeding its constitutionality is judicially passed upon.

Staff notes that while Sections 364.163 and 364.164, Florida Statutes, were modified in 2003 as part of the Tele-Competition Innovation and Infrastructure Enhancement Act, the Commission's ability to act beyond implementation of the process contemplated by these statutory provisions appears to be limited in much the same way as it was prior to the 2003 Act. While the process for addressing intrastate switched access charges changed in 2003, the scope of the Commission's authority remains limited. Thus, staff's analysis presented herein is consistent with that in Order No. PSC-97-1370-FOF-TP, issued October 29, 1997, in Docket No. 970841-TP, wherein the Commission granted GTE Florida, Inc.'s (GTEFL n/k/a Verizon) Motion to Dismiss MCI's complaint regarding GTEFL's allegedly excessive intrastate switched access charges on the grounds that the Commission lacked jurisdiction over the level of access charges except as specifically provided by statute.

Based on the foregoing, staff recommends that AT&T's request for relief in the form of reduced access charges is beyond the scope of the Commission's jurisdiction, and as such, should be dismissed with prejudice.

## **V. Conclusion**

Based on the foregoing, staff recommends that BellSouth's Motion to Dismiss be granted.<sup>5</sup> Staff further recommends that the Commission, on its own motion, dismiss with prejudice AT&T's request that BellSouth's access charges be reduced. In addition, staff recommends that AT&T be granted leave to amend its Petition within 20 days of issuance of the Commission's Order for the limited purposes of: (1) alleging specific facts and identifying specific violations that may constitute a cause of action arising under Sections 364.08, 364.09, and 364.10; and (2) alleging specific facts to support its assertion that BellSouth and BSLD are acting in concert to enable BellSouth to do that which it is otherwise prohibited by law from doing.

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<sup>5</sup> Staff emphasizes that while staff believes that AT&T has failed to state a cause action in its Petition, the Commission has oversight regarding "... cross-subsidization, predatory pricing or similar anticompetitive behavior and may investigate, upon complaint or on its own motion, allegations of such practices," in accordance with Section 364.3381, Florida Statutes. However, the scope of the Commission's jurisdiction under this Section is not clear, particularly as it relates to activities of IXC's.

**ISSUE 2:** Should BSLD's and AT&T's Motions for Summary Final Order be granted?

**RECOMMENDATION:** If the Commission approves staff's recommendations in Issue 1, BSLD's and AT&T's separate motions for summary final order will be rendered moot and no further action will need to be taken. If the Commission denies staff's recommendation in Issue 1, BSLD's and AT&T's separate motions for summary final order should be denied as neither has met the legal standard for which Summary Final Order may be granted. **(ROJAS)**

**STAFF ANALYSIS:** If the Commission approves staff's recommendation in Issue 1, BSLD's and AT&T's separate motions for summary final order will be rendered moot and no further action will need to be taken. If the Commission denies staff's recommendation in Issue 1, BSLD's and AT&T's separate motions for summary final order should be denied as neither has met the legal standard for which Summary Final Order may be granted.

**I. Standard of Review**

Rule 28-106.204(4), Florida Administrative Code, provides:

Any party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits. A party moving for summary final order later than twelve days before the final hearing waives any objection to the continuance of the final hearing.

The standard for granting a summary final order is very high. The purpose of summary judgment, or in this instance summary final order, is to avoid the expense and delay of trial when no dispute exists concerning the material facts. The record is reviewed in the light most favorable to the party against whom the summary judgment is to be entered. When the movant presents a showing that no material fact on any issue is disputed, the burden shifts to his opponent to demonstrate the falsity of the showing. If the opponent does not do so, summary judgment is proper and should be affirmed. The question for determination on a motion for summary judgment is the existence or nonexistence of a material factual issue. There are two requisites for granting summary judgment: first, there must be no genuine issue of material fact, and second, one of the parties must be entitled to judgment as a matter of law on the undisputed facts. See, Trawick's Florida Practice and Procedure, §25-5, Summary Judgment Generally, Henry P. Trawick, Jr. (1999).

Further, under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact, and . . . every possible inference must be drawn in favor of the party against whom a summary judgment is sought." Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993)(citing Wills v. Sears, Roebuck & Co., 351 So. 2d 29 (Fla. 1977)). Furthermore, "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law." Moore v.

Morris, 475 So. 2d 666 (Fla. 1985); City of Clermont, Florida v. Lake City Utility Services, Inc., 760 So. 1123 (5<sup>th</sup> DCA 2000).

## **II. Arguments**

### **A. AT&T's Motion for Summary Order**

On December 9, 2003, AT&T filed a Motion for Summary Final Order. In its complaint, AT&T alleges that the rate for two ends of switched access in Florida is approximately \$0.046 per minute. AT&T asserts that BSLD admits to this rate in its Answer to AT&T's complaint, and that the Lohman affidavit (supra fn. 2) confirms that the 1-cent promotional package offers long distance calling at a rate that does not cover the applicable access services being provided. Therefore, AT&T contends that it should be granted summary judgment regarding the matters set forth in its complaint.

### **B. BSLD's Response to AT&T's Motion**

BSLD did not file a response to AT&T's motion.

### **C. BSLD's Motion for Summary Order**

On January 15, 2004, BSLD filed a Motion for Summary Order. In its motion, BSLD cites that AT&T's assertions are inherently flawed in that they fail to factor in the \$3.95 monthly recurring charge (MRC) to all customers of BSLD's plan. BSLD asserts that the total revenues derived from the plan, including the MRC, adequately cover, and even exceed, the associated costs involved in the promotion. BSLD contends that this alone is sufficient to grant its motion for Summary Order.

### **D. AT&T's Response to BSLD's Motion**

On January 29, 2004, AT&T filed a Response in Opposition to BSLD's Motion for Summary Order, in which, it asserts that BSLD has failed to meet the legal standard for which summary final order may be granted. AT&T argues that the calculations supporting BSLD's motion are incomplete in their consideration of all the relevant costs, including non-access related and marketing costs. This shortcoming results in a disputed issue of material fact.

## **III. Staff's Analysis**

If the Commission approves staff's recommendation on Issue 1, these Motions will be rendered moot. Otherwise, staff believes that neither BSLD or AT&T has met the standard necessary to grant a motion for a summary final order. Based on the pleadings, the parties have been unable to make a conclusive showing that there are no genuine issues of material fact in dispute or that either is entitled to judgment as a matter of law on the undisputed facts. As such, if the Commission finds it necessary to rule on the merits of these Motions, staff recommends that they both be denied.

**ISSUE 3:** Should this Docket be closed?

**RECOMMENDATION:** Yes. If the Commission approves staff's recommendations in Issues 1 and 2, and no amended petition is filed within 20 days from the issuance of the order, this Docket should be closed as no further action by the Commission will be required. If, however, the parties choose to file an amended petition within 20 days of the order, this docket should remain open for further proceedings. **(ROJAS)**

**STAFF ANALYSIS:** If the Commission approves staff's recommendations in Issues 1 and 2, and no amended petition is filed within 20 days from the issuance of the order, this Docket should be closed as no further action by the Commission will be required. If, however, the parties choose to file an amended petition within 20 days of the order, this docket should remain open for further proceedings.