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Sent: Monday, April 26, 2010 1:58 PM
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Subject: Docket Number 100144-TP
Attachments: STS response in opposition to motion to dismiss4-26-10 (final).pdf

Attached for filing, please find STS's Response to AT&T Florida's Motion To Dismiss STS's Petition For Arbitration and Alternatively For Mediation.

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April 26, 2010

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

RE: In the Matter of the Petition of Saturn Telecommunication Services, Inc. d/b/a STS Telecom for Arbitration Pursuant to Section 252(b) of the Telecommunication Communications Act of 1934 as amended, and Section 364.162, Florida Statutes, to Establish an Interconnection Agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Florida, Docket No. 100144-TP

Dear Ms. Cole:

Enclosed for filing, please find the following:

Saturn Telecommunication Services, Inc.'s (STS) Response to AT&T Florida's Motion To Dismiss. Copies of the same have been furnished to all counsel via electronic mail.

We thank you for your kind assistance and attention to this matter.

Very truly yours,

s/ Alan C. Gold

ALAN C. GOLD

CC: Robert (Kip) Edenfield, Esquire, (Via Email: ke2722@att.com)
Tracy W. Hatch, Esquire, (Via Email: thatch@att.com)
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:	)	Docket No. 100144-TP
The Petition of Saturn Telecommunication Services Inc.	)	
d/b/a STS Telecom for Arbitration Pursuant to Section	)	
252(b) of the Telecommunication Communications Act	)	
of 1934 as amended, and Section 364.162, Florida	)	
Statutes, to Establish an Interconnection Agreement with	)	
BellSouth Telecommunications, Inc. d/b/a AT&T Florida	)	
	)	Filed April 26, 2010

STS'S RESPONSE TO AT&T FLORIDA'S MOTION TO DISMISS

Petitioner, SATURN TELECOMMUNICATION SERVICES, INC. ("STS"), by and through its undersigned Counsel, pursuant to Rules 28-106.204 and 28-106.303, Florida Administrative Code, hereby files its Response to AT&T Florida's ("AT&T") Motion to Dismiss, and in support thereof states as follows:

Standard of Review

A motion to dismiss raises as a question of law, the sufficiency of the facts alleged in a petition to state a cause of action. *See Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. *See Id.* Respondent, citing to *In re: Petition to investigate, claim for damages, complaint and other statements against respondents Evercom Systems, Inc. d/b/a Correctional Billing Services and BellSouth Corporation by Bessie Russ*, Docket No. 060640-TP, Order No. PSC-07-0332-PAA-TP (Issued April 16, 2007) (citing *In re: Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc.*, 95 FPSC 5:339 [1995]), notes that in order to "sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially

correct, the petition still fails to state a cause of action for which relief can be granted."[1] When making a determination of whether to grant a motion to dismiss, only the *petition* can be reviewed and all reasonable inferences drawn from the petition must be made in favor of the petitioner. *See In re: Application for Transfer of Certificates Nos. 592-W and 509-S from Cypress Lakes Associates, Ltd. to Cypress Lakes Utilities, Inc. in Polk County*, Docket No. 971220-WS, Order No. PSC-99-1809-PCO-WS (Issued September 20, 1999). Looking only at STS's Petition, and assuming all of the allegations contained therein are true, STS has stated a cause of action for which relief can be granted.

STS's Petition is not Improper Despite the Parties Existing Interconnection Agreement

It should be noted at the outset that AT&T crafts arguments based solely on its needs for a particular day, and without regard to the merits of such. The parties, as they are presently involved in another dispute before the FCC, have touched upon this very issue in their various pleadings. AT&T has previously acknowledged the ability for STS to call upon the FPSC to resolve disputes arising out of the renegotiation of the relevant terms of the ICA, in the event of a change in legislation, regulation, or judicial action. In a Reply Brief to the Complaint filed by STS, AT&T states, "the ICA provides that, '[i]n the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement,' either party may seek renegotiation of the relevant terms (with disputes, again, to be resolved by the FPSC)."[2] Nevertheless, AT&T's argument is still inadequate.

STS acknowledges that the parties have an existing Interconnection Agreement (hereinafter "ICA") and that the five-year term of the ICA expires on November 16, 2011.

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[1] *See* AT&T's Motion, pp. 2-3.

[2] *See* AT&T's AT&T's Reply – Legal Analysis, p. 27, File No. EB-09-MD-008, filed before Federal Communications Commission

However, the existence of an interconnection agreement has never precluded the possibility of subsequent amendments.[3] In its Motion to Dismiss, AT&T cites to a plethora of case law in an effort to place great importance and finality on the parties' ICA.[4] This is done, presumably, to avoid the proposed amendment to the ICA that STS has attempted to unsuccessfully negotiate with AT&T. STS is in full agreement with AT&T when it cites, among others, *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 305 F.3d 89, 104 (2d Cir. 2002) for the holding that "once a carrier enters 'into an interconnection agreement in accordance with section 252,…it is then regulated directly by the interconnection agreement.'"[5] Having already established that interconnection agreements can be amended, the case law and holdings cited by AT&T are clearly taken out of context, for if they are not, all orders amending interconnection agreements by the Florida Public Service Commission would be in direct disregard of established legal principles. Furthermore, regulating the duties and obligations of parties to an interconnection agreement according to the specific terms of that agreement is not what STS seeks to do, but rather amend the existing ICA by way of arbitration pursuant to 47 USC §252(b).

AT&T cites only one legal authority for its assertion that "STS [cannot] seek arbitration from this Commission when it has an approved interconnection agreement."[6] The Florida Public Service Commission ("FPSC") in *In re: Petition of Supra Telecommunications & Information*

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[3] *See Generally In re: Request by BellSouth Telecommunications, Inc. for Approval of Amendment to Interconnection, Unbundling, and Resale Agreement with Orlando Telephone Company Pursuant to Sections 251, 252, and 271 of the Telecommunications Act of 1996*, Docket No. 980884-TP, Order No. PSC-98-1369-FOF-TP (Issued October 12, 1998); *In re: Request for Approval of Amendment to Interconnection, Unbundling, and Resale Agreement Negotiated by BellSouth Telecommunications, Inc. with 360 Communications Company Pursuant to Section 252(e) of the Telecommunications Act of 1996*, Docket No. 971451-TP, Order No. PSC-98-0257-FOF-TP (Issued February 9, 1998); *In re: Petition by Verizon Florida, Inc. for Approval of Second Amendment to Interconnection, Resale, and Unbundling Agreement with Business Telecom, Inc. d/b/a BTI*, Docket No. 010047-TP, Order No. PSC-01-0601-FOF-TP (Issued March 13, 2001).

[4] *See* AT&T's Motion, p. 5.

[5] *See* AT&T's Motion, p. 5.

[6] *See* Id.

Systems for generic proceeding to arbitrate rates, terms, and conditions of interconnection with BellSouth Telecommunications, Inc. or, in the alternative, petition for arbitration of interconnection agreement, Docket No. 980155-TP, Order No. PSC-98-0466-FOF-TP at 5 (Issued March 31, 1998), stated, "The Act does not authorize a state commission to alter terms *within* an approved *negotiated* agreement…." The FPSC went on to say, "Nothing in the Act provides for a request for arbitration while the *matters at issue* are *governed by* an approved agreement." *Id.*

What AT&T failed to account for was the 2008 decision by the United States Eleventh Circuit Court of Appeals in *Nuvox Communications, Inc. v. BellSouth Communications, Inc.*, 530 F.3d 1330. In *Nuvox*, the Court affirmed the United States District Court ruling, which reversed a decision by the FPSC concluding that federal law did not require BellSouth to commingle Section 251 elements with Section 271 elements. The Court's decision to require the commingling of both Section 251 and 271 elements came more than a year after the parties entered into the ICA in 2007. As such, STS was without the ability to negotiate, and ultimately include, terms for Section 251 and 271 commingling, and therefore is not addressed in the ICA. As terms for commingling Section 251 and 271 elements are neither "within" the parties' ICA, nor "negotiated," the holding of *In re: Petition of Supra*, Docket No. 980155-TP, Order No. PSC-98-0466-FOF-TP is not applicable to the instant scenario.

Lending support to STS's petition for arbitration is an order by the FPSC cited by AT&T in its Motion, which is in direct contradiction to its position. In its Motion, AT&T cites *In re: Petition for arbitration of amendment to interconnection agreements with certain competitive local exchange carriers and commercial mobile radio service provides in Florida by Verizon Florida, Inc.*, Docket No. 040156-TP, Order No. PSC-04-0671-FOF-TP (Issued July 12, 2004),

for a holding unrelated to this specific issue. In that order, the FPSC granted respondent's motion to dismiss the petition for arbitration of a proposed draft amendment to an interconnection agreement because of facial deficiencies in petitioner's request for arbitration.[7] However, the FPSC did not dismiss the petition on procedural grounds, specifically, that it was improper to conduct arbitration of an amendment to an interconnection agreement under 47 USC §252(b).

Moreover, a recent order by the FPSC approving an amendment to an interconnection agreement provides additional support in favor of the right to petition for arbitration.[8] In that order, the FPSC approved the two parties' amendment to an existing interconnection agreement pursuant to 47 USC §252(e), which was the product of successful negotiations, but nevertheless stated, "This amendment is a product of negotiations between the parties and effectively eliminates the need to *arbitrate* the single issue…."[9] It is difficult to imagine why any reference to arbitration pertaining to amending an interconnection agreement would be made, unless arbitration under 47 USC §252(b) was permitted.

STS's Dispute is not Exclusively Covered by the Interconnection Agreement

The parties' ICA contains change of law and dispute resolution clauses which provide guidance to the parties where there is a change of law, such as the decision in *Nuvox Communications, Inc. v. BellSouth Communications, Inc.*, 530 F.3d 1330. The relevant portion of the ICA, Section 12.3, provides as follows:

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[7] *See In re: Petition for Arbitration*, Docket No. 040156-TP, Order No. PSC-04-0671-FOF-TP (Issued July 12, 2004) at 6.

[8] *See In re: Petition by Sprint Communications Company Limited Partnership and Sprint Spectrum Limited Partnership d/b/a Spring PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Southeast*, Docket No. 070249-TP, Order No. PSC-08-0066-FOF-TP (Issued January 29, 2008)

[9] *See Id.*

> In the event that any effective legislation, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of STS or BellSouth to perform any material terms of this Agreement, STS or BellSouth may, on thirty (30) days written notice, require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such terms are not renegotiated within forty-five (45) days after such notice, and either Party elects to pursue resolution of such amendment such Party shall pursue the dispute resolution process set forth in Section 8 above.[10]

In its Motion, AT&T first states that "it is clear that STS should have invoked the change of law provisions contained in the parties' Interconnection Agreement…."[11] AT&T severely misinterprets the ICA, as the change of law provision is not mandatory but permissive. The key phrase in the ICA is that "BellSouth *may*, on thirty (30) days written notice, require that such terms be renegotiated…."[12] In order for it to be "clear" that STS "should have" invoked the change of law provision, the ICA should have mandated that STS request renegotiation by using the word "must." Therefore, as the ICA provides permissive language, whether or not STS chose to invoke the change of law provision is irrelevant.

Even if AT&T's reasoning is accurate, STS has nonetheless followed the appropriate procedures governed by the change of law provision. STS filed a request to renegotiate the ICA on October 16, 2009. Thereafter, and after the passage of forty-five days, as required by the change of law provision, STS pursued the dispute resolution process set forth in Section 8 of the ICA. Section 8 - Dispute Resolution - of the parties' ICA states, in pertinent part:

> Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement, or as to the proper implementation of this Agreement, the aggrieved Party,

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[10] *See* ICA, Section 12.3, attached as Exhibit B to AT&T's Motion.

[11] *See* AT&T's Motion, p. 9.

[12] *See* ICA, Section 12.3, attached as Exhibit B to AT&T's Motion.

> if it elects to pursue resolution of the dispute, shall petition the Commission for a resolution of the dispute.[13]

In its Motion, AT&T contends that STS should have "filed a complaint against AT&T[ ] pursuant to the dispute resolution section…."[14] Nowhere in the dispute resolution procedure is there a requirement that STS must file a *complaint*. STS followed proper procedure by *petitioning* the FPSC for a resolution through arbitration.

STS' October 16, 2009 Correspondence Is a "Request"

Once again, AT&T takes it upon itself to be the ultimate authority, claiming, "It is clear that STS's [sic] October 16th correspondence is not a 'request for interconnection, services, or network elements pursuant to section 251.'"[15] STS' letter to AT&T dated October 16, 2009, was just one of many written requests for renegotiation made to AT&T. As noted in paragraph 12 of STS' Petition for Arbitration, a letter dated October 7, 2009, was sent to AT&T, requesting a renegotiation. When no response was received, STS then sent the October 16, 2009 letter as both a follow-up and an additional request, as it reads, "In the event AT&T continues to ignore STS' request, STS will pursue its remedies…."[16] A cursory review is not enough to quickly determine that the correspondence was not a request; the letter references the previously written request and re-states with specificity what STS is seeking to do. Furthermore the forewarning of pursuing remedies at a future time, was only in the event AT&T "continue[d] to ignore STS' request," inclusive of the request made on October 16, 2009.

In addressing AT&T's cited order, *In re: Petition for arbitration*, Docket No. 040156-TP, Order No. PSC-04-0671-FOF-TP (issued, July 12, 2004), there is little need to provide any

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[13] *See* ICA, Section 8, attached as Exhibit C to AT&T's Motion.
[14] *See* AT&T's Motion, p. 9.

[15] *See* AT&T's Motion, p. 10.
[16] *See* October 16, 2009 Correspondence, attached as Exhibit E to AT&T's Motion

rebuttal commentary. The holding for which the order was cited (that the "Commission granted motion to dismiss finding that petitioner in action failed to state a cause of action upon which relief could be granted by failing to comply with Section 252 at a sufficient level to sustain the action requested in the petition for arbitration"[17]) was referencing the facial deficiencies in petitioner's request for arbitration, and not deficiencies in petitioner's request to respondent to renegotiate their interconnection agreement, and is therefore inapplicable.

STS' Petition Was Properly Filed Within the "135th to the 160th day" Window

In order to qualify for arbitration with the FPSC, 47 USC §252(b)(1) states, "During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues." As a proper request was made on October 16, 2009, pursuant to Section 252, the period in which STS was able to effectively petition the FPSC to arbitrate began on February 28, 2010, through March 25, 2010. STS filed its Petition with the FPSC on March 25, 2010, on the 160th day following its request for negotiation with AT&T. AT&T's Motion even recognizes that STS' Petition was filed on the 160th day.[18] As 47 USC §252(b) allows for filing on the 160th day by using the word "inclusive," STS' Petition is not untimely.

The Commission Can Require Mediation Between the Parties

In STS' Petition, a request for mediation pursuant to 47 USC §252(a)(2) was made as an alternative to arbitration in the event the FPSC declines to conduct arbitration. AT&T asserts that there is no authorization for a state commission to conduct mediation on matters covered by

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[17] *See* AT&T's Motion, p. 10.

[18] *See* AT&T's Motion, p. 13.

an agreement that has been approved by the FPSC, and for support cites to *In re: Petition of Supra*, Docket No. 980155-TP, Order No. PSC-98-0466-FOF-TP (Issued March 31, 1998). As explained supra, the FPSC specifically stated, "Nothing in the Act provides for a request for arbitration while the *matters at issue* are *governed by* an approved agreement." *Id.* at 5. The terms STS seeks to renegotiate are neither within the ICA, nor contemplated by the parties at the time the ICA went into effect and are therefore not "matters at issue." STS is nevertheless seeking mediation, not arbitration, which is not mentioned by the FPSC in its holding referenced by AT&T. Furthermore, both the FCC and the United States District Court for the Eastern District of New York have recognized that a state commission can conduct mediation pursuant to 47 USC §252(a)(2) in order to interpret *previously approved* interconnection agreements.[19]

AT&T next argues that STS' request for mediation is improper as it requires the consent of both parties, and AT&T has not consented to mediation. In support thereof, AT&T refers to an order handed down by the PSC, in which the PSC noted that "mediation…is available on a strictly voluntary basis."[20] Once again, AT&T is attempting to fool this honorable Commission into believing its arguments by citing out of context. The referred to order was not only relating to an electrical company (not telecommunications, as STS and AT&T both are), but also relates specifically to mediation under Rule 28-106.111, Florida Administrative Code and Section 120.573, Florida Statutes, and not mediation pursuant to 47 USC §252(a)(2). 47 USC §252(a)(2) provides, "*Any* party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any

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[19] *See In re Starpower Communications, LLC*, 15 F.C.C.R 11277 (2000); *Atlantic Alliance Telecommunications, Inc. v. Bell Atlantic*, 2000 WL 34216867 (E.D.N.Y. 2000).

[20] *See* AT&T's Motion, pp. 14-15.

differences arising in the course of the negotiation." There is no denying that this paragraph allows for the request of mediation by just one party, and not both as AT&T asserts.

Conclusion

WHEREFORE, STS respectfully requests that this Commission deny AT&T's Motion to Dismiss and arbitrate STS' request for an Interconnection Agreement to include the commingling of section 271 elements of the switch port with section 251(c)(3) DS0, UCL-ND and SL-1 voice grade loops, or alternatively, if for any reason this Commission declines to so arbitrate, to participate in the negotiation of such an interconnection agreement and mediate any differences, and granting such further relief as this Commission deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 26, 2010, I electronically filed the foregoing document with the Florida Public Service Commission. 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 email transmission or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ ALAN C. GOLD_____

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