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November 7, 2003

Ms. Blanca S. Bayó
Director, Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No.: 020919-TP
Complaint of AT&T Communications of the Southern States, LLC, Teleport Communications Group, Inc., and TCG South Florida for Enforcement of Interconnection Agreements with BellSouth Telecommunications, Inc.

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response to AT&T's Motion for Reconsideration of Order No. PSC-03-1082-FOF-TP, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Andrew D. Shore

Andrew D. Shore

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

CERTIFICATE OF SERVICE
DOCKET NO. 020919-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 7th day of November 2003 to the following:

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(+) Signed Protective Agreement

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	Docket No. 020919-TP
AT&T Communications of the Southern	)	
States, LLC, Teleport Telecommunications	)	
Group, Inc., and	)	
TCG South Florida for Enforcement of	)	
Interconnection Agreements with	)	
BellSouth Telecommunications, Inc.	)	Filed: November 7, 2003

BELLSOUTH'S RESPONSE TO AT&T'S MOTION FOR RECONSIDERATION

BellSouth Telecommunications, Inc. ("BellSouth") submits this Response in Opposition to the Motion for Reconsideration of Order No. PSC-03-1082-FOF-TP ("Final Order") filed by AT&T Communications of the Southern States, LLC, Teleport Telecommunications Group, Inc., and TCG South Florida (collectively "AT&T").

INTRODUCTION

AT&T, in its latest motion, not only rehashes a contract interpretation argument that the Commission concluded previously "[f]rom a plain language standpoint, [ ] makes no sense," but AT&T also misrepresents the Florida Public Service Commission's ("Commission") evidentiary rulings in this docket, misconstrues the parol evidence rule, and invents a purported consequence of the Commission's Final Order that does not in fact exist. First, the Commission did not hold in denying AT&T's pre-hearing motions to strike evidence that the definition of local traffic in the parties' interconnection agreement was ambiguous and that the Commission would therefore consider parol evidence in construing the definition, as AT&T contends that it did. Rather, the Commission ruled that it would not strike extrinsic evidence contained in pre-filed testimony, because *if* the Commission concluded when it reached the merits of the case that the definition of local

traffic set forth in the agreement was not clear on its face, then governing law would require it to examine evidence other than the contract language.

When it came time to address the merits of AT&T's complaint, the Commission concluded that "the contract language is clear on its face" -- that calls that have traditionally been treated as intraLATA toll traffic and that are carried over switched access arrangements are expressly excluded from the definition of local traffic. AT&T's continuing argument to the contrary is wholly undermined by the testimony of the witness AT&T put forward to opine about what the contract language means – he agreed on cross-examination that the local traffic definition "on its face" excludes calls that traverse switched access facilities from treatment as local traffic, tr. at 90, and further testified that the interpretation AT&T sought was, at best, "spin." Tr. at 131-32. There is no dispute that controlling law mandates that the Commission give effect to the plain words of the contract, and the Commission properly concluded that it was required to interpret the contract to mean exactly what even AT&T's witness acknowledged that it plainly says.

Second, AT&T's contention in its motion for reconsideration that the Commission ran afoul of the parol evidence rule in construing the plain words of the contract has no basis in law or fact. The parol evidence rule bars the use of extrinsic testimony of a prior or contemporaneous agreement to alter or vary the terms of an unambiguous contract. The testimony that AT&T contends that the Commission considered impermissibly neither describes a prior or contemporaneous agreement or varied the unambiguous terms of the agreement. The Commission merely concluded that the contract phrase at issue means exactly what *both* parties understood it to mean.

Finally, the Commission already considered and rejected AT&T's claim that calls carried over "switched access arrangements" is synonymous with "Switched Access

Traffic," as that term is defined in another provision in the contract. AT&T, nevertheless, continues to make that argument, and asserts again that the Commission's conclusion to give effect to the plain words of the contract "eviscerates the contract's definition of 'Switched Access Traffic." In fact, the Commission's plain reading of the definition of local traffic does not in any way impact the definition of "Switched Access Traffic." AT&T's argument is premised on its claim that traffic that does not meet the definition of "local traffic" must meet the contract's definition of "Switched Access Traffic." But that, as AT&T's witness also acknowledged, is not true.

As the Commission has already concluded, the contract is clear – intraLATA traffic that was formerly treated as toll traffic and is carried over switched access arrangements is expressly excluded from the definition of local traffic. Even if the Commission were to believe that AT&T, at the time the parties were negotiating their interconnection agreement, wanted the contract to say something different, which would require the Commission to ignore the gaping holes in AT&T's story and the inconsistent testimony of its witnesses, the fact remains that the law does not permit the Commission to ignore the plain words of the contract. AT&T has failed to identify a point of fact or law that the Commission overlooked or that the Commission failed to consider in rendering its Final Order. Consequently, the Commission should deny AT&T's motion for reconsideration.

BACKGROUND

When telecommunications traffic is originated on the network of one carrier and terminated on the network of another carrier, the carrier on whose network the traffic originated pays the second carrier for transporting and terminating the call. So, for example, if an end user that receives its local service from AT&T calls a BellSouth customer, AT&T pays BellSouth, and vice versa. Reciprocal compensation rates apply to

calls the parties define as "local traffic," and switched access rates, which are higher, apply to non-local traffic.

The interconnection agreement between BellSouth and AT&T defines "local traffic" as follows:

> The Parties agree to apply a "LATAwide" local concept to this Attachment 3, meaning traffic that has traditionally been treated as intraLATA toll traffic will now be treated as local for intercarrier compensation purposes, **except those calls that are originated or terminated through switched access arrangements** as established by the State Commission or FCC.

AT&T alleged that BellSouth is in breach of the interconnection agreement because it charges AT&T switched access rather than reciprocal compensation rates for intraLATA calls traditionally treated as toll that AT&T acknowledges it terminates over switched access arrangements. AT&T's position is that the express exclusion for calls carried over switched access arrangements excludes only *inter*LATA traffic from the definition of "local traffic." Tr. at 92-93.

In its Final Order, the Commission stated: "From a plain language standpoint, AT&T's position makes no sense. InterLATA traffic is not intraLATA toll traffic, so it does not need to be excluded." Final Order, at 14. It further concluded that "the contract is clear on its face" and that it means just what it plainly says – "calls that have been traditionally treated as intraLATA toll traffic, that are originated or terminated over switched access facilities, should be excluded from the definition of LATAwide local traffic." Final Order, at 15.

LEGAL STANDARD

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to

consider in rendering an order. See Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. See Sherwood v. State, 111 So. 2d 96, 97 (Fla. 3rd DCA 1959) (citing State ex. Rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958)). Moreover, a motion for reconsideration is not intended to be "a procedure for re-arguing the whole case merely because the losing party disagrees with the judgment or the order." Diamond Cab Co., 394 So. 2d at 891. Indeed, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based on specific factual matter set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

AT&T claims that its motion satisfies this standard. AT&T is wrong. AT&T's motion, to the extent it is not merely rearguing matters the Commission already considered and rejected, relies on a foundation of misrepresentations that do not provide a legitimate basis for the Commission to modify its Final Order.

ARGUMENT

I. The Commission Did Not Hold in Denying AT&T's Motions to Strike that the Interconnection Agreement was Ambiguous and That it Would Consider Extrinsic Evidence in Interpreting the Agreement.

AT&T states in its motion that "prior to the hearing in this proceeding, the Commission held that the contract was ambiguous, and thus allowed the consideration of BellSouth's 'parol' evidence." Motion, at 8. That is not true. The alleged ruling to which AT&T refers is the Commission's Order denying AT&T's second motion to strike pre-filed testimony. In its two pre-hearing motions to strike, AT&T asked the Commission to strike certain portions of the testimony of BellSouth's witness, Beth Shiroishi, claiming that

consideration of her testimony discussing the parties' discussions during contract negotiations would violate the parol evidence rule. Both parties maintained throughout this proceeding in their pleadings, testimony, and post-hearing briefs that the definition of local traffic set forth in their interconnection agreement is clear and unambiguous, though they ascribed very different meanings to the same language. If the Commission ultimately determined that the agreement was not clear, however, then applicable law mandates that the Commission would have had to consider extrinsic evidence of the parties' intent, and BellSouth included testimony about the parties' negotiation of the language at issue in the event the Commission reached that point.

AT&T failed to mention in its motion for reconsideration (or in its motions to strike) that it also filed testimony about the parties' negotiations and supposed intent.[1] Since the parol evidence rule only applies to bar testimony that seeks to alter or vary the terms of an unambiguous contact, and the Commission had not yet reached the stage in the proceeding to make a determination as to whether the agreement was unambiguous, it recognized that the most efficient way to proceed was to deny the motions, because it would not have to consider the extrinsic evidence if it ultimately determined that the contract was clear, but would not be deprived of evidence it would need if it determined that the contract was ambiguous.

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[1] AT&T filed over 50 pages of what it characterizes as "parol evidence," and argued in its post-hearing brief that its "extrinsic evidence" supported the interpretation of the contract it sought. BellSouth pointed out in its post-hearing brief, with numerous examples and citations to the record, that AT&T's witnesses testified inconsistently and untruthfully and that AT&T's "extrinsic evidence" was not reliable. The Commission cited a couple of these many examples in its Final Order. *See* Final Order, at 14 (noting that documentary evidence contradicted testimony of AT&T witnesses King and Peacock and stating that the "testimony of AT&T witness is also not convincing.")

This Commission made clear in its Orders Denying AT&T's motions to strike that it was not *holding* that the contract was ambiguous. Instead, the Commission stated that it was making a "*preliminary finding for evidentiary purposes* that the contract language was 'sufficiently ambiguous' to permit the introduction of extrinsic evidence." Order PSC-03-0525-FOF-TP, at 9 (emphasis added). The Commission stated specifically that "*if after receiving all the evidence, we conclude that the language is, in fact, clear and unambiguous, then we need not consider any 'extrinsic' testimony.* . . . [W]e can clearly differentiate what testimony we can and cannot consider when rendering our final determination." *Id.* (emphasis added).

There is no question that the Commission did not *hold* in its order denying AT&T's second motion to strike that the contract *was* ambiguous and that the Commission *would* consider extrinsic evidence in rendering its final determination. AT&T's assertion to the contrary is a complete misrepresentation of the Commission's Order.

AT&T asserts in its motion for reconsideration that it was "surprising" that the Commission concluded in its Final Order that the contract was clear and unambiguous. Motion, at 8. The only thing that is surprising is AT&T's continued willingness to contradict itself in an effort to have the Commission endorse an interpretation to a contract provision that AT&T's own witness admits "on its face" means exactly what this Commission ruled that it means. *Both* BellSouth *and* AT&T argued at every stage of this proceeding that the local traffic definition was clear on its face. Indeed, AT&T continues to assert in its motion for reconsideration that that the Commission "should interpret the 'literal words' and unambiguous provisions of the contract." Like its contract interpretation argument that its primary witness called "spin," AT&T's motion is premised upon demonstrable double-speak, and "makes no sense."

II. The Commission Did Not Improperly Consider Parol Evidence in Interpreting the Interconnection Agreement.

The parol evidence rule prohibits the consideration of evidence of a prior or contemporaneous oral agreement to *alter, vary or change* the *unambiguous* terms of a written contract." *First Data POS, Inc. v. Willis*, 273 Ga. 792, 546 S.E.2d 781 (2001) (emphasis added). "To be ambiguous, a word or phrase must be of uncertain meaning and fairly understood in multiple ways." *Resolution Trust Corp. v. Artley*, 24 F.3d 1363, 1366 (11th Cir. 1994) (citations omitted).

AT&T's claim in its motion for reconsideration that the Commission improperly considered "BellSouth's parol evidence" in interpreting the interconnection agreement is based upon AT&T's assertion that the rule "bans consideration of all 'parol' evidence except where the contract language is ambiguous." AT&T Motion, at 14. The rule does not, however, bar evidence of the meaning of an unambiguous term. Indeed, Georgia law expressly permits such evidence. Since words must be construed in their "popular sense," *see, e.g., Henderson v. Henderson*, 264 S.E.2d 299 (Ga. App. 1979), and be given the meaning they have in a particular trade or business, Ga. Code Ann. § 13-2-2(2), a court, or in this case the Commission, is permitted to hear evidence of a word or phrase's popular and/or specialized meaning. Allowing evidence for that purpose does not even implicate, not to mention run afoul, of the parol evidence rule.

The "parol evidence" that AT&T contends the Commission should not have considered – testimony that the phrase "switched access arrangements" refers to facilities purchased out of tariffs – is not evidence of a prior or contemporaneous oral agreement, and it did not alter or change the contract. Indeed, notwithstanding AT&T's characterization of such evidence as "BellSouth's," the truth, which the Commission recognized in its Final Order, is that AT&T's witnesses agreed that the phrase "switched

access arrangements" means *exactly* what BellSouth understood it to mean. See Final Order, at 6, 13, 14. **AT&T's Mr. King testified specifically: "I want to make very clear that I do not have a dispute as to what a switched access arrangement is. It is indeed a facility that supports the delivery of switched access traffic."** Tr. at 86. *See also* Tr. at 105; Ex. 9. Mr. King also testified that the "switched access service arrangements" described in BellSouth's Florida Switched Access Service Tariff are what he understood "switched access arrangements" in the local traffic definition referred to when he first saw the contract language, and he acknowledged that the traffic in dispute in this case traverses these "facilities." Tr. at 112-13. The testimony of BellSouth's Ms. Shiroishi that AT&T now claims that the Commission relied upon impermissibly is her testimony that "switched access arrangements" refers to facilities sold through the tariff. AT&T Motion, at 13-14. That testimony does not describe a prior agreement, nor does it in any way vary the meaning of the contract. It confirmed that the phrase "switched access arrangements" is capable of only one reasonable interpretation -- the one *both* parties placed on it at the time of contracting – and is therefore unambiguous.

The Commission concluded in its Final Order that the local traffic definition in the interconnection agreement is clear on its face. Whether AT&T misunderstands the parol evidence rule or mischaracterizes it purposefully in order to attempt to convince the Commission to adopt a contract interpretation that the Commission already determined "makes no sense" is not readily apparent. What is crystal clear, however, is that the Commission did not violate the rule in rendering it decision to give the words in the contract what AT&T's own witness admitted was their plain meaning.

III. The Final Order Does Not Contradict or in Any Way Affect the Definition of "Switched Access Traffic" in the Interconnection Agreement.

AT&T claims in its motion that the Commission's interpretation of the definition of "local traffic" in the parties' interconnection agreement "eviscerates the contract's definition of 'Switched Access Traffic' by including certain intraLATA traffic in this definition." AT&T Motion, at 18. AT&T made this same argument in its post-hearing brief. The Commission rejected it then and it should reject it now for one simple reason – it is not true.

AT&T's argument is predicated on its contention that AT&T's "complaint involved what constitutes 'Local Traffic' and 'Switched Access Traffic' under the Interconnection Agreement, and AT&T continues to argue that "the distinction between what constitutes "Local Traffic" and what constitutes "Switched Access Traffic" is critical to the Parties regarding determining the appropriate compensation for the transport and termination of traffic." Motion, at 3. In fact, as the Commission recognized at the outset of its Final Order, the sole issue for determination by the Commission was the definition of local traffic in the Second Interconnection Agreement. *See* Final Order, at 5. "Switched Access Traffic" is expressly defined in a different provision of the contract. That definition was not in dispute, and it is independent of the definition of "Local Traffic."

AT&T's claim that traffic that is outside of the contract's definition of "Local Traffic" is "Switched Access Traffic" (unless it was considered local traffic under the parties' first agreement) is simply wrong. AT&T's access expert, Mr. King, testified that traffic that is not specifically defined by the parties as local traffic in their interconnection agreement is transported and terminated at switched access rather than reciprocal compensation rates. Tr. at 62, 99-100. In other words, traffic need not satisfy a definition of "Switched Access Traffic" for switched access rather than reciprocal compensation rates to apply.

Indeed, most of the hundreds of interconnection agreements filed with and approved by the Commission, including the first interconnection agreement between BellSouth and AT&T, do not contain a definition of "Switched Access Traffic." Only the handful of local interconnection agreements that specifically address VOIP transmissions define that term. Tr. at 335-36, 370. AT&T's agreement is no different from any other interconnection agreement -- if traffic is not specifically defined as local traffic, switched access rates apply for the transport and termination of such traffic. To rule otherwise would give the definition of local traffic in AT&T's agreement a different meaning than the *exact* same definition in the agreement of another CLEC that adopted the definition, but did not also adopt the provision that addresses VOIP transmissions. That absurd result demonstrates further that the Commission properly construed the plain meaning of the definition in its Final Order.

CONCLUSION

"When the language of a contract is plain and unambiguous, the court **must** afford it its literal meaning, despite a party's contention that he had a different understanding of its meaning." A&D Asphalt Co. v. Carrol, 520 S.E.2d 499, 502 (Ga. App. 1999) (citation omitted) (emphasis added). There is no dispute that contract term at issue here – "switched access arrangements" – unambiguously refers to facilities purchased out of BellSouth's Switched Access Tariff, for AT&T's witnesses admitted that is exactly what they understood the term to mean. Consequently, even if the Commission believed that AT&T wanted a different arrangement, governing law requires that it give effect to the plain language of the contract. For the reasons set forth above as well as in BellSouth's post-hearing brief, the Commission should deny AT&T's Motion for Reconsideration and should affirm its Final Order.

BellSouth does not believe that an oral argument would assist the Commission in its consideration of the pending motion. These issues have been briefed extensively and BellSouth does not see what an oral argument at this point would add to the process.

Respectfully submitted this 7th day of November, 2003.

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