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September 28, 2009

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

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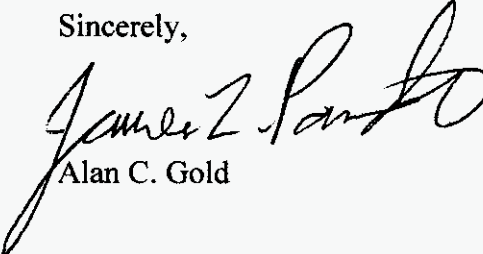
Re: Docket No. 090430-TP: Saturn Telecommunication Services, Inc. v. AT&T Florida

Dear Ms. Cole:

Enclosed is Response to AT&T Florida's Partial Motion to Dismiss, Reply to Answer and Reply Affirmative Defenses filed by Saturn Telecommunication Services, Inc., which we ask that you file in the captioned docket.

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

Sincerely,



Alan C. Gold

CC: All parties of record

DOCUMENT NUMBER-DATE

10118 OCT-1 8

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

SATURN TELECOMMUNICATION SERVICES INC., a Florida corporation,

Petitioner,

v.

BELLSOUTH TELECOMMUNICATIONS, INC., a Florida corporation, d/b/a AT&T

Respondent.

Docket No.090430-TP

Filed: September 28, 2009

**STS'S RESPONSE TO AT&T FLORIDA'S PARTIAL MOTION TO DISMISS, REPLY TO ANSWER AND REPLY TO AFFIRMATIVE DEFENSES**

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 Partial Motion to Dismiss, Reply to Answer and Reply Affirmative Defenses, and in support thereof states as follows.

**Response to Motion to Dismiss**

**A. Standard for Motion to Dismiss**

1. "[A] motion to dismiss for failure to state a cause of action is not a substitute for a motion for summary judgment, and in ruling on such a motion, the trial court is confined to a consideration of the allegations found within the four corners of the complaint." *Bradsheer v. Florida Dept. of Highway Safety and Motor Vehicles*, 2009 WL 3047325, p. 6 (Fla. 1<sup>st</sup> DCA 2009); *Consuegra v. Lloyd's Underwriters at London*, 801 So.2d 111, 112 (Fla. 2d DCA 2001) (citing *Cyn-co, Inc. v. Lancto*, 677

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So.2d 78, 79 (Fla. 2d DCA 1996)). *See also Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n*, 210 So.2d 750, 752 (Fla. 4th DCA 1968) (“The test of sufficiency of a complaint in such a proceeding is not whether the complaint shows that the plaintiff will succeed in getting a declaration of rights in accordance with his theory and contention, but whether he is entitled to a declaration of rights at all.”).

2. Therefore, all allegations made in the Introduction section of AT&T Florida’s Motion, pp. 1-3, should be disregarded because the factual allegations are outside of the four corners of the Petition.
3. As AT&T Florida points out at page 4 of its Motion, in disposing of a motion to dismiss, the Commission must assume all of the allegations of the complaint to be true. *See In re: Complaint and Petition of John Charles Heekin against Florida Power & Light Co.*, Order No. PSC-99-10544-FOF-EI, Docket No. 981923-EI, (Issued May 24, 1999)(citing to *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1<sup>st</sup> DCA 1993)).
4. Assuming the allegations in the Petition are true, STS has stated a cause of action.

**B. STS’ Request for Injunctive Relief**

5. At page 4 of AT&T Florida’s Motion, AT&T Florida takes STS’ request in the *ad damnum* clause out of context.
6. The request at paragraph (a) of the *ad damnum* clause is as follows:

[STS requests] [a]n order that this Commission restrain AT&T from implementing the AT&T 22-State OSS Alignment in November 2009, and/or file an action in circuit court for an injunction....

7. In this regard, STS is asking the Commission to invoke its statutory right to enjoin and seek an injunction under Rule 25-22.030, Fla. Admin. Code and §§ 364.015 and 364.285(2), Fla. Stat.
8. Florida Statutes clearly state that such relief is available.
9. The request for relief is appropriate, and STS has followed the proper procedures contemplated by Florida Statutes.
10. The Commission may seek enforcement of an action by filing a petition for enforcement, as requested by STS, in the circuit court where the subject matter of the enforcement is located. *See* § 120.69(1)(a), Fla. Stat.
11. Furthermore, a petition for enforcement of any agency action may be filed by any substantially interested person, in this case STS, who is a resident of Florida. *See* § 120.69(1)(b), Fla. Stat.
12. In order for STS to be able to file a petition pursuant to § 120.69(1)(b), it must first notify this honorable Commission, and then if the Commission fails to act within 60 days, then STS may file its own suit in circuit court. *See* §120.69(1)(b)1. and 2., Fla. Stat.
13. STS' Petition serves as notice as required by §120.69, Fla. Stat. It is now up to the Commission to act.
14. Notably, AT&T Florida has not objected or otherwise moved to dismiss STS' request in paragraph (b) of the *ad damnum* clause to issue a stay of the implementation of the AT&T 22-State OSS Alignment set for November 29<sup>th</sup>.

**C. STS' Request for Attorney's Fees and Costs**

15. AT&T Florida argues at page 6 of its Motion to Dismiss that a request for attorney's fees and costs are inappropriate.
16. AT&T Florida is incorrect. In any final order on a petition for enforcement, the court may award to the prevailing party all or part of the costs of litigation and reasonable attorney's fees and expert witness fees, whenever the court determines that such an award is appropriate. § 120.69(7), Fla. Stat.
17. STS is requesting this Commission to enforce its order in circuit court, and in the event that the Commission chooses to do so and prevails, the circuit court has the statutory authority to award attorney's fees to the prevailing parties under §120.69(7).
18. In any event, the Parties' Interconnect Agreement allows for an award of reasonable attorneys' fees to the prevailing party.

**WHEREFORE**, Petitioner, SATURN TELECOMMUNICATION SERVICES, INC., respectfully requests that this honorable Commission deny Defendant AT&T Florida's Partial Motion to Dismiss, and for any other relief deemed appropriate.

**Reply to Answer**

19. AT&T Florida argues consistently throughout its Answer that the Commission's Order at issue (Order No. PSC-98-1001-FOF-TP in Docket No. 980119-T) ("Supra Order") has no relevance to this proceeding as neither STS nor any other CLEC (other than Supra, which is now defunct) was a party to that proceeding, and that therefore STS cannot rely on the same.
20. AT&T Florida's argument is contrary to Florida Statutes.

21. Section 120.69(1)(b) contemplates that a petition for enforcement of any agency action may be filed by any substantially interested person who is a resident of Florida. The statute does not limit enforcement of the Commission's order to only the parties, but also includes STS as a substantially interested person. AT&T Florida admits that STS "may have second-handedly received some benefit from the Supra Order."

**WHEREFORE**, Petitioner, SATURN TELECOMMUNICATION SERVICES, INC., respectfully requests that this honorable Commission grant relief to STS the relief sought in its Petition, and for any other relief deemed appropriate.

**Reply to Affirmative Defenses**

22. STS denies AT&T Florida's First Affirmative Defense (failure to state a cause of action) and demands strict proof thereof. Furthermore, STS hereby incorporates its arguments made in its Response to Motion to Dismiss and Reply to Answer stated above.
23. STS denies AT&T Florida's Second Affirmative Defense (STS lacks to standing as it was not a party to the Supra Order) and demands strict proof thereof. Furthermore, STS hereby incorporates its arguments made in its Reply to Answer stated above.

**WHEREFORE**, Petitioner, SATURN TELECOMMUNICATION SERVICES, INC., respectfully requests that this honorable Commission grant relief to STS the relief sought in its Petition, and for any other relief deemed appropriate.

s/ Alan C. Gold

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**CERTIFICATE OF SERVICE**

**Docket No. 090430-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 29<sup>th</sup> day of September, 2009 to the following:

Earl E. Edenfield, Esquire

Tracy W. Hatch, Esquire

Manuel A. Gurdian, Esquire

c/o Gregory R. Follensbee

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s/ Alan C. Gold

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