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090430-TP

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Sent: Thursday, October 29, 2009 4:16 PM
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Subject: Docket Number: 09-0430-TP - Saturn Telecommunication Services, Inc. v. BellSouth Telecommunications, Inc. d/b/a AT&T
Attachments: STS Response to Partial Motion to Dismiss Amended Pet-Reply to Ans and Reply to Aff Def 10-28-09-1jp.pdf

Enclosed for filing, please find attached, STS' Response to AT&T Florida's Partial Motion To Dismiss Amended Petition, Reply to Answer and Reply to Affirmative Defenses.

Thank you.

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October 29, 2009

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

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

Dear Ms. Cole:

Enclosed is STS' Response to AT&T Florida's Partial Motion to Dismiss Amended Petition, 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.

Very truly yours,

s/ Alan C. Gold

ALAN C. GOLD

CC: All parties of record

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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: October 29, 2009

STS'S RESPONSE TO AT&T FLORIDA'S PARTIAL MOTION TO DISMISS AMENDED PETITION, 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 Amended Petition, Reply to Answer and Reply Affirmative Defenses filed on October 23, 2009, in response to STS' Amended Verified Emergency Petition for Injunctive Relief and Request to Restrict or Prohibit AT&T from Implementing Its CLEC OSS-Related Releases filed on October 13, 2009, and in support thereof states as follows.

Introduction

1. AT&T Florida's Motion is substantially a rewrite of its previous Motion to Dismiss filed in response to STS' Original Petition. In its Introduction at page 1 of the Motion, AT&T Florida argues that "STS has decided to forgo the Change Control Process ("CCP") and attempt to unilaterally decide, through pre-emptive

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action, what is best for the entire CLEC community.” AT&T’s argument is disingenuous, ironic, and outrageous given that, as the Commission staff will recall, at an earlier telephone conference in this case which was held on or about on October 2, 2009, AT&T Florida vigorously objected to the presence of other CLECs who were not parties to this docket, including but not limited to Verizon and Time Warner from participating in the phone call and ensuing settlement negotiations. For AT&T Florida to claim that on the one hand, STS cannot speak for the entire CLEC community, but then on the other hand state directly and with a straight face to the Commission that others in the CLEC community should be excluded from these proceedings, defies logic and common sense. Moreover, STS does not maintain it is speaking for the entire CLEC community. STS wants AT&T to honor its obligations under the law, and follow the directives of this Honorable Commission. STS is certainly an interested party and has standing to file its petition.

2. In any event, the actions by AT&T as alleged in the Amended Petition affect STS directly. The fact that other CLECs may also be impacted is incidental to STS’s case. To the extent that the Amended Petition invokes, Section 120.69(1)(b), said statute 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 orders to only the parties of a particular order, but also includes anyone, including STS, as a substantially interested person.
3. AT&T improperly attempts to interject factual disputes in its motion to dismiss, by making the unsupported claim in its Motion that LEX has the same pre-order

functions as LENS. Not only is it improper to make factual allegations in a motion to dismiss, AT&T's assertion that LEX is equivalent to, or better than LENS is false. Moreover since both systems belong to AT&T, the only possible conclusion is that (i) AT&T knows that LEX does not have the same pre-order edit capabilities of LENS, (ii) the implementation of LEX and the retirement of LENS would be in violation of this Commission's order in the SUPRA case, and (iii) AT&T is intentionally attempting to mislead this Commission. It should be noted that even though it was not required to do so at this point in this case, STS has made a video of this "new" LEX, (not the old LEX as alleged by AT&T) which irrefutably demonstrates many of the deficiencies in LEX and has provided the same to both the Commission and AT&T. This should be contrasted to the unsupported, unverified, and patently false factual allegations in AT&T's motion. If STS is paranoid as AT&T alleges, it is because it has investigated and tested the "new" LEX OSS, has seen and documented its defects, and knows what a devastating effect it would have on the CLEC's ability to order, while AT&T's ability to order on its retail side remains unaffected.

4. It must also be emphasized, that a careful reading of AT&T's motion indicates its erroneous belief that this Commission does not have the authority to prevent AT&T from retiring LENS in March, 2010 and leaving STS and other Florida CLECS with only the defective LEX OSS. AT&T clearly considers the short timeframe in which both LEX and LENS are operational as merely a learning period, and is apparently firm in its position that LENS is being retired and replaced by LEX in March 2010. AT&T's position as evidenced in its recently filed Motion demonstrates that prompt

and swift action by this Commission is required to prevent another disastrous OSS failure, with once again the aftermath of AT&T begging for forgiveness instead of asking permission, and making hollow promises of better future performance.

Response to Motion to Dismiss

A. Standard for Motion to Dismiss

5. “[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. 1st 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 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.”).
6. Therefore, all allegations made in the Introduction section of AT&T Florida’s Motion, pp. 1-4, should be disregarded because the factual allegations are outside of the four corners of the Petition.
7. 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. 1st DCA 1993).

8. Assuming the allegations in the Petition are true, STS has stated a cause of action.

B. STS' Request for Injunctive Relief

9. At page 5 of AT&T Florida's Motion, AT&T Florida takes STS' request for injunctive relief out of context.
10. In the Amended Petition, 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.
11. STS is not asking that the Commission act as a court by issuing injunctive relief and costs itself.
12. Florida Statutes clearly state that such relief is available.
13. The request for relief is appropriate, and STS has followed the proper procedures contemplated by Florida Statutes.
14. 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.
15. Furthermore, a petition for enforcement of any agency action may be filed by any substantially interested person, such as STS, who is a resident of Florida. *See* § 120.69(1)(b), Fla. Stat.
16. 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.

17. STS' Petition serves as notice, as required by §120.69, Fla. Stat. It is now up to the Commission to act.
18. Notably, AT&T Florida has not objected or otherwise moved to dismiss STS' remaining requests concerning the implementation of the AT&T 22-State OSS Alignment set for November 29th and the relief requested therein which was not injunctive relief.
19. As such, AT&T Florida concedes that the Amended Petition cannot be dismissed in its entirety, and indeed filed an answer to the same, which is an acknowledgement that the relief requested by STS is appropriate. .

C. STS' Request for Costs

20. AT&T Florida argues at page 7 of its Motion to Dismiss that a request for costs are inappropriate.
21. 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.
22. 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).

23. In any event, the Parties' Interconnect Agreement allows for an award of reasonable attorneys' fees and costs to the prevailing party.

D. Violation of Section 364.14(2), Florida Statutes

24. STS considers the arguments legal authority¹ cited by AT&T Florida at page 8 of its Motion, and agrees to voluntarily withdraw its request that the Commission find that AT&T Florida violated Section 374.14(2).

E. Violation of Section 364.15, Florida Statutes

25. AT&T Florida argues at page 9 of its Motion that §364.15, Fla. Stat. is inapplicable because the statute only applies to "basic local telecommunications services."
26. AT&T Florida is correct that the statute only applies to "basic local telecommunication services," but is incorrect that the statute is inapplicable to the instant Amended Petition.
27. Section 364.02(2), Florida Statutes, as amended by Chapter 95-403, Laws of Florida, defines basic local telecommunications service as:
- voice-grade, flat-rate residential and flat-rate single-line business local exchange services which provide dial tone, local usage necessary to place unlimited calls within a local exchange area, dual tone multi-frequency dialing, and access to the following: emergency services such as "911," all locally available interexchange companies, directory assistance, operator services, relay services, and an alphabetical directory listing. For a local exchange telecommunications company, such term shall include any extended area service routes, and extended calling service in existence or ordered by the commission on or before July 1, 1995.
28. AT&T Florida's OSS-Related Releases will directly impact the basic local telecommunications service that STS offers to its customers and end users.

¹ AT&T cited *In Re: Notice of election of price regulation by BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company*, Docket No. 951354-TL, Order No. PSC-96-0036-FOF-TL (Issued January 10, 1996); and §364.051(c), Fla. Stat.

29. Therefore, it is a nonsensical argument for AT&T Florida to claim that §364.15, Fla. Stat. is inapplicable.

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

Reply to Answer

30. 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.
31. AT&T Florida's argument is contrary to Florida Statutes.
32. 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 Amended Petition, and for any other relief deemed appropriate.

Reply to Affirmative Defenses

33. 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.
34. 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 Response to Motion to Dismiss and Reply to Answer stated above.
35. STS admits AT&T Florida's Third Affirmative Defense (AT&T Florida did not violate Section 374.14, Florida Statutes). STS considers the arguments legal authority² cited by AT&T Florida at page 8 of its Motion, and agrees to voluntarily withdraw its request that the Commission find that AT&T Florida violated Section 374.14(2). Therefore, AT&T Florida's affirmative defense that the Commission has no authority to find AT&T Florida in violation of said statute is now moot.
36. STS denies AT&T Florida's Fourth Affirmative Defense (Section 364.15, Fla. Stat. is limited to "basic local telecommunications services," therefore is inapplicable to the systems at issue) 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.

² AT&T cited *In Re: Notice of election of price regulation by BellSouth Telecommunications, Inc. d/b/a Southern Bell Telephone and Telegraph Company*, Docket No. 951354-TL, Order No. PSC-96-0036-FOF-TL (Issued January 10, 1996); and §364.051(c), Fla. Stat.

37. **WHEREFORE**, Petitioner, SATURN TELECOMMUNICATION SERVICES, INC., respectfully requests that this honorable Commission grant relief to STS the relief sought in its Amended 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 this 19th day of October, 2009 to the following:

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