

Diamond Williams

From: GURDIAN, MANNY (Legal) [mg2708@att.com]
Sent: Monday, November 28, 2011 3:06 PM
To: Filings@psc.state.fl.us
Cc: FOLLENSBEE, GREGORY R; MONTGOMERY, SUZANNE L (Legal); HATCH, TRACY W (Legal); SIRIANNI, MARYROSE; Pauline Robinson; amatari@flatel.net
Subject: Docket No.: 110306-TP; BellSouth Telecommunications, LLC d/b/a AT&T Florida's Motion to Dismiss and Response to FLATEL's Complaint

Attachments: Untitled.pdf

A. Manuel A. Gurdian

BellSouth Telecommunications, LLC d/b/a AT&T Florida

150 South Monroe Street

Suite 400

Tallahassee, Florida 32301

(305) 347-5560

mg2708@att.com

B. Docket No.: 110306-TP: Request for emergency relief and Complaint of FLATEL, Inc.

against BellSouth Telecommunications, LLC d/b/a AT&T Florida to resolve

interconnection agreement dispute

C. BellSouth Telecommunications, LLC d/b/a AT&T Florida

on behalf of Manuel A. Gurdian

D. 67 pages total (includes letter, certificate of service, pleading and Exhibits A, B and C)

E. BellSouth Telecommunications, LLC d/b/a AT&T Florida's Motion to Dismiss and Response to FLATEL's Complaint

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Manuel A. Gurdian
General Attorney

AT&T Florida
150 South Monroe Street
Suite 400
Tallahassee, FL 32301

T: (305) 347-5561
F: (305) 577-4491
manuel.gurdian@att.com

November 28, 2011

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

Re: Docket No.: 110306-TP: Request for emergency relief and Complaint of FLATEL, Inc. against BellSouth Telecommunications, Inc. d/b/a AT&T Florida to resolve interconnection agreement dispute

Dear Ms. Cole:

Enclosed is BellSouth Telecommunications, LLC d/b/a AT&T Florida's Motion to Dismiss and Response to FLATEL's Complaint, 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,



Manuel A. Gurdian

cc: All Parties of Record
Jerry D. Hendrix
Gregory R. Follensbee
Suzanne L. Montgomery

975818

CERTIFICATE OF SERVICE
Docket No. 110306-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 28th day of November, 2011 to the
following:

Pauline Robinson
Staff Counsel
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No.: (850) 413-6183
pevans@psc.state.fl.us

FLATEL, Inc.
Mr. Abby Matari
Executive Center, Suite 100
2300 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409-3307
Tel. No.: (561) 688-2525 ext
Fax No.: (561) 688-7334
AMatari@Flatel.net



Manuel A. Gurdian

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for Emergency Relief) Docket No. 110306-TP
and Complaint of FLATEL, Inc.)
Against BellSouth Telecommunications,)
Inc. d/b/a AT&T Florida to Resolve)
Interconnection Agreement Dispute) Filed: November 28, 2011

**AT&T FLORIDA'S MOTION TO DISMISS AND RESPONSE TO
FLATEL'S COMPLAINT**

BellSouth Telecommunications, LLC¹ d/b/a AT&T Florida ("AT&T Florida") respectfully submits its Motion to Dismiss and Response to the Complaint filed by FLATEL, Inc. ("FLATEL").² As will be explained herein, FLATEL is not entitled to any relief whatsoever and its Complaint should be dismissed. Accordingly, AT&T Florida respectfully requests that the Commission issue an Order that: (i) dismisses FLATEL's Complaint; (ii) requires FLATEL to make immediate payment to AT&T Florida of all past due amounts on its Florida accounts; and (iii) does not prohibit AT&T Florida from exercising its contractual rights to discontinue providing services to FLATEL.

I. INTRODUCTION

In a desperate (but late) attempt to avoid AT&T Florida's disconnection of its resale services for failure to pay its bills according to the terms of the parties' Commission-approved interconnection agreement ("Agreement"), after the close of business on November 4, 2011, FLATEL filed with the Commission a four-page disjointed, rambling letter (which was docketed as a complaint on November 7th). FLATEL's Letter Complaint is unclear as to what relief it is

¹ Effective July 1, 2011, BellSouth Telecommunications, Inc. was converted to BellSouth Telecommunications, LLC by operation of Georgia law.

² Upon information and belief, AT&T Florida does not believe that the Complaint was properly filed by Abby Matari, FLATEL's CEO, as Mr. Matari is not a Florida Bar licensed attorney nor has he been designated a qualified representative by this Commission. See *In re: Applications for Qualified Representative Status*, Docket No. 110008-TP and www.flabar.org.

requesting from the Commission, but FLATEL appears to be arguing that AT&T Florida has somehow acted improperly by enforcing the payment provisions of the Agreement and threatening suspension and disconnection of FLATEL's services due to short payments. It suggests that AT&T Florida's promotion credit process is somehow improper because "AT&T offers immediate relief via Promotions to its End Users without parity to instantly offer the same exact relief to FLATEL's End Users." (Letter Complaint at 1.). In apparent support of its position, FLATEL references section 251 of the Telecommunications Act of 1996 (the "1996 Act"), a Florida statute that was repealed more than four months ago, and a U.S. Supreme Court case addressing the issue of set-off in a bankruptcy situation. FLATEL also includes more than 90 pages of attachments with its letter, without explanation of how these attachments support its position or justify the relief it seeks.

FLATEL's arguments and its requested relief fail as a matter of law. It completely ignores the plain and unambiguous provision in its Agreement that clearly requires it to pay its bills, regardless of any disputes. Its argument that this was a "nonnegotiable Interconnection Agreement in which we were forced to waive our rights," (Letter Complaint at 3), is simply wrong and contrary to the protections afforded CLECs in the 1996 Act. FLATEL is not without recourse related to its disputes with AT&T Florida as it suggests. On this front, FLATEL is free to follow the dispute resolution provisions specifically outlined in the parties' Agreement to address any and all disputes it may have with AT&T Florida.³ To the extent FLATEL is seeking a Commission order preventing AT&T Florida from taking further collection action, that request also fails as a matter of law because it is beyond the scope of the Commission's jurisdiction.

³ See Agreement, General Terms and Conditions ("GTC"), § 8, and Attachment 7, Billing § 2. Exhibits "A" and "B" to this Response are copies of the GTC and Attachment 7, respectively, to the Parties' Agreement.

FLATEL's Letter Complaint fails to state an actionable claim as a matter of law and should be dismissed.

II. FACTUAL BACKGROUND

On July 19, 2005, AT&T Florida filed a request for approval of the Agreement with FLATEL. *See* Docket No. 050492-TP, Doc. No. 06903-05. FLATEL filed no response to AT&T Florida's request, and by operation of law, on October 19, 2005, the Commission approved the Agreement between FLATEL and AT&T Florida. *See generally* Docket No. 050492-TP. On January 14, 2009, AT&T Florida filed a request with the Commission to approve an amendment to the Agreement, which amendment extended the term of the Agreement. *See* Docket No. 090028-TP, Doc. No. 00377-09. In response to AT&T Florida's filing, the Commission issued an administrative letter that, among other things, notified the parties that "[m]ediation may be available to resolve any dispute in this docket." Docket No. 090028-TP, Doc. No. 00386-09. FLATEL filed no response in this docket, and the Commission approved the amendment by operation of law on April 15, 2009. *See generally* Docket No. 090028-TP.

In that Commission-approved and binding Agreement, FLATEL expressly agreed to "make payment to [AT&T Florida] for all services billed *including disputed amounts*," and it agreed to make those payments "on or before the next bill date."⁴ FLATEL has not honored its payment commitments under the Agreement. Instead, under the guise of various credit requests and billing "disputes," FLATEL has been short-paying its bills by more than half. On September 19, 2011, AT&T Florida sent FLATEL a collection letter with attachments⁵ that, among other things: sets forth FLATEL's substantial past due balance; sets forth the billing, adjustment and

⁴ *See* Agreement, Attachment 7, Billing, §§1.4 and 1.4.1 (emphasis added).

⁵ Confidential and Proprietary Exhibit "C" to this Response is a copy of that letter and its attachments.

payment history on FLATEL's account from January 2009 through August 2011; quotes the operative language of the parties' Agreement; and demands payment of all past due charges on or before October 10, 2011, or suffer suspension of order processing, and payment on or before October 25, 2011, or FLATEL's service will be disconnected.⁶

FLATEL alleges that it does not have to pay these charges because it has submitted what it alleges are promotion claims but disputes the method by which AT&T Florida processes those claims. AT&T Florida denies these allegations, which are, in effect, an argument that FLATEL can dictate the method AT&T Florida undertakes to process promotion claims. More importantly, FLATEL's allegations do nothing to alter the fact that the plain language of the Agreement requires it to pay all amounts it is billed, even if it disputes those amounts. In its Letter Complaint, FLATEL makes no offer to pay any portion of the balance. Instead, it essentially asks the Commission to allow it to continue ordering services from AT&T Florida and continue violating its Agreement by paying AT&T Florida less than the full amount for those services indefinitely. To require AT&T Florida to wait indefinitely for FLATEL to pay its bills in full would require AT&T Florida's stockholders, in essence, to continue subsidizing a non-paying wholesale customer like FLATEL.

III. MOTION TO DISMISS

FLATEL's disjointed Letter Complaint should be summarily dismissed because it falls far short of the well-established pleading requirements that a complaint must meet to be deemed sufficient. The various deficiencies in the letter do not just render it inadequate to meet the

⁶ AT&T Florida extended the suspension of order processing deadline several times while the parties attempted to negotiate a resolution, and ultimately suspended its order processing on October 20, 2011. Beginning on November 8, 2011, AT&T Florida disconnected FLATEL's resale services. Disconnection of all services has been completed.

requirements of Florida law. The Letter Complaint is so vague as to both the operative facts and the law for which FLATEL seeks relief that it would be impossible for the Commission to properly issue a decision in FLATEL's favor. To the extent there are discernable legal arguments, they fail as a matter of law. For these reasons, the Commission should dismiss the Complaint.

A. Standard for Motion to Dismiss

A motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. *See Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). 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. *In re: Petition to investigate, claim for damages, complaint and other statements against respondents Evercom Sys., Inc. d/b/a Correctional Billing Servs. and BellSouth Corp. by Bessie Russ*, Docket No. 060640-TP, Order No. PSC-07-0332-PAA-TP (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)); *Varnes*, 624 So. 2d at 350.

The Commission should "examine the elements needed to be alleged under the substantive law on the matter." *In re: Complaint and petition of John Charles Heekin against Florida Power & Light Co.*, Docket No. 981923-EI, Order No. PSC-99-10544-FOF-EI, at 3 (May 24, 1999) ("*Heekin v. FPL*"). If "[a]ll of the elements of a cause of action" are not properly alleged with "ultimate facts which, if established by competent evidence, would support a decree granting the relief sought under the law," the complaint should be dismissed. *Id.*; *Kislak v. Kredian*, 95 So. 2d 510, 514 (Fla. 1957).

B. FLATEL's Disjointed Letter Complaint Fails to State a Cause of Action

FLATEL has not identified a viable cause of action. At best, its Letter Complaint could be interpreted to argue that AT&T Florida should be prevented from taking collection action against it, but FLATEL has not identified a violation of the Agreement by AT&T Florida and its argument that the Agreement should not be enforced fails as a matter of law. Its suggestion that the Commission should not enforce the Agreement because it was "nonnegotiable" is directly contrary to the 1996 Act, and it has no remedy under the referenced Florida statute because that provision has been repealed. FLATEL's Letter Complaint should be dismissed.

1. FLATEL Fails to Allege a Specific Violation of the Parties' Agreement

To the extent FLATEL is attempting to claim that AT&T Florida violated the parties' Agreement by pursuing collection activity and threatening to and ultimately disconnecting its services, FLATEL's claim fails to state a viable cause of action because FLATEL fails to allege which provisions of the Agreement were allegedly violated and how, with specificity, such provisions were violated. To prevail on a breach of contract action, a complaining party must plead and prove a material breach of the contract. *See Merin Hunter Codman, Inc. v. Wackenhut Corrections Corp.*, 941 So. 2d 396, 398 (Fla. 4th DCA 2006). It is therefore axiomatic that the complaining party must identify a contract provision that it believes the other party materially breached. Here, FLATEL has not done so, and its claim should be dismissed.

2. FLATEL's Nonnegotiable Allegation is Simply Wrong as a Matter of Law

FLATEL seems to suggest that the Commission should prevent AT&T Florida's collection efforts because, in its view, its Agreement was "nonnegotiable" and it was forced to "waive" its "rights." (Letter Complaint at 3.) This suggestion is simply meritless. First, FLATEL failed to allege any facts to support its position that AT&T Florida refused to negotiate

in connection with its Agreement. A conclusory allegation without any supporting facts is insufficient to allege an actionable claim before the Commission. *See Kislak*, 95 So. 2d at 514. Second, the premise of FLATEL's argument is wrong. Even if AT&T Florida failed or refused to negotiate with FLATEL in connection with its Agreement (and FLATEL alleges no facts to support this), FLATEL had options available to it before this Commission of which it never availed itself.

In enacting the 1996 Act, Congress recognized the relative negotiating strengths of ILECs compared to CLECs such as FLATEL and "establishe[d] a system of negotiations and arbitrations in order to facilitate voluntary agreements between the competing carriers to implement its substantive requirements." *Iowa Network Servs., Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850, 890 (S.D. Iowa 2005). The parties can negotiate in good faith to try to reach a mutually acceptable agreement and can seek mediation assistance from the Commission in those efforts. *See* 47 U.S.C. § 252(a). The parties may also "ask the state commission to arbitrate any disputes that arise in the negotiating process." *Law Offices of Curtis V. Trinko LLP v. Bell Atl. Corp.*, 305 F.3d 89, 102 (2d Cir. 2002), *rev'd in part on other grounds sub nom Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). Or, instead of negotiating or arbitrating terms, a CLEC can choose to adopt an existing interconnection agreement on file with the Commission under 47 U.S.C. § 252(i).

Regardless of how the agreement between the parties is reached, it is then submitted to the Commission for approval, and the Commission is afforded an opportunity to identify deficiencies in the agreement or to reject the agreement in full if it finds that it discriminates against another carrier, is not consistent with the public interest, convenience, and necessity, or does not meet the requirements of § 251. *See* 47 U.S.C. § 252(e).

Here, there is no evidence that FLATEL ever sought mediation or an arbitration at the Commission over the terms of its Agreement. *See generally* Docket Nos. 050492-TP & 090028-TP. Thus, FLATEL's argument that AT&T Florida somehow forced it to accept the terms of the Agreement without negotiation, is misplaced and without factual or legal support. Even if FLATEL somehow believes that it was forced to accept the terms of the Agreement, it had subsequent opportunities to seek relief at the Commission and oppose either the request for approval of the Agreement and/or the request for approval of the extension of the Agreement. Those dockets, however, are devoid of any evidence supporting FLATEL's contrived contention that it was opposed to the Agreement. *See generally id.* Having not made use of the mediation and arbitration rights available to it when it voluntarily entered in the Agreement with AT&T Florida and having agreed to extend its original term, FLATEL simply cannot now argue that the Agreement is now unenforceable.

3. Chapter 364, Florida Statutes, Does Not Provide Relief to FLATEL

FLATEL "appeal[s]" to the Commission to provide it with relief under § 364.162, Fla. Stat. This claim is meritless. Section 364.162 of the Florida Statutes was repealed effective July 1, 2011, *see* Laws 2011, c.2011-36, § 24, which was more than two months before the collection efforts of AT&T Florida that FLATEL is complaining about here.

C. FLATEL's "Demand" for a "Stay" Fails as a Matter of Law

1. The Commission Does Not Have Authority to Issue an Injunction

FLATEL closed its Letter Complaint with a statement that it "is exercising any grounds to demand a stay to AT&T's actions of suspension and termination and to be reinstated until these matters can be addressed . . ." (Letter Complaint at 4.) To the extent this is a request for an injunction prohibiting AT&T Florida from disconnecting its services (which AT&T Florida

began doing on November 8 and has completed), or to order AT&T Florida to turn those services back on, the Commission does not have the authority to grant the requested injunctive relief.

To hear and determine a complaint or petition, a court or agency must be vested not only with jurisdiction over the parties, but also with subject matter jurisdiction to grant the requested relief. *See Keena v. Keena*, 245 So. 2d 665, 666 (Fla. 1st DCA 1971). Subject matter jurisdiction arises only by virtue of law – it must be conferred by constitution or statute and cannot be created by waiver or acquiescence. *See Jesse v. State*, 711 So. 2d 1179, 1180 (Fla. 2d DCA 1998). The Commission, therefore, must dismiss a complaint or deny a request for relief to the extent it asks the Commission to address matters over which it has no jurisdiction or to the extent it seeks relief that the Commission is not authorized to grant. *See, e.g., In re: Petition by AT&T Commc'ns of the Southern States, Inc., TCG South Florida, and MediaOne Florida Telecomms., Inc. for structural separation of BellSouth Telecoms., Inc. into two distinct wholesale and retail corporate subsidiaries*, Docket No. 010345-TP, PSC-01-2178-FOF-TP (Nov. 6, 2011) (BellSouth's motion to dismiss petitions for structural separation granted because "the Petitions fail to state a cause of action upon which relief can be granted. Namely, we have neither Federal nor State authority to grant the relief requested."); *Heekin v. FPL*, Order No. PSC-99-1054-FOF-EI (dismissing complaint because it involved "a claim . . . outside this Commission's jurisdiction.").

Here, the Commission must determine whether the legislature has granted it any authority to force AT&T Florida to continue to provide service to FLATEL or to turn the service back on when AT&T Florida is not being paid in full in breach of the parties' Agreement. AT&T Florida respectfully points out that the Legislature greatly reduced the Commission's jurisdiction over telecommunications companies earlier this year, *see* Laws 2011, c.2011-36, and the Legislature

has never conferred upon the Commission any general authority to regulate public utilities, including telephone companies. See *City of Cape Coral v. GAC Utils., Inc. of Fla.*, 281 So. 2d 493, 496 (Fla. 1973). Instead, “[t]he Commission has only those powers granted by statute expressly or by necessary implications.” *Deltona Corp. v. Mayo*, 342 So. 2d 510, 512 n.4 (Fla. 1977); accord *East Central Regional Wastewater Facilities Oper. Bd. v. City of West Palm Beach*, 659 So. 2d 402, 404 (Fla. 4th DCA 1995) (noting that an agency has “only such power as expressly or by necessary implication is granted by legislative enactment” and that “as a creature of statute,” an agency “has no common jurisdiction or inherent power”).

Moreover, any authority granted by necessary implication must be derived from fair implication and intendment incident to any express authority. See *Atlantic Coast Line R.R. Co. v. State*, 74 So. 595, 601 (Fla. 1917); *State v. Louisville & N. R. Co.*, 49 So. 39 (Fla. 1909). Finally, “any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it.” *State v. Mayo*, 354 So. 2d 359, 361 (Fla. 1977).

To the extent FLATEL has asked the Commission to “stay” suspension and disconnection of its services and to order that those services “be reinstated,” (Letter Complaint at 4), those are requests for an injunction. See *First Nat’l Bank in St. Petersburg v. Ferris*, 156 So. 2d 421, 423 (Fla. 2d DCA 1963) (An injunction “commands that acts be done or undone.”). The Commission cannot grant FLATEL this requested relief because it lacks the authority to issue injunctions.⁷ See *In re: Complaint and Petition of Cynwyd Invs. Against Tamiami Village Utility, Inc.*, Docket Nos. 920649-WS and 930642-WS, Order No. PSC-94-0210, at 9 (February 21, 1994) (“We agree that this Commission does not have subject matter jurisdiction to issue injunctions . . .”); see also *Florida Power & Light Co. v. Albert Litter Studios, Inc.*, 896 So. 2d

⁷ Pursuant to Section 364.015, Florida Statutes, the Commission may seek to enforce its orders in circuit court via a request for an injunction.

891, 892 n.3 (Fla. 3d DCA 2005) (The Commission “concedes that it lacks the authority to issue injunctive relief.”); *In re: Petition to investigate, claim for damages, complaint and other statements against respondents Evercom Systems, Inc. d/b/a Correctional Billing Servs. and BellSouth Corp. by Bessie Russ*, Docket No. 060640-TP, Order No. PSC-07-0332-PAA-TP (April 16, 2007) (“We find it appropriate to grant BellSouth’s Partial Motion to Dismiss. The Petition/Complaint shall be dismissed in part because we do not have judicial power required to... (b) issue injunctions.”).

Because FLATEL seeks a remedy (an injunction) that the Commission has no authority to provide, the Commission should deny its “demand” for a “stay.”

2. FLATEL Has Not Demonstrated That it is Entitled to Injunctive Relief

Even if the Commission had authority to issue injunctions (which it does not), FLATEL has not demonstrated, and cannot demonstrate, that it is entitled to the extraordinary injunctive relief it seeks. The test consists of a showing of satisfaction of the following criteria: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) considerations of public interest. *See Tom v. Russ*, 752 So. 2d 1250, 1251 (Fla. 1st DCA 2000) (citation omitted). For an injunction to be entered, “clear, definite, and unequivocally sufficient factual findings must support each of the four conclusions necessary to justify entry of a preliminary injunction.” *Id.*

In light of the plain language of the Agreement discussed below, *see infra* § IV.A, FLATEL cannot prove that it has a right to refuse to pay its bills in full or that it has a substantial likelihood of success on the merits of that position. Further, if FLATEL has the money to pay its bills as it committed to do in the Agreement, it will suffer no harm whatsoever – if its disputes are invalid, it merely will have paid amounts it was contractually obligated to pay anyway (and

there is no "harm" in that), and if its disputes are valid, there is nothing to suggest that AT&T Florida cannot provide it bill credits or payments in accordance with the Commission's rulings in this Docket. In contrast, if FLATEL does not have the money to pay its bills (which apparently is the case), then the harm of requiring AT&T Florida to provide even more service for which it will not be paid clearly outweighs any purported "harm" to FLATEL.

To the extent disconnection of FLATEL's resale services may impact its end users, that is not a basis to grant an injunction. While they may no longer receive service from FLATEL, there are a number of other carriers in Florida, including other prepay resellers, from whom FLATEL's end users can receive service. FLATEL had nearly two months to notify its end users that they needed to obtain replacement service between the time AT&T Florida sent its demand for payment on September 19, 2011, and when AT&T Florida began disconnecting FLATEL's service on November 8, 2011. If *FLATEL* failed to notify its end users, that failure is not a basis to grant an injunction ordering *AT&T Florida* to provide service without full payment.

* * *

Accordingly, based upon the foregoing, AT&T Florida respectfully requests that the Commission enter an Order dismissing FLATEL's Letter Complaint.

IV. RESPONSE

A. The Unambiguous Language of the Agreement Requires FLATEL to Pay All Amounts Billed, Including Disputed Charges

The parties' Commission-approved Agreement⁸ requires FLATEL to pay all amounts it is billed, even if it disputes those amounts:

⁸ The parties' Agreement is currently month-to-month. See Agreement, GTC, § 2.2 ("If as of the expiration of the initial term of this Agreement, a subsequent Agreement has not been executed by the Parties...this Agreement shall continue on a month-to-month basis . . .").

Payment Responsibility. Payment of *all* charges will be the responsibility of FLATEL. . . . FLATEL shall make payment to [AT&T Florida] for all services billed *including disputed amounts*. . . .⁹

Payment Due. Payment for services provided by [AT&T Florida], *including disputed charges*, is due on or before the next bill date. . . .¹⁰

This contractual language is unambiguous, and the Commission-approved Agreement is a valid contract. The Commission, therefore, is required by law to enforce the Agreement as written because Georgia law, which governs the contract,¹¹ is clear that “[w]here the language of a contract is plain and unambiguous, no construction is required or permissible and the terms of the contract must be given an interpretation of ordinary significance.” *Fernandes v. Manugistis Atlanta, Inc.*, 582 S.E.2d 499, 502 (Ga. Ct. App. 2003) (citation omitted). This is true even if the provision is perceived to be harsh to one party to the contract. *See Berry v. Travelers Ins. Co.*, 14 S.E.2d 196, 202 (Ga. Ct. App. 1941) (“If it be said that the provision is a harsh one, the answer is that the rights of the parties are to be determined under the contract as made, and it is not within the power of this court to rewrite it.”).¹²

The Agreement here is not only a binding contract but also “the Congressionally prescribed vehicle for implementing the substantive rights and obligations set forth in the Act,” *Michigan Bell Tel. Co. v. Strand*, 305 F.3d 580, 582 (6th Cir. 2003), and once a carrier enters “into an interconnection agreement in accordance with section 252, 47 U.S.C. § 251(c)(1), it is

⁹ Agreement, Attachment 7, § 1.4 (emphasis added).

¹⁰ *Id.* § 1.4.1.

¹¹ *See* Agreement, GTC, § 17 (“In all other respects, this Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Georgia without regard to its conflict of laws principles.”).

¹² Florida law is in accord with Georgia law on these points. *See Applica Inc. v. Newtech Electronics Indus., Inc.*, 980 So. 2d 1194, 1194 (Fla. 3d DCA 2008) (“[W]here an agreement is unambiguous . . . we enforce the contract as written, no matter how disadvantageous the language might later prove to be.”); *Medical Ctr. Health Plan v. Brick*, 572 So. 2d 548, 551 (Fla. 1st DCA 1990) (“A party is bound by, and a court is powerless to rewrite, the clear and unambiguous terms of a voluntary contract.”) (citation omitted); *Paddock v. Bay Concrete Indus., Inc.*, 154 So. 2d 313, 316 (Fla. 2d DCA 1963) (holding that “an unambiguous agreement must be enforced in accordance with its terms”).

then regulated directly by the interconnection agreement.” *Law Offices of Curtis V. Trinko LLP*, 305 F.3d at 104; *see also Mich. Bell Tel. Co. v. MCIMetro Access Trans. Servs., Inc.*, 323 F.3d 348, 359 (6th Cir. 2003) (“[O]nce an agreement is approved,” the parties are “governed by the interconnection agreement.”).

FLATEL’s suggestion that the Agreement is somehow not enforceable because it was, in its view, “nonnegotiable,” fails. As discussed above, FLATEL’s nonnegotiable argument is simply wrong. It is hard to conceive of a situation where a contracting party could have more protection in its negotiation efforts than FLATEL had under the 1996 Act. FLATEL is essentially asking the Commission to alter the terms of its Agreement. It does not have authority to do so. *See In re: Petition of Supra Telecomms. & Info. Sys. for generic proceeding to arbitrate rates, terms, and conditions of interconnection with BellSouth Telecomms., Inc., or, in the alternative, petition for arbitration of interconnection agreement*, Docket No. 980155-TP, Order No. PSC-98-0466-FOF-TP (March 31, 1998).

FLATEL’s suggestion that the payment terms are somehow unfair and thus unenforceable is equally meritless. The Commission recently enforced the same contract language. In a docket involving a similar CLEC complaint to avoid contractual payment obligations, the Commission found “that AT&T is entitled under the plain terms of the ICA to prompt payment of all sums billed; and in the absence of such payment, is entitled to proceed with the actions outlined in the Notice of Commencement of Treatment” and “the plain language of these provisions is clear that while [the CLEC] can dispute amounts billed by AT&T, it must pay those amounts as billed within the time specified by the ICA.” *In re: Complaint and petition for relief against LifeConnex Telecom, LLC f/k/a Swifitel, LLC by BellSouth Telecomms., Inc.*

d/b/a AT&T Florida, Docket No. 100021-TP, Order No. PSC-10-0457-PCO-TP, at 6 (July 16, 2010).¹³

Here, as in *LifeConnex*, Sections 1.4 and 1.4.1 of the Agreement are unambiguous and enforceable. The Commission, therefore, should enforce the Agreement as written and deny FLATEL's Complaint in which FLATEL does nothing more than ask to be relieved of its contractual obligations.

B. FLATEL's Promotion Claims Do Not Obviate its Payment Obligations

With regard to the merits of FLATEL's promotion claims, AT&T Florida denies that FLATEL is entitled to the promotions that it has claimed or that FLATEL is somehow entitled to have AT&T Florida process its claims the way FLATEL thinks it should. FLATEL has not identified any specific promotions in its Letter Complaint. Instead, it has attached a spreadsheet of nearly 75 pages with no explanation of what it is intended to represent. That spreadsheet is insufficient to put AT&T Florida on notice of FLATEL's claims or for AT&T Florida to assess the validity of those claims. To the extent a response is required, AT&T Florida denies FLATEL's promotion claims.

With regard to FLATEL's allegation that the method by which AT&T Florida processes its promotion claims is somehow unfair because it is different from how AT&T Florida processes claims for its retail customers, AT&T Florida denies that allegation. FLATEL has no right to tell AT&T Florida how to process its promotion claims. There is no provision in the

¹³ Commissions in Kentucky, North Carolina and Alabama have all reached similar conclusions regarding interconnection agreements with language that is identical to the above quoted Agreement provisions. See, *In the Matter of BellSouth Telecomms., Inc. d/b/a AT&T Southeast d/b/a AT&T Kentucky v. LifeConnex Telecom, LLC f/k/a Swiftel, LLC*, Case No. 2010-00026; *In the Matter of Disconnection of LifeConnex Telecom, Inc. f/k/a Swiftel, LLC by BellSouth Telecomms., Inc. d/b/a AT&T Southeast d/b/a AT&T North Carolina*, Docket No. P-55, Sub 1817; and *Petition of LifeConnex Telecom, LLC, f/k/a Swiftel, LLC Concerning Implementation of its Interconnection Agreement with BellSouth Telecomms., Inc. d/b/a AT&T Alabama or AT&T Southeast and Motion for Temporary Emergency Relief to Prevent Suspension of Service*, Docket No. 31450.

1996 Act or in Florida law that provides FLATEL with the ability to dictate the procedures by which AT&T Florida processes promotional claims. If there were such a provision, the hundreds of CLECs operating across the country could each theoretically dictate their own individual requirements on an ILEC, which would not only create an absurd result, but a process nightmare.

Additionally, there is no requirement that AT&T Florida employ the same method for providing promotion credits for its wholesale customers as it does for its retail customers. Instead, when a promotion reduces the effective retail price of a resalable product, AT&T Florida can and should pass on that price decrease (appropriately discounted) to its eligible wholesale customers for eligible lines. AT&T Florida has access to its retail customer records and thus has the ability to easily determine whether the customer is entitled to the credit, gift card, or other applicable promotion item. For its wholesale customers, AT&T Florida employs a claim submission and review process to assess the validity of the promotional claims submitted. This review process, which is not discriminatory, is necessary to allow AT&T Florida the opportunity to assess the legitimacy of the thousands of claims it receives. As the Commission knows, AT&T Florida has had issues with some CLEC customers submitting promotion claims that do not meet the qualifications of the promotion and for which the CLECs were not entitled. *See, e.g., In re: Complaint by DPI-Teleconnect, L.L.C. against BellSouth Telecomms., Inc. for dispute arising under interconnection agreement*, Docket No. 050863-TP, Order No. PSC-08-0598-FOF-TP, at 7-9 (Sept. 16, 2008) (seeking credits for promotion that required features that CLEC did not purchase).

FLATEL's claim that AT&T Florida's process does not allow it to compete as "FLATEL's End User should be entitled to the same instant consumer relief," (Letter Complaint at 2), is baseless. FLATEL is solely in control of how its end user is treated; AT&T Florida has

no relationship with FLATEL's end users and FLATEL may not even pass along the promotional credit it references. Further, if FLATEL chooses to waive a certain charge for the end user at ordering, FLATEL will simply put itself in the same or even better position as AT&T Florida. When AT&T Florida has a promotion in which it waives installation charges for its own end users, AT&T Florida still must incur the cost of installing the service for those end users; it then looks to recoup those costs over time. In comparison, FLATEL will pay the installation charges up front and, for requests that meet the qualification criteria, it will recoup the installation charges through a credit granted by AT&T Florida and can also recoup those charges over time if it retains the customer (just as AT&T Florida does). In this way, FLATEL can conceivably be in a better position than AT&T Florida.

FLATEL's argument that AT&T Florida's affiliated companies in another region of the country might do things differently and accept claims on the front end of the ordering process is irrelevant to this proceeding. What another company might do has no relation to what AT&T Florida should have to do. Moreover, on information and belief, AT&T Florida understands that its affiliates have previously experienced a large number of invalid promotion claims through their front end promotion claim process, which requires those AT&T affiliates to lose out or to expend a substantial amount of time and resources on pursuing recovery on promotions paid. AT&T Florida's claim submission and review process is a viable and legitimate way for it to handle promotion claims from its wholesale customers.

And, regardless, FLATEL's complaints about AT&T Florida's claim review process does not negate its contractual obligation to pay its bills in full when due. If FLATEL has a dispute about AT&T Florida's handling of a promotion claim, there is a dispute resolution process

included in the Agreement, *see* Agreement, GTC, § 8; Attachment 7, § 2, or it can pursue relief from this Commission. What it cannot do is withhold payment as it has done here.

Finally, FLATEL argues that in withholding amounts due to AT&T Florida, it is merely exercising a “set-off” of its claim against AT&T Florida. (Letter Complaint at 3 (citing *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 18 (1995).) In asking for an opportunity to “reconcile the amount demanded from AT&T after application of Promotions” before it pays its bills, (Letter Complaint at 3), FLATEL is merely restyling its promotion claims as “set-offs.” This argument is contrary to the plain language of the Agreement discussed above and thus fails on its face. Furthermore, the case cited by FLATEL is completely irrelevant to this proceeding; it addresses the applicability of the bankruptcy automatic stay provision to a bank account when the debtor is in default on a loan obligation to the bank. The language FLATEL cites (“the absurdity of making A pay B when B owes A”) is taken completely out of context. The Supreme Court did not create any substantive rights through that language, and it does not allow FLATEL to take self-help to avoid a contractual payment obligation because it has a claim against AT&T Florida. Instead, the quoted phrase is merely an explanation for a pleading standard – when a defendant is sued on a debt and it has a claim against the plaintiff, the defendant can assert its claim as a counterclaim or plead it as an affirmative defense. *See Studley v. Boylston Nat’l Bank of Boston*, 229 U.S. 523, 528 (1913) (cited in *Citizens Bank of Md.*, 516 U.S. at 18)).

V. CONCLUSION

WHEREFORE, AT&T Florida respectfully requests that the Commission enter an Order dismissing FLATEL's Letter Complaint for failure to state a claim.

Respectfully submitted this 28th day of November, 2011.

AT&T FLORIDA



Tracy W. Hatch
Manuel A. Gardian
AT&T Florida
c/o Gregory R. Follensbee
150 South Monroe Street
Suite 400
Tallahassee, FL 32301
Tel. No. (305) 347-5558
Fax. No. (305) 577-4491
th9467@att.com
mg2708@att.com

Exhibit A



WHOLESALE AGREEMENT

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EXHIBIT A

Note: This page is not part of the actual signed contract/amendment, but is present for record keeping purposes only.

Interconnection Agreement
Between
BellSouth Telecommunications, Inc.
and
Flatel, Inc.

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**AGREEMENT
GENERAL TERMS AND CONDITIONS**

THIS AGREEMENT is made by and between BellSouth Telecommunications, Inc., (BellSouth), a Georgia corporation, and Flatel, Inc. (FLATEL), a Florida corporation, and shall be effective on the Effective Date, as defined herein. This Agreement may refer to either BellSouth or FLATEL or both as a "Party" or "Parties."

WITNESSETH

WHEREAS, BellSouth is a local exchange telecommunications company authorized to provide Telecommunications Services (as defined below) in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee; and

WHEREAS, FLATEL is or seeks to become a CLEC authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; and

WHEREAS, pursuant to Sections 251 and 252 of the Act; FLATEL wishes to purchase certain services from BellSouth; and

WHEREAS, Parties wish to interconnect their facilities, exchange traffic, and perform Local Number Portability (LNP) pursuant to Sections 251 and 252 of the Act as set forth herein; and

NOW THEREFORE, in consideration of the mutual agreements contained herein, BellSouth and FLATEL agree as follows:

Definitions

Affiliate is defined as a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or equivalent thereof) of more than 10 percent (10%).

Commission is defined as the appropriate regulatory agency in each state of BellSouth's nine-state region (Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee).

Competitive Local Exchange Carrier (CLEC) means a telephone company certificated by the Commission to provide local exchange service within BellSouth's franchised area.

Effective Date is defined as the date that the Agreement is effective for purposes of rates, terms and conditions and shall be thirty (30) days after the date of the last signature executing the Agreement. Future amendments for rate changes will also be effective thirty (30) days after the date of the last signature executing the amendment.

End User means the ultimate user of the Telecommunications Service.

FCC means the Federal Communications Commission.

Telecommunications means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

Telecommunications Service means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Telecommunications Act of 1996 (Act) means Public Law 104-104 of the United States Congress effective February 8, 1996. The Act amended the Communications Act of 1934 (47 U.S.C. Section 1 et. seq.).

1. CLEC Certification

1.1 FLATEL agrees to provide BellSouth in writing FLATEL's CLEC certification for all states covered by this Agreement except Kentucky prior to BellSouth filing this Agreement with the appropriate Commission for approval.

1.2 To the extent FLATEL is not certified as a CLEC in each state covered by this Agreement as of the execution hereof, FLATEL may not purchase services hereunder in that state. FLATEL will notify BellSouth in writing and provide CLEC certification when it becomes certified to operate in any other state covered by this Agreement and upon receipt thereof, FLATEL may thereafter purchase services pursuant to this Agreement in that state. BellSouth will file this Agreement with the appropriate Commission for approval.

1.3 Should FLATEL's certification in any state be rescinded or otherwise terminated, BellSouth may, at its election, terminate this Agreement immediately and all monies owed on all outstanding invoices shall become due, or BellSouth may refuse to provide services hereunder in that state until certification is reinstated in that state, provided such notification is made prior to expiration of the term of this Agreement. FLATEL shall provide an effective certification to do business issued by the secretary of state or equivalent authority in each state covered by this Agreement.

2. Term of the Agreement

- 2.1 The initial term of this Agreement shall be three (3) years, beginning on the Effective Date and shall apply to the BellSouth territory in the state(s) of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. Notwithstanding any prior agreement of the Parties, the rates, terms and conditions of this Agreement shall not be applied retroactively prior to the Effective Date.
- 2.2 The Parties agree that by no earlier than two hundred seventy (270) days and no later than one hundred and eighty (180) days prior to the expiration of the initial term of this Agreement, they shall commence negotiations for a new agreement to be effective beginning on the expiration date of this Agreement (Subsequent Agreement). If as of the expiration of the initial term of this Agreement, a Subsequent Agreement has not been executed by the Parties, then except as set forth in Sections 2.3.1 and 2.3.2 below, this Agreement shall continue on a month-to-month basis while a Subsequent Agreement is being negotiated. The Parties' rights and obligations with respect to this Agreement after expiration of the initial term shall be as set forth in Section 2.3 below.
- 2.3 If, within one hundred and thirty-five (135) days of commencing the negotiation referred to in Section 2.2 above, the Parties are unable to negotiate new terms, conditions and prices for a Subsequent Agreement, either Party may petition the Commission to establish appropriate rates, terms and conditions for the Subsequent Agreement pursuant to 47 U.S.C. § 252.
- 2.3.1 FLATEL may request termination of this Agreement only if it is no longer purchasing services pursuant to this Agreement. Except as set forth in Section 2.3.2 below, notwithstanding the foregoing, in the event that as of the date of expiration of the initial term of this Agreement and conversion of this Agreement to a month-to-month term, the Parties have not entered into a Subsequent Agreement and no arbitration proceeding has been filed in accordance with Section 2.3 above, then BellSouth may terminate this Agreement upon sixty (60) days notice to FLATEL. In the event that BellSouth terminates this Agreement as provided above, BellSouth shall continue to offer services to FLATEL pursuant to the rates, terms and conditions set forth in BellSouth's then current standard interconnection agreement. In the event that BellSouth's standard interconnection agreement becomes effective between the Parties, the Parties may continue to negotiate a Subsequent Agreement.
- 2.3.2 Notwithstanding Section 2.2 above, in the event that as of the expiration of the initial term of this Agreement the Parties have not entered into a Subsequent Agreement and no arbitration proceeding has been filed in accordance with Section 2.3 above and BellSouth is not providing any services under this Agreement as of the date of expiration of the initial term of this Agreement, then this Agreement shall not continue on a month-to-month basis but shall be deemed terminated as of the expiration date hereof.

2.4 If, at any time during the term of this Agreement, BellSouth is unable to contact FLATEL pursuant to the Notices provision hereof or any other contact information provided by FLATEL under this Agreement, and there are no active services being provisioned under this Agreement, then BellSouth may, at its discretion, terminate this Agreement, without any liability whatsoever, upon sending of notification to FLATEL pursuant to the Notices section hereof.

2.5 In addition to as otherwise set forth in this Agreement, BellSouth reserves the right to suspend access to ordering systems, refuse to process additional or pending applications for service, or terminate service in the event of prohibited, unlawful or improper use of BellSouth's facilities or service, abuse of BellSouth's facilities or any other material breach of this Agreement, and all monies owed on all outstanding invoices shall become due.

3. **Nondiscriminatory Access**

When FLATEL purchases Telecommunications Services from BellSouth pursuant to Attachment 1 of this Agreement for the purposes of resale to End Users, such services shall be equal in quality, subject to the same conditions, and provided within the same provisioning time intervals that BellSouth provides to others, including its End Users. To the extent technically feasible, the quality of a Network Element, as well as the quality of the access to such Network Element provided by BellSouth to FLATEL shall be at least equal to that which BellSouth provides to itself and shall be the same for all Telecommunications carriers requesting access to that Network Element. The quality of the interconnection between the network of BellSouth and the network of FLATEL shall be at a level that is equal to that which BellSouth provides itself, a subsidiary, an Affiliate, or any other party. The interconnection facilities shall be designed to meet the same technical criteria and service standards that are used within BellSouth's network and shall extend to a consideration of service quality as perceived by BellSouth's End Users and service quality as perceived by FLATEL.

4 **Court Ordered Requests for Call Detail Records and Other Subscriber Information**

4.1 Subpoenas Directed to BellSouth. Where BellSouth provides resold services for FLATEL, or, if applicable under this Agreement, switching, BellSouth shall respond to subpoenas and court ordered requests delivered directly to BellSouth for the purpose of providing call detail records when the targeted telephone numbers belong to FLATEL End Users. Billing for such requests will be generated by BellSouth and directed to the law enforcement agency initiating the request. BellSouth shall maintain such information for FLATEL End Users for the same length of time it maintains such information for its own End Users.

4.2 Subpoenas Directed to FLATEL. Where BellSouth is providing resold services to FLATEL, or, if applicable under this Agreement, switching, then FLATEL agrees that in those cases where FLATEL receives subpoenas or court ordered requests regarding targeted telephone numbers belonging to FLATEL End Users, and

where FLATEL does not have the requested information, FLATEL will advise the law enforcement agency initiating the request to redirect the subpoena or court ordered request to BellSouth for handling in accordance with Section 4.1 above.

- 4.3 In all other instances, where either Party receives a request for information involving the other Party's End User, the Party receiving the request will advise the law enforcement agency initiating the request to redirect such request to the other Party.

5 Liability and Indemnification

- 5.1 FLATEL Liability. In the event that FLATEL consists of two (2) or more separate entities as set forth in this Agreement and/or any Amendments hereto, or any third party places orders under this Agreement using FLATEL's company codes or identifiers, all such entities shall be jointly and severally liable for the obligations of FLATEL under this Agreement.

- 5.2 Liability for Acts or Omissions of Third Parties. BellSouth shall not be liable to FLATEL for any act or omission of another entity providing any services to FLATEL.

- 5.3 Except for any indemnification obligations of the Parties hereunder, each Party's liability to the other for any loss, cost, claim, injury, liability or expense, including reasonable attorneys' fees relating to or arising out of any cause whatsoever, whether based in contract, negligence or other tort, strict liability or otherwise, relating to the performance of this Agreement, shall not exceed a credit for the actual cost of the services or functions not performed or improperly performed. Any amounts paid to FLATEL pursuant to Attachment 9 hereof shall be credited against any damages otherwise payable to FLATEL pursuant to this Agreement.

- 5.3.1 Limitations in Tariffs. A Party may, in its sole discretion, provide in its tariffs and contracts with its End Users and third parties that relate to any service, product or function provided or contemplated under this Agreement, that to the maximum extent permitted by Applicable Law, such Party shall not be liable to the End User or third party for (i) any loss relating to or arising out of this Agreement, whether in contract, tort or otherwise, that exceeds the amount such Party would have charged that applicable person for the service, product or function that gave rise to such loss and (ii) consequential damages. To the extent that a Party elects not to place in its tariffs or contracts such limitations of liability, and the other Party incurs a loss as a result thereof, such Party shall, except to the extent caused by the other Party's gross negligence or willful misconduct, indemnify and reimburse the other Party for that portion of the loss that would have been limited had the first Party included in its tariffs and contracts the limitations of liability that such other Party included in its own tariffs at the time of such loss.

- 5.3.2 Neither BellSouth nor FLATEL shall be liable for damages to the other Party's terminal location, equipment or End User premises resulting from the furnishing of

a service, including, but not limited to, the installation and removal of equipment or associated wiring, except to the extent caused by a Party's negligence or willful misconduct or by a Party's failure to ground properly a local loop after disconnection.

- 5.3.3 Under no circumstance shall a Party be responsible or liable for indirect, incidental, or consequential damages, including, but not limited to, economic loss or lost business or profits, damages arising from the use or performance of equipment or software, or the loss of use of software or equipment, or accessories attached thereto, delay, error, or loss of data. In connection with this limitation of liability, each Party recognizes that the other Party may, from time to time, provide advice, make recommendations, or supply other analyses related to the services or facilities described in this Agreement, and, while each Party shall use diligent efforts in this regard, the Parties acknowledge and agree that this limitation of liability shall apply to provision of such advice, recommendations, and analyses.
- 5.3.4 To the extent any specific provision of this Agreement purports to impose liability, or limitation of liability, on either Party different from or in conflict with the liability or limitation of liability set forth in this Section, then with respect to any facts or circumstances covered by such specific provisions, the liability or limitation of liability contained in such specific provision shall apply.
- 5.4 Indemnification for Certain Claims. Except to the extent caused by the indemnified Party's gross negligence or willful misconduct, the Party providing services hereunder, its Affiliates and its parent company, shall be indemnified, defended and held harmless by the Party receiving services hereunder against any claim, loss or damage arising from the receiving Party's use of the services provided under this Agreement pertaining to (1) claims for libel, slander or invasion of privacy arising from the content of the receiving Party's own communications, or (2) any claim, loss or damage claimed by the End User of the Party receiving services arising from such company's use or reliance on the providing Party's services, actions, duties, or obligations arising out of this Agreement.
- 5.5 Disclaimer. EXCEPT AS SPECIFICALLY PROVIDED TO THE CONTRARY IN THIS AGREEMENT, NEITHER PARTY MAKES ANY REPRESENTATIONS OR WARRANTIES TO THE OTHER PARTY CONCERNING THE SPECIFIC QUALITY OF ANY SERVICES, OR FACILITIES PROVIDED UNDER THIS AGREEMENT. THE PARTIES DISCLAIM, WITHOUT LIMITATION, ANY WARRANTY OR GUARANTEE OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, ARISING FROM COURSE OF PERFORMANCE, COURSE OF DEALING, OR FROM USAGES OF TRADE.

6 Intellectual Property Rights and Indemnification

- 6.1 **No License.** Except as expressly set forth in Section 6.2 below, no patent, copyright, trademark or other proprietary right is licensed, granted or otherwise transferred by this Agreement. The Parties are strictly prohibited from any use, including but not limited to, in the selling, marketing, promoting or advertising of telecommunications services, of any name, service mark, logo or trademark (collectively, the "Marks") of the other Party. The Marks include those Marks owned directly by a Party or its Affiliate(s) and those Marks that a Party has a legal and valid license to use. The Parties acknowledge that they are separate and distinct and that each provides a separate and distinct service and agree that neither Party may, expressly or impliedly, state, advertise or market that it is or offers the same service as the other Party or engage in any other activity that may result in a likelihood of confusion between its own service and the service of the other Party.
- 6.2 **Ownership of Intellectual Property.** Any intellectual property that originates from or is developed by a Party shall remain the exclusive property of that Party. Except for a limited, non-assignable, non-exclusive, non-transferable license to use patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property right, now or hereafter owned, controlled or licensable by a Party, is granted to the other Party. Neither shall it be implied nor arise by estoppel. Any trademark, copyright or other proprietary notices appearing in association with the use of any facilities or equipment (including software) shall remain on the documentation, material, product, service, equipment or software. It is the responsibility of each Party to ensure at no additional cost to the other Party that it has obtained any necessary licenses in relation to intellectual property of third Parties used in its network that may be required to enable the other Party to use any facilities or equipment (including software), to receive any service, or to perform its respective obligations under this Agreement.
- 6.3 **Intellectual Property Remedies**
- 6.3.1 **Indemnification.** The Party providing a service pursuant to this Agreement will defend the Party receiving such service or data provided as a result of such service against claims of infringement arising solely from the use by the receiving Party of such service in the manner contemplated under this Agreement and will indemnify the receiving Party for any damages awarded based solely on such claims in accordance with Section 5 above.
- 6.3.2 **Claim of Infringement**
- 6.3.2.1 In the event that use of any facilities or equipment (including software), becomes, or in the reasonable judgment of the Party who owns the affected network is likely to become, the subject of a claim, action, suit, or proceeding based on intellectual property infringement, then said Party, promptly and at its sole expense and sole option, but subject to the limitations of liability set forth below, shall:

- 6.3.2.2 modify or replace the applicable facilities or equipment (including software) while maintaining form and function, or
- 6.3.2.3 obtain a license sufficient to allow such use to continue.
- 6.3.2.4 In the event Sections 6.3.2.2 or 6.3.2.3 above are commercially unreasonable, then said Party may terminate, upon reasonable notice, this contract with respect to use of, or services provided through use of, the affected facilities or equipment (including software), but solely to the extent required to avoid the infringement claim.
- 6.3.3 **Exception to Obligations.** Neither Party's obligations under this Section shall apply to the extent the infringement is caused by: (i) modification of the facilities or equipment (including software) by the indemnitee; (ii) use by the indemnitee of the facilities or equipment (including software) in combination with equipment or facilities (including software) not provided or authorized by the indemnitor, provided the facilities or equipment (including software) would not be infringing if used alone; (iii) conformance to specifications of the indemnitee which would necessarily result in infringement; or (iv) continued use by the indemnitee of the affected facilities or equipment (including software) after being placed on notice to discontinue use as set forth herein.
- 6.3.4 **Exclusive Remedy.** The foregoing shall constitute the Parties' sole and exclusive remedies and obligations with respect to a third party claim of intellectual property infringement arising out of the conduct of business under this Agreement.
- 6.3.5 **Dispute Resolution.** Any claim arising under Sections 6.1 and 6.2 above shall be excluded from the dispute resolution procedures set forth in Section 8 below and shall be brought in a court of competent jurisdiction.

7 **Proprietary and Confidential Information**

- 7.1 **Proprietary and Confidential Information.** It may be necessary for BellSouth and FLATEL, each as the "Discloser," to provide to the other Party, as "Recipient," certain proprietary and confidential information (including trade secret information) including but not limited to technical, financial, marketing, staffing and business plans and information, strategic information, proposals, request for proposals, specifications, drawings, maps, prices, costs, costing methodologies, procedures, processes, business systems, software programs, techniques, customer account data, call detail records and like information (collectively the "Information"). All such Information conveyed in writing or other tangible form shall be clearly marked with a confidential or proprietary legend. Information conveyed orally by the Discloser to Recipient shall be designated as proprietary and confidential at the time of such oral conveyance, shall be reduced to writing by the Discloser within forty-five (45) days thereafter, and shall be clearly marked with a confidential or proprietary legend.

7.2 **Use and Protection of Information.** Recipient agrees to protect such Information of the Discloser provided to Recipient from whatever source from distribution, disclosure or dissemination to anyone except employees of Recipient with a need to know such Information solely in conjunction with Recipient's analysis of the Information and for no other purpose except as authorized herein or as otherwise authorized in writing by the Discloser. Recipient will not make any copies of the Information inspected by it.

7.3 **Exceptions**

7.3.1 Recipient will not have an obligation to protect any portion of the Information which:

7.3.2 (a) is made publicly available by the Discloser or lawfully by a nonparty to this Agreement; (b) is lawfully obtained by Recipient from any source other than Discloser; (c) is previously known to Recipient without an obligation to keep it confidential; or (d) is released from the terms of this Agreement by Discloser upon written notice to Recipient.

7.4 Recipient agrees to use the Information solely for the purposes of negotiations pursuant to 47 U.S.C. § 251 or in performing its obligations under this Agreement and for no other entity or purpose, except as may be otherwise agreed to in writing by the Parties. Nothing herein shall prohibit Recipient from providing information requested by the FCC or a state regulatory agency with jurisdiction over this matter, or to support a request for arbitration or an allegation of failure to negotiate in good faith.

7.5 Recipient agrees not to publish or use the Information for any advertising, sales or marketing promotions, press releases, or publicity matters that refer either directly or indirectly to the Information or to the Discloser or any of its affiliated companies.

7.6 The disclosure of Information neither grants nor implies any license to the Recipient under any trademark, patent, copyright, application or other intellectual property right that is now or may hereafter be owned by the Discloser.

7.7 **Survival of Confidentiality Obligations.** The Parties' rights and obligations under this Section 7 shall survive and continue in effect until two (2) years after the expiration or termination date of this Agreement with regard to all Information exchanged during the term of this Agreement. Thereafter, the Parties' rights and obligations hereunder survive and continue in effect with respect to any Information that is a trade secret under applicable law.

8 **Resolution of Disputes**

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, if it elects to pursue

resolution of the dispute, shall petition the Commission for a resolution of the dispute. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement.

9 Taxes

9.1 **Definition.** For purposes of this Section, the terms “taxes” and “fees” shall include but not be limited to federal, state or local sales, use, excise, gross receipts or other taxes or tax-like fees of whatever nature and however designated (including tariff surcharges and any fees, charges or other payments, contractual or otherwise, for the use of public streets or rights of way, whether designated as franchise fees or otherwise) imposed, or sought to be imposed, on or with respect to the services furnished hereunder or measured by the charges or payments therefore, excluding any taxes levied on income.

9.2 **Taxes and Fees Imposed Directly On Either Providing Party or Purchasing Party**

9.2.1 Taxes and fees imposed on the providing Party, which are not permitted or required to be passed on by the providing Party to its customer, shall be borne and paid by the providing Party.

9.2.2 Taxes and fees imposed on the purchasing Party, which are not required to be collected and/or remitted by the providing Party, shall be borne and paid by the purchasing Party.

9.3 **Taxes and Fees Imposed on Purchasing Party But Collected And Remitted By Providing Party**

9.3.1 Taxes and fees imposed on the purchasing Party shall be borne by the purchasing Party, even if the obligation to collect and/or remit such taxes or fees is placed on the providing Party.

9.3.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing Party at the time that the respective service is billed.

9.3.3 If the purchasing Party determines that in its opinion any such taxes or fees are not payable, the providing Party shall not bill such taxes or fees to the purchasing Party if the purchasing Party provides written certification, reasonably satisfactory to the providing Party, stating that it is exempt or otherwise not subject to the tax or fee, setting forth the basis therefor, and satisfying any other requirements under applicable law. If any authority seeks to collect any such tax or fee that the purchasing Party has determined and certified not to be payable, or any such tax or fee that was not billed by the providing Party, the purchasing Party may contest the same in good faith, at its own expense. In any such contest, the purchasing Party shall promptly furnish the providing Party with copies of all filings in any

proceeding, protest, or legal challenge, all rulings issued in connection therewith, and all correspondence between the purchasing Party and the taxing authority.

- 9.3.4 In the event that all or any portion of an amount sought to be collected must be paid in order to contest the imposition of any such tax or fee, or to avoid the existence of a lien on the assets of the providing Party during the pendency of such contest, the purchasing Party shall be responsible for such payment and shall be entitled to the benefit of any refund or recovery.
- 9.3.5 If it is ultimately determined that any additional amount of such a tax or fee is due to the imposing authority, the purchasing Party shall pay such additional amount, including any interest and penalties thereon.
- 9.3.6 Notwithstanding any provision to the contrary, the purchasing Party shall protect, indemnify and hold harmless (and defend at the purchasing Party's expense) the providing Party from and against any such tax or fee, interest or penalties thereon, or other charges or payable expenses (including reasonable attorney fees) with respect thereto, which are incurred by the providing Party in connection with any claim for or contest of any such tax or fee.
- 9.3.7 Each Party shall notify the other Party in writing of any assessment, proposed assessment or other claim for any additional amount of such a tax or fee by a taxing authority; such notice to be provided, if possible, at least ten (10) days prior to the date by which a response, protest or other appeal must be filed, but in no event later than thirty (30) days after receipt of such assessment, proposed assessment or claim.
- 9.4 Taxes and Fees Imposed on Providing Party But Passed On To Purchasing Party
- 9.4.1 Taxes and fees imposed on the providing Party, which are permitted or required to be passed on by the providing Party to its customer, shall be borne by the purchasing Party.
- 9.4.2 To the extent permitted by applicable law, any such taxes and/or fees shall be shown on applicable billing documents between the Parties. Notwithstanding the foregoing, the purchasing Party shall remain liable for any such taxes and fees regardless of whether they are actually billed by the providing Party at the time that the respective service is billed.
- 9.4.3 If the purchasing Party disagrees with the providing Party's determination as to the application or basis for any such tax or fee, the Parties shall consult with respect to the imposition and billing of such tax or fee. Notwithstanding the foregoing, the providing Party shall retain ultimate responsibility for determining whether and to what extent any such taxes or fees are applicable, and the purchasing Party shall abide by such determination and pay such taxes or fees to the providing Party. The providing Party shall further retain ultimate responsibility for determining whether and how to contest the imposition of such taxes and fees; provided,

however, that any such contest undertaken at the request of the purchasing Party shall be at the purchasing Party's expense.

- 9.4.4 In the event that all or any portion of an amount sought to be collected must be paid in order to contest the imposition of any such tax or fee, or to avoid the existence of a lien on the assets of the providing Party during the pendency of such contest, the purchasing Party shall be responsible for such payment and shall be entitled to the benefit of any refund or recovery.
- 9.4.5 If it is ultimately determined that any additional amount of such a tax or fee is due to the imposing authority, the purchasing Party shall pay such additional amount, including any interest and penalties thereon.
- 9.4.6 Notwithstanding any provision to the contrary, the purchasing Party shall protect, indemnify and hold harmless (and defend at the purchasing Party's expense) the providing Party from and against any such tax or fee, interest or penalties thereon, or other reasonable charges or payable expenses (including reasonable attorneys' fees) with respect thereto, which are incurred by the providing Party in connection with any claim for or contest of any such tax or fee.
- 9.4.7 Each Party shall notify the other Party in writing of any assessment, proposed assessment or other claim for any additional amount of such a tax or fee by a taxing authority; such notice to be provided, if possible, at least ten (10) days prior to the date by which a response, protest or other appeal must be filed, but in no event later than thirty (30) days after receipt of such assessment, proposed assessment or claim.
- 9.5 Mutual Cooperation. In any contest of a tax or fee by one Party, the other Party shall cooperate fully by providing records, testimony and such additional information or assistance as may reasonably be necessary to pursue the contest. Further, the other Party shall be reimbursed for any reasonable and necessary out-of-pocket copying and travel expenses incurred in assisting in such contest.

10 Force Majeure

In the event performance of this Agreement, or any obligation hereunder, is either directly or indirectly prevented, restricted, or interfered with by reason of fire, flood, earthquake or like acts of God, wars, revolution, civil commotion, explosion, acts of public enemy, embargo, acts of the government in its sovereign capacity, labor difficulties, including without limitation, strikes, slowdowns, picketing, or boycotts, unavailability of equipment from vendor, changes requested by FLATEL, or any other circumstances beyond the reasonable control and without the fault or negligence of the Party affected, the Party affected, upon giving prompt notice to the other Party, shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference (and the other Party shall likewise be excused from performance of its obligations on a day-to-day basis until the delay, restriction or interference has ceased);

provided, however, that the Party so affected shall use diligent efforts to avoid or remove such causes of non-performance and both Parties shall proceed whenever such causes are removed or cease.

11 Adoption of Agreements

Pursuant to 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809, BellSouth shall make available to FLATEL any entire interconnection agreement filed and approved pursuant to 47 U.S.C. § 252. The adopted agreement shall apply to the same states as the agreement that was adopted, and the term of the adopted agreement shall expire on the same date as set forth in the agreement that was adopted.

12 Modification of Agreement

12.1 If FLATEL changes its name or makes changes to its company structure or identity due to a merger, acquisition, transfer or any other reason, it is the responsibility of FLATEL to notify BellSouth of said change, request that an amendment to this Agreement, if necessary, be executed to reflect said change and notify the appropriate state commission of such modification of company structure in accordance with the state rules governing such modification in company structure if applicable. Additionally, FLATEL shall provide BellSouth with any necessary supporting documentation.

12.2 No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.

12.3 In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of FLATEL or BellSouth to perform any material terms of this Agreement, FLATEL 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 new 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.

13 Legal Rights

Execution of this Agreement by either Party does not confirm or imply that the executing Party agrees with any decision(s) issued pursuant to the Telecommunications Act of 1996 and the consequences of those decisions on specific language in this Agreement. Neither Party waives its rights to appeal or otherwise challenge any such decision(s) and each Party reserves all of its rights to pursue any and all legal and/or equitable remedies, including appeals of any such decision(s).

14 Indivisibility

Subject to Section 15 below, the Parties intend that this Agreement be indivisible and nonseverable, and each of the Parties acknowledges that it has assented to all of the covenants and promises in this Agreement as a single whole and that all of such covenants and promises, taken as a whole, constitute the essence of the contract. Without limiting the generality of the foregoing, each of the Parties acknowledges that any provision by BellSouth of collocation space under this Agreement is solely for the purpose of facilitating the provision of other services under this Agreement as set forth in Attachment 4. The Parties further acknowledge that this Agreement is intended to constitute a single transaction and that the obligations of the Parties under this Agreement are interdependent.

15 Severability

If any provision of this Agreement, or part thereof, shall be held invalid or unenforceable in any respect, the remainder of the Agreement or provision shall not be affected thereby, provided that the Parties shall negotiate in good faith to reformulate such invalid provision, or part thereof, or related provision, to reflect as closely as possible the original intent of the parties, consistent with applicable law, and to effectuate such portions thereof as may be valid without defeating the intent of such provision. In the event the Parties are unable to mutually negotiate such replacement language, either Party may elect to pursue the dispute resolution process set forth in Section 8 above.

16 Non-Waivers

A failure or delay of either Party to enforce any of the provisions hereof, to exercise any option which is herein provided, or to require performance of any of the provisions hereof shall in no way be construed to be a waiver of such provisions or options, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the performance of any and all of the provisions of this Agreement.

17 Governing Law

Where applicable, this Agreement shall be governed by and construed in accordance with federal and state substantive telecommunications law, including rules and regulations of the FCC and appropriate Commission. In all other respects, this Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Georgia without regard to its conflict of laws principles.

18 Assignments and Transfers

18.1 Any assignment by either Party to any entity of any right, obligation or duty, or of any other interest hereunder, in whole or in part, without the prior written consent of the other Party shall be void. The assignee must provide evidence of a Commission approved certification to provide Telecommunications Service in each

state that FLATEL is entitled to provide Telecommunications Service. After BellSouth's consent, the Parties shall amend this Agreement to reflect such assignments and shall work cooperatively to implement any changes required due to such assignment. All obligations and duties of any Party under this Agreement shall be binding on all successors in interest and assigns of such Party. No assignment or delegation hereof shall relieve the assignor of its obligations under this Agreement in the event that the assignee fails to perform such obligations. Notwithstanding anything to the contrary in this Section, FLATEL shall not be permitted to assign this Agreement in whole or in part to any entity unless either (1) FLATEL pays all bills, past due and current, under this Agreement, or (2) FLATEL's assignee expressly assumes liability for payment of such bills.

18.2 In the event that FLATEL desires to transfer any services hereunder to another provider of Telecommunications Service, or FLATEL desires to assume hereunder any services provisioned by BellSouth to another provider of Telecommunications Service, such transfer of services shall be subject to separately negotiated rates, terms and conditions.

19 Notices

19.1 With the exception of billing notices, governed by Attachment 7, every notice, consent or approval of a legal nature, required or permitted by this Agreement shall be in writing and shall be delivered either by hand, by overnight courier or by US mail postage prepaid, or email if an email address is listed below, addressed to:

BellSouth Telecommunications, Inc.

BellSouth Local Contract Manager
600 North 19th Street, 10th floor
Birmingham, AL 35203

and

ICS Attorney
Suite 4300
675 West Peachtree Street
Atlanta, GA 30375

FLATEL, Inc.

Abby matari
2300 Palm Beach Lakes Blvd.
Suite 210
West Palm Beach, FL 33409
Phone: 561-688-2525 Ext. 102
Email: flatelinc@aol.com

or at such other address as the intended recipient previously shall have designated by written notice to the other Party.

19.2 Unless otherwise provided in this Agreement, notice by mail shall be effective on the date it is officially recorded as delivered by return receipt or equivalent, and in the absence of such record of delivery, it shall be presumed to have been delivered the fifth day, or next business day after the fifth day, after it was deposited in the mails.

19.3 Notwithstanding the above, BellSouth will post to BellSouth's Interconnection Web site changes to business processes and policies and shall post to BellSouth's Interconnection Web site or submit through applicable electronic systems, other service and business related notices not requiring an amendment to this Agreement.

20 Rule of Construction

No rule of construction requiring interpretation against the drafting Party hereof shall apply in the interpretation of this Agreement.

21 Headings of No Force or Effect

The headings of Articles and Sections of this Agreement are for convenience of reference only, and shall in no way define, modify or restrict the meaning or interpretation of the terms or provisions of this Agreement.

22 Multiple Counterparts

This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which shall together constitute but one and the same document.

23 Filing of Agreement

This Agreement, and any amendments hereto, shall be filed with the appropriate state regulatory agency pursuant to the requirements of Section 252 of the Act, or as otherwise required by the state and the Parties shall share equally in any applicable fees. Notwithstanding the foregoing, this Agreement shall not be

submitted for approval by the appropriate state regulatory agency unless and until such time as FLATEL is duly certified as a local exchange carrier in such state, except as otherwise required by a Commission.

24 Compliance with Law

The Parties have negotiated their respective rights and obligations pursuant to substantive Federal and State Telecommunications law and this Agreement is intended to memorialize the Parties' mutual agreement with respect to each Party's rights and obligations under the Act and applicable FCC and Commission orders, rules and regulations. Nothing contained herein, nor any reference to applicable rules and orders, is intended to expand on the Parties' rights and obligations as set forth herein. To the extent the provisions of this Agreement differ from the provisions of any Federal or State Telecommunications statute, rule or order, this Agreement shall control. Each Party shall comply at its own expense with all other laws of general applicability.

25 Necessary Approvals

Each Party shall be responsible for obtaining and keeping in effect all approvals from, and rights granted by, governmental authorities, building and property owners, other carriers, and any other persons that may be required in connection with the performance of its obligations under this Agreement. Each Party shall reasonably cooperate with the other Party in obtaining and maintaining any required approvals and rights for which such Party is responsible.

26 Good Faith Performance

Each Party shall act in good faith in its performance under this Agreement and, in each case in which a Party's consent or agreement is required or requested hereunder, such Party shall not unreasonably withhold or delay such consent or agreement.

27. Rates

27.1 FLATEL shall pay the charges set forth in this Agreement. In the event that BellSouth is unable to bill the applicable rate or no rate is established or included in this Agreement for any services provided pursuant to this Agreement, BellSouth reserves the right to back bill FLATEL for such rate or for the difference between the rate actually billed and the rate that should have been billed pursuant to this Agreement. To the extent a rate element is omitted or no rate is established, BellSouth has the right not to provision such service until the Agreement is amended to include such rate.

27.2 To the extent FLATEL requests services not included in this Agreement, such services shall be provisioned pursuant to the rates, terms and conditions set forth in the applicable tariffs or a separately negotiated Agreement, unless the Parties agree to amend this Agreement to include such service prospectively.

28 Rate True-Up

28.1 This section applies to rates that are expressly subject to true-up.

28.2 The rates shall be trueed-up, either up or down, based on final prices determined either by further agreement between the Parties, or by a final and effective order of the Commission. The Parties shall implement the true-up by comparing the actual volumes and demand for each item, together with the rates for each item, with the final prices determined for each item. Each Party shall keep its own records upon which the true-up can be based, and any final payment from one Party to the other shall be in an amount agreed upon by the Parties based on such records. In the event of any discrepancy between the records or disagreement between the Parties regarding the amount of such true-up, the dispute shall be subject to the dispute resolution process set forth in this Agreement.

28.3 A final and effective order of the Commission that forms the basis of a true-up shall be based upon cost studies submitted by either or both Parties to the Commission and shall be binding upon BellSouth and FLATEL specifically or upon all carriers generally, such as a generic cost proceeding.

29 Survival

The Parties' obligations under this Agreement which by their nature are intended to continue beyond the termination or expiration of this Agreement shall survive the termination or expiration of this Agreement.

30 Entire Agreement

30.1 This Agreement means the General Terms and Conditions, the Attachments hereto and all documents identified therein, as such may be amended from time to time and which are incorporated herein by reference, all of which, when taken together, are intended to constitute one indivisible agreement. This Agreement sets forth the entire understanding and supersedes prior agreements between the Parties relating to the subject matter contained in this Agreement and merges all prior discussions between them. Any orders placed under prior agreements between the Parties shall be governed by the terms of this Agreement and FLATEL acknowledges and agrees that any and all amounts and obligations owed for services provisioned or orders placed under prior agreements between the Parties, related to the subject matter hereof, shall, as of the Effective Date, be due and owing under this Agreement and be governed by the terms and conditions of this Agreement as if such services or orders were provisioned or placed under this Agreement. Neither Party shall be bound by any definition, condition, provision, representation, warranty, covenant or promise other than as expressly stated in this Agreement or as is contemporaneously or subsequently set forth in writing and executed by a duly authorized officer or representative of the Party to be bound thereby.

30.2

Any reference throughout this Agreement to a tariff, industry guideline, BellSouth's technical guideline or reference, BellSouth business rule, guide or other such document containing processes or specifications applicable to the services provided pursuant to this agreement, shall be construed to refer to only those provisions thereof that are applicable to these services, and shall include any successor or replacement versions thereof, all as they are amended from time to time and all of which are incorporated herein by reference, and may be found at BellSouth's Interconnection Web site at: www.interconnection.bellsouth.com. References to state tariffs throughout this Agreement shall be to the tariff for the state in which the services were provisioned.

General Terms and Conditions
Signature Page

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year written below.

BellSouth Telecommunications, Inc.

Flatel, Inc.

By: 

By: 

Name: Kristen E. Rowe

Name: Abby Motari

Title: Director

Title: CEO

Date: 7/13/05

Date: 7-13-05

Version: 2Q05 Standard ICA
07/06/05

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Exhibit B

Attachment 7

Billing

EXHIBIT B

Version: 2Q05 Standard ICA
07/06/05

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Rates.....Exhibit A

BILLING

1. Payment and Billing Arrangements

The terms and conditions set forth in this Attachment shall apply to all services ordered and provisioned pursuant to this Agreement.

1.1 BellSouth will bill through the Carrier Access Billing System (CABS), Integrated Billing System (IBS) and/or the Customer Records Information Systems (CRIS) depending on the particular service(s) provided to FLATEL under this Agreement. BellSouth will format all bills in CABS Billing Output Specification (CBOS) Standard or CLUB/EDI format, depending on the type of service provided. For those services where standards have not yet been developed, BellSouth's billing format may change in accordance with applicable industry standards.

1.1.1 For any service(s) BellSouth receives from FLATEL, FLATEL shall bill BellSouth in CBOS format.

1.1.2 Any switched access charges associated with interexchange carrier access to the resold local exchange lines will be billed by, and due to BellSouth.

1.1.3 BellSouth will render bills each month on established bill days for each of FLATEL's accounts. If either Party requests multiple billing media or additional copies of the bills, the billing Party will provide these at the rates set forth in BellSouth's FCC No. 1 Tariff, Section 13.3.6.3, except for resold services which shall be at the rates set forth in BellSouth's Non-Regulated Services Pricing List N6.

1.1.4 BellSouth will bill FLATEL in advance for all services to be provided during the ensuing billing period except charges associated with service usage and nonrecurring charges, which will be billed in arrears.

1.1.4.1 For resold services, charges for services will be calculated on an individual End User account level, including, if applicable, any charge for usage or usage allowances. BellSouth will also bill FLATEL, and FLATEL will be responsible for and remit to BellSouth, all charges applicable to said services including but not limited to 911 and E911 charges, End Users common line charges, federal subscriber line charges, telecommunications relay charges, and franchise fees, unless otherwise ordered by a Commission.

1.1.5 BellSouth will not perform billing and collection services for FLATEL as a result of the execution of this Agreement.

1.2 Establishing Accounts. After submitting a credit profile and deposit, if required, and after receiving certification as a local exchange carrier from the appropriate Commission, FLATEL will provide the appropriate BellSouth Local Contract Manager responsible for new CLEC activation, the necessary documentation to

enable BellSouth to establish accounts for Local Interconnection, Network Elements and Other Services and/or resold services. Such documentation shall include the Application for Master Account, if applicable, proof of authority to provide telecommunications services, the appropriate OCN for each state as assigned by the NECA, CIC, if applicable, ACNA, if applicable, BellSouth's blanket form LOA, Misdirected Number form, and a tax exemption certificate, if applicable. Notwithstanding anything to the contrary in this Agreement, FLATEL may not order services under a new account established in accordance with this Section until thirty (30) days after all information specified in this Section is received from FLATEL.

1.2.1 Company Identifiers. If FLATEL needs to change, add to, eliminate or convert its OCN(s), ACNAs and other identifying codes (collectively "Company Identifiers") under which it operates when FLATEL has already been conducting business utilizing those Company Identifiers, FLATEL shall pay all charges as a result of such change, addition, elimination or conversion to the new Company Identifiers. Such charges include, but are not limited to, all time required to make system updates to all of FLATEL's End User records and any other changes to BellSouth systems or FLATEL records, and will be handled in a separately negotiated agreement or as otherwise required by BellSouth.

1.2.2 Tax Exemption. It is the responsibility of FLATEL to provide BellSouth with a properly completed tax exemption certificate at intervals required by the appropriate taxing authorities. A tax exemption certificate must be supplied for each individual FLATEL entity purchasing Services under this Agreement. Upon BellSouth's receipt of a properly completed tax exemption certificate, subsequent billings to FLATEL will not include those taxes or fees from which FLATEL is exempt. Prior to receipt of a properly completed exemption certificate, BellSouth shall bill, and FLATEL shall pay all applicable taxes and fees. In the event that FLATEL believes that it is entitled to an exemption from and refund of taxes with respect to the amount billed prior to BellSouth's receipt of a properly completed exemption certificate, BellSouth shall assign to FLATEL its rights to claim a refund of such taxes. If applicable law prohibits the assignment of tax refund rights or requires the claim for refund of such taxes to be filed by BellSouth, BellSouth shall, after receiving a written request from FLATEL and at FLATEL's sole expense, pursue such refund claim on behalf of FLATEL, provided that FLATEL promptly reimburses BellSouth for any costs and expenses incurred by BellSouth in pursuing such refund claim, and provided further that BellSouth shall have the right to deduct any such outstanding costs and expenses from the amount of any refund obtained prior to remitting such refund to FLATEL. FLATEL shall be solely responsible for the computation, tracking, reporting and payment of all taxes and fees associated with the services provided by FLATEL to its End Users.

1.3 Deposit Policy. Prior to the inauguration of service or, thereafter, upon BellSouth's request, FLATEL shall complete the BellSouth Credit Profile (BellSouth form) and provide information to BellSouth regarding FLATEL's

credit and financial condition. Based on BellSouth's analysis of the BellSouth Credit Profile and other relevant information regarding FLATEL's credit and financial condition, BellSouth reserves the right to require FLATEL to provide BellSouth with a suitable form of security deposit for FLATEL's account(s). If, in BellSouth's sole discretion, circumstances so warrant and/or FLATEL's gross monthly billing has increased, BellSouth reserves the right to request additional security (or to require a security deposit if none was previously requested) and/or file a Uniform Commercial Code (UCC-1) security interest in FLATEL's "accounts receivables and proceeds".

- 1.3.1 Security deposit shall take the form of cash, an Irrevocable Letter of Credit (BellSouth form), Surety Bond (BellSouth form) or, in BellSouth's sole discretion, some other form of security proposed by FLATEL. Any such security deposit shall in no way release FLATEL from its obligation to make complete and timely payments of its bill(s). If BellSouth requires FLATEL to provide a security deposit, FLATEL shall provide such security deposit prior to the inauguration of service or within fifteen (15) days of BellSouth's request, as applicable. Deposit request notices will be sent to FLATEL via certified mail or overnight delivery. Such notice period will start the day after the deposit request notice is rendered by certified mail or overnight delivery. Interest on a cash security deposit shall accrue and be applied or refunded in accordance with the terms in BellSouth's GSST.
- 1.3.2 Security deposits collected under this Section shall not exceed two (2) months' estimated billing. Estimated billings are calculated based upon the monthly average of the previous six (6) months current billings, if FLATEL has received service from BellSouth during such period at a level comparable to that anticipated to occur over the next six (6) months. If either FLATEL or BellSouth has reason to believe that the level of service to be received during the next six (6) months will be materially higher or lower than received in the previous six (6) months, FLATEL and BellSouth shall agree on a level of estimated billings based on all relevant information.
- 1.3.3 In the event FLATEL fails to provide BellSouth with a suitable form of security deposit or additional security deposit as required herein, defaults on its account(s), or otherwise fails to make any payment or payments required under this Agreement in the manner and within the time required, service to FLATEL may be Suspended, Discontinued or Terminated in accordance with the terms of Section 1.5 below. Upon Termination of services, BellSouth shall apply any security deposit to FLATEL's final bill for its account(s).
- 1.3.3.1 At least seven (7) days prior to the expiration of any letter of credit provided by FLATEL as security under this Agreement, FLATEL shall renew such letter of credit or provide BellSouth with evidence that FLATEL has obtained a suitable replacement for the letter of credit. If FLATEL fails to comply with the foregoing, BellSouth shall thereafter be authorized to draw down the full amount of such letter of credit and utilize the cash proceeds as security for FLATEL accounts(s).

If FLATEL provides a security deposit or additional security deposit in the form of a surety bond as required herein, FLATEL shall renew the surety bond or provide BellSouth with evidence that FLATEL has obtained a suitable replacement for the surety bond at least seven (7) days prior to the cancellation date of the surety bond. If FLATEL fails to comply with the foregoing, BellSouth shall thereafter be authorized to take action on the surety bond and utilize the cash proceeds as security for FLATEL's account(s). If the credit rating of any bonding company that has provided FLATEL with a surety bond provided as security hereunder has fallen below B, BellSouth will provide written notice to FLATEL that FLATEL must provide a replacement bond or other suitable security within fifteen (15) days of BellSouth's written notice. If FLATEL fails to comply with the foregoing, BellSouth shall thereafter be authorized to take action on the surety bond and utilize the cash proceeds as security for FLATEL's account(s). Notwithstanding anything contained in this Agreement to the contrary, BellSouth shall be authorized to draw down the full amount of any letter of credit or take action on any surety bond provided by FLATEL as security hereunder if FLATEL defaults on its account(s) or otherwise fails to make any payment or payments required under this Agreement in the manner and within the time, as required herein.

- 1.4 **Payment Responsibility.** Payment of all charges will be the responsibility of FLATEL. FLATEL shall pay invoices by utilizing wire transfer services or automatic clearing house services. FLATEL shall make payment to BellSouth for all services billed including disputed amounts. BellSouth will not become involved in billing disputes that may arise between FLATEL and FLATEL's End User.
- 1.4.1 **Payment Due.** Payment for services provided by BellSouth, including disputed charges, is due on or before the next bill date. Information required to apply payments must accompany the payment. The information must notify BellSouth of Billing Account Numbers (BAN) paid; invoices paid and the amount to be applied to each BAN and invoice (Remittance Information). Payment is considered to have been made when the payment and Remittance Information are received by BellSouth. If the Remittance Information is not received with payment, BellSouth will be unable to apply amounts paid to FLATEL's accounts. In such event, BellSouth shall hold such funds until the Remittance Information is received. If BellSouth does not receive the Remittance Information by the payment due date for any account(s), late payment charges shall apply.
- 1.4.1.1 **Due Dates.** If the payment due date falls on a Sunday or on a holiday that is observed on a Monday, the payment due date shall be the first non-holiday day following such Sunday or holiday. If the payment due date falls on a Saturday or on a holiday which is observed on Tuesday, Wednesday, Thursday, or Friday, the payment due date shall be the last non-holiday day preceding such Saturday or holiday. If payment is not received by the payment due date, a late payment charge, as set forth in Section 1.4.1.2, below, shall apply.

- 1.4.1.2 **Late Payment.** If any portion of the payment is not received by BellSouth on or before the payment due date as set forth above, or if any portion of the payment is received by BellSouth in funds that are not immediately available to BellSouth, then a late payment and/or interest charge shall be due to BellSouth. The late payment and/or interest charge shall apply to the portion of the payment not received and shall be assessed as set forth in Section A2 of BellSouth's GSST, Section B2 of the Private Line Service Tariff or Section E2 of the BellSouth intrastate Access Services Tariff, or pursuant to the applicable state law as determined by BellSouth. In addition to any applicable late payment and/or interest charges, FLATEL may be charged a fee for all returned checks at the rate set forth in Section A2 of BellSouth's GSST or pursuant to the applicable state law.
- 1.5 **Discontinuing Service to FLATEL.** The procedures for discontinuing service to FLATEL are as follows:
- 1.5.1 In order of severity, Suspend/Suspension, Discontinue/Discontinuance and Terminate/Termination are defined as follows for the purposes of this Attachment:
- 1.5.1.1 Suspend/Suspension is the temporary restriction of the billed Party's access to the ordering systems and/or access to the billed Party's ability to initiate PIC-related changes. In addition, during Suspension, pending orders may not be completed and orders for new service or changes to existing services may not be accepted.
- 1.5.1.2 Discontinue/Discontinuance is the denial of service by the billing Party to the billed Party that will result in the disruption and discontinuation of service to the billed Party's End Users or customers. Additionally, at the time of Discontinuance, BellSouth will remove any Local Service Freezes in place on the billed Party's End Users.
- 1.5.1.3 Terminate/Termination is the disconnection of service by the billing Party to the billed Party.
- 1.5.2 BellSouth reserves the right to Suspend, Discontinue or Terminate service in the event of prohibited, unlawful or improper use of BellSouth facilities or service, abuse of BellSouth facilities, or any other violation or noncompliance by FLATEL of the rules and regulations of BellSouth's tariffs.
- 1.5.3 **Suspension.** If payment of amounts due as described herein is not received by the bill date in the month after the original bill date, or fifteen (15) days from the date of a deposit request in the case of security deposits, BellSouth will provide written notice to FLATEL that services will be Suspended if payment of such amounts, and all other amounts that become past due before Suspension, is not received by wire transfer, automatic clearing house or cashier's check in the manner set forth in Section 1.4.1 above, or in the case of a security deposit request, in the manner set forth in Section 1.3.1 above: (1) within seven (7) days following such notice for CABS billed services; (2) within fifteen (15) days following such notice for

CRIS and IBS billed services; and (3) within seven (7) days following such notice for security deposit requests.

- 1.5.3.1 The Suspension notice shall also provide that all past due charges for CRIS and IBS billed services, and all other amounts that become past due for such services before Discontinuance, must be paid within thirty (30) days from the date of the Suspension notice to avoid Discontinuance of CRIS and IBS billed services.
- 1.5.3.2 For CABS billed services, BellSouth will provide a Discontinuance notice that is separate from the Suspension notice, that all past due charges for CABS billed Services, and all other amounts that become past due for such services before Discontinuance, must be paid within thirty (30) days from the date of the Suspension notice to avoid Discontinuance of CABS billed services. This Discontinuance notice may be provided at the same time that BellSouth provides the Suspension notice.
- 1.5.4 Discontinuance. If payment of amounts due as described herein is not received by the bill date in the month after the original bill date, BellSouth will provide written notice that BellSouth may Discontinue the provision of existing services to FLATEL if payment of such amounts, and all other amounts that become past due before Discontinuance, including requested security deposits, is not received by wire transfer, automatic clearing house or cashier's check in the manner set forth in Section 1.4.1 above or in the case of a deposit in accordance with Section 1.3.1 above, within thirty (30) days following such written notice; provided, however, that BellSouth may provide written notice that such existing services may be Discontinued within fifteen (15) days following such notice, subject to the criteria described in Section 1.5.5 below.
- 1.5.5 BellSouth may take the action to Discontinue the provision of existing service upon fifteen (15) days from the day after BellSouth provides written notice of such Discontinuance if (a) such notice is sent by certified mail or overnight delivery; (b) FLATEL has not paid all amounts due pursuant to a subject bill(s), or has not provided adequate security pursuant to a deposit request; and (c) either:
- (1) BellSouth has sent the subject bill(s) to FLATEL within seven (7) business days of the bill date(s), verifiable by records maintained by BellSouth:
 - i. in paper or CDROM form via the United States Postal Service (USPS),
or
 - ii. in magnetic tape form via overnight delivery, or
 - iii. via electronic transmission; or
 - (2) BellSouth has sent the subject bill(s) to FLATEL, using one of the media described in (1) above, more than thirty (30) days before notice to Discontinue service has been rendered.

- 1.5.6 In the case of Discontinuance of services, all billed charges, as well as applicable disconnect charges, shall become due.
- 1.5.7 FLATEL is solely responsible for notifying the End User of the Discontinuance of service. If, within seven (7) days after FLATEL's services have been Discontinued, FLATEL pays, by wire transfer, automatic clearing house or cashier's check, all past due charges, including late payment charges, outstanding security deposit request amounts if applicable and any applicable restoral charges as set forth in Section A4 of BellSouth's GSST, then BellSouth will reestablish service for FLATEL.
- 1.5.7.1 Termination. If within seven (7) days after FLATEL's service has been Discontinued and FLATEL has failed to pay all past due charges as described above, then FLATEL's service will be Terminated.
- 1.6 Notices. Notwithstanding anything to the contrary in this Agreement, all bills and notices regarding billing matters, disconnection of services for nonpayment of charges, and rejection of additional orders from FLATEL, shall be forwarded to the individual and/or address provided by FLATEL in establishment of its billing account(s) with BellSouth, or to the individual and/or address subsequently provided by FLATEL as the contact for billing. All monthly bills and notices described in this Section shall be forwarded to the same individual and/or address; provided, however, upon written request from FLATEL to BellSouth's billing organization, the notice of discontinuance of services purchased by FLATEL under this Agreement provided for in Section 1.5.4 above shall be sent via certified mail to the individual(s) listed in the Notices provision of the General Terms and Conditions.
- 2. Billing Disputes**
- 2.1 FLATEL shall electronically submit all billing disputes to BellSouth using the form specified by BellSouth. In the event of a billing dispute, the Parties will endeavor to resolve the dispute within sixty (60) days of the notification date. Within five (5) business days of BellSouth's denial, or partial denial, of the billing dispute, if FLATEL is not satisfied with BellSouth's resolution of the billing dispute or if no response to the billing dispute has been received by FLATEL by such sixtieth (60th) day, FLATEL must pursue the escalation process as outlined in the Billing Dispute Escalation Matrix, set forth on BellSouth's Interconnection Services Web site, or the billing dispute shall be considered denied and closed. If, after escalation, the Parties are unable to reach resolution, then the aggrieved Party, if it elects to pursue the dispute shall pursue dispute resolution in accordance with General Terms and Conditions.
- 2.2 For purposes of this Section 2, a billing dispute means a reported dispute submitted pursuant to Section 2.1 above of a specific amount of money actually billed by BellSouth. The billing dispute must be clearly explained by FLATEL and

supported by written documentation, which clearly shows the basis for disputing charges. The determination as to whether the billing dispute is clearly explained or clearly shows the basis for disputing charges shall be within BellSouth's sole reasonable discretion. Disputes that are not clearly explained or those that do not provide complete information may be rejected by BellSouth. Claims by FLATEL for damages of any kind will not be considered a billing dispute for purposes of this Section. If BellSouth resolves the billing dispute, in whole or in part, in favor of FLATEL, any credits and interest due to FLATEL as a result thereof shall be applied to FLATEL's account by BellSouth upon resolution of the billing dispute.

3. RAO Hosting :

- 3.1 Centralized Message Distribution System (CMDS) is a national message exchange system administered by Telcordia Technologies (Telcordia) used to transmit alternately billed calls (e.g., credit card, third number and collect) from the Earning Company, as defined herein, to the Billing Company, as defined herein, to permit the Earning Company and the Billing Company to receive appropriate compensation. It is also used to transmit access records from one company to another.
- 3.2 Direct Participants are Telecommunications carriers that exchange data directly with other Direct Participants via the CMDS Data Center and may act as host companies (Host) for those Telecommunications carriers that do not exchange data directly via the CMDS Data Center (Indirect Participants).
- 3.3 RAO Hosting is a hosting relationship where an Indirect Participant sends and receives CMDS eligible messages to and from its Host, who then interfaces, on behalf of the Indirect Participant, with other Direct Participants for distribution and collection of these messages. RAO Hosting also includes the Direct Participant's provision of revenue settlements functions (compensation) for alternately billed calls based upon reports generated by Credit Card and Third Number Settlement (CATS) and Non-InterCompany Settlement (NICS) as described herein. CATS and NICS are collectively referred to as Intercompany Settlements.
- 3.4 The CATS System is a national system administered by Telcordia, used to settle revenues for calls that are sent from one CMDS Direct Participant to another for billing. CATS applies to calls that originate within one Regional Bell Operating Company's (RBOC) territory, as defined at Divestiture, and bill in another RBOC's territory. CATS calculates the amounts due to Earning Companies (i.e., billed revenue less the billing and collection fee). For alternately billed calls, the originating company, whose facilities are used to place the call, is the Earning Company and the company that puts the charges on the End User's bill is the Billing Company
- 3.5 The NICS is the national system administered by Telcordia that is used in the settlement of revenues for calls that are originated and billed by two (2) different

local exchange carriers (LEC) within a single Direct Participant's territory to another for billing. NICS applies to calls involving another LEC where the Earning Company and the Billing Company are located within BellSouth's territory.

- 3.6 RAO Hosting, CATS and NICS services provided to FLATEL by BellSouth will be in accordance with the methods and practices regularly applied by BellSouth to its own operations during the term of this Agreement, including such revisions as may be made from time to time by BellSouth.
- 3.7 FLATEL shall furnish all relevant information required by BellSouth for the provision of RAO Hosting, CATS and NICS.
- 3.8 Charges or credits, as applicable, will be applied by BellSouth to FLATEL on a monthly basis in arrears. Amounts due (excluding adjustments) are due on or before the next bill date.
- 3.9 FLATEL must have its own unique hosted RAO code. Where BellSouth is the selected CMDS interfacing host, FLATEL must request that BellSouth establish a unique hosted RAO code for FLATEL. Such request shall be in writing to the BellSouth RAO Hosting coordinator and must be submitted at least eight (8) weeks prior to provision of services pursuant to this Section. Services shall commence on a date mutually agreed by the Parties.
- 3.10 BellSouth will receive messages from FLATEL that are to be processed by BellSouth, another Local Exchange Carrier (LEC) in the BellSouth region or a LEC outside the BellSouth region. FLATEL shall send all messages to BellSouth no later than sixty (60) days after the message date.
- 3.11 BellSouth will perform invoice sequence checking, standard EMI format editing, and balancing of message data with the EMI trailer record counts on all data received from FLATEL.
- 3.12 All data received from FLATEL that is to be processed or billed by another LEC within the BellSouth region will be distributed to that LEC in accordance with the Agreement(s) in effect between BellSouth and the involved LEC.
- 3.13 All data received from FLATEL that is to be placed on the CMDS network for distribution outside the BellSouth region will be handled in accordance with the agreement(s) in effect between BellSouth and its connecting contractor.
- 3.14 BellSouth will receive messages from the CMDS network that are destined to be processed by FLATEL and will forward them to FLATEL on a daily basis for processing.
- 3.15 Transmission of message data between BellSouth and FLATEL will be distributed via FTP mailbox. It will be created on a daily basis Monday through Friday,

except holidays. Details such as dataset name and delivery schedule will be addressed during negotiations of the distribution medium. If BellSouth determines the Secure FTP Mailbox is nearing capacity levels, BellSouth may move FLATEL to CONNECT:Direct file delivery.

- 3.15.1 If FLATEL is moved to CONNECT:Direct, data circuits (private line or dial-up) may be required between BellSouth and FLATEL for the purpose of data transmission. Where a dedicated line is required, FLATEL will be responsible for ordering the circuit, overseeing its installation and coordinating the installation with BellSouth. FLATEL will also be responsible for any charges associated with this line. Equipment required on the BellSouth end to attach the line to the mainframe computer and to transmit successfully ongoing will be negotiated on an individual case basis. Where a dial-up facility is required, dial circuits will be installed in the BellSouth data center by BellSouth and the associated charges assessed to FLATEL. Additionally, all message toll charges associated with the use of the dial circuit by FLATEL will be the responsibility of FLATEL. Associated equipment on the BellSouth end, including a modem, will be negotiated on an individual case basis between the Parties. All equipment, including modems and software, that is required on the FLATEL end for the purpose of data transmission will be the responsibility of FLATEL.
- 3.15.2 If FLATEL utilizes FTP for data file transmission, purchase of the FTP software will be the responsibility of FLATEL.
- 3.16 All messages and related data exchanged between BellSouth and FLATEL will be EMI formatted records and packed between appropriate EMI header and trailer records in accordance with accepted industry standards.
- 3.17 FLATEL will maintain recorded message detail necessary to recreate files provided to BellSouth for a period of three (3) calendar months beyond the related message dates.
- 3.18 Should it become necessary for FLATEL to send data to BellSouth more than sixty (60) days past the message date(s), FLATEL will notify BellSouth in advance of the transmission of the data. BellSouth will work with its connecting contractor and/or FLATEL, where necessary, to notify all affected LECs.
- 3.19 In the event that data to be exchanged between the two (2) Parties should become lost or destroyed, the Party responsible for creating the data will make every effort to restore and retransmit such data.
- 3.20 Should an error be detected by the EMI format edits performed by BellSouth on data received from FLATEL, the entire pack containing the affected data will not be processed by BellSouth. BellSouth will notify FLATEL of the error. FLATEL will correct the error(s) and will resend the entire pack to BellSouth for processing. In the event that an out-of-sequence condition occurs on subsequent

packs, FLATEL will resend these packs to BellSouth after the pack containing the error has been successfully reprocessed by BellSouth.

- 3.21 In association with message distribution service, BellSouth will provide FLATEL with associated intercompany settlements reports (CATS and NICS) as appropriate.
- 3.22 Notwithstanding anything in this Agreement to the contrary, in no case shall either Party be liable to the other for any direct or consequential damages incurred as a result of the obligations set out in this Section 3.
- 3.23 Intercompany Settlements Messages
- 3.23.1 Intercompany Settlements Messages facilitate the settlement of revenues associated with traffic originated from or billed by FLATEL as a facilities based provider of local exchange telecommunications services.
- 3.23.2 BellSouth will receive the monthly NICS and CATS reports from Telcordia on behalf of FLATEL and will distribute copies of these reports to FLATEL on a monthly basis.
- 3.23.3 Through CATS, BellSouth will collect the revenue earned by FLATEL from the RBOC in whose territory the messages are billed, less a per message billing and collection fee of five cents (\$0.05), or such other amount as may be approved by the Direct Participants and Telcordia, on behalf of FLATEL. BellSouth will remit the revenue billed by FLATEL to the RBOC in whose territory the messages originated, less a per message billing and collection fee of five cents (\$0.05), or such other amount as may be approved by the Direct Participants and Telcordia, on behalf of FLATEL. These two (2) amounts will be netted together by BellSouth and the resulting charge or credit issued to FLATEL via a CABS miscellaneous bill on a monthly basis in arrears.
- 3.23.4 Through NICS, BellSouth will collect the revenue earned by FLATEL within the BellSouth territory from another LEC also within the BellSouth territory where the messages are billed, less a per message billing and collection fee of five cents (\$0.05), on behalf of FLATEL. BellSouth will remit the revenue billed by FLATEL within the BellSouth region to the LEC also within the BellSouth region, where the messages originated, less a per message billing and collection fee of five cents (\$0.05). These two (2) amounts will be netted together by BellSouth and the resulting charge or credit issued to FLATEL via a CABS miscellaneous bill on a monthly basis in arrears.
- 3.23.5 BellSouth and FLATEL agree that monthly netted amounts of less than fifty dollars (\$50.00) will not be settled.
- 3.24 Rates. Rates for CMDS are as set forth in Exhibit A. If no rate is identified in this Attachment, the rate for the specific service or function will be as set forth in the

applicable BellSouth tariff or as negotiated by the Parties upon request by either Party.

4. Optional Daily Usage File

- 4.1 Upon written request from FLATEL, BellSouth will provide the ODUF Services to FLATEL pursuant to the terms and conditions set forth in this section.
- 4.2 FLATEL shall furnish all relevant information required by BellSouth for the provision of the ODUF.
- 4.3 The ODUF feed provides FLATEL messages that FLATEL has purchased from BellSouth that were carried over the BellSouth network and processed by BellSouth for FLATEL.
- 4.4 Charges for the ODUF Service will appear on FLATEL's monthly bills for the previous month's usage in arrears.
- 4.5 The ODUF feed will contain both rated and unrated messages. All messages will be in the standard ATIS EMI record format.
- 4.6 Messages that error in the billing system of FLATEL will be the responsibility of FLATEL. If, however, FLATEL should encounter significant volumes of errored messages that prevent processing by FLATEL within its systems, BellSouth will work with FLATEL to determine the source of the errors and the appropriate resolution.

4.7 ODUF Specifications

- 4.7.1 ODUF Messages to be Transmitted.
- 4.7.2 The following messages recorded by BellSouth will be transmitted to FLATEL:
 - 4.7.2.1 Message recording for per use/per activation type services (examples: Three-Way Calling, Verify, Interrupt, Call Return, etc.)
 - 4.7.2.2 Measured local calls;
 - 4.7.2.3 Directory Assistance messages;
 - 4.7.2.4 IntraLATA Toll;
 - 4.7.2.5 WATS and 800 Service;
 - 4.7.2.6 N11;
 - 4.7.2.7 Information Service Provider Messages;

- 4.7.2.8 Operator Services Messages;
- 4.7.2.9 Operator Services Message Attempted Calls;
- 4.7.2.10 Credit/Cancel Records; and
- 4.7.2.11 *Usage for Mail Message Service*
- 4.7.3 Rated Incollects (messages BellSouth receives from other revenue accounting offices) also appear on ODUF. Rated Incollects will be intermingled with BellSouth recorded rated and unrated usage. Rated Incollects will not be packed separately.
- 4.7.4 BellSouth will perform duplicate record checks on records processed to ODUF. Any duplicate messages detected will be deleted and not sent to FLATEL.
- 4.7.5 In the event that FLATEL detects a duplicate on ODUF they receive from BellSouth, FLATEL will drop the duplicate message and will not return the duplicate to BellSouth.
- 4.7.6 ODUF Physical File Characteristics
 - 4.7.6.1 ODUF will be distributed to FLATEL via FTP. The ODUF feed will be a variable block format. The data on the ODUF feed will be in a non-compacted EMI format (175 byte format plus modules). It will be created on a daily basis Monday through Friday except holidays. Details such as dataset name and delivery schedule will be addressed during negotiations of the distribution medium. There will be a maximum of one (1) dataset per workday per OCN. If BellSouth determines the Secure FTP Mailbox is nearing capacity levels, BellSouth may move the FLATEL to CONNECT:Direct file delivery.
 - 4.7.6.2 If the FLATEL is moved to CONNECT:Direct, data circuits (private line or dial-up) will be required between BellSouth and FLATEL for the purpose of data transmission. Where a dedicated line is required, FLATEL will be responsible for ordering the circuit, overseeing its installation and coordinating the installation with BellSouth. FLATEL will also be responsible for any charges associated with this line. Equipment required on the BellSouth end to attach the line to the mainframe computer and to transmit messages successfully on an ongoing basis will be negotiated on an individual case basis. Any costs incurred for such equipment will be FLATEL's responsibility. Where a dial-up facility is required, dial circuits will be installed in the BellSouth data center by BellSouth and the associated charges assessed to FLATEL. Additionally, all message toll charges associated with the use of the dial circuit by FLATEL will be the responsibility of FLATEL. Associated equipment on the BellSouth end, including a modem, will be negotiated on an individual case basis between the Parties. All equipment, including modems and software, that is required on FLATEL's end for the purpose of data transmission will be the responsibility of FLATEL.

- 4.7.6.3 If FLATEL utilizes FTP for data file transmission, purchase of the FTP software will be the responsibility of FLATEL.
- 4.7.7 **ODUF Packing Specifications**
- 4.7.7.1 The data will be packed using ATIS EMI records. A pack will contain a minimum of one (1) message record or a maximum of ninety-nine thousand nine hundred and ninety-nine (99,999) message records plus a pack header record and a pack trailer record. One transmission can contain a maximum of ninety nine (99) packs and a minimum of one (1) pack.
- 4.7.7.2 The OCN, From RAO, and Invoice Number will control the invoice sequencing. The From RAO will be used to identify to FLATEL which BellSouth RAO is sending the message. BellSouth and FLATEL will use the invoice sequencing to control data exchange. FLATEL will notify BellSouth of sequence failures identified by FLATEL and BellSouth will resend the data as appropriate.
- 4.7.8 **ODUF Pack Rejection.** FLATEL will notify BellSouth within one business day of rejected packs (via the mutually agreed medium). Packs could be rejected because of pack sequencing discrepancies or a critical edit failure on the Pack Header or Pack Trailer records (e.g. out-of-balance condition on grand totals, invalid data populated). Standard ATIS EMI error codes will be used. FLATEL will not be required to return the actual rejected data to BellSouth. Rejected packs will be corrected and retransmitted to FLATEL by BellSouth.
- 4.7.9 **ODUF Control Data.** FLATEL will send one confirmation record per pack that is received from BellSouth. This confirmation record will indicate FLATEL's receipt of the pack and acceptance or rejection of the pack. Pack Status Code(s) will be populated using standard ATIS EMI error codes for packs that were rejected by FLATEL for reasons stated in the above section.
- 4.7.10 **ODUF Testing.** Upon request from FLATEL, BellSouth shall send ODUF test files to FLATEL. The Parties agree to review and discuss the ODUF content and/or format. For testing of usage results, BellSouth shall request that FLATEL set up a production (live) file. The live test may consist of FLATEL's employees making test calls for the types of services FLATEL requests on ODUF. These test calls are logged by FLATEL, and the logs are provided to BellSouth. These logs will be used to verify the files. Testing will be completed within thirty (30) days from the date on which the initial test file was sent.
- 5 Access Daily Usage File (ADUF)**
- 5.1 Upon written request from FLATEL, BellSouth will provide the ADUF Services to FLATEL pursuant to the terms and conditions set forth in this section.
- 5.2 FLATEL shall furnish all relevant information required by BellSouth for the provision of ADUF Services.

- 5.3 The ADUF provides FLATEL originating and terminating access and third party messages associated with a port that FLATEL has purchased from BellSouth.
- 5.4 Charges for ADUF Services will appear on FLATEL's monthly bills for the previous month's usage in arrears.
- 5.5 Messages that error in the billing system of FLATEL will be the responsibility of FLATEL. If, however, FLATEL should encounter significant volumes of errored messages that prevent processing by FLATEL within its systems, BellSouth will work with FLATEL to determine the source of the errors and the appropriate resolution.
- 5.6 ADUF Messages to be Transmitted
- 5.6.1 The following messages recorded by BellSouth will be transmitted to FLATEL:
- 5.6.2 Recorded originating and terminating interstate and intrastate access records associated with Wholesale Switch Port Services and Wholesale Local Platform Services.
- 5.6.3 Recorded terminating access records for undetermined jurisdiction access records associated with Wholesale Switch Port Services and Wholesale Local Platform Services.
- 5.6.4 BellSouth will perform duplicate record checks on records processed to ADUF. Any duplicate messages detected will be dropped and not sent to FLATEL.
- 5.6.5 In the event that FLATEL detects a duplicate on ADUF they receive from BellSouth, FLATEL will drop the duplicate message and will not return the duplicate to BellSouth.
- 5.7 ADUF Physical File Characteristics
- 5.7.1 ADUF will be distributed to FLATEL via Secure FTP Mailbox. The ADUF feed will be a fixed block format. The data on the ADUF feed will be in a non-compacted EMI format (210 bytes). It will be created on a daily basis Monday through Friday except holidays. Details such as dataset name and delivery schedule will be addressed during negotiations of the distribution medium. There will be a maximum of one (1) dataset per workday per OCN. If BellSouth determines the Secure FTP Mailbox is nearing capacity levels, BellSouth may move the FLATEL to CONNECT:Direct file delivery.
- 5.7.2 If the FLATEL is moved to CONNECT:Direct, data circuits (private line or dial-up) will be required between BellSouth and FLATEL for the purpose of data transmission. Where a dedicated line is required, FLATEL will be responsible for ordering the circuit, overseeing its installation and coordinating the installation with BellSouth. FLATEL will also be responsible for any charges associated with

this line. Equipment required on the BellSouth end to attach the line to the mainframe computer and to transmit messages successfully on an ongoing basis will be negotiated on an individual case basis. Any costs incurred for such equipment will be FLATEL's responsibility. Where a dial-up facility is required, dial circuits will be installed in the BellSouth data center by BellSouth and the associated charges assessed to FLATEL. Additionally, all message toll charges associated with the use of the dial circuit by FLATEL will be the responsibility of FLATEL. Associated equipment on the BellSouth end, including a modem, will be negotiated on an individual case basis between the Parties. All equipment, including modems and software, that is required on FLATEL's end for the purpose of data transmission will be the responsibility of FLATEL.

- 5.7.2.1 If FLATEL utilizes FTP for data file transmission, purchase of the FTP software will be the responsibility of FLATEL.
- 5.7.3 ADUF Packing Specifications
- 5.7.3.1 The data will be packed using ATIS EMI records. A pack will contain a minimum of one (1) message record or a maximum of ninety-nine thousand nine hundred and ninety-nine (99,999) message records plus a pack header record and a pack trailer record. One transmission can contain a maximum of ninety-nine (99) packs and a minimum of one (1) pack.
- 5.7.3.2 The OCN, From RAO, and Invoice Number will control the invoice sequencing. The From RAO will be used to identify to FLATEL which BellSouth RAO is sending the message. BellSouth and FLATEL will use the invoice sequencing to control data exchange. FLATEL will notify BellSouth of sequence failures identified by FLATEL and BellSouth will resend the data as appropriate.
- 5.7.4 ADUF Pack Rejection. FLATEL will notify BellSouth within one (1) business day of rejected packs (via the mutually agreed medium). Packs could be rejected because of pack sequencing discrepancies or a critical edit failure on the Pack Header or Pack Trailer records (e.g. out-of-balance condition on grand totals, invalid data populated). Standard ATIS EMI error codes will be used. FLATEL will not be required to return the actual rejected data to BellSouth. Rejected packs will be corrected and retransmitted to FLATEL by BellSouth.
- 5.7.5 ADUF Control Data. FLATEL will send one (1) confirmation record per pack that is received from BellSouth. This confirmation record will indicate FLATEL's receipt of the pack and acceptance or rejection of the pack. Pack Status Code(s) will be populated using standard ATIS EMI error codes for packs that were rejected by FLATEL for reasons stated in the above section.
- 5.7.6 ADUF Testing. Upon request from FLATEL, BellSouth shall send a test file of generic data to FLATEL via CONNECT:Direct or Text File via e-mail. The Parties agree to review and discuss the test file's content and/or format.

6. Rates for ODUF and ADUF

6.1 The rates for ODUF and ADUF are as set forth in Exhibit A.

Exhibit C

Redacted