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Order on Motion For Summary Judgment
(SOUTHERN TELECOM)

Melvin K. Westmoreland
Superior Court of Fullton County

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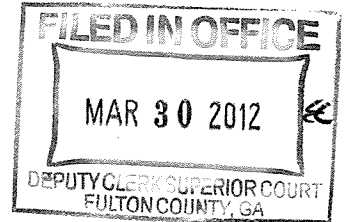
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

COPY

SOUTHERN TELECOM, INC.,)
)
Plaintiff,)
)
v.)
)
TW TELECOM INC. OF GEORGIA)
L.P., F/K/A TIME WARNER)
TELECOM OF GEORGIA, L.P. AND)
TW TELECOM OF ALABAMA LLC,)
F/K/A TIME WARNER TELECOM OF)
ALABAMA LLC,)
)
Defendants.)
)

Civil Action File No.
2011-CV-198651



ORDER ON MOTIONS FOR SUMMARY JUDGMENT

On March 21, 2012, counsel appeared before the Court to present oral arguments on Plaintiff's Motion for Partial Summary Judgment as to the Issues of Breach of Contract Under Counts I, II, VII and VIII and Defendants' Motion for Summary Judgment. Upon consideration of the motions, the briefs submitted on the motions and the record of the case, the Court finds as follows:

This case involves the interpretation of revenue sharing provisions contained in two agreements between Plaintiff's predecessors-in-interest and Defendants' predecessors-in-interest for the construction, maintenance and use of certain telecommunications facilities within the metropolitan statistical areas of Birmingham, Alabama and Atlanta, Georgia. On March 26, 1996, ICG Access Services, Inc. and Southern Development and Investment Group, Inc. entered into a Fiber Optic Facilities and Services Agreement (the "Birmingham Agreement"). On May 2, 1997, ICG Telecom Group, Inc. and Southern Telecom 1, Inc., entered into a Fiber Optic

Network Facilities and Services Agreement (the “Atlanta Agreement”), which is almost identical to the Birmingham Agreement.

After a series of assignments, Plaintiff Southern Telecom, Inc. (“Southern Telecom”) and Defendants tw telecom of alabama llc, f/k/a Time Warner Telecom of Alabama, LLC (“tw alabama”), and tw telecom of Georgia l.p., f/k/a Time Warner Telecom of Georgia, L.P. (“tw georgia,” together with tw alabama, “tw telecom” or “Defendants”), became parties to the Birmingham Agreement and the Atlanta Agreement, respectively.

Under the Birmingham Agreement, Southern Telecom is entitled to receive a percentage of “On-Net Telecommunications Revenues” determined by a formula. The formula is calculated, in part, based on revenue generated by certain services provided to “On-Net Buildings” connected to the “ICG Network.” On one hand, Southern Telecom argues that this definition entitles it to a fee based on all of tw alabama’s facilities in the Birmingham metropolitan statistical area (“MSA”). In contrast, tw alabama argues that Southern Telecom’s fee should be calculated to include only the buildings connected by cable installed under the Birmingham Agreement at the time immediately prior to the first assignment of the Birmingham Agreement.

The Atlanta Agreement contains a similar provision and authorizes Southern Telecom to receive a “Network Fee” based on a percentage of revenue generated from services provided on the “ICGT Network.” Again, the parties dispute the scope of the network on which Southern Telecom’s fee should be calculated. Southern Telecom contends that the Atlanta Agreement authorizes it to a fee based on all of tw georgia’s network in the Atlanta MSA that connects either directly or indirectly to those facilities constructed pursuant to the Atlanta Agreement. On

the other hand, tw georgia argues that Southern Telecom is only entitled to a fee based on facilities constructed under the Atlanta Agreement at the time immediately prior to the first assignment of the Atlanta Agreement.

In addition to the dispute over the interpretation of the revenue sharing provisions, Southern Telecom also seeks quarterly certified financial reports that Defendants are obligated to produce under the Birmingham and Atlanta Agreements that reflect information relating to the calculation of the fees at issue in this case. After the initiation of this lawsuit, Defendants provided Southern Telecom with information related to the revenues generated on the original facilities constructed under the agreements at issue. However, Southern Telecom contends it is entitled to information related to revenue generated on tw telecom's entire network in both MSA's.

Southern Telecom has asserted the following claims against Defendants: 1) Breach of Contract Against tw georgia for Failure to Pay Full Network Fees; 2) Breach of Contract/Specific Performance Against tw georgia for Failure to Provide Certified Quarterly Financial Reports; 3) Equitable Accounting (against tw georgia); 4) Interlocutory Injunction (against tw georgia); 5) Permanent Injunction (against tw georgia); 6) Attorneys' Fees (against tw georgia); 7) Breach of Contract against tw alabama for Failure to Pay Southern Development's Bonuses; 8) Breach of Contract/ Specific Performance Against tw alabama for Failure to Provide Certified Quarterly Financial Reports; 9) Equitable Accounting (against tw alabama); 10) Interlocutory Injunction (against tw alabama); 11) Permanent Injunction (against tw alabama); and 12) Attorneys' Fees.

Pursuant to the Court's First Amended Scheduling Order as modified by the Scheduling Order entered on February 2, 2012, the parties have moved for summary judgment on the scope and interpretation of the Birmingham and Atlanta Agreements. Plaintiff filed its Motion for Partial Summary Judgment as to the Issues of Breach of Contract Under Counts I, II, VII and VIII, and Defendants filed their Motion for Summary Judgment as to all claims.

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau's Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991).

The parties agree that the Birmingham and Atlanta Agreements are unambiguous and appropriate for resolution on summary judgment. See, e.g., O.C.G.A. § 13-2-3; McLemore v. Hyundai Motor Mfg. Ala., LLC, 7 So.3d 318, 327 (Ala. 2008) (a trial court should determine the force and effect of an unambiguous contract). Accordingly, the Court has reviewed the provisions at issue and finds in favor of Defendants as to Counts I and VII. The unambiguous language of the operative provisions obligates tw alabama and tw georgia, as appropriate, to pay Southern Telecom a portion of revenue generated on the facilities built pursuant to the Birmingham and Atlanta Agreements then existing at the time of the first assignment.

The Court disagrees with the interpretation of the revenue sharing provisions advanced by Southern Telecom which would require the Court to replace "ICG" or "ICGT," as the case may be, with "tw telecom" at all places where ICG or ICGT is referenced in the agreements. The Court bases its ruling on the definitions of "ICG Network" under the Birmingham Agreement and "ICG Network" under the Atlanta Agreement, around which definitions the

formulas under both agreements are structured. Under the Birmingham Agreement, the “ICG Network” is defined as “facilities of ICG within the Birmingham MSA...” Likewise, under the Atlanta Agreement, “ICGT Network” is defined as “facilities of ICGT within the Atlanta MSA...”

The Court finds that the reference to “ICG” and “ICGT” in both definitions is merely intended to provide geographic context for the scope of the facilities subject to the revenue sharing provisions. It is not appropriate to substitute the assignee’s name to expand the geographic territory described by those terms and to impose greater obligations on the assignee. It is through this interpretation the Court views the entire network of clauses under both agreements that establish the revenue sharing formula. Accordingly, the Court **GRANTS** Defendants’ Motion for Summary Judgment as to Counts I and VII.

Turning to Plaintiff’s motion for summary judgment as to Counts II and VIII, the Court finds that Defendants are obligated under Sections 27.1 of the Atlanta and Birmingham Agreements to provide a:

report certified as true and correct by the chief financial officer or treasurer of ICG(T) setting forth for such quarter the amount of ICG(T)’s On-Net Revenue from operations (listed by customer), calculations of the Southern Development’s Bonus(Network Fee) and financial statements of ICG(T) (including at least a balance sheet and a statement of income and cash flow) for the period then ended.

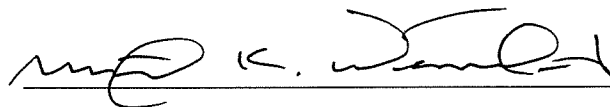
Consistent with the Court’s ruling above, the Court holds that the scope of information Defendants are required to provide under Sections 27.1 is restricted to the “legacy networks” in line with the Court’s interpretation of the facilities subject to the revenue sharing provisions. Accordingly, and in consideration of defense counsel’s agreement in open court to provide Southern Telecom with Section 27.1 reports regarding the legacy networks, the Court **GRANTS**

summary judgment to Plaintiff on Counts II and VII subject to the Court's ruling set forth above regarding the scope of information subject to Sections 27.1.

With regard to the remaining claims at issue in Defendants' Motion, the Court **GRANTS** summary judgment in favor of Defendants with respect to Counts III, IV, V, IX, X and XI finding these claims moot in light of the Court's ruling herein. The Court **DENIES** Defendants' Motion as to Counts VI and XII in light of the fact that Southern Telecom prevailed, in part, on its breach of contract claims against Defendants based on their failure to provide periodic financial information required under the agreements at issue in this case.

Defendants moved the Court to strike the Affidavit of Wayne A. Ellis submitted in support of Plaintiff's Motion for Partial Summary Judgment on the basis that the affidavit purportedly conflicts with Mr. Ellis's deposition testimony. Having reviewed the affidavit of Mr. Ellis, as well as the deposition testimony referenced by Defendants, the Court hereby **DENIES** Defendants' Motion finding no direct contradiction between the testimony of Mr. Ellis set forth in his affidavit and his deposition.

SO ORDERED this 28th day of March, 2012.



MELVIN K. WESTMORELAND, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

Copies via email to:

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