Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Saturn Telecommunication Services, Inc.,	)	
	)	
Complainant,	)	
	)	File No.: EB-09-MD-008
v.	)	
	)	
BellSouth Telecommunications, Inc., d/b/a/ AT&T Florida,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 4, 2013 **Released: April 4, 2013**

By the Associate Chief, Enforcement Bureau:

I. INTRODUCTION

1. This Memorandum Opinion and Order (Order) dismisses with prejudice the formal complaint[1] that Saturn Telecommunication Services, Inc. (STS) filed against BellSouth Telecommunications, Inc., d/b/a/ AT&T Florida (AT&T or BellSouth) under Section 208 of the Communications Act of 1934, as amended (Act).[2] STS alleges that AT&T violated Sections 201(a), 201(b), 202(a), 251(c)(2)(B)–(D), 251(c)(3), and 271(c)(2)(B) of the Act[3] by refusing to permit STS to purchase special access service commingled with certain "non-designed" DS-0 loops rather than commingled with higher-priced, "designed" DS-0 loops.[4] In addition, STS alleges that AT&T violated Sections 202(a) and 251(c)(2)(C) of the Act by failing to have a process by which AT&T could "seamlessly convert" STS's existing customers in bulk from "UNE-P" arrangements to arrangements

[1] Formal Complaint, File No. EB-09-MD-008 (filed July 20, 2009) (Compl.). AT&T filed an answer and an amended answer to the Complaint. *See* AT&T's Answer to STS's Formal Complaint, File No. EB-09-MD-008 (filed Sept. 4, 2009); AT&T'S Legal Analysis, File No. EB-09-MD-008 (filed Sept. 4, 2009) (AT&T's Legal Analysis); AT&T's Amended Answer to STS's Formal Complaint, File No. EB-09-MD-008 (filed Sept. 18, 2009) (Answer). STS then filed a Reply to the Answer. *See* Saturn Telecommunication Services, Inc.'s Reply to AT&T's Amended Answer and Legal Analysis to STS's Formal Complaint, File No. EB-09-MD-008 (filed Sept. 28, 2009) (Reply). Thereafter, the parties filed a joint statement of undisputed facts. *See* Further Revised Joint Statement of Undisputed Facts, File No. EB-09-MD-008 (filed July 16, 2010) (Joint Statement).

[2] 47 U.S.C. § 208.

[3] 47 U.S.C. §§ 201(a), 201(b), 202(a), 251(c)(2)(B)–(D), 251(c)(3), and 271(c)(2)(B).

[4] *See, e.g.*, Compl. at 68–85, Counts I–IX.

commingling special access service with loops.[5] STS further alleges that AT&T violated its duty under Section 251(c)(1) of the Act to negotiate an interconnection agreement in good faith.[6]

2. For the reasons discussed below, we dismiss Counts I–IX and XI–XIII because STS released the claims stated in those Counts under the terms of a prior settlement agreement with AT&T. Because these are the only Counts remaining in the Complaint,[7] we dismiss the Complaint in its entirety.

II. BACKGROUND

3. During all relevant periods, STS was a competitive local exchange carrier (CLEC) and interexchange carrier (IXC) certified by the Florida Public Service Commission (FPSC) to provide telecommunications services in Florida.[8] STS offered local and long distance services to businesses and residential consumers in an area that included South Florida.[9] Prior to 2006, pursuant to an interconnection agreement with AT&T,[10] STS served most, if not all, of its customers by purchasing from AT&T a service known as "UNE-P," which consisted of unbundled local switching combined with local loops and shared transport.[11]

4. For purposes relevant to this proceeding, AT&T is an incumbent local exchange carrier (ILEC) certified by the FPSC to provide local exchange services in Florida.[12] AT&T is also a Bell Operating Company (BOC), and its affiliate BellSouth Long Distance, Inc. d/b/a AT&T Long Distance Service is an IXC authorized by this Commission and the FPSC to provide long distance services.[13]

5. On February 4, 2005, the Commission released the *Triennial Review Remand Order* (*TRRO*), which, *inter alia*, eliminated a requirement that ILECs such as AT&T sell UNE-P service to CLECs such as STS.[14] The Commission established a 12-month transition period for CLECs to purchase from ILECs services other than UNE-P to serve the CLECs' customers.[15]

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[5] *See, e.g.*, Compl. at 91–93, Counts XI and XII.

[6] *See, e.g.*, Compl. at 95–96, Count XIII. Pursuant to Section 1.722(d) of the Commission's rules, 47 C.F.R § 1.722(d), STS requested that a determination of damages be made in a proceeding separate from and subsequent to the proceeding to determine liability. Compl. at 127, para. 415.

[7] STS voluntarily dismissed Count X of the Complaint, which alleged a violation of Section 272 of the Act, 47 U.S.C. § 272. Notice of Voluntary Dismissal, File No. EB-09-MD-008 (filed May 19, 2010); Letter Order from Lisa Saks, Assistant Chief, Market Disputes Resolution Division, EB-FCC, to Counsel for AT&T and STS, File No. EB-11-MD-005 (dated June 7, 2010).

[8] *See, e.g.*, Joint Statement at 2, para. 1.

[9] *See, e.g.*, Joint Statement at 2, para. 2.

[10] Compl. at 14, para. 23.

[11] *See In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Notice of Proposed Rulemaking, 16 F.C.C.R. 22781, 22802 n. 102 (2001).

[12] *See, e.g.*, Joint Statement at 2, para. 4.

[13] *See, e.g.*, Joint Statement at 2, para. 4.

[14] *See Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, 2641–42, at para. 199 (2005), *aff'd*, 450 F.3d 528 (D.C. Cir. 2006) (*TRRO*); Joint Statement at 5, para. 14. The *TRRO* was issued following the appeal of an earlier

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6. By late 2004, prior to the release of the *TRRO*, AT&T and STS had already begun discussing the design and construction of a new AT&T network to which STS could migrate its UNE-P customers.[16] Working with AT&T through 2005, STS ultimately decided on a network consisting of the commingling of Section 251(c)(3) unbundled network elements with a special access facility called a SMARTRing (henceforth, the "commingled network").[17] The commingled network design called for STS's customers to be connected to the SMARTRing through "DS-0" and "DS-1" loops,[18] with collocation arrangements located at eight AT&T wire centers.[19]

7. During the negotiations in 2005, AT&T advised STS that STS could purchase two types of "non-designed" DS-0 loops for use in the commingled network: either an Unbundled Copper Loop Non-Designed (UCL-ND) loop or a Service Level 1 (SL1) loop.[20] During those same discussions, STS told AT&T that, to transition STS's customers from UNE-P to the new commingled network as quickly as possible, STS wanted AT&T to use a "bulk migration" process capable of moving customers in large increments.[21] At that time, STS had approximately 18,200 UNE-P lines, provisioned mostly to small business and residential customers in South Florida.[22]

8. In about March 2006, shortly before the *TRRO* transition deadline and while the parties were negotiating the terms of a new interconnection agreement, AT&T changed its earlier advice and informed STS for the first time that it was technically infeasible to use a non-designed DS-0 loop in the

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Commission order. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*TRO*), *vacated and remanded in part*, *aff'd in part*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). *See also* Joint Statement at 8, para. 29.

[15] *See, e.g.*, *TRRO*, 20 FCC Rcd at 2641–42, para. 199.

[16] *See, e.g.*, Joint Statement at 6, para. 19.

[17] *See, e.g.*, Joint Statement at 7, para. 22. "Commingling" is defined in the Commission's rules as "the … linking of an unbundled network element, or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services." 47 C.F.R. § 51.5. The Commission affirmatively permitted requesting carriers to commingle UNEs with services and required ILECs to perform functions to effectuate these arrangements upon request. *TRO*, 18 FCC Rcd at 17342, para. 579.

[18] A DS-0 loop is a voice-grade digital channel of 64 Kbps, and DS-1 loops are the next higher capacity digital transmission facilities. *See* Compl. at 19 n.57; *Newton's Telecom Dictionary* at 298 (25th ed. 2009).

[19] *See, e.g.*, Joint Statement at 7, para. 23.

[20] *See, e.g.*, Joint Statement at 13, para. 51. We use the term, "designed loop" in this proceeding to denote a loop as to which AT&T claims to undertake design work before the loop is provisioned. *See, e.g.*, Answer at 80, para. 192. A "non-designed loop," as used in this proceeding, means a loop that does not require any such design work, according to AT&T. Whether and to what extent AT&T actually performs design work on its "designed" SL2 loops was a disputed issue in this proceeding that need not be addressed here.

[21] *See, e.g.*, Joint Statement at 13, para. 49.

[22] *See, e.g.*, Joint Statement at 5, para. 14.

commingled network.[23] According to AT&T, only a certain "designed" DS-0 UNE loop—known here as a Service Level 2 (SL2) Loop—would work in the commingled network, and such designed loops would cost STS substantially more than non-designed loops.[24] Further, AT&T informed STS that it had not created a bulk migration process to convert STS's UNE-P customers to the kind of commingled network STS had chosen.[25]

9. STS expressed great dissatisfaction with these late revelations and demanded that AT&T compensate STS for the additional costs STS would incur as a result of AT&T's changed requirements.[26] The parties engaged in a series of discussions, and exchanged several settlement proposals, in an effort to resolve this dispute.[27] During those discussions, STS questioned AT&T about its failure to develop a bulk migration process and about the basis for AT&T's determination that commingling using non-designed DS-0 loops was technically infeasible.[28] STS expressed skepticism—both internally and in communications with AT&T—about the veracity of the answers it received[29] and harbored doubts about whether AT&T was conducting these discussions in good faith.[30]

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[23] *See, e.g.*, Joint Statement at 14, 18–19, 45, paras. 57, 72, 177; Compl, Aff. of Keith G. Kramer (Kramer Aff.), Ex. 1 at KK00208-09 (E-mail from Keith Kramer, STS, to Mark Amarant, STS, et al. (March 22, 2006)); Compl. at 93, para. 285. We note that, in the documents and pleadings filed in this proceeding, the parties generally use the terms "non-designed DS-0 loop," "non-designed loop," "UCL-ND loop," and "SL1 loop" interchangeably, although there is some difference, e.g., in price, between a UCL-ND loop and a SL1 loop. *See, e.g.*, Joint Statement at 43, paras. 168–69. In this Order, we use the single term "non-designed DS-0 loop."

[24] *See, e.g.*, Joint Statement at 14, 19, 43, 45, paras. 57, 73, 168, 170, 177, 180. For example, AT&T's recurring charges for a SL2 loop are approximately 15% more than for a SL1 loop, and the non-recurring charge for an SL2 loop is more than twice the non-recurring charge for an SL1 loop. Joint Statement at 15, 43, paras. 63, 170–171. The cost differential between an SL2 loop and a UCL-ND loop is even greater. *Id*. at 43, paras. 168–70.

[25] *See, e.g.*, Joint Statement at 15–16, para. 64.

[26] *See, e.g.*, Joint Statement at 14–15, paras. 58–59, 61–62; Answer, Ex. 32 (Letter via e-mail from Keith Kramer, STS, to Donna Hartley, AT&T (May 3, 2006) (STS May 3, 2006 Letter)); Kramer Aff., Ex. 1 at KK00331–35 ("STS Position on Network and TRRO Compliance" (undated)); *id.* at KK00216–17 (E-mail from Keith Kramer, STS, to James Tamplin, AT&T, et al. (March 27, 2006)); *id.* at KK00220 (E-mail from Ronald Curry, STS, to LSM Group, AT&T, et al. (March 27, 2006)).

[27] *See, e.g.*, Joint Statement at 17–19, paras. 66, 68–73.

[28] STS submitted a set of questions to AT&T concerning AT&T's proposed settlement terms, the technical feasibility of commingling non-designed DS-0 loops, and the availability of bulk migration, and AT&T provided responses to these questions on June 2, 2006. *See, e.g.*, Joint Statement at 19, para. 73; Kramer Aff., Ex. 1 at KK00339–45 ("STS UVL-SL 2 & Collocation Proposal Comments and Questions for Understanding Between the Parties" (undated)); STS May 3, 2006 Letter; Kramer Aff. Ex. 1 at KK00353–366 (Letter from Tosha Davis, AT&T, to Keith Kramer, STS (June 2, 2006) (stating STS's questions and AT&T's responses). Keith Kramer, the STS executive who took the lead in these discussions with AT&T, prepared internal notes commenting on AT&T's responses to STS's questions. *Id.* at KK00367–83 (Kramer Comments on AT&T Responses).

[29] After reviewing AT&T's responses to STS's questions, Keith Kramer of STS observed "several problems" with AT&T's statement that the commingling of non-designed DS-0 loops is not technically feasible, *see* Kramer Comments on AT&T Responses at KK00367, and suggested that AT&T's failure to allow such commingling was contrary to Commission policy as expressed in the TRO and TRRO. *Id.* at KK00367; KK00369–70. Kramer also questioned (a) AT&T's assertion that a commingled loop must be provisioned in AT&T's Trunk Inventory Record Keeping System (TIRKS) and (b) AT&T's explanation of why the loops STS sought to commingle could not be included in TIRKS, calling AT&T's explanation "misdirection and meaningless." *Id.* at KK00367–68. Kramer testified that AT&T's responses to STS's questions "raised concerns for STS" because AT&T's explanation of

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10. In June 2006, after the parties had failed to achieve a resolution, STS filed a complaint against AT&T before the FPSC,[31] and also filed comments with this Commission opposing AT&T's then-proposed merger with BellSouth.[32] In both filings, STS assailed AT&T's alleged failure to timely migrate STS's UNE-P customers to another arrangement, and asserted that AT&T had misled STS regarding the use of non-designed DS-0 loops in the commingled network and imposed arbitrary commingling rules.[33] STS also asserted in both filings that AT&T had improperly refused to provide a bulk migration process to transfer STS's UNE-P customers to the commingled network, and had made misrepresentations to STS concerning the availability and operation of AT&T's bulk migration process.[34] STS further argued in both filings that AT&T had acted fraudulently, anti-competitively, and in bad faith in dealing with STS on the commingling and migration issues.[35] In its FPSC Complaint, STS sought prospective relief in the

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why it was technically infeasible to commingle a non-designed DS-0 loop "made no sense." Kramer Aff. at 29, para. 45. Further, in a June 8, 2006 e-mail to STS's counsel recounting a conversation he had with AT&T employee Daryl Ducote concerning AT&T's position on technical infeasibility, Kramer observed: "We both knew that was bull_ _ _ _. The reason it is not technically feasible is because it is five dollars less per line. That is the only reason, he knows it and now I know it." *Id.*, Ex. 1 at KK00384–85 (E-mail from Keith Kramer, STS, to Alan Gold, STS Counsel, et al. (June 8, 2006)). Kramer testified that after receiving AT&T's responses to STS's questions on June 2, 2006 and conferring with Daryl Ducote of AT&T, Kramer concluded that AT&T "would not convert STS' embedded base of UNE-P customers and that [AT&T] had no intention of allowing STS to commingle a DS0 level UNE loop on STS' commingled network"). Kramer Aff. at 37, para. 47. *See also* STS May 3, 2006 Letter at ATT000243–44 (asserting that use of the SL2 designed loop with its additional features "does not appear to be necessary" for the migration of STS's embedded base of customers).

[30] *See* Kramer Comments on AT&T Responses at KK00379 ("how can [AT&T] state that they were acting in good faith. . .What part of good faith am I missing?"); *id.* at KK00372 ("they are not giving us accurate truthful answers even in a settlement offer"); *id.* at KK00383. *See also* Kramer Aff., Ex. 1 at KK00346–47 (E-mail from Keith Kramer, STS, to Alan Gold, STS Counsel, et al. (May 26, 2006) (stating that AT&T employee Robby Pannel "dilibertly [sic] has been misleading [STS employee] Kathy Cicero over the past couple of weeks while we have been waiting for a settlement.")).

[31] Compl., Aff. of Nancy M. Samry (Samry Aff.), Ex. 2 (*Emergency Pet. of Saturn Telecommunication Services, Inc. Against BellSouth Telecommunications, Inc. to Require BellSouth to Honor Commitments and to Prevent Anticompetitive and Monopolistic Behavior*, Docket No. 060435-TP (filed June 5, 2006) (FPSC Compl.)); Joint Statement at 19, para. 74.

[32] Compl., Samry Aff., Ex. 3 (*Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corp.*, WC Docket No. 06-74, Saturn Telecommunication Services, Inc.'s Comments (filed June 5, 2006) (FCC Comments)); Joint Statement at 19, para. 74. The Commission concluded, without addressing the substance of the allegations, that the STS Comments did not provide a basis for finding that AT&T lacked the fitness to acquire the BellSouth authorizations and licenses. *Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corp.*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5757-58, para. 194 (2007).

[33] *See*, *e.g.*, Joint Statement at 19, 49–50, paras. 74, 201–202; FPSC Compl. at 4–6, 8–16, paras. 5, 8, 19, 21, 26, 28–29, 34, 36, 44–47, 49–50, 54–55, 62; FCC Comments at 4, 6–7, 9–11, 13, paras. 10, 17–19, 26, 28, 32–34, 36–37, 41–43. *See also* Compl. at 34, para. 88.

[34] *See*, *e.g.*, Joint Statement at 19, 49, paras. 74, 201; FPSC Compl. at 5–10, 13, 15–16, paras. 5, 8, 14–16, 18, 22–24, 30, 43, 48, 54–55, 58, 62; FCC Comments at 3–7, 10, 11, paras. 9–11, 13–16, 20, 31, 36. *See also* Compl. at 34, para. 88.

[35] *See*, *e.g.*, FPSC Complaint at 4–6, 14–16, paras. 5–6, 49–51, 54, 60–61; *id.* at 17 (Prayer for Relief) ; FCC Comments at 11–13, 15–17, paras. 37–40, 43, 45, 49, 53.

form of an order requiring AT&T to transfer STS's existing UNE-P customers, and to add new STS customers in the future, to the commingled network at the lower rates for non-designed DS-0 loops.[36]

11. Following these filings, representatives of AT&T and STS engaged in a mediation of their dispute in July 2006 and ultimately reached a settlement.[37] Pursuant to that settlement, in late 2006, STS and AT&T entered into a Confidential Settlement Agreement (Settlement Agreement)[38] and a new Interconnection Agreement (ICA).[39]

12. Under the Settlement Agreement, the parties agreed that AT&T would provide STS with certain billing credits[40] and that STS would withdraw all billing disputes regarding the difference between the rates for a non-designed DS-0 loop and an SL2 loop, regardless of whether the disputed charges were assessed under the existing or the new ICA.[41] The Settlement Agreement also permitted STS to migrate 2,500 of STS's existing UNE-P lines to SL2 loops commingled with special access transport using a "bulk migration work-around process."[42]

13. The Settlement Agreement acknowledged that STS had withdrawn the FPSC Complaint and the FCC Comments without prejudice, and STS expressly agreed not to re-file the FPSC Complaint or the FCC Comments "or the allegations raised in or associated with" them, in any forum.[43] In addition, STS agreed in the Settlement Agreement to "release[], acquit[], and discharge[] [AT&T] from all Demands, Actions and Claims, whether known or unknown, asserted or which could have been asserted,

[36] *See, e.g.*, FPSC Compl. at 6, para. 6; *id.* at 17–18 (Prayer for Relief).

[37] *See, e.g.*, Joint Statement at 19, 20, paras. 75–76. The mediation resulted in the parties' execution of a Term Sheet on July 12, 2006 setting forth the terms under which STS had agreed to withdraw its claims against AT&T and indicating that the parties would negotiate and execute a new Interconnection Agreement and a new Market Based Rates (MBR) Agreement. Joint Statement at 19–21, paras. 75–76, 81; STS's Initial Response to Legal Issues for Briefing, File No. EB-09-MD-008 (filed Jan. 31, 2011) (STS Initial Br.), Ex. App., Tab 10 (Term Sheet) at 1, paras. 1–8.

[38] Answer, Ex. App., Tab 40 (Settlement Agreement). The Settlement Agreement was entered into on November 8, 2006. *Id*. at 1 (ATT144159).

[39] *See, e.g.*, Answer, Ex. App., Tab 33 ("Interconnection Agreement Between Bell South Telecommunications, Inc. and Saturn Telecommunication Services Inc. dba STS"). STS apparently executed the ICA on October 23, 2006, *id.* at ATT144197, and AT&T apparently executed the ICA on November 1, 2006. *Id. See also* Answer, Ex. App., Tab 128 (*Saturn Telecommunication Services, Inc. v. BellSouth Telecommunications, Inc.*, Case No. 4:08-cv-00271-SPM-WCS, Amended Complaint and Demand for Jury Trial (filed June 27, 2008) (Federal District Ct. Compl.) at 2, paras. 5, 8. Pursuant to their settlement, the parties also executed a new MBR Agreement in late 2006. Joint Statement at 21, para. 81.

[40] Settlement Agreement at 4, paras. 9–10.

[41] Settlement Agreement at 4, para. 11.

[42] Joint Statement at 21–22, 66–67, 70, paras. 85–87, 286, 290, 295; Settlement Agreement at 4–5, para. 13.

[43] Settlement Agreement at 3, para. 5 ("STS has withdrawn the FPSC Complaint without prejudice. STS agrees not to re-file the FPSC Complaint or the allegations raised in or associated with the FPSC Complaint at the FPSC or in any other forum."); *id.* at 3, para. 6 ("STS has withdrawn its Comments in the FCC Docket without prejudice. STS agrees not to re-file the Comments or the allegations raised in or associated with the Comments at the FCC or in any other forum."); Joint Statement at 21, para. 83.

against [AT&T] related to" the FPSC Complaint or the FCC Comments.[44] The parties agreed that the Settlement Agreement would be construed in accordance with Florida law.[45]

14. The parties agree that the ICA, executed just days prior to the Settlement Agreement, limits STS to commingling certain kinds of DS-0 loops, including SL2 loops, but not including non-designed DS-0 loops, such as SL1 loops.[46] The parties disagree about whether the ICA requires AT&T to provide bulk migrations to commingled arrangements.[47]

15. In the months that followed execution of the Settlement Agreement, the parties experienced difficulties in implementing the Settlement Agreement's provisions allowing bulk migration of 2,500 of STS's existing UNE-P lines to the commingled arrangement.[48] Each party blames the other for these difficulties.[49] In the end, only about eighty-five of STS's UNE-P lines were moved to the commingled network utilizing a bulk migration work-around process.[50]

16. On May 30, 2008, pursuant to Commission rules 1.716–1.718,[51] STS filed an informal complaint against AT&T with this Commission.[52] The Informal Complaint asserted violations of Sections 271 and 251 of the Act based primarily on AT&T's allegedly faulty implementation of a new Operating Support System (OSS) in April 2008.[53] The Informal Complaint also alleged that AT&T had "misled STS into believing that [AT&T] had perfected the process" for converting STS's existing UNE-P customers to a commingled network when, according to STS, AT&T was "unable to do this conversion in a proper manner."[54]

17. A few weeks later, in June 2008, STS filed a three-count complaint against AT&T with the United States District Court for the Northern District of Florida.[55] In Count I of the Federal District Court Complaint, STS alleged that AT&T had breached the Settlement Agreement by failing to convert

[44] Settlement Agreement at 3, paras. 5–6; Joint Statement at 21, para. 84. As discussed below, the phrase, "Demands, Actions and Claims" is a defined term in the Settlement Agreement. Settlement Agreement at 2–3, para. 8 (Definitions).

[45] Settlement Agreement at 5, para. 16. The parties also consented to jurisdiction and venue in the United States District Court for the Northern District of Florida. *Id.*

[46] *See, e.g.*, Joint Statement at 45, para. 178; Reply at 64, para. 129.

[47] *See, e.g.*, Joint Statement at 21 n.17; Reply at 30, para. 45; AT&T's Statement of Facts Disputed by STS, File No. EB-09-MD-008 (filed Mar. 8, 2010) (AT&T's Statement of Disputed Facts) at 74, para. 108.

[48] *See, e.g.*, Joint Statement at 22–35, paras. 89–131.

[49] *See, e.g.*, Saturn Telecommunication Services, Inc.'s Amended Statement of Disputed Facts, File No. EB-09-MD-008 (filed March 9, 2010) (STS's Statement of Disputed Facts) at 33–38, paras. 41–43.

[50] *See, e.g.*, Joint Statement at 35, para. 133.

[51] 47 C.F.R. §§ 1.716–1.718.

[52] STS Initial Br., Ex. App., Tab 14 (Informal Complaint, File No. EB-08-MDIC-0034 (filed May 30, 2008) (Informal Compl.)). *See* Joint Statement at 35, para. 136.

[53] Informal Compl. at 2–6.

[54] Informal Compl. at 2–3, 6. The Informal Complaint did not address the negotiations that led to the ICA or accuse AT&T of violating its duty under Section 251(c)(1) of the Act to negotiate the ICA in good faith.

[55] *See, e.g.*, Joint Statement at 35, para. 137; Federal District Ct. Compl.

2,500 of STS's lines from UNE-P to the commingled network.[56] In Count II, STS alleged that AT&T had fraudulently induced STS to enter the Settlement Agreement by falsely stating that AT&T was able to convert the 2500 lines.[57] And in Count III, STS alleged that AT&T had breached the ICA by failing properly to (i) implement the new OSS and (ii) migrate STS's UNE-P customers to the commingled network utilizing SL2 loops.[58]

18. On November 28, 2008, the District Court granted AT&T's motion to dismiss STS's fraudulent inducement claim in Count II, ruling that under Florida law, STS could not have reasonably relied on AT&T's alleged misrepresentations because the parties were in adverse positions at the time the alleged misrepresentations were made.[59] The Court also granted AT&T's motion to dismiss Count III based on a dispute resolution clause in the ICA that designated the FPSC as the appropriate forum for addressing disputes arising under the ICA.[60] The Court denied AT&T's Motion to Dismiss Count I of the Complaint because the parties had explicitly chosen that Court as the appropriate forum for any dispute regarding the Settlement Agreement.[61] The Court further ruled that STS's prior filing of the Informal Complaint with this Commission did not preclude STS from filing suit in court for breach of the Settlement Agreement.[62]

19. On June 22, 2009, STS filed a motion in the District Court seeking to amend its complaint to add an alternative count for rescission of the Settlement Agreement.[63] On the following day, however, STS and AT&T entered a stipulation agreeing to dismiss the entire court action without prejudice, and the Court then dismissed the case on June 30, 2009 without ruling on STS's motion to amend the complaint.[64]

20. Less than one month later, on July 20, 2009, STS filed the instant Complaint.[65] In Counts I through IX and XIII, STS alleges that AT&T violated Sections 201(a), 201(b), 202(a), 251(c)(1), 251(c)(2)(B)–(D), 251(c)(3), and 271(c)(2)(B) of the Act by refusing to permit STS to commingle special access with non-designed DS-0 loops and requiring STS to purchase the higher-priced SL2 loops instead,

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[56] *See, e.g.*, Joint Statement at 35, para. 138; Federal District Ct. Compl. at 4–6, paras. 19–26.

[57] *See, e.g.*, Joint Statement at 35–36, para. 138; Federal District Ct. Compl. at 6–9, paras. 27–42.

[58] *See, e.g.*, Joint Statement at 36, para. 138; Federal District Ct. Compl. at 9–17, paras. 43–93.

[59] *See, e.g.*, Joint Statement at 36, para. 139; Compl., Samry Aff., Ex. 7 (*Saturn Telecomm. Servs., Inc. v. BellSouth Telecomms., Inc.*, No. 4:08-cv-00271-SPM-WCS, Order Granting Defendant's Mot. to Dismiss in Part and Denying Defendant's Mot. to Dismiss in Part (N.D. Fla. Nov. 25, 2008) (Order Granting Mot. to Dismiss in Part), at 17–20).

[60] *See, e.g.*, Joint Statement at 36, para. 139; Order Granting Mot. to Dismiss in Part at 6, 7–11.

[61] *See, e.g.*, Joint Statement at 36, para. 139; Order Granting Mot. to Dismiss in Part at 11–17.

[62] *See*, *e.g.*, Joint Statement at 36, para. 139.

[63] *See, e.g.*, Joint Statement at 37, para. 144; Compl., Samry Aff., Ex. 6 (*Saturn Telecommunication Services, Inc. v. BellSouth Telecommunications, Inc.*, No. 4:08-cv-00271-SPM-WCS, Motion for Leave to File Second Amended Complaint and Supporting Memorandum (filed June 22, 2009)).

[64] Joint Statement at 37, paras. 145–46.

[65] The original deadline for STS to convert its informal complaint to a formal complaint pursuant to 47 C.F.R. § 1.718 was January 21, 2009. That deadline was ultimately moved to July 21, 2009, after the Commission approved a series of joint or agreed requests from the parties seeking to extend that deadline. Joint Statement at 37–38, paras. 147–151.

and by intentionally misrepresenting that the commingling of non-designed DS-0 loops was technically infeasible.[66] In short, STS alleges that in order to sell STS a commingled network that included an expensive special access SMARTRing, AT&T represented to STS in 2005 that it could use low cost non-designed DS-0 loops in the commingled network rather than the more expensive designed SL2 loops.[67] In 2006, after STS had committed to moving forward with the commingled network, AT&T advised STS for the first time that a non-designed DS-0 loop would not work in a commingled network and that the more costly SL2 loop was required.[68] STS alleges that AT&T intentionally misrepresented to STS that the commingling of non-designed DS-0 loops was technically infeasible, prior to and during the negotiations of the ICA.[69] According to STS, AT&T imposed these commingling restrictions in bad faith, in order to raise barriers to STS's entry into the local service market and prevent STS from effectively competing with AT&T for residential and small business customers.[70] A selection of the Complaint allegations that form the basis for Counts I through IX and XIII is set forth in Appendix A to this order.[71]

21. In Counts XI and XII, STS alleges that AT&T violated Sections 202(a) and 251(c)(2)(C) of the Act by failing to provide "seamless conversions" of STS's UNE-P customers to the commingled network through use of a bulk migration process.[72] STS alleges that in 2005, it requested information about the sufficiency of AT&T's bulk migration process for converting STS's embedded base of customers to its planned commingled network and AT&T advised STS that these customers could be migrated to the new network in a timely manner and that the network could be built and operated profitably.[73] However, in 2006, AT&T advised STS that it had no bulk migration process for converting STS's customers.[74] Instead, AT&T suggested a manual process involving an expensive disconnect that would leave STS customers out of service for a significant period of time.[75] STS contends that AT&T has refused its request to develop a bulk migration process to convert STS's new or existing customers to its commingled network.[76] STS charges that AT&T's failure to provide a process for seamless migration of STS customers amounts to a barrier to entry and makes commingling uneconomical for a CLEC, such as STS.[77] A selection of the Complaint allegations that form the basis for Counts XI and XII is set forth in Appendix A to this order.[78]

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[66] The allegations that form the basis of STS's claims in Counts I through IX and XIII appear mainly in paragraphs 25 through 143, paragraphs 155 through 204, paragraphs 223 through 248, and paragraphs 285 through 292 of STS's Complaint. Compl. at 68–72, 74, 81, 83–84, 93, paras. 205, 208, 211, 214, 217, 220, 249, 252, 255, 293.

[67] *See, e.g.*, Compl. at 19–21, 23, 75, 77, paras. 46, 48, 51, 58, 223, 233.

[68] *See, e.g.*, Compl. at 26–28, 54, 75–76, paras. 68, 72, 73, 163, 225, 227, 229.

[69] *See, e.g.*, Compl. at 93–95, paras. 285–89, 291.

[70] *See, e.g.*, Compl. at 54, 58, 64, 78, 95, paras. 163, 175, 192, 237, 291.

[71] *See* App. A (Part I).

[72] The allegations that form the basis of STS's claims in Counts XI and XII appear mainly in paragraphs 25 through 143 and paragraphs 261 through 278 of STS's Complaint. Compl. at 91–92, paras. 279, 282.

[73] *See, e.g.*, Compl. at 16, 19, paras. 31, 45.

[74] *See, e.g.*, Compl. at 28, 30, paras. 75, 78.

[75] *See, e.g.*, Compl. at 30, para. 78.

[76] *See, e.g.*, Compl. at 54, 59, 65, paras. 164, 178, 196.

[77] *See, e.g.*, Compl. at 86, para. 261.

[78] *See* App. A (Part II).

22. STS claims that it has suffered damages as a result of AT&T's alleged violations,[79] and requests that damages be determined in a separate proceeding following a decision on liability, as permitted under Section 1.722(d) of the Commission's rules.[80]

III. DISCUSSION

23. For the reasons explained below, we find that the parties' Settlement Agreement bars all of the claims STS asserts in this action. Accordingly, we dismiss the Complaint in its entirety.

A. STS Agreed to Release its Claims Relating to AT&T's Refusal to Permit Commingling with Non-Designed DS-0 Loops and Relating to AT&T's Failure to Provide a Bulk Migration Process.

24. AT&T argues that we should dismiss STS's claims in Counts I–IX, and XI–XIII because STS released those claims in the parties' Settlement Agreement.[81] We agree, for the reasons discussed below.[82]

25. The Settlement Agreement contains the following release:

> STS releases, acquits, and discharges [AT&T] from all Demands, Actions, and Claims, whether known or unknown, asserted or which could have been asserted, against [AT&T] related to the FPSC Complaint . . . [or] the FCC Comments.[83]

The Settlement Agreement broadly defines the phrase "Demands, Actions, and Claims" to include, *inter alia*:

> all obligations, promises, covenants, agreements, contracts, endorsements, controversies, suits, actions, causes of action, rights of action, trespasses, variances, judgments, executions, damages, claims, demands, rights, charges, encumbrances or liens of any kind or sort whatsoever or howsoever or whenever arising, in law or in equity,

[79] *See, e.g.*, Compl. at 68–74, 82–84, 91–93, paras. 207, 210, 213, 216, 219, 222, 251, 254, 257, 281, 284.

[80] *See* Compl. at 127, paras. 414–15; 47 C.F.R. § 1.722(d).

[81] *See, e.g.*, AT&T's Legal Analysis at 13–23; AT&T's Brief in Response to Additional Legal Issues, File No. EB-09-MD-008 (filed Feb. 1, 2011) (AT&T Initial Br.) at 24–38; AT&T's Reply Brief Regarding Additional Legal Issues, File No. EB-09-MD-008 (filed Feb. 15, 2011) (AT&T Reply Br.) at 14–17.

[82] Neither party challenges our authority to construe the Settlement Agreement and apply it to the claims raised by the complaint here. We note that the Commission has, in the past, construed and applied the terms of a settlement agreement, under which it found certain claims to have been waived. *See Nova Cellular West, Inc. v. AirTouch Cellular*, Memorandum Opinion and Order, 17 FCC Rcd 15026 (2002) (*Nova v. AirTouch*) (construing a settlement agreement as waiving claims for violations of the Act and Commission rules).

[83] Settlement Agreement at 3, paras. 5–6 (emphasis added).

> whether known or unknown . . . that relate to the claims set forth by STS in the FCC [Comments] and the FPSC Complaint.[84]

The Settlement Agreement thus released AT&T from liability for all claims, "whenever arising," "whether known or unknown," that relate to claims in the FPSC Complaint or FCC Comments (collectively, "2006 Proceedings") and that were "asserted" or "could have been asserted" in the 2006 Proceedings.

26. Applying the broad language of the release, STS's claims in Counts I–IX and XIII of its Complaint are barred because they are clearly "related to" (or the same as) claims that STS "asserted" or "could have [] asserted" in the 2006 Proceedings. As previously recounted, in Counts I–IX and XIII, STS alleges that AT&T violated various provisions of the Act by refusing to permit commingling of non-designed DS-0 loops, misrepresenting in bad faith that such commingling was technically infeasible, and requiring STS to use higher-priced SL2 loops. STS alleges that AT&T imposed these commingling restrictions for anticompetitive reasons in an effort to raise STS's barriers to entry.[85] In so alleging, those Counts describe conduct by AT&T that is the same, or related to, conduct that formed the basis of STS's claims in the 2006 Proceedings. Indeed, comparing the key allegations of the Complaint previously recounted[86] with representative excerpts from STS's FPSC Complaint plainly shows that the two Complaints raise closely related (or nearly identical) claims.[87]

27. For example, after AT&T advised STS that the commingling of non-designed DS-0 loops was technically infeasible, STS alleged in the 2006 Proceedings, as it argues here, that AT&T had imposed arbitrary commingling rules, and had required STS to purchase the costlier SL2 loops. STS asserted that AT&T's objective was to raise STS's costs and undermine its profitability.[88] STS also alleged in the 2006 Proceedings, as it does here, that AT&T had made misrepresentations to STS about DS-0 loop commingling and negotiated with STS in bad faith.[89] The claims STS asserts here in Counts I-IX and XIII thus relate to STS's claims in the 2006 Proceedings, and were asserted or could have been asserted in those Proceedings. In particular, we find that STS's claim in Count XIII that AT&T falsely represented that non-designed DS-0 commingling was technically infeasible is a claim that STS could have brought before the FPSC. Under the Commission's rules, the FPSC had authority to determine the validity of AT&T's claim that commingling of non-designed DS-0 loops is technically infeasible, and STS had a right to demand that AT&T prove that claim by clear and convincing evidence.[90] Indeed, the

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[84] Settlement Agreement at 2–3, para. 8 (emphases added). As noted above, the parties also agreed that STS would not re-file the FPSC Complaint or the FCC Comments "or the allegations raised in or associated with" them, in any forum. Settlement Agreement at 3, paras. 5–6.

[85] *See, e.g.,* Compl. at 54, 58, 64, 78, 95, paras. 163, 175, 192, 237, 291.

[86] *See supra* paragraph 20 and App. A.

[87] *See* App. A (Parts I and III). STS's FCC Comments contain very similar allegations as those in STS's FPSC Complaint, so in the interest of brevity we will not quote or paraphrase them here. *See, e.g.*, FCC Comments at 4–17, paras. 12, 17–19, 24, 26–28, 32–41, 43, 45, 49, 53.

[88] *See, e.g.,* FPSC Compl. at 13–14, paras. 44–47, 49.

[89] *See, e.g.,* FPSC Compl. at 5, 14–16, paras. 5, 49, 54, 60–61; App. A (compare Parts I and III).

[90] *See* 47 C.F.R. § 51.5 (definition of "Technically feasible") (stating in part that "Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. . . . An incumbent LEC that claims that it cannot satisfy such request because of adverse network

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FPSC likely would have made such a determination if the parties had not settled their dispute, since technical infeasibility was the reason AT&T offered for denying the type of DS-0 commingling that STS had requested.[91]

28. Similarly, applying the language of the parties' release, STS's claims in Counts XI and XII of its Complaint are barred because they are related to (or the same as) claims that STS asserted in the 2006 Proceedings. As previously recounted, in Counts XI and XII, STS alleges that AT&T violated various provisions of the Act by misleading STS about, and failing to provide, a bulk migration process to "seamlessly" convert STS's UNE-P customers to the commingled network. Once again, a comparison of the key allegations of the Complaint[92] with representative allegations from STS's FPSC Complaint shows that the two Complaints are based on essentially the same conduct.[93]

29. STS repeatedly claimed in the 2006 Proceedings that AT&T violated the law by misleading STS about, and failing to provide, a bulk migration process to convert STS's UNE-P customers to the commingled arrangement. That claim is nearly identical to the claims STS asserts in Counts XI and XII of the Complaint; at the very least, the claims in the two proceedings are "related." Accordingly, both Counts are released under the terms of the Settlement Agreement.

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reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts."). *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15602-06, paras. 198-205 (1996) (*Local Competition Order*). STS also could have sought a ruling on technical infeasibility in an arbitration proceeding before the FPSC under Section 252 of the Act. *See*, *e.g.*, 47 C.F.R. § 51.319(b)(3)(i) (if parties are unable to reach agreement through voluntary negotiations as to whether the unbundling of copper subloops is technically feasible "the incumbent LEC shall have the burden of demonstrating to the state commission, in state proceedings under section 252 of the Act . . . that it is not technically feasible to unbundle the subloop at the point requested.").

[91] Because the record shows that in the spring of 2006, STS questioned the veracity of AT&T's infeasibility claim and had accused AT&T of negotiating in bad faith, *see supra* notes 29–30, FPSC Compl. at 5, 14–16, paras. 5, 49–51, 54, 60–61, we reject STS's assertion that it "had no reason to disagree with AT&T's representation about technical infeasibility" at the time the parties were negotiating the ICA "because AT&T intentionally misled STS and failed to provide STS with material information that would have allowed STS to make a reasonable determination about the truthfulness of AT&T's claim." STS's Reply to AT&T's Brief in Response to Additional Legal Issues, File No. EB-09-MD-008 (filed Feb. 14, 2011) (STS Reply Br.) at 20 n.71; *see also* STS Initial Br. at 23 ("STS did not discover or even suspect AT&T's misrepresentations concerning SL1 loops until shortly before it filed the pending Formal Complaint."). Moreover, STS was represented by counsel at the time of its negotiations with AT&T in 2006, and was in a position to assess whether AT&T had provided sufficient information to establish that commingling non-designed DS-0 loops was technically infeasible under the standard set forth in the Commission's rules. *See* 47 C.F.R. § 51.5. If STS doubted whether AT&T had provided sufficient information to satisfy that standard—and the record indicates that STS harbored such doubts—it could have demanded that AT&T prove its claim of technical infeasibility before the FPSC. *See supra* note 90.

[92] *See supra* paragraph 21.

[93] *See* App. (Parts II and IV). In this area, too, STS's FCC Comments contain very similar allegations as those in STS's FPSC Complaint, so in the interest of brevity we will not quote or paraphrase them here. *See, e.g.*, FCC Comments at 2–7, 10–11, 13–15, paras. 6, 9–11, 13–16, 20, 30–31, 36, 40, 43, 45.

B. STS's Attempts to Avoid the Release All Fail.

30. STS makes little or no argument that the claims in Counts I–IX, and XI–XIII do not "relate to" the claims it asserted in the 2006 Proceedings within the meaning of the Settlement Agreement's release. STS argues, instead, that (i) the claims in Counts I–IX, and XI–XIII pertain to AT&T's post-Settlement Agreement conduct, which the release does not temporally reach; and (ii) the Settlement Agreement's release should be rescinded or extinguished. As explained below, neither argument has merit.

1. STS's Argument that the Release Does Not Reach Post-Settlement Agreement Conduct Lacks Merit.

31. STS argues that the Settlement Agreement's release does not bar any of the Complaint's claims because those claims concern AT&T's post-Settlement Agreement conduct, and the release does not reach such "future" conduct.[94] STS's argument has at least two fatal flaws.

32. First, most of the allegations in the Complaint concern conduct that originated before the Settlement Agreement was executed.[95] In particular, we find no support for STS's suggestion that the release does not bar STS's claim in Count XIII because negotiation of the ICA occurred after the parties resolved their claims in mediation and entered into a Term Sheet.[96] The parties' earlier execution of a Term Sheet in July 2006 does not change the fact that they completed the negotiation and execution of the ICA by November 1, 2006, *before* they executed the Settlement Agreement, along with its release provision, on November 8, 2006.[97]

33. Further, those Complaint allegations that actually address post-Settlement conduct mostly concern AT&T's alleged non-compliance with the bulk migration obligations contained in the Settlement Agreement itself,[98] and STS has expressly disavowed any claim here based on that conduct.[99] Instead, STS chose to pursue such a claim in Federal District Court.[100]

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[94] *See, e.g.*, Compl. at 121, para. 388; Reply at 43, para. 74; STS Initial Br. at 25, 29–34; STS Reply Br. at 1–8.

[95] *See, e.g.*, *supra* paragraphs 25–28.

[96] *See* STS Initial Br. at 30 n.81 ("The Settlement Agreement did not release AT&T from its conduct in the negotiation of the ICA, all of which occurred after both claims were resolved at mediation and binding Term Sheet executed."); *see also* STS Reply Br. at 7–8.

[97] Indeed, the Settlement Agreement expressed the parties' intent to "memorialize the terms contained in the Term Sheet, *as such terms may have been mutually modified herein* for purposes of this Settlement Agreement . . . ." Settlement Agreement at 1–2 (emphasis added). One such modification was the addition of a provision in the Settlement Agreement, absent from the Term Sheet, affirming that the parties "have not been induced to execute this Agreement by reason of non-disclosure or suppression of any fact." *Id.* at 6, para. 28. This language affirms that, by entering into the Settlement Agreement, STS released any claims concerning AT&T's alleged non-disclosure of information about non-designed DS-0 loop commingling, particularly since STS had a motive and opportunity to request such information prior to entering into the ICA and the Settlement Agreement. *See supra* notes 90–91.

[98] *See, e.g.*, Compl. at 36–51, 86–91, paras. 96–101, 106–143, 145, 261–278.

[99] *See* Compl. at 121, para. 388 (asserting that this case is "completely separate" from the District Court case, which included a claim for breach of the Settlement Agreement: "The district court [case] only concerns the 2,500 lines that were not converted to the commingled network pursuant to the Bulk Migration Work Around Process. The instant complaint concerns the other 16,000 wholesale UNE-P lines that STS should have been able to convert

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34. Second, and more fundamentally, STS's argument fails to give meaning to two key phrases in the release: that the release applies to all demands, actions, and claims—"howsoever and whenever arising"—that "relate to" claims in the 2006 Proceedings and were asserted, or could have been asserted, in those Proceedings.[101] This language means that STS cannot accuse AT&T of "continu[ing] [to] violat[e] the law" based on AT&T's continuation of the very conduct at issue in the 2006 Proceedings.[102] Specifically, prior to the Settlement Agreement, AT&T did not commingle non-designed DS-0 loops with special access and did not provide a bulk migration process for converting former UNE-P customers to commingled arrangements, and it maintained that it was not legally required to do so. After the parties settled their dispute, AT&T continued to assert that it had no legal obligation under the Act to commingle non-designed DS-0 loops with special access or to offer a bulk migration process to convert UNE-P customers, and it continued its refusal to provide such services, except with regard to the specific commitments made in the Settlement Agreement or the ICA. Thus, the conduct at issue here—the refusal to commingle non-designed DS-0 loops with special access and to offer a bulk-migration process allowing unlimited conversion of UNE-P lines to a commingled arrangement—is the same (or related to) conduct that STS had already complained of prior to the Settlement Agreement. Accordingly, the claims in Counts I–IX and XI–XIII are claims "howsoever and whenever arising" that "relate to" the claims STS made in the 2006 Proceedings.

35. STS's argument that the release does not reach post-Settlement Agreement "future" conduct is further undermined by the fact that its claims in the 2006 Proceedings included demands for *future* relief. Specifically, in its FPSC Complaint, STS demanded an order "[r]equiring BellSouth *to continue* to provide new services at just and reasonable rates," meaning at the rates for non-designed DS-0 loops instead of the higher SL2 rates.[103] STS also asked the FPSC to "[r]equire[] BellSouth to transition STS's embedded base to the network at the rates and upon the terms promised, add new customers to the network at the rates and upon the terms promised, and maintain the embedded base and new customers at the rates and terms promised."[104] The Settlement Agreement addresses these future looking demands for relief by, for example, requiring AT&T to provide STS with a bulk migration process to be used in future

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…, [and] the 100,000 new lines that STS should have been [able to] convert subsequent to the execution of the … Settlement Agreement . . . ."); Reply at 29, para. 44 (stating that "[W]hether or not AT&T breached the settlement agreement regarding the failure to convert the 2500 lines is not determinative of the formal complaint before this Commission. STS is not complaining or seeking damages about the 2500 lines.").

[100] *See, e.g.*, Joint Statement at 35, para. 138. AT&T concedes that STS "did not release any claim for breach of the Settlement Agreement itself." AT&T Reply Br. at 16.

[101] Settlement Agreement at 2–3, para. 8 (Definitions) (emphases added); *id.* at 3, paras. 5–6.

[102] Reply at 43, para. 74. *See* STS Initial Br. at 32 (arguing that the release clause "did not give AT&T a free pass to continue to violate its legal obligations subsequent to the Settlement Agreement.").

[103] *See* FPSC Compl. at 18, para. 5 (Prayer for Relief) (emphasis added); *id*. (demanding that the requested "just and reasonable rates" be "adjusted for the fact that such services should have been provided by the Company's facilities through the represented network of commingled services."); *id.* at 6, para. 6 (asking the FPSC to "require that BellSouth transfer STS's existing embedded base and new customers to [the commingled network] pursuant to the rates and charges it had previously agreed upon," and if this was not possible, to require AT&T to "pay all fees and costs associated with the implementation of the network" and preclude AT&T from billing and collecting charges that STS "would not have incurred if BellSouth had honored its commitments").

[104] *Id.* at 17–18, para. 2 (Prayer for Relief).

migrations of certain STS customer lines.[105] Given that the Settlement Agreement's release bars claims that "relate to" any of the "demands" in the 2006 Proceedings—including any demands for future relief—the release bars STS's claims for future relief here. Accordingly, STS cannot escape the reach of the Settlement Agreement's release provision simply by claiming that STS only challenges "AT&T's conduct subsequent to the effective date of" that Agreement.[106]

36. The parties presented extensive arguments about whether Florida law supports their respective positions regarding the scope of the Settlement Agreement's release.[107] The parties cited a number of precedents that turned largely on the particular facts and contract language at issue. Collectively, they support the conclusion that a release may bar claims based on post-release conduct, if a careful review of the language of the release and of the circumstances at issue indicates that the parties intended the release to reach such conduct.[108]

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[105] *See* Settlement Agreement at 4, para. 13. *See also* STS Reply Br. at 4 (noting that the Settlement Agreement's provision for the migration of 2,500 lines "by a date in the near future" "gave STS partial relief on the future commercial billing rates . . . .").

[106] Reply at 43, para. 74. Further buttressing this conclusion is the language in the Settlement Agreement's release provision stating STS's agreement not to raise the settled claims in the future: "STS agrees not to re-file the FPSC Complaint [and the FCC Comments] or the allegations raised in or associated with the FPSC Complaint [and the FCC Comments] at the FPSC [or the FCC] or in any other forum." Settlement Agreement at 3, paras. 5–6. This language barring STS from re-filing its claims in the future undercuts STS's reliance on other language in the release affirming that STS had withdrawn its FPSC Complaint and FCC Comments "without prejudice." According to STS, this reference to withdrawal "without prejudice" indicates that the release was not intended to bar claims based on future conduct. *See* STS Initial Br. at 31 n.82. However, as AT&T explains, because the FPSC Complaint and the FCC Comments were dismissed prior to the execution of the Settlement Agreement, dismissal without prejudice left open the possibility that STS could re-file these documents in the event the parties were unable to reach a final settlement. *See* AT&T Reply Br. at 14 n.36. Once the parties executed their Settlement Agreement, STS was expressly barred from re-filing these documents or pursuing the claims associated with them in any other forum, including this one. *See* Settlement Agreement at 3, paras. 5–6.

[107] *See, e.g.*, AT&T Legal Analysis at 13–21; Reply at 45–52, paras. 81–104; STS Initial Br. at 29–34; AT&T Initial Br. at 33–36; STS Reply Br. at 1–8; AT&T Reply Br. at 16–17. In support of their respective positions, the parties primarily rely upon the following precedents: *Nova v. AirTouch*, cited *supra* note 82; *Gulf Group Holdings, Inc. v. Coast Asset Management, Corp.*, 516 F.Supp.2d 1253, 1268 (S.D. Fla. 2007); *Farese v. Scherer*, 297 Fed. Appx. 923, 926 (11th Cir. 2008); *Zinz v. Concordia Properties, Inc.*, 694 So. 2d 120, 121 (4th Fla. Dist. Ct. App. 1997); *Motown Record Corp. v. Wilson*, 849 F.2d 1476, 1988 WL 63755 (9th Cir. 1988); *Strube v. American Equity Investment Life Insurance Co.*, 226 F.R.D. 688 (M.D. Fla. 2005); *Schwartz v. Dallas Cowboys Football Club, Ltd.*, 157 F. Supp. 2d 561 (E.D. Pa. 2001); *Polsky v. Radio Shack*, 666 F.2d 824, 828 (3rd Cir. 1981); and *JM Family Enterprises, Inc. v. Winter Part Imports, Inc.*, 10 So.3d 1133 (Fla. 5th DCA 2009).

[108] *See, e.g., Nova v. AirTouch,* 17 FCC Rcd 15026, 15032 (release stating that both parties "release and forever discharge each other . . . from any and all claims . . ., known or unknown, that each party has had in the past, or now has, or may have in the future against each other" coupled with provision imposing future obligations on a party indicated that the parties intended to bar claims based on post-release conduct); *Gulf Group Holdings*, 516 F.Supp.2d at 1268-69 (where the language of a release did not appear to cover future actions by, for example, referring to all claims "known or unknown" which a party "ever had [or] . . . hereafter can, shall or may have" the question of whether the parties intended the release to bar a claim that accrued after the release was executed was a fact issue for the jury based on the circumstances at issue); *Motown Record Corp.*, 849 F.2d 1476, 1988 WL 63755, *2 (interpretation of release was governed by the "paramount rule of contract interpretation" that "the mutual intent of the parties is to be given effect by reviewing the words of the contract, and the circumstances and conditions of its execution") (citation omitted). *See also Somerset Pharmaceuticals, Inc. v. Kimball*, 49 F.Supp.2d 1335, 1339 (M.D. Fla. 1999) (in interpreting a release in a settlement agreement, "'[t]he court's role is to

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37. In this case, the record shows that in 2006 the parties intended to resolve their dispute concerning DS-0 loop commingling and bulk migration by entering into two related agreements. Specifically, the parties agreed to execute a Settlement Agreement that released all claims "whenever arising" that related to claims STS asserted, or could have asserted, in the 2006 Proceedings, and a new ICA that would cover their future business dealings.[109] Indeed, STS has acknowledged that the Settlement Agreement "was conditioned upon" the parties executing a new ICA agreement that would "govern the parties' relationship going forward."[110] We find that by executing the Settlement Agreement in conjunction with the ICA, the parties intended that STS would give up its right to insist on services that were the subject of the 2006 Proceedings, including the commingling of non-designed DS-0 loops and the bulk migration of lines, except to the extent such services were provided for in the Settlement Agreement or the ICA.

38. The circumstances of this case resemble those the Commission addressed in *Nova Cellular West v. AirTouch*.[111] In that case, Nova, a reseller of CMRS service, filed a complaint before the California Public Utilities Commission challenging AirTouch's practice of failing to provide a billing tape when service was ordered under its retail rate plans.[112] Nova and Airtouch resolved their dispute by entering into a settlement agreement stating in part that both carriers "release and forever discharge each other . . . from any and all claims . . ., known or unknown, that each party has had in the past, or now has, or may have in the future against each other, arising out of the matters involved in the formal complaint proceeding."[113] As a condition for Nova's agreement to dismiss its suit against AirTouch, AirTouch agreed "to make retail pricing plans . . . available to Nova in a wholesale billing tape format" when it was "capable of doing so."[114] Nova later claimed that AirTouch failed to provide the billing tapes as required by the settlement agreement, and brought an action before the Commission alleging, *inter alia*, violations of Sections 201 and 202 of the Act.[115]

39. The Commission concluded that the release in the parties' settlement agreement barred Nova's claim that AirTouch had an obligation under the Communications Act to provide electronic billing tapes.[116] The Commission noted that "Nova obtained a promise from AirTouch regarding the

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determine the intention of the parties from the language of the agreement, the apparent objects to be accomplished, other provisions in the agreement that cast light on the question, and the circumstances prevailing at the time of the agreement.'") (citation omitted).

[109] The resolution of the parties' dispute also involved the execution of the MBR in addition to the Settlement Agreement and ICA. *See, e.g.*, STS Initial Br. at 32; Joint Statement at 19–21, paras. 75–76, 81. The scope and construction of the MBR are not at issue here.

[110] *See* STS Initial Br. at 32 ("The Settlement Agreement was conditioned upon the parties executing a new ICA and MBR agreement."); *id*. at 24 ("It was clear that the future business dealings were to be governed by the agreements the parties were bound by, including without limitation, the new ICA and MBR, and applicable law."); *id.* at 20 ("The ICA was to control the future ongoing business of STS . . . ."); STS Reply Br. at 7 ("the Settlement Agreement was contingent on the execution of a new ICA to govern the parties' relationship going forward . . . .").

[111] *Nova v. AirTouch*, 17 FCC Rcd 15026.

[112] *Id.* at 15028, para. 6.

[113] *Id.* at 15028, para. 7 (internal quotation marks and emphases omitted; alteration in original).

[114] *Id.* at 15028, para. 7 (internal quotation marks and emphasis omitted).

[115] *Id.* at 15030, para. 13.

[116] *Id.* at 15031–34, paras. 14–21.

provision of electronic billing tapes for future retail rate plans in exchange for Nova relinquishing its right to seek redress regarding such provision by means other than enforcement of the [settlement agreement]."[117] The Commission thus found that Nova had "expressly and deliberately waived its right" to challenge AirTouch's conduct regarding the provisioning of electronic billing tapes.[118]

40. Here, as in *Nova v. AirTouch*, the parties entered into a Settlement Agreement that involved an exchange of promises.[119] AT&T promised to provide STS with a bulk migration process in the future for the prospective conversion of up to 2500 lines, and to extend specified billing credits, and STS, in return, agreed to release all claims related to claims asserted in the 2006 Proceedings, to withdraw its filings in the 2006 Proceedings, and to withdraw all billing disputes regarding the difference between non-designed DS-0 loops and SL2 loops.[120] STS thereby relinquished its right to seek redress for the conduct it complained of in the 2006 Proceedings—AT&T's alleged failure to provide the commingling of non-designed DS-0 loops or bulk migration of STS's customer base—except through enforcement of the Settlement Agreement or the ICA.[121] Because such conduct forms the basis for STS's claims in Counts I–IX and XI–XIII of the Complaint, we find that these Counts are barred by the release.

[117] *Id.* at 15032, para. 16.

[118] *Id.*

[119] In *Nova v. AirTouch*, the Commission observed that "[a]lthough releases typically do not cover claims based on post-release conduct," the combination of promises in the parties' settlement agreement led the Commission to "conclude that that is precisely what the parties intended here." *Id*. at 15032, para. 16. In this case, as in *Nova v. AirTouch,* we have a broad release provision coupled with a promise of future performance that leads us to conclude that the parties agreed to release post-settlement conduct that is related to the subject matters referenced in the Settlement Agreement's release provision.

[120] *See*, *e.g.*, Settlement Agreement at 3–4, paras. 5–8, 11; *see also id.* at 2–3, para. 8 (Definitions).

[121] STS maintains that the ICA provides for bulk migration of all of STS's embedded customer lines (beyond the 2500 lines referenced in the Settlement Agreement); AT&T disputes that interpretation of the ICA, and contends that STS had abandoned its plan to migrate its entire embedded base to a commingled arrangement by the time the parties entered into the ICA. *See, e.g.*, Joint Statement at 21 n.17; Reply at 30, para. 45; AT&T's Statement of Facts Disputed by STS, File No. EB-09-MD-008 (filed Mar. 8, 2010) (AT&T's Statement of Disputed Facts) at 74, para. 108. To the extent the parties dispute whether the terms of the ICA require AT&T to provide bulk migration of STS's embedded customer base, they are free to bring that dispute before the FPSC, the parties' chosen forum for the resolution of such disputes. *See* ICA, General Terms and Conditions § 8; Order Granting Motion to Dismiss in Part at 6–11; Joint Statement at 35–36, paras. 138–39; *See also* Federal District Ct. Compl. at 13–15, paras. 71–86. STS acknowledges that the ICA does not provide for the commingling of non-designed DS-0 loops. Compl. at 94, 101, paras. 286, 313; Joint Statement at 45, para. 178. However, the ICA contains a "Bona Fide Request" (BFR) process that allows STS to request that AT&T provide commingling of elements not currently eligible for commingling, and to seek resolution before the FPSC if it is not satisfied with AT&T's response. *See* ICA, Attach. 11, § 1.1; *id.*, General Terms and Conditions § 8. *See also* AT&T's Legal Analysis at 26. In fact, STS invoked the BFR process in May 2009 to request the commingling of a designed SL1 loop, (*see*, *e.g.*, Joint Statement at 82, paras. 340-41; STS Initial Br. at 10-11, 14), but did not seek resolution before the FPSC when AT&T denied its request.

2. STS Cannot Avoid the Release by Rescinding or Extinguishing the Settlement Agreement.

41. STS contends that, under Florida law, it can rescind the entire Settlement Agreement, including the release, because AT&T allegedly failed to migrate 2500 STS UNE-P lines as promised.[122] STS's contention is foreclosed by its failure to assert a claim for rescission of the Settlement Agreement in its Complaint here. Nevertheless, even if the Complaint included a claim for rescission of the Settlement Agreement, and assuming, *arguendo*, that the Commission has authority to grant such relief—a point that AT&T disputes[123]—STS has not established on this record that it has a right to rescind the Settlement Agreement.

42. Under Florida law, "'a contract will not be rescinded even for fraud when it is not possible for the opposing party to be put back into his pre-agreement status.'"[124] Moreover, a party's right to rescind an agreement in Florida "is subject to waiver if he retains the benefits of a contract after discovering the grounds for rescission."[125] In this case, STS retained the benefits it received under the Settlement Agreement, such as billing credits, long after it became aware of the asserted grounds for rescission, *i.e.*, AT&T's alleged failure to migrate 2500 STS UNE-P lines under the Settlement Agreement.[126] STS thus has failed to establish that it is entitled to rescind the Settlement Agreement.

43. Finally, we find no merit in STS's suggestion that AT&T's alleged failure to migrate the 2,500 lines under the Settlement Agreement automatically extinguished STS's obligation to abide by the Agreement, including the release, without STS having to bring a claim for rescission.[127] STS has cited no Florida law allowing a non-breaching party to escape its obligations under a release in a settlement agreement based on the other party's breach of the agreement.[128] In fact, the Eleventh Circuit's opinion in *Farese v. Scherer*, which STS cited for another purpose, supports the opposite conclusion.[129] There, the court rejected the plaintiff's argument that a defendant's violation of the parties' settlement agreement allowed the plaintiff to breach the settlement agreement by bringing claims barred by the agreement, reasoning:

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[122] *See, e.g.*, Compl. at 121, 123, paras. 388–89, 393; Reply at 52–57, paras. 105–20.

[123] AT&T's Legal Analysis at 21–22; AT&T Initial Br. at 36-37.

[124] *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 313 (Fla. 2000) (citing *Bass v. Farish*, 616 So.2d 1146, 1147 (Fla. 4th DCA 1993)).

[125] *Mazzoni Farms,* 761 So. 2d at 313 (citing *Rood Co. v. Board of Pub. Instruction*, 102 So.2d 139, 141–42 (Fla.1958)).

[126] STS has known of its asserted grounds for rescission at least since it filed its Federal District Court Complaint in 2008 alleging that AT&T fraudulently induced it to enter into the Settlement Agreement and breached the Settlement Agreement by failing to migrate 2500 lines from UNE-P to a commingled network. *See supra* paragraph 17 and notes 56 and 57. Yet, the record contains no evidence that STS ever returned to AT&T the value of the billing credits it received under the Settlement Agreement.

[127] *See* Reply at 54–57, paras. 109–120.

[128] Cases cited by STS for the general proposition that breach of an agreement by one party relieves the non-breaching party of its obligation to perform are inapposite, because none of them involved an alleged breach of a settlement agreement or the extinguishment of the non-breaching party's obligation under a release provision. *See* Reply at 54–55, 57, paras. 111, 120 (citing *Toyota Tsusho America Inc. v. Crittenden*, 732 So.2d 472 (Fla. 3d DCA 1997); *Bradley v, Health Coalition*, 687 So.2d 329, 333 (Fla. 3d DCA 1997)).

[129] *Farese v. Scherer*, 297 Fed. Appx. at 927.

> Parties are limited to contract remedies following the breach of a settlement agreement. If the . . . defendants did in fact breach the settlement agreement—and we express no opinion on that question—Farese has the option to either bring an action to rescind the agreement or sue for damages caused by the breach. Farese has provided no authority—and we can find none—suggesting that breach of a settlement agreement automatically rescinds or voids the agreement. Bankruptcy courts have frequently stated just the opposite; the non-breaching party is bound by the agreement despite the breach, unless and until he brings a rescission action.[130]

44. For all of these reasons, we reject STS's attempt to escape the Settlement Agreement's release by arguing that STS had a right to rescind the Agreement or to treat the Agreement as a nullity.[131]

IV. CONCLUSION

45. The claims stated in Counts I–IX, and XI–XIII of the Complaint are barred by the release in the parties' Settlement Agreement because they are related to claims that STS asserted or could have asserted in the 2006 Proceedings.

V. ORDERING CLAUSE

46. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 202, 251, 271, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 202, 251, 271, and 208, and Sections 1.720–1.736 of the Commission's rules, 47 C.F.R. §§ 1.720–1.736, that Counts I–IX and XI–XIII of the Formal Complaint are hereby DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Christopher L. Killion
Associate Chief, Enforcement Bureau

[130] *Farese v. Scherer*, 297 Fed. Appx. at 927 (citations omitted).

[131] Because we have determined that the claims in Counts I–IX and XI–XIII must be dismissed based on the Settlement Agreement's release provision, we need not and do not reach the other grounds AT&T raised for rejecting the Complaint, including, *e.g.*, AT&T's arguments that (i) STS waived its claims in Counts I-XII by voluntarily entering into the ICA; (ii) STS's claim in Count XIII is barred by the statute of limitations, and (iii) all of STS's claims should be dismissed on the merits because STS has failed to establish that AT&T has violated the Act or the Commission's regulations. *See* Answer at 119–20, paras. 417–21, and AT&T's Legal Analysis at 23–63.