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TN REGULATORY AUTHORITY
DOCKET ROOM

Honorable Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: Petition to Suspend BellSouth Tariff No. TN 2002-256 ("Switched Access Pricing Flexibility Tariff") and to Convene a Contested Case Proceeding
Docket No. 02-01073

Dear Chairman Kyle:

Please accept the attached letter for filing in the above-captioned docket, now pending before the TRA and scheduled for the next conference agenda.

This letter was sent last week to BellSouth by attorneys for AT&T and discusses in some detail BellSouth's interstate "Switched Access Contract Tariff" filed by BellSouth with the Federal Communications Commission. The interstate "Switched Access Contract Tariff" described in the letter is, essentially, the interstate counterpart to the "Switched Access Pricing Flexibility Tariff" filed with the TRA and the subject of this docket.

As stated in the "Petition to Suspend Tariff" filed by the CLEC Coalition in this docket, BellSouth's proposed tariff is discriminatory in violation of state and federal law. It offers discounts to a long distance carrier whose volume of calls is steadily increasing but not to another carrier which has the same or larger volume of calls but whose business is flat.

The Coalition's Petition noted that these so-called "growth" discounts have been explicitly disapproved by the FCC because there is no economic justification for the discounts. The attached letter to BellSouth explains these issues in some detail and will be useful to the TRA in analyzing BellSouth's comparable intrastate tariff.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Henry Walker

HW/nl
c: Guy Hicks, BellSouth Telecommunications, Inc.

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October 2, 2002

Via Certified Mail and Facsimile (404-529-7839)

Mr. Jerry Hendrix
Assistant Vice President -- Regulatory Policy and Operations
BellSouth Telecommunications, Inc.
675 West Peachtree Street
Atlanta, Georgia 30375

Re: BellSouth Interstate Switched Access Contract Tariff 2002-01
Transmittal No. 637

Dear Mr. Hendrix:

On May 17, 2002, BellSouth Telecommunications, Inc. ("BellSouth") filed its above-referenced Switched Access ("SWA") Contract Tariff at the Federal Communications Commission ("FCC" or "Commission") that provides impermissible growth discounts based on the growth in access minutes over the life of the contract.[1] AT&T Corp. ("AT&T") has discussed with you that these growth tariffs violate the Communications Act, discriminate against large interexchange carriers, and impermissibly favor smaller carriers such as BellSouth's long distance affiliate BellSouth Long Distance, Inc. ("BSLD"). BellSouth, however, has not been willing to withdraw or satisfactorily modify the Tariff. Accordingly, this letter is to provide you with the notice required by Section 1.721(a)(8) of the FCC's rules, 47 C.F.R. § 1.721(a)(8), that, unless BellSouth agrees to withdraw the Tariff or reach a satisfactory negotiated settlement with AT&T, AT&T intends to file a formal complaint before the FCC seeking cancellation of the Interstate SWA Contract Tariff and damages.

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[1] BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1, Section 26, BellSouth SWA Contract Tariff, Original Page 26-1 et seq. (eff. May 18, 2002), filed under Transmittal No. 637 (May 17, 2002) ("Tariff," "Interstate SWA Contract Tariff" or "BellSouth FCC Tariff"). A copy of the Tariff is attached as Appendix 1 to this letter.

Background

Under the terms of its Interstate SWA Contract Tariff, for the eight MSAs in which BellSouth has pricing flexibility pursuant to Part 69, Subpart H, of the Commission's rules, BellSouth is making available volume discounts to parties that execute a multi-year contract. Volume discounts are available over a five-year contract period for annual growth in switching usage compared to a specified minimum level. A carrier must achieve growth each year over the minimum level to receive a discount, which is applied only to revenues that exceed the revenues associated with the stated minimum. The discounts increase from 7% in the first year to a maximum of 35% for more than 10% growth over the stated minimum in the fifth year of the contract.[2]

In addition to the federal tariff, BellSouth has filed the BellSouth SWA Contract Tariff in all its service territory states. In each of these filings, BellSouth is making volume discounts on intrastate access available to parties that contract to provide increased annual minutes of use over the life of the contract. In the North Carolina filing, BellSouth is candid about the purpose of the SWA Contract Tariff, acknowledging that it provides "discounts based upon positive incremental local switching usage."[3]

In North Carolina, AT&T filed a complaint against BellSouth claiming that the BellSouth SWA Contract Tariff in North Carolina was discriminatory and anticompetitive.[4] On August 13, 2002, the North Carolina Utilities Commission determined that the tariff must be rejected on the ground that it is "biased" and "against the public interest." *N.C. Disapproval Order* at 4, 5.[5] AT&T has also filed complaints about the SWA Contract Tariff in Florida and Georgia and participated as part of a coalition

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2 BellSouth Interstate SWA Contract Tariff, Original Page 26-5.

3 Letter from C. D. Hatchcock, Regulatory & External Affairs Vice President, BellSouth Telecommunications, Inc. to N. Carpenter, Director, Communications Division, Public Staff, N.C. Utilities Comm., at 2 (May 23, 2002).

4 Complaint for Anticompetitive Activity Pursuant to N.C.G.S. 62-73; 62-133.5(a)(iii) and (iv); 62-133.5(d) and (e); and 62-134; and Commission Rule R1-9 and Motion to Find Tariff Noncompliant or Suspend Tariff for Failure to Comply with N.C.G.S. 133.5(a)(iii) and (iv); 62-133.5(a) and (e) and Commission Tariff Rule R9-4, *In the Matter of BellSouth Telecommunications, Inc. Intrastate Access Services Tariff/New Section 26/BellSouth SWA Contract Tariffs*, Docket No. P-100, Sub 30, Docket No. P-55, Sub 1365 (N.C. Util. Comm.).

5 Order Disapproving Proposed Tariff, *In the Matter of Complaint for Anticompetitive Activity and Motion to Find Tariff Noncompliant or Suspend Tariff and Tariff Filing by BellSouth Telecommunications, Inc. to Establish Contract Rates for Switched Access Rate Elements*, Docket No. P-55, Sub 1365 & 1366 (N.C. Util. Comm. Aug. 13, 2002) (*"N.C. Disapproval Order"*).

The Texas Commission revoked a similar growth tariff proposed by Southwestern Bell as "discriminatory and anticompetitive." Order, *Complaint by AT&T Communications of the Southwest, Inc. Regarding Tariff Control Number 21302—Switched Access Optional Payment Plan (OPP)*, Docket No. 21392 (SOAH Docket No. 473-99-1963) (Texas PUC March 1, 2000).

opposing the Tariff in Tennessee. BellSouth has withdrawn its Georgia and Tennessee filings.[6]

BellSouth's SWA Contract Tariff Discriminates Against Large IXCs such as AT&T and in Favor of Smaller Carriers

Section 201(b) of the Communications Act requires that all charges and practices be just and reasonable, and under this provision, a charge or practice is unlawful if it is "'unjust, unreasonable, unduly discriminatory, or preferential.'" *Cable & Wireless P.L.C. v. FCC,* 166 F3d 1224, 1231 (D.C. Cir. 1999) (quoting *Western Union Telegraph Co. v. FCC,* 815 F.2d 1495, 1501 n.2 (D.C. Cir. 1987)). In a similar vein, Section 202(a) of the Communications Act prohibits discrimination by carriers such as BellSouth against customers in the provision of services. Different treatment of customers that are similarly situated constitutes unlawful discrimination under Section 202(a). *The Competitive Telecommunications Assoc. v. FCC*, 998 F.2d 1058, 1062 (D.C. Cir. 1993). Under Section 272, Bell Operating Companies ("BOCs") are prohibited from discriminating in favor of their long distance affiliates.

BellSouth's Interstate SWA Contract Tariff violates Section 201(b) and Section 202(a) by discriminating against established interexchange carriers and offering discounts based on percentage growth from a fixed customer base. This plan has a discriminatory impact on established interexchange carriers because they start with a large customer base, which is difficult to grow annually, and that base is, in fact, likely to shrink as BellSouth enters into the long distance market in various BellSouth service territory states.

Relative volume growth, however, is not a justifiable basis for providing a rate discount, because a low base makes significant growth percentages possible even if the absolute volume growth is insignificant and provides no economies to BellSouth. Instead, any discounts should be based on absolute volumes, as such volumes make possible the economies that support any discount. Given that large interexchange carriers have declining access minutes of use ("MOUs"), BellSouth's Interstate SWA Contract Tariff discriminates against interexchange carriers such as AT&T in favor of smaller carriers with growing access MOUs. These growing carriers may obtain a large volume discount and lower access charges than are available to AT&T even though AT&T's total access minutes are significantly larger than those of the smaller carrier. As a result of BellSouth's Interstate SWA Contract Tariff and the skewed discounts it provides, carriers with the same number of access minutes may pay different rates for access -- those carriers with growing MOU volumes may enjoy discounts of up to 35% that are not available to a carrier with declining MOU volumes.

6 A new version of the growth tariff was filed in Tennessee on September 13, 2002. The revised tariff does not change the fundamental problems associated with the growth tariffs.

BellSouth's SWA Contract Tariff Discriminates in Favor of BellSouth's Long Distance Affiliate BSLD

In its decision authorizing BellSouth to provide in-region interLATA service in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, the FCC rejected AT&T's argument that BellSouth's SWA Contract Tariff violated Section 272 in discriminating in favor of BellSouth's long distance affiliate BSLD. That decision, reached on an expedited 90-day schedule and without discovery, noted that "if [BSLD] were eligible to obtain service under these or similar tariffs, [the Commission] could then address allegations that [the SWA Contract Tariffs] offer illegal growth discounts in violation of section 272."[7] AT&T believes that BSLD is eligible to take service under the growth Tariff or a similar arrangement and accordingly is continuing to pursue this claim.

Section 272(c)(1) "establishes an *unqualified prohibition* against discrimination by a BOC in its dealings with its section 272 affiliate and unaffiliated entities." *Non-Accounting Safeguards Order* ¶ 197 (emphasis added).[8] Moreover, Section 272(e)(3) expressly "require[s] the BOCs to charge nondiscriminatory prices" for telephone exchange service and exchange access. *Id.* ¶ 258. The Commission has explicitly ruled, in the context of its review of interstate switched access service tariffs, that a BOC may not adopt tariff rates employing so-called "growth discounts"[9] because such discounts will inevitably favor a BOC's section 272 affiliate over established IXCs, thereby violating the BOC's section 272 nondiscrimination obligations. *Access Charge Reform NPRM,* ¶ 192.[10]

BellSouth's growth discount Tariff opens the door to allow BellSouth to engage in precisely the conduct proscribed by Section 272. Under the Commission's pricing flexibility rules, an incumbent local exchange carrier ("ILEC") may provide a contract tariff to its long distance affiliate only if it first provides service under the same contract tariff to an unaffiliated carrier.[11] Because a carrier that is not affiliated with BellSouth now

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7 *In the Matter of the Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, WC Doc. No. 02-150, FCC 02-260, ¶ 274 (September 18, 2002). The Commission also explicitly acknowledged that AT&T could pursue its claims under Sections 201, 202, and 208. *Id.* at ¶ 274 n. 1061.

8 *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Telecommunications Act of 1934, as amended,* First Report and Order, CC Docket No. 96-149, 11 FCC Rcd 21905, 21998 (1996) ("*Non-Accounting Safeguards Order*").

9 "Growth discounts," as defined by the Commission, are "pricing plans under which incumbent LECs offer reduced per-unit access service prices for customers that commit to purchase a certain percentage above their past usage, or reduced prices based on growth in traffic placed over an incumbent LEC's network." *Access Charge Reform,* Notice of Proposed Rulemaking, CC Docket No. 96-262, 11 FCC Rcd 21354, 21437-38 (1996) *("Access Charge Reform NPRM").*

10 *See also Access Charge Reform,* Fifth Report and Order, CC Docket No. 96-262, 14 FCC Rcd 14221, 14294 (1999) (citations omitted, emphasis added) *("Access Charge Reform Fifth Report and Order").*

11 *See* 47 C.F.R. § 69.727(a)(2)(iii) ("Before the price cap LEC provides a contract tariffed service, under § 69.727(a), to one of its long-distance affiliates, as described in section 272 of the Communications Act

purchases service under BellSouth's growth discount Tariff, BellSouth is free to make the certification required under the regulations and then offer the same contract tariff to BSLD with its discriminatory growth discounts. Any plan by BellSouth to offer the growth tariff to BSLD would violate Section 272, as would the certification by BellSouth under the pricing flexibility rules that it offers the unlawful growth tariff to an unaffiliated third party.

Mr. Jeffrey King has held several discussions with Ed Matejick and you on the subject of growth tariffs over the past couple years. In May and June 2001, in meetings involving Mr. King, Mr. Matejick, and other representatives from both parties, the issue of growth tariffs was discussed, and AT&T expressed its objection to use of a growth discount instead of a straightforward volume discount that takes into account the efficiencies and cost savings associated with large volumes. More discussions were held specifically regarding the SWA Contract Tariff proposal in January 2002, but no resolution was reached on the issue at that meeting or at subsequent meetings held on February 8, 2002, February 21, 2002, March 5, 2002, or March 7, 2002. In addition, after the filing of the North Carolina SWA Contract Tariff, at the behest of the North Carolina Commission Staff, a meeting was held on June 11, 2002 at which BellSouth's growth tariff was discussed, but there has been no resolution of the matter.

Since that last meeting, the North Carolina Commission has cancelled the North Carolina SWA Contract tariff for being "biased" and "against the public interest," and BellSouth has withdrawn its Georgia state filing. BellSouth, however, has not been willing to remove the discriminatory impact of the growth discount and substitute a discount based on volumes alone.

Although AT&T would prefer to resolve this matter without the need for formal action, unless BellSouth responds in writing within 10 days of receipt of this letter, and agrees to negotiate in good faith to remove the discriminatory aspects of the SWA

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of 1934, as amended, or [47 C.F.R. § 64.1903, relating to separate subsidiary requirements of ILEC long distance affiliates], the price cap LEC certifies to the Commission that it provides services pursuant to that contract tariff to an unaffiliated customer."); *see also Access Charge Reform Fifth Report and Order*, 14 FCC Rcd at 14292, ¶ 129.

Contract Tariff that violate Sections 201(b), 202(a), and 272, AT&T intends to file a formal complaint with the FCC.

Yours sincerely,

Alan C. Geolot

cc: FCC:

Monica Desai
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