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TN REGULATORY AUTHORITY
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October 14, 2002

VIA HAND DELIVERY

The Honorable Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: *CLEC Coalition Petition to Suspend Tariff and to Convene a Contested Case Proceeding*
Docket No. 02-01073

Dear Chairman Kyle:

Enclosed please find the original and fourteen copies of BellSouth's Answer to CLEC Coalition Petition to Suspend Tariff and to Convene a Contested Case Proceeding in the above-referenced matter.

Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH/jej

Enclosure

465777

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re: *Petition To Suspend BellSouth Tariff No. TN2002-256 And To Convene A Contested Case Proceeding*
Docket No. 02-01073

BELLSOUTH'S ANSWER TO CLEC COALITION PETITION TO SUSPEND TARIFF AND TO CONVENE A CONTESTED CASE PROCEEDING

BellSouth Telecommunications, Inc. ("BellSouth"), hereby files its Answer to the CLEC Coalition Petition To Suspend Tariff And To Convene A Contested Case Proceeding, and states the following:

1. BellSouth denies each and every factual allegation of the Petition of the CLEC Coalition. Essentially, the Coalition contends that the current Tariff is designed to benefit a single carrier, and that it is discriminatory. Both of these claims are wrong. Further, while the Coalition makes passing reference to Tennessee law, its argument that the Tariff is discriminatory is based largely on the claim that the FCC has prohibited tariffs like the one at issue, which the Coalition mislabels a "growth tariff." This contention, however, is also wrong for two reasons: (1) the subject Tariff is not a growth tariff of the type that has been previously considered by the FCC; and (2) The FCC has never issued a blanket prohibition of growth tariffs.

2. Also, in the Petition, the Coalition contends that the Tariff at issue is the same in all practical respects as a switched access discount tariff that was previously filed by BellSouth in Tennessee, then withdrawn. The Coalition then goes on to conjecture that BellSouth's withdrawal of the first tariff was somehow based on the merits (or lack thereof) of the filing. Both the Coalition's contention that the two tariffs are the same and its conjecture as to why the first tariff was withdrawn are incorrect.

3. In general concept, the Tariff at issue operates by setting certain volume requirements for an interexchange carrier ("IXC" or "Carrier") to purchase from the Tariff. If a carrier does not qualify by having sufficient volume, then it is not eligible to buy from the tariff. If a carrier does qualify, then it may receive a discount by increasing the volume of its switched access purchases as set forth in the Tariff. If it fails to do so, however, there is no penalty. In this instance, the carrier would simply pay for access service at the tariffed rate that would otherwise apply. Thus, there is no commitment to purchase increased access services, nor is there any penalty for failing to do so. In essence, the plan simply provides an opportunity for carriers that purchase a certain volume of access services to receive a discount if they increase their purchases. Again, this option does not require a binding commitment of any sort.

4. Initially, BellSouth negotiated this arrangement with Sprint, and consequently, filed a Contract Tariff with the FCC for the interstate switched access service that Sprint would purchase. BellSouth also filed Contract Tariffs (in practical effect, contract service arrangements) in each of its nine states to memorialize the agreement with Sprint. The original structure of this Tariff filing was based on the requirements of the FCC that each discount plan be memorialized with each carrier and filed in the form of a separate contract tariff. Thus, BellSouth filed a contract tariff at the federal level for interstate service, then essentially mirrored the federal filing in the tariffs filed with the various states for intrastate service. These tariffs were approved and are currently in effect in six states in BellSouth's region.[1] Although the original contract tariffs (both federal and state) were based on Sprint's usage levels, BellSouth has always been willing to enter into comparable contracts with other carriers that have sufficient volume to qualify, based on that carrier's specific volume levels.

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[1] Alabama, Florida, Kentucky, Louisiana, Mississippi and South Carolina.

5. The Coalition argues that the tariff is designed to be available only to one carrier. This simply is not true. In fact, BellSouth withdrew the original tariff, and filed the subject Tariff in its current form, in large part, to make it completely clear that the volume-based discount is available to any qualifying carrier that wishes to make use of the plan.

6. BellSouth's plan allows for a discount from the otherwise available prices for switched access services on the basis of both the volume of services used and increases in the volume of services used. Again, this discount is available to every IXC with sufficient volume to qualify. More specifically, the plan, as detailed in the Tariff, functions as follows: for any carrier wishing to accept the plan, a minimum usage is established. Setting the minimum usage entails reviewing both the volume of usage and the usage patterns of the IXC over the previous 18 months, then projecting this usage forward for an additional 12 months. In order to be eligible for the discount plan, a carrier's minimum usage must be at least .1 billion minutes of use ("MOU") per year. Based on the volume of its minimum usage, (assuming it meets the above-described threshold), an IXC is eligible for one of three discount bands. In each band, there are specified percentage discounts that apply for usage that exceeds the minimum usage. Thus, the greater the carrier's volume of usage, the greater the potential discount (*see* page 3 of the Tariff for a more detailed description of the usage bands and the accompanying discount levels).

7. Again, the discount plan is based principally on volume, in two regards: (1) a minimum volume is necessary to qualify; (2) the discount is available on a per unit basis, which means that the greater the purchased volume, the greater the discount, as applied. The plan is also based in part on increases in volume. In other words, the greater the volume increase in usage above the minimum usage, the greater the discount.

8. BellSouth has structured this discount plan as a reasonable response to the current competitive market for switched access service. IXCs have available to them an unprecedented

array of alternatives to purchasing switched access services. Of course, special access arrangements have long been available, and continue to be so. Beyond this, an increasing number of IXCs are providing long distance service by obtaining access either through the use of their own facilities or the facilities of carriers other than BellSouth. It is for this reason that in February of 2001, the FCC granted BellSouth pricing flexibility in the offering of certain switched access services.[2]

Given the declining price of switched access service, and the increasing availability of competitive alternatives, BellSouth is attempting to provide a financial incentive to IXCs to not only purchase switched access service from BellSouth, but to increase the amount of these purchases.

9. Again, the discount plan is available to all IXCs. Moreover, it is structured so that the benefits to carriers (i.e., the inducement to increase the purchase of switched access from BellSouth) will be available to all. Specifically, BellSouth has set the discount so that the greater the percentage of the increase over the baseline usage, the greater the discount. Setting the discount based, in part, upon the percentage of increase allows both large and small IXCs to benefit financially from increasing the amount of service that they purchase from BellSouth. That is, even a relatively small IXC[3] that is unable to purchase switched access in volumes as great as the largest carrier can still obtain a discount by increasing proportionately the amount of its purchases.

10. At the same time, the discount plan does not include a penalty of any sort for a carrier that contracts to purchase services under the tariffed terms, but does not achieve the designated increases in volume. In this instance, the otherwise available rates would apply. In

2 Memorandum Opinion and Order, released February 27, 2001, FCC 01-76, Docket (CB/CP) No. 00-21 ("Pricing Flexibility Order").

3 The term "relatively small IXC" refers to a carrier that achieves the threshold of usage to qualify for the plan, but is small when compared to a dominant carrier such as AT&T.

other words, while the discount plan provides a lower rate for increases in levels of volume, it contains absolutely no penalty for a carrier that signs up for the plan, but whose subsequent usage is too small to qualify for the discount.

11. In granting BellSouth's request for pricing flexibility, the FCC set forth the requirement that flexible pricing plans entered into on a contract basis must be available in addition to the special access prices that would otherwise be available. (Pricing Flexibility Order, ¶ 6). This requirement is to ensure that no customer of the LEC "that has been granted [pricing] flexibility [will] be required to pay more than it would if the flexibility had not been granted." (*Id.*). BellSouth has complied with this requirement in its federal filings, and it has done the same in this case.

12. The Coalition contends that the Tariff discriminates against large IXCs such as AT&T because these carriers necessarily have "declining minutes of use (Petition, p. 4). Apparently, this contention is based on the fact that the volume of switched access services that AT&T has purchased from BellSouth in recent years has declined. However, this fact does not disqualify AT&T, if it elects to increase its purchases in the future. As described in the Tariff, discounts are given in a contract (of 36, 48 or 60 months) based on the percentage of incremental increase in use beyond the minimum usage (Tariff, p. 1). Again, the minimum usage is determined by looking at the purchasing trend of the IXC over the past eighteen months and projecting this trend forward for the next twelve months. The discount is then based upon the percentage by which the IXC exceeds this baseline usage.

13. Thus, an IXC that has purchased switched access service from BellSouth in increasing amounts over the past eighteen months would have a baseline usage that would reflect a projected increase over the next year, i.e., its baseline usage for discount purposes would be higher than its current usage. If, however, a given IXC's purchase of switched access from

BellSouth has declined over the past eighteen months (i.e. the AT&T situation), then this would be projected forward for the next twelve months in order to arrive at a baseline usage figure that would be lower than the current usage. To obtain a discount in the first year, that IXC would simply need to maintain its current usage. Thus, the formula, if anything, would benefit the IXC whose purchase volume during this eighteen month has declined, but that purchases more switched access from BellSouth in the future, i.e., the IXC that exhibits the future purchasing decisions that the Tariff is intended to encourage.

14. Beyond this, the Coalition's contention that the discounted Tariff offering is discriminatory appears to be based on its belief that the discount will be permanently unavailable to "carriers such as AT&T" because AT&T's purchase of switched access service from BellSouth will necessarily decline perpetually.[4] The Coalition also seems to imply not only that this result is a given, but that this result is entirely outside of AT&T's control. The contention, however, could only be true if two factors existed: (1) if AT&T is currently purchasing the absolute maximum amount of switched access from BellSouth that it can purchase (i.e., if it is eschewing all other alternatives), and (2) if AT&T is so doomed to fail in the future competition for long distance customers that AT&T's need for access to serve these customers will unavoidably decrease. AT&T has certainly not represented that either of these limiting factors exists.

15. In reality, the situation is simply that if AT&T anticipates that the amount of switched access that it purchases from BellSouth will decline in the future, then this is because AT&T has made a business decision to pursue other alternatives for access (and/or foresees only future market failures).

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[4] It is noteworthy that the current Coalition is composed of two members: the dominant IXC, AT&T, and a small carrier, Birch. Thus, when the Coalition contends that the Tariff discriminates in favor of "smaller carriers" it is apparently claiming that the Tariff would potentially discriminate against carriers such as AT&T and in favor of carriers such as Birch. It is noteworthy that similar petitions that have been filed in other states have been filed solely on behalf of AT&T.

16. Again, the purpose of this Tariff is to provide an incentive for IXC customers to remain on BellSouth's network and to increase their usage of BellSouth's switched network to serve their long distance customers. It is perfectly legitimate for BellSouth to create this incentive for IXCs through the subject Tariff. If AT&T does not care to take advantage of the offered discount, this in no way renders the Tariff discriminatory. AT&T's decision should also not provide a basis for it to prevent Sprint (or any other similarly situated IXC) from accepting the offer.

17. Four IXCs currently meet the Tariff's subscription threshold for intrastate usage in Tennessee: Sprint, AT&T, WorldCom and Qwest. The Coalition claim that the Tariff was designed for one carrier and is unavailable to others is clearly incorrect. Any of these carriers that make the business decision to increase the volume of switched access services they purchase may take advantage of this offer. Moreover, any IXC that reaches the usage threshold in the future may then subscribe as well.

18. The Coalition also claims that the subject Tariff is of a type that has been prohibited by the FCC. However, the FCC's rulings regarding growth tariffs are marketedly different from what the Coalition has represented them to be. First, the FCC has never considered the merits of a tariff like the subject BellSouth tariff. In other words, the BellSouth tariff is not a growth tariff as that term has been utilized by the FCC. In the Notice of Proposed Rulemaking, Third Report and Order and Notice of Inquiry,[5] the Commission provided the following example of a growth tariff:

> For example, if a buyer purchased $100 of services for a given three-month period, the seller's offer of a five percent discount on the buyer's purchase

[5] *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; Usage of the Public Switched Network by Information Service and Internet Access Providers,* CC Docket Nos. 96-262, 94-1, 91-213 and 96-263, *Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry,* 11 FCC Rcd 21354 (1996) ("*Access Reform NPRM*") .

> for the next three month period if the buyer committed to purchasing $120 worth of services during that time would be considered a growth discount.

(*Id.*, fn 251)(emphasis added).

In other words, a salient characteristic of the described discount is that the buyer must commit to the increase in future growth in order to obtain the discounted price. Presumably, this commitment would be in the form of a contractual obligation that would be breached if the growth were not achieved. BellSouth's proposed discount does not operate in this fashion. Instead, a carrier that has sufficient volume to qualify for the offering receives a discount if it increases the volume of services purchased. However, if the volume of purchases does not increase, there is no penalty whatsoever. Instead, the carrier would simply pay the non-discounted tariffed price.

19. Moreover, BellSouth's Tariff is, in fact, a volume-based tariff. The discount is not available to a carrier that does not have current annual purchases of a certain requisite volume of services. Also, the discount levels are based on usage bands. A greater volume of usage means a carrier qualifies for a higher band and a larger discount. The FCC has never considered a tariff of this sort. Thus, AT&T's contention that the FCC has prohibited, under the general rubric of "growth tariffs," an offering like the one at issue is simply wrong.

20. Further, the FCC has not issued a blanket prohibition of growth tariffs. Instead, the FCC has merely declined to approve certain growth tariffs that have been considered in the context of past proceedings. For example, in the *Access Reform NPRM,* the Commission merely expressed concern that growth discounts might be inappropriately advantageous to BOC affiliates under certain circumstances. As the FCC stated, "we are concerned that because BOC affiliates will begin with existing relationships with end users, name recognition, and no subscribers, they will grow much more quickly than existing IXCs and other new entrants." (*Access Reform NPRM*, Par. 192). The Commission also noted, however, that "some incumbent

LECs argued in comments filed in response to our *Price Cap Second NPRM,* that growth discounts could benefit smaller IXCs that do not qualify for volume discount." (*Id.*). The Commission did not reject growth tariffs at that juncture, but instead invited parties to provide evidence that, among other things, "growth discounts would not circumvent the safeguards of Section 272." (*Id.*). The specific tariffs at issue had been proposed by Ameritech and Bell Atlantic. Since no additional support for growth discounts was provided, the FCC subsequently concluded that "without any affirmative benefit to growth discounts presented in the record before us, we have no basis for allowing such discounts."[6]

21. Thus, the FCC has never ruled that growth tariffs are discriminatory <u>per se</u>, even growth tariffs of the sort that they <u>have</u> considered. At most, the FCC has expressed general concern that a growth discount <u>might</u> be structured in a way that benefits RBOC affiliates. At the same time, the FCC, while approving BellSouth's five state 271 application, specifically found that the BellSouth discount plan does <u>not</u> violate section 272.

22. AT&T responded to BellSouth's 271 application for five states, in part, by claiming that BellSouth's SWA tariff constitutes a § 272 violation. The FCC rejected this contention in a way that clearly demonstrates AT&T had no claim under federal law, and the Coalition has no claim here. Specifically, the FCC noted that AT&T had raised as an ostensible violation both BellSouth's federal (interstate) tariff, and the respective (intrastate) tariff for each of the five states subject to the 271 application. The FCC responded by stating unequivocally that "we reject AT&T's argument that BellSouth has violated Section 272 through its interstate

6 *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered By Competitive Local Exchange Carriers; Petition of US West Communications Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA,* CC Docket Nos. 96-262, 94-1 and 98-157 and CCB/CDD File No. 98-63, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, 14294, ¶ 135 (1999).

and intrastate switched access (SWA) tariffs."[7] The Commission also stated that "BellSouth contends that there is no Section 272 violation because BellSouth Long Distance is not eligible to take service under the tariffs at issue. We agree." (*Id.*, ¶ 274). The Commission noted that each of the tariffs contained language "expressly limiting the availability of the tariff only to customers that meet certain minimum usage requirements associated with the SWA service." (*Id.*).[8] The FCC also noted that the federal tariff (like the instant Contract Tariff) "mandates that customers must subscribe within 30 days of tariff's effective date." (*Id.*). The Commission observed the fact that BellSouth Long Distance did not meet the minimum usage requirement, and therefore found "that these BellSouth tariff offerings do not result in a Section 272 violation." (*Id.*).[9]

23. Finally, the FCC noted that AT&T has the option of pursuing its claim that the Tariff is discriminatory by a federal action pursuant to Sections 201, 202, or 208 of the Act. (*Id.*, Footnote 1061). To date, of course, AT&T has not brought such a claim before the FCC.

24. Of course, in our case, the Coalition has not invoked § 272 specifically, probably because the FCC's recent Order would render such a claim frivolous. The Coalition, however, does misstate federal law in its representation that the FCC has made a categorical ruling that growth tariffs are discriminatory. Further, the subject Tariff does not operate in a discriminatory fashion. To the contrary, the tariff provides any IXC with sufficient volume with the opportunity

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7 *In the Matter of 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 Docket No. 02-150, *Memorandum Opinion and Order*, FCC 02-260, ¶ 272 (rel. Sept. 18, 2002) ("*Memorandum Opinion*").

8 BellSouth Long Distance does not currently meet the usage threshold in Tennessee either.

9 Also, the Commission rejected AT&T's contention that action should be taken now because, if at some point in the future BSLD becomes eligible to obtain the switched access discount, this could become a Section 272 violation. Specifically, the FCC responded to this argument by stating that "we reject AT&T's contention that we should find a violation based on a hypothetical future contract with BellSouth Long Distance." (*Id.*, fn 1061).

to receive a discount on switched access service when it makes the business decision to increase its usage. Again, election of this option involves no commitment to increase access usage, and there is no penalty if the increase does not subsequently occur.

WHEREFORE, BellSouth respectfully requests that, for the reasons set forth above, the Authority enter an Order dismissing or denying the Petition and denying all relief requested therein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2002, a copy of the foregoing document was served on counsel for known parties, via the method indicated, addressed as follows:

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