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March 4, 1997

VIA OVERNIGHT DELIVERY

Blanca S. Bayo
Director, Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 961346-TP

Dear Ms. Bayo:

Enclosed please find an original and fifteen (15) copies of the Posthearing Brief and Statement of Issues and Positions of Telenet of South Florida, Inc. in the above-captioned proceeding. Copies will be served to the parties shown on the attached Certificate of Service.

Please date-stamp the enclosed copy of this filing and return it to me in the self-addressed, stamped envelope provided.

Very truly yours,

Douglas G. Bonner
Colin Alberts

Counsel for Telenet of South Florida, Inc.

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CERTIFICATE OF SERVICE
DOCKET NO. 961346-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Federal Express this 4th day of March, 1997 to the following:

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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Resolution of Petition(s) to Establish Right of Access of Telenet of South Florida, Inc. to Call Forwarding Lines Offered by BellSouth Telecommunications, Inc., and for Arbitration	))))	Docket No. 961346-TP Filed: March 5, 1997

POSTHEARING BRIEF AND STATEMENT OF ISSUES AND POSITIONS OF TELENET OF SOUTH FLORIDA, INC.

Telenet of South Florida, Inc. ("Telenet"), by its undersigned attorneys, pursuant to Rule 25-22.056, Florida Administrative Code, files this posthearing brief and statement of issues and positions in the Commission's arbitration proceeding to determine whether BellSouth Telecommunications, Inc. ("BellSouth")'s may sell its Call Forwarding service subject to the restrictions of Section A13.9.1A.1 of BellSouth's General Subscriber Service Tariff ("Tariff"). Pursuant to section III of the Prehearing Order, references herein to prefiled testimony will be to the page number of the Hearing Transcript ("Tr.") where it has been inserted.

Background

This Commission has before it the historic task of implementing local exchange competition in the State of Florida in accordance with the Telecommunications Act of 1996[1/] and Florida Statutes Chapter 364. Essential to the task of promoting local competition will be

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1/ 47 U.S.C. §151, *et. seq.* Public Law 104-104, 100 Stat. 56, approved February 8, 1996 (henceforth "1996 Act" or "Federal Act").

to ensure that alternative local exchange carriers ("ALECs") will effectively be able to resell BellSouth services without discriminatory and unreasonable restrictions. It will also be necessary to order the unbundling of the features, functions, and capabilities of the local exchange network so that the new entrant can determine whether economic efficiency requires that various features be obtained from BellSouth or be provided by the ALEC itself.

If BellSouth's tariff restriction barring the competitive use of call forwarding services by ALECs is upheld, an important segment of competition will be stifled, and Florida consumers will not enjoy the option of significantly lower prices for intraLATA local calling. The need for unbundling to foster local exchange competition is expressly provided for in Fla. Stat. § 364.161(1) which states that each LEC shall, upon request: "unbundle all of its network features, functions, and capabilities, including access to signaling databases, systems and routing processes, and offer them to any other telecommunications provider requesting such features, functions or capabilities for resale to the extent technically and economically feasible."

While the Florida Legislature properly provided for the unbundling of *all* features, functions, and capabilities to the extent technically and economically feasible, there are specific elements of the network that are absolutely essential to the development of competition. The Legislature recognized this and specifically identified several such features. Accordingly, the statute specifically requires unbundling of "systems and routing processes." *Id.* This includes the call forwarding services which Telenet has been purchasing from BellSouth since May of 1996.

The unbundling of call forwarding services is essential because BellSouth continues to enjoy dominant market power in the intraLATA toll market in Florida. This market power stems from the fact that BellSouth's network consists mostly of transmission facilities carrying the majority of intraLATA toll traffic, spread over wide geographic areas. This infrastructure was paid for by BellSouth customers over the course of the past century and constructed during that period with the benefit of an exclusive monopoly franchise, access to rights-of-way, unique tax treatment, access to buildings on an unpaid basis, and protection against competition. No new entrant can today construct a ubiquitous network on an economically viable basis, nor would the duplication of this entire network be efficient. Given this reality, the intraLATA network as a whole is an essential bottleneck facility for any potential provider of competitive local exchange service. Even large competitors such as AT&T and MCI must resell intraLATA toll. Composite Exhibit 4 at 95. The U.S. Congress recognized the importance of unbundling to competition and, therefore, required it in the 1996 Act. *See* 47 U.S.C. § 251(c)(3). Based on this rationale, call forwarding and the other elements requested by Telenet must be unbundled and made separately available without unreasonable and discriminatory restrictions as to their use.

Summary

Pursuant to the process established by statute, Telenet made requests starting in November 1995 that BellSouth provide it with call forwarding services, lines, and related services. Tr. at 80-82. The Commission determined in its Order denying BellSouth's motion to dismiss Telenet's petition that Telenet has alleged that it is seeking BellSouth elements on an unbundled basis. Commission Order No. PSC-97-0072-FOF-TP, January 23, 1997.

Under Fla. Stat. § 364.161(1), BellSouth is required to unbundle network elements to the extent "technically and economically feasible." All of the call forwarding elements requested by Telenet are already utilized by BellSouth customers. As the testimony submitted in this proceeding demonstrates, it is technically and economically feasible to unbundle these elements. As such, there is no question that BellSouth should be required to provide them on an unbundled basis. BellSouth's approach of inserting a discriminatory and anti-competitive tariff restriction for the use of call forwarding services, precluding its use for arbitrage purposes by competitors, would deprive Telenet (and other ALECs) of access to necessary services to provide services that will be competitive with BellSouth's current service offerings. This tariff restriction violates Section 251(c)(4) of the 1996 Act and Fla. Stat. § 364.161(2). As such, it fundamentally contravenes the intent of the U.S. Congress and the Florida Legislature to encourage the development of local exchange competition.

Call forwarding services must not only be offered by BellSouth but must also be made available without the existing use restrictions contained in BellSouth's tariff to ensure that ALECs such as Telenet may provide arbitrage benefits (i.e. cost-based services) to Florida consumers in the intraLATA toll market.

Argument

Issue 1: May BellSouth Telecommunications, Inc. sell its Call Forwarding service subject to the restrictions of Section A13.9.1A.1 of BellSouth Telecommunications, Inc.'s General Subscriber Service Tariff?

Summary of Position: *** No. BellSouth has a duty to resell call forwarding services to Telenet under 47 U.S.C. sections 251(b)(1) and (c)(4)(B). BellSouth's tariff restrictions on the

use of call forwarding services violate Florida and the 1996 Act. The restrictions are not in the public interest of providing competitive alternatives to Florida consumers. ***

Discussion:

A. The BellSouth Call Forwarding Tariff Restriction Violates the Mandatory Resale Provisions of the 1996 Act and Fla. Stat. § 364.161(2) and Should Be Rejected

BellSouth argues that Telenet's operations, particularly the use of multi-path call forwarding, violates of Section A13.9.1A.1 of BellSouth's General Subscriber Services Tariff. That Tariff provides in pertinent part:

> ...Call Forwarding shall not be used to extend calls on a planned and continuing basis to intentionally avoid the payment of in whole or in part, of message toll charges that would regularly be applicable between the station originating the call and the station to which the call is transferred.

However, BellSouth admits that because its tariff provision was filed before passage of the 1996 Act (and for that matter Fla. Stat. § 364.161(2)), this Commission has never before addressed whether BellSouth's Tariff provision is an unreasonable or discriminatory restriction in violation of the 1996 Act or Fla. Stat. § 364.161(2), which states that "*no local exchange telecommunications company may impose any restrictions on the resale of its services or facilities except those that the commission may determine are reasonable*" (emphasis added). Tr. at 160, 162. Furthermore, under 47 U.S.C. §§ 251(c)(4)(B) of the 1996 Act, BellSouth has "*[t]he duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of [their] telecommunications services,*" (emphasis added) and the Commission has not yet addressed the Tariff in the light of this provision. Moreover, it has

been FCC policy for almost twenty years to endorse such arbitrage practices as promoting lower consumer rates and improved services. *See Memorandum Opinion and Order,* Regulatory Policies Concerning Resale and Shared Use; ¶14; 62 F.C.C. 2d 588, at 596. (January 5, 1977); *Memorandum Opinion and Order,* Regulatory Policies Concerning Resale and Shared Use, ¶2, 83 F.C.C. 2d 167, at 168-9, ¶9, at 172 (October 21, 1980). As discussed above, BellSouth has inserted in its Tariff an unreasonable and discriminatory restriction on the resale of call forwarding services, the sole purpose of which can only be to preclude the resale of its services by competitors in the intraLATA toll market which BellSouth dominates.

Throughout this proceeding BellSouth has been remarkably consistent in its attempt to obscure these clear-cut state and federal directives with double talk that the tariff restriction in question is in fact not a restriction at all, but rather essential to the definition of the service. *See, e.g.*, Composite Exhibit 4 at 26-27, Tr.at 137, 176. Alternatively, BellSouth asserts that its restriction is reasonable allegedly to protect the integrity and efficiency of the network, because Telenet is avoiding payment of access charges due in violation of Fla. Stat. § 364.16(3), and because the Commission approved the Tariff when it was filed.

BellSouth cannot have it both ways. The tariff provision in question cannot be a restriction and not a restriction at the same time. BellSouth's contention that the provision is not a restriction but rather definitional is disingenuous, and a red herring. BellSouth's other arguments should be rejected, as being without merit, for the reasons discussed below.

1. The Tariff Provision is Certainly a Restriction as Contemplated by the Florida and Federal Statutes.

BellSouth's semantical argument that the Resale Arbitration provision is not meant to apply to the current dispute because the tariff language is not a restriction, and based on a selective reading of the statute. BellSouth focuses upon the language of "terms, conditions and prices" which the statute frames as the substance of disputes between ILECs and new carriers. *See* BellSouth Motion to Dismiss at 6, Tr. at 129, 141-2, 176.[2/] BellSouth then illogically argues that the very *denial* of tariffed services is somehow excluded from "terms" and "conditions," and thus not within the scope of the statute in question. Yet at the very outset of this proceeding, BellSouth undercut its own argument when it claimed that "the only sticking point is that Telenet wishes to resell these services in a manner that is *in direct contravention of the restrictions that are set forth* in the tariff..." BellSouth Motion to Dismiss ¶21; emphasis added.

2. BellSouth's Tariff Restriction is Not Reasonable Because Telenet's Use of Call Forwarding Is Technically Feasible and Presents No Threat to the Public Switched Network.

BellSouth raises the spectre of network congestion and the potential of systemic collapse as a result of Telenet's (and hypothetically other ALECs') usage of call forwarding services to set up virtual networks. See Composite Exhibit 4 at 51-53 and 87-90, Tr. at 131, 183-184. However, in its discovery responses and by its own witness' admission at the hearing, BellSouth admits that it has no evidence, and cannot claim, that Telenet's resale of

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[2/] BellSouth does not dispute, and readily admits, that the Resale Arbitration provision applies to disputes concerning requests to purchase unbundled network elements or services purchased for resale. BellSouth Motion to Dismiss at 6, ¶20.

call forwarding to bypass intraLATA toll is technically infeasible or will exceed BellSouth's network capability. *See* BellSouth's Response to Telenet Interrogatory No. 1, Tr. at 184. Therefore, BellSouth's argument that Telenet's use of call forwarding is for a purpose not 'designed" by BellSouth for the service injects an irrelevant consideration.

3. The Tariff Restriction is Not Reasonable Because Telenet is Not Liable for Access Charges to BellSouth.

Shifting its ground, BellSouth also argues that the tariff restriction is reasonable because provision of call forwarding services to Telenet would allow Telenet to avoid access charges it would be liable for pursuant to Fla. Stat. § 364.16(3)(a), which reads in part

> No ... alternative local exchange telecommunications company shall knowingly deliver traffic, for which terminating access service charges would apply, through a local interconnection arrangement without paying the appropriate charges for such terminating access service.

See, e.g., Tr. 132-133, 143-144. Ignoring the obvious flaw in BellSouth's allegation, which is that § 364.161(2) makes no reference to access charges in its standard of reasonableness, the argument still fails because § 364.16(3) does not implicate Telenet in any event. First, § 364.16(3) mandates terminating access charge payment by an ALEC where appropriate, in the context of an "interconnection arrangement." As BellSouth has repeatedly pointed out in this case, there is currently no interconnection agreement or "arrangement" in place between BellSouth and Telenet. Tr. at 163-164. Indeed, BellSouth insisted in writing in September 1996 that Telenet would have to execute a resale agreement to continue to resell call forwarding services. *See* Exhibit MAK-4. This fact alone is enough to render BellSouth's

reliance upon § 364.16(3)(a) for unpaid access charges from Telenet invalid.[3/] Also, even if one were to assume *arguendo* that terminating access charge reform is a component of the reasonableness and competitiveness of the tariff provision, and to assume further that there was an interconnection arrangement somehow, § 364.16(3)(a) still does not apply to Telenet's operations, as Telenet is not receiving traffic from interexchange carriers for which terminating access charges would apply. Telenet is a licensed Alternative Local Exchange Carrier[4/] acting entirely within the service territory of the incumbent LEC, BellSouth. BellSouth is providing service in all instances. Telenet is merely enhancing the local exchange services already provided by BellSouth for Florida consumers. Since there is no IXC involved, there is no question of terminating access charges being bypassed. Moreover, the Rules of the Florida Public Service Commission, Chapter 2-4, Part IV, governing the Classification of Telephone Exchanges and Extended Area Service, do not prohibit Telenet from defining its local service area as it has already done so in its Price List filed and accepted by the Commission.[5/]

As this Commission has recognized, the issue of defining respective local calling areas is a difficult one for determining if access charges are due. "The ALEC's local calling area

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[3/] This despite BellSouth's rather awkward attempts to manufacture an "interconnection arrangement" to meet the requirement of Fla. Stat. § 364.16(3)(a) out of thin air. As BellSouth's witness stated: "I believe in the *broad sense*, yes, we have [an interconnection arrangement]. *Not in the fullest sense* that we may have with a full facility-based carrier..." Composite Exhibit 4 at 49 (emphasis added).

[4/] Commission Order No. PSC-96-0538-FOF-TX, Docket No. 960043-TX, April 17, 1996.

[5/] Filed October 22, 1996, effective October 23, 1996.

may or may not be the same as the LEC's local calling area . . . a call that is local to the ALEC customer may be a toll call for a LEC customer. Florida Public Service Commission Order No. PSC-96-1231-FOF-TP, Docket No. 950985-TP (October 1, 1996) at 23 (The Commission took official notice of this Order during the hearing).

4. The Tariff Restriction is Not Reasonable Because it was Approved by the Florida Public Service Commission Before the 1995 Enactment of Fla. Stat. § 364.161 and the 1996 Act.

BellSouth also argues that because of the Commission's initial approval of its tariff, the provision has acquired the status of law, and thus is *ipso facto* reasonable. This of course ignores the fact that the Commission, during the course of a Complaint proceeding or during an Arbitration such as this proceeding, may choose to examine any part of a previously approved tariff to determine its reasonableness or discriminatory effect under *current* law. As BellSouth admits, its Tariff has not yet been viewed by the Commission through the glass of the 1996 Act or Fla. Stat. § 364.161 (1995). Tr. at. 160, 162. BellSouth acknowledges that it has the burden to demonstrate that its tariff restriction is reasonable and non-discriminatory under both § 251(c)(4)(B) of the 1996 Act and Chapter 364 of the Florida Statutes. Tr. at 176. BellSouth's argument is that call forwarding was not intended to "hop around . . . local exchanges" because (1) call forwarding would otherwise have to be repriced to account for the loss of intraLATA toll and (2) the switched local network was not intended for this usage. Pricing is not at issue in this proceeding. If BellSouth wishes to reprice its service it can attempt do that in another proceeding. As for network design, BellSouth is required to provide any service as long as it is technically feasible. Fla. Stat. § 364.161(1); 47 § 251(C)(3).

B. The Commission Should Order the Continued Use by Telenet of Call Forwarding Services as Mandated by the 1996 Act and Fla. Stat. § 364.161.

By "Call Forwarding" services, Telenet refers to a variety of arrangements that BellSouth, and nearly every other incumbent LEC in the nation, offers to end-users, which allow for the routing of incoming calls to be sent to another telephone number and location by means of dialing an appropriate code. BellSouth offers such arrangements in its Tariff. The unbundling of network elements (including "systems and routing processes") and the resale of services such as call forwarding are critical to the development of local exchange competition in Florida. The Legislature recognized the critical significance of unbundling routing services such as call forwarding by specifying "systems and routing processes" in Fla. Stat. § 364.161(1) as processes which must be unbundled by BellSouth.

This unbundling mandate is also set forth in §§ 251 and 252 of the 1996 Act. Section 153(29) of the 1996 Act defines "network element" as both "a facility or equipment used in the provision of a telecommunications service" and "features, functions, and capabilities that are provided by means of such facility or equipment." The FCC has interpreted this definition as allowing a competitive carrier to purchase the right to obtain exclusive access to an entire element (such as the local loop) or some feature, function or capability of the element (with respect to shared facilities such as common transport). *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order "FCC Interconnection Order"), pricing rules stayed on other grounds, *Iowa Utilities Bd. v. F.C.C.*, 1996 Westlaw 589204 (8th Cir. October 15, 1996), ¶ 258. The FCC also interprets this definition broadly, to include "facilities or equipment used in the provision

of a telecommunications service," and all "features, functions, and capabilities that are provided by means of such facility or equipment *including . . . databases, signaling systems . . .* used in the transmission, *routing*, or other provision of a telecommunications service." *Id.* ¶ 262 (emphasis added). Thus the definition includes software and elements sold directly to end users as retail services, such as call forwarding and caller ID.

BellSouth has continued to maintain throughout this proceeding that this dispute actually has nothing to do with unbundling. *See, e.g.*, Composite Exhibit 4 at 93-4 ("[Telenet is] not unbundling anything"). However, what Telenet has been doing, and seeks to continue to do, is engage in a form of competitive service analogous to what incumbent LECs derogatorily refer to as "sham unbundling."[6/] This term describes alternative, competitive carriers purchasing network elements separately from incumbents like BellSouth, and then proceeding to combine them, thereby creating a finished service. Although the incumbent LECs, including BellSouth, have chosen to call this process by the unsavory term "sham unbundling," resale is resale by any other name. BellSouth's witness admitted that "[n]either the [Federal] Act nor [Florida Statute Section] 364[.161] . . . specify" that a formal resale or interconnection agreement is required for a carrier to purchase call forwarding and then repackage it to its own customers, and for the arbitration process to apply in the instance of the failure of negotiations. Composite Exhibit 4 at 72. In the absence of a formalized resale agreement,

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6/ The FCC approved of this practice in the Interconnection Order, ¶¶ 328-341. Several state commissions have also approved of combinations of unbundled elements. Similarly, in this proceeding BellSouth has repeatedly attempted to describe Telenet's operations as unlawful "tariff arbitrage," a perfectly legitimate resale activity which the FCC has repeatedly found encourages cost-based rates and price competition benefitting consumers. *See* Tr. at 50-53.

BellSouth's witness conceded that Telenet "is reselling . . . Resale means to take a regulated telecommunication service and use it for profit. That's exactly what [Telenet is] doing." Composite Exhibit 4 at 94. BellSouth's witness further admitted that BellSouth's tariffs must comply with the above-cited controlling statutes with respect to the impermissability of restrictions on resale, and that BellSouth would have to modify its tariffs if the Commission were to find tariff provisions to be unreasonable, unjust or discriminatory restrictions. Composite Exhibit 4 at 101-102. The sum and substance, therefore, of BellSouth's position in this arbitration, is that the provision in Section A13.9.1A.1 of its Tariff does not constitute a restriction of the kind that the new telecommunications laws are meant to address and eliminate. "I don't even believe [the tariff provision is] a service restriction . . . [i]t is a fundamental component of the service." Composite Exhibit 4 at 26-27.

Fatal to BellSouth's claims, however, is that the 1996 Act explicitly provides that ALECs "shall" be allowed to "combine such [unbundled] elements in order to provide [a] telecommunication service." § 251(c)(3) emphasis added; 47 C.F.R. § 51.315(a). The 1996 Act does not specify any restriction that may be imposed on recombination of unbundled elements. In addition, the FCC Interconnection Rules, 47 C.F.R. §§ 51.311 & 51.315, expressly require that requesting carriers be permitted to purchase single and combined unbundled network elements -- without restriction -- in any manner that is technically feasible. See FCC Interconnection Order, ¶¶ 328-341. This FCC regulation has not been stayed by the Eighth Circuit.

This creation of a finished service by Telenet is a function of unbundling, and it is incumbent upon BellSouth to provide its services on a non-discriminatory, just, competitive

and reasonable basis pursuant to Fla. Stat. § 364.161 (read in its entirety), and the 1996 Act. The portions of the FCC Interconnection Order which have approved finished service unbundling have *not* been stayed by the Eighth Circuit in the decision referenced above, and remain in force and operative. This fact has recently been noted by, among others, the Oregon and Washington Commissions. *See In the Matter of the Investigation of the Costs of Providing Telecommunications Services*, Oregon Public Utility Commission Order No. 97-071, Docket No.UM-351 (February 20, 1997) at 9 (portion of FCC Interconnection Order endorsing procedure known as "sham unbundling" has not been stayed); *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and U S WEST Communications, Inc., et al.,* Washington Utilities and Transportation Commission, Order Approving Negotiated and Arbitrated Interconnection Agreement, Appendix A at 13 ("The Act, on its face, therefore, appears to expressly permit the combination of elements by a requesting carrier for the purpose of providing a telecommunications service"; 47 C.F.R. § 51.315(a), permitting combination of unbundled elements, is not subject to the Eighth Circuit stay).

The intraLATA service that Telenet is currently providing Florida consumers consists of two key components: (1) the lines, which provide the transmission path between customers in different counties, and (2) the multiplexing systems, which allow the interface to the switch, and the capability to originate, forward and terminate calls as Telenet's network requires. Unbundling the Call Forwarding services consists of physically unbundling the line and routing switch elements.

Specifically, BellSouth should immediately unbundle and make available on a nondiscriminatory basis all of its Call Forwarding services, including two separate elements: the lines, both standard (prestige services) and T-1 (Mega Link Channel Services) plus the routing factors and hardware, or special assemblies, that allow for multi path call forwarding.

In order for ALECs to offer effective competitive service in the intraLATA market, ALECs (such as Telenet) must be able to have access to the technical means by which they can offer low-priced services to residential and small- and medium-sized business customers for whom the cost and complexity of establishing similar ubiquitous land-line networks would not be possible. Tr. at 5-6. Accordingly, Telenet strongly urges the Commission to require BellSouth to offer call forwarding services and equipment without tariffed restrictions on competitive use of call forwarding services. Failing to order the unbundling of the services necessary for service offerings which can effectively compete with BellSouth's intraLATA toll services would result in the Commission undermining the Legislature's unbundling policies, and would severely limit the development of competition in South Florida.

Conclusion

BellSouth has an affirmative duty to resell call forwarding services to Telenet without imposing "unreasonable or discriminatory conditions" on such resale under 47 U.S.C. sections 251 (b)(1) and (c)(4)(B). BellSouth's restriction on the use of call forwarding services to bypass intraLATA toll in Section A13.9.1A.1 of BellSouth's General Subscriber Services Tariff is unlawful, as it violates Fla. Stat. § 364.161(1) and (2) and §§ 251(b)(1) and (c)(3) and (4) of the 1996 Act. No such use restriction is permissable under the 1996 Act, or the FCC Interconnection Order. This restriction is also clearly against the public interest of providing competitive low-cost alternatives to Florida consumers.

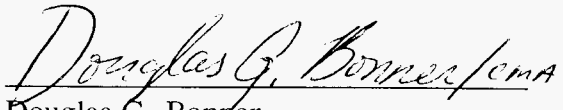
For the foregoing reasons, the Commission should

(1) Reject the use restriction in Section A13.9.1A.1 of BellSouth's General Subscriber Services Tariff;

(2) Order BellSouth to file an amended tariff to conform with para. (1); and

(3) Order BellSouth to provide continued call forwarding and attendant services to Telenet without use or quantity restrictions.

Respectfully submitted,



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Dated: March 5, 1997