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October 3, 2002

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Mrs. Blanca S. Bayo
Director, Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

RE: Docket No. 020738-TP (AT&T Switched Access Contract Tariff)

Dear Ms. Bayo:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Answer to, and Partial Motion to Strike, Amended Petition of AT&T Communications of the Southern States, LLC Requesting Suspension of and Cancellation of General Intrastate Access Tariff Filed by BellSouth Telecommunications, Inc. which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return a copy to me. Copies have been served to the parties shown on the attached certificate of service.

Sincerely,

J. Phillip Carver
J. Phillip Carver (KA)

Enclosures

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

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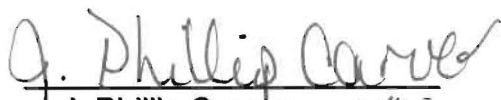
**CERTIFICATE OF SERVICE
DOCKET NO. 020738-TP**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and U.S. Mail this 3rd day of October, 2002 to the following:

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J. Phillip Carver (KA)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Amended Petition of AT&T)	
Communications of the Southern States,)	Docket No. 020738-TP
LLC for Suspension and Cancellation of)	
General Intrastate Access Tariff Filed by)	Filed: October 3, 2002
BellSouth Telecommunications, Inc.)	

BELLSOUTH TELECOMMUNICATIONS, INC.'S ANSWER TO, AND PARTIAL MOTION TO STRIKE, AMENDED PETITION OF AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC REQUESTING SUSPENSION OF AND CANCELLATION OF GENERAL INTRASTATE ACCESS TARIFF FILED BY BELLSOUTH TELECOMMUNICATIONS, INC.

BellSouth Telecommunications, Inc. ("BellSouth"), hereby files, pursuant to Rule 25-22.037, Florida Administrative Code, its Answer to the Amended Petition of AT&T Communications of the Southern States, LLC, and its Motion to Strike the portion of the Amended Petition in which AT&T demands an award of damages, and states the following:

I. INTRODUCTION AND SPECIFIC RESPONSES

1. AT&T has apparently filed its Amended Petition to replace the original Petition it filed in this proceeding on July 16, 2002. Although both the original Petition and the Amended Petition make essentially spurious claims, the original Petition at least did so in a relatively straightforward manner. The Amended Petition, in contrast, repeatedly violates the requirement of Rule 25-22.036 F.A.C., that a Petition shall contain "a concise statement of the ultimate facts alleged" (25-22.036(7)(a)4). The Amended Petition is a 33-page screed in which AT&T intermingles allegations (that are almost uniformly unsupported, and frequently untrue), citation to legal authority (frequently wrong), rank speculation and argument. Moreover, AT&T has done so in such a way that

makes it virtually impossible for BellSouth to specifically admit or deny any alleged “facts” that are buried within this harangue. Accordingly, BellSouth responds specifically to the Amended Petition in the only way that it can:

2. As to the preliminary allegations of Paragraphs 1 through 4, which relate principally to AT&T, BellSouth is without knowledge. Accordingly, these allegations are deemed to be denied.

3. As to all other factual allegations woven throughout the next thirty pages of argument, speculation, and rhetoric, specifically, paragraphs 5 through 51, BellSouth denies these allegations.

II. BELLSOUTH’S GENERAL RESPONSE AND STATEMENT OF FACTS

4. Apart from the regrettable form of the Amended Petition, the substance of AT&T’s Petition can be reduced to three assertions: 1) the subject BellSouth tariffs are growth tariffs; 2) the Federal Communications Commission (“FCC”) has prohibited all growth tariffs. Therefore, 3) the “legal authority” contained in opinions by the FCC prohibit the instant tariffs. Each element of AT&T’s argument, however, is clearly and demonstrably false. Beyond this, AT&T’s rambling discourse is devoted to either expanding on arguments contained in its first Petition, or attempting to rebut facts stated in BellSouth’s previous Answer. Rather than replowing all this old ground, BellSouth will simply incorporate herein by reference its previous Answer. Beyond this, BellSouth will focus primarily on AT&T’s new (and patently false) claim that BellSouth’s offering is “prohibited explicitly by the FCC.” (Amended Petition, p. 3).

5. AT&T's Petition makes no more than passing reference to Florida law. Specifically, AT&T vaguely alludes to five sections of the Florida Statutes, but fails to discuss the substance of any of them, and further fails to make any allegations of fact that, if proven, would establish a violation.¹ Instead, AT&T's Petition is premised entirely on the contention that the subject tariffs violate federal law, specifically §§ 47 U.S.C. 202 and 272. At the same time, AT&T also notes that BellSouth filed a comparable Contract Tariff with the FCC almost five months ago. This, of course, begs the question of why, if AT&T truly believes that BellSouth has violated federal law, it has not filed a claim before the FCC to this effect, but is, instead, arguing federal law before this Commission. The reality is that AT&T knows perfectly well that the FCC has not ruled as AT&T claims. One, the FCC has never even considered a tariff structured like the one here at issue. Two, even if BellSouth's tariff were a growth tariff of the sort previously addressed by the FCC (and it is not), the FCC has never ruled as AT&T claims, that all growth tariffs are prohibited by § 202.² Third, the FCC specifically rejected AT&T's argument that BellSouth's tariff violates § 272 in its recent Order granting BellSouth's 271 application for North Carolina, South Carolina, Kentucky, Mississippi and Alabama.

6. The pertinent facts that the Commission need consider to resolve the Amended Petition, and to conclude that a summary dismissal or denial of this Petition is required, are relatively limited and are very straightforward:

¹ For example, with no explanation whatsoever, AT&T makes the conclusory allegation that BellSouth has violated § 364.3381, which prohibits cross-subsidization between services. AT&T provides no clue as to how cross-subsidization could possibly be at issue.

² AT&T erroneously describes the FCC's rulings as a "conclusion that growth discounts and tariffs violate Section 202(a) of the Communications Act." (Amended Petition, p. 18).

(1) In 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 the 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 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.

(2) 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. In Florida, of course, BellSouth has also filed a similar offering to make clear that this same discount plan is generally available to any carrier that wishes to purchase it.³ The generally available tariff utilizes three usage bands, with the intention that a carrier’s particular discount will be based on the band into which it falls. Further, the subscription period of the discount is open-ended.

³ The Sprint specific tariff was based on a volume of usage specific to Sprint, and was for a limited time frame.

(3) BellSouth Long Distance (“BSLD”) is not eligible for either the specific or the general tariff. BSLD does not have the minimum usage necessary to qualify for the Contract Tariff, and it did not opt-into that tariff during the limited time frame in which it was available. As to the generally available tariff, BSLD’s current usage falls far short of the usage (.5 billion minutes of use per year) that is necessary for a carrier to qualify for the discount.

7. Although a good deal of AT&T’s Amended Petition is actually an attempt to respond to BellSouth’s Answer to its first Petition, AT&T has not denied any of the facts set forth above, nor can it deny these facts. Standing alone, these facts are sufficient to allow the Commission to conclude that AT&T’s Amended Petition is spurious and that it should be summarily denied.

III. BELLSOUTH’S TARIFFS ARE NOT CONTRARY TO FEDERAL LAW

8. Even before the FCC’s recent approval of BellSouth’s five-state 271 application, the FCC’s rulings regarding growth tariffs were marketedly different from what AT&T has represented them to be. In fact, establishing this point does not even require BellSouth to cite to any FCC orders to contradict the Orders cited by AT&T. Instead, this conclusion is plain on the face of the Orders cited (or more properly miscited) by AT&T.

9. First, the FCC has never considered the merits of a growth 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 cited by AT&T⁴, 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 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.

10. 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. 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.

⁴ *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").

11. Further, the FCC has not issued a blanket prohibition of growth tariffs. Instead, the FCC has simply 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.”⁵

12. Thus, the FCC has never ruled that growth tariffs violate Section 202, as AT&T claims. At most, the FCC has expressed general concern that a growth discount

⁵ *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).

might 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 not violate section 272.

13. 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 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 and intrastate switched access (SWA) tariffs."⁶ 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.*). 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.*).

⁶ *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*").

14. 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). Finally, the FCC noted that AT&T has the option of pursuing its claim that the tariffs are 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.

15. Thus, it is clear that the FCC specifically found that the SWA tariff⁷ does not discriminate in favor of BellSouth's affiliate because BellSouth's affiliate is not eligible for the tariff. The exact same set of facts pertain to the intrastate tariff filed in Florida, and these facts mandate that AT&T's claim be rejected here as well.

16. Decisions by other states applying their own standards, of course, are not binding on this Commission in any way, and are, therefore, of only limited assistance to this Commission. Still, it is worth noting that in its claims as to what has occurred in other states, AT&T also gives a false impression. First, although AT&T acknowledges that BellSouth has filed some form of its intrastate SWA tariff in nine states, it fails to mention that in five of these, neither AT&T nor any other party opposed the Contract Tariff filing, no one has subsequently complained, and the Tariff is currently in effect.⁸

⁷ The Contract Tariff here at issue is precisely the same as the tariffs considered by the FCC. The generally-available tariff is the same in all pertinent respects, and is, most importantly, identical in the fact that BSLD does not qualify for this tariff.

⁸ These states include Louisiana, South Carolina, Kentucky, Alabama and Mississippi. AT&T also appears to attempt to create the false impression that BellSouth's withdrawal of the Contract Tariff in Tennessee and Georgia constitutes some sort of substantive admission (Amended Petition, p. 11). In fact, in Tennessee, BellSouth withdrew the Contract Tariff, but replaced it with a generally available Tariff that

Further, AT&T has cited to the one state that has denied BellSouth's tariff, North Carolina, as if that Commission's ruling supports AT&T's claim in this case. This simply is not true.

17. Again, the entire basis of AT&T's opposition to the instant tariffs is the claim that they are unlawfully discriminatory, and, therefore, violate §§ 202 and 272. The ruling of the North Carolina Commission makes no reference whatsoever to § 202, § 272, or to any other federal law. Further, the North Carolina Commission expressly found that the BellSouth tariff was not "unreasonably discriminatory in the legal sense."⁹ The North Carolina Commission also stated that "as has been noted many times, [the tariff] would be available to any IXC which qualifies without distinction, and there is some logic in targeting IXCs who may seem to be most enthusiastic about purchasing one's product." (Order, p. 5). Instead, the North Carolina Commission ruled (for reasons that are largely unexplainable), that the version of BellSouth's such tariff at issue in that proceeding was not in the public interest.¹⁰

18. In our case, AT&T has not claimed that BellSouth's tariffs violate the public interest according to the standards that pertain in Florida, either generally or under the specific rules of this Commission. Thus, AT&T has not raised what was the sole basis in North Carolina for that Commission's decision not to approve BellSouth's tariff. Instead, AT&T is relying solely upon a claim of discrimination that the North Carolina Commission rejected, and that the FCC has rejected, albeit for different reasons.

was filed on September 13, 2002. At this time, BellSouth plans a comparable Tariff filing in Georgia as well.

⁹ *In the Matter of Complaint for Anticompetitive Activity and Motion to Find Tariff Noncompliant or Suspend Tariff*, Docket Nos. P-55, Sub 1365, and Sub 1366, Order Disapproving Proposed Tariff, issued August 13, 2002, p. 5.

¹⁰ At the same time, of course, this is one of the tariffs that the FCC previously found in the aforementioned Memorandum Opinion not to be in violation of Section 272.

19. Given the controlling legal authority, and the uncontroverted facts, it is clear that AT&T's claim that BellSouth's tariff is discriminatory has no merit whatsoever. For this reason, the Commission should summarily deny AT&T's Amended Petition.

MOTION TO STRIKE

20. Perhaps the most alarming portion of AT&T's Amended Petition occurs when, hidden away at the end of the Prayer For Relief, AT&T makes what amounts to a demand that the Commission unlawfully coerce BellSouth to provide AT&T with a discriminatory discount of a type that it has long demanded. As BellSouth stated in its original Answer, AT&T's real motivation in this proceeding is to attempt to coerce BellSouth into providing it with a "pure volume" discount for the simple reason that a discount based solely on volume would benefit AT&T, as the largest carrier, far out of proportion to any other IXC. In other words, AT&T desires a pure volume discount because this discount would have the effect of discriminating in AT&T's favor. AT&T has been clear throughout negotiations with BellSouth that this is the only discount that it will accept, and it has admitted as much in its pleadings in North Carolina.¹¹ AT&T's improper motive is once more confirmed by a demand that AT&T has slipped into its pleading on the final page. Specifically, on page 32 of the Amended Petition, AT&T demands in its Prayer For Relief that,

. . . The Commission find and order that BellSouth shall pay damages to AT&T measured as the difference between the amount AT&T paid (or will pay) for intrastate access services and the amount AT&T should have paid, assuming AT&T's absolute volumes (not growth) would

¹¹ In a rare moment of candor, AT&T stated in North Carolina that "BellSouth is correct that AT&T seeks greater discounts than those granted by BellSouth to 'other competitive carriers having less volume of usage.'" (AT&T Reply Comments, p. 12).

exceed the volumes that triggered discounts of the carriers under general tariff.

21. To begin with the most obvious aspect of this ridiculous demand, it is not legally tenable for the simple reason that this Commission does not have the legal authority to award monetary damages. Further, even if the Commission had the ability to award damages, there is absolutely no legal theory to support the contention that AT&T has been (or will be) damaged in some way that corresponds to what it would have paid for access services if it had been subject to a pure volume discount that exists only in AT&T's dreams. This demand for relief is clearly frivolous, is legally unsupportable, and should be summarily stricken.

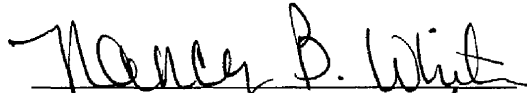
22. Paradoxically, what this plea for relief does do is demonstrate one more time that AT&T's clear motivation in this proceeding is to utilize procedural gamesmanship as a means to attempt to coerce BellSouth into providing it a pure volume discount that would have the effect of discriminating in favor of AT&T.

23. In general, the appropriate course is for the Commission to summarily deny AT&T's Amended Petition in its entirety. If, however, the Commission allows this case to proceed, the Commission should, at a minimum, immediately strike AT&T's request for damages. The plea for damages is legally untenable in that, even if AT&T were to prevail entirely on its claim, the Commission lacks the legal authority to award monetary damages. Moreover, even if the Commission had such authority, there is absolutely no legal theory that would support an award of monetary damages under the bizarre calculation method described by AT&T. For this reason, in the event that the remainder of the Amended Petition is not summarily denied, the request for damages should be summarily stricken.


WHEREFORE, BellSouth respectfully requests the entry of an Order denying AT&T's Amended Petition in its entirety.

Respectfully submitted this 3rd day of October, 2002.

BELLSOUTH TELECOMMUNICATIONS, INC.



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