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November 20, 2002

BY HAND DELIVERY

Ms. Blanca Bayó, Director
The Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 020738-TP

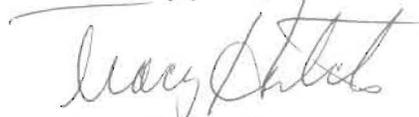
Dear Ms. Bayó:

On November 15, 2002 AT&T Communications of the Southern States, LLC filed their Response to Staff's Data Request in the above referenced docket. After filing, we noted that Attachments 1 and 2 were not included with the filing. Enclosed are three copies of Attachments 1 and 2 to be included with the Response. A copy of these attachments have been served on Staff.

Please acknowledge receipt of this letter by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,



Tracy W. Hatch

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Enclosure

cc: Lee Fordham, Esq.

Mr. Michael Barrett

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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.

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.

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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

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).

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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 F.3d 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.

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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

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

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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

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.

SIDLEY AUSTIN BROWN & WOOD LLP

WASHINGTON, D.C.

Mr. Jerry Hendrix

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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
Vienna Jordan
Judith Nitsche
Tamara Preiss
Deena Shetler
Alexander Starr
Joshua Swift

BELLSOUTH TELECOMMUNICATIONS, INC.
LEGAL DEPARTMENT
4300 BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, Georgia 30375
FAX: (404) 614-4054

Facsimile Cover Page

Date: 10/11/02

To: Alan C. Geolot

FAX NO: 202-736-8711

From: Angela N. Brown
Regulatory Counsel-BellSouth

NO. OF PAGES: 7
(including cover)

RE: BellSouth Transmittal No. 637

MESSAGE:

Please deliver to Mr. Alan C. Geolot. Thanks for your assistance.

Nita Lee
Legal Secretary - BellSouth

THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL TO WHOM, OR ENTITY TO WHICH, IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US IMMEDIATELY BY TELEPHONE (COLLECT), AND DESTROY THE ORIGINAL MESSAGE. THANK YOU.

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BellSouth Telecommunications, Inc.
Room 34501 BellSouth Center
875 West Peachtree Street, N.E.
Atlanta, Georgia 30375

**VIA CERTIFIED MAIL
AND FACSIMILE (202) 736-8711**

October 11, 2002

Mr. Alan C. Geolot
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005

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

Dear Mr. Geolot:

This letter responds to your correspondence dated October 2, 2002, in which you assert that the federal Switched Access ("SWA") Contract Tariff¹ filed by BellSouth Telecommunications, Inc. ("BellSouth") on May 17, 2002 violates several provisions of the Communications Act of 1934, as amended ("Act").² As explained more fully herein, BellSouth's interstate SWA Contract Tariff is lawful and fully consistent with the Act. Accordingly, BellSouth must respectfully decline to withdraw or modify its SWA Contract Tariff as requested by AT&T Corp. ("AT&T"). BellSouth, however, has been – and continues to be – willing to work with AT&T to try to resolve this issue in a manner mutually acceptable to both parties.

I. BACKGROUND

The Contract 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

¹ BellSouth Telecommunications, Inc., Transmittal No. 637, F.C.C. Tariff No. 1, Section 26, BellSouth SWA Contract Tariff No. 2002-01 (effective May 18, 2002).

² Letter from Alan C. Geolot, Sidley Austin Brown & Wood LLP, to Jerry Hendrix, Assistant Vice President – Regulatory Policy and Operations, BellSouth Telecommunications, Inc., Re: BellSouth Interstate Switched Access Contract Tariff 2002-01, Transmittal No. 637 (dated October 2, 2002) ("AT&T Letter").

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qualify, then it may receive the discount by increasing the volume of its switched access purchases as set forth in the tariff. If the carrier does not increase its volume, however, there is no penalty. In such an 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.

Initially, BellSouth negotiated this arrangement with Sprint, and consequently, filed a Contract Tariff with the Commission 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 this agreement with Sprint.³ Although the original contract tariffs (state and federal) were based on Sprint's usage levels, BellSouth has always been willing to enter into comparable contracts with other carriers (including AT&T) that have sufficient volume to qualify, based on that carrier's specific volume levels. As AT&T points out, BellSouth has participated in several negotiation meetings with AT&T in an effort to reach a mutually acceptable outcome.⁴

II. BELLSOUTH'S SWA CONTRACT TARIFF IS LAWFUL AND FULLY CONSISTENT WITH THE LAW.

AT&T claims that BellSouth's interstate SWA Contract Tariff violates federal law, specifically Sections 201(b),⁵ 202(a),⁶ and 272⁷ of the Act. AT&T asserts that BellSouth's interstate SWA Contract Tariff violates Sections 201 and 202 by discriminating against established interexchange carriers.⁸ In addition, AT&T claims that BellSouth's tariff discriminates in favor of BellSouth's long distance affiliate, BellSouth Long Distance ("BSLD"). For the reasons set forth below, AT&T is wrong. BellSouth's SWA Contract Tariff is lawful and fully consistent with the Act.

As an initial matter, contrary to AT&T's assertions, the instant Contract Tariff is a volume and term discount tariff, not a growth discount tariff. Volume and term discounts of the type at issue here are completely lawful and were expressly authorized as part of the pricing

³ The state tariffs essentially mirrored the federal filing. These tariffs are in effect in six states in BellSouth's region - Alabama, Florida, Kentucky, Louisiana, Mississippi, and South Carolina.

⁴ See AT&T Letter at 5.

⁵ Section 201(b) requires carriers to provide service on terms that are just and reasonable. 47 U.S.C. § 201(b).

⁶ Section 202(a) prohibits carriers from engaging in unjust or unreasonable discrimination. 47 U.S.C. § 202(a).

⁷ Section 272(c)(1) prohibits a BOC from discriminating in favor of its affiliate in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards. 47 U.S.C. § 272(c)(1).

⁸ AT&T Letter at 3.

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flexibility granted to price cap local exchange carriers.⁹ The Commission has concluded that BellSouth has made the competitive showing necessary to satisfy the Phase I conditions for pricing flexibility.¹⁰ As a result, BellSouth is permitted to offer contract tariffs and negotiate volume and term plans for those competitive services as it has done here.

AT&T's characterization of BellSouth's tariff as a growth tariff therefore is misleading. In the *Notice of Proposed Rulemaking, Third Report and Order and Notice of Inquiry*¹¹ cited by AT&T,¹² 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.¹³

This example clearly demonstrates that 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. Clearly, BellSouth's volume-based SWA Contract Tariff is distinguishable from the example above and thus does not constitute a growth tariff as previously defined by the Commission.

Even if the instant tariff were of the sort previously addressed by the Commission (and it is not), the Commission has never ruled that all growth tariffs are *per se* unlawful and

⁹ *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 U S West Communications, Inc. For Forbearance from Regulation as a Dominant carrier in the Phoenix, Arizona MSA, CC Docket Nos. 96-262, 94-1, 98-157; CCB/CPD File No. 98-63, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14289, ¶ 124 (1999) ("Access Reform Order").*

¹⁰ *In the Matter of BellSouth Petition For Phase I Pricing Flexibility for Switched Access Services, Memorandum Opinion and Order, CCB/CPD No. 00-21, 16 FCC Rcd 5040 (2001).*

¹¹ *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").*

¹² AT&T Letter at 4.

¹³ *Access Reform NPRM, 11 FCC Rcd at 21437, n.251 (emphasis added).*

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discriminatory. Instead, the Commission 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 expressed concern that growth discounts might be inappropriately advantageous to Bell Operating Company ("BOC") affiliates under certain circumstances. As the Commission stated, "[w]e 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."¹⁴ The Commission also noted, however, that "[s]ome 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 discounts."¹⁵ 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."¹⁶ The specific tariffs at issue had been proposed by Ameritech and Bell Atlantic. Since no additional support for growth discounts was provided, the Commission subsequently concluded that "without any affirmative benefit to growth discounts presented in the record before us, we have no basis for allowing such discounts."¹⁷ Thus, the Commission has never ruled that growth tariffs are a *per se* violation of Sections 201 or 202. At most, the Commission has expressed general concern that a growth discount might be structured in a way that benefits a BOC's affiliate.

Just as AT&T's argument that BellSouth's SWA Contract Tariff violates Sections 201 and 202 must fail, so must the assertion that BellSouth's tariff violates Section 272. The Commission specifically rejected this argument in its recent order granting BellSouth's Section 271 application for Alabama, Kentucky, Mississippi, North Carolina, and South Carolina.¹⁸ The Commission stated unequivocally, "[w]e reject AT&T's argument that BellSouth has violated Section 272 through its interstate and intrastate switched access (SWA) tariffs."¹⁹ The Commission further stated that "BellSouth contends that there is no Section 272 violation

¹⁴ *Access Reform NPRM*, 11 FCC Rcd at 21437-38, ¶ 192.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *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).

¹⁸ *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, ¶¶271-274 (rel. Sept. 18, 2002) ("*BellSouth Alabama, et al. 271 Order*").

¹⁹ *BellSouth Alabama, et al. 271 Order*, ¶ 272.

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because BellSouth Long Distance is not eligible to take service under the tariffs at issue. We agree."²⁰ The Commission noted that the federal SWA Contract Tariff contains language "expressly limiting the availability of the tariff only to customers that meet certain minimum usage requirements associated with the SWA service."²¹ The Commission also noted that the federal tariff "mandates that customers must subscribe within 30 days of the tariff's effective date."²² The Commission observed the fact that BSLD did not meet the minimum usage requirement, and therefore found "that these BellSouth tariff offerings do not result in a Section 272 violation."²³

In addition, 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 Commission responded to this argument by stating: "[w]e reject AT&T's contention that we should find a violation based on a hypothetical future contract with BellSouth Long Distance."²⁴ Obviously, AT&T has taken the Commission up on its invitation to pursue a claim under Sections 201, 202, or 208 of the Act.²⁵ Notwithstanding AT&T's most recent effort, the end result is the same – BellSouth is not in violation of Section 272.

Nothing has changed since the Commission approved BellSouth's five-state Section 271 application. BSLD continues to be ineligible to purchase switched access service from the federal SWA Contract Tariff. Not only does BSLD not have the minimum usage necessary to qualify for the federal tariff, but also the subscription period for the tariff has expired thereby eliminating the ability of BSLD to become a customer.

As a final matter, AT&T's reliance on the North Carolina Utilities Commission's ("NC Commission") order disapproving the SWA tariff in North Carolina is misplaced. AT&T has cited to the one state that has denied BellSouth's tariff, North Carolina, as if that state commission's ruling supports AT&T's claims of discrimination. Again, AT&T's allegations are without merit.

The entire basis of AT&T's opposition to the instant federal and state tariffs is the claim that they are unlawfully discriminatory, and, therefore, violate Sections 201, 202, and 272. The ruling of the NC Commission makes no reference whatsoever to Sections 201, 202, 272, or to any other federal law. Further, the NC Commission expressly found that the BellSouth tariff was

²⁰ *BellSouth Alabama, et al. 271 Order*, ¶ 274.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*, ¶ 274, n. 1061.

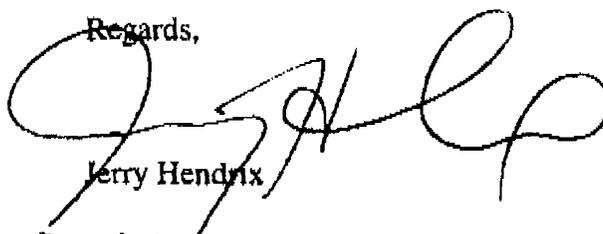
²⁵ *Id.*

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not "unreasonably discriminatory in a legal sense."²⁶ The NC Commission also stated that "[a]s 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."²⁷ The NC Commission ultimately ruled (for reasons that are largely unexplainable), that the version of BellSouth's tariff at issue in that proceeding was not in the public interest.²⁸ Thus, AT&T is relying solely upon a claim of discrimination that the NC Commission has rejected, and that the Commission has rejected, albeit for different reasons.

Given the controlling legal authority, and the uncontroverted facts, it is clear that AT&T's claims that BellSouth's federal (and state) SWA contract tariffs are discriminatory and anticompetitive have no merit. For the reasons set forth above, BellSouth must respectfully decline to withdraw or modify its SWA Contract Tariff as requested by AT&T. BellSouth, however, has been – and continues to be – willing to work with AT&T to try to resolve this issue in a manner mutually acceptable to both parties. Accordingly, Mr. Ed Matejick from BellSouth will be contacting Mr. Jeffrey King from AT&T within the next week to arrange a meeting to discuss this issue.

Regards,



Jerry Hendrix

cc: Federal Communications Commission
 Monica Desai
 Vienna Jordan
 Judith Nitsche
 Tamara Preiss
 Deena Shetler
 Alexander Starr
 Joshua Swift

²⁶ *In the Matter of Complaint for Anticompetitive Activity and Motion to Find Tariff Noncompliant or Suspend Tariff; In the Matter of Tariff Filing by BellSouth Telecommunication, Inc. to Establish Contract Rates for Switched Access Rate Elements*, Docket Nos. P-55, Sub 1365, and Sub 1366, *Order Disapproving Proposed Tariff*, issued August 13, 2002, at 5 ("NCUC Order").

²⁷ NCUC Order at 5.

²⁸ At the same time, of course, this NC tariff is one of the tariffs that the Commission concluded did not violate Section 272 in the aforementioned *BellSouth Alabama, et al. 271 Order*. See *supra* note 18.