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Blanca S. Bayo, Director
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Re: Docket No. 981052-TP

Dear Ms. Bayo:

Enclosed for filing and distribution are the original and fifteen copies of the Telephone Company of Central Florida, Inc.'s Post-Hearing Statement of Issues and Positions and Post-Hearing Brief in the above docket.

Please acknowledge receipt of the above on the extra copy enclosed herein and return it to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

VGK/pr
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Telephone Company of Central Florida, Inc. for resolution of items under dispute in resale agreement with BellSouth Telecommunications, Inc.	)))))	Docket No. 981052-TP Filed: March 2, 1999

THE TELEPHONE COMPANY OF CENTRAL FLORIDA, INC.'S POST-HEARING STATEMENT OF ISSUES AND POSITIONS AND POST-HEARING BRIEF

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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TABLE OF CONTENTS

TABLE OF CITATIONS

Preliminary Statement

The Telephone Company of Central Florida, Inc. files its Post-hearing Statement of Issues and Positions and its Post-Hearing Brief.[1]

Introduction

TCCF is a small reseller, with less than 25 employees. It was one of the first companies to sign a Resale Agreement with BellSouth in the spring of 1996. Since that time, TCCF has been engaged in a David and Goliath struggle with BellSouth on several fronts.

First, TCCF has attempted to require BellSouth to perform under its current Resale Agreement, particularly as it pertains to the provisioning of ESSX services. As the testimony clearly shows, though BellSouth had a clear obligation to provide ESSX to TCCF for resale, it failed to do so, necessitating the complaint portion of this case.

Second, TCCF has tried to negotiate a new Resale Agreement (at BellSouth's request) containing reasonable terms and conditions. Despite TCCF's efforts, BellSouth seeks to impose exorbitant charges for the use of OSS that do not function correctly, as well as to impose charges for manual processing due to the fact that BellSouth has no electronic systems in place for certain orders. In addition, to remedy BellSouth's failure to provide ESSX, TCCF seeks to provide that service under the new Resale Agreement. BellSouth has predictably refused, thus necessitating arbitration of these issues.

If the Commission (and consumers) are to see any local competition, the Commission

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[1] The following abbreviations are used in this brief. The Telephone Company of Central Florida, Inc. is referred to as TCCF. The Florida Public Service Commission is referred to as the Commission. BellSouth Telecommunications, Inc. is called BellSouth. Operational support systems are referred to as OSS.

must hold BellSouth's "feet to the fire." It should not permit BellSouth to use its extraordinary size and resources to strangle attempts by small carriers to provide local service.

Summary of TCCF's Position

Section 251(c)(4) and section 252(d)(3) of the Telecommunications Act of 1996 (Act) require BellSouth to offer its telecommunications services for resale. Though BellSouth was obligated to provide ESSX for resale to TCCF pursuant to these provisions, it has failed to do so during the term of the current TCCF/BellSouth Agreement. Thus, BellSouth is in violation of the Act. The only remedy TCCF has is for the Commission to order BellSouth to provide ESSX service for resale under the new Agreement or to require BellSouth to provide its substitute for ESSX (MultiServ) at the same price as ESSX.

The Act also requires BellSouth to develop and provide access to nondiscriminatory OSS. Thus far BellSouth has failed to do so. Rather, as TCCF's testimony shows in detail, BellSouth touts systems which, despite BellSouth's claims to the contrary, do not work when real people in the real marketplace attempt to process orders. To add insult to injury, BellSouth now wants to *charge* for the use of electronic systems which it is BellSouth's responsibility to provide. Further, where BellSouth does not have appropriate electronic systems, it wants to impose a *charge of $20.08 per order*! The Commission should not countenance such a request.

Argument

Complaint

ISSUE 1

HAS BST PROVIDED TCCF WITH ESSX SERVICE IN COMPLIANCE WITH THE PARTIES' RESALE AGREEMENT FOR PERIODS OF TIME NOT COVERED BY SETTLEMENTS AND ADJUSTMENTS MADE REGARDING ESSX? IF NOT, WHAT ACTION, IF ANY, SHOULD THE COMMISSION TAKE?

TCCF Position: *No. BellSouth has not provided TCCF with ESSX in compliance with the Resale Agreement. BellSouth has never been able to adequately provision ESSX resulting in continual disruption for TCCF customers. To remedy BellSouth's nonperformance, TCCF should be permitted to resell ESSX in the new Resale Agreement.*

TCCF's Business Plan

As a small reseller, TCCF knew going into the marketplace that it would have to have something unique to offer to consumers. That unique product was ESSX and TCCF's Business Plan called for it to primarily resell ESSX. (Tr. 50-51; Exhibit No. 3, ENR-4). BellSouth was well aware of TCCF's Business Plan. (Tr. 18). There was no secret about what TCCF was trying to accomplish (Tr. 16, 27) nor was there any secret that the price of ESSX would allow TCCF to be successful in the Florida market. (Tr. 28, 35-36, 202-203). BellSouth agreed to make the Resale Agreement effective on May 28, 1996[2] and BellSouth was well aware that ESSX was not a grandfathered service at that time. (Tr. 201).

If BellSouth had properly provisioned ESSX for resale, TCCF would have been able to provide ESSX at a lower price while still making a profit. TCCF could also have offered long

[2] There was nothing nefarious about this execution date, as BellSouth tries to imply. TCCF had always planned to resell ESSX and BellSouth knew it. (Tr. 330, 332).

distance and put all services on one bill. (Tr. 18). If BellSouth had fulfilled its part of the bargain, customers would have had lower rates, TCCF would have had a successful business and BellSouth would have retained the resale revenue. (Tr. 18, 67). And, a small measure of competition would have been brought to the local market. However, BellSouth continually failed to live up to its obligations, causing great harm to TCCF and impeding local competition. (Tr. 18).

BellSouth's Obligation to Provide ESSX for Resale

The original Resale Agreement between TCCF and BellSouth was executed on May 28, 1996. (Tr. 103; Exhibit No. 8, AKW-1). Paragraph III A of the Agreement clearly provides that all types of Centrex services are available for resale. This provision required BellSouth to provide a working ESSX Centrex network. (Tr. 18). Such network was described and confirmed by BellSouth's Charlotte Webb on May 31, 1996. (Exhibit No. 3, ENR-6). Further, on May 29, 1996, BellSouth accepted TCCF's formal service request for 201 line ESSX agreements for 73 months. (Exhibit No. 3, ENR-5).

To avoid any doubt, the availability of ESSX for resale was confirmed over and over again by BellSouth personnel. For example, on July 9, 1996, BellSouth's Wade Johnson wrote to TCCF and said:

> BellSouth and the Telephone Company of Central Florida, Inc. have entered into a contractual agreement whereby the Telephone Company of Central Florida may purchase BellSouth Telecommunications services, *such as BellSouth's ESSX(r) service, for resale purposes.*

(Exhibit No. 3, ENR-1, emphasis supplied). The availability of ESSX for resale was also confirmed by BellSouth's Jerry Hendrix who wrote to TCCF on April 18, 1997 (almost a year after the execution of the Resale Agreement) and said:

> . . . [I]n compliance with the Resale Agreement entered into between TCCF and BellSouth effective May 28, 1996, *BellSouth will honor your request for additional ESSX lines.*

(Exhibit No. 3, ENR-2, emphasis supplied). Further, at hearing, Mr. Hendrix admitted that BellSouth was obligated to provide TCCF with ESSX for resale in the way TCCF requested. (Tr. 204-205).

In addition, BellSouth's own behavior in dealing with TCCF regarding ESSX confirms that BellSouth was well aware of its obligation to properly provision the service. If BellSouth had no obligation to provision ESSX, why did BellSouth continue to meet with TCCF and superficially respond to TCCF's numerous complaints regarding the lack of appropriate provisioning over the past two and one-half years? (Exhibit No. 3, ENR-7, 9; Exhibit No. 6, KEK-1-28).

It should be clearly noted that in none of the correspondence or conversations regarding ESSX over the past two and one-half years was TCCF *ever* told that BellSouth's position was that TCCF had no right to sell ESSX after May 30, 1996 or that the ESSX service TCCF sought to resell was somehow "non-standard." These were positions raised for the first time at this hearing.

BellSouth's Failure to Fulfill Its Obligation to Provision ESSX

Despite TCCF's good faith attempt to enter the marketplace and the hollow promises of BellSouth, TCCF was in for a rude awakening. BellSouth's attempts to provision ESSX were, and continue to this day to be, a dismal failure. BellSouth has frustrated TCCF at every turn in its efforts to provide this service to its customers. <u>BellSouth has never been able to provision</u>

one ESSX customer correctly.[3] (Tr. 29). As explained in detail by TCCF's Director of Engineering, Mr. Koller, BellSouth has had a variety of technical and personnel problems, which have resulted in its inability to provision ESSX for resale.[4]

Originally, TCCF selected nineteen locations (23 central offices) throughout the state of Florida for ESSX service, but BellSouth never delivered the promised services. (Tr. 19). For example, customers were continually disconnected, there have been continual delays in provisioning and as recently as November 25, 1998, BellSouth ignored change orders on existing TCCF ESSX customers resulting in three large customers losing long distance service for over 24 hours. (Tr. 20).

Mr. Koller described some representative problems occurring after March 17, 1997. For example, 90 orders were sent to BellSouth for processing for eleven central offices. Continual inquiries went unanswered. Approximately, *one month* after the orders were submitted, TCCF was advised that some were in progress, but that the form previously designed by Mr. Koller and BellSouth personnel to process such orders was inadequate and that a different *72-page form* would have to be submitted. (Tr. 77-78; Exhibit No. 6, KEK-9, 10).

On April 23, 1997, BellSouth attempted to switch six accounts to TCCF for ESSX service. Four of the six customers had problems associated with feature capability and database errors.

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[3] For the most part, TCCF has been required to serve those customers promised ESSX service via a much more expensive BellSouth service. Eventually, TCCF lost over 5,000 lines because BellSouth was unable to provision these customers. (Tr. 30-31).

[4] Even relying on Mr. Cathey's numbers (which TCCF views as severely understated), out of a potential 4,632 ESSX lines (Tr. 437), BellSouth has provisioned only "several hundred" to TCCF. (Tr. 439). Mr. Cathey further admits that TCCF's Business Plan was linked to selling the full ESSX capacity. (Tr. 440).

The other two customers had problems associated with memory call. That is, of the six switches, *none* were done correctly. Additionally, these problems persisted into the weekend with much customer anxiety and loss of customers for TCCF. (Tr. 78; Exhibit No. 6, KEK-11). On September 3, 1997, seven customers were moved to ESSX and *every line* involved was disconnected. (Tr. 80). In addition, BellSouth continually changed its requirements and its time tables, such as when on September 22, 1997, TCCF was informed *for the first time* that certain central offices could not accommodate ESSX and that certain additional changes would have to be made. (Tr. 80-82). As late as the spring of 1998, accounts were not moved and features paid for in October 1997 still had not been provisioned. (Tr. 83).

Continual changes on the BellSouth account team, as described by Mr. Koller (Tr. 73-77), only exacerbated an already serious problem and further slowed ESSX implementation. According to Mr. Koller, who was intimately involved with ESSX implementation, the TCCF Account Team changed at least *four times* over the period of TCCF's current Resale Agreement. (Tr. 86). Each new team had no idea of the work done or the promises made by the prior team. (Tr. 20). Further, each new team ignored or discarded guidelines agreed to by the prior team. (Tr. 21).

Even BellSouth's Mr. Cathey acknowledged that BellSouth had problems provisioning ESSX. (Tr. 450). These included sequencing problems, translation problems and order issuance problems. (Tr. 451). He further testified that implementation of ESSX was more difficult than originally thought. (Tr. 452). Mr. Cathey also admitted that BellSouth had personnel problems with employees working on ESSX and that it was even necessary to discipline an employee. (Tr. 450-451). BellSouth also had to provide additional training to BellSouth employees. (Tr. 451).

Further, BellSouth required TCCF to limit the number of ESSX lines it could order to 10 per day. BellSouth admitted it was unable to provision more than 10 lines in a quality fashion. (Tr. 451-452).

The detailed testimony of Mr. Ripper and Mr. Koller (and the detailed correspondence attached thereto) illustrates beyond a shadow of a doubt that BellSouth (to this day) has not properly provisioned ESSX for resale. This is corroborated by Mr. Wilburn, CLEC Sales Director and member of the TCCF Account Team, who describes orders not entered timely and human errors in the field resulting in customer outages. (Exhibit No. 2, p. 32). Mr. Koller summarized the situation:

> . . . at no time during this two-and-a-half year period did BellSouth dedicate the technical resources or the manpower required to effectively implement the resale of ESSX service by TCCF. And in fact, in every instance, BellSouth changed the personnel, initiated new technical requirements, or instituted schedule changes that delayed the entire process and negated previously scheduled work in progress.

(Tr. 87).

The ESSX Settlement

BellSouth touts the settlement entered into between TCCF and BellSouth as putting an end to the ESSX dispute; however, nothing could be further from the truth. First, while it is correct that TCCF and BellSouth entered into an ESSX settlement in March of 1997, that settlement covered claims *only* through March 17, 1997. And, TCCF was assured that the many ESSX problems TCCF had experienced prior to March 17, 1997 were experiences of the past. BellSouth said ESSX would be appropriately provisioned. However, after the settlement, it was just more of the same--BellSouth did not appropriately provision ESSX for resale. (Tr. 23).

Second, the settlement, by its clear terms, covers BellSouth's actions only through March

17, 1997, leaving almost an additional two years of service problems and issues *not* covered by the settlement. (Exhibit No. 5; Tr. 47, 59, 61). Problems with ESSX occurred after March 17, 1997, and continue to occur today. (Tr. 23; Exhibit No. 3, ENR-9).[5]

BellSouth attempts to rely on an October 7, 1997 letter as representing an additional settlement relating to an upgrade of BellSouth's 5ESS switches. (Exhibit No. 6, KEK-23). However, that upgrade was BellSouth's responsibility not TCCF's. (Tr. 44, 62). Mr. Hendrix admitted that TCCF never agreed to pay for the switch upgrades. (Tr. 216). In addition, the letter which BellSouth represents as a "settlement" falls far short of the mark. While Mr. Ripper was, of course, delighted to hear BellSouth represent that operational issues would be resolved, they never were; TCCF customers still did not get converted to ESSX. (Tr. 62). In addition, though the October 7 letter recites that an amendment to the Resale Agreement will be made and a settlement and release executed, no amendment to the Resale Agreement was ever executed and no settlement and release was ever signed. (Tr. 212-214). Further, Mr. Ripper replied to the October 7 letter on October 10 (Exhibit No. 12) and, as Mr. Cathey admitted (Tr. Tr. 460), took issue with many of the statements set out in the October 7 letter. (Tr. 215). Because a settlement, of necessity, involves the agreement of *both* parties, the attempt by BellSouth to represent the October 7 letter as any sort of settlement must be rejected.

BellSouth's 11th Hour Excuses for Its Nonperformance

To excuse its appalling failure to honor the Resale Agreement and appropriately provision

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[5] Exhibit No. 3 (ENR-9) illustrates that TCCF experienced delays of 60 days in getting ESSX service turned up as recently as November 1998. It is hard to imagine a customer who would be willing to wait 60 days to receive service. At hearing, Mr. Cathey admitted that BellSouth recently sent TCCF a letter refusing to provision any further ESSX lines (Tr. 444), apparently in an attempt to preempt the Commission's decision in this case.

ESSX, BellSouth has devised some creative 11th hour excuses for its nonperformance. First, BellSouth says (via Mr. Hendrix and Ms. Arrington) that because ESSX was grandfathered on May 30, 1996, BellSouth had an obligation to permit TCCF to resell the service only for two days! This "argument" ignores the obvious fact that TCCF signed its Resale Agreement on May 28, 1996, before ESSX was grandfathered and that BellSouth repeatedly confirmed TCCF's right to resell ESSX through the term of the Resale Agreement.

BellSouth attempts to rely on Commission Order No. PSC-96-1579-FOF-TP. This reliance is misplaced for three reasons. First, the order does not relate to the factual situation before the Commission in this case. At the time TCCF signed its Resale Agreement with BellSouth, ESSX was *not* a grandfathered service. TCCF signed its Agreement and contract and made its request for the service *before* ESSX was grandfathered. Therefore, the order BellSouth relies on is inapplicable in the situation before the Commission in this case.

Second, TCCF is in a unique situation not contemplated by the order. TCCF relied on BellSouth's representations that it would provision ESSX and tried to move forward with its Business Plan; BellSouth never advised TCCF to the contrary. Until the testimony was filed in this case, BellSouth never told TCCF it was not entitled to resell ESSX. (Tr. 202). BellSouth *never* informed TCCF of its view that Order No. PSC-1579-FOF-TP was applicable to TCCF's situation. Further, TCCF was not a party to that order (as BellSouth was) and had no reason to be aware of it, especially given BellSouth's conduct during the duration of the Resale Agreement. BellSouth should not be permitted to use the Commission's order as a "shield" against TCCF's legitimate claims.

Third, even if BellSouth were correct and it had no legal obligation to provide ESSX service for resale after May 30, 1996 (a position with which TCCF strongly disagrees), BellSouth has waived the right to assert this position at this late date. For the past two and one-half years, TCCF has participated in numerous telephone calls and meetings and has sent extensive correspondence to BellSouth regarding ESSX provisioning. (Tr. 202). Further, at the time the Resale Agreement was signed, the BellSouth Account Team told TCCF that once TCCF made a commitment to buy the ESSX service, it could be provisioned at any time during the Resale Agreement to serve TCCF customers. (Tr. 55, 64, 336).

It is undisputed that *no one* at BellSouth ever informed TCCF that it had no right to resell ESSX. As Mr. Ripper testified:

> . . .[U]p until the time that Mr. Hendrix's testimony was filed in this case, such a position was **never** taken by BellSouth. I find it quite remarkable that over the past two and a half year period, TCCF has continually tried to work with BellSouth to provision ESSX; <u>at no time</u> during our many, many conversations and the reams of written correspondence did anyone at BellSouth ever question TCCF's right to resell the service. . . . While we had many problems with BellSouth and its inability to provision ESSX service, <u>no one</u> ever suggested we were not entitled to resell it.

(Tr. 324, emphasis in original). As Mr. Ripper noted, the first time this position was advanced was in the testimony filed in this case. The fact that BellSouth's position in this case was never communicated to TCCF was confirmed by BellSouth witnesses Arrington (Tr. 263), Hendrix (Tr. 201-202), Cathey (Tr. 443) and in the deposition of BellSouth Account Team member, Wilburn. (Exhibit No. 2, p. 47).

As a matter of law, BellSouth has waived any right to assert such a position in this case as to TCCF. BellSouth has clearly engaged in conduct which warrants the inference that it has relinquished a known right. *Board of County Commissioners of Jackson County v. International*

Union of Operating Engineers, 620 So.2d 1062 (Fl. 1st DCA 1993); *Capital Bank v. Needle*, 596 So.2d 1134 (Fl. 4th DCA 1992).

Closely related to BellSouth's grandfather argument is its claim that somehow the tariff and/ or the Resale Agreement are violated by TCCF's resale of ESSX. But again, ESSX was *not* grandfathered when the TCCF Resale Agreement was signed. And, BellSouth's actions during this period prohibit BellSouth from relying on this argument as to TCCF.

BellSouth's next excuse is that TCCF requested some sort of "non-standard" ESSX service. This argument is nothing but a red herring. What TCCF requested and what BellSouth is obligated to provide is clearly delineated in correspondence from BellSouth employee Charlotte Webb to TCCF. (Exhibit No. 3, ENR-6). Ms. Webb reiterated the arrangement TCCF wanted and confirmed it in her letter. At no time did she say that TCCF sought anything "non-standard" or that what TCCF sought could not be provided by BellSouth. In fact, Mr. Ripper testified that the first time he heard BellSouth use the term "nonstandard" in regard to his service request was when BellSouth filed its testimony in this case. (Tr. 333). Further, both Mr. Hendrix and Mr. Cathey admit that BellSouth was required to provide the service which TCCF sought. (Tr. 204-205, 447). And Mr. Wilburn, CLEC Sales Director, and member of the TCCF Account Team, never mentioned to Mr. Ripper, Ms. Welch or anyone else at TCCF that the ESSX service TCCF sought was "non-standard." (Exhibit No. 2, p. 30). This is simply a last-minute fabrication to excuse nonperformance.

Again, even assuming (though strongly disagreeing) that TCCF sought something "non-standard," BellSouth's actions over the past two and one-half years constitute a waiver of any right to assert this position now. For this entire period of time, TCCF attempted to work with

BellSouth as to this service and at no time did BellSouth assert that what TCCF sought was a "non-standard" service which BellSouth had no obligation to provide. It is too late to make that claim now.

The Appropriate Remedy

BellSouth's failure to fulfill its obligations under the current Resale Agreement has had a devastating effect on TCCF. TCCF has not been able to fulfill its Business Plan. It has had to sell its services below cost to provide its customers with standard service that costs TCCF twice as much as the ESSX service to which it is entitled. (Tr. 21). In the past five months, TCCF has been forced to adjust its pricing to customers causing many of them to go back to BellSouth because TCCF cannot give them the promised services at the appropriate price. And just as importantly, TCCF's business reputation has been damaged. (Tr. 22).

In addition, and perhaps even more important for this Commission's purposes, BellSouth's disregard of its obligation to provide ESSX for resale has undermined the purpose of the Telecommunications Act by ensuring that TCCF will not be able to resell BellSouth services. Competition has been thwarted by BellSouth at every turn and consumers have not received the benefits the Act envisions. (Tr. 22). Even under BellSouth's tortured view of grandfathering, TCCF would have many more grandfathered customers if BellSouth had appropriately provisioned ESSX. (Tr. 266).

Because the Commission has determined in other proceedings that it does not have the authority to award damages, there is only one remedy available to TCCF. It must be permitted to resell ESSX in its new Resale Agreement with BellSouth to both current and new customers and the Commission must ensure that BellSouth correctly provisions ESSX. Alternatively, TCCF is willing to resell MultiServ (which is essentially the same product as ESSX) at the same price as ESSX. (Tr. 23-24). Only in this way will TCCF be put in the position it would have been in had BellSouth complied with the Resale Agreement.

Arbitration

ISSUE 1

SHOULD BST BE PERMITTED TO RECOVER FROM TCCF ITS NON-RECURRING AND RECURRING COSTS OF PROVIDING OSS FOR USE BY ALECS?

TCCF's Position:*No. It is BellSouth's responsibility to develop and provide nondiscriminatory interfaces. And, even if the Commission finds such costs appropriate, they should not be imposed absent a demonstration that nondiscriminatory interfaces are available to ALECs. Today, nondiscriminatory systems are not available.*

ISSUE 1A

IF SO, HOW SHOULD THE CHARGES FOR SUCH USE BE DETERMINED?

TCCF's Position:*There should be no additional charges for OSS. But if any such charges are imposed, they should not be imposed until the OSS work in a nondiscriminatory fashion. Further, no charges are appropriate for systems TCCF does not use.*

ISSUE 1B

WHAT LANGUAGE AND RATES REGARDING OSS SHOULD BE INCLUDED?

TCCF's Position:*Language should be included requiring BellSouth to provide OSS to resellers that is at parity with the OSS BellSouth personnel use to process retail orders. The Commission should institute a monitoring process to ensure that this is accomplished. No additional processing fees or "development" fees should be permitted.*

Responsibility for Development and Processing Fees[6]

BellSouth seeks to shift to TCCF its responsibility under the Act for developing and implementing appropriate OSS.[7] As Ms. Welch testified, this is simply an attempt by BellSouth to inflate resellers' costs (Tr. 111-112) and to decrease the wholesale discount this Commission ordered. (Tr. 126, 129). This is impermissible.

In addition, this Commission has already addressed cost responsibility for OSS:

> [W]e find that . . . operations support systems are necessary for competition in the local market to be successful. We believe that both the new entrants and the incumbent LECs will benefit from having efficient operational support systems. *Thus, all parties shall be responsible for the costs to develop and implement such systems. . . .*
>
> [E]ach party shall bear its own cost of developing and implementing electronic interface systems, because those systems will benefit all carriers.

Order No. PSC-96-1579-FOF-TP, emphasis supplied. And this is as it should be since ALECs

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[6] Determinations about the BellSouth OSS and the cost study BellSouth proffers are more appropriately made in a generic proceeding, where the Commission can get input and analyses from all ALECs who use BellSouth's OSS and to whom BellSouth wants to assess these charges. TCCF has indicated its willingness to defer these issues until the conclusion of a generic OSS proceeding, so long as there is no "back billing" of charges, if any, resulting from that proceeding.

[7] The history of the negotiations on this issue is set out in Ms. Welch's direct testimony. (Tr. 104-109). BellSouth changed its position several times during negotiations on the OSS fee issue. First, BellSouth agreed to Item U (Tr. 106), but then changed its position when it became apparent that Item U did not apply to the manual fees BellSouth sought to impose. BellSouth changed its position again when in response to TCCF correspondence of September 24, 1998, BellSouth proposed "interim" fees for the first time. (Tr. 377, 396-397).

face significant costs of their own in order to even be able to access the BellSouth OSS.[8]

The FCC has also recognized the LECs' responsibility to appropriately provision OSS. The FCC said in Order No. 98-271 (La. II Order) (¶ 84),:

> In the *Local Competition First Report and Order*, the Commission concluded that provision of access to OSS functions falls squarely within an incumbent LEC's . . . duty under section 251(c)(4) to offer resale services without imposing any limitations or conditions that are discriminatory or unreasonable.

Further, BellSouth's attempt to impose OSS charges on TCCF ignores the costs TCCF has already incurred, including training costs, personnel costs and computer hardware costs, and will incur in the future to access OSS. Additionally, there are implementation and recurring costs to use the OSS systems. (Tr. 116-117). Exhibit No. 8 (AKW-11) provides an example of these costs for just EDI. Implementation and testing costs for TAG are even greater *and* there is a substantial lag time for system testing. If BellSouth seeks to recover its costs from TCCF, perhaps TCCF should also recover its costs from BellSouth.

If the Commission permits the imposition of such fees, the impact on TCCF will be severe. Current processing fees TCCF pays to BellSouth range from 2.1% to 4.2% of TCCF's total invoice. If the proposed fees are permitted, processing fees will more than double to 4.5% to 8.4% (Tr. 118; Exhibit No. 8, AKW-12). OSS fees will have the effect of decreasing the wholesale discount this Commission has ordered and are unfair and discriminatory in

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[8] BellSouth insists that Order No. PSC-98-0604-FOF-TP entitles it to assess the charges set out in its testimony. However, *no* OSS charges were levied in that order, nor did the Commission guarantee any such recovery. In fact, the Commission struck testimony on the topic of OSS charges from that proceeding. Further, that order dealt with UNEs which are inapplicable in a resale situation.

contravention of the Act.[9] (Tr. 118-119). Because ALEC margins are already very slim, it will not take much for BellSouth to recapture the wholesale discount through the use of excessive OSS fees. In fact, this could become a profit center for BellSouth. However, any profit will be short-lived as it will cause the collapse of the already struggling resale market.[10] (Tr. 357).

The Commission should not permit BellSouth to impose additional charges on TCCF.

BellSouth OSS Is Discriminatory

Properly functioning OSS systems are critical to TCCF's ability to do business and to the advent of local competition.[11] Poorly functioning OSS interferes with TCCF's ability to serve its customers. TCCF's provisioning and service costs have been dramatically inflated over the course of TCCF's two and on-half year relationship with BellSouth due to BellSouth's refusal to provide TCCF with access to existing computer systems. This lack of parity has caused TCCF to lose customers. (Tr. 115).

Underlying BellSouth's request to impose charges for the use of OSS is the assumption that such systems are nondiscriminatory.[12] Evidence showed that they clearly are not.[13] As

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[9] These fees are not charged by BellSouth to its retail customers. (Tr. 119).

[10] BellSouth itself recognizes that these fees, if implemented, will decrease the amount of services ALECs will be able to purchase from BellSouth. (Exhibit No. 2, p. 55). That is, resale (and thus competition) will decline.

[11] The commitment to competition has been emphasized again in the United States Supreme Court's recent decision, *AT&T Corp. v. Iowa Utilities Board.*

[12] There is confusion among BellSouth personnel over what "nondiscriminatory" means. Ms. Arrington, the witness who sponsors the fees, assumes the systems are nondiscriminatory but doesn't know what "nondiscriminatory" means. (Tr. 254). Mr. Wilburn mistakenly believes "nondiscriminatory" means that all *ALECs* have access to the same OSS. (". . . I'm looking at applying the same platform to all the customers I have. . . ." Exhibit No. 2, p. 64). As this Commission has stated, nondiscriminatory OSS operates at parity with the systems BellSouth's retail representatives use. Order No. PSC-97-1459-FOF-TL at 94.

Ms. Welch outlined in her testimony, the systems BellSouth touts fall far short of meeting the required nondiscrimination standard:

> . . . BellSouth has opted to throw bits and pieces of automation at resellers over the past two years. To add insult to injury, BellSouth now wants to impose inflated prices for use of these systems, many of which do not even work appropriately.

(Tr. 111-112). Ms. Welch explained that EDI (Electronic Data Interchange) provides for only limited order flow through and that LENS (Local Exchange Navigation System), which is a pre-ordering tool, also has very limited ordering capability.[14] (Tr. 112). TAG (Telecommunications Access Gateway) is in use by one ALEC for preordering only. (Tr. 510). TAFI (Trouble Analysis and Facilitation Interface) is supposed to be used for maintenance and repair, but does not provide the functionality purported.[15] (Tr. 112). Only limited order flow through can be achieved with the above systems. (Tr. 112-113). These systems are far inferior to the systems BellSouth's retail representatives use to process orders. (Tr. 115).

Ms. Arrington, the BellSouth witness proffered to support the inclusion of OSS charges

[13] Despite BellSouth's attempt to insinuate otherwise, TCCF personnel are trained and qualified to use the BellSouth OSS. TCCF personnel have been trained on TAFI, EDI, LENS and TAG. (Tr. 113). TCCF has a very low error rate on its orders. (Tr. 168).

[14] Mr. Pate characterized LENS as having "limited functionality." (Tr. 514, 521).

[15] TCCF personnel have made several attempts to use TAFI. Problems were encountered using TAFI to open a trouble ticket (Tr. 149) and the system was not always available when needed. (Tr. 150). Further, the "help" keys do not work at all. (Tr. 150). As recently as two weeks prior to her testimony, Ms. Welch observed her customer service representatives try to use TAFI and they could get no trouble ticket history. (Tr. 150-151).

in the new Agreement, has had *no* real world experience with OSS.[16] (Tr. 346). She had no involvement in developing any of the OSS, has never used any of the OSS, has never looked at any flow through comparisons and has never even spoken to any ALECs who have attempted to use the OSS. (Tr. 252-253).

Mr. Pate, the OSS witness proffered by BellSouth, also has had little real world OSS experience. Mr. Pate acknowledged that he has been in his current position only 8 months. (Tr. 500). He further acknowledged that during that time he has visited only two ALECs and other than that he has had no personal contact with any ALECs trying to use the OSS. (Tr. 500). Mr. Pate has never used the OSS in the field. (Tr. 501). Though BellSouth has a "Help Desk" to assist ALECs, Mr. Pate has never spoken to anyone at the "Help Desk." (Tr. 502). Further, while Mr. Pate agrees that the experience and quality of the LCSC representatives is important in the efficient processing of orders (Tr. 502-503), Exhibit No. 25 illustrates that the LCSC representatives have much less experience than BellSouth's retail representatives.

In contrast to Ms. Arrington's and Mr. Pate's unsupported conclusions, TCCF has encountered numerous and continual problems in its attempts to use BellSouth's OSS. (Tr. 346).

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[16] In contrast, in her testimony Ms. Welch provides numerous examples of OSS deficiencies. See Tr. 348-349 for a very recent example of the failure of LENS and TAFI to function appropriately. After 10 hours of effort, TAFI still did not work correctly. After 4 hours of effort, LENS still could not function to change a yellow page heading code. As Ms. Welch said:

> BellSouth's OSS do not work. . . . We [TCCF] have a business to run and should not be burdened with troubleshooting deficient OSS or being required to use OSS which do not work.

(Tr. 349).

Lack of order flow through[17] is a continual problem; all but "plain vanilla" orders often drop out of the system. (Tr. 347). To document these problems, Ms. Welch kept a log of TCCF orders which she attempted to process through LENS in a recent two-week period in December, 1998. (Exhibit No. 10). This log demonstrates that the ordering functions of LENS are very limited. The log tracks 21 orders; though 14 did flow through the system, those were disconnect orders, the easiest type of order to submit and process. Further, the number of days it took for the orders to flow through was excessive. Though BellSouth says that orders submitted before 3 p. m. will be worked that day it took *three days* for a disconnect order to be worked. (Tr. 179-181).

Mr. Pate touted the BellSouth OSS, but the numbers don't bear out his claims. Of 250 ALECs, only 120 use LENS, only 20 use EDI and just 1 uses TAG. (Tr. 527). Region-wide in December 1998, ALECs submitted 189,000 orders to BellSouth. Of that number, an astonishing 56% were processed manually. (Tr. 517-518). When questioned about the high number of orders processed manually, Mr. Pate could only speculate. However, he did agree that ALECs prefer electronic processing because it is faster and more efficient. (Tr. 516-517). TCCF submits the reason that more than half of all ALEC orders are submitted manually is obvious -- the systems do not function as their glowing paper descriptions indicate. TCCF's real world experience proves that.

For example, in the La. II Order, the FCC evaluated the flow through rate of BellSouth's

[17] Order flow through occurs when a person enters relevant ordering information on an ordering screen, pushes a button, and the order is received, processed and returned via machine. (Tr. 113).

OSS[18] and found it wanting:

> BellSouth's own data indicate that in a significant number of cases, the failure of orders to flow through BellSouth's order processing systems cannot be attributed solely to the errors of competitive carriers. Even if we accept BellSouth's analysis of competing carriers' errors, the data show that a significant number of EDI orders drop out for manual processing due to other reasons. We describe the flow-through data for one competing carrier, identified as "Carrier No. 9," to illustrate. BellSouth's flow-through data for May 1998 show that it received 622 EDI orders from competing carrier No. 9, 18 of which were automatically rejected. These 18 automatically rejected orders are excluded from the flow-through calculation. Of the remaining 604 orders that BellSouth determined are "valid orders," 170 orders flowed through BellSouth's systems and, according to BellSouth, 67 orders dropped out for manual processing due to competing carriers' errors. In other words, 367 of 604 valid orders dropped out for manual processing for reasons other than the competing carrier's errors, *producing a BellSouth-calculated flow-through rate of 31.6 percent. As noted above, the flow-through rates when BellSouth representatives place an order for their own retail operations are 96 percent for residential services and 82 percent for business services.*

La. II Order at ¶ 112, footnotes omitted, emphasis supplied. The OSS picture is not nearly as rosy as Mr. Pate suggests.

In a real world example, Ms. Welch described a very recent experience with BellSouth's OSS. On February 5, 1998, TCCF wanted to suspend service for one of its pay phone customers for non-payment and then restore service when payment was made. The suspend and restore involved 573 lines. Though TCCF attempted to do the disconnect via LENS, LENS was not capable of performing that function and the lines had to be disconnected manually. When payment was made, TCCF tried to restore service through LENS, but again LENS couldn't

[18] Mr. Pate agreed that since the BellSouth OSS operate on a regional basis, results from all BellSouth states are similar. (Tr. 526).

handle it and the restore was done manually. (Tr. 367-368). Not only was the above process very labor-intensive for TCCF, but if the fees proposed in this docket had been in place, BellSouth would have charged TCCF $36,190.98.[19] (Tr. 368-369). This is clearly excessive. It would not take long for a few of these type of transactions to put a reseller out of business. This real world example makes the two basic points at the heart of the OSS charge issue -- BellSouth's OSS does not function as it should and the charges BellSouth wants to impose are exorbitant.

Further, BellSouth adamantly refuses to give ALECs access to the systems BellSouth retail representatives use to process retail orders. These systems have been developed over time and allow BellSouth retail representatives to process orders error free and to deliver well-defined, time-proven service intervals to their end-user customers. (Tr. 347).

The discriminatory nature of BellSouth's OSS is further confirmed by BellSouth's own witness, Mr. Pate. Mr. Pate testified that LENS is not integrated with EDI. Therefore, ALECs must move between the two systems and enter information two times; BellSouth's retail representatives don't have to do that. (Tr. 506). BellSouth's retail representatives can check a customer's credit information; ALECs don't have access to that information. (Tr. 508). EDI has no summary screen; retail representatives have a summary screen. (Exhibit No. 26, p. 76). If an ALEC submits an order and then wants to change it, it must make another submission; retail representatives don't have to make a new submission. (Exhibit No. 26, p. 76).

[19] BellSouth would have charged $23.00/line to reinstall the lines ($23 x 573 = $13,179), plus $20.08/line for the manual disconnect ($20.08 x 573 = $11,505.84), plus $20.08/line for the manual restore ($20.08 x 573 = $11,505.84) for a grand total of $36,190.98. (Tr. 368-369). Ms. Arrington and Mr. Pate confirmed that Ms. Welch's calculations of the charges BellSouth would expect in this situation were correct. (Tr. 390, 528).

Thus, *even if* the Commission determines that BellSouth should collect OSS fees, such fees should not go into effect until the Commission makes an informed determination that BellSouth's OSS is at parity with the systems BellSouth retail representatives use.

As to manual orders, Ms. Arrington testified that when BellSouth does not have an electronic system in place and the order must be processed manually, there will be a charge of $20.08, more than three times more than the electronic charge BellSouth proposes. (Tr. 255-256, 389). Such a charge is inappropriate because the necessary electronic systems are simply not in place and (as discussed above) even the ones in place do not function correctly. In addition, when an electronic order falls out of the OSS and therefore must be processed manually, BellSouth assumes in its cost model that 100% of the time the order falls out due to an ALEC error. That is, BellSouth assumes *no* interface errors. (Tr. 303-305). Such an assumption is biased on its face and should be rejected.

BellSouth's Cost Study is Flawed

Even if the Commission determines that BellSouth should be permitted to collect fees for its OSS, it should not base such fees on the cost study submitted in this proceeding. Rather, it should thoroughly investigate all aspects of the cost study.[20] TCCF's analysis reveals that the study contains several obvious flaws.

First, Ms. Caldwell admitted that as order volume increase, per order fees decrease. (Tr. 302). However, as Ms. Arrington testified, the language which BellSouth has insisted upon including in the new Agreement makes *no* provision to reduce OSS fees if order volumes are

[20] As Ms. Welch testified, TCCF is a small reseller. It does not have the resources to do an in-depth analysis of the BellSouth cost study. Placing such a burden on TCCF would frustrate the intent of the Act. (Tr. 354).

higher than projected. (Tr. 251-252). Nor is it at all clear who is responsible for monitoring order volume and ensuring appropriate changes to OSS fees. (Tr. 356).

Second, there appears to have been no analysis of the order reject rate, but rather an assumption that all ALECs have the same reject rate and thus should receive the same charge. Further, it is unclear how errors caused by BellSouth will be treated, (Tr. 356), because Ms. Caldwell assumes that *all* errors are caused by ALECs and the system is error free. (Tr. 303-305).

Third, there appears to be no protection for resellers from the potential of BellSouth booking unrelated costs against the OSS development fees for resellers. It is unclear how ALECs will be protected from fraudulent cost allocation practices. Who will be responsible to audit any cost allocations BellSouth makes? (Tr. 357).

Finally, the cost study does not account for the many costs of doing business which BellSouth no longer incurs when a customer moves to an ALEC. (Tr. 306-307, 354). Nor does the cost study take into account the costs a reseller incurs to "access"[21] the BellSouth OSS.[22] (Tr. 307; Exhibit No. 8, AKW-11). For example, there are software fees, fees related to the number of users on the system as well as programming and interface costs. (Tr. 166-167).

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[21] BellSouth wants TCCF to pay for access to new OSS because it refuses to provide access to its existing systems. For example, in the case of TAFI, TCCF must go through the TAFI interface (for which BellSouth wants it to pay) to input information into the repair and maintenance system. BellSouth representatives do not have to go through an additional interface; they input their information directly into the BellSouth Legacy system. (Tr. 305-306).

[22] See Exhibit No. 8 (AKW-11) which estimates the cost to TCCF to implement EDI.

It is Inequitable to Charge TCCF for OSS It Does Not Use

BellSouth wants to charge TCCF for the use and development of *all* its OSS,[23] *even* those systems TCCF does not utilize.[24] BellSouth wants to recover the costs for all its systems from TCCF because the systems are *available*. (Tr. 248). Such an "inclusive" charge is unfair on its face. Further, BellSouth's definition of "available" does not mean the systems are ready to use (Tr. 509); the ALEC must invest substantial time and money just to access the systems and there is a time lag between when they are "available" and when they can actually be used. (Tr. 511, 515-516).

Due to the numerous problems TCCF has experienced trying to use BellSouth's OSS, it currently uses only LENS.[25] (Tr. 113). Though TCCF has attempted numerous times to use TAFI, because of its failure to function, TCCF developed its own system at a cost of approximately $200,000 which it uses. (Tr. 151-152). As to EDI, TCCF was specifically told by Account Team Member, Mr. Wilburn, *not* to implement EDI but rather to wait for TAG. (Exhibit No. 2, p. 45). Of course, Ms. Welch followed Mr. Wilburn's instructions. Mr. Cathey also confirmed that this was BellSouth's recommendation. (Tr. 455). The recommendation not to implement EDI was based on the "double keying" problem inherent in EDI. As Mr. Cathey

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[23] There is confusion between the BellSouth witnesses as to the systems for which recovery is sought. Ms. Arrington says it is TAG, EDI and TAFI (Tr. 246), while Ms. Caldwell says BellSouth wants to recover for EDI, LENS, TAG, LEO, LESOG, BSOG, TAFI and ECTA. (Tr. 292).

[24] In fact, the BellSouth cost witness, Ms. Caldwell, did not even know if TCCF uses all eight OSS or, for that matter, if any Florida ALEC uses all eight systems. BellSouth even wants TCCF to pay for TAG, which only one ALEC is using for preordering only. (Tr. 297).

[25] At one time, TCCF used TAFI but it greatly slowed down the processing of trouble tickets. (Tr. 113-114).

explained, double keying means an ALEC service representative must enter ordering information two times. In contrast, a BellSouth retail representative does not have to enter ordering information two times. (Tr. 456, 505-506).

The Account Team also told TCCF that EDI could not process any complex orders, any orders in excess of six lines, any adds, moves or changes and that order flow through could not be accomplished. (Tr. 185). TAG is included in the cost study, even though there is only one ALEC using it and that ALEC uses it only for preordering; no ALECs currently use TAG for ordering. (Tr. 510-511).

Nonetheless, as Ms. Arrington clearly explained, BellSouth wants TCCF to pay for *all* the BellSouth OSS, whether or not TCCF uses them, (Tr. 249-250), and whether or not they function correctly. This is patently unfair and, despite BellSouth's protestations to the contrary, is nothing more than a transparent attempt to increase resellers' costs.

BellSouth's last-minute proffer of undefined "cost efficiencies" related to system development should be rejected out of hand. No such efficiencies were demonstrated in the record. And even if they had been, TCCF should not be required to pay for "efficiencies" in development of systems it does not even use.

ISSUE 2

SHOULD ESSX SERVICE BE MADE AVAILABLE FOR RESALE IN THE NEW RESALE AGREEMENT?

TCCF Position:*Yes. BellSouth has not fulfilled its obligations under the current Agreement regarding ESSX resale. The only way this situation can be remedied is to include ESSX in the new Agreement for at least 18 months for new customers and current customers. Alternatively, TCCF would accept MultiServ at the ESSX price.*

TCCF comes before this Commission in a very unique situation. It has tried to deal with BellSouth regarding ESSX resale for two and one-half years with no success. The Commission must provide a remedy for BellSouth's failure to perform under the Resale Agreement. Since the Commission cannot award money damages, it should attempt to put TCCF in the position (or as close to it as possible) it would have been in had BellSouth complied with the original Resale Agreement. The *only* way to do that is to provide for resale of ESSX in the new Resale Agreement between BellSouth and TCCF or, alternatively, to require BellSouth to provide MultiServ to TCCF at the same price points as ESSX in the new Agreement. In addition, a Commission Staff member should be assigned to closely monitor BellSouth's compliance or lack thereof under the new Resale Agreement.

The discussion under Issue 1 of the Complaint will not be repeated here but is incorporated by reference. That discussion clearly illustrates that BellSouth has failed to appropriately provide ESSX under the current Resale Agreement. Now BellSouth has asked TCCF to renegotiate that Agreement and in the process claims ESSX should not be included in the new Resale Agreement because it is a grandfathered service. Having thwarted TCCF at every turn in its efforts to resell ESSX, BellSouth now claims "gotch ya" in its argument that it need not provide ESSX in the new Resale Agreement. This duplicity is disingenuous and should not be permitted.

Mr. Ripper testified that MultiServ and ESSX are essentially the same service, but the price differential is approximately 40%. (Tr. 56). BellSouth wants TCCF to abandon its Business Plan, which was clearly tied to the provision of ESSX at the ESSX price points, and resell MultiServ at a much higher price, because it knows TCCF can never survive in the marketplace under those conditions.

BellSouth itself currently has thousands of ESSX lines in place. (Tr. 58). BellSouth has recently filed a new ESSX tariff which will allow BellSouth ESSX subscribers to keep ESSX service *indefinitely*. (Exhibit No. 13). That is, BellSouth may keep its customers on the lower-priced ESSX service forever (Tr. 408), while forcing TCCF to try to compete by selling a service that is 40% more expensive. Ms. Arrington testified that this indefinite extension of ESSX for BellSouth retail customers was a business decision. (Tr. 408). That "business decision" is understandable -- it gives BellSouth a huge advantage in the marketplace over resellers who are left to resell the same product at 40% more than ESSX.

BellSouth testified that this Commission has *no* remedy available to redress BellSouth's failure to properly provision ESSX. (Tr. 400-401). Such a finding would reward BellSouth for its lack of compliance with the Resale Agreement and would be inconsistent with the letter and spirit of the Act. As Mr. Ripper testified, resellers, particularly small resellers, rely on this Commission to protect their rights under their agreements with the incumbents. (Tr. 334). Only if TCCF can resell ESSX (or MultiServ at ESSX price points) will TCCF be redressed for BellSouth's unlawful actions.

Conclusion

As to the complaint issue, it is clear from evidence in this case that BellSouth had an obligation to provision ESSX to TCCF for resale and that it dismally failed to do so despite continual attempts by TCCF to work with BellSouth to accomplish ESSX provisioning. BellSouth's last minute excuses and manuverings to escape this obligation have no merit and should be summarily discarded.

As to the arbitration issues, BellSouth has an obligation to develop appropriate OSS to fulfill its obligations under the Act. It should not be permitted to pass these costs on to ALECs who have their own costs to bear to access and use the BellSouth systems. Even if the Commission permits some charges for OSS, before the imposition of any such charges, the Commission must assure itself that BellSouth's OSS provides parity in the field. As the testimony in this case demonstrated, BellSouth's OSS fails to meet the nondiscriminatory standard. Further, the charges proffered by BellSouth in this proceeding are based on a flawed cost study and should be rejected. Finally, fundamental fairness dictates that TCCF should not be forced to pay for OSS which it does not even use.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the **Telephone Company of Central Florida, Inc.'s** foregoing **Post-Hearing Statement of Issues and Positions and Post-Hearing Brief** has been furnished by United States Mail or Hand Delivery (*) this **2nd** day of **March, 1999**, to the following:

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