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TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: DIVISION OF COMPETITIVE MARKETS & ENFORCEMENT (BARRETT, ^{MBB}
GILCHRIST) *[Signature]*
OFFICE OF THE GENERAL COUNSEL (FORDHAM) *bik*

RE: DOCKET NO. 020738-TP - PETITION OF AT&T COMMUNICATIONS OF
THE SOUTHERN STATES, LLC REQUESTING SUSPENSION OF AND
CANCELLATION OF SWITCHED ACCESS CONTRACT TARIFF NO.
FL2002-01 FILED BY BELLSOUTH TELECOMMUNICATIONS, INC.

AGENDA: 12/17/02 - REGULAR AGENDA - PROCEDURAL ACTION - DECISION
PRIOR TO HEARING - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMP\WP\020738.RCM

CASE BACKGROUND

On June 2, 2002, pursuant to Section 364.051, Florida Statutes, BellSouth Telecommunications, Inc. (BellSouth) filed an Access Service Tariff (T-020572, or Contract tariff), which became effective on June 17, 2002. This filing introduces Florida's first contract tariff for access services, BellSouth Switched Access (SWA). BellSouth identifies it as Contract Tariff No. FL2002-01.

On July 16, 2002, AT&T Communications of the Southern States, LLC (AT&T) filed a Petition requesting suspension of and cancellation of Switched Access Contract Tariff No. FL2002-01 filed by BellSouth (Petition). AT&T also requested a formal administrative hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

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On August 12, 2002, BellSouth filed its Response and Answer to AT&T's Petition (Response) and another Access Tariff Filing introducing BellSouth SWA Pricing Flexibility (T-020828, or Revised tariff), which BellSouth identifies as Contract Tariff No. FL2002-02.

On September 13, 2002, AT&T filed a Motion for Leave to File an Amended Petition (AT&T Motion). Attached to this pleading was the 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. (Amended Petition). In its Amended Petition, AT&T claims the requested relief in its original Petition should apply as well to the subsequent tariff that BellSouth filed. (Amended Petition at p. 1) The Amended Petition, which contained 22 exhibits in support of AT&T's allegations, was filed in order to achieve a more timely and efficient resolution of the issues raised in both of the BellSouth tariffs.

On September 23, 2002, Order No. PSC-02-1291-PCO-TP was issued granting AT&T's Motion.

On October 3, 2002, BellSouth filed an Answer to and Partial Motion to Strike in response to the AT&T Amended Petition. (Response to Amended Petition and Partial Motion) On October 10, 2002, AT&T filed its Response and Opposition to BellSouth's Partial Motion to Strike.

On October 30, 2002, additional information was requested from both parties via written staff inquiries. The responses to the same were filed on November 14 and 15, 2002 (BellSouth and AT&T, respectively).

This recommendation first addresses BellSouth's Partial Motion to Strike, and then the allegations raised in the AT&T Petitions and BellSouth Responses are addressed in Issue 2.

The Commission is vested with jurisdiction in this matter pursuant to Sections 364.01, 365.051, 364.08, and 364.285, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should BellSouth's Partial Motion to Strike be granted?

RECOMMENDATION: Yes. BellSouth's Partial Motion to Strike should be granted. (FORDHAM)

STAFF ANALYSIS: BellSouth's October 3, 2002 response to AT&T's Amended Petition was styled as both an "Answer" to the Amended Petition as well as a "Partial Motion to Strike." The "Answer" portion of BellSouth's Response will be addressed later in this recommendation. BellSouth's Partial Motion to Strike should be granted based on the following analysis.

BellSouth

BellSouth asserts that the Prayer for Relief in AT&T's Amended Petition "makes what amounts to a demand that the Commission unlawfully coerce BellSouth to provide AT&T with a discriminatory discount of the type it has long demanded." (Response to Amended Petition and Partial Motion at p. 11) Therein, on page 32, AT&T pleads 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 exceed the volume that triggered discounts of the carriers under [the] general tariff. (Response to Amended Petition and Partial Motion at pp. 11-12)

BellSouth believes AT&T is seeking a "pure volume" discount for its exclusive benefit as the largest carrier; BellSouth claims this demand is "ridiculous" for reasons set forth below. (Response to Amended Petition and Partial Motion at pp. 11-12)

BellSouth claims that AT&T's request for damages "is not legally tenable for the simple reason that this Commission does not have the legal authority to award monetary damages." (Response to Amended Petition and Partial Motion at p. 12) There is no legal theory to support the contention that AT&T has been (or will be) damaged in some way that corresponds to AT&T's requested relief,

according to BellSouth. (Response to Amended Petition and Partial Motion at p. 12)

BellSouth believes this plea for relief demonstrates that AT&T's motivation in this proceeding is to utilize procedural gamesmanship as a means to attempt to coerce BellSouth into providing it a pure volume discount. (Response to Amended Petition and Partial Motion at p.12) This action would have the effect of discriminating against all other carriers, according to BellSouth. (Response to Amended Petition and Partial Motion at p. 12)

BellSouth requests that the Commission should immediately strike AT&T's request for damages. (Emphasis in original, Response to Amended Petition and Partial Motion at p. 12) BellSouth asserts:

The [AT&T] 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. (Response to Amended Petition and Partial Motion at p. 12)

In summary, BellSouth believes AT&T's request for damages should be summarily stricken.

AT&T

On October 10, 2002, AT&T filed its Response and Opposition to BellSouth's Partial Motion to Strike. In that Response, AT&T first disputes BellSouth's claims that the Commission is without authority to award damages. In support of its argument, AT&T states:

BellSouth's blanket statement that the Commission does not have any authority to award damages is without citation to any authority. This bald unsupported statement is simply wrong. The Commission has long exercised its authority to award damages. In the many cases in which the Commission determined that a customer was overcharged by a utility, the Commission has awarded damages to the customer in the amount of the overcharge. When the local service of a BellSouth customer is out of

service for a period of more than twenty-four hours, BellSouth must pay damages to the affected customer in the form of a credit to that customer's bill pro-rated for the portion of the customer's monthly service charge for the time the service was down.

AT&T next acknowledges that the Commission does not have the broad latitude in the amounts and types of damages that are the purview of the civil courts, but does have authority to award damages in certain instances. AT&T claims that the Commission has authority to order the relief requested pursuant to Section 365.051(5)(a) and (b), Florida Statutes.

The remainder of the AT&T Response restates the arguments made in earlier pleadings on the merits of the tariff. Those arguments will be fully discussed in Issue 2 of this recommendation.

Analysis

Staff believes that this issue is easily disposed of by one simple fact of law. This Commission lacks any legal authority to award the type of monetary damages sought by AT&T. The two examples cited by AT&T of damages awarded by the Commission are restitutions which are very specifically prescribed by rule. The damages sought by AT&T are, first, highly speculative. Secondly, it appears to staff that there is no objective way in which the subject damages could actually be calculated. Finally, staff agrees with BellSouth that even if the requested damages could be identified and legally ordered, it would simply amount to an untariffed discount to AT&T, which could be construed as discriminatory.

AT&T claims that the Commission has authority to order the relief requested pursuant to Section 365.051(5)(a) and (b), Florida Statutes. Staff believes AT&T to be referring instead to Section 364.051(5)(a) and (b), Florida Statutes, pursuant to which the Commission is to ensure that all similarly situated customers are treated fairly in the market. Staff does not, however, believe this provision authorizes the Commission to award damages. See Southern Bell Tel. And Tel. Co. v. Mobile America Corp., 291 So. 2d 199 (Fla. 1974) ("Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for past failures to provide telephone service meeting the statutory standards . . ."). The Commission, as a matter of law, may not grant the relief

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requested by AT&T in its Amended Petition. Accordingly, staff believes BellSouth's Partial Motion to Strike should be granted.

ISSUE 2: Should BellSouth's Switched Access Contract Tariff No. FL2002-01 (T-020572), and BellSouth SWA Pricing Flexibility Contract Tariff No. FL2002-02 (T-020828), be suspended or canceled?

RECOMMENDATION: The above-referenced tariffs should not be suspended or canceled at this time. However, AT&T's request for a formal administrative hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, should be granted. (BARRETT, GILCHRIST, FORDHAM)

STAFF ANALYSIS: The staff analysis for Issue 2 and the allegations presented in AT&T's Petitions and BellSouth's Responses are summarized below, followed by the staff's analysis, and staff's conclusion.

AT&T

In its Petition, AT&T requests relief on two fronts: first, suspension of and cancellation of BellSouth's Access Service Tariff Filing (T-020572), Switched Access Contract Tariff No. FL2002-01, and second, a formal administrative hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes. AT&T claims that BellSouth's tariff "seeks to fundamentally change the switched access landscape in Florida." (Petition at p. 2) In its Amended Petition, AT&T claims the requested relief in its original Petition should apply as well to the subsequent tariff that BellSouth filed. (Amended Petition at p. 1) AT&T appears to assume incorrectly that BellSouth's Switched Access Contract Tariff No. FL2002-01 was replaced and superceded by a subsequent filing, Switched Access Contract Tariff No. FL2002-02. Staff notes, however, that both tariffs are currently in effect.

AT&T contends that prior to BellSouth filing its Access Service Tariff Filing (T-020572), it was limited to only one option for purchasing switched access services, and BellSouth charged all

long distance carriers the same access charges. (Petition at pp. 2-3) AT&T alleges that this is the first time BellSouth has offered a customer-specific contract service arrangement for switched access services. (Petition at p. 3)

AT&T states that the BellSouth tariff is structured in such a way that the discounts apply only if the carrier's Minutes of Use (MOU) volumes are steadily increasing. Under the legal standards established by the Federal Communications Commission (FCC), growth discounts and associated growth tariffs are discriminatory. AT&T states:

"Growth discounts," as defined by the FCC, are pricing plans under which incumbent LECs offer reduced per-unit access service prices for customers who 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. (footnote omitted, Amended Petition at pp. 14-15)

According to AT&T, the tariff at issue is a "growth tariff" because it provides the following:

- a. To qualify for discounts, the IXC in Year 1 must exceed the minimum usage specified; in Year 2, it must exceed 102% of the minimum usage; and by Year 4, it must exceed 110% of the minimum usage.
- b. BellSouth applies a discount to the revenue associated with minutes that exceed the minimum usage (i.e., growth or incremental volumes up to 30% of the minimum usage) during the relevant year. (Petition at p. 4)

Under the BellSouth tariff, Contract No. FL2002-01, BellSouth will reduce access rates for a certain carrier by up to 35% while, at the same time, continuing to charge the regular tariffed rates to all other long distance carriers, "including those which have the same amount of usage as that unnamed contract carrier." (Petition at p. 3) AT&T further contends that IXCs with lower MOU volumes could receive large discounts based on their positive incremental growth when the larger IXCs with significantly higher, but declining, MOUs would not receive a discount at all. (Amended Petition at p. 4) According to AT&T, Florida law does not allow for

this type of special contract, contending "its design and in its ultimate effect [is] in violation of Sections 364.051(5), 364.08, 364.09, 364.10, and 364.3381, Florida Statutes, and Section 251(g) of the Telecommunications Act." (Petition at pp. 4-5)

AT&T believes that BellSouth has developed such an arrangement to benefit its IXC affiliate, BellSouth Long Distance, Inc. (BSLD), though BSLD is not yet authorized to operate in Florida. (Petition at p. 3) AT&T believes that BellSouth is discriminating against IXCs whose intrastate volumes historically have been declining. (Petition at p. 4) AT&T believes BSLD would (or may soon) experience a growth in MOU volumes. AT&T states that a tariff that benefits an affiliate company would be a clear violation of the nondiscrimination requirements of Section 272 of the 1996 Act, since the FCC recognized:

. . . if a BOC [Bell Operating Company] charges other firms prices for inputs that are higher than the prices charged, or effectively charged, to the BOC's section 272 affiliate, then the BOC could create a 'price squeeze' . . . [that] may allow the BOC affiliate to win customers even though a competing carrier may be a more efficient provider in serving the customer.¹

(Amended Petition at p. 18)

In its Amended Petition, AT&T also states that BellSouth concurrently filed similar tariffs in all nine states² of its service area and at the FCC, even though the FCC has prohibited "growth tariffs." (Amended Petition at pp. 3, 9) In addition to the instant proceeding, AT&T has contested these filings in North Carolina, Georgia, and Tennessee. AT&T elaborates on the prohibitive aspects of "growth tariffs," citing two FCC proceedings:

¹Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Telecommunications Act of 1934, as amended, First Report and Order, FCC 96-489, FCC Rcd 21905 (released December 24, 1996), ¶12.

²Exhibits 3-11 of AT&T's Amended Petition are copies of BellSouth's SWA intrastate tariff filings for each of the nine states in BellSouth's service area.

In the *Transport Rate Structure and Pricing* proceeding,³ the FCC reaffirmed a policy allowing incumbent local exchange carriers to offer volume and term discounts for switched transport services. However, with respect to such offerings, the FCC also determined that "growth" discounts were not permitted:

We clarify that the rules adopted in the expanded interconnection proceeding regarding discounted transport offerings contemplate only volume discounts (reduced per-unit prices for a particular number of units of service) and term discounts (reduced per-unit prices for a specified service for a particular period of time). **These rules do not provide for percentage or growth discounts - reduced per unit prices for customers that commit to purchase a certain percentage of their past usage from a LEC, or reduced prices based on growth in traffic placed over a LEC's network.**

. . .

In the *Access Charge Reform Fifth Report and Order*,⁴ the FCC confirmed its rejection of growth discounts and tariffs [at ¶¶ 134-35]. ILEC supporters of growth tariffs failed to provide any evidence that growth tariffs would assist in the development of a competitive access market, and accordingly the FCC rejected their use:

The Commission tentatively decided not to permit growth discounts in the *Access Reform NPRM*, because they create an artificial advantage for BOC long distance affiliates with no subscribers, relative to existing IXCs and other new entrants. The Commission also invited parties to comment on whether growth

³*In the Matter of Transport Rate Structure and Pricing*, Third Memorandum Opinion and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, FCC 94-325, 7 FCC Rcd 3030.

⁴*Access Charge Reform*, Fifth Report and Order, FCC 99-206, CC Docket No. 96-262.

discounts would enhance the development of competitive access markets.

None of the parties supporting growth discounts explain why growth discounts enhance the development of competitive access markets . . . **Without any affirmative benefit to growth discounts presented in the record before us, we have no basis for allowing such discounts.**

(Emphasis in original, footnotes omitted, Amended Petition at pp. 15-17)

AT&T contends that the timing of BellSouth's tariff filings is also a cause for concern:

After decades of offering interstate access services to all carriers at the same rates, BellSouth submitted its SWA Contract Tariff 2002-01 to the FCC on May 17, 2002, just two (2) days after receiving Section 271 authority to provide interLATA services in Georgia and Louisiana. (footnote omitted, Amended Petition at p. 5)

In the interstate filing, BellSouth described its federal SWA Contract Tariff as a "volume and term plan" discount, though AT&T contends that the increasing volume requirements make clear that the tariff really is only a "growth" tariff. (Amended Petition at p. 5) AT&T asserts:

[The] discounts are not available based on volumes alone, but rather over a five (5) year contract period for a carrier's annual **growth** in switching usage compared to a specified minimum level . . . A carrier must achieve growth each year over the minimum level to receive any discounts, and absolute volumes of business alone do not give rise to discounts. Importantly, discounts do not apply to all of the carrier's volumes, but only as to volumes that exceed the stated minimum volumes. (Emphasis in Original, Amended Petition at pp. 5-6)

AT&T claims that at the state level, the North Carolina Utilities Commission (NCUC) rejected BellSouth's access filing in

that state, "because it was not in the public interest."⁵ (Amended Petition at p. 3, 10, 24) AT&T claims that the NCUC "soundly dismissed" BellSouth's assertion that the tariff at issue there would keep traffic on its network, suggesting instead that BellSouth should offer a volume-only discount plan. Page 5 of the NCUC Order states, in part:

. . . if the aim is to stimulate the volume of purchases (and, hence, revenue), it would better serve the public interest if the discounts were volume-based, instead of being based upon percentage increases over a baseline. After all, even a relatively modest percentage increase in the volume of purchases from a high-volume IXC could dwarf the increased volume coming from a low-volume IXC or a group of them. This would mean that much more revenue for BellSouth.

(Amended Petition at p. 25)

Additionally and very recently, BellSouth's similar filings in the states of Georgia and Tennessee were voluntarily withdrawn, according to AT&T, though a revised version of the tariff was subsequently filed in Tennessee. Although outside of BellSouth's operating area, AT&T contends the Texas Public Utility Commission also "has determined that 'growth' tariffs are discriminatory and thus rejected an intrastate 'growth' tariff of Southwestern Bell Telephone Company." (Amended Petition at p. 4, Exhibit 22 of Amended Petition)

BellSouth

BellSouth states in its Response that the Contract tariff "is the product of an agreement between BellSouth and Sprint." (Response at p. 2) Although it was crafted as a specific arrangement for Sprint, BellSouth states:

⁵State of North Carolina Utilities Commission Order Disapproving Proposed Tariff, issued August 13, 2002, in Docket No. P-55, Sub 1365, In the Matter of Complaint for Anticompetitive Activity and Motion to find Tariff Noncompliant or Suspend Tariff, and Docket No. P-55, Sub 1366, In the Matter of Tariff Filing by BellSouth Telecommunications, Inc. to Establish Contract Rates for Switched Access Rate Elements. (NCUC Order) The NCUC Order is attached as Exhibit 14 in AT&T's Amended Petition.

[The Contract] "tariff functions much like a Contract Service Arrangement. Further, it has always been BellSouth's intention to make the same discount plan available to all IXCs and to file appropriate Contract Tariffs to memorialize these agreements as well. (Underline in Original) (Response at p. 2)

Concurrent with the filing of its Response, BellSouth filed another tariff introducing BellSouth's SWA Pricing Flexibility (T-020828, Revised tariff, or Switched Access Contract Tariff No. FL2002-02). The Revised tariff formally makes the Contract tariff discount plan available to every IXC. (Response at p. 2) BellSouth explains that the Revised filing enables BellSouth to offer its IXC customers intrastate contract tariffs that are customized to meet their needs. BellSouth elaborates on the Revised tariff:

[F]or any carrier wishing to accept the plan, a minimum usage is established. Setting the minimum usage entails reviewing both the volume of usage and the usage patterns of the IXC over the previous 18 months, then projecting this usage forward for an additional 12 months. In order to be eligible for the discount plan, a carrier's minimum usage must be at least .5 billion MOU per year. Based on the volume of its minimum usage (assuming it meets the above-mentioned threshold), an IXC is eligible for one of three discount bands. In each band, there are specified percentage discounts that apply for usage that exceeds the minimum usage. (Response at pp. 3-4)

Staff notes, however, that although the Revised tariff has different parameters, it is substantially similar to the Contract tariff. The specific parameters of the Contract tariff were developed based upon carrier-specific (e.g., Sprint) usage.

BellSouth asserts that neither tariff includes a penalty of any sort for an IXC that contracts to purchase services under the tariffed terms, but does not achieve the designated increases in volume. (Response at p. 5) In its Response to Amended Petition, BellSouth elaborates:

If a carrier does not qualify by having sufficient volume, then it is not eligible to buy from the [subject] tariff. If the 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. (Response to Amended Petition and Partial Motion at p. 4)

BellSouth states that it has set the discount levels so that the greater the percentage increase over the baseline usage, the greater the discount. In its Response, BellSouth offers:

Setting the discount based, in part, upon the percentage increase allows both large and small IXCs to benefit financially from increasing the volume of minutes that they purchase from BellSouth. For example, even a relatively small IXC can obtain a discount by increasing proportionately the amount of its purchases. (Response at p. 5)

BellSouth claims that the FCC granted it the pricing flexibility in February of 2001 to offer these types of switched access service arrangements⁶. (Response at p. 4)

BellSouth argues that IXCs have available to them an unprecedented array of alternatives for purchasing switched access services. (Response at p.4) BellSouth asserts that an increasing number of IXCs are providing long distance service by obtaining access either through the use of their own facilities or the facilities of carriers other than BellSouth.

BellSouth flatly disputes AT&T's contention that its tariff was designed to be advantageous to its long-distance affiliate. The Company claims:

[E]ven at the future point where BSLD might become eligible for this discount program under the terms that would apply to all carriers, the discount plan is structured so that, as a practical matter, it will likely be permanently unavailable to BSLD. (Response at p. 9)

⁶Memorandum Opinion and Order, released February 27, 2001, FCC 01-76, Docket No. 00-21.

Regarding AT&T's allegation that its tariff is discriminatory, BellSouth states that this "is really nothing more than a complaint that BellSouth has not proposed a discount that suits AT&T's desire to both use BellSouth's switched access services less in the future and receive a discount on the declining amount of switched access that it does purchase." (Underlines in Original) (Response at p. 8) BellSouth asserts that the purpose of this tariff is to provide an incentive for IXC customers to remain on its network, and if AT&T does not avail itself of the offering, "this in no way renders the tariff discriminatory." (Response at p. 8)

Because the FCC Orders speak for themselves, BellSouth states that it is not required to cite to any FCC orders to contradict the Orders cited by AT&T. Nonetheless, the FCC has never considered the merits of a growth tariff like the subject BellSouth tariffs, according to BellSouth. Based on the FCC's definition of a "growth tariff," BellSouth believes that a true "growth tariff" entails an established commitment from the buyer to future growth in order to obtain the discounted price; BellSouth stresses that the subject tariffs do not entail any sort of commitment, but rather, the "discount levels are based on usage bands." (Response to Amended Petition and Partial Motion at pp. 5-7) BellSouth contends:

Presumably, this commitment [of a true "growth tariff"] would be in the form of a contractual obligation that would be breached if the growth were not achieved In the Notice of Proposed Rulemaking, Third Report and Order and Notice of Inquiry cited by AT&T, 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. (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 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. (Footnote omitted) (Response to Amended Petition and Partial Motion at pp. 5-6)

BellSouth concludes that the FCC has never considered a tariff of this sort, and 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." (Response to Amended Petition and Partial Motion at p. 6)

BellSouth claims that AT&T's argument concerning "growth" tariffs is premised entirely on the contention that "the subject tariffs violate federal law, specifically §§ 47 U.S.C. 202 and 272." (Response to Amended Petition and Partial Motion at p. 3) BellSouth points out that AT&T, however, does not specifically delve into any applicable Florida law, and has not filed a claim before the FCC to this effect. BellSouth elaborates:

AT&T's Petition makes no more than a 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 [of Florida law].

. . .

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 § [47 U.S.C.] 202. Third, the FCC specifically rejected AT&T's argument that BellSouth's tariff violates § [47 U.S.C.] 272 in its recent Order granting BellSouth's 271 application for North Carolina, South Carolina, Kentucky, Mississippi and Alabama. (Emphasis in original, footnote omitted) (Response to Amended Petition and Partial Motion at p. 3)

In essence, AT&T is arguing federal law before the Florida Commission, claims BellSouth. (Response to Amended Petition and Partial Motion at p. 3)

Finally, BellSouth points out that AT&T's assertion that this discount would be of no interest to any IXC other than BSLD is clearly rebutted by the fact that Sprint has entered into a Letter of Agreement to purchase service under this discount plan. (Response at p. 6) BellSouth respectfully requests that the Commission dismiss AT&T's Petition and deny all relief requested therein. (Response at p. 11)

Staff's Analysis

As mentioned previously, AT&T's Petition requests two specific forms of relief, suspension and cancellation of both BellSouth tariffs, and a formal administrative hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes. Staff would note that the arguments presented by AT&T and BellSouth addressed these topics in a combined manner; staff will do so as well.

As noted previously, BellSouth's Revised tariff has somewhat different parameters than the Contract tariff, primarily because the Contract tariff was narrowly structured in accordance with Sprint's usage. For comparison purposes using the Sprint usage bands (or usage ranges), the volume discount percentages would be the same under the Contract and the Revised tariffs. Staff points out, however, that the Revised tariff has an entry threshold of 500,000,000 MOUs, and is generally available for any IXC that meets the parameters. Staff believes the terms of the earlier BellSouth tariff plan (that AT&T thought was custom-crafted for BSLD) are now universally available for any carrier that meets the thresholds of the tariff. In staff's opinion, this partially mitigates the "discrimination" argument proffered by AT&T, since carriers other than BSLD that meet the requirements of the tariff could avail themselves to it. Nevertheless, staff believes that the "discrimination" argument cannot be conclusively dismissed on this basis alone, particularly in light of the argument regarding whether the BellSouth tariffs offer "growth discounts."

AT&T argues extensively that the BellSouth SWA tariffs are "growth tariffs," whereby the discounts apply only if the carrier's MOU volumes are steadily increasing. AT&T states that under the

legal standards established by the FCC, growth discounts and associated growth tariffs are discriminatory:

"Growth discounts," as defined by the FCC, are pricing plans under which incumbent LECs offer reduced per-unit access service prices for customers who 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. (footnote omitted, Amended Petition at pp. 14-15)

In both its original Petition and the Amended Petition, AT&T repeatedly describes the BellSouth SWA tariffs in this manner, as "growth tariffs." BellSouth bluntly disputes this characterization of the subject tariffs, although staff notes that both parties cite the above-noted definition of a "growth discount," and the FCC order from which the quote was gleaned, for support. Though AT&T cites numerous federal orders and decisions from other state commissions that concern "growth discounts," none provided a more targeted or alternative definition, nor could staff discern one from reviewing the cited documents. Staff therefore believes this case turns on interpreting whether the subject tariff offerings of this instant proceeding meet the definition of a "growth discount."

To that end, staff critically examined the cited passage that each party relies upon. The comma within the cite after the word "usage" and the word "or" following the comma suggest that two items need to be considered. To facilitate analysis, staff has inserted dividing brackets to separate the first and second parts of the sentence ("Part A" and "Part B"), as shown below:

"Growth discounts," as defined by the FCC, are "pricing plans under which incumbent LECs offer [A] reduced per-unit access service prices for customers who commit to purchase a certain percentage above their past usage, or [B] reduced prices based on growth in traffic placed over an incumbent LEC's network.

In staff's opinion, the interpretation of this passage turns on whether "Part B" is merely a restatement of "Part A," or rather a second consideration that is separate and distinct from "Part A." BellSouth seems to rely on the former as the basis for its position. Under the theory that "Part B" is merely a restatement of "Part A," one can argue that the subject tariffs do not require a commitment since there is no penalty or liability for failing to

meet the pre-established threshold. Accordingly, this analysis supports BellSouth's position that the subject tariffs do not provide impermissible growth discounts. However, under the theory that "Part B" is separate and distinct from "Part A," the subject tariffs do appear to violate "Part B," which leads to the conclusion that these tariffs do provide impermissible growth discounts.

Next, staff considers which theory is more plausible. While "Part A" and "Part B" are worded differently, the two parts are conceptually rather similar. Both address reduced prices for increasing volume. A closer review suggests that there may well be a distinction between "Part A" and "Part B." "Part A" may address the situation where a carrier commits to purchasing greater volumes, whether ultimately needed or not, and "Part B" may address the situation where a carrier's traffic volumes actually grow. However, because each party supports a contrasting interpretation of the cited text, staff believes an administrative hearing would present a forum for additional argument beyond that contained in the pleadings received to-date.

Staff notes that AT&T does not offer much in the way of Florida-specific argument, other than to state that "the design of [the BellSouth SWA tariff] and the ultimate effect [is] in violation of Sections 364.051(5), 364.08, 364.09, 364.10, and 364.3381, Florida Statutes, and Section 251(g) of the Telecommunications Act." (Petition at pp. 4-5) Nothing more of substance is offered, although staff notes that any determination of undue discrimination would need to consider competitive alternatives to BellSouth's Switched Access service. While BellSouth asserts that there are many competitive alternatives, minimal supporting detail is provided.

AT&T places considerable emphasis on the August 13, 2002 decision of the NCUC, wherein that state commission rejected the proposed tariff for "not being in the public interest."⁷ The NCUC concluded that the BellSouth's tariff plan was "biased against high-volume IXCs." Staff would note that BellSouth has not filed any other tariff of this type in that state since withdrawing the initial (Contract) filing. However, staff points out that the parties may be pursuing a region-wide settlement of the issues of

⁷See footnote 5 for the complete citation for this order.

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this proceeding, though staff is puzzled that AT&T has only formally contested the BellSouth tariffs in selected states.

Both parties rely on the FCC's definition of a "growth discount" to support their respective positions. Given the parties' contrasting conclusions, staff believes a hearing would be useful to elicit evidence that could assist in determining the proper interpretation and application in this case. In addition, a hearing would enable parties and staff to further explore the competitive alternatives to BellSouth's Switched Access service, which would be useful in determining whether the subject tariffs are unduly discriminatory under state law or a reasonable, authorized response to competitive pressure.

Conclusion

In summary, staff believes BellSouth's Switched Access Contract Tariff No. FL2002-01 (T-020572), and BellSouth SWA Pricing Flexibility, Contract Tariff No. FL2002-02 (T-020828), should not be suspended or canceled, and AT&T's request for a formal administrative hearing pursuant to Section 120.569 and 120.57(1), Florida Statutes, should be granted.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending resolution of all issues. (FORDHAM)

STAFF ANALYSIS: No. This docket should remain open pending resolution of all issues.