Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc.	)	
Tariff FCC No. 1	)	
Transmittal No. 629	)	**WCB/Pricing No. 02-15**
	)	

MOTION OF AT&T CORP. FOR STAY PENDING COMMISSION REVIEW

Pursuant to Sections 1.41 and 1.44(e) of the Commission's Rules, 47 C.F.R. §§1.41, 1.44(e), AT&T Corp. ("AT&T") respectfully requests that the Commission stay the Wireline Competition Bureau's Order on Reconsideration, DA 02-1355, released June 7, 2002 ("*Reconsideration Order*")[1] pending the Commission's consideration of AT&T's application, filed today, seeking to vacate the *Reconsideration Order*. The *Reconsideration Order* reversed the Bureau's earlier decision to suspend and investigate the above-captioned tariff filing by BellSouth seeking approximately $64 million in alleged exogenous costs incurred for the implementation of thousands-block number pooling. As a result of the Bureau's *Reconsideration Order*, the BellSouth tariff went into effect on July 2, 2002, pursuant to 47 U.S.C. § 402 and the Commission's *Tariff Streamlining Order*. As shown below, AT&T readily satisfies the applicable legal standards for grant of such a stay pending review by this Commission of the Bureau's erroneous *Reconsideration Order*.[2]

[1] In the Matter of BellSouth Telecommunications, Inc. Tariff FCC No. 1 Transmittal No. 629, WCB/Pricing No. 02-15, Order On Reconsideration, 17 FCC Rcd 10753 (2002) ("*Reconsideration Order*").

[2] The Bureau originally suspended BellSouth's rates, but withdrew the suspension in its

First, there is a strong likelihood that the Bureau's *Reconsideration Order* will be set aside by the Commission. As shown in AT&T's separate Application for Review (also filed today), BellSouth's proposed "exogenous cost" increases are fundamentally contrary to the Commission's pronouncement that "the costs of numbering administration are generally and appropriately treated as an ordinary cost of doing business."[3] The Commission's rules establish a rebuttable presumption against *any* recovery of thousands-block number pooling costs through exogenous cost increases, and BellSouth has not remotely overcome that presumption. To the contrary, BellSouth's increases include state thousands-block pooling costs that are expressly excluded by Commission rule; they fail to conform in other respects to the specific limits on thousands-block number pooling costs set forth in the Commission's recent Numbering Resource Optimization ("NRO") Orders; and they fail to reflect the required offset of significant cost reductions achieved by thousands-block number pooling.

Second, the balance of harms and the public interest also strongly favor a stay. The BellSouth tariff, by embedding (alleged) thousands-block number pooling costs in access charges, is at odds with Congressional intent, made clear in the Telecommunications Act of 1996, both to remove concealed subsidies from access charges and to require that costs be recovered in a competitively neutral manner. *See* 47 U.S.C. §§ 251(e)(2); 254(e). BellSouth's tariff inflicts irreparable injury on AT&T, by subjecting AT&T (and other IXCs) to substantial competitive disadvantages that cannot be undone later. BellSouth's tariff, especially when combined with the number pooling tariffs of other carriers, impose hundreds of millions of

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Reconsideration Order. AT&T asks the Commission to stay the effectiveness of the *Reconsideration Order*, which would have the effect of reviving the Bureau's original suspension order.

[3] *Numbering Resource Optimization*, CC Docket Nos. 96-98 and 99-200, Third Report and Order and Second Order on Reconsideration, 17 FCC Rcd. 252, ¶ 37 (2001) (*"Third NRO Order")*.

dollars in costs on IXCs and IXCs alone – conferring competitive advantages on IXCs' competitors, such as wireless carriers and BellSouth. These competitive disadvantages are particularly inappropriate given that IXCs (*qua* IXCs) do not contribute significantly to the problem of number exhaust.

For the same reasons, the public interest favors a stay. A stay will allow the Commission to evaluate the propriety and level of such charges before they are imposed, potentially (and, in AT&T's view, necessarily) avoiding their imposition altogether. Similarly, a stay will avoid inevitable (and potentially unnecessary) increases in IXC rates to consumers based on increased access charges, again allowing the Commission first to determine their propriety before their imposition. And a stay will avoid further artificial inflation of IXC costs and further tilting of the competitive playing field. The public-interest factor thus argues compellingly for a stay of the Bureau's *Reconsideration Order*.

In contrast, BellSouth will suffer no harm, irreparable or otherwise, from a stay of the Bureau's *Reconsideration Order*. If the Commission ultimately concludes that the Bureau acted appropriately, then BellSouth still will be able fully to recover the alleged costs. The tariff anticipates that BellSouth will recover such costs over a two-year period, so the immediate consequence of a stay is simply to delay the beginning of the two-year period.

In short, both the law and the equities strongly support a stay of the Bureau's *Reconsideration Order* pending review of that Order by the Commission.

In light of the substantial and ongoing injury suffered by AT&T and other IXCs, AT&T requests expedited consideration of this Motion to Stay. Should the Commission choose not to act with 10 days, AT&T will be compelled, given this ongoing harm, to consider its motion to the Commission denied and to seek appropriate relief from the United States Court of Appeals.

ARGUMENT

The Commission considers four criteria in evaluating requests that an order be stayed pending the Commission's own review: (1) the likelihood of the movant's success on the merits upon Commission review of the order; (2) the threat of irreparable harm absent the grant of a stay; (3) the degree of injury to other parties if a stay is granted; and (4) the public interest.[4] Further, the Commission has recognized that "no single factor is necessarily dispositive," and the Commission will thus grant a stay when there are "'serious questions going to the merits'" and the "'balance of hardships tip[s] sharply'" in favor of such relief.[5]

Here, all four factors strongly support the issuance of a stay. There is a strong likelihood that the *Reconsideration Order* will be reversed upon review by this Commission; there is substantial irreparable harm facing AT&T, other competitors, consumers, and the public interest during the pendency of the application for review; and BellSouth faces no remotely comparable harm if its efforts to pass these costs onto AT&T and other IXCs are delayed for a short period pending Commission review. Indeed, even if the likelihood of reversal by the Commission was less strong, the balance of hardships would still tip overwhelmingly in favor of a stay.

I. THE BUREAU'S RECONSIDERATION ORDER IS LIKELY TO BE REVERSED.

The first factor, the likelihood of success on the merits, strongly favors a stay of the Bureau's *Reconsideration Order* pending review of that order by the Commission. As detailed in AT&T's Application for Review, BellSouth's filing is, in numerous respects, flatly inconsistent with the Commission's ruling in the *Third NRO Order*. According to the *Third*

[4] *See AT&T* v. *Ameritech*, No. E-98-41, Memorandum Opinion and Order, ¶ 13 (June 30, 1998), ("*Qwest Order*"); *see also Virginia Petroleum Jobbers* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958).

[5] *Qwest Order* ¶ 14 (citation omitted).

NRO Order, "the costs of numbering administration are generally and appropriately treated as an ordinary cost of doing business."[6] Indeed, the Commission stressed that amounts involved in any such recovery of the costs of numbering administration would be minimal, if there were any at all.[7] Yet, BellSouth has revised its access tariffs to recover number pooling costs totaling approximately $64 million over a two-year period.

As the Commission made abundantly clear, the presumption of no additional recovery for thousand block number pooling can be rebutted only upon proof of "extraordinary" pooling implementation costs that meet a stringent three-part test and exceed all of the savings generated through pooling. BellSouth did not come close to meeting the Commission's test.

First, BellSouth's tariff revisions include costs that the Commission has made clear in its NRO Orders are not eligible for exogenous cost recovery, including, among other items: costs not directly incurred in implementing thousands-block number pooling; costs incurred prior to the national roll-out; costs incurred for adapting existing systems to the presence of thousands-block number pooling; costs associated with number administration generally; and costs incurred for state ordered thousands-block pooling in advance of the national implementation. *See* AT&T Application for Review at 6-15.

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[6] *Third NRO Order*, ¶ 37. As the Commission explained, the "recent growth in demand for number resources [has] required carriers to implement number conservation and numbering management practices, for example, reusing numbers assigned to former subscribers, area code splits, and overlays." The Commission considers "the costs of these numbering administration measures to be ordinary LEC administrative functions that are recovered in LEC rates generally. Under price caps, they are usually considered normal network upgrades that do not qualify for extraordinary recovery (*i.e.*, through exogenous adjustment to the price cap formula)." *Id.*, ¶ 39.

[7] *Id.*, ¶¶ 25, 38-41.

Second, BellSouth's tariff revisions violate the Commission's general rules governing exogenous cost recovery. BellSouth's tariff ignores the central tenet that in order for a cost to be exogenous, it must be imposed on the carrier by virtue of a legal mandate. BellSouth's tariff disregards the accepted principle that a cost incurred *before* the implementation of the Commission's mandate cannot be an exogenous cost. *See* AT&T Application for Review at 6-15.

Third, despite the Commission's unambiguous reiteration of its offset requirement, including a clear direction that carriers seeking an exogenous cost adjustment must offset any cost increases by the substantial savings associated with delay of North American Numbering Plan ("NANP") exhaust, BellSouth fails to show that any recoverable exogenous thousands-block number pooling implementation costs exceed the costs that would otherwise have been incurred in the absence of thousands-block number pooling. BellSouth's tariff revisions ignore altogether the savings attributable to the delay of NANP exhaust. As AT&T demonstrated, had BellSouth correctly accounted for these avoided costs, the savings offset would completely eliminate its claimed exogenous adjustments. *See* AT&T Application for Review at 15-19.

The obvious errors and omissions discovered even in the course of "streamlined" review, coupled with a disregard of explicit Commission rulings, warrant rejection of the tariff filing. At the very least, a full investigation should be conducted and the filing suspended. In sum, and as discussed in greater detail in AT&T's Application for Review, incorporated herein by reference, BellSouth's filing is wholly inconsistent with the Commission's *Third NRO Order*. The Bureau's reversal of its initial suspension of the BellSouth filing, was clear error.

II. THE BALANCE OF HARMS AND THE PUBLIC INTEREST STRONGLY FAVOR A STAY.

The balance of harms and the public interest also strongly favor a stay. First, AT&T (and other IXCs) will suffer irreparable harm absent a stay. As a result of the Bureau's *Reconsideration Order*, BellSouth's tariff was allowed to take effect on July 2, 2002. AT&T and other IXCs, therefore, are now paying significantly increased access charges as a result of BellSouth's tariff. These charges are substantial, raising access charges paid by IXCs by more than $30 million annually.

Harm to AT&T. These increased access charges threaten substantial and irreparable competitive harm during the pendency of the application for review. The Commission's access charge cost recovery scheme, as implemented through the excessive BellSouth tariff, imposes a substantial competitive disadvantage on AT&T relative to other carriers, such as wireless carriers and the ILECs themselves. This competitive disadvantage is particularly unwarranted, because IXCs (*qua* IXCs) generally do not contribute to the problem of number exhaust in the first place (*i.e.*, IXCs rarely obtain numbers and therefore IXCs generally do not place pressure on numbering resources). Further allowing BellSouth to recover its alleged number pooling costs in access charges forces long distance carriers that are also CLECs, like AT&T, to "pay twice;" first, by covering their own pooling expenses and, second, by absorbing a substantial portion of BellSouth's unwarranted costs.

BellSouth's ownership interest in Cingular makes its exorbitant pooling tariff particularly troubling. The Commission has acknowledged that traditional wireline IXCs and wireless carriers increasingly compete for the same customers, and that the growth of wireless carriers "appears to be causing a significant migration of interstate telecommunications revenues from wireline to mobile wireless providers."[8] Accordingly, BellSouth will benefit from potential

[8] *Federal-State Joint Board on Universal Service*, 17 FCC Rcd 3752, ¶ 11 (2002).

increases in Cingular's subscribership that would be driven in part by the increased costs placed upon IXCs by BellSouth's own cost recovery filing.[9] A stay will avoid the substantial and likely irreversible market distortions that will arise from the Commission's failure to evaluate properly the BellSouth tariff and disallow the significant ineligible costs, in advance of its imposition.

These competitive harms are substantial and cannot be undone later if the Commission ultimately finds, as it should, that BellSouth has not overcome the presumption that recovery of its pooling costs in access charges is unreasonable. BellSouth and Sprint together have tariffs with increases of $140 million, and Verizon and Qwest have sought (or are expected to seek) additional increases of almost $170 million. The magnitude of these increased access charges is staggering, and will have a substantial impact on competition between IXCs and other types of carriers, such as wireless carriers and the ILECs themselves. In light of the Commission's admonition in the *Third NRO Order* that it was unlikely that any ILEC would be able to establish the need for *any* exogenous cost adjustment, these increases "run the risk that that the . . . long distance markets will be changed in ways that Congress [and the Commission] did not intend, and that will substantially harm [AT&T], and ultimately the public as well." *See Qwest Order* ¶ 28. The Commission should therefore stay the Bureau's Order, so that the Commission can undertake a thorough review of BellSouth's tariff.

Public Interest. For many of the same reasons, the public interest strongly favors a stay. Indeed, the BellSouth tariff, by increasing access charges in order to pay (allegedly) for thousands-block number pooling, conflicts with Congress's direction in the Telecommunications Act of 1996 ("1996 Act") to remove just such concealed subsidies. The Commission previously recognized this mandate, and acknowledged that it must identify implicit support and remove it

[9] *See* Reuters Company News, S*BC bundling wireline, Cingular wireless service* (May 30,

from interstate access charges.[10] Indeed, Chairman Powell emphasized on many occasions that the Commission has a strong "commitment to reforming universal service to make [access] subsidies more explicit and portable,"[11] and that the agency "must not waiver in [its] resolve to make that which is implicit explicit."[12] A stay of the Bureau's decision, therefore, by suspending imposition of just such a hidden subsidy, will serve the purposes of the 1996 Act.

Second, a stay will also serve the related mandate under the 1996 Act that numbering administration costs be recovered in a competitively neutral manner. In section 251(e)(2) of the Act, Congress expressly provided that "the cost of establishing numbering administration arrangements . . . shall be borne by *all* telecommunications carriers *in a competitively neutral manner*." 47 U.S.C. § 251(e)(2) (emphasis added). As explained above, however, BellSouth's tariffs (together with other tariffs shortly to become effective) impose a substantial competitive

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2002), *available at* http://biz.yahoo.com/rc/020530/telecoms_sbc_cingular_1.html.

[10] *See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, 12 FCC Rcd 15982, ¶¶ 5-8 (1997), *aff'd sub nom., Southwestern Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998); s*ee also Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State Joint Board on Universal Service, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 16 FCC Rcd 19613, ¶¶ 8, 138 (2001) (concluding that leaving the removal of implicit support to the discretion of individual carriers is neither consistent with the mandate of the 1996 Act nor justified from a public policy standpoint); *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, ¶ 32 (2001) ("Congress in the 1996 Act directed [the] Commission and the states to reform universal service, and in particular, to eliminate implicit subsidies contained in access charges and instead make all universal service support explicit.").

[11] *Low-Volume Long-Distance Users*, Separate Statement of Commissioner Powell, 15 FCC Rcd 6298 (1999).

[12] *Federal-State Joint Board on Universal Service*, Statement of Commissioner Powell, 14 FCC Rcd 20432 (1999); *see also Federal-State Joint Board on Universal Service*, Separate Statement of Commissioner Powell, 14 FCC Rcd 8078 (1999) (stating that eliminating support from access charges has "some important merits").

disadvantage on IXCs. The Commission should stay the Bureau's *Reconsideration Order*, because the increases the Bureau has approved – and especially the magnitude of those increases – threaten the competitive neutrality that Congress required.

Third, a stay will serve the public interest by avoiding the inevitable costs to consumers arising from the BellSouth tariff before the Commission has been able to conduct a thorough evaluation of the proprietary of BellSouth's cost-recovery efforts. The long distance industry today is ill equipped to absorb entirely the tremendous costs BellSouth seeks to impose through its pooling tariffs, and thus such costs inevitably will have to be passed on to customers in the form of higher rates. A stay thus will protect consumers from unnecessary and unjustified rate hikes.

Lack of Harm to BellSouth. In contrast to the substantial and irreparable harm that AT&T, other IXCs, and consumers necessarily will suffer if a stay of the Bureau's *Reconsideration Order* is not entered, BellSouth will suffer no significant injury arising from such a stay. In its tariff filing, BellSouth allegedly seeks to recover, over a two-year period, certain historical costs associated with implementing nationwide thousands block number pooling. If the Commission enters a stay, but later deems the tariff filing lawful or otherwise finds the Bureau's *Reconsideration Order* proper, then BellSouth can still recover the same amounts, with the two-year period simply shifting to begin on a later date. Thus, any harm to BellSouth from a stay would be minimal.

CONCLUSION

For the foregoing reasons, as well as those presented in AT&T Application for Review, separately filed today, the Commission should grant AT&T's motion to stay the Bureau's *Reconsideration Order* pending the Commission's consideration of the Application for Review.

Respectfully submitted,

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