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

In the Matter of)
)
BellSouth Telecommunications, Inc.)
Tariff F.C.C. No. 1)

Transmittal No. 705

**PETITION TO REJECT OR SUSPEND AND INVESTIGATE
PROPOSED TARIFF REVISIONS**

US LEC Corp. ("US LEC") hereby petitions the Federal Communications Commission ("FCC" or "Commission"), pursuant to Section 1.773 of the Commission's rules (47 C.F.R. § 1.773), to reject the proposed tariff revisions filed by BellSouth Telecommunications, Inc. ("BellSouth") in the above-captioned Transmittal No. 705. At a minimum, the Commission should suspend and investigate the above-captioned transmittals.¹

BellSouth filed Transmittal No. 705 to revise its special access service offerings in FCC Tariff No. 1. The effect of the revisions would be, among other things, to impose unjust and unreasonable charges on US LEC and similarly situated CLECs for when a CLEC orders special access service on an expedited basis, and then is unable to meet that scheduled appointment. Because BellSouth is already adequately compensated for dispatching a technician a second time when a customer misses a service appointment, the effect of BellSouth's proposed revision would be to create a revenue stream to BellSouth's benefit solely at the cost of its competitors.

¹ Suspension and investigation or rejection of a proposed tariff or tariff modification is warranted when significant questions of unlawfulness arise in connection with the tariff. See *BellSouth Telecommunications, Inc. Transmittal No. 657*, Order, DA 02-1886 (rel. Aug. 2, 2002); *AT&T Co., Transmittal No. 148*, Memorandum Opinion and Order, 56 RR 2d 1503 (1984); *ITT World Comms., Transmittal No. 2191*, Memorandum Opinion and Order, 73 FCC 2d 709, 719 (1979); *AT&T Co., Transmittal No. 11935*, CC Docket No. 19989, 46 FCC 2d 81, 86 (1974); see also *Arrow Transp. Co. v. Southern Ry. Co.*, 372 U.S. 658 (1963).

I. THE COMMISSION SHOULD REJECT OR SUSPEND AND INVESTIGATE THE TRANSMITTAL BECAUSE THE NEW CHARGES FOR MISSED APPOINTMENTS ARE UNJUST AND UNREASONABLE, IN VIOLATION OF SECTION 201 OF THE COMMUNICATIONS ACT

A. BellSouth's Proposed Revision Is Unjust and Unreasonable Because BellSouth is Already Compensated for the Same Service for Which BellSouth Seeks New Compensation

BellSouth's tariff revisions should be rejected, or suspended and investigated, because it is unjust and unreasonable for BellSouth to be compensated for a service for which it is already compensated under its tariff. In its entirety, the excerpt below is the Description and Justification for the proposed additional charge of \$300.00 per occurrence when a customer misses an appointment that was subject to a Service Date Advancement (service scheduled on an expedited basis):

2.2 New Charge for Customer Missed Appointment on Advanced Service Dates

In today's environment, an advancement charge is not assessed in situations when BellSouth attempts and cannot complete delivery of an order with an advanced service date (i.e., the customer is not ready for service when a BellSouth technician arrives at the customer's premises to install, move or rearrange the service). To address this situation, this filing introduces a new rate element, called Service Date Advancement-Missed Appointment, at a charge of \$300 per occurrence. Section 5.1.1(H) of the tariff has been revised to add the terms, conditions and rates applicable for this situation.

In short, BellSouth's justification for the new charge is that it has identified a fact pattern for which it has not yet assessed a fee, regardless of whether BellSouth incurs additional costs in that situation. The new charge would apply when two conditions occur: (1) the customer has scheduled special access service on an expedited basis and (2) the customer misses the scheduled service appointment. If the new charge is intended to be compensatory (rather than punitive), the new charge is apparently intended to compensate BellSouth for the inconvenience of having to reschedule the service and dispatch a technician for a second appointment.

But BellSouth does not mention the essential point that BellSouth already has a tariffed charge for this situation. BellSouth has tariffed a Service Date Change Charge (\$31.60) and a Service Date Change-Additional Dispatch Charge (\$150.00). Sec. 5.3(C)(1)(e), 17th Rev. Pg. 5-

12. Nothing in BellSouth's tariff indicates that this charge is not applicable to service scheduled on an expedited basis. In fact, BellSouth states that it intends to impose *all three charges* when a customer misses an appointment scheduled on an expedited basis: "In addition [to the proposed new charge], a Service Date Change charge and a Service Date Change-Additional Dispatch charge will apply as specified in 5.3(C)(1)(e), following." Sec. 5.1.1(H)(4)(b), Original Page 5-1.2.1. BellSouth provides no explanation for why the additional charge is necessary or proper.

Apparently, BellSouth wants to be able to double-bill the customer for the exact same service—the process of providing an additional dispatch for a customer-missed appointment. The only difference between the existing charge and the new charge is that BellSouth assesses the new charge when the customer has also requested an advancement of service beyond the standard interval. US LEC submits that double billing is per se unreasonable and unlawful.

B. Approval of the BellSouth Tariff Revisions Would Be Contrary to Pro-Competitive Goals

It is clear that the purpose of the proposed tariff revisions is for BellSouth to generate additional revenue in the form of "penalty payments" from its competitors that order special access services on an expedited basis. CLECs already pay significant fees to BellSouth to obtain expedited service (\$200 per day per circuit). Under BellSouth's proposed revisions, a CLEC would have to assess the risks of incurring an additional charge of \$300 per circuit in the event that circumstances prevent the CLEC from meeting its scheduled service commitment. The effect of the new charge would be to chill the order of special access services on an expedited basis. As a result, fewer customers served by CLECs will have service on an expedited basis.

Because there is no cost justification for the new charges, they can only be explained as either seeking to maximize BellSouth's revenues in the form of monopoly rents, or seeking to impede competition by making the conditions for ordering special access services from BellSouth more onerous. It should be noted that BellSouth already earns extraordinary profits from its special access services. As AT&T points out in its October 15, 2002 Petition for Rulemaking, BellSouth's special access rates in areas in which it has obtained pricing flexibility

are grossly excessive, and BellSouth is gouging its captive special access customers.² According to AT&T's review of BellSouth's ARMIS data, BellSouth is earning a 49.26% rate of return on its special access products.³

II. THE COMMISSION SHOULD REJECT OR SUSPEND THE TRANSMITTAL BECAUSE IT FAILS TO MEET THE "SUBSTANTIAL CAUSE" TEST

Under the substantial cause test, the Commission measures the reasonableness of a tariff modification by weighing two principal considerations: the "carrier's explanation of the factors necessitating the desired changes at that particular time," and the "position of the relying customer."⁴ Concerning the first leg of this test, the only evidence that BellSouth has proffered in its brief Description and Justification is the statement that "[i]n today's environment, an advancement charge is not assessed in situations when BellSouth attempts and cannot complete delivery of an order with an advanced service date." This is an insufficient basis for the proposed revision. A purchaser of special access service already compensates BellSouth dearly to have service provided on an expedited basis. If the purchaser decides it no longer wants the service, or is unable to meet the scheduled service appointment, it has lost the sums already paid to BellSouth to have expedited service without receiving any benefit. If the purchaser wishes to reschedule the service, it must pay BellSouth a Service Date Change charge as well as a Additional Dispatch Charge on top of all other fees. There simply is no reason to impose additional charges solely because the purchaser sought expedited service and then was unable to complete the appointment.

² *AT&T Corp. Petition for Rulemaking To Reform Regulation Of Incumbent Local Exchange Carrier Rates For Interstate Special Access Services*, filed October 15, 2002, at 3.

³ *Id.* at 8.

⁴ *RCA American Comms., Inc.*, CC Docket No 80-766, Memorandum Opinion and Order, 86 FCC 2d 1197 at 1201 (1981).

Regarding the second leg of this test, BellSouth's customers have developed rates and operating budgets, relying on the underlying costs for services and the cash flow they provide. Should BellSouth impose higher financial commitments without justification, carriers will be forced to tie up resources that could otherwise be used to compete more effectively.

Based on this analysis, it is clear that Transmittal 705 fails the substantial cause test. BellSouth seeks to impose substantial burdens on its competitor/customers based on a weak justification. This is a manifestly unjust and unreasonable practice and cannot be allowed to become effective. The Commission should reject these proposed revisions.

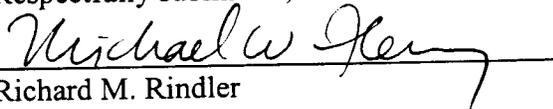
III. CONCLUSION

For the reasons described herein, the revisions proposed by Transmittal 705 are on their face unjust and unreasonable, and therefore unlawful under section 201(b) of the Communications Act. US LEC respectfully requests that the Commission reject the tariff revisions. If the Commission fails to reject the tariffs outright, the Commission should at a minimum suspend the revisions proposed by BellSouth in the above referenced Transmittals subject to an accounting order and an investigation to resolve the foregoing issues.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2003, copies of the foregoing **PETITION TO REJECT OR SUSPEND AND INVESTIGATE PROPOSED TARIFF REVISIONS;** BellSouth Tariff F.C.C. No. 1, Transmittal No. 705, were sent via Messenger and/or Facsimile, where indicated, to the following:

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