

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

In the Matter of)	
)	
BellSouth Telecommunications, Inc.)	Transmittal No. 716
Tariff F.C.C. No. 1)	

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

US LEC Corp. ("US LEC") and XO Communications, Inc. ("XO") hereby petition 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. 716. At a minimum, the Commission should suspend and investigate the above-captioned transmittals.¹

BellSouth filed Transmittal No. 716 to revise its special access service offerings in FCC Tariff No. 1. This filing is substantially the same as Transmittal No. 705, filed on March 20, 2003. US LEC petitioned the Commission to reject that tariff revision, and BellSouth withdrew the proposed revisions on April 3, 2003.

The latest filing is no improvement on the earlier filing. As US LEC stated with respect to Transmittal No. 705, the effect of the revisions would be, among other things, to impose unjust and unreasonable charges on US LEC, XO, and similarly situated CLECs when a CLEC orders special access service on an expedited basis, and then the CLEC (or its customer) is unable to meet that scheduled appointment. Because BellSouth is already adequately

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).

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. Neither BellSouth's latest revisions, nor its argument in response to US LEC's earlier petition dispel these concerns.

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. While BellSouth has provided additional verbiage in the Description and Justification for Transmittal No. 716 than it provided for Transmittal No. 705, BellSouth still cannot justify the proposed additional charge of \$300.00 per circuit per occurrence when a customer misses an appointment that was subject to a Service Date Advancement (service scheduled on an expedited basis).

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 service to be provided on an expedited basis (for which BellSouth is already well compensated). US LEC and XO submit that double billing is *per se* unreasonable and unlawful.

B. BellSouth's Response to US LEC's Initial Protest Demonstrates the Unreasonableness of the Proposed Revision

BellSouth has attempted to justify its proposed double-billing arrangement once already. In comments in response to US LEC's first petition to reject these tariff revisions, BellSouth stated:

The pre-existing service date advancement charges would apply only if the customer, having missed the initial installation, decided to reschedule the installation. The pre-existing service date change and the service date change-additional dispatch charges do not cover the customer's initial failure to meet the initial installation date and consequently result in the need for an additional dispatch to complete the service request. At that point, the service date change and the service date change-additional dispatch charges are associated with rescheduling of the installation and another dispatch that becomes necessary to complete the installation. Thus, the restructured charge and the existing charges cover separate activities. BellSouth Reply ¶ 8 (Mar. 31, 2003).

BellSouth's response proves the unreasonableness of the proposed revisions. BellSouth has an existing Service Date Advancement charge to compensate it when "BellSouth has expended considerable resources to meet the customer's request to advance the service date (i.e., BellSouth provisioning centers monitor service orders by due dates and reprioritize, reschedule,

and accelerate pre-defined daily work activities for these advancement requests which involve special handling).” Description and Justification, 2.2. When the customer reschedules installation, not only does the customer pay the normal non-recurring charges for the installation (which compensates BellSouth to dispatch a technician), but the customer also pays a Service Date Change charge (for BellSouth’s efforts to reschedule) as well as a Service Date Change-Additional Dispatch charge (to compensate BellSouth for the initial, unsuccessful technician dispatch). There simply is no basis to charge the customer for canceling the expedited service appointment.

C. BellSouth Does Not Assert That the Proposed Revision Will Be a Substitute for the Existing Service Date Advancement Charge

BellSouth justifies its proposed revision as necessary to compensate BellSouth for the cost of providing an installation on an expedited basis. Yet BellSouth already has a Service Date Advancement charge for this service. BellSouth’s proposed revision would be less objectionable if BellSouth intended to substitute its Service Date Advancement charge of \$200.00 per circuit per day (§5.1.1(H)(8)(a)) with the Service Date Advancement-Missed Appointment charge of \$300.00 per circuit per occurrence (§5.1.1(H)(8)(b)) in the event of a missed appointment. BellSouth’s tariff revisions do not propose to do this; instead, BellSouth proposes to double-bill customers that request an installation on an expedited basis and then cancel the installation after BellSouth has deployed a technician.

D. 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

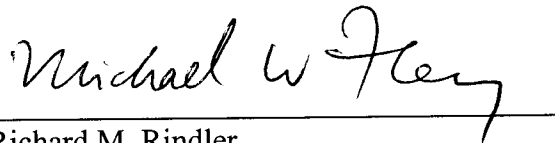
effect of the new charge would be to chill the order of special access services on an expedited basis. As a result, fewer customers served by CLECs will have service on an expedited basis.

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. CONCLUSION

For the reasons described herein, the revisions proposed by Transmittal 716 are on their face unjust and unreasonable, and therefore unlawful under section 201(b) of the Communications Act. US LEC and XO respectfully request 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 Transmittal subject to an accounting order and an investigation to resolve the foregoing issues.

Respectfully submitted,



Wanda G. Montano
Vice President, Regulatory &
Industry Affairs

Richard M. Rindler
Patrick J. Donovan
Michael W. Fleming

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.

US LEC Corp.
6801 Morrison Blvd.
Charlotte, NC 28211-3599

Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W. Suite 300
Washington, D.C. 20007
(202) 424-7500 (Tel.)
(202) 474-7645 (Fax)

Dana Shaffer
Vice President & Southeast Regulatory Counsel
XO Communications, Inc.
105 Molloy St.
Nashville, TN 37201

Dated: May 2, 2003

Counsel for US LEC Corp.
and XO Communications, Inc.