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

In the Matter of	)	
BellSouth Telecommunications Inc.	)	Transmittal No. 764
Revisions to Tariff F.C.C. No. 1	)	

PETITION OF AT&T CORP.

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TABLE OF CONTENTS

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PETITION OF AT&T CORP.

Pursuant to Section 1.773 of the Commission's rules, 47 C.F.R. § 1.773, AT&T Corp. ("AT&T") petitions the Commission to reject or, in the alternative, suspend and investigate the above-captioned tariff revisions filed by BellSouth Telecommunications Inc. ("BellSouth") on December 5, 2003, under Transmittal No. 764.[1] In this transmittal, BellSouth proposes to offer a special promotion for DS1 (a.k.a. BellSouth SPA DS1) service for a six-month period from January 1, 2004 to June 30, 2004. If this tariff is permitted to take effect, the special promotion would be offered to customers throughout the BellSouth region and would provide a nonrecurring credit of $400 for each new subscription to DS1 local channel upon the customer meeting

1 A tariff is subject to rejection when it is *prima facie* unlawful, in that it demonstrably conflicts with the Communications Act or a Commission rule, regulation or order. *See, e.g., American Broadcasting Companies, Inc.* v. *AT&T*, 663 F.2d 133, 138 (D.C. Cir. 1980); *MCI* v. *AT&T*, 94 F.C.C.2d 332, 340-41 (1983). Suspension and investigation are appropriate where a tariff raises substantial issues of lawfulness. *See AT&T (Transmittal No. 148),* Memorandum Opinion and Order, 56 RR2d 1503 (1984); *ITT (Transmittal No. 2191),* 73 F.C.C.2d 709, 716, n.5 (1979) (*citing AT&T (Wide Area Telecommunications Service*), 46 F.C.C.2d 81, 86 (1974)).

certain terms and conditions set forth in the special promotion. The Commission should reject BellSouth's proposed tariff revisions because they offer an unlawful growth discount.

INTRODUCTION AND SUMMARY

According to BellSouth's tariff, the promotion would operate as follows:

(1) At the end of each month of the promotion, the customer must have added a minimum of 10% net Local Channels over and above the previous month's net Local Channel additions. The previous month's net Local Channel additions must be a positive number (this includes the beginning month). If the previous month's net Local Channel additions is a negative number, the customer will not qualify for any credits until the net Local Channel additions is positive for two consecutive months at which time the customer may qualify for credits the second month.

(2) If the customer maintains the requirements in (1) above each month of the promotion, the customer shall receive a $400 credit for each net Local Channel addition. Credits will be given each month up to a maximum of 15% for each net Local Channel addition over and above the previous month's net Local Channel additions.

(3) Should the customer fail to meet the minimum Local Channel requirement specified in (1) above for any month, the customer will not qualify for a credit for such month. However, the customer may continue participation in the promotion for the remaining months.

(4) A maximum credit of 60% will be given for the entire promotional period, which will be determined by summing the percentages of net Local Channel increases for those months qualifying for credit.[2]

BellSouth's Transmittal No. 764 is clearly a tariff filing that offers "growth" discounts to its customers. According to BellSouth's Description and Justification, "[c]redit[] given under this special promotion applies only to DS1 (a.k.a. BellSouth SPA DS1) service incremental net demand <u>growth</u> and is not applicable to any existing demand."[3] Such "growth" discounts have been explicitly prohibited by the

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[2] BellSouth Transmittal No. 764, Tariff Original p. 7-174.

[3] BellSouth Transmittal No. 764, Description and Justification, p. 1 (emphasis supplied).

Commission, as there is no economic justification for their use. *See infra* nn.5, 6, 7, 12, 13 & 24.

The requirement that a carrier have growing DS1 service volumes to qualify for a discount can result in two carriers with the exact same DS1 service volumes paying different rates for access – a carrier with declining DS1 volumes paying BellSouth's "standard rate" and another carrier with increasing DS1 volumes paying "rates discounted by $400 per DS1." In addition, a carrier with small (but growing) DS1 volumes could receive a substantial discount at the same time that a large carrier with significantly higher (but flat or declining) DS1 volumes receives no discount. The growth tariff blatantly discriminates against interexchange carriers such as AT&T with high DS1 volumes that are declining due to BellSouth entry into long distance and a growing CLEC presence that diverts special access services from BellSouth.

Even worse, the growth discount provisions in BellSouth's DS1 promotion tariff favor *higher-cost* access carriers. As the Commission has recognized – and as Bell Operating Companies ("BOCs") have admitted in the past – the BOCs' costs of carrying traffic for higher-volume carriers are *lower* than those for carrying traffic for lower-volume carriers.[4] Yet, because the growth discounts are based on percentage growth levels of DS1 local channels added, carriers with low volumes can more easily satisfy the growth rates that trigger the discounts than carriers with high volumes. For example, an access customer that currently adds 20 DS1 local channels in one month

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[4] *Access Charge Reform,* CC Docket No. 96-262, Notice of Proposed Rulemaking, 11 FCC Rcd. 21354, ¶ 189 (1996) (*"Access Charge Reform NPRM"*) (concluding that BOCs should be permitted to provide volume-based discounts based on the BOCs' showing that the per minute cost of providing access services for higher-volume carriers are lower than those for providing access services to lower-volume carriers).

could satisfy a ten percent growth requirement by adding just 22 DS1 local channels in the following month. By contrast a larger-volume access customer – say a customer that orders 300 DS1 local channels in a month – would have to add 330 DS1 local channels in the following month to satisfy a ten percent growth requirement. Thus, the proposed growth discount would be much easier for the lower-volume, higher-cost access customers to attain, and much more difficult for the higher-volume, lower-cost access customers to achieve.

Moreover, BellSouth's growth tariffs have the effect of targeting those customers and that traffic most vital to BellSouth's maintenance of its monopoly power in the provision of special access services. The incentive provided by the promotion is not tied to cost savings, offered widely to retain or win customers, or tied to any other basis that might benefit competition. Instead, it targets the new business and traffic most readily available to carriers that would provide competitive special access offerings or self-deploy facilities. In this nascent and vulnerable market, the tariff revision has the effect of (i) precluding competing providers of special access services from securing traffic and customers for current offerings; (ii) precluding competing providers of special access from securing traffic and customers that would justify new facilities deployment; and (iii) precluding customers from self-deploying special access facilities based on their own traffic. The BellSouth offering is thus not only anticompetitive, but also contrary to the Commission's policies that seek to promote facilities-based competition.

Finally, it is clear that this proposed growth discount tariff, introduced during a time when BellSouth has entered the interexchange market, is designed to benefit BellSouth's long distance affiliate with its small but growing share of access traffic. BellSouth's tariff proposes to establish growth discounts that would result in unjust and unreasonable rates that contravene Section 201(b) of the Communications Act and violate the antidiscrimination provisions of Section 202 and Section 272 of the Communications Act, 47 U.S.C. §§ 201, 202, 272.

ARGUMENT

BellSouth's proposed DS1 growth discount tariff is plainly unlawful. The Commission has on numerous occasions rejected BOC attempts to implement the type of growth discounts proposed here. For example, in 1994, the Commission assessed whether various forms of discounts should be permitted in connection with its review of transport rates. The Commission determined that volume and term discounts would benefit consumers and increase competition, but the Commission expressly rejected the use of growth discounts, reaffirming that the Commission's "rules do not provide for percentage or growth discounts" for transport.[5] In 1995, the Commission again reaffirmed that its "rules do not contemplate percentage or growth discounts" for transport and directed that a BOC must obtain a waiver from the Commission to be allowed to offer such discounts.[6]

In 1996, the Commission again tentatively concluded that it would not be in the public interest to permit incumbent LECs to offer growth discounts for particular

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5 *Transport Rate Structure and Pricing*, Third Memorandum Opinion and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, 7 FCC Rcd. 3030, ¶¶ 113-14 (1994).

6 *Transport Rate Structure and Pricing*, CC Docket No. 91-213, Fourth Memorandum Opinion And Order On Reconsideration, FCC 94-325, ¶ 17 (1995).

access services. The Commission explained that:

> it would not be in the public interest to permit incumbent LECs to offer "growth discounts" for particular access services . . . because BOC affiliates will begin with existing relationships with end users, name recognition, and no subscribers, they will grow much more quickly than existing IXCs and other new entrants. . . . Thus, incumbent LECs could circumvent the nondiscrimination provisions of section 272 by offering growth discounts for which, as a practical matter, only their affiliates would qualify.[7]

In 1999, the Commission affirmed this tentative conclusion, reasoning that such discounts "create an artificial advantage for BOC long distance affiliates with no subscribers relative to existing IXCs and other new entrants."[8]

Commission rejection of these BOC attempts to include growth discount provisions in their tariffs is entirely appropriate. Growth discounts violate numerous provisions of the Communications Act, including 47 U.S.C. §§ 201, 202 and 272.

I. BELLSOUTH'S PROPOSED DS1 GROWTH DISCOUNT TARIFF VIOLATES SECTIONS 272(c)(1) AND (e)(3) OF THE COMMUNICATIONS ACT.

Section 272(c)(1) states that "[i]n its dealings with its affiliate . . . a Bell operating company . . . may not discriminate between [its affiliate] . . . and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards." The Commission has explained that this provision of the Communications Act "establishes an *unqualified prohibition* against discrimination by a

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7 *Access Charge Reform NPRM*, ¶ 192. These concerns were reaffirmed by the Commission in 1999. *See Access Charge Reform*, Fifth Report and Order, 14 FCC Rcd. 14294, 14221, ¶¶ 134-35 (1999) ("Without any affirmative benefit to growth discounts presented in the record before us, we have no basis for allowing such discounts.") ("*Access Charge Reform Fifth Report and Order*").

8 *Id.*

BOC in its dealings with its section 272 affiliate and unaffiliated entities,[9] and that "a BOC must provide to unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions."[10] Similarly, section 272(e)(3) expressly "require[s] the BOCs to charge nondiscriminatory prices" for telephone exchange service and exchange access.[11]

Based on these statutory requirements, the Commission has stated that section 272(e)(3) prohibits even volume and term discounts that have a discriminatory effect because "[w]e recognize that a BOC may have an incentive to offer tariffs that, while available on a nondiscriminatory basis, are in fact tailored to its affiliate's specific size, expansion plans, or other needs."[12] The Commission has held that BOCs may not discriminate among carriers when implementing term or volume discounts and has acknowledged that growth discounts violate this directive:

> A BOC "must make volume and term discounts available on a non-discriminatory basis to all unaffiliated interexchange carriers." Growth discounts violate this mandate because they offer reduced prices based on growth in interexchange traffic, and therefore create "an artificial advantage for BOC long distance affiliates with no subscribers, relative to existing IXCs and other new entrants."[13]

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[9] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Telecommunications Act of 1934*, *As Amended*, First Report and Order, 13 FCC Rcd. 11230, ¶ 197 (1996) (emphasis supplied) ("*Non-Accounting Safeguards Order*").

[10] *Id*. ¶ 202.

[11] *Id*. ¶ 258.

[12] *Id*. ¶ 257.

[13] *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA*

There is nothing in BellSouth's proposed DS1 growth tariff that carves out its long distance affiliate, or an interexchange carrier that may be the underlying facilities-based carrier for BellSouth's long distance offerings, from taking advantage of the discount. Because BellSouth's proposed DS1 special promotion would create an artificial advantage for its own long distance affiliate, the tariff violates the *unqualified prohibition* against discrimination embodied in Sections 272(c)(1) and (e)(3).

II. BELLSOUTH'S PROPOSED DS1 GROWTH DISCOUNT TARIFF VIOLATES SECTIONS 201(b) AND 202(a) OF THE COMMUNICATIONS ACT.

Even if BellSouth were to modify the tariff so as to preclude a discriminatory advantage in favor of its long distance affiliate, the proposed growth discount would still violate Sections 201(b) and 202(a).

A. BellSouth's Proposed Tariff Is Unreasonably Discriminatory In Violation Of Section 202(a).

Section 202(a) of the Communications Act states that "it shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges . . . for or in connection with like communications services . . . by any means or device . . . or to make or give any undue or unreasonable preference or advantage to any particular person, [or] class of persons."[14]

The D.C. Circuit Court of Appeals has explained that a dominant carrier's differential rates for like services "cannot be sustained under section 202(a) unless the

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Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, WC Doc. No. 02-150, Order, 17 FCC Rcd. 17595, ¶ 272 (2002) (citations omitted) ("*BellSouth 5-State Section 271 Order*").

[14] 47 U.S.C. § 202(a).

resulting differences between them, to the extent that they are based on the costs of like facilities, are not unjust or unreasonable in amount."[15] Put simply, discriminatory rates for "like" services violate section 202(a) unless those discriminatory rates are "just and reasonable."

The "test of whether services are 'like' is functional similarity or equivalence."[16] "This test looks to the nature of the service" to determine "whether the services are different in any material functional respect."[17] And the test considers whether services are functionally equivalent "from the perspective of consumers."[18] In this regard, the D.C. Circuit and the Commission have emphasized that "the functional equivalency test should be allowed to yield a determination that . . . services are 'like,' whether or not they are 'identical.'"[19] Thus, for example, the Commission has determined that full-time and part-time video services were "like" services where users received the identical transmission service, and the fact that each service category had its own dedicated facilities was found to be irrelevant to the issue of whether the services were "like" services.[20] Under this precedent, it is clear that the DS1 access services

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15 *MCI Telecommunications* v. *FCC*, 842 F.2d 1296, 1303 (D.C. Cir. 1988).

16 *Investigation of Special Access Tariffs of Local Exchange Carriers*, Tentative Decision, 8 FCC Rcd. 1059, ¶ 19 (1994) ("*SNFA Remand Findings*").

17 *Id.*

18 *Id.* ¶ 20; *see also Ad Hoc Telecommunications Users Committee* v. *FCC*, 680 F.2d 790, 796 (D.C. Cir. 1982).

19 *SNFA Remand Findings* ¶ 20; *Ad Hoc* v. *FCC*, 680 F.2d at 797.

20 *See American Broadcasting Companies, Inc.* v. *FCC*, 663 F.2d. 133, 139 (D.C. Cir. 1980).

provided to BellSouth higher-volume customers are "like" services to DS1 access services provided to BellSouth lower-volume customers.

The next question is whether BellSouth's proposed growth discount tariff would result in discriminatory charges for those "like" services. The answer is yes. As noted, access customers that are able to satisfy the growth requirements will pay access rates that are as much as $400 lower per DS1 than access customers that do not qualify for the discount.

Thus, the only remaining question is whether that discrimination in charges is unreasonable or unjust. Again, the answer is yes. The Commission has explained that discriminatory rates are unjust or unreasonable if they are not "justified by considerations such as differences in cost" or do not serve the "goals of the Act."[21] There is no question that the growth discount provisions of BellSouth's DS1 special promotion tariff are not justified by cost differences, nor do they serve the procompetitive goals of the Act. BellSouth's proposed tariff revisions therefore violate section 202(a) of the Communications Act because they establish an unjust and unreasonable rate difference for like (in this case identical) services.

B. BellSouth's Proposed Tariff Is Unjust and Unreasonable In Violation Of Section 201(b).

Section 201(b) of the Communications Act states that any "charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared unlawful."[22] In accordance with that provision, a charge or practice is unlawful if it is

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21 *SNFA Remand Findings* ¶ 135.

22 47 U.S.C. § 201(b).

"unjust, unreasonable, unduly discriminatory, or preferential."[23] BellSouth's proposed growth discount tariff is unjust and unreasonable because, if permitted to take effect, it would result in unduly discriminatory rates for DS1 services and would distort the competitive interexchange market, thereby harming consumers and competition. As demonstrated above (pp. 3-4, 9-10), BellSouth's promotion would give the benefits of the discount to lower-volume carriers that are more costly to serve, while precluding larger lower-cost access carriers, such as AT&T, from taking advantage of the discount.

Moreover, BellSouth's growth tariffs have the effect of targeting those customers and that traffic most vital to BellSouth's maintenance of its monopoly power in the provision of special access services. The incentive provided by the promotion is not tied to cost savings, offered widely to retain or win customers, or tied to any other basis that might benefit competition. Instead, it targets the new business and traffic most readily available to carriers that would provide competitive special access offerings or self-deploy facilities. In this nascent and vulnerable market, the tariff revision has the effect of (i) precluding competing providers of special access services from securing traffic and customers for current offerings; (ii) precluding competing providers of special access from securing traffic and customers that would justify new facilities deployment; and (iii) precluding customers from self-deploying special access facilities based on their own traffic. The BellSouth offering is thus not only anticompetitive, but also contrary to the Commission's policies that seek to promote facilities-based competition.

The anticompetitive discriminatory nature of the proposed growth discounts is not offset by any public interest benefits. In fact, the Commission has in the

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[23] *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1231 (D.C. Cir. 1999) (quoting *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 n.2 (D.C. Cir. 1987)).

past explicitly invited BOCs and other carriers to provide evidence that growth discounts have benefits that offset the obvious competitive harms, but "none of the parties supporting growth discount explain[ed] why growth discounts enhance the development of competitive markets."[24] Not surprisingly, BellSouth has offered no justification whatsoever for the proposed discount.

[24] *Access Charge Reform Fifth Report and Order* ¶ 135.

CONCLUSION

For the reasons stated above, the Commission should reject BellSouth's patently unlawful DS1 growth tariff revisions or, in the alternative and at a minimum, suspend and investigate BellSouth's Transmittal No. 764 for the full five months and impose an accounting order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Judy Sello, do hereby certify that on this 11th day of December, 2003, a copy of the foregoing "Petition of AT&T Corp." was served by facsimile and U.S. first class mail, postage prepaid, on the party named below.

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