

# LOUISIANA PUBLIC SERVICE COMMISSION

## DOCKET NO. U-22091

### LOUISIANA PUBLIC SERVICE COMMISSION EX PARTE

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*In re: Docket No. U-22091, Review and Consideration of BellSouth Telecommunications' Resale Tariff Filing of April 15, 1996, Filed Pursuant to Section 1101 in the Regulations for Competition in the Local Telecommunications Market*

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(Decided at Open Session, March 18, 1998 )

#### NATURE OF THE CASE

This proceeding concerns the Resale Tariff filed by BellSouth on April 15, 1996, which was later withdrawn and replaced by a second Resale Tariff filed on February 5, 1997. Both tariff filings stated that the filing was made pursuant to Section 1101 of the Regulations for Competition in the Local Telecommunications Market ("the Regulations"). Intervenors and the LPSC Staff contended that several of the tariff provisions excluding or restricting the availability of services offered at retail to end users by BellSouth violate Sections 251(B)(1) and 251(C)(4) of the Telecommunications Act of 1996 ("The Act"), and ¶939 of FCC's First Report and Order ("the Order"), and the Commission's Competition Regulations ("the Regulations"). BellSouth responded that the exclusions and restrictions contained in their tariff are in conformity with the applicable Regulations and should be approved by the Commission. The Proposed Recommendations issued by the Administrative Law Judge concluded that there were several provisions in BellSouth's tariff which should be modified or eliminated. BellSouth filed its exceptions to the Proposed Recommendations and MCI filed reply to BellSouth's exceptions. A final recommendation was issued by the ALJ and after due consideration, adopted by the Commission with the amendments as specified below.

#### PROCEDURAL HISTORY

BellSouth Telecommunications, Inc. ("BellSouth") initiated this proceeding by filing a tariff on the sale of services to Competing Local Exchange Carriers for purposes of resale to end-users with the Commission on April 15, 1996, pursuant to Section 1101 of the Regulations for Competition in the Local Telecommunications Market. Various parties filed notice of intervention and protest, with several Late Filed Interventions after Motions for leave to intervene out of time were granted. At a status conference in November 1996, hearings dates in January, 1997 were scheduled and a pre-hearing procedural schedule was established, pursuant to which discovery was conducted and testimony was filed. On February 6, 1997, BellSouth filed an amended and restated Resale Tariff, which was published in the Commission's Official Bulletin on February 21, 1997. Several parties filed notice of intervention and protest. Several requested postponements of the hearing followed, including a continuance ordered by the Commissioners in February of 1997. At its March 19, 1997 Business and Executive Meeting, the Commission amended its Competition Regulations. A number of amendments were to sec. 1101(B) Resale Regulations. The amendments to the Commission's Competition Regulations resolved a number of issues that had been raised in the current docket, including issues related to use and user restrictions, contract service Arrangements, N11, 911, and E911 services, Link-Up Louisiana and Lifeline services, short term promotions, and grand fathered services. On May 5, 1997, following submission of memoranda and oral arguments from all parties as to the scope of Docket No. U-22091, the Administrative Law Judge ruled that any issues raised by the parties which have been previously considered and decided by the Commission in amending its Rules for Competition, Docket No. U-20883, will not be considered in Docket No. U-22091. A status conference was

held on April 1, 1997, at which a hearing date of June 19, 1997 was established. A hearing was held on June 19, 1997. A Joint Stipulation was executed on July 24, 1997 by BellSouth and the Intervenor MCI, AT&T, ACSI, Sprint and the Small Company Committee, concerning the areas of agreement. MCI expressed its disagreement over one of the items in the Joint Stipulation (Item II.2), and reserved its rights to argue on appeal all issues concerning the Resale Tariff. In addition, the LPSC Staff and Access Network Services, Inc. (“ANSI”, one of the intervenors) stated their non-opposition to the stipulation, but did not sign it, as they did not wish to become parties to the stipulation. BellSouth and several of the intervenors submitted post-hearing briefs on July 24, 1997, and the Staff, after a requested extension was granted, filed its brief on August 1, 1997. On August 4, 1997, the Joint Stipulation was filed. The Proposed Recommendation was issued by the Administrative Law Judge on November 10, 1997. BellSouth filed its exceptions to the Proposed Recommendations on November 21, 1997, and MCI’s Reply to BellSouth’s exceptions was received by the Commission on December 1, 1997. No other parties filed exceptions or replies to exceptions within the 10 day period allowed for filing exceptions and replies to exceptions. A final recommendation was issued by the ALJ, which was adopted by the Commission at its March 18, 1998 Business Meeting, subject to three modifications as specified below.

## **CONTENTIONS OF THE PARTIES**

BellSouth filed the Amendments to its General Subscriber Services Tariff and Private Line Services Tariff on February 5, 1997; at a status conference on April 2, 1997, upon BellSouth’s request, it was agreed by the parties that the intervenors and the LPSC Staff would submit a list of what they viewed as still at issue in this docket, by April 18, 1997, concerning the amended tariff. In its response to the intervenors’ and the Staff’s lists of issues (filed on April 25, 1997), BellSouth stipulated that it would not dispute some of the issues (Staff’s Issue No. 1 and 2; MCI’s Issues No. 4, 6, 11, 23-24, and ACSI’s issues No. 16 and 17) and agreed to change its tariff accordingly at the conclusion of this docket. On several of the other issues, BellSouth filed a Motion to limit the scope of the docket, and the Administrative Law Judge ruled on May 29, 1997, that “[a]ny issues raised by the parties which have been previously considered and decided by the Commission in amending its Rules for Local Competition, Docket No. U-20883, will not be considered in this docket.” It was determined that all other issues that had been raised by the parties would be considered.

While the Joint Stipulation does reflect some agreement over many issues that were previously disputed by the parties, the Joint Stipulation does not address all disputed issues. The provisions of BellSouth’s tariff that remain heavily contested by the parties concern the following services:

### ***A. Educational Discount Program***

BellSouth’s Resale Tariff Section A15.14 states that the Educational Discount Program (“EDP”) is not available for resale. The Intervenor MCI argues that the goals of the Act, and the Commission’s Regulations cannot be achieved if the CLECs cannot compete effectively with BellSouth by offering the Education Discount Program to end users. They contend that they cannot compete effectively if the Education Discount Program is not available for resale, and even if it is, if it is not available to CLECs at wholesale prices.

BellSouth concedes that the Education Discount Program is a service offered at retail to end users, but relies on “certain limited exceptions” to BellSouth’s resale obligations recognized by the Regulations to argue that an exclusion of this service is proper under the Regulations. According to BellSouth, because the Education Discount Program is not a typical retail service available to the general body of subscribers, the tariff’s exclusion of the Education Discount Program is consistent with the intent of the Regulations to exempt that service from resale.

Further, BellSouth contends that, if the Commission orders it to offer the Educational

Discount Program for resale to CLECs, it should be allowed to do so at no discount because the services provided through the Education Discount Program are already discounted, and there would be no costs avoided through resale. The intervenors and the LPSC Staff point out that the Education Discount Program was established by the Commission by Order No. U-17949-JJ, dated March 18, 1994. By this Order, the Commission allocated certain over-earnings of BellSouth through a special tariff to fund the provision of dedicated high speed transmission facilities to eligible schools, libraries and hospitals at a rate discounted from BellSouth's retail tariff rates. The Staff points out that, while these services are discounted from the end user's point of view, they are not "already discounted" to the CLEC seeking to resell those services, and should therefore be offered for resale at the discounted rate.

### ***B. Special Billing Arrangements***

BellSouth's Tariff §A.5.8.1 states that Special Billing Arrangements ("SBA") are not available for resale. The SBA is a term in BellSouth's tariff that offers rates that have been discounted to reflect billing efficiencies that accrue to billing those services to one entity, which any state government location can avail itself of, subject to some conditions<sup>1</sup>. The Tariff refers to a specific SBA involving the State of Louisiana that will remain in place until the year 2002. The intervenors contend that the restriction on SBA unduly limits local competition, since BellSouth would be the only provider offering this service to its customers. BellSouth responds with two related arguments: (1) that SBAs are similar to Contract Service Arrangements ("CSA") which are not available for resale under Commission Order U-22145, and Regulation 1101 (B)27, if entered into prior to January 28, 1997; (2) that SBAs are so unique that they cannot be offered for resale, that indeed, there is only one SBA, with the Louisiana State Government which went into effect in 1992. BellSouth admits that, though similar to CSAs, there is no actual contract. Rather, SBAs are spelled out in the tariff, while CSAs are contained in a separate agreement<sup>2</sup>.

Intervenors and the LPSC Staff respond that even if SBAs were to be considered CSAs, only those SBAs that were entered into prior to January 28, 1997 are unavailable for resale under the Commission Orders and Regulations. BellSouth's tariff restricts, not only those SBAs offered to agencies that availed themselves of this service prior to January 28, 1997, but even those that BellSouth could offer in the future to those agencies not currently using the service. BellSouth's overall restriction on *all* SBAs is, therefore, not justified and cannot overcome the presumption of unreasonableness, as it is not "narrowly tailored".

The intervenors contest BellSouth's characterization of the SBA with "the State of Louisiana" as an existing contract, since by BellSouth's own witness's admission, there is no written "contract"<sup>3</sup>; while some agencies of the government have availed themselves of the SBA, many have not; and finally, the witness does not know which agencies currently are using the SBA, and which ones are not<sup>4</sup>. The intervenors find no "contract" in the state locations' use of SBA, a term in the tariff, to which there are no "parties". They also contend that, even if some agencies have availed themselves of the SBA, that does not make this a contract or agreement binding the whole Louisiana State Government. In their view, the goals of competition will not be served if the Competitive Access Service Providers cannot offer SBAs to other agencies of the government which are currently not using SBA, whereas BellSouth itself is free to offer it to any new, large state government location, or even amend its tariff to offer SBAs to non-governmental customers. The exclusion of SBAs in the Resale Tariff, according to AT&T, should be limited to those branches of government that are currently using the SBA, or should similarly limit BellSouth's ability to offer SBAs to new customers not currently using the SBA.

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<sup>1</sup>See Section A5.8.2B of BellSouth's tariff on file that is currently in effect.

<sup>2</sup>Scheye, Transcript at 114

<sup>3</sup>Scheye, Transcript at 25-26.

<sup>4</sup>Scheye, Transcript at page 81.

The intervenors further argue that if SBAs are available for resale, they should be at the Commission-ordered resale discount rate of 20.72% under Order No. U-22020. BellSouth argues that resale discount is intended to reflect the avoided costs to BST that will occur with resale, the main components of which are billing expenses and uncollectible expenses. In BellSouth's view, these two types of avoided costs are already reflected in the discounted rate that the end user pays, which makes a resale discount to the Reseller unnecessary and unwarranted. But BellSouth has not done a cost study, or presented any other evidence to support its assertion that there are no avoided costs.<sup>5</sup>

AT&T argues that SBAs should be available for resale, and that new entrants should be permitted to compete for the business of those state agencies or divisions not currently under an SBA arrangement with BellSouth. AT&T points out that the interpretation of Section 251(c)(4) as applied to services offered at special promotional rates was recently affirmed by the Eighth Circuit in *Iowa Utilities Board v. FCC, et al.*, 120 F.3d 753 (8th Cir. 1997), in which the Eighth Circuit upheld FCC's regulation providing telecommunication services offered at special promotional rates that last for more than ninety days will be subject to resale at a wholesale discount. The court reasoned that the rule is a valid exercise of the Commission's authority under §251(c)(4)(B) because it restricts the ability of incumbent LECs to circumvent their resale obligations under the Act simply by offering their services to the subscribers at perpetual 'promotional' rates. AT&T argues that BellSouth's assertion that SBAs should be excluded from resale because of their discount rate is contrary to the Eighth Circuit reasoning, since SBAs are offered at a special rate that last for more than ninety days, and therefore should be available for resale.

### ***C. Contract Service Arrangements***

LPSC Staff pointed out the discrepancy between the Resale Tariff section A4.6.1.D and B2.19.14 which state that CSAs in effect as of February 21, 1997 shall be exempt from mandatory resale, and the Commission's Regulations that exempt CSAs entered prior to January 28, 1997 from resale. BellSouth agreed to amend this section to conform with the Regulations. At the hearing, BellSouth agreed to amend its tariff, regarding the date of CSAs, in order to conform to the Commission's Regulations §1101(B)(2), which provides that CSAs which are in place on January 28, 1997 shall be exempt from mandatory resale, and all CSAs entered into after that date will be subject to resale, at no discount. ACSI argues, however, that parties to CSAs with BellSouth should be afforded a "fresh look" at the contracts they have with BellSouth once a competitor has entered the market to determine if there is a competitor that can provide a better service or price; that the customer should then be allowed to opt out of the contract with BellSouth without penalty. With respect to contracts entered after January 28, 1997, ACSI argues that the customer should be able to switch from BellSouth to the competitor without termination penalty. BellSouth responds that ACSI's proposals regarding CSAs are simply an attempt to reopen the issues that the Commission already settled in its recent amendments to the Regulations; that such a proposal, if adopted, would allow all parties to existing CSAs with BST to unilaterally cancel those agreements, and would abrogate the contract and the Regulations.

### ***D. Services to Hotel/Motel and Hospital Customers (a use and user restriction)***

ACSI contends that §A.2.19.B.4 of BellSouth's tariff contains an unreasonable restriction, because it limits the local exchange services available for resale to hotel/Motel and Hospital customers to Hotel and Hospital PBX service, respectively. According to ACSI, these restrictions on the services available for resale to COCOTs, hotels and hospitals are unreasonable as these are flat prohibitions on the resale of the vast majority of services available to this class of customers. BellSouth views these issues as settled, as the Commission has already determined in §1101(B)(1) of its Competition Regulations that the existing use and user restrictions in BellSouth's retail

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<sup>5</sup>Scheye, Transcript at 86

tariffs will apply to those services when they are resold.

### ***E. Standard Service Intervals***

A2.19.7.C states that Standard Service Intervals shall apply to the establishment of services of resold services. Under the terms of BellSouth's Resale Tariff, the CLECs cannot access information regarding standard service intervals applicable to different classes of customers, which ACSI argues, results in a competitive disadvantage to CLECs. Therefore, ACSI argues, sections A2.19.7.C and B2.19.6.C of the tariff should be amended to make this information available to CLECs, in order to enable the CLECs to tell their customers when service would be available, and to assess when BellSouth is discriminating in the treatment of requests. BellSouth responds that ACSI, in a **voluntarily negotiated** agreement, did not object to a similar term, and therefore cannot now find this term in the tariff unreasonable<sup>6</sup>.

### ***F. Number Portability***

The LPSC Staff and MCI had expressed concerns about a provision in BellSouth's tariff that under certain circumstances an end user might not retain their current telephone number when taking service from a Reseller, because the tariff does not specify what those circumstances are. The Staff's present position is that BellSouth satisfied this concern at the hearing when BellSouth explained that end user customers of resellers would not experience any changes to their telephone numbers that end user customers of BellSouth would not also experience<sup>7</sup>. MCI notes that, despite BellSouth's witness's assurance that the resellers' customers' numbers would not be changed any differently than a retail customer of BellSouth, the language of the tariff does not limit BellSouth's ability to change resellers' customers' numbers in such a manner.

### ***G. Discount Calculation***

The LPSC Staff also points out that the tariff's "individual end user level" method of calculating the wholesale resale rates for resold services using the wholesale discount percentage, differs from the method specified in §1101.D of the Regulations which provides that an ILEC's tariff wholesale resale rates will be determined by discounting the ILEC's retail rates by the wholesale discount percentage. BellSouth agreed to amend the tariff to include the language contained in §1101.D of the Regulations<sup>8</sup>.

### ***H. Termination penalties***

ACSI argues that section A2.19.7.D contains an unreasonable condition on the end user's ability to switch from BellSouth. A2.19.7.D states that when a customer switches to the Reseller, BellSouth will issue a final bill that will include any termination liability applicable to the disconnected service and refund the deposit if appropriate. ACSI argues that termination liabilities deter competition among BellSouth and the new entrants, and that the tariff should clarify that no termination penalties will be imposed and that deposits will not be forfeited as a result of a switch to a Reseller.

### ***I. Access to customer records***

MCI and ACSI argue that, in order to compete effectively with BellSouth, the resellers should have access to customer records, and information such as the layout of customers' premises, and the history of services provided to customers. Without such access, ACSI argues, the competitor-Reseller cannot provide adequate service, and is placed at a competitive

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<sup>6</sup>BellSouth Post-Hearing Brief at page 10

<sup>7</sup>Scheye, Transcript at 109-110

<sup>8</sup>Robert Scheye, Rebuttal Testimony, Pages 4-5.

disadvantage; and MCI points out that such information is accessible to the resellers in other jurisdictions. BellSouth responds that §901(T) of the Regulation has clearly resolved this issue, which provides that TSPs are not required to provide access to customer service records without the customer's consent in a "three-way" call.

#### ***J. Deposits***

ACSI argues that sections A2.19.8 and B2.19.7, allowing BellSouth to collect from the CLEC a deposit not to exceed two months of estimated billing when the CLEC requests resold services from BellSouth, contain an unreasonable restriction, increasing the resellers' cost of providing service and deterring effective competition between BellSouth and the new entrants. ACSI suggests that this provision should be eliminated from the Resale Tariff, or a specific amount should be set forth in the tariff.

#### ***K. Audit rights***

Sections A2.19.14 and B2.19.13 allow BellSouth to audit data furnished and maintained by the Reseller with thirty (30) days notice. These audit rights, intervenors such as MCI and ACSI argue, are anti-competitive and impinge on the proprietary rights of the resellers. MCI argues that BellSouth, like all other carriers, should file a complaint with the Commission if it has complaints about the data furnished by the resellers. BellSouth's response is that ACSI agreed to this provision (as well as other provisions such as Standard Service Intervals) in a *voluntarily negotiated* resale agreement between ACSI and BST executed in December 1996; hence, ACSI cannot now find these same provisions unreasonable.

#### ***L. Link-Up Louisiana***

Section A4.7.B of the Resale Tariff requires the resellers to offer Link-Up Louisiana to eligible subscribers. ACSI suggests that this provision should be clarified to require only resellers of residential service to offer Link-Up Louisiana. BellSouth agreed to revise the language to make such clarification.

#### ***M. Authority to contact resellers' customers***

AT&T and MCI argue that the tariff provision that allows BellSouth to contact a Reseller's customer without the consent or input of the Reseller should be rejected by the Commission as improper because there is no restriction in the tariff on the occasions in which BellSouth may contact a Reseller's customer. In their view, this provision is discriminatory and provides an unfair advantage to BellSouth, because the Reseller has no means to monitor the content of BellSouth's contact with the Reseller's customer, or how it affects the Reseller's service to its customers. BellSouth disagrees on the grounds that it is impractical to get the Reseller's consent whenever it contacts the Reseller's end user customer, for the reasons for such contacts are not related to sale, but to maintenance, repairs and such other contingencies<sup>9</sup>.

The intervenors MCI and AT&T argue that the tariff provision that allows BellSouth to contact a Reseller's customer without the consent or input of the Reseller should be rejected by the Commission as improper because there is no restriction in the tariff on the occasions in which BellSouth may contact a Reseller's customer. BellSouth agreed to remove this provision from its tariff, and MCI wished to maintain it in the tariff subject to some modifications.<sup>10</sup>

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<sup>9</sup>Robert Scheye, Rebuttal Testimony, page 9.

<sup>10</sup>Counsels for BellSouth and MCI in a Georgia proceeding agreed upon the removal of the same provision in BellSouth's tariff in that jurisdiction. But in the present case, after BellSouth agreed to remove that provision, MCI wished to maintain it in the tariff, with some modifications. The parties could not come to an agreement on MCI's suggested modifications. See Post-Hearing Briefs of MCI and BellSouth.

#### ***N. Annoyance calls and other unlawful use of services***

Sections A2.19.11 and B2.19.10 state that it is the responsibility of the Reseller to correct problems with nuisance calls, and that BellSouth will disconnect the end user's service if the annoyance calls do not cease. Several of the intervenors argue that BellSouth should not be allowed to unilaterally disconnect resellers' customers when there are legitimate disputes. BellSouth asserts that there is no unfair disadvantage to the resellers because its ability to disconnect Reseller's customers under this tariff provision is not different from its ability to terminate service to one of its own customers. BellSouth further argues that the tariff properly allows BellSouth, as the provider of the underlying telecommunication services, to terminate service to end users who are using their exchange service to make annoying or harassing calls to other end users. In BellSouth's view, the language that BellSouth agreed to add to this section, that obliges BellSouth to notify the Reseller before a Reseller's customer is disconnected, sufficiently protects the intervenors from any abuse of BellSouth's ability to terminate the service of a Reseller's customer.

#### ***O. Unauthorized PIC changes***

The Resale Tariff allows BellSouth to be the sole arbitrator of alleged unauthorized PIC changes and to impose charges for those alleged unauthorized PIC changes. MCI argues that such provision is monopolistic and has no place in a competitive environment. MCI proposes two alternatives to this provision: (1) require that all local carrier changes be administered by a neutral third party; or, (2) require that the LEC receiving the call of the former customer complaining of the unauthorized change to transfer the customer call back to the provider of record or complete a three-way call with the LEC that made the change to verify the change or switch the customer back to the previous provider. In the event that neither of these alternatives are required by the Commission, MCI suggests that, as a minimum, the Reseller who allegedly made the unauthorized change should be involved in the process, and should be notified of the complaint, while BellSouth contends that it is impractical to always contact the present carrier whenever a complaint is made. MCI argues that this provision allows BellSouth to engage in anti-competitive behavior, as BellSouth admits that it would have no proof and has no obligation to retain evidence that a customer called requesting to be switched back to BellSouth.<sup>11</sup>

Finally, MCI contends that the proposed charge of \$19.41 for unauthorized changes is not shown to be cost-based, and not supported by any evidence or results of cost study filed with the Commission.

#### ***P. Notice of less-than-standard operations***

Sections A2.19.3.B and B2.19.3.B require the Reseller to notify BellSouth regarding "less than standard operations". MCI and other intervenors contend that this provision is vague, ambiguous and might impose unforeseen obligations on the Reseller. BellSouth responds that this provision applies when a Reseller intentionally degrades the services that it purchased from BellSouth. But MCI points out that even BellSouth's own witness admits that he does not envision any reason for a Reseller to offer a lesser quality service than what was provided to the Reseller<sup>12</sup>. They argue that this provision lacks a rationale, and should be removed from the tariff.

#### ***Q. Liability provisions***

MCI contends that sections A2.19.12.A and B2.19.11.A, limiting BellSouth's liability for damages arising out of BellSouth's errors and omissions in providing service and other similar causes, and sections requiring resellers to indemnify BellSouth in all actions by third parties arising as a result of BellSouth's furnishing of services to the Reseller are one-sided, monopolistic

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<sup>11</sup>Transcript at 129-130.

<sup>12</sup>Transcript at 59-60

and clearly contrary to the provisions of the Act and the Regulations. Regarding A2.19.12.D, which provides that BellSouth shall accept no responsibility for the unlawful acts of the Reseller, MCI suggests reciprocal terms similarly limiting the Reseller's responsibility for the unlawful acts of BellSouth. In the Joint Stipulation, BellSouth agreed to revise sections A2.19.2.D and B2.19.2.D of its amended Resale Tariff to include the reciprocal terms language suggested by MCI<sup>13</sup>.

### ***R. Other Restrictions***

Additionally, MCI and ACSI believe that various other tariff provisions are anti-competitive, and should be modified or removed from the tariff. MCI believes that the Regulations, while "a nod in the right direction", are not consistent with the Act and inadequate in many respects in mandating the ILECs' full compliance with the requirements of the Act.<sup>14</sup> It further asserts that this docket should not be limited to exclude the issues decided in Order No. U-22020, such as access to customer records, 911, E911, N11 services, etc.

Similarly, AT&T maintains that the scope of this docket should not be limited to exclude issues previously considered and decided in Docket U-20883, as in AT&T's view, several of those issues pertain to the Commission's review of the tariff in this docket. AT&T disagrees with the limiting of evidence in this docket and believes that all relevant issues should be addressed. ACSI does not argue this issue of limiting the scope of this docket, but it challenges the CSA provisions of the tariff which appear to be decided in Docket U-20883 and the amended Regulations.

### **BST'S EXCEPTIONS TO PROPOSED RECOMMENDATIONS**

Of the issues discussed above, BellSouth's exceptions address the Administrative Law Judge's recommendations on the following issues: the availability of EDP for resale; the applicability of the resale discount to EDP should it be available for resale; the availability of SBAs for resale, and the applicable discount, if any; the availability of BellSouth's Standard Service Intervals to resellers; termination penalties; deposits; audit rights; BellSouth's authority to contact resellers' customers; unauthorized PIC changes and the charges for unauthorized PIC changes; and finally, liability provisions. The exceptions will be addressed in the Legal Analysis section below, within the corresponding subsections.

### **STIPULATIONS**

At several points in the course of this docket, including the execution of the July 24, 1997 Joint Stipulation, BellSouth agreed to revise the amended restated Resale Tariff filed on February 5, 1997, to become part of the final version of the Resale Tariff at the conclusion of the docket. In addition, BellSouth further agreed to incorporate in the revised final version, any revisions ordered by the Commission.<sup>15</sup> BellSouth also stipulated that the revised version, incorporating the Joint Stipulation, and other revisions ordered by the Commission, shall become effective on the date of the final Commission Order in this docket, notwithstanding any appeals by BellSouth of the Order. The Joint Stipulation incorporated the modifications to some of the issues in the List of Issues submitted by the Staff and the Intervenors that BellSouth had stated it does not dispute<sup>16</sup>.

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<sup>13</sup>Item II.4 of the Joint Stipulation dated July 24, 1997 and filed on August 4, 1997

<sup>14</sup>MCI Post-Hearing Brief at Page 8.

<sup>15</sup>Joint Stipulation, Page 1

<sup>16</sup>As mentioned in the Procedural History section of this recommendation, upon BellSouth's request, the parties agreed at the April 2, 1997 status conference, that the Intervenors and the Staff will submit a list of what they viewed as still at issue in this docket. Accordingly,

Thus, the final version of the Resale Tariff, according to the agreement among the parties, and BellSouth's stipulations, is to contain the following modifications:

- (A) those issues in the Intervenor's and Staff's List of Issues that BellSouth agreed not to dispute in its response to the lists of issues, some of which have been incorporated into Joint Stipulation (Staff's Issue No. 1 and 2, MCI Issues No. 4,6,11,23-24, and ACSI's Issues No. 16 and 17);
- (B) the items in the Joint Stipulation entered into by BellSouth and several of the Intervenor's, dated July 24, 1997;
- (C) the revisions ordered by the Commission at the conclusion of the docket.

In addition, at the hearing, BellSouth's witness, Robert Scheye, testified concerning several matters that do not constitute stipulations or agreements on behalf of BellSouth, but help determine the manner in which some of the provisions of the tariff should be applied or revised lest they be found unreasonable restrictions on resale. For instance, Mr. Scheye testified that BellSouth's ability to terminate the services of a Reseller's retail customer is not in any way different from BellSouth's ability to terminate the services of its own retail customer<sup>17</sup>. He also testified, concerning number portability, that the Reseller's customer and BellSouth's own customer will be able to retain their numbers or suffer a number change in exactly the same circumstances, and that the Resale Tariff provision was not intended to be applied in a discriminatory manner<sup>18</sup>; that termination penalties will not be used to deter customers from switching to resellers. But these assertions are not currently found in the terms of the tariff, upon which the CLECs can readily rely, and they need to be incorporated into the tariff.

Finally, MCI has not signed the Joint Stipulation, but has instead expressed its agreement to all but one item (Item II.2) in a letter dated July 24, 1997, made part of the record. This item in the Joint Stipulation concerns the change of some references "CLECs" to "TSPs" in the Resale Tariff<sup>19</sup>. MCI did not agree to such a stipulation since, in MCI's view, it is unclear which references to CLECs will be replaced with the term "TSPs". MCI stated in that letter that, in agreeing to the remaining stipulations, MCI in no way waives its right to argue on appeal or in any other proceeding all issues concerning any inconsistency of BellSouth's Resale Tariff provisions with the 1996 Act or any regulations promulgated thereunder, as well as any other issues raised in MCI's proffered testimony. MCI requested that the above-mentioned letter be attached to the stipulation since MCI is unable to agree to its current form.

In its Exception to the Proposed Recommendation, BellSouth makes further concessions, which are not part of the tariff: for example, regarding audit rights, BellSouth asserts that such rights will only be used when BellSouth has concerns about the information provided by the competitor about interLATA and intraLATA jurisdiction; concerning deposit requirements, BellSouth again asserts that deposits will only be required of new start-up companies, whereas the deposit provision in the tariff gives BellSouth broad discretion to require a deposit when it deems it necessary.

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lists of issues were submitted to the Commission, in response to which BellSouth agreed not to dispute some of the issues raised by Staff, MCI and ACSI.

<sup>17</sup>Scheye, Transcript at 55-56

<sup>18</sup>Scheye, Transcript at 109-110

<sup>19</sup>BellSouth agreed to make this change in order to address Staff's concerns that the tariff improperly limits resale to CLECs. Staff's Post-Hearing Brief at page 2; Issue 2, page 3 of Staff's List of Issues

## FINDINGS OF FACT

The Commission adopts the following findings of fact:

1. Commission Order No. U-22020, and U-20883, and the Amended Regulations, particularly Section 1101, resolved several matters that have been raised in this docket, such as CSAs entered prior to January 28, 1997, access to customer records, 911, N11 services, etc.
2. The ruling by the Administrative Law Judge dated May 5, 1997, stated that the scope of this docket will be limited to exclude those issues previously considered and decided by the Commission in amending its Rules for Competition, Docket N. U-20883, but that all other issues raised by the parties would be considered.
3. Information, such as the history of a customer, and/or the layout of the customer's premises is not generally provided by the presently serving company, in most business situations, to competitors seeking to attract the customer away from the current company..
4. Release of BellSouth's customer records to CLECs could impinge on the customer's right to privacy.
5. Tariff Sections A4.6.1.D and B2.19.14 state that Contract Service Agreements in place as of February 21, 1997 shall be exempt from mandatory resale. Amendments to LPSC Competition Regulations state that CSAs entered prior to January 28, 1997 would not be available for resale. BellSouth has agreed to amend the Resale Tariff to correct the date from February 21, 1997 to January 28, 1997. This amendment shall be in place prior to Commission approval of the Resale Tariff.
6. Link-Up Louisiana is a service which is typically provided to residential retail customers only. Section A4.7.B requires Resellers to offer Link-up Louisiana to eligible subscribers. BellSouth has indicated in Comments filed in Docket No. U-22091 that it will agree, and the Commission should authorize BellSouth to revise this section to require only resellers of residential service to provide Link-up Louisiana.
7. BellSouth's witness testified that provisions relating to number portability and annoyance calls will be applied to the Reseller's customers in the same manner and in the same circumstances as they apply to BellSouth's own retail customers.
8. BellSouth's witness testified that BellSouth will contact the Reseller's customer for purposes of repair and maintenance only, and that these contacts will not be used for marketing or sales purposes or disparaging the Reseller's services.<sup>20</sup>
9. BellSouth's tariff applying to BellSouth's own retail customers contains three preconditions to the termination of services due to unlawful use of services: (a) a written notice from a law enforcement agency; (b) notifying BellSouth that services have been used unlawfully and that formal charges have been filed against the customer; (c) a three day written notice to the customer notifying customer of BellSouth's intent to terminate services<sup>21</sup>.
10. A2.19.11 and B2.19.10 of BellSouth's Proposed Resale Tariff, pertaining to unlawful use of services does not contain the same safeguards as listed above. The Resale Tariff only

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<sup>20</sup>Scheye, Rebuttal Testimony, page 9; Transcript at 53-54

<sup>21</sup>Section A2.2.9 of BellSouth's General Subscriber Services Tariff, Second Revised Page

requires notification from a law enforcement agency of unlawful use of services. The notification need not be in writing, and no formal charges need be filed, and no three day notice need be given, prior to termination of services of the Reseller's customer.

11. A2.19.7.C states that Standard Service Intervals apply to the establishment of service of resold services, but BST has not identified what those intervals are for each class of customer.
12. A Reseller does not have the sufficient information, under the terms of the tariff, to apprise its end user customer of when service will start or to assess if there are any disparities in BellSouth's treatment of the Reseller's customers and its own retail customers.
13. BellSouth's tariff is vague and ambiguous regarding the circumstances under which the telephone number of a Reseller's customer will be changed.
14. Sections A2.19.3.B and B2.19.3.B, requiring the Reseller to notify BellSouth of less than standard services, are vague and ambiguous. It is not clear under what circumstances these provisions apply.<sup>22</sup>
15. There is no evidence on the record to show why a Reseller would want to intentionally degrade the services that it purchased from BellSouth. BellSouth's witness testified that he did not know of any reason why a Reseller would do that<sup>23</sup>.
16. A2.19.12(A) and (B) and B2.19.11(A) and (B), affording liability restriction and indemnification to BellSouth, and no such protection to the resellers, are one-sided and are reflective of BellSouth's market power in a monopoly regime.
17. Sections A2.19.12 and B2.19.11, limiting BellSouth's liability arising out of BellSouth's errors and omissions in providing service and other similar causes, and A2.19.12.B and B2.19.11.B requiring resellers to indemnify BellSouth in all actions by third parties arising as a result of BellSouth's furnishing of services to the Reseller
18. It is not appropriate for BellSouth to seek such sweeping indemnification through a tariff provision. Even in a negotiated contract, such a one-sided protection given to the party with more bargaining power would likely be found coercive and invalid as a contract of adhesion. Such unilateral exercise of market power by a hitherto monopoly such as BellSouth is even more egregious in a tariff, which, unlike a contract, is not an agreement between parties, but a statement of terms and conditions for furnishing services to be approved by the Commission.
19. A deposit could protect BellSouth from risks, but it can also be assessed in a manner that makes entry into the local exchange market unduly difficult.
20. Specific criteria that will be used in determining when a deposit will be required of a Reseller, and if required, how that amount is to be determined are needed to allow resellers to determine probable costs.
21. There are no provisions in the proposed tariff showing the circumstances under which a deposit is to be required and the method of computing the deposit and the limit of a deposits.
22. There is no evidence on the record providing guidelines for how "estimated billing" is to

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<sup>22</sup>Scheye, Transcript at 59

<sup>23</sup>Id.

be determined for deposit purposes, where the entity requesting services is the Reseller, and not a retail customer.

23. Termination penalties deter competition and can be readily used to penalize customers wishing to switch to a CLEC.
24. Allowing a business-vendor broad audit rights of its competitor-purchasers is not a general practice and can be used as anti-competitive measure. Any right to audit would need to be narrowly defined.
25. In a competitive environment, in which BellSouth is a major player, it is unreasonable not to require verification as for other company PIC changes, for BellSouth PIC changes.
26. The record contains very little cost data supporting BellSouth's proposed charge of \$19.41 for unauthorized changes.
27. The Special Billing Arrangement is a provision in BellSouth's General Subscriber Services Tariff that any State Government location can avail itself of, subject to some conditions<sup>24</sup>.
28. Some agencies of the Louisiana State Government are currently using SBA, while some are not<sup>25</sup>.
29. Under the proposed tariff, BellSouth is not precluded from offering SBAs to other agencies not currently using that service, or, possibly by amending its tariff, to other large non-governmental customers
30. Special Billing Arrangements are similar in character to Contract Service Agreements
31. BellSouth's assertion that SBAs do not have any avoided costs is not supported by evidence on the record. BellSouth admits that no cost study was done to support its position.
32. The LPSC Amended Competition Regulations explicitly exempt certain services from resale, and the Education Discount Program is not one of the exempted services<sup>26</sup>.
33. The Education Discount Program was established by the Commission by Order No. U-17949-JJ dated March 18, 1994, to allocate certain over-earnings of BellSouth. The discount was not funded by BellSouth, but by the ratepayers.
34. The Education Discount Program is discounted to the end user but is not already discounted as to the Reseller.

## LEGAL ANALYSIS

Sections 251(b)(1) and (c)(4) of the Telecommunications Act of 1996 set forth BellSouth's duties, as an ILEC, toward the intervenors. Section 251(b) provides:

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<sup>24</sup>Section A5.8.2B (1) and (3) of BellSouth's General Subscriber Services Tariff, Fifth Revised Page 24; Scheye, Transcript at 25-26

<sup>25</sup>Id.

<sup>26</sup>Section 1101 of the Regulations

**Obligations of all Local Exchange Carriers:** Each local exchange carrier has the following duties:

(1) **Resale:** The duty not to prohibit and not to impose unreasonable or discriminatory conditions or limitations on the resale of its telecommunications services.”

In addition, 251(C) provides:

**Additional Obligations of Incumbent Local Exchange Carriers.** In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties: ...

(4) **Resale:** The duty

(A) to offer for resale at wholesale rates any telecommunication services that the carrier provides at retail to subscribers who are not telecommunications carriers;

(B) not to prohibit and not to impose unreasonable or discriminatory conditions or limitations on the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a Reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

The FCC stated in its First Report and Order dated August 8, 1996 (*In the matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, CC. Docket No. 96-98, FCC 96-325 {rel.Aug. 8, 1996}) that “[a] state commission may permit an incumbent LEC to prohibit a requesting telecommunications carrier that purchases at wholesale rates for resale, telecommunication services that the incumbent LEC makes available only to residential customers or a limited class of residential customers, from offering such services to classes of customers that are not eligible to subscribe such services from the incumbent LEC”. In addition, “[w]ith respect to any restriction on resale not permitted under paragraph (A), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and non-discriminatory”. 47 C.F.R. §51.613(b). Most important for the purposes of this proceeding is ¶939 of the FCC Order which provides that restrictions on resale are presumptively unreasonable, and that, to overcome this strong presumption, the ILEC must prove to the state commission that the restriction is “narrowly tailored”. These regulations were upheld by the Eighth Circuit as a valid exercise of FCC’s authority to issue regulations regarding the ILEC’s duty not to prohibit or impose unreasonable limitations on the resale of telecommunications, in *Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753 (8th Cir. 1997). More particularly, the FCC, in ¶939 of its First Report and Order stated:

“We, as well as state commissions, are unable to predict every potential restriction or limitation an incumbent LEC may seek to impose on a Reseller. Given the probability that restrictions and conditions may have anti-competitive results, we conclude that it is consistent with the pro-competitive goals of the 1996 Act to presume resale restrictions and conditions to be unreasonable and therefore in violation of section 251(c)(4).”

The LPSC has adopted the Act’s resale requirements in Section 1101 of its Local Competition Regulations. Section 1101(B) of the Regulations provides:

No facilities based TSP may impose any restrictions on the resale of its unbundled retail

features, functions, capabilities, and services, and bundled retail services, except as follows:

1. Resale must be of the same class of service and category of customer. When TSPs purchase services for resale, they must do so on the same terms and conditions that the ILEC imposes on end users that purchase such services on a retail basis.
2. Contract Service Arrangements which are in place on January 28, 1997 shall be exempt from mandatory resale. All CSAs entered into after January 28, 1997 and existing CSAs upon termination after January 28, 1997, will be subject to resale at no discount.
3. N11, 911 and E911 services are not subject to mandatory resale.
4. Link Up and Lifeline services are available for resale, with the restriction that TSPs shall offer such services only to those subscribers who meet the criteria the ILEC currently applies to subscribers of these services, TSPs shall discount the Link Up/Lifeline services by at least the same percentage as provided by the ILEC. TSPs shall comply with all aspects of any applicable rules, regulations or statutes relative to the providing of Link Up/Lifeline programs.
5. Short-term promotions, which are those offered for ninety (90) days or less, are not subject to mandatory resale. Promotions that are offered for more than ninety (90) days must be made available for resale, at the Commission established discount, with the express restriction that TSPs shall only offer a promotional rate obtained by the ILEC for resale to those customers who would qualify for the promotion if they received it directly from the ILEC.
6. "Grand fathered services" (services available only to a limited group of customers that have purchased the service in the past) are available for resale by TSPs to the same limited group of customers that have purchased the service in the past.

In addition, under Section 1101(L), BellSouth must provide customized electronic interfaces to its databases within twelve months of a bona fide request from a TSP. The Commission's Regulations do not require BellSouth to grant a Reseller electronic access to its customer service records. Instead, Section 901 (T) provides that an ILEC must set up a three-way call between itself, the customer and the TSP so that the customer can expressly consent to the ILEC's disclosure of the customer's current features and services.<sup>27</sup>

An overall discount rate of 20.72% for all services made available for resale was established by the Commission in Order No. U-22020, dated November 12, 1996.

## CONCLUSIONS

### *Issues addressed in Order No. U-22020 and U-20883:*

The Commission amended its Competition Regulations at its March 19, 1997 Business and Executive Meeting. The amendments to the Regulations, particularly to Section 1101(B)

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<sup>27</sup>MCI challenges these Regulations as inconsistent with the Act, and inadequate measures to implement the ILEC's duty to resellers. ACSI, and other intervenors, raise issues such as CSAs, customer records, and such other issues that BellSouth argues have been resolved by the Commission in its favor, in Order No. U-22020 and the Regulations.

Resale Regulations, resolved a number of issues raised in the current docket, including issues concerning use and user restrictions, Contract Service Arrangements, 911, N11 and E911 services, Link-Up Louisiana and Lifeline services, short term promotions, and grandfathered services. BellSouth filed a Motion to limit the scope of this docket, and the Administrative Law Judge ruled on May 29, 1997 that “[a]ny issues raised by the parties which have been previously considered and decided by the Commission in amending its Rules for Local Competition, Docket No. U-20883, will not be considered in this docket”, and any other issues raised by these parties that have not been previously been considered by the Commission will be considered.

Issues relating to access to customer records, “fresh look” proposals regarding existing CSAs, use and user restrictions, and LinkUp services raised by ACSI, to the extent that they have already been considered by the Commission, will not be addressed in this docket, as explained above. Similarly, the issue raised by MCI and AT&T of whether those orders and LPSC’s Regulations conform with the mandates of the ACT and FCC’s First Report shall not be addressed in this docket. The parties were afforded the opportunity to appeal those orders within the applicable time delays. Revisiting those issues in this proceeding could constitute a collateral attack on those orders and could create a morass of interlocking litigation.

#### ***Service to Hotel/Motel and Hospital customers (a use and user restriction)***

A2.19.B.4 of the Resale Tariff shall remain in its present form, since the restriction on the local exchange services available for resale to hotel/motel and hospital customers has already been resolved by the Commission. It is a “use and user restriction” within the meaning of §1101(B)(1), which provides that the existing use and user restrictions in BellSouth’s retail tariffs will apply to those services when they are resold.

#### ***Access to customer records***

This issue was resolved by the amendments made to §901(T) of the Regulations, which provides that TSPs are not required to provide access to customer service records without the customer’s consent in a “three-way” call. BellSouth should not be required to provide the resellers access to customer service records. Competitors usually do not expect to be provided with customer service records of other competitions. Furthermore, the end user may not wish to have some of his information transferred to the new service provider.

#### ***Contract Service Agreements Dates***

BellSouth’s Resale Tariff shall be amended to conform to §1101(B)(2) of the Regulations, which provides that CSAs which are in place on January 28, 1997 shall be exempt from mandatory resale. BellSouth agreed to amend its tariff to reflect the appropriate date of CSAs that are excluded from resale. ACSI’s arguments, that parties to existing CSAs with BellSouth should be afforded a “fresh look” will be addressed below, under the section “Scope of this Proceeding”.

#### ***Discount Calculation***

The tariff’s “individual end user level” method of calculating the wholesale resale rates for resold services using the wholesale discount percentage differs from the method specified in §1101(D) of the Regulations which provides that an ILEC’s tariff wholesale resale rates will be determined by discounting the ILEC’s retail rates by the wholesale discount percentage. BellSouth has agreed to amend the tariff to include the language contained in §1101(D) of the Regulations. That provision of the tariff shall be amended accordingly.

#### ***Link-Up Louisiana***

Section A4.7.B of the tariff shall be amended to clarify that only resellers of residential services are required to offer Link-Up Louisiana. BellSouth has agreed to make such a clarification. Such an amendment would make the provision conform with the Regulations.

### *Number portability*

Mr. Scheye testified that the Reseller's customer will not experience any changes to their telephone numbers that end user customers of BellSouth would not also experience<sup>28</sup>. However, as one of the intervenors point out, the tariff allows BellSouth to unilaterally change the numbers of the Reseller's customer, and does not limit BellSouth's ability to discriminatory change numbers of the Reseller's customers. In order for this provision to be "reasonable and non-discriminatory", the language of this provision of the Resale Tariff shall be amended to provide that the Reseller's' customers numbers would be subject to alteration only on the same basis as BellSouth's own customers.

### *Authority to contact resellers' customers*

At the hearing and in his rebuttal testimony, Mr. Scheye stated that the provision giving BellSouth the authority to contact the Reseller's customers is included in the tariff mainly for repair and maintenance purposes<sup>29</sup>. The tariff provision, as it stands, is discriminatory and provides an unfair advantage to BellSouth because the Reseller has no means of monitoring the content of BellSouth's contact with the Reseller's customer, or how it affects the Reseller's service to its customers. BellSouth agreed to amend the provision to state that such contacts will not be used for marketing purposes by BellSouth, and that no disparaging remarks will be made of the Reseller's services. In addition to making these revisions, to fully avoid any possibility of unfair advantage or anti-competitive behavior, BellSouth shall be required to amend the provision to state that notice will be given when practicable to the Reseller prior to such contacts with the Reseller's customers except in cases of emergencies.

### *Annoyance calls and other unlawful use of services*

Sections A2.19.11 and B2.19.10 of the Resale Tariff do not provide the Reseller's customers the same procedural protections against termination of services on slim evidence of unlawful use of services, as BellSouth's tariff affords to BellSouth's own retail customers. BellSouth states that it can similarly terminate services of its own retail customers; that its ability to terminate the Reseller's customer's services is not different from its ability to terminate services of its own retail customer<sup>30</sup>. However, BellSouth's tariff applying to BellSouth's own retail customers contains three preconditions to the termination of services due to unlawful use of services, which are not present in the Resale Tariff: (a) a written notice from a law enforcement agency; (b) notifying BellSouth that services have been used unlawfully and that formal charges have been filed against the customer; (c) a three day written notice to the customer notifying customer of BellSouth's intent to terminate services<sup>31</sup>. A2.19.11 and B2.19.10 of BellSouth's Resale Tariff, pertaining to unlawful use of services does not contain the same safeguards as listed above. The Resale Tariff only requires notification from a law enforcement agency of unlawful use of services. The notification need not be in writing, and no formal charges need be filed, and no three day notice need be given prior to termination of services of the Reseller's customer. These disparities between the tariff provisions applicable to BellSouth's own customers and Reseller's customers could result in discriminatory and anti-competitive behavior. A2.19.11 and B2.19.10 of BellSouth's Resale Tariff shall be amended to include all the safeguards afforded to BellSouth's own retail customers in its tariff, as listed above, in order for those provisions to be non-discriminatory. In addition, BellSouth agreed to MCI's suggestion of notification to the Reseller prior to disconnection, which should also be included in these provisions.

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<sup>28</sup>Scheye, Transcript at 109-110

<sup>29</sup>Scheye, Rebuttal Testimony, page 9; Scheye, Transcript at 53-54

<sup>30</sup>BellSouth Post Hearing Brief at page 8; Scheye, Transcript at 135-137

<sup>31</sup>Section A2.2.9 of BellSouth's General Subscriber Services Tariff, Second Revised Page 2.

### *Standard Service Intervals*

The denial of access to the CLECs regarding BellSouth's Standard Service Intervals applicable to different classes of customers would result in a competitive disadvantage to the CLECs, since the CLECs cannot tell their customers when service would be available, or assess when BellSouth is discriminating in its treatment of requests from the Reseller's customers. This restriction can encourage anti-competitive behavior, and make it unduly burdensome for the Reseller to detect such behavior. A2.19.7.C and B2.19.6.C shall be amended to make accurate and complete information on BellSouth's Standard Service Intervals applicable to various classes of customers available to the resellers, as well as to the Commission

BellSouth's argument that ACSI cannot object to these provisions because it agreed to very similar provisions in a **voluntarily negotiated** contract is irrelevant. A tariff is not a voluntarily negotiated contract, and the resellers do not negotiate the terms of a tariff. What parties might agree to under certain, perhaps temporary circumstances, particularly when one party has market power, is not necessarily what should be authorized by the Commission on a long term basis.

In its Exception, BellSouth again urges that ACSI had agreed to an identical provision on Standard Service Intervals and cannot now argue against a provision that it previously agreed to. BellSouth, however, does not provide any reason why information on Standard Service Intervals should not be provided to resellers in order to carry its burden of showing that this restriction is not unreasonable. BellSouth's exception is rejected: (1) the matter that is at issue here is the reasonableness of the resale tariff, i.e. whether it contains unreasonable restrictions on resale; ACSI, as an intervenor in this proceeding, has standing to raise this issue, regardless of the fact that it may have agreed to a similar provision in an interconnection agreement. ACSI is not raising an objection to the terms of the interconnection agreement, but to the unavailability of this information under the resale tariff; (2) the resale tariff governs the availability of services to *all* resellers, not just ACSI. Thus, the fact that ACSI agreed to an identical provision in the interconnection agreement is irrelevant with respect to all the other resellers.

### *Notice of less-than-standard operations*

Sections A2.19.3.B and B2.19.3.B of the Resale Tariff require the Reseller to notify BellSouth regarding "less than standard operations". BellSouth's witness stated that this provision applies only when a Reseller intentionally degrades the services it purchased from BellSouth<sup>32</sup>. However, he could not put forth any reason why a Reseller would offer a lesser quality service than what was provided to the Reseller<sup>33</sup>. Also, BellSouth has not offered any clear guidelines for measuring "less than standard" services. In view of the lack of rationale for this provision (because BellSouth admits that a Reseller has no reason to degrade services intentionally) and the vagueness of this provision, it is difficult to determine exactly what occurrences would trigger the Reseller's obligation under this provision. The Commission finds that this provision could result in unforeseen obligations imposed on the Reseller, and could be used as an anti-competitive measure. The FCC's warnings that it is impossible to predict every potential restriction or limitation an ILEC may seek to impose on a Reseller, and that the probability that restrictions and conditions may have anti-competitive results are very pertinent here. BellSouth has offered no rationale or justification to overcome the presumptive unreasonableness of this vague provision. This provision shall be removed from the tariff.

### *Liability Provisions*

Sections A2.19.12.A and B2.19.11.A limit BellSouth's liability for damages arising out of BellSouth's errors and omissions in providing service and other similar causes; subsections (B) of

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<sup>32</sup>Scheye, Transcript at 59-60.

<sup>33</sup>Id.

each of these above provisions require resellers to indemnify BellSouth in all actions by third parties arising as a result of BellSouth's furnishing of services to the Reseller. While such indemnification and liability limitation clauses might be appropriate in contracts negotiated between parties with equal bargaining power, such provisions are not as appropriate as terms in a tariff filed with the Commission.

Express agreements limiting damages recoverable are valid, with certain exceptions involving generally contracts of the adhesion type, wherein bargaining power of one party is extremely restricted to the point at which countenancing the limitation becomes unconscionable. *Alcoa S.S.Co. V. Charles Ferran & Co.*, 251 F.Supp. 823, affirmed 383 F.2d 46, certiorari denied 89 S.Ct.111, 393 U.S. 836, 21 L.Ed2d 107. A contract of adhesion is a standard contract, usually in printed form, prepared by a party in superior bargaining power for adherence or rejection by weaker party. *Welch v. A.G.Edwards & Sons, Inc.*, 677 So.2d 520, 95-2085 (La.App. 4 Cir. 5/15/96). The doctrine of adhesion is applicable where it appears that a great difference in bargaining position exists. *Id.*

If contained in a contract between BellSouth and a Reseller, where BellSouth is in a uniquely powerful position in the local exchange market, these provisions could very likely be found to be contracts of adhesion. Such unilateral insulation from liability is even more egregious in a tariff, where there is no negotiation or agreement between parties. A tariff has no parties to it, but is a unilateral declaration of terms and conditions on the provisioning of services submitted to the Commission for approval. BellSouth will not be authorized to unilaterally opt out of liability in actions arising out of its furnishing resold services in this manner.

BellSouth contends, in its Exception, that the liability provisions in its resale tariff are similar to those in BellSouth's approved tariffs for its retail customers. BellSouth raises a valid concern that, absent such limitations of liability, its cost of providing service will increase, affecting all customers. However, BellSouth still has monopoly power in the local market, and the resellers do not have the same bargaining power as BellSouth; moreover, BellSouth will be in direct competition with its resellers. In addition, there is no indemnification provision in BellSouth's tariff for its retail customers, whereas the resale tariff requires the resellers to indemnify BellSouth in actions arising out of its provisioning of services to the resellers' customers. For all these reasons, the reasonableness of the resale tariff and BellSouth's tariff for its retail customers are not to be judged using the same standards. Second, BellSouth's tariff for its retail customers is drawn in more particular terms (e.g. the liability provisions have a willful conduct exception; the types of liability limitations are listed -- service, maintenance, installation, etc.), whereas the indemnification provision and the liability limitation provisions in the resale tariff do not contain a willfulness exception, and are written in broader terms. Sections A2.19.12A and B2.19.12.A should be modified to provide less sweeping escape from liability. At a minimum, BellSouth's willful misconduct should be excluded. It would also be appropriate to exclude gross negligence.

BellSouth agreed to incorporate reciprocal terms in section A2.19.2.D and B2.19.2.D as suggested by MCI, thus providing that BellSouth shall accept no responsibility for the unlawful acts of the Reseller, and the Reseller, similarly, shall accept no responsibility for the unlawful acts of BellSouth. This revision would result in a non-discriminatory and reasonable condition on resale, and the tariff shall be revised accordingly

### ***Deposits***

The Proposed Recommendation on this issue stated that BellSouth should either remove Sections A2.19.8 and B2.19.7 or state a specific amount to be collected as deposit. This recommendation was based on the ALJ's finding that "two months of estimated billing" cannot be easily determined in the case of a Reseller-customer, as well as the finding that the rationale for requiring a deposit from individual retail customers might not exist with corporate Reseller customers.

BellSouth raised an exception to that recommendation, stating that not all resellers are established businesses, and that BellSouth should not be required to expose itself to the financial risks of dealing with new start-up companies. This could be a valid objection. However, these sections, as they stand, allow BellSouth unlimited discretion and do not specify the criteria for determining when a deposit would be required, and if required, how the amount of the deposit is to be determined. A deposit could protect BellSouth from risks, but can also be assessed in a manner that makes entry into the local exchange market unduly difficult.

BellSouth is hereby ordered to add specific criteria that will be used in determining when a deposit will be required of a Reseller, and if required, how that amount is to be determined. In any case, such a deposit shall not exceed Commission established guidelines.

### ***Termination Penalties***

A2.19.7.D of the Resale Tariff, providing that there could be termination penalties assessed to BellSouth's customer at the time of switching to a Reseller, contains an unreasonable condition on the end user's ability to switch from BellSouth, and on the Reseller's ability to compete effectively with BellSouth. Mr. Scheye testified that termination penalties will not be used as a means of penalizing customers for switching to resellers<sup>34</sup>, though the tariff does not limit BellSouth's ability to do so. Termination penalties deter competition and encourage anti-competitive behavior. This provision of the tariff shall be removed or amended to clarify that no termination penalties will be imposed and that deposits will not be forfeited as a result of a switch to a Reseller.

BellSouth's exception that the tariff states that penalty will be assessed "only if applicable", and that it agrees that such penalties will not be imposed to deter or to penalize switching. As stated in the Proposed Recommendation, it is the *terms of the tariff itself* that govern, and BellSouth's assurance that penalties will not be imposed as a deterrent mechanism is not part of the tariff. The tariff, as it stands, allows BellSouth unlimited discretion to decide when the penalty is "applicable". Even adding the language that such penalties will not be assessed to deter switching is vague and does not state sufficiently precisely the circumstances under which termination penalties will be imposed. The basis for the recommendation on this issue was the presumption that restrictions and conditions on resale are unreasonable because they can be used discriminatory, and BellSouth's assurance that it will not be so used does not alter anything.

BellSouth's other objection that BellSouth should be allowed to recoup any expenses that it has incurred to build facilities to serve the customer who moves to another customer raises a valid concern. However, this was already considered and sufficiently accommodated in the Proposed Recommendations. See #15 of the Ordering language: "In Instances where BST has invested in facilities requested by a customer which are not readily transferable to subsequent customers, recovery of the demonstrated cost of the facilities should be permitted."

### ***Audit Rights***

Sections A2.19.14 and B2.19.13, allowing BellSouth to audit the resellers after a thirty (30) day notice, shall be amended. These provisions are unreasonable, they are not narrowly tailored. It is unusual for a business vendor to have the right to audit its purchasers or its customers, especially when such purchasers are also its competitors. These provisions are anti-competitive, monopolistic and impinge on the proprietary rights of the resellers. Where BellSouth has complaints regarding the data furnished by the Reseller, the reasonable remedy in a competitive market is for BellSouth to file a complaint with the Commission. These provisions are unreasonable.

BellSouth's Exception states that far from being extraordinary, it is common in the

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<sup>34</sup>Scheye, Transcript at 104

Interexchange telecommunications industry to audit the information reported by a purchaser of switched access. BellSouth adds that it should be allowed to audit information regarding intraLATA and interLATA calls to verify the jurisdictional nature of the call. Again, this assurance by BellSouth that the power to audit will only be used in these situations is not matched by the broad power to audit information provided by resellers that the tariff allows BellSouth. Also, as MCI points out in its reply to BellSouth's exception, the difference between the Interexchange market and the local market is crucial because BellSouth directly competes with its purchasers in the local market, and not in the Interexchange market. BellSouth's ability to audit its purchaser-competition resellers can be used in an anti-competitive manner. The audit rights, as found in the tariff, are too broadly termed and do not limit the circumstances and to what extent, under which a competitor could be audited by BellSouth to just those situations that BellSouth describes in its exception.

Furthermore, the evidence on the standard procedure in the Interexchange market, offered by BellSouth in its Exception, has not been previously offered by BellSouth. Since the very inception of this proceeding, audit rights have been challenged by the intervenors. (E.g. See Paragraph No. 9(2) of AT&T's Notice of Protest and Intervention filed on March 13, 1997, Paragraph No. 13(b) of MCI's Notice of Protest and Intervention filed on February 17, 1997; ACSI's Post-Hearing Brief, page 10; Item 12 on ACSI's list of issues; and Item 19 on MCI's list of issues filed on April 18, 1997). In fact, BellSouth addressed the issue of audit rights in its post-hearing brief<sup>35</sup>, only to briefly mention that ACSI, the only intervenor to raise this issue in its Post-Hearing Brief, should not do so since it voluntarily agreed to a similar term in its interconnection agreement with BellSouth. Thus, BellSouth was aware of the fact that this was an issue and did not raise the possibility of the interLATA, intraLATA jurisdictional disputes as a justification for this restriction on resale. This evidence, in BellSouth's Exception, if raised earlier, would have given the parties an opportunity to litigate the veracity of BellSouth's statement, whether the Interexchange world practice is suitable in the context of local competition, etc. The Commission finds that this evidence cannot be properly considered at this stage in the proceeding. BellSouth bears the burden of proving that the restriction on resale is not unreasonable, and the evidence on the record does not support a finding that audit rights are reasonable.

The tariff sections A2.19.14 and B2.19.13, as they stand, are not "narrowly tailored", and could encourage anti-competitive behavior. They should be removed from the tariff.

### ***Unauthorized PIC changes***

The Resale Tariff, in its current form, allows BellSouth to be the sole arbitrator of any alleged unauthorized PIC changes and to impose charges for those unauthorized changes. As BellSouth will be in direct competition with the CLECs in the local market, it is reasonable and necessary to require BST to maintain evidence that the customer notified BST that he wanted to be switched back.

The tariff should provide that the customer's current carrier must be timely notified of the requested change and given the opportunity to provide proof that the change was in fact authorized before any charges may be imposed on the competing carrier for the unauthorized change. In instances in which evidence of authorization is provided, but the issue is not resolved, the Commission shall determine if the charge should be retained.

BellSouth notes in its Exception that the \$19.41 amount is based on the FCC tariff for unauthorized change charge in the Interexchange market<sup>36</sup>. However, the data provided by BellSouth, namely that the same amount is charged under the FCC tariff for Interexchange PIC changes, does not show that it is cost-based, which has been the concern of some of the

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<sup>35</sup>See page 10 of BellSouth's Post-Hearing Brief

<sup>36</sup>See copy of FCC tariff attached as Exhibit 2 to BellSouth's Exception

intervenors<sup>37</sup> during the proceeding. The presumptive unreasonableness under the FCC Order is not overcome by this evidence, especially since this evidence does not show that the charge of \$19.41 is cost-based, because if this charge is greater than the actual cost to switch the customer, then this could provide BellSouth further incentive for BellSouth to engage in anti-competitive practices<sup>38</sup>. No cost data was submitted to support the proposed charge, although BellSouth was requested to file adequate cost data to justify this proposed charge. The Commission will accept BellSouth's proposed charge of \$19.41 for unauthorized changes only on an interim basis. BellSouth is directed to file adequate cost data to justify this proposed charge within 30 days. In connection therewith, there will be an investigation on unauthorized PIC change charges. A Recommendation from the Administrative Law Judge in this matter will be reviewed at the next possible Commission meeting.

### ***Special Billing Arrangements:***

Special Billing Arrangements are not specifically exempted from resale under LPSC Regulation. BellSouth argues that Special Billing Arrangements are like Contract Service Agreements and therefore should be exempted, similarly to CSA, from resale. The Special Billing Arrangement is a term in BellSouth's tariff, A5.8.2.B which states that the Louisiana State Government has sixty (60) days from the effective date of this tariff (July 23, 1992) to subscribe to this special billing arrangement and that any Louisiana State Government location may convert to service provided under this tariff where central office facilities permit, and be covered under the SBA. If these services are indeed analogous to CSAs, as BellSouth claims they are, they should be available for resale if entered into after January 28, 1997, as CSAs entered into after that date are. BellSouth's General Subscriber Services tariff state that the government locations can opt for this service or choose not to opt for this service. Those locations that have not contacted BellSouth to convert to SBA are not bound by this "contract". To the extent that BellSouth is free to offer SBA to those government locations that have not so far opted into SBA, the competitors should not be precluded from offering SBA to those locations.

By analogizing SBA to existing contracts, if BellSouth means that the State of Louisiana as a whole is bound by this "contract" because one or more locations have converted to SBA, then that amounts to BellSouth's choice to interpret the otherwise ambiguous tariff in a way that restricts resale of its services to the resellers. This is an unreasonable restriction on resale which prevents state government agencies from benefiting from competition and the resellers from effectively competing with BellSouth. BellSouth has not overcome the presumptive unreasonableness of this restriction on the resale of SBAs since the restriction is not "narrowly tailored", but excludes all SBAs with any government location, whether or not that location is currently availing itself of the SBA under BellSouth's tariff.

The Commission's Rules for Competition do not contain a specific exemption from the duty of resale for Special Billing Arrangements. BST urges that SBAs be considered a special CSA -- one with the state. The Commission concludes that SBAs are indeed similar to CSAs, and therefore only those SBAs offered to those governmental agencies that availed themselves of SBAs prior to January 28, 1997 should be exempt from mandatory resale.

It is acknowledged that the Commission's rules on CSAs may or may not be altered by the courts when a court decision has been reached at that time the matter will be re-visited. The Special Billing Arrangement have all the characteristics of a CSA and, therefore, to be consistent with the rules previously adopted by this Commission, the restrictions on CSAs should also apply to the SBAs, subject to the court's determination of the validity of the Commission rules on CSAs

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<sup>37</sup>Page 10 of Darnell's pre-filed direct testimony

<sup>38</sup>Page 10 of MCI's Reply to BellSouth's Exception

### ***Education Discount Program:***

The exclusion of Education Discount Program from resale to the intervenors is presumptively unreasonable and BellSouth bears the burden of showing that this restriction is “narrowly tailored”. ¶939 of FCC’s First Report and Order. BellSouth admits that this service is available to end users other than telecommunication carriers. BellSouth’s argument that it should not be available for resale because it is not a typical service available to the general body of subscribers is irrelevant, since the clear mandate of §251 (c)(4)(A) does not limit the class of services to be offered by the ILEC to “typical service” or “services available to the general body of subscribers”. BellSouth’s other argument that the Regulations allow “certain limited exceptions”, of which the Education Discount Program is one, is also rejected. The Commission did not specifically exclude the Education Discount Program from resale when it excluded a number of other services. An expansive interpretation of the Regulation would be inconsistent with the clear mandate of the Act. Accordingly, the provision excluding Education Discount Program should be removed from BellSouth’s tariff.

The Education Discount Program should be available for resale at the discount rate of 20.72% established by the Commission in Order No. U-22020. This service, though offered at a discounted rate to end users, is not “already discounted” to the Reseller, and thus BellSouth’s argument that this service should be offered at no discount does not address the intervenors’ and the Staff’s concern that this service is not discounted to the Reseller, but to the end user. Also, as the Staff and MCI point out, the discount was ordered by the Commission in order to allocate certain over-earnings of BellSouth in Order No. U-17949-JJ, added to in more recent orders, and thus is being paid for by the ratepayers, not by BellSouth. BellSouth should not attempt to exempt from resale a discount program funded not by BellSouth, but by the ratepayers. The Education Discount Program should be available for resale at the overall discount rate of 20.72% as established in Order U-22020.

BellSouth’s exception states that the EDP is not a service in and of itself, but a Commission-mandated discount that applies for the benefit of certain customers only to certain existing retail services set forth in BellSouth’s Private Line Tariff. The retail services to which this discount applies, according to BellSouth, are SynchroNet, MagaLink and Frame Relay service, which are currently available to the resellers at the 20.72% discount<sup>39</sup>. Thus, BellSouth argues, the recommendation that retail services be offered at the Commission-established discount of 20.72% is “double-dipping”, forcing BellSouth to offer some of these services below cost which is prohibited by Section 701.H of the Regulations. BellSouth further contends that the Commission regulation on CSAs offers a basis for The Commission to conclude that the services to which the EDP applies are already available for resale at 20.72%, and that the Commission should not order BellSouth to offer MegaLink, Synchronet or Frame Relay services at below cost, and to the extent that BellSouth is ordered to provide these services below cost, BellSouth should be permitted to recover any shortfall from the Universal Services Fund, and that BellSouth should not be ordered to resell such services until that Fund is established and functioning.

The Commission must base its findings of fact and conclusions of law on the evidence in the record. BellSouth’s witness and counsel had not previously articulated this position that the SBA or EDP is not a service. BellSouth argues, for the *first time*, that the EDP and the SBA are not really services, whereas the testimony of Robert Scheye and the arguments of BellSouth’s counsel have been that these services should not be available for resale because the EDP is a unique service and the SBAs are analogous to CSAs. In its exceptions to the Proposed Recommendation<sup>40</sup>, where BellSouth states that the EDP and the SBA are not services, BellSouth does not direct The Commission to any portion of the testimony (prefiled or at hearing), or any briefs by counsel where this position has been previously stated by BellSouth. After carefully reviewing the transcripts, briefs and prefiled testimonies, The Commission is unable to find *any*

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<sup>39</sup>BellSouth’s Exceptions to the ALJ’s Proposed Recommendation at 1-2

<sup>40</sup>Pages 1 and 3 of BellSouth’s exception to the Proposed Recommendation

evidence to support BellSouth's current position that these are not services. On the contrary, the record shows several references by BellSouth's witness and counsel to EDP and SBA as a "service"<sup>41</sup>. Even though the use of the term "service" by BellSouth is not to be taken as definitive of the true characterization of EDP or SBA, BellSouth's failure to state its current position earlier, coupled with its use of the term "service" to refer to EDP and SBA up to now, deprives the parties of the ability to respond to such a contention. The Commission finds no evidence to support this BellSouth's witness, Robert Scheye testified that the EDP should not be available for resale because it is a unique service, and that it is a service available to end users who are not telecommunications carriers. BellSouth's counsel, advanced the same basic arguments in all the briefs, memoranda and other such correspondence. For example, these excerpts from Mr. Scheye's prefiled testimony, testimony at hearing and BellSouth's briefs (emphasis added):

- "EDP is a Commission established program that requires BellSouth to offer specified services to educational institutions at a very significant discount. **This service** is clearly as unique as services that the Commission rules already exempt from their resale requirements. ... The fact that **the service** is already heavily discounted coupled with the fact that there will be no additional avoided costs if **the service** were taken over by a Reseller clearly supports this alternative." [page 7 of Scheye's prefiled direct testimony]
- (concerning EDP and SBA) "**Those services** are already very severely discounted ... It would be our preference and we believe consistent with this Commission's findings in the past that **those services** not be made available for resale." [Scheye, Transcript at 14]
- **This service** should not be available for resale. ... While the Regulations do not specify that the EDP is unavailable for resale, it is consistent with the intent of the Regulations to exempt **that service** offering from resale. EDP is **not a typical retail service** available to the general body of subscribers. If the Commission finds that the EDP should be offered for resale, then there should be no further discount because **the service** is already heavily discounted..." [page 7-8 of BellSouth's Post-Hearing Brief]

There are many more references by BellSouth to EDP and SBA as services. The Commission has examined the two qualifications contained in Mr. Scheye's testimony and BellSouth's briefs, but those qualifications address the uniqueness of the EDP and SBA "EDP is not a typical retail service..."; "[s]ection 1101 of the Commission's rules specifies the terms and conditions for the resale of BellSouth's *retail* services [emphasis in the original]. BST argues that the Education Discount Program is a special discount program established by the Commission that requires BellSouth to offer its SynchroNet® and MegaLink® services to educational institutions at a significant discount. BellSouth suggests alternatively, if the Commission believes that the program should be available for resale, such resale should be (1) limited to the same subscribers who are eligible for the service today, and (2) without any further discount.<sup>42</sup>"). BST does not state or even suggest a proposition that the EDP and SBA are not *services*. BellSouth does not deny that EDP and SBA are offered to non-telecommunications-carrier customers. Rather, BellSouth's arguments thus far have been that the EDP should not be available for resale because it is not available to the general body of subscribers, and such an exclusion is consistent with the intent of the Regulations which exempt certain enumerated services from resale. Nowhere in this portion of the testimony, particularly addressing EDP, or anywhere else in the

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<sup>41</sup>It is noteworthy that BellSouth objects to the ALJ's use of the word "service" to refer to EDP and SBAs in the Proposed Recommendation, having used the term itself all through the proceeding. BellSouth's Exception states: "The stated rationale [for the ALJ's recommendation that EDP should be available for resale at the 20.72% discount] is that '[*this service*, though offered at a discounted rate to end users, is not 'already discounted' to the Reseller, and thus BellSouth's argument that *this service* should be offered at no discount does not address intervenors' and the Staff's concern that *this service* is not discounted to the Reseller, but to the end user.' See Proposed Recommendation at p. 32 (emphasis added)"

<sup>42</sup>Pages 6-7 of Scheye's prefiled direct testimony

testimony or counsel's brief, has BellSouth stated that the EDP is not a service<sup>43</sup>.

Given the antithetical nature of the positions that the EDP is a service, and that it is not a service, it is indeed baffling that BellSouth used the term "service" to refer to EDP throughout the proceeding without ever stating that these are not services. The Commission finds no evidence to make a finding that the EDP is not a service. After careful consideration of BellSouth's exception, The Commission concludes that the EDP should be available for resale at the Commission-established discount of 20.72%, for the reasons given above.

On motion of Commissioner Field, seconded by Commissioner Owen and unanimously adopted, the Commission voted to accept the Administrative Law Judge's recommendation with the elimination of recommendations number 20 and 21 and the adoption of the alternate recommendation, number 22<sup>44</sup>, regarding resale of Special Billing Arrangements. BellSouth is directed to file adequate cost data to justify the proposed unauthorized PIC change charge within 30 days, for review at hearing before the ALJ.

THEREFORE, IT IS ORDERED THAT:

- #1 Issues such as N11, 911 calls, use-and-user restrictions, which have been the subject matter of the Commission's Order No. U-22020, and of Docket No. U-20883, will not be reopened in this proceeding.
- #2 BellSouth is not be required to revise its Resale Tariff to provide for the release of customer records to competitors.
- #3 BellSouth's Resale Tariff shall be amended to reflect all of the modifications BellSouth agreed to during the progress of Docket No. U-22091 prior to Commission approval of the Resale Tariff.
- #4 The Joint Stipulations agreed to, or not objected to, by the parties, are approved and authorized by the Commission and made a part of the BellSouth Resale Tariff
- #5 Tariff Sections A4.6.1.D and B2.19.14 state that Contract Service Agreements in place as of February 21, 1997 shall be exempt from mandatory resale. Amendments to LPSC Competition Regulations state that CSA's entered prior to January 28, 1997 would not be available for resale. BellSouth has agreed to amend the Resale Tariff to correct the date from February 21, 1997 to January 28, 1997. This amendment shall be in place prior to Commission approval of the Resale Tariff.
- #6 Section A4.7.B requires Resellers to offer Link-up Louisiana to eligible subscribers. The Commission authorizes BellSouth, to revise this section to require only resellers of residential service to offer Link-Up Louisiana.
- #7 BellSouth's Resale Tariff shall be amended to reflect that end user customers of resellers will not be subject to, or experience any changes to their telephone numbers that end users of BellSouth do not also experience.

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<sup>43</sup>See MCI's reply to BellSouth's Exception, page 5, on the same point: "Now that the ALJ has rejected BellSouth's "justification" for excluding the EDP from resale, BellSouth attempts to argue that the EDP is not *really* a service. ... MCI maintains that the testimony at the hearing establishes that the EDP is a retail service offered by BellSouth to subscribers who are not telecommunication carriers. BellSouth's newfound argument defies logic, is inconsistent with its testimony and should be rejected."

<sup>44</sup>The original numbering in the ALJ's Final Recommendation is retained in the numbering of the present Order, to facilitate reference to Commissioner Field's Motion which was adopted by the Commission.

- #8 BellSouth's Resale Tariff shall be amended to include the statements that BellSouth will contact competitors customers only for repair and maintenance, and that no disparaging comments regarding the Reseller's products and services will be made, and no marketing of any type will occur during these contacts.
- #9 BellSouth's proposed Resale Tariff provides that BST may terminate service to end users who are making annoying or harassing calls. The Tariff shall be amended to include the same provisions that are found in BellSouth's tariff for its own end users, i.e., that termination of service of a Reseller's customer would occur with the following protections, (1) written notice from a law enforcement agency; (2) notifying BellSouth that services have been used unlawfully and that formal charges have been filed against the customer; (3) and written notice is provided to the customer three days before termination.
- #10 Any competitor requesting it, as well as the Commission, shall be provided with the standard service intervals for all classes of service. BellSouth's tariff shall be amended to include a provision that standard service interval information for all classes of service is available upon request of a Reseller for those services, and that services will be provided in a nondiscriminatory manner.
- #11 Sections A2.19.3.B and B2.19.3.B, requiring the Reseller to notify BellSouth of any less than standard operations shall be removed from the tariff. The rationale for this provision remains unclear because BellSouth was unable to explain the rationale, and this provision could result in unforeseen obligations being imposed on the Reseller.
- #12 A2.19.12.D and B2.19.11.D, limiting BellSouth's liability arising out of the Reseller's unlawful acts shall be revised to include the reciprocal terms suggested by MCI, and as agreed upon in the Joint Stipulation.
- #13 Sections A2.19.12 and B2.19.11, limiting BellSouth's liability arising out of BellSouth's errors and omissions in providing service and other similar causes, and A2.19.12.B and B2.19.11.B requiring resellers to indemnify BellSouth in all actions by third parties arising as a result of BellSouth's furnishing of services to the Reseller, shall be modified so that parties subscribing to the tariff would not be required to indemnify BellSouth for all actions by BellSouth. BellSouth's own willful misconduct, and gross negligence, shall be excluded from the indemnification clause.
- #14 Sections A2.19.8 and B2.19.7 dealing with deposits shall be revised to eliminate BellSouth's unlimited discretion. BellSouth is ordered to add to the Resale Tariff, specific criteria that will be used in determining when a deposit will be required of a Reseller, and if required, how that amount is to be determined. (Any such deposit shall not exceed Commission established deposit limitations)
- #15 In order to foster competition, no termination penalties shall be permitted in the Resale Tariff. (CSAs entered into before 1/28/97 would not be effected.) In instances where BST has invested in facilities requested by a customer which are not readily transferable to subsequent customers, recovery of the demonstrated cost of the facilities will be permitted in the form of a termination cost.
- #16 BellSouth shall modify the Resale Tariff to eliminate the broad right to audit purchasers-competitors. Commission approval of narrowly drafted audit authority shall be required.
- #17 As BellSouth will be in direct competition with TSP's in the local market, it is reasonable and necessary to require BST to maintain evidence that the customer notified BST that he wanted to be switched back. BellSouth shall therefore obtain and retain proof of authorization for a switch to, or a switch back to BellSouth Telecommunication for a minimum of one year, and abide by all other Commission regulations on provider selection

and verification. BellSouth's proposed Resale Tariff shall provide that the customer's current carrier must be timely notified of the requested change and given the opportunity to provide proof that the change was in fact authorized. In instances in which the issue is not resolved, the Commission shall determine if the charge for unauthorized PIC change charge should be retained.

- #18 Adequate cost data was not submitted at hearing to justify BellSouth's proposed charge of \$19.41 for unauthorized changes. The Commission accepts BellSouth's proposed charge of \$19.41 for unauthorized PIC change charges on an interim basis. BellSouth is directed to file adequate cost data to justify this proposed charge within 30 days. Once the information has been provided, proceedings will be held, and a proposed recommendation from the Administrative Law Judge will be submitted to the Commission for review.
- #19 Other State agencies and/or locations might wish to participate in a Special Billing Arrangement. Any additional State Agencies or locations which have been, or are, added to SBA service after January 28, 1997, shall be available for resale.
- #22 The Commission considers Special Billing Arrangements to be sufficiently analogous to Contract Service Arrangements to be included in the Commission's Contract Service Arrangement exception to required resale. Special Billing Arrangements have all the characteristics of Contract Service Agreements and therefore, to be consistent with the rules previously adopted by this Commission the restrictions on CSAs shall also apply to SBAs. SBAs shall be treated as CSAs under Commission rules. Only those State agencies and/or locations who were participating in the SBA tariff prior to January 28, 1997 shall be exempted from resale. It is acknowledged that the Commission's rules on CSAs may or may not be altered by the courts when a court decision has been reached, at that time the matter will be revisited.
- #23 The provision of BellSouth's Resale Tariff excluding the resale of the Education Discount Program shall be removed from BellSouth's tariff and the Education Discount Program shall be available for resale.
- #24 No cost information was presented by BellSouth concerning the Education Discount Program to justify consideration of any modification to the Commission established discount of 20.72%.(other than a suggestion in briefs that some of the service could approach, or fall below cost -- which could cause concern) Education Discount Services shall therefore be available at the Commission-established overall discount rate of 20.72%.

**BY ORDER OF THE COMMISSION  
BATON ROUGE, LOUISIANA**

April 27, 1998

/S/ DON OWEN  
DON OWEN, CHAIRMAN  
DISTRICT V

/S/ IRMA MUSE DIXON  
IRMA MUSE DIXON, VICE-CHAIRMAN  
DISTRICT III

/S/ C. DALE SITTIG  
C. DALE SITTIG, COMMISSIONER  
DISTRICT IV

/S/ JAMES M. FIELD

JAMES M. FIELD, COMMISSIONER  
DISTRICT II

/S/ LAWRENCE C. ST. BLANC  
SECRETARY

/S/ JACK "JAY" A. BLOSSMAN, JR.  
JACK "JAY" A. BLOSSMAN, JR., COMMISSIONER  
DISTRICT I