



# Public Service Commission

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**DATE:** SEPTEMBER 10, 1998

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

**FROM:** DIVISION OF COMMUNICATIONS (AUDU, SIMMONS) *SAS*  
DIVISION OF LEGAL SERVICES (COX) *WR MCB*

**RE:** DOCKET NO. 971399-TL - PETITION OF BELLSOUTH TELECOMMUNICATIONS, INC. TO LIFT MARKETING RESTRICTIONS IMPOSED BY ORDER NO. PSC-96-1569-FOF-TP.

**AGENDA:** SEPTEMBER 22, 1998 - REGULAR AGENDA - POST-HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\CMU\WP\971399.RCM

### CASE BACKGROUND

On October 21, 1997, BellSouth Telecommunications, Inc. (BellSouth) filed a Petition to Lift the (intraLATA toll) Marketing Restrictions imposed by Order No. PSC-96-1569-FOF-TP (Order) in Docket No. 930330-TP. On November 10, 1997, MCI Telecommunications Corporation (MCI), AT&T Communications of the Southern States, Inc. (AT&T), and the Florida Competitive Carriers Association (FCCA; formerly FIXCA), collectively referred to as the Joint Complainants, filed responses to BellSouth's petition. On the same day, the Joint Complainants filed a motion to dismiss BellSouth's petition. On November 18, 1997, BellSouth filed a Response and Opposition to the Joint Motion to Dismiss. On February 17, 1998, the Commission issued Order No. PSC-98-0293-FOF-TP denying the Joint Motion to Dismiss and setting the matter for hearing. On June 18, 1998, an evidentiary hearing was conducted to address the issues of whether the marketing restrictions should be lifted and

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what relief is due to BellSouth, if any. Staff's recommendations on the issues are set forth below.

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### DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant BellSouth relief from the requirements of Section III of Order No. PSC-96-1659-FOF-TP, issued December 23, 1996 in Docket Nos. 930330-TP and 960658-TP?

RECOMMENDATION: Yes. BellSouth should be granted relief from the requirements of Section III, item 1, of Order No. PSC-96-1659-FOF-TP, issued December 23, 1996 in Docket Nos. 930330-TP and 960658-TP, as specified in Issue 1a. This relief becomes effective when BellSouth files the six-month report (as described in staff's analysis) with this Commission on February 1, 1999. (AUDU, SIMMONS)

### POSITION OF PARTIES:

#### BELLSOUTH:

Yes. The current market conditions are markedly different than they were when the Commission imposed the restrictions on BellSouth for marketing intraLATA toll service to new customers. The increased activity in the intraLATA market in the last two years, as evidenced by Hilda Geer's testimony, supports there is customer awareness of intraLATA toll carrier options and that competing carriers have established themselves in the intraLATA toll market, thereby resulting in a competitively thriving intraLATA toll market as intended by the Commission's Order. Since the intent of that Order has been met, the restrictions should be lifted.

#### FCCA/MCI/AT&T:

No. The Commission should not alter the requirements of Section 3 of Order No. PSC-96-1659-FOF-TP. Specifically, the Commission should continue to require BellSouth to maintain a carrier-neutral approach when informing new customers of their intraLATA options. BellSouth's proposal would not pass muster under the carrier-neutral routines prescribed by federal law for interLATA purposes.

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**STAFF ANALYSIS:**

BellSouth witness Geer argues that the marketing restrictions imposed on BellSouth by Order No. PSC-96-1659-FOF-TP<sup>1</sup> were intended to promote intraLATA toll competition by restricting BellSouth's ability to market its intraLATA toll services to new customers, in order to increase customers' awareness and allow competing carriers to establish their presence in the intraLATA toll market. (TR 23, 41, 80) Witness Geer argues that the restrictions prevent BellSouth from informing customers that it provides intraLATA toll service unless the customer specifically asks if BellSouth provides this service. Witness Geer contends that these restrictions have created an unlevel playing field since BellSouth does provide intraLATA toll service. (TR 63, 77-78) Witness Geer further argues that the IXCs have established their presence in the intraLATA market as is evidenced by customer awareness of choices in the intraLATA marketplace. She also contends that this will not change merely because BellSouth is relieved of these marketing restrictions. (TR 101) The BellSouth witness further argues that the requested relief will enable customers to make informed decisions, as should be the case in a competitive marketplace. (TR 101)

BellSouth witness Geer argues that there is ample data to suggest that there is flourishing competition in the intraLATA market. (TR 41) Witness Geer asserts that as of May 31, 1998, BellSouth had lost 32% of its residential lines, 25% of its complex business lines, and 36% of its small business Florida

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<sup>1</sup> "Thus, we find that the following modifications to BellSouth's business practices and prompts are appropriate:

1. BellSouth shall advise customers that due to the newly competitive environment they have an option of selecting a long distance carrier for their local toll calls (calls made within a local calling zone to nearby communities).
2. BellSouth shall offer to read to the customer the list of available carriers. If the customer responds affirmatively, then the list shall be read.
3. If the customer declines, then the customer service representative shall ask the customer to identify the carrier of choice. If the customer's response is ambiguous or non-committal, the service representative shall offer to read the list of available carriers and encourage the customer to make a selection. If the customer does not want to make a selection, the customer shall be advised that he must dial an access code to reach an intraLATA carrier each time he makes an intraLATA call until a presubscribed carrier is chosen." (Order, p 6)

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intraLATA toll PIC-able lines to other intraLATA toll carriers. She contends that this data is indicative of market share loss. (TR 27, 104) With respect to new service requests, witness Geer states that during the period January 1997 to June 1998, 33% of all new residential and 20% of all new business customers selected other intraLATA toll providers. For existing customers' service changes, witness Geer asserts that 84% of residential and 91% of business customers selected other intraLATA toll providers. Overall (combining both new and existing customers), witness Geer states that for that same period, January 1997 to June 1998, 57% of residential and 45% of business customers selected other intraLATA carriers. (Geer, EXH-2 p. 17) Witness Geer concedes that this data is indicative of intraLATA PIC (LPIC) activity and not market share loss. Witness Geer concedes that this activity-based data includes customers calling either the carrier or the business office for PIC changes; she asserts that these changes could be multiple activities on the same access line which could overstate the loss. (Geer, EXH-2 pp. 17-19)

BellSouth witness Geer argues that the marketing restrictions create an unfair playing field and a great deal of customer confusion. Witness Geer further argues that this customer confusion results from the fact that BellSouth is not allowed to fully educate the customer of all the participants and services available in the intraLATA marketplace. Witness Geer contends that this customer confusion potentially leads to either the customers not being aware/informed that there are a number of intraLATA calling plans they could benefit from or to a customer subscribing to a calling plan that he/she may not actually use because he/she is PIC'd to an intraLATA carrier other than BellSouth. (Geer, EXH-2 pp. 11-13, 26-27; TR 81) Witness Geer contends that these situations could result in a customer paying for a service the customer may not be receiving, or that the customer could otherwise be paying a higher rate for his/her service. The BellSouth witness argues that in either case, BellSouth receives complaints from these customers expressing that they were not well served because BellSouth should have educated them up-front about their services. (Geer, EXH-2 pp. 12-13; TR 81) Witness Geer asserts that this customer confusion is due to the fact that with the current restrictions, BellSouth is not allowed to inform these customers of its available calling plans and its intraLATA toll service. (TR 81-82)

FCCA witness Seay argues that the purpose of the intraLATA marketing restrictions was to ensure that a new customer's initial contact with BellSouth was neutral and fair, recognizing the two



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hats BellSouth wears in the intraLATA toll marketplace. (TR 122-123, 138-139) Witness Seay further argues that under one hat, BellSouth is the dominant provider of local exchange services; under the other hat, BellSouth is a provider of intraLATA toll services in the intraLATA toll marketplace. She contends that these restrictions are there to prohibit BellSouth from wearing these two hats concurrently. (TR 123) Witness Seay asserts that the present customer awareness is due to aggressive marketing efforts by the competitors. She contends that customers are being educated on a regular basis through marketing efforts and that customers are starting to seek out information on services that they readily use. (TR 150-151)

FCCA witness Seay argues that as long as BellSouth remains the dominant local exchange service provider, these restrictions should remain in effect. (TR 152, 154) The FCCA witness argues that without these restrictions, BellSouth, as a dominant local exchange carrier, will use its position to influence customers during their initial contact. She further argues that these restrictions are to ensure neutral customer contact protocols, and at the same time, to enable BellSouth to market its intraLATA toll services in any way it chooses outside of this initial customer contact. (TR 119, 152-153) Witness Seay argues these competitively neutral protocols do not disadvantage BellSouth; instead, they place BellSouth on the same footing with the other intraLATA toll carriers. She contends that BellSouth is the only intraLATA toll carrier with this unique opportunity to market its services to captive customers. Witness Seay contends that this position gives BellSouth an unfair advantage in the intraLATA marketplace; hence, lifting these restrictions will allow BellSouth to leverage its position as a dominant LEC even before there is local competition. (TR 112, 116, 118, 122, 152-153)

FCCA witness Seay agrees that the data BellSouth has proffered shows the existence of competition in the intraLATA marketplace, but she argues that even with these restrictions, BellSouth still retains 75% of the market. Witness Seay argues that some of this data is not relevant, since the existing customer restrictions have expired. (TR 124, 149) Furthermore, witness Seay argues that at the onset of intraLATA presubscription there was a lot of customer confusion. Witness Seay contends that these customers were uninformed and unaware of the choices in the intraLATA toll environment, but that this is no longer the case as more and more customers are becoming increasingly aware that there are many intraLATA toll providers. Witness Seay contends that this confusion has diminished because of increased carrier marketing and efforts to educate the customers. (TR 150-151, 163) Witness Seay

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further argues that there should be no customer confusion with new customers since BellSouth will only educate and market its services to customers who have elected BellSouth as their intraLATA toll carrier. (TR 161, 163) Witness Seay asserts that for a customer who has elected an intraLATA toll provider other than BellSouth, this customer could dial around to utilize any of BellSouth's services. (TR 161)

Staff agrees with both BellSouth and the Joint Complainants that the marketing restrictions were intended to ensure competitively neutral customer contact protocols, increase customer awareness, and allow the IXCs to establish a presence in the intraLATA marketplace. The question is whether the reported market activity is sufficiently compelling to warrant lifting these restrictions. The Commission should also consider the public interest concern of how many entities, besides BellSouth, are available for a new customer to call upon to initiate service.

Staff observes that BellSouth and the Joint Complainants have diametrically opposed, yet logical, arguments on the appropriateness of continuing the marketing restrictions on new customers. On the one hand, BellSouth points to its portion of LPIC activity and presubscribed intraLATA lines as indicative of market erosion that justifies relief from the marketing restrictions. Staff believes that the LPIC activity data for new service connections is more informative than the LPIC activity data for existing service changes and moves. The latter includes cases of multiple activity on the same line. In addition, much of the existing customer activity is undoubtedly associated with customers who want to exercise their option to select an intraLATA carrier other than BellSouth. Since there was no balloting, customers who wanted to stay with BellSouth did not need to take any action. With the LPIC activity for new service connections, there is a very low probability of multiple activity on the same line within the 17-month period cited by BellSouth witness Geer. (Geer, EXH-6, p. 1) In addition, each new service connection will include the choice of intraLATA carrier.

As of May 31, 1998, BellSouth had 69.32% of the LPIC-able access lines. (Geer, EXH-2 p 73) The distribution of intraLATA presubscribed lines is a measure of market share at a snapshot in time; however, this does not consider when the line was connected. For new service connections over the period January 1997 through June 1998, 72% of the lines were presubscribed to BellSouth for intraLATA calling (Geer, EXH-2 p 71a (June 17th supplement to HG-1)). Since the marketing restrictions on existing customers did not expire until June 23, 1998, the statistics on new and existing

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customers were derived under the same constraints. The similar percentages for new connections and LPIC-able access lines suggest that new and existing customers have a similar propensity to select BellSouth as their intraLATA carrier. Since the marketing restrictions on existing customers have expired, these statistics corroborate BellSouth's position that the marketing restrictions on new customers should be lifted as well.

In staff's view, the Joint Complainants' arguments are seemingly conceptual in nature and hinge on BellSouth's "gatekeeper" position on new connections. The Joint Complainants argue that the limited competition in local markets places BellSouth in the unique and advantageous position of being the first point of contact for most new connections. There is justifiable concern that BellSouth might be able to use its "gatekeeper" position to unduly influence the customer's choice of intraLATA carrier.

There are valid arguments on both sides of this issue. Staff has yet to see, however, the effects of removing the marketing restrictions on existing customers. Prior to removing the marketing restrictions on new customers, staff would prefer to have six months' experience (i.e., through December 31, 1998) with the new marketing environment for existing customers.

Staff acknowledges that the limited competition in local markets effectively places BellSouth in a "gatekeeper" position with respect to new connections. While this "gatekeeper" position gives BellSouth an advantage in theory, staff believes that market data is a more telling indicator since this data is the product of actual customer and company actions. Staff expects that BellSouth's new marketing efforts on existing customers will not adversely affect the state of that market, and will confirm that customers have become sufficiently informed to make educated choices, despite any inherent advantage BellSouth has due to its incumbent status or "gatekeeper" position on business office transactions.

To avoid undue delay, staff recommends that BellSouth be granted relief from the marketing restrictions on new customers, concurrently with providing reports on LPIC activity and the distribution of LPIC-able access lines for the six-month period following expiration of the marketing restrictions on existing customers. While staff does not expect that these reports will indicate any market re-concentration, these reports will provide staff and the parties with important information that could be used in a subsequent proceeding should the need arise.



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Based on the record, staff recommends that BellSouth should be granted relief from the requirements of Section III, **item 1**, of Order No. PSC-96-1659-FOF-TP, issued December 23, 1996 in Docket Nos. 930330-TP and 960658-TP, as specified in Issue 1a. This relief should become effective when BellSouth files its six-month report with this Commission on February 1, 1999. The report shall include LPIC activity for the six months ending December 31, 1998 and the distribution of LPIC-able access lines for June 30, 1998 and December 31, 1998.

ISSUE 1a: What relief, if any, is appropriate?

RECOMMENDATION: Section III, item 1 of the current marketing restrictions should be amended to read as follows:

"..., due to the newly competitive environment you have an option of selecting a carrier for your local toll calls (calls made within a local calling zone to nearby communities) in addition to us.

BellSouth should also be allowed to educate new customers who select BellSouth for their intraLATA toll service or who introduce the subject during the initial customer contact. Staff also recommends that BellSouth should be required to rewrite its customer mailer to actually educate the customer on how to dial-around and not reference it in a footnote. (AUDU)

POSITION OF PARTIES:

BELLSOUTH:

The marketing restrictions imposed by Order No. PSC 96-1659-FOF-TP should be lifted.

FCCA/MCI/AT&T:

No relief is appropriate; thus the Commission should not alter the requirements of Section 3 of Order No. PSC-96-1659-FOF-TP. BellSouth's own evidence shows that, with the requirement in place, 68% of new residential customers and 80% of new business customers choose BellSouth as their intraLATA carrier; the rest are divided among 51 competitors. Thus, BellSouth can hardly claim to be disadvantaged by a requirement that does no more than put BellSouth on an equal footing with its competitors when new customers learn of their intraLATA options. More importantly, BellSouth still has a virtual monopoly on local service. It has attendant obligations as exclusive gatekeeper to the intraLATA market. The Commission should not permit BellSouth to leverage that role and abuse its gatekeeper status in order to gain unfair advantages as an intraLATA competitor.

STAFF ANALYSIS:

BellSouth witness Geer argues that the first "buying experience" between a company and a new customer is crucial. She argues that this first experience creates a lasting impression,

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hence, a company's ability to fully educate the new customer on its products and services is an essential cornerstone in developing a lasting relationship. Witness Geer argues that these marketing restrictions preclude BellSouth from explaining in detail products and services that can benefit its customers. Witness Geer contends that the restrictions have silenced BellSouth from telling customers about its products and services during intraLATA toll service negotiations, thereby, impacting customers' choices and resulting in customers making uninformed choices. (TR 24-25) Witness Geer further argues that these restrictions have allowed its competitors to enjoy an unshackled opportunity to gain market share. (TR 25) Witness Geer states that the relief BellSouth is seeking is the ability to inform customers that it provides intraLATA toll service in addition to local service. (TR 63)

BellSouth witness Geer argues that BellSouth is an intraLATA toll competitor and should be allowed to educate and market its local toll services to new customers. The BellSouth witness argues that the current restrictions prohibit BellSouth from educating and marketing its intraLATA toll services (ECS and Area Plus services) to new customers; hence, customers are uninformed about service options that are otherwise available. (TR 28) She argues that when a new customer selects an intraLATA toll carrier other than BellSouth, the company is prohibited from educating the customer about the impact his/her choice may have on the local calling plan he/she may have chosen or may access. (TR 28) Witness Geer argues that to ensure that a customer continues to enjoy ECS rates, it is necessary that BellSouth be allowed to inform these customers selecting an intraLATA carrier other than BellSouth to dial around using 1015124 (BellSouth's Carrier Access Code). She asserts that BellSouth communicates the dial-around process using a customer mailer. (TR 29, 71, 91) Witness Geer argues that BellSouth should be allowed to inform customers of these conflicts without having to wait "until the subject is introduced by the customer." (TR 39, 70) Witness Geer asserts that BellSouth's ability to market its local toll services will enhance customers' awareness regarding the full range of choices in the marketplace and also eliminate customers' confusion. (TR 43)

To fully educate these customers, BellSouth has proposed the use of three prompts as guides for its customer service representatives. BellSouth argues that it will use these three prompts to advise customers regarding available choices in the intraLATA marketplace. The three prompts are as follows:

1. That the customer has a choice of selecting a long distance carrier for local toll calls.

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2. That BellSouth can provide the customer's local toll service.

3. That BellSouth will read the list of the available intraLATA carriers if the customer desires. (TR 28, 41-42, 64, 66)

Witness Geer argues that using these prompts in a presentation is fair and equitable to the competitors, and that it eliminates customer confusion. (TR 42-43) Witness Geer asserts that this balanced presentation is necessary because if the customer chooses not to have the list read, the current restrictions preclude informing the customer that BellSouth is also an intraLATA toll provider. She contends that the proposed prompts are competitively neutral and concludes that there is nothing magical about the three prompts. (TR 50-51, 67)

FCCA witness Seay argues that BellSouth is still the monopoly LEC that all customers initiating local service must call upon, and contends that these marketing restrictions are intended to keep the discussions between BellSouth and these customers neutral and fair during this first encounter. (TR 138-139) Witness Seay further argues that since BellSouth is positioned as the gatekeeper for intraLATA service, BellSouth's initial customer contact must be neutral until the local market is truly competitive for new customers. (TR 129)

FCCA witness Seay argues that the marketing restrictions do not disadvantage BellSouth; instead, they put BellSouth at parity with other intraLATA toll providers because no other intraLATA toll provider has this unique opportunity to market its service to a captive customer. (TR 126-127) Witness Seay contends that BellSouth is not precluded from marketing its service in the same manner as its competitors. She asserts that BellSouth can advertise, telemarket, and use direct mail. (TR 132-133) Furthermore, witness Seay argues that without the restrictions, BellSouth will utilize any contact with new customers to market its services. She argues that BellSouth will never market any competitor's service that may be better than BellSouth's, e.g., MCI's 5-cent calling plan. Witness Seay asserts that it is necessary to have some neutral customer contact protocol. Witness Seay argues that by BellSouth seeking to educate customers, BellSouth is actually seeking to discuss its calling plans with them. The FCCA witness concludes that if BellSouth will discuss any of its calling plans with these new customers, BellSouth should also discuss its competitors' calling plans. (TR 152-154)

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FCCA witness Seay argues that customers are less confused and better informed today and attributes this to the fact that customers are being educated on a regular basis through marketing activities. She further argues that customers are beginning to seek information and options on their regularly used services (TR 151)

FCCA witness Seay argues that BellSouth's proposed prompts are an attempt by BellSouth to renege on a stipulation to which BellSouth is a party. She argues that with these proposed prompts, BellSouth will put its name first before the customer and only mention other intraLATA carriers if so requested. Witness Seay contends that allowing BellSouth to use the proposed prompts will undermine the intraLATA toll competition that is evolving. (TR 124) Witness Seay further argues that BellSouth has not been prohibited from educating its customers, when the customer introduces the subject. Witness Seay contends that with the competitively neutral contact protocols, BellSouth should not worry about customer confusion since further discussion regarding other intraLATA services will be contingent on the customer's selection of an intraLATA toll provider. (TR 125, 161)

Staff agrees with BellSouth that the first "buying experience" is crucial. Staff also agrees with the Joint Complainants that this makes a strong case for competitively neutral customer contact protocols when BellSouth negotiates a new customer's local service and his/her selection of intraLATA carrier. In one sense, staff agrees with BellSouth that the marketing restrictions preclude BellSouth from explaining fully its products and services; however, BellSouth has other means of educating and informing these customers besides inbound customer contacts. In addition, staff notes that in Order No. PSC-96-1569-FOF-TP, BellSouth was allowed to educate customers when they introduced the subject. Staff agrees with both BellSouth and the Joint Complainants that customers' awareness has increased, and staff believes that as customers' awareness grows, they will become more informed and thereby seek the necessary information to enable them to make informed decisions. Staff commends BellSouth's efforts to use a customer mailer to educate customers on how to dial around as resolution for any conflicts arising from a customer's desire to use BellSouth's ECS while being PIC'd to a different intraLATA carrier. However, staff notes that the mailer package talks about dial-around in a postscript footnote. (Geer, EXH-7 pp 1-4) Indeed, the mailer package appears to target these customers more for win-back than education.

Staff observes that the prompts BellSouth has proposed in this proceeding are the same prompts the Commission prohibited BellSouth from using in the original Complaint proceeding in Order No. PSC-96-



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1569-FOF-TP<sup>2</sup>. The only thing that has changed in the marketplace since that complaint is increased customer intraLATA activity; BellSouth still effectively maintains its gatekeeper status since alternative local providers have not garnered any significant local market share. Staff observes that the existing prompts do not inform a customer that BellSouth is an intraLATA toll provider. However, allowing BellSouth to use its proposed prompts will not meet the competitive neutrality standard -- if the customer declines to have the list read to him/her and the customer leaves with the full knowledge of one provider, the negotiation is not competitively neutral. (TR 138, 153)

Based on the above arguments, staff believes that in order for competition to thrive, it is necessary for now that a new customer's buying experience be competitively neutral to allow the customer to make an informed decision based on his/her need. Staff is cognizant of the need for BellSouth to inform customers that it provides intraLATA service; however, BellSouth is uniquely positioned. This being the case, staff agrees with the Joint Complainants that the alleged customer confusion can be mitigated by BellSouth marketing only to customers that are PIC'd to BellSouth. However, staff is concerned that customers need to be made aware that BellSouth is an intraLATA provider. Thus, staff recommends section III, item 1 of the current marketing restrictions should be amended to read: BellSouth shall advise customers that due to the newly competitive environment they have an option of selecting a carrier for their local toll calls (calls made within a local calling zone to nearby communities) in addition to us<sup>3</sup>. As previously specified in Order No. PSC-96-1569-FOF-TP, BellSouth should also be allowed to educate new customers who select BellSouth for their intraLATA toll service.

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<sup>2</sup> Witness Geer stated that this balanced approach is based upon the following guiding principles:

- 1) Advise the customer that several carriers provide local toll (intraLATA) service;
- 2) Inform the customer BellSouth is a carrier that can provide local toll service; and
- 3) Offer to read to the customer a list of available carriers. (Order, p 5)

<sup>3</sup> In Order No. PSC-98-0710-FOF-TP, where the Commission determined - "... we believe that Sprint's use of the phrase "in addition to us" is potentially helpful and informative for customers; ... accordingly, we will not prohibit Sprint from using the phrase "in addition to us" in its customer contact protocol." (Order, p 5)

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Staff also recommends that BellSouth should be required to rewrite its customer mailer to actually educate the customers on how to dial-around and not merely reference it in a footnote.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending the filing of BellSouth's six-month report on February 1, 1999. (COX)

STAFF ANALYSIS: The order issued on this recommendation will be final; however, this docket should remain open to allow BellSouth to file the six-month report on February 1, 1999.