ORIGINAL

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June 4, 1999

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 981052-TP (TCCF Petition)

Dear Ms. Bayó:

Enclosed please find the original and fifteen copies of BellSouth Telecommunication, Inc.'s Motion for Reconsideration, which we ask that you file in the above-referenced matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Michael P. Goggin

Michael P. Goggin

(2d)

cc: All Parties of Record
Marshall M. Criser III
William J. Ellenberg II

AFA
APP
CAF
CMU Lewis
CTR
EAG
LEG 2
MAS 2
OPC
RRR
SEC 1
WAW
OTH

CERTIFICATE OF SERVICE
Docket No. 981052-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail this 4th day of June, 1999, to the following:

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Michael P. Goggin
Michael P. Goggin

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

PETITION OF TELEPHONE COMPANY OF CENTRAL FLORIDA (TCCF) FOR ARBITRATION OF RESALE AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC., PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996)	Docket No: 981052-TP
	Filed: June 4, 1999

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR RECONSIDERATION

BellSouth Telecommunications, Inc., pursuant to Rule 25-22.060(1), Florida Administrative Code, hereby files its motion for reconsideration by the Public Service Commission ("Commission") of Order No. PSC-99-1013-FOF-TP ("Order") issued on May 20, 1999. Reconsideration is required because the Commission overlooked or failed to consider applicable law and evidence affecting the outcome of this proceeding. In support of its motion, BellSouth states:

I. Procedural Background.

On February 8, 1996, the Telecommunications Act of 1996 ("the Act") became law. The Act required resale negotiations between incumbent local exchange carriers and new entrants. On July 1, 1996, BellSouth Telecommunications, Inc. ("BellSouth") and Telephone Company of Central Florida ("TCCF") filed a request for approval of a resale agreement under the Act. On October 8, 1996, the Florida Public Service Commission ("PSC" or "Commission") approved the Agreement in Order No. PSC-96-1251-FOF-TP. The Commission found the Agreement complied with the Act. The Agreement

governs the relationship between BellSouth and TCCF regarding resale pursuant to the Act.

On August 20, 1998, TCCF filed a petition with the Commission as a result of TCCF and BellSouth being unable to reach agreement on all issues that were being negotiated between them for the renewal of the parties' resale agreement. By Order No. PSC-98-1490-PCO-TP, issued November 9, 1998, the Commission separated the issues into one issue for enforcement of the parties' current resale agreement ("Complaint Issue") and two issues for arbitration of the renewal of the resale agreement ("Arbitration Issues"). The three issues included in the Prehearing Order: (i) Whether BellSouth complied with the parties' May 28, 1996 resale agreement with respect to the provision of ESSX® service; (ii) whether BellSouth should be permitted to recover its costs associated with providing Operation Support Services ("OSS") in the new resale agreement between the parties; and (iii) whether BellSouth should be required to offer ESSX® for resale in the new resale agreement between the parties. A hearing before a Commission panel on all issues was held on January 22, 1999, and concluded on February 9, 1999.

On May 20, 1999, the full Commission issued Order No. PSC-99-1013-FOF-TP (the "Order"). On the first issue, the Commission ordered BellSouth to "fulfill all requests for installation of ESSX® service placed after March 14, 1997, which are associated with [TCCF's] original May 29, 1996 order." Order at 9. The Commission also ordered BellSouth to provide ESSX® under the new agreement with respect to any grandfathered ESSX® end-user customers of

TCCF and "encouraged" the parties to negotiate a term and volume contract that would permit TCCF to resell MultiServ®, a Centrex-like product that replaced ESSX®, at or near the price at which ESSX® had been available (and make this deal available to other carriers in addition to TCCF). Id. Finally, the Commission ordered that "OSS costs shall not be included in the new resale agreement" between BellSouth and TCCF. Id. at 10.

BellSouth seeks reconsideration of the Order by the Commission because, in reaching its decision on these issues,[1] the Commission either overlooked or failed to consider certain law and evidence applicable to this docket. See Diamond Cab Co. of Miami vs. King, 146 So. 2d 889 (Fla. 1962). The Commission's decision lacks the requisite foundation of competent and substantial evidence. In making its decision, the Commission must rely upon evidence that is "sufficiently relevant and material that a reasonable man would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1st DCA 1957) See also Agrico Chem. Co. v. State of Fla. Dep't of Environmental Reg., 365 So. 2d 759, 763, (Fla. 1st DCA 1979); Ammerman v. Fla. Board of Pharmacy, 174 So. 2d 425, 426 (Fla. 3d DCA 1965). The evidence must "establish a substantial basis of fact from which the fact at issue can reasonably be inferred." DeGroot, 95 So. 2d at 916. The Commission should reject evidence that is devoid of elements giving it probative value. Atlantic Coast Line R.R. Co. v. King, 135 So. 2d 201, 202 (1961). "The public

[1] BellSouth seeks reconsideration on all issues except the portion of the Commission's order concerning the denial of OSS cost recovery. While BellSouth does not concede that the Commission's order on this issue is supported by substantial evidence, it understands that the Commission will consider the issue in a generic docket concerning OSS issues.

service commission's determinative action cannot be based upon speculation or supposition." 1 Fla. Jur. 2d, § 174, citing Tamiami Trail Tours, Inc. v. Bevis, 299 So. 2d 22, 24 (1974). "Findings wholly inadequate or not supported by the evidence will not be permitted to stand." Caranci v. Miami Glass & Engineering Co., 99 So. 2d 252, 254 (Fla. 3d DCA 1957). In addition, the Commission's Order goes beyond the scope of the issues that were properly before it to decide.

The section below considers the grounds for reconsideration.

II. The Commission's Order That BellSouth Was Required Under the 1996 Agreement to Provide ESSX® Service to TCCF for Resale After May 30, 1996 is Contrary to Law.

Under the terms of its tariff, BellSouth was banned from selling ESSX® to new customers after May 30, 1996. Similarly, the tariff banned any agreement by BellSouth to provide ESSX® to TCCF (or any other reseller) for resale to new customers after May 30, 1996. Thus, the Commission's finding that BellSouth was obligated to do so by the terms of its May 28, 1996 resale agreement with TCCF is contrary to the filed tariff doctrine and should be reversed.

The Commission's Order should also be reconsidered for a separate but related reason. BellSouth raised the filed tariff doctrine issue in its briefing in this matter. BellSouth's Brief of the Evidence at 12-16 (May 2, 1999). Yet, the filed tariff doctrine was not addressed either by the Commission Staff in its recommendation in this matter, or in the Order. The Commission's apparent failure to consider this issue itself justifies granting this Motion for Reconsideration.

BellSouth and TCCF entered into a resale agreement on May 28, 1996, which was approved by the Commission on October 8, 1996 ("Resale Agreement" or "Agreement"). TCCF was one of the first resellers to enter into a resale agreement with BellSouth under the provisions of the Act. Ripper, Tr., p. 17; Welch, Tr. pp. 101-102. TCCF's Resale Agreement with BellSouth provided that TCCF may resell the "tariffed local exchange, including Centrex type services available under Section A12 of the Florida tariff. . . ." Exh. 11 (JDH-1, p. 2), Sec. III.A (emphases added). That same provision specifically stated, "Nothwithstanding the foregoing," grandfathered services are "not available for purchase." Id. (emphases added). ESSX® Service was grandfathered effective May 30, 1996, and pursuant to the clear and unambiguous language of the Agreement was no longer available for resale after that date. Hendrix, Tr. pp. 192-193.

BellSouth's lawfully filed and approved tariff barred BellSouth from making ESSX® Service available to TCCF for resale to new customers after May 30, 1996. The parties' Agreement obligated BellSouth to provide "Centrex type services" that were "available under Section A12 of the Florida tariff." As of May 30, 1996, ESSX® Service, a Centrex type service, was not "available under Section A12 of the Florida tariff," and BellSouth should not have allowed TCCF to resell it as such to new customers. The fact that BellSouth improperly allowed such resale does not, and cannot under the law, constitute a waiver of the tariff provisions. American Tel. & Tel. Co. v. Central Office Tel., 524 U.S. 214, 141 L.Ed.2d 222, 118 S.Ct. 1956 (1998).

BellSouth's tariff making ESSX® Service obsolete effective May 30, 1996, was a lawfully filed and approved tariff. Hendrix, Tr. p. 193, Tr. Exh. 11 (JDH-2). As a matter of law, once BellSouth's tariff obsoleting ESSX® Service was approved by the Florida Public Service Commission, the tariff itself became the contract between BellSouth and TCCF. See MCI Telecomm. Corp. v. The Best Tel. Co., Inc., 898 F. Supp. 868 (S.D. Fla. 1994); MCI Telecomm. Corp. v. O'Brien Mktg., Inc., et al., 913 F. Supp. 1536, 1540 (S.D. Fla. 1995) (Tariffs filed with the FCC pursuant to the Communications Act "conclusively and exclusively control the rights and liabilities between a carrier and its customer." This is the "filed rate doctrine."); Accord, MCI Telecomm. v. Happy The Glass Man, 974 F. Supp. 1016 (E.D. Ky. 1997).

The principle of the filed-rate doctrine is supported by Florida statutes that specify the subjects to be included in tariffs and the manner by which tariffs are to be filed. Fla. Stat. § 364.04. See also Fla. Stat. §364.08 ("telecommunications company may not charge, demand, collect or receive for any service rendered or to be rendered any compensation other than the charge applicable to such service as specified in its schedule on file and in effect at that time."); Fla. Stat. § 364.10 ("telecommunications company may not make or give any undue or unreasonable preference or advantage to any person or locality . . . in any respect whatsoever.").

The tariff must contain the rates to be charged and the classifications, practices, and regulations affecting such rates. Indeed, Fla. Stat. § 364.08 mandates that only those rates and terms and conditions of service set forth in

an approved tariff may be charged. American Tel. & Tel. Co. v. Central Office Tel., 524 U.S. 214, 141 L.Ed.2d 222, 118 S.Ct. 1956 (1998). The purpose of the tariff filing requirement is to prevent discrimination in price (and related terms and conditions), to stabilize rates and to ensure that expenditures by a common carrier will not be recouped improperly from the consuming public. See MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 230 (1994); Maislin Ind. U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 126 (1990). The filed-tariff doctrine is not limited to rates. American Tel. & Tel. Co., 141 L.Ed.2d at 233-234.

The record is undisputed that BellSouth and TCCF were aware that the services available for resale were those available under BellSouth's tariffs, and that the terms and conditions of the tariffs would ultimately control the relationship between them. Ripper, Tr. p. 32-33. TCCF was aware ESSX® Service was being grandfathered before it entered into the Resale Agreement with BellSouth. Ripper, Tr. pp. 35-36. Once ESSX® Service was grandfathered pursuant to a lawfully filed and approved tariff, both parties had to abide by the tariff and could not agree to terms contrary to those in the tariff. The filed tariff doctrine not only operates as a strict rule against use of any parole evidence or alleged side agreements, it pre-empts state law contract claims. Id. at 180-181; American Tel. & Tel. Co., supra.

The tariff at issue in this docket is BellSouth's Section A112, which provides that ESSX® Service is obsoleted effective May 30, 1996. Arrington, Tr. p. 241, Tr. Exh. 15 (SMA-2). Under the filed-tariff doctrine, TCCF could not resell ESSX® Service and BellSouth could not agree to allow TCCF to resell ESSX®

Service to new customers after May 29, 1996. American Tel. & Tel. Co., 141 L.2d at 223 ("even if a carrier intentionally misrepresents its rates and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff.") (citation omitted). The tariff filed with and approved by this Commission exclusively defines the rights and obligations of the parties and it explicitly prohibits the sale or resale of ESSX® Service except to grandfathered customers. Therefore, based on the tariff and the filed-tariff doctrine, BellSouth was not obligated to provide ESSX® Service to TCCF for resale to new customers after May 29, 1996. Accordingly, to the extent that the Commission has ordered that BellSouth was obligated to provide ESSX® service to TCCF for resale after May 30, 1996, its Order is contrary to law.

III. The Commission's Order That BellSouth Was Obligated to Provide ESSX® Service to TCCF for Resale after May 29, 1996 is Contrary to the Clear and Unambiguous Language of the Agreement.

Even if BellSouth could lawfully have agreed to provide ESSX® service to TCCF for resale to end-users after May 30, 1996, it is clear that it did not do so in the Agreement. The Commission's finding that the Agreement obligated BellSouth to provide ESSX® service for resale after May 30, 1996 is contrary to the law and is not supported by substantial evidence.

The May 28, 1996, Resale Agreement between BellSouth and TCCF provided for the resale of "tariffed local exchange, including Centrex type services available under Section A12 of the Florida tariff." Hendrix, Tr. pp. 191-192, Tr. Exh. 11 (JDH-1, p. 2). The Agreement specifies "Centrex type services," not ESSX® Service. Ripper, Tr. p. 17. The Agreement further specifies that

"[n]otwithstanding the foregoing, the following are not available for purchase: Grandfathered services . . . ." Hendrix, Tr. p. 192, Tr. Exh. 11 (JDH-1, p. 2). ESSX® Service, a Centrex-type service, was obsoleted May 30, 1996, thereby becoming a grandfathered service at that time. Id

TCCF was aware that ESSX® Service was being grandfathered when it entered into the Resale Agreement with BellSouth. Ripper, Tr. pp. 35-36, 53. In fact, it was clear from Mr. Ripper's testimony that he was trying to "beat the system" by rushing to sign the agreement two days before ESSX® Service was grandfathered. Id. at 35, 53.

Pursuant to the plain language of the parties' Resale Agreement and BellSouth's tariff, however, ESSX® Service was not, and should not have been, available to TCCF for resale to new customers after May 29, 1996. The Resale Agreement provided that TCCF "may resell the tariffed local exchange, including **Centrex type** services **available under Section A12** of the Florida tariff." Tr. Exh. 11 (JDH-1, p.2) (emphases added). This language clearly and unambiguously precludes TCCF's claims in three separate and distinct ways.

First, Section III.A clearly states that TCCF may resell "tariffed" services. Once ESSX® Service became obsoleted effective May 30, 1996, it was no longer a "tariffed" service available for resale under the parties' Agreement.

Second, the Agreement provided TCCF may resell "Centrex type services." It does not specify ESSX® Service. Moreover, for a Centrex type service to be available to TCCF for resale it had to be "available under Section A12 of the Florida tariff." ESSX® Service, although a Centrex type service, was

not "available under Section A12 of the Florida tariff" after May 29, 1996. The Centrex type service available under Section A12 from that date forward was MultiServ® Service, which BellSouth indisputably made available to TCCF during the term of its Agreement. Ripper, Tr. pp. 25-26.

Third, the language of Section III.A clearly and specifically states that "[n]othwithstanding the foregoing," "[g]randfathered services" were "not available for purchase." There is no dispute that ESSX® Service was "grandfathered" effective May 30, 1996. Ripper, Tr. pp. 35-36, 335. TCCF was aware at the time it entered into the Resale Agreement that ESSX® Service was being "grandfathered" and that MultiServ® Service was the Centrex type service replacing ESSX® Service. Ripper, Tr. p. 35, 335-336. Mr. Ripper, President of TCCF, testified that MultiServ® and ESSX® Service are the same product except that ESSX® Service is unbundled. Ripper, Tr. pp. 24-25. He further admitted that "MultiServ® could be utilized in place of the existing ESSX® arrangement." Ripper, Tr. p. 25.

There is nothing in the Agreement that requires BellSouth to make ESSX® Service available for resale throughout the parties' Agreement. The Agreement only specifies "Centrex type services available under Section A12 of the Florida tariff." Once ESSX® Service became grandfathered it was no longer available to TCCF for new customers or to any new customers of BellSouth at retail. Hendrix, Tr. pp. 193-195. Existing ESSX® Service customers of both TCCF and BellSouth were able to continue with their ESSX® Service but no new customers

were allowed to be sold the service either through retail or resale. Id. TCCF should be no exception.

Under Florida law, where the language of the contract is clear and unambiguous, the terms of the contract are conclusive. Lyng v. Bugbee Distributing Co., 182 So. 801 (Fla. 1938). A court, (or, in this case the Commission), cannot entertain evidence contrary to its plain meaning. Sheen v. Lyon, 485 So.2d 422, 424 (Fla. 1986). As the court in Lyng stated:

> "The intention of the parties to a contract is to be deduced from the language employed by them. The terms of the contract, when unambiguous, are conclusive, in the absence of averment and proof of mistake, the question being, not what intention existed in the minds of the parties, but what intention is expressed by the language used." [citation omitted]

182 So. 2d at 802. Regardless of the apparent intent of the parties at the time they entered the agreement, such intent cannot prevail over the actual terms of the agreement. Acceleration Nat'l Serv. Corp. v. Brickell Fin. Servs. Motor Club, Inc., 541 So.2d 738, 739 (Fla. App. 1989). It is a basic principle of contract interpretation under Florida law that a limited or specific provision will prevail over one that is more broadly inclusive. Raines v. Palm Beach Leisureville Community Assoc., 317 So. 2d 814 (Fla. App. Dist. 4, 1975)(specific clause in contract takes precedence over general clause.) *reversed on other grounds* 413 So. 2d 30. The language in the Agreement specifically stated Centrex type services available for resale were those "available under Section A12 of the Florida tariff," and that grandfathered services were "not available for purchase." There were no provisions specifying ESSX® Service would be available. The

specific provisions of the Agreement provide otherwise and, thus, prevail over TCCF's claims generally that BellSouth was required to make ESSX® Service available for resale under the Agreement. There is simply no language, general or specific, which requires BellSouth to make such service available.

BellSouth had no obligation to provide ESSX® Service for resale to TCCF after May 29, 1996, under the plain and unambiguous language of the parties' Resale Agreement. Yet, in its Order, the Commission found that BellSouth was so obligated under the Agreement. Order at 3. This finding is contrary to the law regarding contract interpretation and is not supported by substantial evidence.

IV. To the Extent That the Commission Found that TCCF's May 29, 1996 Order of ESSX® Service Became "Grandfathered" After May 30, 1996, Its Finding is Contrary to Prior Commission Rulings and the Order in This Proceeding.

In its Order, the Commission concludes that BellSouth "has not completed the provisioning of ESSX® service ordered under this contract prior to the grandfathering of ESSX® on May 30, 1996." Order at 3. The Commission explains that BellSouth "is obligated to perform under its agreement with TCCF." Id. Apparently, the Commission's decision that BellSouth is obligated to provide this ESSX® service under the Agreement hinges on the fact that TCCF ordered ESSX® service on May 29, 1996, which the Commission apparently contends, would make TCCF a "grandfathered" customer, entitled to receive ESSX® service after ESSX® became obsolete on May 30, 1996.

The premise of the Commission's ruling, that simply by ordering ESSX® service for end-users who might be found later, TCCF itself became a grandfathered customer, is inconsistent with prior rulings of the FCC, the

Commission and its Order in this proceeding. Arrington, Tr. pp. 382-384; Order at 8. The fact that a reseller might have been able to resell ESSX® to a new customer prior to May 30, 1996 does not entitle the reseller to resell ESSX® to a new customer after May 30, 1996. As the Commission stated elsewhere in its order, "eligibility for the grandfathered ESSX® services hinges on whether the end-user did or did not have ESSX® on May 30, 1996. We conclude that any end-user customer that had ESSX® by May 30, 1996, is grandfathered and eligible to continue to receive ESSX®." Order at 8. In other words, eligibility to receive a grandfathered service depends on whether the customer has received the service, not whether the carrier was once permitted to sell it.

By ruling that BellSouth must provision ESSX® requested by TCCF prior to May 30, 1996, the Commission has contradicted itself. If the ruling is allowed to stand, eligibility for the grandfathered ESSX® service will not "hinge" on whether an end-user "did or did not have ESSX® service on May 30, 1996." TCCF will be free to resell this service to customers who have *never* had ESSX® service, simply because TCCF may have been eligible to resell it for a two day period three years ago. Such a ruling is contrary to the law .

V. The Commission's Conclusion that BellSouth Was Obligated Under the Agreement to Provide ESSX® Service in the Nonstandard Arrangement Requested by TCCF is Not Supported by Substantial Evidence and Goes Beyond the Scope of the Issues Before the Commission to Decide.

On page 3 of its Order, the Commission states that "whether as a standard or a nonstandard ESSX® arrangement, [BellSouth] is obligated to perform under its contract with TCCF." Such a conclusion goes beyond the

bounds of the case. The issue to be decided was whether BellSouth was obligated *under the Agreement* to provide ESSX® service to TCCF to resell after May 30, 1996. The "nonstandard service" requested by TCCF was not ordered or provided pursuant to the Agreement, but was provided pursuant to a Business Opportunity Request. To find that the Agreement required BellSouth to provide the *nonstandard* ESSX® service requested by TCCF is to go beyond the evidence and the scope of the issues to be decided in this case.

BellSouth's obligation, if any, to provide ESSX® Service under the Agreement applied only to such ESSX® Service as was "available under Section A12 of the Florida tariff." This service is what BellSouth referred to during the hearing as "standard" ESSX® Service. Cathey, Tr. pp. 444-445. TCCF witness Ken Koller also testified that "all the features and everything in the *A12 tariff* consisted of or made a standard ESSX® system." Koller, Tr. p. 90 (emphasis added).

As for the nonstandard arrangement, BellSouth had no obligation under its Resale Agreement to provision ESSX® Service in the unique arrangement requested by TCCF. Whatever obligation BellSouth had to provision the nonstandard arrangement arose from a special arrangement outside the Resale Agreement. Cathey, Tr. p. 445; Hendrix, Tr. pp. 196-197. Under the nonstandard arrangement, although TCCF requested ESSX® Service, the service was to be interconnected in a nonstandard arrangement using direct access via T1 transport to Wiltel's point of presence. Cathey, Tr. p. 421. This was not a standard serving arrangement for BellSouth. Id. TCCF's plan was to

disguise ESSX® Service dial tone as business (1FB) service to TCCF end users using assumed dial 9 and dedicated access to route interLATA calls. Id. A special software release was required to allow Automatic Number Identification (ANI) to be passed from the common block to a carrier interface in all 5ESS offices, which was not a standard software release for the 5ESS switch and had to be submitted as a Business Opportunity Request (BOR) similar to a special assembly. Cathey, Tr. pp. 421-422; Koller, Tr. pp. 79-80. There was also a dual dial tone problem in the 5ESS offices that required a BOR. Cathey, Tr. p. 422; Koller, Tr. p. 79.

The arrangement TCCF requested regarding ESSX® Service was not described in the tariff. Id. at 435-436; Koller, Tr. p. 91 (if it does not include everything in the tariff, "then it's not a standard application, because anything in the tariff that's not a special assembly is a standard application.") (emphasis added). Mr. Koller admitted that the Primary Rate ISDN ("PRI") arrangement required for TCCF's request is "not included in the standard tariff." Koller, Tr. p. 93. Regardless of whether it is referred to as a nonstandard arrangement or something else, the bottom line is that this unique arrangement requested by TCCF for ESSX® Service was not "included in the standard tariff," and was, therefore, not required to be provided under the terms of the parties' Resale Agreement.

As Mr. Cathey explained, in a wholesale environment it is BellSouth's responsibility as a supplier to provide services as they are "described in the tariff." Id. at 435. It is then TCCF's responsibility as the local exchange carrier to

integrate that particular service offering with other suppliers with whom it does business. Id. This would include integration with its billing supplier to make sure the appropriate bills could be rendered to TCCF's end users. Id. BellSouth had no obligation under its Agreement with TCCF to provision the nonstandard arrangement requested by TCCF. Cathey, Tr. p. 444. BellSouth's obligation regarding the nonstandard arrangement arose only through the BOR process, which is not at issue in this case. Id. at 445. The Commission's erred by finding that BellSouth was obligated by the Agreement to provide this nonstandard arrangement and went beyond the scope of this proceeding in doing so.

VI. To the Extent that The Commission's Order Would Require BellSouth to Provide ESSX® Service to TCCF for 73 Months From The Date TCCF Resells the Service, Rather Than From May 29, 1996 Is Contrary to BellSouth's Tariff.

In its Order, the Commission orders BellSouth to "fulfill all requests for installation of ESSX® service placed after March 14, 1997, which are associated with the original May 29, 1996, order," and to provide this service "for the full 73 months from the day the service is implemented." Order at 9. Elsewhere in the Order, the Commission states that after BellSouth provisions the ESSX® service it has been ordered to provide, it must make the service available to TCCF "for the full 73 month period pursuant to [BellSouth's] tariff." Id. at 3. Under BellSouth's tariff, the 73 month period should have begun to run on May 29, 1996, not some date in the future after TCCF may resell this obsolete service. Thus, this portion of the Commission's order appears to be inconsistent with BellSouth's tariff obligations and at least should be clarified.

In addition, the Commission has ordered BellSouth to fulfill only requests for installation of ESSX® received after March 14, 1997. BellSouth interprets this provision to mean that the parties' March 14, 1997 Settlement Agreement resolved all requests received prior to that date, and that if no requests for the installation of ESSX service associated with the original May 29, 1996 order were received by BellSouth after March 14, 1997, then BellSouth has no obligation to provide ESSX service to TCCF pursuant to this provision of the Order. If this interpretation is inconsistent with the Commission's intent, BellSouth requests that this provision be clarified.

VII. The Commission's Order that the Parties Negotiate a Volume and Term Contract for Multi-Serv® at a Price Equivalent to ESSX® Is Improper Because It Exceeds the Scope of This Proceeding.

The Commission also "encouraged" BellSouth to negotiate a "term and volume contract" to allow TCCF to sell MultiServ® "at or as close to the price points of ESSX®" and to report back to the Commission in 90 days. Order at 9. The Commission's reasoning for this provision of the Order is that "denying TCCF the ability to resell ESSX® [in the new agreement] without any recourse but MultiServ® has the potential to drive TCCF out of the business since TCCF's 'flagship' product is ESSX®-based." Order at 8. Yet, the undisputed facts in the record show that TCCF knew when it signed the May 28, 1996 Agreement that ESSX® would be obsolete as of May 30, 1996 and that if it wished to order Centrex-type service after that time it would have to order MultiServ® at MultiServ® prices. Accordingly, TCCF could not have reasonably expected to receive MultiServ® at an ESSX® price in the new resale agreement. This

provision of the Order goes beyond the bounds of the case and should be expunged.

Aside from OSS cost recovery, which this provision does not address, the only issue to be arbitrated by the Commission with respect to the new resale agreement was: "Should ESSX® Service be made available for resale in the new resale agreement?" The parties had no disagreement to arbitrate with regard to MultiServ®. What is worse, the Commission did not merely decide an issue outside the scope of the case, it intends to apply this provision to parties who did not participate in this matter by requiring BellSouth to make this repriced MultiServ® product "available for resale by other ALECs." Order at 9.

For the Commission to go beyond the scope of the case in this manner is clearly improper. Moreover, even if the issue were before the Commission to decide, this provision could not be defended. There are no facts in the record to support this de facto change in BellSouth's rate structure. There is no evidence, much less substantial evidence, regarding BellSouth's costs with respect to either product, just the supposition by the Commission that it would be a pretty good deal for TCCF and other resellers if MultiServ® were priced like ESSX®. In addition, any requirement that BellSouth discount MultiServ® beyond its wholesale rate would be inconsistent with the Communications Act. 47 U.S.C. §252(c)(3), which provides that wholesale rates should be based on retail rates minus avoided costs. This provision of the Commission's order is in error and is indefensible. The Commission should delete it.

V. Conclusion

WHEREFORE, BellSouth respectfully requests that the full Commission grant BellSouth's motion and reconsider its May 20, 1999 Order.

Respectfully submitted this 4th day of June, 1999.

BELLSOUTH TELECOMMUNICATIONS, INC.

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