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October 10, 2002

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Ms. Blanca Bayó, Director  
The Commission Clerk and Administrative Services  
Room 110, Easley Building  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

Re: Docket No. 020738-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of AT&T Communications of the Southern States, LLC are an original and fifteen copies of AT&T's Response in Opposition to BellSouth Telecommunications, Inc.'s Partial Motion to Strike in the above referenced docket.

Please acknowledge receipt of this letter by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

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Sincerely yours,

  
Tracy W. Hatch

cc: Virginia Tate, Esq.  
Parties of Record

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**ORIGINAL**

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Amended Petition of AT&T )  
Communications of the Southern States, ) Docket No. 020738-TP  
LLC for Suspension and Cancellation of )  
General Intrastate Access Tariff Filed by ) Filed: October 10, 2002  
BellSouth Telecommunications, Inc. )  
\_\_\_\_\_ )

**AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC'S  
RESPONSE IN OPPOSITION TO  
BELLSOUTH TELECOMMUNICATIONS, INC.'S  
PARTIAL MOTION TO STRIKE**

AT&T Communications of the Southern States, LLC hereby responds in opposition to BellSouth Telecommunications Inc.'s Partial Motion to Strike pursuant to Rule 28-106.204, Florida Administrative Code, and in support states:

1. AT&T filed its Amended Petition requesting that the Commission suspend and cancel BellSouth's Switched Access Tariff on September 13, 2002. In conjunction with its Amended Petition, AT&T also filed its Motion for Leave to File Amended Petition. That Motion was granted by Order No. PSC-02-1291-PCO-TP, issued September 23, 2002.

2. BellSouth's Answer to AT&T's Amended Petition also contained a Motion to Strike a portion of AT&T's prayer for relief asking that the Commission award damages to AT&T measured by the difference between the amount AT&T paid (or will pay) for intrastate access services and the amount that AT&T should have paid assuming AT&T's absolute switched access traffic volumes, not its growth volumes, would exceed the volumes that triggered discounts of the carriers under

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BellSouth's general switched access tariff, Section E27. BellSouth's motion to strike should be denied for several reasons.<sup>1</sup>

3. BellSouth's Motion must be denied. In support of its Motion, BellSouth argues essentially: 1) the Commission has no authority to recompense the harm done to AT&T by BellSouth's switched access discount based on growth in switched access volumes, and 2) AT&T has some sort of "impure" motive in complaining of the unreasonably discriminatory effects of BellSouth's access discount tariff based on growth in volumes.

4. BellSouth's blanket statement that the Commission does not have any authority to award damages is without citation to any authority. This bald unsupported statement is simply wrong. The Commission has long exercised its authority to award damages. In the many cases in which the Commission determined that a customer was overcharged by a utility, the Commission has awarded damages to the customer in the amount of the overcharge. When the local service of a BellSouth customer is out of service for a period of more than twenty-four hours, BellSouth must pay damages to the affected customer in the form of a credit to that customer's bill pro-rated for the portion of the customer's monthly service charge for the time the service was down<sup>2</sup>. These examples illustrate only a few of the instances in which the Commission requires payments to customers for improper behavior by the regulated company. While the Commission does not have the broad latitude in the amounts and types of damages awards that are the purview of the civil courts, it is beyond question that the Commission has authority to award damages in certain instances. Moreover, AT&T submits

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<sup>1</sup>It should be noted that Rule 28-106.204(3), Florida Administrative Code, requires that motions, other than a motion to dismiss, shall include a statement that the movant has conferred with all other parties of record and shall state as to each party whether the party has any objection to the motion. At no time was counsel for AT&T contacted by BellSouth regarding its Motion to Strike.

<sup>2</sup> See Rule 25-070(1)(b), Florida Administrative Code.

that the Commission does have the authority pursuant to Section 365.051(5)(a) and (b), Florida Statutes, to order the relief requested by AT&T in this case.

5. BellSouth's suggestion of an improper motive also is wrong. AT&T filed its Amended Petition in order to obtain nondiscriminatory treatment in the assessment of switched access charges to IXCs. In this respect, AT&T's desire to obtain reductions in the intrastate switched access charges which it pays is neither a new nor surprising revelation. If the Commission accepts BellSouth's avowed purpose in proposing access discounts -- that being to provide an incentive to IXCs to retain as much traffic on BellSouth's network as possible -- then AT&T simply seeks to insure that the discounts that are provided are rationally related to BellSouth's goal. If BellSouth wants to retain switched access traffic on its network, then by any logic it should be seeking to provide an incentive to its largest switched access customers to keep their traffic on BellSouth's networks. In particular, it is these largest customers that have the most opportunities to move their traffic off BellSouth's network. Rather than supporting BellSouth's "on network" goal, the incentive structure created by BellSouth in its growth discount tariffs has the perverse affect of creating an incentive only for smaller carriers which can significantly grow their traffic within the timeframes set by the tariff. Ironically, these carriers are least able to help BellSouth meet its goal while carriers with large volumes of traffic are best able to aide BellSouth's avowed purpose.

6. In an environment where access traffic levels are generally declining and based on the experience of RBOCs that have previously won interLATA long distance authority in Section 271 proceedings, it is not by accident that the most likely candidate to experience substantial growth in the five year horizon established in the general discount tariff is BellSouth's long distance affiliate, BellSouth Long Distance. While BellSouth Long Distance arguably may not now meet the initial threshold to qualify for the discount tariff, experience with other RBOCs' market share gains in Texas

and New York suggest that it will not be long before BSTLD can meet the threshold and capitalize on the discounts to the detriment of all its competitors. The substantial market share gains by the RBOCs upon interLATA entry in New York and Texas further insure that the growth in access volumes needed under the tariff will not materialize for any carrier but BellSouth Long Distance.

7. Stripped of all rhetoric, there is no debate that a discount structure most consistent with BellSouth's avowed "on network" goal would be a volume discount tariff—pure and simple. This is because a volume discount tariff would incent those with the most access traffic on BellSouth's network to keep it there. To the contrary, because the discount structure in Section E27, as well as the one in Section E26, does not reward those carriers with the most access traffic (albeit declining) on BellSouth's network, it clearly is not the best means of achieving BellSouth's publicly stated goal. This simple fact makes BellSouth's ultimate motive for this tariff all the more suspect and the remedies sought by AT&T all the more critical.

8. Moreover, despite pages of alleged deficiencies regarding AT&T's Amended Petition, nowhere in its response does BellSouth do two simple things. First, it never provides any coherent argument that its Switched Access Tariff discount is not premised solely on growth. The tariff is in reality a camouflaged "growth" tariff because it fails to reward carriers with the highest (yet declining) volumes of traffic on BellSouth's network and instead relies on growth in access traffic volumes. Second, it does not eliminate the controversy regarding the ability of its affiliated company, BellSouth Long Distance, to take advantage of the tariff by affirmatively advising this Commission that it will never allow BellSouth Long Distance to obtain access discounts under the tariff. These two simple—but important BellSouth failures—provide this Commission with all it needs to suspend and cancel the tariff.

9. Further, AT&T has raised public interest as a basis for suspending and canceling BellSouth's growth tariff contrary to BellSouth's allegations. BellSouth argues that the North Carolina Utilities Commission suspended BellSouth's tariff for public interest reasons, but that AT&T never raised public interest as an issue in the current docket. In AT&T's original Petition filed on July 16, 2002, and again in its Amended Petition, filed September 13, 2002, AT&T specifically pled violations of Sections 364.051(5), 364.08, 364.09, 364.10 and 364.3381, Florida Statutes. These sections are all subject to the Commission's public interest responsibilities set forth in Section 364.01, Florida Statutes, which encompass the anticompetitive and discriminatory elements of BellSouth's growth tariff.

10. Finally, BellSouth asserts that AT&T has not complained about a similar FCC growth access discount tariff to the FCC and in certain states in BellSouth's territory. AT&T has vigorously pursued the issue of BellSouth's growth tariffs at the FCC<sup>3</sup> and in those states where the issue is most pressing. AT&T has already initiated the FCC process that will lead to a formal complaint at the FCC. AT&T has served BellSouth with a demand letter required by the FCC's rules prior to filing a complaint. See Attachment 1. The letter clearly establishes the basis for the determination that BellSouth's Switched Access Discount Tariff is a growth tariff and is in violation of federal law.

11. BellSouth's request to strike AT&T's request for damages is clearly without merit and should be denied. In addition, BellSouth's request for summary denial of AT&T's Amended Petition buried within BellSouth's Motion to Strike, must also be denied. AT&T has clearly raised and placed before the Commission issues of fact and law regarding BellSouth's Switched Access Discount Tariff.

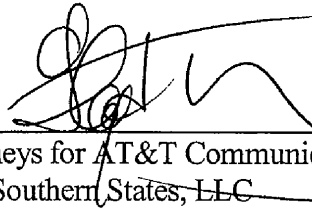
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<sup>3</sup> The FCC rejected AT&T's arguments regarding BellSouth's Access Discount Tariff in the course of approving BellSouth's five-state 271 application. The FCC premised its conclusion on the fact that BellSouth Long Distance (BSLD) would not be eligible because the tariff required minimum access usage levels that BSLD did not meet and that the tariff required subscription within 30 days of the effective date of the tariff. Section E27 of the Florida Access Tariff does not contain any limitation on the date of subscription. As soon as BSLD has 18 months of access usage is will be eligible to subscribe to the discount access tariff.

BellSouth has answered the Amended Petition and denied the vast bulk of the allegations. BellSouth has presented extensive argument in its Answer and its Motion to Strike, but has nowhere alleged or otherwise established that there are no facts in dispute or that as a matter of Federal and Florida law, AT&T claims must fail. Having failed to provide the requisite support for any request for summary denial, BellSouth's request must be denied.

WHEREFORE, based on the foregoing, AT&T respectfully requests that BellSouth's Motion to Strike and its request for summary denial be denied.

Respectfully submitted this 10<sup>th</sup> day of October, 2002.



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the Southern States, LLC

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October 2, 2002

*Via Certified Mail and Facsimile (404-529-7839)*

Mr. Jerry Hendrix  
Assistant Vice President -- Regulatory Policy and Operations  
BellSouth Telecommunications, Inc.  
675 West Peachtree Street  
Atlanta, Georgia 30375

Re: BellSouth Interstate Switched Access Contract Tariff 2002-01  
Transmittal No. 637

Dear Mr. Hendrix:

On May 17, 2002, BellSouth Telecommunications, Inc. ("BellSouth") filed its above-referenced Switched Access ("SWA") Contract Tariff at the Federal Communications Commission ("FCC" or "Commission") that provides impermissible growth discounts based on the growth in access minutes over the life of the contract.<sup>1</sup> AT&T Corp. ("AT&T") has discussed with you that these growth tariffs violate the Communications Act, discriminate against large interexchange carriers, and impermissibly favor smaller carriers such as BellSouth's long distance affiliate BellSouth Long Distance, Inc. ("BSLD"). BellSouth, however, has not been willing to withdraw or satisfactorily modify the Tariff. Accordingly, this letter is to provide you with the notice required by Section 1.721(a)(8) of the FCC's rules, 47 C.F.R. § 1.721(a)(8), that, unless BellSouth agrees to withdraw the Tariff or reach a satisfactory negotiated settlement with AT&T, AT&T intends to file a formal complaint before the FCC seeking cancellation of the Interstate SWA Contract Tariff and damages.

<sup>1</sup> BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1, Section 26, BellSouth SWA Contract Tariff, Original Page 26-1 et seq. (eff. May 18, 2002), filed under Transmittal No. 637 (May 17, 2002) ("Tariff," "Interstate SWA Contract Tariff" or "BellSouth FCC Tariff"). A copy of the Tariff is attached as Appendix 1 to this letter.



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### Background

Under the terms of its Interstate SWA Contract Tariff, for the eight MSAs in which BellSouth has pricing flexibility pursuant to Part 69, Subpart H, of the Commission's rules, BellSouth is making available volume discounts to parties that execute a multi-year contract. Volume discounts are available over a five-year contract period for annual growth in switching usage compared to a specified minimum level. A carrier must achieve growth each year over the minimum level to receive a discount, which is applied only to revenues that exceed the revenues associated with the stated minimum. The discounts increase from 7% in the first year to a maximum of 35% for more than 10% growth over the stated minimum in the fifth year of the contract.<sup>2</sup>

In addition to the federal tariff, BellSouth has filed the BellSouth SWA Contract Tariff in all its service territory states. In each of these filings, BellSouth is making volume discounts on intrastate access available to parties that contract to provide increased annual minutes of use over the life of the contract. In the North Carolina filing, BellSouth is candid about the purpose of the SWA Contract Tariff, acknowledging that it provides "discounts based upon positive incremental local switching usage."<sup>3</sup>

In North Carolina, AT&T filed a complaint against BellSouth claiming that the BellSouth SWA Contract Tariff in North Carolina was discriminatory and anticompetitive.<sup>4</sup> On August 13, 2002, the North Carolina Utilities Commission determined that the tariff must be rejected on the ground that it is "biased" and "against the public interest." *N.C. Disapproval Order* at 4, 5.<sup>5</sup> AT&T has also filed complaints about the SWA Contract Tariff in Florida and Georgia and participated as part of a coalition

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<sup>2</sup> BellSouth Interstate SWA Contract Tariff, Original Page 26-5.

<sup>3</sup> Letter from C. D. Hatchcock, Regulatory & External Affairs Vice President, BellSouth Telecommunications, Inc. to N. Carpenter, Director, Communications Division, Public Staff, N.C. Utilities Comm., at 2 (May 23, 2002).

<sup>4</sup> Complaint for Anticompetitive Activity Pursuant to N.C.G.S. 62-73; 62-133.5(a)(iii) and (iv); 62-133.5(d) and (e); and 62-134; and Commission Rule R1-9 and Motion to Find Tariff Noncompliant or Suspend Tariff for Failure to Comply with N.C.G.S. 133.5(a)(iii) and (iv); 62-133.5(a) and (e) and Commission Tariff Rule R9-4, *In the Matter of BellSouth Telecommunications, Inc. Intrastate Access Services Tariff/New Section 26/BellSouth SWA Contract Tariffs*, Docket No. P-100, Sub 30, Docket No. P-55, Sub 1365 (N.C. Util. Comm.).

<sup>5</sup> Order Disapproving Proposed Tariff, *In the Matter of Complaint for Anticompetitive Activity and Motion to Find Tariff Noncompliant or Suspend Tariff and Tariff Filing by BellSouth Telecommunications, Inc. to Establish Contract Rates for Switched Access Rate Elements*, Docket No. P-55, Sub 1365 & 1366 (N.C. Util. Comm. Aug. 13, 2002) ("*N.C. Disapproval Order*").

The Texas Commission revoked a similar growth tariff proposed by Southwestern Bell as "discriminatory and anticompetitive." Order, *Complaint by AT&T Communications of the Southwest, Inc. Regarding Tariff Control Number 21302—Switched Access Optional Payment Plan (OPP)*, Docket No. 21392 (SOAH Docket No. 473-99-1963) (Texas PUC March 1, 2000).

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opposing the Tariff in Tennessee. BellSouth has withdrawn its Georgia and Tennessee filings.<sup>6</sup>

**BellSouth's SWA Contract Tariff Discriminates Against Large IXCs such as AT&T and in Favor of Smaller Carriers**

Section 201(b) of the Communications Act requires that all charges and practices be just and reasonable, and under this provision, a charge or practice is unlawful if it is "unjust, unreasonable, unduly discriminatory, or preferential." *Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224, 1231 (D.C. Cir. 1999) (quoting *Western Union Telegraph Co. v. FCC*, 815 F.2d 1495, 1501 n.2 (D.C. Cir. 1987)). In a similar vein, Section 202(a) of the Communications Act prohibits discrimination by carriers such as BellSouth against customers in the provision of services. Different treatment of customers that are similarly situated constitutes unlawful discrimination under Section 202(a). *The Competitive Telecommunications Assoc. v. FCC*, 998 F.2d 1058, 1062 (D.C. Cir. 1993). Under Section 272, Bell Operating Companies ("BOCs") are prohibited from discriminating in favor of their long distance affiliates.

BellSouth's Interstate SWA Contract Tariff violates Section 201(b) and Section 202(a) by discriminating against established interexchange carriers and offering discounts based on percentage growth from a fixed customer base. This plan has a discriminatory impact on established interexchange carriers because they start with a large customer base, which is difficult to grow annually, and that base is, in fact, likely to shrink as BellSouth enters into the long distance market in various BellSouth service territory states.

Relative volume growth, however, is not a justifiable basis for providing a rate discount, because a low base makes significant growth percentages possible even if the absolute volume growth is insignificant and provides no economies to BellSouth. Instead, any discounts should be based on absolute volumes, as such volumes make possible the economies that support any discount. Given that large interexchange carriers have declining access minutes of use ("MOUs"), BellSouth's Interstate SWA Contract Tariff discriminates against interexchange carriers such as AT&T in favor of smaller carriers with growing access MOUs. These growing carriers may obtain a large volume discount and lower access charges than are available to AT&T even though AT&T's total access minutes are significantly larger than those of the smaller carrier. As a result of BellSouth's Interstate SWA Contract Tariff and the skewed discounts it provides, carriers with the same number of access minutes may pay different rates for access -- those carriers with growing MOU volumes may enjoy discounts of up to 35% that are not available to a carrier with declining MOU volumes.

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<sup>6</sup> A new version of the growth tariff was filed in Tennessee on September 13, 2002. The revised tariff does not change the fundamental problems associated with the growth tariffs.

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### **BellSouth's SWA Contract Tariff Discriminates in Favor of BellSouth's Long Distance Affiliate BSLD**

In its decision authorizing BellSouth to provide in-region interLATA service in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, the FCC rejected AT&T's argument that BellSouth's SWA Contract Tariff violated Section 272 in discriminating in favor of BellSouth's long distance affiliate BSLD. That decision, reached on an expedited 90-day schedule and without discovery, noted that "if [BSLD] were eligible to obtain service under these or similar tariffs, [the Commission] could then address allegations that [the SWA Contract Tariffs] offer illegal growth discounts in violation of section 272."<sup>7</sup> AT&T believes that BSLD is eligible to take service under the growth Tariff or a similar arrangement and accordingly is continuing to pursue this claim.

Section 272(c)(1) "establishes an *unqualified prohibition* against discrimination by a BOC in its dealings with its section 272 affiliate and unaffiliated entities." *Non-Accounting Safeguards Order* ¶ 197 (emphasis added).<sup>8</sup> Moreover, Section 272(e)(3) expressly "require[s] the BOCs to charge nondiscriminatory prices" for telephone exchange service and exchange access. *Id.* ¶ 258. The Commission has explicitly ruled, in the context of its review of interstate switched access service tariffs, that a BOC may not adopt tariff rates employing so-called "growth discounts"<sup>9</sup> because such discounts will inevitably favor a BOC's section 272 affiliate over established IXCs, thereby violating the BOC's section 272 nondiscrimination obligations. *Access Charge Reform NPRM*, ¶ 192.<sup>10</sup>

BellSouth's growth discount Tariff opens the door to allow BellSouth to engage in precisely the conduct proscribed by Section 272. Under the Commission's pricing flexibility rules, an incumbent local exchange carrier ("ILEC") may provide a contract tariff to its long distance affiliate only if it first provides service under the same contract tariff to an unaffiliated carrier.<sup>11</sup> Because a carrier that is not affiliated with BellSouth now

<sup>7</sup> *In the Matter of the Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, WC Doc. No. 02-150, FCC 02-260, ¶ 274 (September 18, 2002). The Commission also explicitly acknowledged that AT&T could pursue its claims under Sections 201, 202, and 208. *Id.* at ¶ 274 n. 1061.

<sup>8</sup> *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Telecommunications Act of 1934, as amended*, First Report and Order, CC Docket No. 96-149, 11 FCC Rcd 21905, 21998 (1996) ("*Non-Accounting Safeguards Order*").

<sup>9</sup> "Growth discounts," as defined by the Commission, are "pricing plans under which incumbent LECs offer reduced per-unit access service prices for customers that commit to purchase a certain percentage above their past usage, or reduced prices based on growth in traffic placed over an incumbent LEC's network." *Access Charge Reform*, Notice of Proposed Rulemaking, CC Docket No. 96-262, 11 FCC Rcd 21354, 21437-38 (1996) ("*Access Charge Reform NPRM*").

<sup>10</sup> See also *Access Charge Reform*, Fifth Report and Order, CC Docket No. 96-262, 14 FCC Rcd 14221, 14294 (1999) (citations omitted, emphasis added) ("*Access Charge Reform Fifth Report and Order*").

<sup>11</sup> See 47 C.F.R. § 69.727(a)(2)(iii) ("Before the price cap LEC provides a contract tariffed service, under § 69.727(a), to one of its long-distance affiliates, as described in section 272 of the Communications Act

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purchases service under BellSouth's growth discount Tariff, BellSouth is free to make the certification required under the regulations and then offer the same contract tariff to BSLD with its discriminatory growth discounts. Any plan by BellSouth to offer the growth tariff to BSLD would violate Section 272, as would the certification by BellSouth under the pricing flexibility rules that it offers the unlawful growth tariff to an unaffiliated third party.

Mr. Jeffrey King has held several discussions with Ed Matejick and you on the subject of growth tariffs over the past couple years. In May and June 2001, in meetings involving Mr. King, Mr. Matejick, and other representatives from both parties, the issue of growth tariffs was discussed, and AT&T expressed its objection to use of a growth discount instead of a straightforward volume discount that takes into account the efficiencies and cost savings associated with large volumes. More discussions were held specifically regarding the SWA Contract Tariff proposal in January 2002, but no resolution was reached on the issue at that meeting or at subsequent meetings held on February 8, 2002, February 21, 2002, March 5, 2002, or March 7, 2002. In addition, after the filing of the North Carolina SWA Contract Tariff, at the behest of the North Carolina Commission Staff, a meeting was held on June 11, 2002 at which BellSouth's growth tariff was discussed, but there has been no resolution of the matter.

Since that last meeting, the North Carolina Commission has cancelled the North Carolina SWA Contract tariff for being "biased" and "against the public interest," and BellSouth has withdrawn its Georgia state filing. BellSouth, however, has not been willing to remove the discriminatory impact of the growth discount and substitute a discount based on volumes alone.

Although AT&T would prefer to resolve this matter without the need for formal action, unless BellSouth responds in writing within 10 days of receipt of this letter, and agrees to negotiate in good faith to remove the discriminatory aspects of the SWA

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of 1934, as amended, or [47 C.F.R. § 64.1903, relating to separate subsidiary requirements of ILEC long distance affiliates], the price cap LEC certifies to the Commission that it provides services pursuant to that contract tariff to an unaffiliated customer."); *see also Access Charge Reform Fifth Report and Order*, 14 FCC Rcd at 14292, ¶ 129.

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WASHINGTON, D.C.

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Page 6

Contract Tariff that violate Sections 201(b), 202(a), and 272, AT&T intends to file a formal complaint with the FCC.

Yours sincerely,

Alan C. Geolot

cc: FCC:

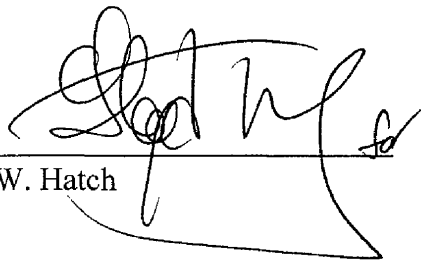
Monica Desai  
Vienna Jordan  
Judith Nitsche  
Tamara Preiss  
Deena Shetler  
Alexander Starr  
Joshua Swift

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Hand Delivery and/or U.S. Mail this 10th day of October, 2002.

Lee Fordham, Esq.\*  
Office of General Counsel  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0850

Nancy B. White  
c/o Nancy H. Sims  
BellSouth Telecommunications, Inc.  
150 South Monroe Street, Suite 400  
Tallahassee, FL 32301

A handwritten signature in black ink, appearing to read 'Tracy W. Hatch', written over a horizontal line.

Tracy W. Hatch