

FCC MAIL SECTION

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Before the
Federal Communications Commission
Washington, D.C.

DISPATCHED BY

In the Matter of)	
)	CC Docket No. 98-161
Bell South Telecommunications, Inc.)	
Bell South Tariff FCC No. 1)	
Bell South Transmittal No. 476)	

ORDER SUSPENDING TARIFF AND DESIGNATING ISSUES FOR INVESTIGATION

Adopted: September 1, 1998

Released: September 1, 1998

By the Chief, Competitive Pricing Division, Common Carrier Bureau:

I. INTRODUCTION

1. On August 18, 1998, Bell South filed Transmittal No. 476 establishing a new offering, Bell South ADSL Service, to become effective September 2, 1998.¹ Bell South describes its digital subscriber loop (DSL) offering as an interstate data special access service that provides a high speed access connection between an end user subscriber and an Internet Service Provider (ISP) by utilizing a combination of the subscriber's existing local exchange physical plant (*i.e.* copper facility), a specialized DSL-equipped wire center, and transport to the frame relay switch where the ISP will connect to Bell South's network.² DSL Service will allow for the simultaneous transmission of voice dialed calls and high speed data access over a single path, thereby reducing the need for subscribers to obtain additional lines for their Internet access capabilities, according to Bell South.³

2. We find that issues raised by petitioners in support of their petitions to reject,

¹ Bell South Transmittal No. 476. The following parties filed petitions to reject, or petitions to suspend and investigate, Bell South's Transmittal No. 476: Northpoint Communications; America Online, Inc.; Association for Local Telecommunications Services; Sprint Corporation; E*spire Communications Inc.; ACI Corporation; Hyperion Communications Inc., ICG Communications, Inc., ITC^Delta Communications, Inc., and KMC Telecom Inc.

² Bell South Transmittal No. 476, Description and Justification at 1.

³ *Id.*

or petitions to suspend and investigate, Bell South's Transmittal No. 476 raise substantial questions of lawfulness that warrant investigation of this tariff. Accordingly, Bell South's Transmittal No. 476 is suspended for one day, following the effective date. This transmittal will also be subject to an accounting order to facilitate any refunds that may later prove to be necessary. In this Order, we designate for investigation under section 204(a) of the Communications Act (the Act) the question of whether Bell South's DSL service offering constitutes an interstate access service, and thus is subject to the Commission's jurisdiction.

II. DISCUSSION

A. Background

3. Bell South's Transmittal No. 476 seeks to offer DSL service through an interstate access tariff.⁴ The Commission has not substantively addressed the lawfulness of a DSL service in the context of an interstate tariff such as that filed by Bell South.⁵

B. Petitions

4. A number of petitioners argue that Bell South's DSL service is an intrastate service offering that should be tariffed at the state level.⁶ AOL, Hyperion Communications, Inc., ICG Communications, Inc., ITC^Delta Communications, Inc., and KMC Telecom, Inc. contend in their petitions that twenty states have already held that traffic from an end user to an ISP is local, and that Bell South's tariff is an attempt to forum shop to avoid these decisions.⁷ Specifically, ALTS maintains that these states have held that incumbent local exchange carriers (ILECs) must pay reciprocal compensation⁸ when they exchange this type of traffic with competitive local exchange carriers (CLECs).⁹ Further, ALTS argues that

⁴ Bell South Transmittal No. 476, Description and Justification at 1.

⁵ We note that the Commission recently released a designation order designating the issue of whether GTOC's DSL service may be tariffed as an interstate access service. *GTE Telephone Operators GTOC Transmittal No. 1148*, CC Docket No. 98-79, DA 98-1667 (Com. Car. Bur., rel. August 20, 1998)

⁶ See ALTS Petition at 1; E*Spire Petition at 2; Hyperion Communications, Inc., ICG Communications, Inc., ITC^Delta Communications, Inc., and KMC Telecom, Inc. Petition at 2-4; AOL Petition at 3.

⁷ ALTS Petition at 8; AOL Petition at 5; Hyperion Communications, Inc., ICG Communications, Inc., ITC^Delta Communications, Inc., and KMC Telecom, Inc. Petition at 4.

⁸ Reciprocal compensation is an arrangement between two carriers that "provide[s] for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." 47 U.S.C. § 252(d)(2)(A)(i). See also 47 U.S.C. § 251(b)(5) (requiring LECs to establish reciprocal compensation arrangements for the transport and termination of telecommunications).

⁹ ALTS Petition at 8.

Commission precedent holds that ISPs are end users, not telecommunications carriers, and therefore Bell South's DSL service offering tariff cannot constitute local exchange access under Part 69.¹⁰

5. Several parties contend that a DSL call terminates at the point where the call reaches an ISP interconnected to Bell South.¹¹ For example, ALTS argues that the telecommunications portion of the DSL call terminates at the point where the call reaches an ISP interconnected to Bell South because ISPs are end users, and that any subsequent information services provided by the ISPs are irrelevant in determining the "jurisdictional end points."¹² Bell South's DSL tariff, therefore, should be subject to state ratemaking authority. ALTS also contends that any change in the states' authority should be done in the context of a rulemaking.¹³

6. Several parties also contest Bell South's characterization of the service as an access service.¹⁴ They argue that Bell South's DSL service is offered only to ISPs interconnected to Bell South wire centers, and not to telecommunications carriers.¹⁵ Hyperion Communications, Inc., ICG Communications, Inc., ITC^Delta Communications, Inc., and KMC Telecom, Inc. argue that, in order for a service to be classified as an access service, the service must be an offering of access to telephone exchange services or facilities for the purpose of origination and termination of telephone toll service.¹⁶ Hyperion Communications, Inc., ICG Communications, Inc., ITC^Delta Communications, Inc., and KMC Telecom, Inc. contend that, because the service provided by ISPs is not telephone toll service, Bell South's DSL service will not terminate in a telephone toll service and therefore is not an access service.¹⁷

7. Northpoint raises another jurisdictional argument. Northpoint contends that data CLECs could be subject to a price squeeze unless regulators review both Bell South's

¹⁰ ALTS Petition at 12.

¹¹ See ALTS Petition at 2; Hyperion Communications, Inc., ICG Communications, Inc., ITC^Delta Communications, Inc., and KMC Telecom, Inc. Petition at 4.

¹² ALTS Petition at 2.

¹³ *Id.* at 7.

¹⁴ See, e.g., Hyperion Communications, Inc., ICG Communications, Inc., ITC^Delta Communications, Inc., and KMC Telecom, Inc. Petition at 2-4; ALTS Petition at 11-12.

¹⁵ ALTS Petition at 11.

¹⁶ Hyperion Communications, Inc., ICG Communications, Inc., ITC^Delta Communications, Inc., and KMC Telecom, Inc. Petition at 2-3.

¹⁷ *Id.* at 4.

retail DSL rates and Bell South's wholesale charges for unbundled network elements (UNEs) used by competitors to provide their own DSL services.¹⁸ Northpoint argues that the Commission does not have the UNE cost data needed to conduct the necessary analysis because UNEs are tariffed at the state level, while Bell South is tariffing retail DSL services at the federal level.¹⁹ This allows, according to Northpoint, the possibility that cost data submitted at the federal level will be significantly different than the cost data submitted at the state level.²⁰ Northpoint, therefore, argues that the Commission should consider deferring the retail tariffing of DSL services to the states, to ensure consistent tariff review.²¹

C. Reply

8. Bell South contends that its DSL service is properly tariffed at the federal level. It argues that the nature of Internet traffic is interstate and thus a federal tariff is not only appropriate, but required.²² Bell South contends that "the key to the Commission's jurisdiction is the nature of the communications rather than the physical location of [the] technology."²³ Bell South asserts that federal jurisdiction is pre-eminent where the jurisdictional components are inseverable, such as in the case of Internet traffic.²⁴

9. Bell South further argues that its DSL service offering is an access service under section 69.2(b) of the Commission's rules, which defines access service as "includ[ing] services and facilities provided for the origination or termination of any interstate or foreign telecommunication."²⁵ Bell South argues that its DSL service is not a line-side circuit switched service nor can it be characterized as a local exchange service because its DSL customers do not intercommunicate with each other.²⁶ Instead, Bell South asserts that its DSL service establishes a "virtual connection that permits point-to-point communication between two locations designated by the DSL customer."²⁷ Bell South maintains, therefore, that the

¹⁸ Northpoint Petition at 5.

¹⁹ *Id* at 4.

²⁰ *Id* at 4.

²¹ *Id*.

²² Bell South Reply at 6.

²³ *Id.* at 2, citing *New York Telephone Company v. FCC*, 631 F.2d 1059, 1066 (2nd Cir. 1980).

²⁴ *Id* at 4 and n.13.

²⁵ 47 C.F.R. § 69.2(b).

²⁶ Bell South Reply at 8 citing 47 U.S.C. § 153(47).

²⁷ *Id*.

state decisions cited by petitioners regarding reciprocal compensation for switched calls to ISPs are not relevant to the jurisdictional classification of Bell South's DSL service offering.²⁸

D. Discussion

10. The threshold issue raised by Bell South's tariff and the petitioners is whether Bell South's DSL service offering is an interstate service, properly tariffed at the federal level, or an intrastate service that should be tariffed at the state level. We find that the record in this proceeding to date does not contain sufficient information on which to decide this issue. We, therefore, designate for investigation the question whether Bell South's DSL service offering is a jurisdictionally interstate service. We solicit comments on the jurisdictional issues raised by Bell South's DSL service offering and whether it should be tariffed at the state or federal level. We also solicit comments on whether the Commission should defer to the states the tariffing of retail DSL services in order to lessen the possibility of a price squeeze.

III. Filing Schedules

11. This investigation will be conducted as a notice and comment proceeding. We have designated CC Docket No. 98-161. Bell South is designated as a party to this proceeding, and shall file its direct case no later than September 11, 1998. The direct case must present the party's positions with respect to the issues described in this Order. Pleadings responding to the direct case may be filed no later than September 18, 1998, and must be captioned "Oppositions to Direct Case" or "Comments on Direct Case." Bell South may file a "Rebuttal" to oppositions or comments no later than September 25, 1998.

12. An original and six copies of all pleadings shall be filed with the Secretary of the Commission. In addition, parties shall file two copies of any such pleadings with the Competitive Pricing Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Parties shall also deliver one copy of such pleadings to the Commission's commercial copying firm, International Transcription Service, Inc., 1231 20th Street, NW, Washington, DC 20036. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments should specify the docket number of this investigation. Parties are also encouraged to submit their pleadings electronically through the Electronic Tariff Filing System.

13. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not

²⁸ *Id* at 9.

contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the order.

IV. *Ex Parte* Requirements

14. This tariff investigation is a "permit-but-disclose proceeding" and subject to the "permit-but-disclose" requirements under section 1.1206(b) of the rules, 47 C.F.R. § 1.1206(b), as revised. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.²⁹ Other rules pertaining to oral and written presentations are set forth in section 1.1206 (b), as well.

V. Paperwork Reduction Act

15. The collections of information contained within are contingent upon approval by the Office of Management and Budget, in accordance with the provisions of the Paperwork Reduction Act, 44 U.S.C. §§ 3506 *et seq.*

²⁹ See 47 C.F.R. §1.1206 (b)(2), as revised.

VI. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that, pursuant to Section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), and authority delegated pursuant to Section 0.91 and Section 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.291, Transmittal No. 476 **IS SUSPENDED** for one day from the effective date and an investigation of the referenced tariff transmittal **IS INSTITUTED**.

17. **IT IS FURTHER ORDERED** that Bell South SHALL FILE tariff revisions within five business days of the release date of this Order to reflect this suspension.

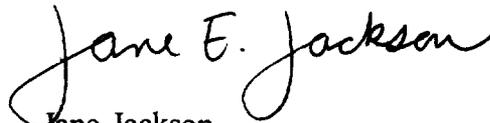
18. **IT IS FURTHER ORDERED** that, for the above purposes, Bell South should cite the "DA" number of the instant Order as the authority for this filing.

19. **IT IS FURTHER ORDERED** that, pursuant to Section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), Bell South shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

20. **IT IS ORDERED** that, pursuant to sections 4(i), 4(j), 201(b), 203(c), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(c), 204(a), 205 and 403, and sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, the issues set forth in this Order **ARE DESIGNATED FOR INVESTIGATION**.

21. **IT IS FURTHER ORDERED** that Bell South is a party to this proceeding and **SHALL INCLUDE**, in its direct case, a response to each issue designated in this Order.

FEDERAL COMMUNICATIONS COMMISSION



Jane Jackson

Chief, Competitive Pricing Division
Common Carrier Bureau