

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter Of)
)
BellSouth Telecommunications, Inc.) **WC Docket No. 02-304**
Tariff FCC No. 1, Transmittal No. 657)

OPPOSITION OF NEXTEL TO BELLSOUTH DIRECT CASE

NEXTEL COMMUNICATIONS, INC.

Thomas D. Hickey
Vice President and Deputy General Counsel

Robert H. McNamara
Senior Counsel – Regulatory

2001 Edmund Halley Drive
Reston, VA 20191
(703) 433-4141

Regina M. Keeney
Ruth Milkman
Lawler, Metzger & Milkman, LLC
2001 K Street, NW, Suite 802
Washington, DC 20006
(202) 777-7700
Counsel for Nextel Communications, Inc.

October 24, 2002

SUMMARY

Nextel Communications, Inc. (“Nextel”) requests that the Commission find unlawful the BellSouth tariff provisions that substantially increase security deposit requirements for interstate access customers. In its direct case, BellSouth has failed to meet its legal burden of demonstrating that its proposed replacement security deposit policy is just, reasonable, and not unreasonably discriminatory under Sections 201 and 202 of the Communications Act. BellSouth’s carrier customers that have a track record of on-time payments should not be subject to onerous security deposits.

The proposed tariff provisions would give BellSouth a powerful weapon that could be deployed in a manner adverse to the interests of competitors such as Nextel. As a provider of commercial mobile radio services (“CMRS”), Nextel competes with the SBC-BellSouth joint venture, Cingular Wireless. As do all major CMRS providers, Nextel relies heavily on interstate special access services purchased from BellSouth and other incumbent local exchange carriers. Should requirements for security deposits increase substantially, BellSouth will be able to raise rivals’ costs, imposing added economic hardships on financially healthy companies like Nextel.

The tariff is unlawful for several reasons. The unlimited discretion BellSouth has reserved to itself to determine how its new policy will be implemented renders the tariff unlawfully vague and ambiguous. BellSouth has also failed to demonstrate that the suspended language is just and reasonable in light of the inclusion of uncollectibles in current access rates. In addition, the unlawful amendment of contract tariffs fails to satisfy the substantial cause test. Finally, the language requiring that the “loser pays all” in an arbitration is unjust and unreasonable.

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I. INTRODUCTION

Nextel Communications, Inc. (“Nextel”), by its attorneys, hereby opposes the direct case filed by BellSouth Telecommunications, Inc. (“BellSouth”) in the above-captioned tariff investigation, and requests that the Commission reject the suspended tariff language as unlawful. On September 18, 2002, the Wireline Competition Bureau announced that it had suspended and set for investigation BellSouth Transmittal No. 657, which sought substantial changes in previously-prescribed tariff provisions governing security deposits that BellSouth could demand from its interstate access customers.¹ In its direct case, BellSouth failed to meet its legal burden of demonstrating that its proposed replacement security deposit policy is just, reasonable, and not unreasonably discriminatory under Sections 201 and 202 of the Communications Act.²

The tariff provisions that BellSouth advocates would give BellSouth a powerful weapon that could be deployed in a manner adverse to the interests of competitors such as Nextel. As Nextel will discuss below, competitors remain highly dependent on

¹ *BellSouth Telecommunications, Inc., Tariff FCC No. 1, Transmittal No. 657, WC Docket No. 02-304, Order (rel. Sept. 18, 2002) (DA 02-2318) (hereinafter “Designation Order”).*

² 47 U.S.C. §§ 201-202.

BellSouth's network for interstate access services. For most routes, facilities-based competition for interstate access continues to be conspicuous by its absence. In Nextel's case, Nextel relies heavily on special access services purchased from BellSouth and other incumbent local exchange carriers ("LECs") to offer its commercial mobile radio services in 197 of the top 200 U.S. markets. At the same time, Nextel competes with incumbent LEC affiliates, such as the SBC-BellSouth joint venture, Cingular Wireless. Should requirements for security deposits increase substantially, BellSouth will be able to raise rivals' costs and tie up scarce working capital.³ In effect, the proposed tariff provisions would empower BellSouth to impose additional economic hardships on financially healthy companies like Nextel. In Nextel's view, BellSouth's carrier customers that have a track record of on-time payments should not be subject to onerous security deposits.

II. DISCUSSION

In its order initiating an investigation, the Bureau designated a number of issues and made numerous data requests. Of the issues designated, the three issues of greatest concern to Nextel are: (1) whether the security deposit provisions applicable to interstate access customers are reasonable and not so vague as to permit BellSouth to discriminate unreasonably among its interstate customers;⁴ (2) whether the new policy is a material change to BellSouth's term plans and contract tariffs that can be justified under the "substantial cause" test;⁵ and (3) whether the expedited arbitration provisions are

³ The carrier customer has virtually no bargaining power against demands for security deposits, since BellSouth has the ability to discontinue service to that customer, and the customer has no practical alternatives to BellSouth's network.

⁴ Designation Order ¶ 10.

⁵ *Id.* ¶¶ 26-27.

reasonable, including the requirement that the loser pays all costs.⁶ With respect to the first issue, Nextel shows that: the unlimited discretion BellSouth has reserved to itself to determine how its new policy will be implemented renders the tariff unlawfully vague and ambiguous; and that BellSouth has failed to demonstrate that the suspended language is just and reasonable in light of the inclusion of uncollectibles in current access rates. In response to the second issue, Nextel shows that the unlawful amendment of contract tariffs fails to satisfy the substantial cause test. Finally, Nextel explains that the language requiring that the “loser pays all” in an arbitration is unjust and unreasonable.

A. The Security Deposit Provisions are Vague, Ambiguous and Unreasonable

1. The Tariff Provisions Regarding Credit Scoring Tools Are Unlawfully Vague and Ambiguous

The Designation Order asks whether the tariff is sufficiently clear and unambiguous to permit nondiscriminatory application to similarly situated customers.⁷ The Order notes that BellSouth will use credit-scoring tools, and seeks information about how the factors used in these tools relate to a predictive judgment about whether a customer will pay its bill. In addition, the Order directs BellSouth to justify how the use of such tools will not result in arbitrary or discriminatory determinations of creditworthiness.

BellSouth’s direct case explains that it will initially employ “a commercially acceptable credit scoring tool” consisting of two software programs offered by Moody’s

⁶ *Id.* ¶ 23.

⁷ *Id.* ¶ 15.

and Dun & Bradstreet.⁸ Carrier customers who score “at least 5” on a scale of 1-10 in these programs (with 10 apparently being the most creditworthy), “are sufficiently creditworthy so as not to require a deposit.”⁹ The suspended tariff also states that “using the data, tools and analysis described above,” BellSouth will determine whether a deposit is required.¹⁰ BellSouth explains that this language means its new policy would provide it unfettered discretion to make a final determination on creditworthiness – up to and including a decision that a carrier customer is not creditworthy even when two software analyses predict the customer to be creditworthy.¹¹

Significantly, BellSouth’s direct case fails to justify why the various inputs into the software programs are each reasonable predictors of creditworthiness, as the Bureau asked BellSouth to do.¹² BellSouth’s non-response to this request is to submit pages and pages of instructions for how one enters data into the software packages.

According to BellSouth, the suspended tariff language permits its “credit specialists” to consider any information that might bear on the customer’s credit score. BellSouth provides one example of information that would negate a good score (a carrier customer’s accounting restatement),¹³ but provides no limiting principle even in its

⁸ Initially, BellSouth confidently asserts that these are “good predictors of risk.” BellSouth Direct Case ¶ 30. In the next paragraph, we learn that the outputs of these models can be overridden at the complete discretion of BellSouth.

⁹ *Id.* ¶ 31. BellSouth also does not explain or justify why “5” is the correct score.

¹⁰ BellSouth Tr. 657, amending section 2.4.1(A) of its Tariff FCC No. 1.

¹¹ BellSouth Direct Case ¶ 31 (explaining that “current information” could negate good scores).

¹² Designation Order ¶ 15 (noting that inputs such as debt ratings, debt performance, net worth, etc., had not been demonstrated to be “valid predictors” of creditworthiness, and directing BellSouth to make such a showing in its direct case).

¹³ BellSouth Direct Case ¶ 31.

advocacy to define what information would be deemed pertinent.¹⁴ BellSouth could override the software “scores” in any circumstances, such as the release of a single negative analyst report on the stock price or a decision to slightly downgrade debt securities by one rating agency. Yet neither a reduction in company stock price, nor a reduction in bonds from a Triple A rating to a Double A rating, has any bearing on a company’s ability to pay its interstate access obligations. Those obligations are met by a company’s cash flow, its cash reserves or credit lines, and/or access to capital raised on the open market.

In the final analysis, the reasonableness of the Moody’s and Dun & Bradstreet software packages BellSouth wants to use are largely irrelevant to the legal determination to be made by the Commission here. That is because BellSouth’s suspended tariff reserves to itself complete, unfettered, and unlimited discretion to raise security deposits for a particular competitor at will. This is unlawful. Sections 61.2(a) and 61.54(j) of the Commission’s rules require that tariff language be clear and definite.¹⁵ As the U.S. Court of Appeals for the D.C. Circuit has held, “[i]f a party could not reasonably ascertain the ‘proper application’ of the tariff at the time it was filed, the tariff was unclear and therefore was invalid.”¹⁶ All that can be discerned from the face of the tariff is that

¹⁴ To satisfy the requirements of 47 C.F.R. § 61.54(j), even if a “limiting principle” could be crafted, it would need to appear in the tariff itself. *AT&T Communications Tariff F.C.C. Nos. 9 and 11, Transmittal No. 6788*, 10 FCC Rcd 4288, ¶¶ 23-24 (1995) (advocacy representations are insufficient to cure an unlawful tariff).

¹⁵ 47 C.F.R. §§ 61.2(a) and 61.54(j). The former rule provides that “all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.” The latter rule states “[t]he general rules (including definitions), regulations, exceptions, and conditions which govern the tariff must be stated clearly and definitely.”

¹⁶ *Global NAPS, Inc. v. FCC*, 247 F.3d 252, 258 (2001). See also *GTE Telephone Operating Companies Tariff F.C.C. No. 1, Transmittal No. 988*, 11 FCC Rcd 3698, ¶ 7 (1995) (impossible to determine how GTE would exercise its discretion in deciding how

BellSouth will use “a commercially acceptable scoring tool applied in a commercially reasonable manner.” Of course, as the direct case explains, the use of a scoring tool is only part of an analysis which can include information – reliable or not – from any source. If the suspended language is allowed to take effect, the customer will be exposed to uncertain liability, which could be compelled at any time, without regard to payment history or any stated criteria in the tariff. The suspended language is vague and ambiguous.¹⁷

BellSouth relies heavily on the idea that it will use a “commercially acceptable scoring tool applied in a commercially reasonable manner.” The Commission, however, cannot rely on carriers with market power acting in a “commercially reasonable manner,” absent Commission regulation. While carriers offering competitive services are constrained by competition, and are thus likely to use commercially available tools in a manner consistent with the requirements of the Act,¹⁸ a carrier with market power, such as BellSouth, is not similarly constrained, and has the incentive and the ability to use these tools in an anti-competitive manner.

Consequently, while the determination of whether a tariff provision is unlawfully vague and ambiguous is a legal question, the determination should be informed by the

it will provide services under a proposed tariff); *Southwestern Bell Telephone Co., Revisions to F.C.C. Tariff No. 73, Transmittal No. 2312*, 9 FCC Rcd 1616, ¶ 11 (1994).

¹⁷ Nor can BellSouth save its suspended tariff provisions with advocacy representations in its direct case pleading that the carrier customer can provide information to BellSouth that would reflect positively on a carrier’s creditworthiness. Pursuant to the tariff language itself, BellSouth reserves the decision about whether to require security deposits to itself, and customer-provided information need not be given any weight in its decision. BellSouth Direct Case ¶ 31.

¹⁸ See, e.g., *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Second Report and Order, 91 F.C.C.2d 59, ¶¶ 16, 20-21 (1982).

fact that BellSouth's carrier customers have few alternatives. Access to BellSouth's network is critical if facilities-based competitors such as Nextel are to reach all their retail customers. Only a very small proportion of the access connections that Nextel and others purchase from BellSouth are subject to competition.¹⁹

Without the ability to lease BellSouth circuits, competitors cannot serve their customers. Thus, the argument that BellSouth should be allowed to put in place any security deposit requirement that falls within a broad range of "commercially reasonable" policies fails. If, for example, Nextel were to mimic BellSouth's proposed policy in its own business, its customers would be free to find a new provider. But Nextel cannot find another vendor to replace BellSouth. This business reality should inform the determination as to whether the tariff language now suspended is unlawful.

2. BellSouth's Proposed "Insurance Policy" Against Uncollectible Debt Is Unjust and Unreasonable

The Designation Order directed BellSouth to explain why its rates under price cap regulation do not adequately compensate it for the risk of uncollectibles.²⁰ The Order made a number of data requests. It also stated that permitting the tariff to take effect would "increase customer-supplied funding as well as reduce BellSouth's exposure to defaults." Accordingly, the Order requested that BellSouth address what modifications the Commission should make to its price cap indexes and service band indexes.

The risk of uncollectibles is a fact of life in an economic downturn, affecting all industries in all sectors of the economy, including regulated ones. BellSouth's interstate

¹⁹ See *AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Access Services* at 25-32 (filed Oct. 15, 2002) ("*AT&T Special Access Petition*").

²⁰ Designation Order ¶ 11.

access rates already include some level of “cost” of uncollectibles, just as do the cost of most goods and services in the economy.²¹ That “cost” was embedded in BellSouth’s rates when the Commission initiated price caps for interstate access. Moreover, the ongoing adjustment in uncollectible cost is one of innumerable cost changes endogenous to the economy-wide measure of cost changes used in adjusting price cap indices.²² If the cost of interstate access uncollectibles increased, and if that cost were not reflected in interstate access rates via price cap regulations, this would have the effect of depressing interstate earnings. Yet BellSouth’s earnings on interstate access are remarkable only for their size and growth. AT&T recently calculated that BellSouth’s ARMIS data shows its interstate rate of return for special access grew from more than 16 percent in 1996 to more than 49 percent in 2001.²³ If BellSouth desires to now eliminate, or virtually eliminate, uncollectible cost, then BellSouth also needs to provide information to determine by how much interstate access charges should be decreased. BellSouth’s direct case fails to address this issue.²⁴ Based on its complete failure to justify its

²¹ BellSouth Direct Case at 8, n.9.

²² *Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, ¶¶ 185-86 (1989) (price cap formula ensures that aggregate rates can move in response to costs, ensuring rates remain in a “zone of reasonableness” and stating that the GNP-PI component of the formula is intended to reflect “the cost of factors of production” for carriers). This same theory was repeated when price cap regulation was adopted for incumbent local exchange carriers. *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, ¶¶ 50-51 (1990).

²³ Declaration of Stephen Friedlander at Exhibit 1, attached at Tab A to *AT&T Special Access Petition*.

²⁴ Compare Designation Order ¶ 11 with BellSouth Direct Case ¶ 20 (simply stating that its new policies “should have no impact on any price cap index”). It is no answer to argue that “deposits will be refunded.” If BellSouth can insulate itself from future uncollectibles, then rates that are subject to price caps are too high.

suspended security deposit plan as just and reasonable under price cap rules, BellSouth's tariff should be found to be unlawful.

B. BellSouth's Security Deposit Revisions Fail to Meet the “Substantial Cause” Test

The Designation Order raises the issue of whether the proposed provisions constitute a material change to BellSouth's term contracts.²⁵ Pursuant to several decades of tariff law, material changes to term plans can only be made if the carrier can demonstrate “substantial cause” to do so, given the customer's expectation that the term plan locks in prices and terms for a specific period. While the Designation Order seeks a legal analysis on term plans and the substantial cause test generally, Nextel will focus its comments on contract tariffs that are subject to the Commission's pricing flexibility rules.

Nextel purchases access services from BellSouth that are today eligible for pricing flexibility under the Commission's pricing flexibility rules, as implemented.²⁶ In addition to winning pricing flexibility over broad portions of its service area, BellSouth has filed at least nine contract tariffs with access customers under the pricing flexibility rules.²⁷

In its Designation Order, the Bureau noted that any carrier seeking to make a “material change” to its contract tariffs must demonstrate that there is “substantial cause” to support such a change.²⁸ The replacement security deposit policy, which subjects

²⁵ Designation Order ¶ 27.

²⁶ *Access Charge Reform*, Fifth Report and Order, 14 FCC Rcd 14221 (1999).

²⁷ Nextel is harmed if BellSouth is allowed to amend contract tariffs unilaterally, because Nextel may wish to purchase access services via contract tariffs in the future, and would be deprived of the certainty that is one principal benefit of a contract tariff for term.

²⁸ Designation Order ¶¶ 27-28.

even those carriers current with their payments to substantial security deposit requirements, is closely analogous to termination liability provisions that the Commission has repeatedly held to be “material.” Both security deposits and termination liability are means of protecting a carrier from a customer-initiated “default” in payment.²⁹ Moreover, BellSouth’s own data do not justify that substantial cause exists for a change in this material term. On at least three other occasions during the 1990s, BellSouth’s interstate access uncollectibles rose, on a percentage basis, as much or more than BellSouth says its exposure is currently rising.³⁰ Furthermore, BellSouth’s direct case does not explain why bankruptcy proceedings are proving unsuccessful in delivering up debt owed to BellSouth, when BellSouth has sought and obtained a priority over unsecured creditors. If anything, the material demonstrates that the small amounts of uncollectibles relative to BellSouth’s interstate access revenues and earnings do not warrant BellSouth collecting additional cash from its paying customers, especially in light of the economic hardships such activity would impose on financially healthy companies such as Nextel.³¹

²⁹ See, e.g., *RCA American Communications, Inc.*, 86 F.C.C.2d 1197, ¶ 24 (1981). This decision and a subsequent decision confirming its result were ultimately upheld by the D.C. Circuit. See *RCA American Communications, Inc.*, 2 FCC Rcd 2363, n.1 (1987) (discussing procedural history of the case).

³⁰ BellSouth Direct Case at 8, Table 1. Between 1993-94, uncollectibles grew by a factor of 2.7; between 1995-96, by a factor of 2.1; and between 2000-01, by a factor of 2.2.

³¹ *RCA American Communications, Inc.*, 2 FCC Rcd 2363, ¶ 30, n.32 (1987) (to meet substantial cause test, carrier must show current mechanism inadequately compensates it for present costs). In *RCA American's* case, high inflation during the 1970s, the loss of SATCOM F-3, and delays in the space shuttle program were all cited as reasons why its cost of capital increased substantially. In contrast, BellSouth simply shows that one category of expense has increased, apparently in the ordinary course of business.

C. “Loser Pays All Arbitration Costs” Is Unjust and Unreasonable

The Designation Order asks a series of questions about the reasonableness of the proposed dispute resolution process in the tariff transmittal, including the provision that the “losing party pays” the costs of an expedited arbitration.³² BellSouth’s justification that its suspended arbitration rule would discourage illegitimate cases is illogical. According to BellSouth, a “loser pays” rule ensures that customers that do not wish to pay a larger security deposit will not make groundless requests for arbitration as a delay tactic.³³ However, an award in favor of BellSouth does not necessarily mean that a finding that the loser’s case was groundless. Additionally, BellSouth does not explain how the “loser” would be defined. For example, an arbitrator might decide that BellSouth’s original demand for security is excessive, and substantially reduce the amount that BellSouth can request. In common parlance, is BellSouth the “loser,” having failed to achieve what it originally demanded? Or, is BellSouth suggesting that because the arbitrator awards any amount at all toward a security deposit, that BellSouth “wins”? BellSouth has not justified its tariff provisions.

BellSouth attempts to bolster its proposed “loser pays” rule by arguing that the rule is consistent with American Arbitration Association (AAA) rules.³⁴ But the very rules that BellSouth cites give the arbitrator (not a single party) the ability to determine how costs should be apportioned. Finally, BellSouth’s argument that the arbitration provision was apparently agreed to (in some pertinent part) by some tariff petitioners³⁵

³² Designation Order ¶¶ 23-25.

³³ BellSouth Direct Case ¶¶ 39-40.

³⁴ *Id.* ¶ 40.

³⁵ *Id.* ¶ 36.

(but not Nextel) cannot save an otherwise unlawful provision. The tariff will apply to all customers and, in a tariff investigation, it is the Commission's duty to determine whether the tariff's provisions pass muster under the Act.

III. CONCLUSION

Based on the foregoing, the Commission should find that BellSouth has failed to meet its burden to justify its suspended security deposit tariff provisions as just, reasonable, and not unreasonably discriminatory. Carrier customers with track records of on-time payments should not be subject to BellSouth's proposed onerous security deposits. The Commission should find the tariff transmittal unlawful.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

/s/ Thomas D. Hickey
Thomas D. Hickey
Vice President and Deputy General Counsel

Robert H. McNamara
Senior Counsel – Regulatory

2001 Edmund Halley Drive
Reston, VA 20191
(703) 433-4141

Regina M. Keeney
Ruth Milkman
Lawler Metzger & Milkman, LLC
2001 K Street NW, Suite 820
Washington DC 20006
(202) 777-7700
Counsel for Nextel Communications, Inc.

October 24, 2002

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2002, I caused true and correct copies of the foregoing Opposition of Nextel to BellSouth Direct Case to be mailed, postage prepaid, to:

Richard M. Sbaratta
BellSouth Telecommunications, Inc.
Suite 4300
675 West Peachtree Street, N.E.
Atlanta, GA 30375-0001

Julie Saulnier (three copies)
Federal Communications Commission
Pricing Policy Division
Wireline Competition Bureau
445 12th Street, S.W., Room 6-C222
Washington, DC 20554

Qualex International
Portals II
445 12th St., S.W., Room CY-B402
Washington, DC 20554

/s/ Ruth E. Holder
Ruth E. Holder