BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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

OPPOSITION TO DIRECT CASE

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October 24, 2002

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OPPOSITION TO DIRECT CASE

Time Warner Telecom Corporation ("TWTC"), by its attorneys, hereby submits this Opposition to the Direct Case filed by BellSouth on October 10, 2002 in the above-captioned proceeding.

I. DISCUSSION

In Transmittal No. 657, BellSouth seeks Commission approval for a fundamental change in the circumstances under which it may require that customers pay deposits as a condition of providing service. BellSouth's existing tariff states that it may require a customer to make a deposit where the customer has a "proven history of late payments on undisputed charges" or "if the Customer does not have established credit." *See* BellSouth Telecommunications, Inc., Tariff FCC No. 1, section 2.4.1(A). Under the revisions proposed in Transmittal No. 657, BellSouth would be able to require new and existing customers to pay security deposits to the extent they fail a credit worthiness test applied by BellSouth. *Id.*, Second Revised Page 2-21.1, section 2.4.1(A). Transmittal No. 657 goes on to assert that BellSouth will use a "commercially acceptable credit scoring tool applied in a commercially reasonable manner to determine a Customer's credit worthiness." *Id.*

In its Designation Order,[1] the Commission observed that the existing tariff language regarding the terms and conditions under which BellSouth may impose deposits reflects the Commission's prior determination as to the appropriate balance between the interests of dominant local exchange carriers in avoiding unnecessary exposure to uncollectibles and the interests of their customers in avoiding onerous payment terms. The basic question in this proceeding is whether circumstances today require that the balance be struck much more significantly in BellSouth's favor.

BellSouth's Direct Case offers no basis for concluding that the changes proposed in Transmittal No. 657 are warranted. BellSouth has failed, and in many cases not even attempted, to respond adequately to numerous concerns raised by the Commission in its Designation Order. In this regard, the most important issues for TWTC are those that pertain to the anticompetitive consequences of BellSouth's proposed language. As TWTC has explained elsewhere,[2] ILEC requests to impose onerous deposit and even advance payment requirements on their competitor customers of access service would result in raising their rivals' costs and would allow the dominant ILECs to gain protection from business risks that is not available to competitors, like TWTC, that do not have interstate special access tariffs and could not renegotiate customer contracts to include terms like those in Transmittal No. 657.

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[1] *BellSouth Telecommunications, Inc. Tariff FCC No. 1, Transmittal No. 657,* WC Docket No. 02-304, Order (rel. Sept. 18, 2002) ("Designation Order").

[2] *See* Comments of Time Warner Telecom, WC Docket No. 02-202 (Aug. 15, 2002) at 4-13.

For example, the Commission asked BellSouth to explain "why it believes its rates under price caps do not adequately compensate it for the risk of uncollectibles." Designation Order, ¶ 11. In response, BellSouth speaks generally about the increased instability in the market compared to the "noncompetitive, stable" environment in the 1980s when the existing deposit provisions were established. Direct Case at 2. In addition, BellSouth asserts that it should be allowed to impose the same kinds of deposit requirements as any other company would in a commercial environment. *Id*. at 3.

These assertions are unconvincing. To begin with, price caps and pricing flexibility essentially give BellSouth greater opportunity to earn greater returns on investment than would be permitted under rate of return regulation while offering fewer protections against losses caused by general marketplace risk. Greater potential for returns essentially compensate for the increased risks. By any measure, BellSouth has profited handsomely from these arrangements, and there is simply no indication that BellSouth's uncollectibles are significant enough to warrant a rate increase in the form of deposit requirements paid by its access customers. As several parties have pointed out, BellSouth's interstate uncollectibles still represent a *de minimis* percentage of its overall interstate revenues. *See, e.g.*, WorldCom Petition to Reject or, in the Alternative, Suspend and Investigate Transmittal No. 657 (July 26, 2002) at 17 (estimating that BellSouth's interstate uncollectibles represent only 1.4 percent of interstate revenues for 2001). These uncollectibles appear to be substantially lower than those faced by BellSouth's competitors.[3] More generally, there can be no question that the rates under price caps "adequately compensate [BellSouth] for the risk of uncollectibles." As several parties have again pointed out, BellSouth's interstate rate of return for 2001 was an impressive 21.22 percent. *Id.* This level of return (which as approximately twice the interstate return incumbent LECs earned in the 1980s) more than compensates BellSouth for any increased market risk it may face as a result of competition. Furthermore, given that BellSouth's current interstate rate of return would almost certainly have led to rate reductions under the rate of return regime in place when the existing deposit tariff provisions were in place, BellSouth is, in the aggregate, much better off under the existing regime than under the regime in place at the time the existing deposit provisions were adopted.

BellSouth's assertion that it should be given the opportunity to take advantage of methods used in other commercial settings to avoid uncollectibles is no more convincing. As mentioned, BellSouth's competitors, such as TWTC, that sell competitive special access service under contract, rather than under tariff, do not have the ability to impose requirements such as those in Transmittal No. 657. Furthermore, it bears repeating that most commercial settings do not involve a firm like BellSouth that supplies bottleneck services to its competitors and has the incentive to exploit deposit requirements in a manner that harms those competitors' ability to compete.

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[3] *See* Letter from Jonathan Lee, Vice President, Regulatory Affairs, CompTel to Ms. Tamara Preiss, filed in the instant proceeding July 1, 2002 at 4 (estimating competitive carrier exposure to doubtful accounts risks).

Nor has BellSouth offered any basis for concluding that a permanent change has occurred in the marketplace such that uncollectibles will continue to increase or even remain at their current (for BellSouth) relatively modest levels for the foreseeable future. The available evidence indicates instead that the relative increase in uncollectibles likely reflects the normal business cycle. For example, BellSouth's data show that interstate access uncollectibles for 1998 ($16,628,000) and 1999 ($14,361,000) were similar to those prior to the passage of the 1996 Act ($12,689 in 1994 and $13,472 in 1995). Direct Case at 8. Notwithstanding BellSouth's assertions to the contrary, it does not appear that the 1996 Act has permanently altered the level of uncollectibles. The fact that interstate uncollectibles have increased to $67,982,000 in 2001 (*see id*.) is of course clearly linked to the recent turmoil in the marketplace, but there is no evidence that the present circumstances represent a permanent change. Most importantly from TWTC's perspective, there is, again, no basis for concluding that BellSouth is more likely to experience higher uncollectibles than any other stable carrier over the foreseeable future.

In addition, the Commission also asked BellSouth to explain how the standards for creditworthiness proposed in Transmittal No. 657 would meet the requirement that tariffs be clear and unambiguous. Designation Order, ¶ 15. The risk of vague and amorphous standards for imposing deposits is obviously that they leave BellSouth with complete discretion to impose deposit requirements in a discriminatory manner, such as by selectively targeting its competitors. BellSouth utterly fails to explain why the standards it proposes for creditworthiness limit the potential for such discrimination.

BellSouth states that it would use two models for assessing credit risk (Moody's RiskCalc and Dun and Bradstreet's Risk Assessment Manager or "RAM"). Direct Case at 12-13. The RiskCalc model apparently provides a risk rating between 1 and 10, with a score of 1 being the least and 10 being the most risky. Direct Case at 13. The RAM model also provides a risk rating between 1 and 10, with a 1 being the most and 10 being the least risky. *Id.* BellSouth states that its "experience has been that customers who score at least five in both models are sufficiently creditworthy so as not to require a deposit." *Id.* at 14. But BellSouth makes no attempt to document this assertion. BellSouth then goes on the state that, in any event, the RiskCalc and RAM models are based on historical data, and that BellSouth's credit specialists are free to "take into account current information that might negate good scores" as a basis for imposing deposit requirements. *Id.* Thus, under Transmittal No. 657, BellSouth is not held accountable to any objective standard for determining which customers should pay deposits and which customers should not.

Moreover, the Commission sought an explanation from BellSouth as to why its proposed creditworthiness test would more effectively target potential defaulting customers than the existing standard, which relies primarily on payment history. BellSouth has not even attempted to make such a showing. For example, in order to understand the effectiveness of the current standard for imposing deposits, the Commission asked BellSouth to provide data on the payment characteristics of defaulting interstate access customers during the year prior to the time the account was 90 days overdue. Designation Order, ¶ 16. In other words, the Commission sought data on the effectiveness of payment history in identifying credit risks. BellSouth's response to this request is, amazingly, that it does not keep track of this data. Direct Case at 14 n.18. BellSouth therefore apparently has no idea how accurately its existing standard for imposing deposits targets credit risks. This is important because it means that the Commission has no basis for concluding that the existing standard for imposing deposits is ineffective or that the standard proposed in Transmittal No. 657 offers a more accurate a means of identifying credit risks than the existing standard (of course, given that the proposed standard would likely cause virtually all carrier purchasers of access to pay deposits, it is hard to see how it would be anything but grossly overinclusive).

Finally, BellSouth has failed to explain why its proposed change does not represent a material change to its term contracts and why that material change is justified. *See* Designation Order, ¶ 27. Under Commission precedent, which has now been discussed at length in the tariff proceedings addressing the various ILEC filings related to deposits and advance payments, a dominant carrier may not make a material change to tariff provisions governing long-term service arrangements absent "substantial cause."[4] As several parties have explained, the significant changes in the deposit provisions contained in Transmittal No. 657 would result in a material change to just the type of long-term service arrangements to which the Commission has applied the substantial cause test. *See, e.g.,* WorldCom Petition to Reject or, in the Alternative, Suspend and Investigate Transmittal No. 657 (July 26, 2002) at 14-15.

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[4] *See RCA American Communications, Inc.*, Memorandum Opinion and Order, 86 FCC 2d 1197 (1981) ("*RCA American Communications*").

There should also be little question that BellSouth lacks “substantial cause” for adopting the proposed changes. As the Commission has explained, customers have “legitimate expectations” that their long-term arrangements will remain stable and unchanged. *See RCA American Communications*, ¶ 13. A carrier seeking to materially alter such long-term arrangements must therefore bear the burden of demonstrating that it has experienced unexpected changes that have resulted in losses so significant that the tariff revisions proposed outweigh the customers’ legitimate expectations of stability in their long-term arrangements. Indeed, that burden should be especially heavy in this case, since BellSouth has proposed was appear to be highly over-inclusive and arbitrary protective measures. Those measures burden carrier customers that pose little or no threat to BellSouth just as much as they burden higher risk carrier customers. When these very significant costs are compared with the relatively small cost that uncollectible interstate revenues have imposed on BellSouth, it is clear that no substantial cause exists for adopting the proposed tariff changes.

In sum, there is no basis for concluding that Transmittal No. 657 is lawful. But there is also no basis for concluding that the existing criteria for requiring deposits are somehow inadequate. BellSouth cannot be sheltered from every possible consequence of the current market turmoil, but there is no reason for concluding that it is somehow disadvantaged vis-à-vis competitors like TWTC by its existing tariff.

II. CONCLUSION

The Commission should rule that Transmittal No. 657 is unlawful for the reasons set forth herein..

Respectfully submitted,

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