BELLSOUTH

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October 28, 2003

The Honorable Gary E. Walsh
Executive Director
Public Service Commission of SC
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: Application of BellSouth Telecommunications, Inc. to Provide In-Region InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996
Docket No. 2001-209-C

Dear Mr. Walsh:

Enclosed for filing are the original and fifteen copies of BellSouth Telecommunications, Inc.'s Motion to Modify Incentive Payment Plan in the above-referenced matter.

By copy of this letter, I am serving this document on all parties of record.

Sincerely,

Patrick Turner

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record
PC Docs # 496918

BEFORE THE

PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2001-209-C

IN RE:

APPLICATION OF BELLSOUTH TELECOMMUNICATIONS, INC. TO PROVIDE IN-REGION INTERLATA SERVICES PURSUANT TO SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996	)	MOTION TO MODIFY INCENTIVE PAYMENT PLAN

BellSouth Telecommunications, Inc. ("BellSouth"), hereby respectfully requests the entry of an Order authorizing BellSouth to modify the Incentive Payment Plan ("IPP") voluntarily filed by BellSouth in this proceeding, and approved by the Public Service Commission of South Carolina ("Commission") in 2002, and states as grounds in support thereof the following:

1. On August 21, 2003, the Federal Communications Commission ("FCC") released its *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (FCC-03-36). *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, FCC 03-36 (rel. Aug. 21, 2003) ("Triennial Order"). The Triennial Order became effective October 2, 2003. Among the many rulings in the Triennial Order is the decision by the FCC that line sharing is no longer an unbundled network element that incumbent LECs are required to offer pursuant to Section 251 of the Act.[1] For this reason, BellSouth should be relieved of any further obligation to pay IPP

[1] In its Triennial Order, the FCC stated that "we use the term 'line sharing' to describe when a competing carrier provides xDSL service over the same line that the incumbent LEC uses to provide voice service to a particular end user, with the incumbent LEC using the low frequency

penalties that relate to the provision of line sharing. Although BellSouth's IPP is a voluntary plan proposed by BellSouth, the Commission approved the IPP and ordered that it be incorporated into the Statement of Generally Available Terms ("SGAT"). Therefore, BellSouth files this Motion requesting that the Commission enter an Order authorizing BellSouth to remove the penalties relating to line sharing from the IPP, and to cease the payment of any such penalties as of October 2, 2003.

2. The performance measurement plan—and more specifically, the penalty component of the plan—is not required by any portion of the Telecommunications Act. The FCC clearly made this point in the Order in which it approved BellSouth's 271 application for Georgia and Louisiana, as follows:

> In prior Orders, the [FCC] has explained that one factor it may consider as part of its public interest analysis is whether a BOC would have adequate incentive to continue to satisfy the requirements of Section 271 after entering the long distance market. Although it is not a requirement for Section 271 Authority that a BOC be subject to such performance assurance mechanisms, the [FCC] previously has found that the existence of the satisfactory performance monitoring and enforcement mechanisms is probative evidence that the BOC will continue to meet its 271 obligations after a grant of such authority.[2]

Thus, "performance assurance mechanisms," including IPP penalties, are not required by Section 271. To the contrary, a measurement plan is simply a mechanism that can be utilized to ensure that an RBOC meets its obligations under Section 251. Consistent with this, every State Commission in BellSouth's region, including this Commission, has limited the application of automatic penalties to performance failures relating to offerings that an incumbent must provide to

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portion of the loop and the competing carrier using the HFPL [or high frequency portion of the loop]." *See* Triennial Order at ¶255.

[2] *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services In Georgia and Louisiana,* CC Docket No. 02-35, *Memorandum Opinion and Order*, 17 FCC Rcd 9018, 9181-82, ¶ 291 (2002).

meet its obligations under Section 251, specifically, unbundled network elements, interconnection and resold services. The current IPP does not include (and has never included) other products that BellSouth may provide to CLECs that are not encompassed within Section 251. At the time the current IPP was approved by this Commission, line sharing was, of course, included in the plan because it had previously been deemed by the FCC to be a UNE. With the FCC's above-referenced ruling in the Triennial Order, line sharing is no longer a UNE. Therefore, it should no longer be subject to penalties under the IPP.

3. Section 251 places upon ILECs the duty to provide "nondiscriminatory access to network elements on an unbundled basis." (§ 251(c)(3)). More specifically, network elements are to be made available on an unbundled basis if "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services it seeks to offer." (Section 251(d)(2)(b)). Thus, whether a network element is required to be offered pursuant to Section 251 depends, at least in part, upon whether the lack of this element would impair the CLEC's ability to do business.

4. In the Triennial Order, the FCC stated in general terms its interpretation of the impairment standard as follows: "We find a requesting carrier to be impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into the market uneconomic." (¶ 84). Applying this standard, the FCC found that line sharing does not meet this impairment test. Specifically, the FCC found that carriers <u>are</u> "generally impaired on a national basis without unbundled access to an incumbent LEC's local loops . . ." (¶ 248). However, the FCC also determined "that unbundled access to conditioned stand-alone copper loops . . . is sufficient to overcome such impairment for the provision of broadband services." (<u>Id.</u>). Accordingly, the

FCC further ruled, "that, subject to the grandfather provision and transition period explained below, the incumbent LECs do not have to unbundle the HFPL [High Frequency Portion of the Loop] for requesting telecommunications carriers (Id.). Further, by way of explaining this decision, the FCC stated that it disagrees "with the [FCC's] prior finding that competitive LECs are impaired without unbundled access to the HFPL . . ." (¶ 258). The FCC also noted that line splitting is available as a means to obtain the high frequency portion of the loop. (¶ 259).

5. Likewise, the FCC specifically rejected earlier FCC findings that "line sharing will level the competitive playing field." (¶ 261, quoting, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket Nos. 98-147 & 96-98, *Third Report and Order in CC Docket No. 98-147; Fourth Report and Order in CC Docket No. 96-98,* 14 FCC Rcd 20912, 20975, ¶ 137 (1999). Moreover, the FCC found that the availability of line sharing as a UNE could have the opposite effect:

> . . . [R]ules requiring line sharing may skew competitive LECs' incentives toward providing a broadband-only service to mass market consumers rather than a voice-only service, or perhaps more importantly, a bundled voice and xDSL service offering. In addition, readopting our line sharing rules on a permanent basis would likely discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs and the competitive LECs' offerings. We find that such results would run counter to the statutes' express goal of encouraging competition and innovation in all telecommunications markets."

(¶ 261). Thus, the FCC has clearly ruled that line sharing does not meet the impairment test, and, therefore, need not be offered on an unbundled basis pursuant to Section 251.

6. The FCC also made the determination that the availability of line sharing will not change immediately. Instead, the FCC adopted a transitional mechanism both for new and existing line sharing arrangements. Specifically, the FCC decided to grandfather until the next

biennial review (which will commence in 2004) "all existing line sharing arrangements unless the respective competitive LEC, or its successor or assign, discontinues providing xDSL service to that particular end-user customer." (¶ 264). The FCC also ruled that new line sharing arrangements would be subject to a three-year transitional period, during which new arrangements could be added in the first year and the price for line sharing would increase each year. At the end of the three year period, "any new customer must be served through a line splitting arrangement, through use of the stand-alone copper loop, or through an arrangement that a competitive LEC has negotiated with an incumbent LEC to replace line sharing." (¶ 265).

7. In outlining the transitional and grandfathering processes, the FCC did nothing to undercut its finding that line sharing does not meet the impairment test, and that it is no longer a UNE. Instead, the FCC adopted this gradual approach because some CLECs currently rely on line sharing to serve their customers (¶ 264). Accordingly, the FCC decided to gradually phase out the availability of line sharing "in order to ensure that these carriers have adequate time to implement new internal processes and procedures, design new product offerings, and negotiate new arrangements with incumbent LECs to replace line sharing, . . ." (Id.).

8. Again, this Commission has always limited the application of IPP penalties to the offerings that an incumbent must provide under Section 251. Further, failure to continue this long-standing approach by not removing line sharing would likely have a deleterious effect. As noted above, the FCC specifically found that the continuation of rules to require line sharing "would run counter to the statute's express goal of encouraging competition and innovation in all telecommunications markets." (¶ 261). Likewise, the continuation of IPP penalties for line sharing, even though it is no longer a UNE, would likely have the same effect by encouraging CLECs to utilize line sharing rather than other competitive alternatives. Accordingly, BellSouth

requests that the Commission enter an Order allowing BellSouth to cease making penalty payments, effective October 2, 2003, for the portion of any IPP penalties that apply to line sharing. Under the IPP currently in place, some measurements specifically identify line sharing as a product and several other measures contain data for line sharing as part of a group of products even though it is not reported separately. BellSouth proposes to remove line sharing from IPP in both of these cases.

9. BellSouth acknowledges that, in general, modifications to either the Service Quality Measurements (SQM) plan or the IPP should be limited to the review process outlined in the Commission's Order(s) adopting the SQM and IPP. BellSouth submits, however, that the instant circumstances are unique, and that they justify immediate modification. The Commission-ordered review process is an ongoing process in which information about the plan is gathered, and as this occurs, modifications are made to add additional necessary measurements, delete measurements or penalties that have proven to be unnecessary, make administrative changes in the plan, or make other appropriate changes on an ongoing basis. It is important to group these types of ongoing changes together and to deal with them as part of a periodic process to avoid having constant changes to the measurement and penalty plan.

10. BellSouth submits, however, that the removal of line sharing from IPP should be dealt with outside of the periodic review process, due to the unique circumstances that pertain. Specifically, the FCC's recent decision constitutes a change in the law that has the effect of placing line sharing outside of the fundamental framework of the IPP. As a result of this, line sharing can no longer appropriately be included in the IPP, after October 2, 2003.

11. BellSouth, however, does not propose that line sharing be immediately removed from the measurement plan. As discussed above, the FCC has provided a transitional process

whereby the availability of line sharing would change over time. Consistent with this approach, BellSouth believes that it is appropriate to have some transitional period at the state level, before line sharing is removed from the SQM. Thus, for now, BellSouth is only requesting removal from the IPP. BellSouth's performance related to line sharing would continue to be reported for some period of time. BellSouth anticipates that the Commission would consider during future periodic reviews the removal of line sharing from the measurement plan.

12. Finally, as to the timing of the implementation of this change, under the IPP, both Tier I and Tier II penalties are paid 45 days after the end of the month in which the particular performance occurs. Thus, any penalties due under the plan for the month of October would normally be payable on December 15, 2003. This means that the Commission will have approximately seven weeks to rule on BellSouth's Motion, prior to the time that penalties would be due. Although BellSouth believes that the Commission will have ample time to consider this Motion and to rule before December 15, 2003, there is, of course, the possibility that the Commission might not be able to rule by this date. In this event, BellSouth would propose to escrow any penalty payments (both Tier I and Tier II) pending a resolution of this Motion by the Commission. If the Commission subsequently rules in BellSouth's favor, then the payments would be returned from escrow to BellSouth. Although BellSouth should prevail on this issue for the reasons set forth above, if BellSouth does not obtain the requested relief, then any payments due would be promptly remitted upon the entry of an Order by the Commission.

WHEREFORE, BellSouth respectfully requests the entry of an Order authorizing BellSouth to remove from the IPP any penalties that would apply to line sharing and to cease payment of any such penalties, effective October 2, 2003.

Respectfully submitted this 28th day of October, 2003.

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STATE OF SOUTH CAROLINA)
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The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused BellSouth Telecommunications, Inc.'s Motion to Modify Incentive Payment Plan in Docket No. 2001-209-C to be served upon the following this October 28, 2003:

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