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November 6, 2001

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**VIA HAND DELIVERY**

Blanca S. Bayo, Director  
Division of Records and Reporting  
Betty Easley Conference Center  
4075 Esplanade Way  
Tallahassee, Florida 32399-0870

Re: Docket No.: 960786-A-TL

Dear Ms. Bayo:

On behalf of the Florida Competitive Carriers Association (FCCA), DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) and NewSouth Communications Corp. (NewSouth), enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ Post-Hearing Statement of Issues and Positions and Post-Hearing Brief of the Joint ALECs.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,

*Vicki Gordon Kaufman*

Vicki Gordon Kaufman

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McWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, DECKER, KAUFMAN, ARNOLD & STEEN, P.A.

DOCUMENT NUMBER - DATE  
14094 NOV -6 2001

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Consideration of BellSouth  
Telecommunications, Inc.'s entry into  
interLATA services pursuant to Section  
271 of the Federal Telecommunications  
Act of 1996.

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Docket No. 960786-A-TL

Filed: November 6, 2001

**POST-HEARING STATEMENT OF ISSUES AND POSITIONS  
AND POST-HEARING BRIEF OF  
THE JOINT ALECS**

DOCUMENT NUMBER-DATE

14094 NOV-60

COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Consideration of BellSouth  
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Docket No. 960786-A-TL

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**POST-HEARING STATEMENT OF ISSUES AND POSITIONS  
AND POST-HEARING BRIEF OF  
THE JOINT ALECS**

## **PRELIMINARY STATEMENT<sup>1</sup>**

Pursuant to rule 28-106.307, Florida Administrative Code, the Joint ALECs<sup>2</sup> file their Post-Hearing Statement of Issues and Positions and Post-Hearing Brief.

### **INTRODUCTION**

This Commission's role in bringing competition to Florida consumers is absolutely critical. It is this Commission which has heard the evidence in this matter which clearly indicates that 5 ½ years after passage of the Federal Telecommunications Act of 1996 (the Act) most consumers still have no choice as to who will provide their local telephone service. It is this Commission that is ultimately responsible to the consumers of Florida to implement the goals of the Act so that the broad choice envisioned by both the Congress and the state legislature will become a reality for telecommunications end users. Therefore, it is this Commission which must take the action necessary to require BellSouth to open its network so that the benefits of competition can come to fruition for all Floridians.

### **ARGUMENT**

#### **ISSUE A<sup>3</sup>**

#### **IN RENDERING ITS RECOMMENDATION ON BELLSOUTH'S § 271 APPLICATION, WHAT IS THE NATURE OF THE COMMISSION'S CONSULTATIVE ROLE?**

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<sup>1</sup>The following abbreviations are used in this brief: The Florida Public Service Commission is referred to as the Commission. BellSouth Telecommunications, Inc. is called BellSouth. The Federal Communications Commission is referred to as the FCC.

<sup>2</sup>Joint ALECs include: The Florida Competitive Carriers Association (FCCA), Covad Communications and NewSouth Communications.

<sup>3</sup>At the conclusion of the hearing, the parties were asked to brief this issue.

**Joint ALECs Position:** \* The Commission's function is to apprise the FCC of the status of competition in this state as it relates to compliance with the Competitive Checklist. This includes what must be accomplished in the state to ensure widespread local competition as envisioned by the Act.\*

**This Commission's Role**

This Commission plays an important role in the 271 process. Section 271(d)(2)(B) provides:

CONSULTATION WITH STATE COMMISSIONS.--Before making any determination under this subsection, the Commission [FCC] shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) [requirements for providing certain in-region interLATA services].

The FCC discussed its view of the role of the state commission in its *Ameritech*<sup>4</sup> decision:

In order to fulfill this [consultative] role as effectively as possible, state commissions must conduct proceedings to develop a comprehensive factual record concerning BOC compliance with the requirements of section 271 and *the status of local competition* in advance of the filing of section 271 applications. We believe that the state commissions' *knowledge of local conditions* and experience in resolving factual disputes affords them a unique ability to *develop a comprehensive, factual record regarding the opening of the BOCs' local networks to competition*.<sup>5</sup>

More recently, the FCC has said that the determination of whether a Regional Bell Operating Company ("RBOC") meets the § 271 Competitive Checklist is a "contextual decision based on the totality of the circumstances . . . ." <sup>6</sup> Thus, this Commission has the authority, and the obligation,

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<sup>4</sup> *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan* ("Ameritech"), 12 FCC Rcd 20543 (F.C.C. Aug. 19, 1997) (No. CC97-137).

<sup>5</sup> *Ameritech* at ¶ 30, emphasis added.

<sup>6</sup> *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communication Act to Provide In-Region, InterLATA Service in the State of New York* ("Bell Atlantic New York Order") ¶ 60, 15 FCC Rcd. 3953 (F.C.C. Dec. 22, 1999) (No. CC99-295, FCC 99-404).

to inform the FCC of its view of the Florida marketplace and whether, in its opinion, BellSouth has met the requirements of the Checklist via making its network available to competitors as well as through the other entry strategies. And equally important, it must also inform the FCC of what additional steps the Commission will require to ensure that local markets are opened to competitive entrants, for it is this Commission that is ultimately responsible for conditions here in Florida, not the FCC. Further, it is important for this Commission to recognize that the requirements set forth by the FCC in its rules and various § 271 orders represent the *minimum*--that is, they are a floor not a ceiling on what this Commission can require prior to BellSouth interLATA entry. (Tr. 1788, 1834). It is this Commission which has heard evidence about, and is most familiar with the, conditions that exist in Florida. It is this Commission that is in the best posture to decide what needs to be done to promote broad-based competition. If this were not the case, state commissions would be unnecessary to the entire regulatory scheme. As Commissioner Deason observed at hearing:

[I]f we're going to provide any meaningful input and if this hearing has any meaning or purpose, we're in the role of making our own independent determination and not just basically conducting a pretest for the FCC to whether they have met what the FCC has already described to be their standard. If that were the case, just avoid us and just go straight to the FCC.

(Tr. 726). In order to give meaning to its role, the Commission needs to view the issues before it in terms of what can it do to accomplish the pro-competitive goals of the Act. (Tr. 1551).

Not only does this Commission have responsibility under the federal Act, this Commission is even more fundamentally directed by the Florida Legislature to bring the benefits of local competition to consumers in this state. Local competition will only occur if this Commission makes wide-spread local competition its policy objective and makes sure that the things that are necessary for the incumbent network to be shared on a nondiscriminatory basis are implemented. (Tr. 1822-

23).

In particular, the Florida Legislature has charged the Commission with the following responsibilities:

- promote competition by encouraging new entrants into telecommunications markets. . . ;<sup>7</sup>
- encourage all provides of telecommunications services to introduce new or experimental telecommunications services. . . ;<sup>8</sup>
- ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior. . . .<sup>9</sup>

Further, the Commission has continuing oversight jurisdiction over anticompetitive behavior.<sup>10</sup> Thus, under both the federal and state scheme, this Commission must critically evaluate the evidence and determine if the goals of the legislation are being met--are there broad alternatives to local service from the incumbent for Florida's end users? If the answer is no, as it is in this case, the Commission must take action to foster such competition for it is the only regulatory body that has the obligation, the focus and the authority to do so.

#### **Lack of Competition in Florida**

The record in this case is clear-- BellSouth must receive a failing grade on any report card

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<sup>7</sup>§364.01(4)(d), Florida Statutes.

<sup>8</sup>§364.01(4)(e), Florida Statutes.

<sup>9</sup>§364.01(4)(g), Florida Statutes.

<sup>10</sup>§364.3381(3), Florida Statutes.

which measures the status of local competition in Florida. (Tr. 1824). BellSouth's *own* statistics<sup>11</sup> paint a very dismal picture regarding the status of local competition in Florida:

Mode of Entry	Relative ALEC Share <sup>12</sup>
Resale	2.5%
UNEs	2.1%
Facilities	5.5% <sup>13</sup>
Total	10.1%

As the evidence demonstrated, entry by resale is basically flat and has been discarded as a viable entry strategy. (Tr. 1823). An entry strategy that *peaks* at 2 ½ % of the market, as the resale strategy did, does not provide evidence of “irreversible” entry. (Tr. 1831). UNEs<sup>14</sup>, which hold the most promise for competition, are at an incredibly small 2.1% of the market, 5 ½ years after the Act’s passage, belying BellSouth’s claim that its network is truly open. (Tr. 1824). And other facilities-based providers<sup>15</sup> (after adjusting for ISPs) and focusing instead on the percent of regular, conventional consumers being served by new entrants—serve only 0.6% of the market. (Tr. 1826,

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<sup>11</sup>“Exhibit No. 50, JPG-1, revised.

<sup>12</sup>This chart represents BellSouth’s “report card” on competition in Florida. (Tr. 1822).

<sup>13</sup>The facilities-based number in the above chart is quite misleading because it is composed primarily of service provided to ISPs, not service to “average” telecommunications users. When the number is adjusted for ISP use, it falls to a share for facilities-based providers of 0.5%-0.6%. (Tr. 1826).

<sup>14</sup>BellSouth only began to offer UNE-P in Florida in February 2000, some four years after the Act’s passage. Up until that time, it strenuously resisting providing UNE-P to new entrants. (Tr. 269).

<sup>15</sup>UNEs are also considered a “facilities-based” entry strategy.



1832). Thus, 5 ½ years after the Act's passage, competitors in Florida (those that remain), under the best case scenario, serve only 5.2% of BellSouth's core market of conventional end-users. (Tr. 1827). Something is very wrong!

### **What Can This Commission Do?**

As the hearing was drawing to a close, Commissioner Jaber asked a question that is both pertinent to the Commission's deliberations here, as well as transcends them:

**What additional requirements would be necessary to effectuate a more competitive local market in Florida? (Tr. 1855-1856).**

Mr. Gillan, on behalf of the FCCA, provided a partial list of action items that would help open Florida's local markets, but also recommended that input be gathered from others. (Tr. 1810-1818). The items Mr. Gillan discussed, as well as other critical items listed below, *must* be implemented to open Florida's market to local competition.<sup>16</sup> The Commission *must* take these actions if it wants to see broad-based local competition become a reality in this state. Time is running short, for capital markets will not wait forever for a Commission to create the conditions needed for competition to take root.

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<sup>16</sup>One suggestion which BellSouth made regarding a way to encourage local competition—granting it interLATA authority—must be discounted at the outset. As cross-examination revealed, BellSouth's testimony was very contradictory. For example, while at one point stating that allowing BellSouth into the long distance market was the *only certain* way for broad-based local competition to occur (Tr. 80), this directly contradicts Ms. Cox's other testimony that extensive competition currently exists in Florida. (Tr. 78-79 ). Further, as Mr. Gillan testified, the most likely effect of granting BellSouth interLATA authority will be for it to gain even *greater* market dominance in the future. BellSouth will be positioned to offer packages that combine local service with other products broadly across the market. Thus, BellSouth will be able to easily increase its market share at the same time its only incentive to comply with the market opening provisions of the Act are removed. (Tr. 1794-1795). It is interesting to note that BellSouth has the ability to go outside its region to offer long distance service but has chosen not to. (Tr. 313).

Joint ALECs fully expect that BellSouth will recommend that each of the issues discussed below simply be deferred to some other proceeding or open docket. For instance, BellSouth may suggest that the Commission merely review these issues in the docket open to investigate BellSouth's anticompetitive conduct. However, such a delaying strategy is the hallmark of BellSouth's post-Act behavior and ignores the need for immediate and significant reform. The Commission must understand the dire straights that today confront competition and the harsh reality that there are probably not many dockets worth of resources remaining in the competitive industry. The need for reform is now, not delayed to the indefinite future.

### **1. BellSouth Must Be Required to Offer All Combinations**

The future of local competition depends upon efficient network provisioning that minimizes cost and accommodates volume. In order for competition to occur, BellSouth *must* provide access to *all* UNE combinations that it ordinarily provides to itself--whether the combinations are "currently" combined in the network or whether they are "new combinations." While BellSouth routinely combines network elements for itself and has configured its network and central offices to efficiently cross-connect facilities into standard arrangements, it refuses to do so for ALECs. (Tr. 1453).

New combinations are especially critical to competition because consumers and businesses frequently add lines and/or change locations. If the serving these "new combinations" is made too difficult and too expensive then BellSouth will have succeeded in disadvantaging competitors by putting competitive alternatives out of reach. (Tr. 1815).

BellSouth simply refuses to combine network elements that it ordinarily combines for itself.<sup>17</sup> There is no technical reason that BellSouth cannot do the combining. In response to a question from Commissioner Deason, Mr. Milner testified that in terms of operational efficiency for BellSouth, “[H]aving only one way to do business is simpler, it is easier to administer one process than more than one.” (Tr. 1278). BellSouth’s refusal has no purpose other than to increase competitors’ costs and to decrease network reliability. (Tr. 1814). Rather than simply combining elements for entrants at those points in the network (such as existing cross-connect frames) that are already established for just this purpose, BellSouth proposes to create *new* environments where entrants would do this work. Competitors would combine elements either in collocation space or in assembly points--space *especially* constructed for only this purpose. Ironically, even BellSouth itself would do “more combining” by cross connecting the requested elements to the facilities necessary to extend the elements to the ALECs, not to mention the cost (in time, money and space) to create the assembly point areas. Expending resources for the sole purpose of achieving a less reliable and more costly environment is a wasteful exercise that finds no support in economics, common sense or sound public policy. (Tr. 1816).<sup>18</sup> It has the effect of stifling competition by failing to provide entrants with nondiscriminatory access to UNE combinations as the Act requires. (Tr. 1453).

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<sup>17</sup>Actually, BellSouth will provide combinations for ALECs, but at non-TELRIC prices and after the addition of a “glue” charge to do the combining. This essentially results in BellSouth charging whatever it wants for these combinations. (Tr. 1456).

<sup>18</sup>It is worth noting that no RBOC has successfully obtained interLATA authority without at least a voluntary commitment to combine for entrants those elements that it ordinarily combines for itself. (Tr. 1817).

Ms. Caldwell's description how the assembly point process would work <sup>19</sup> illustrates the absolute absurdity of this arrangement and clearly makes the point that it is "offered" solely to make it more expensive and more difficult for ALECs to offer service. The assembly point arrangement works as follows: Both the loop and the port which the ALEC needs to provide service are attached to the main distributing frame. BellSouth then runs a jumper from the loop to the cable and the cable goes to a different frame. The same process is followed on the port side. Then the ALEC sends in its own technician to connect the two cables. In contrast, when BellSouth provides this combination itself or provides it for a *new BellSouth* customer, it simply connects the loop to the port on the distribution frame. (Tr. 503-504, 506). Not only is the assembly point process more complicated, it is more costly<sup>20</sup>, as BellSouth witness Caldwell admitted. (Tr. 504-507).<sup>21</sup> In addition, this process introduces more potential points of failure into the network. (Tr. 1284-1285).

When Mr. Milner was asked why BellSouth will not combine new elements but instead requires the "assembly point" arrangement, he said ". . . [combining elements] ignores what BellSouth's legal obligations are. . . . [O]perational efficiency is not the only reason to do something or don't do it the same way in all nine states. (Tr. 1279). This statement simply makes the point-- the *only reason* BellSouth does not combine the elements is because it is more costly and inefficient

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<sup>19</sup>See Exhibit No. 6, p. 136 (Caldwell deposition) for a diagram of the assembly point arrangement.

<sup>20</sup>Ms. Caldwell testified that it costs approximately \$430.00 to set up the assembly point arrangement and the ALEC still has to send out a technician to make the actual connection. The ALEC would also pay additional monthly recurring charges. (Tr. 508-509).

<sup>21</sup>Where a state commission, such as in Georgia or Louisiana, has ordered BellSouth to provide the connection, it does so. (Tr. 505).

for competitors if it refuses to do so.<sup>22</sup> The bottom line is that the only justification for its position on new combinations that BellSouth has ever offered as to *why* it requires such an absurd procedure is “because we can”—a statement that will remain true until this Commission responds: NO YOU CANNOT.

Numerous other state commissions in the BellSouth region have required BellSouth to provide to competitors network elements that it “currently combines”, including elements that it ordinarily combines, even if the particular elements are not yet connected for a specific customer.<sup>23</sup>

The Tennessee Regulatory Authority has held that:

the term “currently combines” . . . include[s] any and all combinations that BellSouth currently provides to itself anywhere in its network thereby rejecting BellSouth’s position that the term means already combined for a particular customer at a particular location.<sup>24</sup>

The Kentucky Public Service Commission has reached a similar conclusion:

BellSouth next asserts that it will combine UNEs only when the requested network elements (i.e. the loop and the port) have been previously combined in its own network. AT&T argues that BellSouth should combine network elements for AT&T if BellSouth ordinarily, or typically, combines such elements for itself. The Commission agrees.<sup>25</sup>

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<sup>22</sup>The lack of viability of the assembly point arrangement is plainly illustrated by the fact that even though this option has been available in BellSouth’s *entire* region for over a year, not one ALEC (in Florida or in any other BellSouth state) has chosen to provision its services in this way. (Tr. 510, 1273). Nonetheless, BellSouth stands ready to provision a “service” no one wants or can afford. (Tr. 1273). Nor has an assembly point arrangement been used in other areas where it is available. (Tr. 1816).

<sup>23</sup>In fact, there has been no RBOC granted interLATA authority that has not also either offered to provide new combinations or been ordered to provide new combinations. (Tr. 347).

<sup>24</sup>Intermedia/BellSouth Arbitration hearing transcript at 7-8.

<sup>25</sup>Order, Kentucky PSC Case No. 2000-465, May 16, 2001; affirmed on reconsideration, June 22, 2001. In addition at its October 30, 2001 meeting, in its UNE docket, the South

And, the Georgia Commission has held that:

“currently combines” means ordinarily combined within the BellSouth network, in the manner in which they are typically combined. Thus, CLECs can order combinations of typically combined elements, even if the particular elements being ordered are not actually physically connected at the time the order is placed.<sup>26</sup>

Even the Louisiana Commission has concluded that BellSouth must combine all elements that it ordinarily combines.<sup>27</sup>

Of course, BellSouth provides combinations where it has been ordered to provide them. The only reason that it does not provide combinations in Florida because this Commission has not ordered it to do so. (Tr. 1277). In order to hasten and encourage local competition, the Commission must require BellSouth to provide all combinations to competitors.<sup>28</sup>

**2. BellSouth Must Continue to Provide and Offer xDSL to Customers Who Choose a Competitive Provider for Voice Service**

BellSouth refuses to provide xDSL service to a customer who chooses a competitive provider for its voice service. (Tr. 287, 691-692). BellSouth aggressively markets bundled voice and advanced services while precluding ALECs from offering voice service to a consumer who has

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Carolina Commission also ordered BellSouth to provide combinations. *In the Matter of Generic Proceeding to Establish Prices for BellSouth's Interconnection Services, Unbundled Network Elements and Other Related Elements and Services*, Docket No. 2001-65-C.

<sup>26</sup>Order, Georgia Public Service Commission, Docket No. 10692-U, Feb. 1, 2000 at 11.

<sup>27</sup>*In re: Consideration and review of BellSouth Telecommunications, Inc.'s preapplication compliance with Section 271 of the Telecommunications Act of 1996 and provide a recommendation to the Federal Communications Commission regarding BellSouth Telecommunications, Inc.'s application to provide interLATA services originating in-region*, Docket No. U-22252 (Sept. 19, 2001).

<sup>28</sup>This would include EELs as well which entrants should be able to order using an local service request (LSR).

BellSouth xDSL service.

Inexplicably, if a customer has both voice and advanced services with BellSouth and wishes to switch to a new entrant for voice only and the provider uses UNE-P to provide that voice service, BellSouth will disconnect—that is, it will actually refuse to continue to provide-- the customer's xDSL service.<sup>29</sup> (Tr. 691-692). When BellSouth was questioned about the reason behind this “policy”, it could give no technical reason for its position. (Tr. 693, 709). Refusing to sell a profitable service simply because the customer has chosen an alternative voice provider, is as anticompetitive an act as the Commission will ever confront. The sole reason for such a posture is BellSouth's expectation that the customer who wants both voice and advanced services will remain with BellSouth rather than risk losing its advanced services. BellSouth's “policy” has the effect of chilling competition for advanced voice services by using its advanced services as a strategic sword to hold over the customer's head. (Tr. 1534).<sup>30</sup>

Like its position on new combinations, BellSouth's explanation for its policy here is simple—“because I can.” As BellSouth explains, the reason for its anticompetitive policy is that it is not “obligated to do so”, (Tr. 290), and that it is a “business decision.” (Tr. 687).<sup>31</sup> BellSouth admitted that there is no prohibition that would foreclose BellSouth from providing DSL service at the same time the ALEC provides voice service over UNE-P. (Tr. 723). Rather, it is clear that the

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<sup>29</sup>Similarly, BellSouth refuses to provide DSL service to customers served by UNE loops.

<sup>30</sup>BellSouth also intends to extend this “policy” to the broad band services it offers over the fiber-fed next generation digital loop carrier architecture. (Tr. 1534-1535).

<sup>31</sup>Mr. Williams further testified that he knows “of no interest right now at BellSouth to change that policy.” (Tr. 697). Obviously, the only way that BellSouth will change its “policy” is if this Commission orders it to do so.

reason BellSouth will *disconnect* a customer and lose xDSL revenue is to create just one more barrier to competition. There is no reason that a customer should not be able to get xDSL service from BellSouth and voice service from another provider if that is how the customer chooses to obtain its service. To ensure customer choice for local service and promote local competition, this Commission should require BellSouth to continue to provide xDSL to customers who choose new entrants to provide their voice service.

### **3. BellSouth Must Offer Line Splitters on All UNE-P Lines**

Consumer demand for advanced services as well as a combination of voice and advanced services is evident in today's marketplace. BellSouth aggressively markets such bundled services but has precluded ALECs who use UNE-P from offering the same options. This hampers competition for these services. (Tr. 1483).

It has been BellSouth's practice to make line splitting available for a new customer *only* if the ALEC provides its own splitter. (Tr. 119). This practice is discriminatory because while BellSouth provides xDSL service to new customers and allows ALECs to provide xDSL service when BellSouth continues to provide the voice portion of the service, BellSouth refuses to allow ALECs to provide voice and xDSL services to new customers through line splitting. Customer service and customer choice are negatively impacted by this discriminatory practice because ALECs are precluded from competing for a customer who wants to obtain voice and advanced data services over one loop. (Tr. 1490-1491, 1493).

In a complete about face from its prefiled testimony, BellSouth witness Williams testified from the witness stand that BellSouth will now provide the splitter in line splitting arrangements in Florida. (Tr. 668). ALECs welcome BellSouth's change of position; however, the Commission



should note that at this point in time no line splitters have been provided in Florida (Tr. 674), line splitting is not contained in any Florida interconnection agreement (Tr. 674), a line splitting offering is not found in the SGAT BellSouth filed in this case<sup>32</sup>, and business rules for line splitting were not put in place just a few months ago. (Tr. 676).

The Commission should confirm that BellSouth will make its splitters available to UNE-P providers in all circumstances, including adding DSL to an existing ALEC customer. (Tr. 1535). The Commission should also make it clear, as the Georgia Commission did, that UNE-P remains UNE-P when it is used for line splitting and that ALECs are entitled to the UNE-P rate when they are engaged in line splitting rather than having to pay the unbundled loop rate and the unbundled port rate. (Tr. 1537). Most importantly, the Commission must require that BellSouth demonstrate compliance with these new commitments in the next phase of this proceeding, through commercial application and working arrangements. Eleventh-hour “concessions” are nothing more than hollow promises until they translate to actual market experience.

#### **4. BellSouth Must Revise its UNE Prices So That They Are Cost-Based**

The Act requires that the pricing of unbundled network elements be nondiscriminatory and based on the cost of providing the element.<sup>33</sup> Cost-based rates must be supported by cost studies that

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<sup>32</sup>Many of the things BellSouth says it offers are not included in the SGAT filed in this case. For example, while BellSouth says it will allow ALECs to cross connect with one another without purchasing a cross-connect from BellSouth, that has not been incorporated in the SGAT. Nor is it in any interconnection agreements. (Tr. 247).

<sup>33</sup>§252(d)(1). In addition, the FCC adopted pricing rules which govern the implementation of this section of the Act. *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No.96-98, First Report and Order (rel. Aug. 8, 1996).

prove the rates are derived from the forward-looking cost of providing the elements, taking into account the circumstances in each state. (Tr. 1725). The rates proposed by BellSouth fail to meet this standard.<sup>34</sup>

The clearest indication that BellSouth's rates could not possibly be cost-based is Mr. Gillan's Exhibit No. 50, JPG-7. In this exhibit, Mr. Gillan estimated BellSouth's financial results for 2000, assuming that BellSouth was required to lease UNEs to offer its conventional switched services.<sup>35</sup> The analysis shows that BellSouth would have run squarely in the red, *by \$189 million*, though it actually had a net income of over \$1.8 billion in 2000. If even BellSouth itself could not operate in Florida if it had to lease its existing network, the rates it proposes to charge new entrants can not be cost-based.

It is useful to note that BellSouth did not rebut this analysis. BellSouth offered no empirical evidence that the analysis was performed incorrectly. Nor did BellSouth claim that the assumptions in the analysis (relating to average usage) were unreasonable—indeed, in Dr. Taylor's cross-examination, each assumption was shown to be accurate. (Tr. 980). Even though Dr. Taylor testified that if the analysis were correct (Tr. 920), the rates must be too high, BellSouth did not show any problem with any part of the analysis.

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<sup>34</sup>There are a number of flaws inherent in BellSouth's rates; these are discussed in detail in Mr. Darnell's testimony. For example, BellSouth uses three different network scenarios to develop UNE rates (Tr. 1757); BellSouth fails to forecast total demand for UNEs (Tr. 1759); BellSouth uses incorrect loading factors, which account for about ½ of the loop rates (Tr. 1760-1761); inflation is not properly applied (Tr. 1761); and finally BellSouth has inappropriately tried to address these issues in a § 271 review. (Tr. 1761-1762).

<sup>35</sup>Mr. Gillan's assumptions relied on ARMIS data and conservative assumptions for the average telecommunications user. (Tr. 1811).

In the near term, the use of the UNE-P is the method of service that presents the most significant opportunity for competitive entry. However, BellSouth has proposed *even higher* UNE rates in the continuation of this Commission's UNE pricing docket.<sup>36</sup>

Further, many of the rates BellSouth has submitted are simply *proposed* rates pending final decisions in Docket No. 990649-TP.<sup>37</sup> These rates, however, cannot be assumed to be cost-based until the Commission completes the next phase of the UNE pricing docket and orders BellSouth to make the changes necessary to make its rates cost-based.<sup>38</sup> For other rates which were not discussed in that docket, such as line sharing, BellSouth has submitted those rates for the *first* time in this docket.

Further evidence regarding the lack of cost basis for BellSouth's proposed rates is the fact that the UNE-P rates that BellSouth proposes in Florida are *21% higher* than the Georgia UNE-P loop rate of \$12.55. (Tr. 1744-1745). The average UNE loop cost in Florida should be *lower* not higher than the Georgia cost because Florida is significantly more population dense than Georgia and population density is a major driver of loop cost. (Tr. 1745). Additionally, Georgia has just begun a proceeding to evaluate BellSouth UNE rates which should result in a reduction to UNE loop rates. A cost-based UNE loop rate for Florida should be below \$7.00, not the \$18.13<sup>39</sup>

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<sup>36</sup> ODUF and ADUF rates are specifically discussed below.

<sup>37</sup>Some other rates have been arbitrated, but BellSouth has not updated its SGAT to reflect, for example, the rates the Commission arbitrated in the Covad/BellSouth arbitration. Docket No. 001797-TP. (Tr. 259).

<sup>38</sup>See Mr. Darnell's testimony at Tr. 1728 for actions the Commission must take to make BellSouth's rates cost-based.

<sup>39</sup>The proposed \$18.13 charge does not include the reinstatement of the inflation factor as a result of the Commission's reconsideration of the UNE order.

BellSouth proposes. (Tr. 1746, 1750). Additionally, features charges should be eliminated or significantly reduced.

The Commission has heard significant evidence in this case which indicates that the rates which BellSouth offers in Florida are not cost-based. The Commission will never see broad-based local competition in this state if it does not require BellSouth to revise its UNE prices so that they meet the Act's cost-based requirements. Therefore, the Commission should, *in this case*, require BellSouth to reduce its UNE rates to encourage broad-based local competition. In particular, the Commission should require BellSouth to reduce its UNE rates to comply with Checklist Item No. 2. The Commission should require BellSouth to eliminate the features charge, eliminate charges for ODUF and ADUF (discussed below), and reduce the average UNE loop rate to \$7.00. EEL rates should be reduced as should the rate for loops used to provide advanced services. In addition, the Commission should lower rates for the non recurring charges on the ADSL loop and lower the recurring charge on the DS1 loop. This will result in cost-based rates as required by the Act.

#### **5. BellSouth Must Eliminate Charges for ODUF and ADUF**

BellSouth proposes to charge competitors for ODUF (provision of local daily usage files) and ADUF (provision of access daily usage files). These files provide the call detail information which the ALECs need to bill their own customers, (Tr. 512), as well as confirm the accuracy of the UNE bills received from BellSouth. The ODUF files are needed for ALECs to verify the amount BellSouth is charging them for switched usage; such files are the *only* source of this information. (Tr. 524-525). BellSouth already has and collects this information for itself because it needs it to bill the ALECs. Nonetheless, BellSouth proposes to charge for this information and to charge at a highly inflated rate that is not plausibly cost-based as explained below.

First, there should be no separately delineated charge for these records. BellSouth requires these same records for its operations and it has not shown any unique cost associated with provisioning the information to ALECs.

Second, the systems which BellSouth uses to extract this billing data are regional—the same BellSouth systems generate this information regardless of the state. (Tr. 525). Thus, the costs (if there even are any additional costs) should be similar from state to state. (Tr. 1748). However, a comparison of the Florida and Georgia rates shows a wide disparity in BellSouth's "cost." BellSouth's Florida ADUF rates are *seven times greater* than the rates BellSouth recently filed in Georgia; BellSouth actually made a filing to reduce these rates in Georgia. (Tr. 515, 519-520).

Third, BellSouth's charges are way out of line when compared to other ILECs (as well as compared to what BellSouth itself has proposed in Georgia, as discussed above). While BellSouth's usage file charges amount to an additional charge of \$3.34 per line in Florida, Ameritech's charge is \$0.27 per line while Qwest's is \$0.29. (Exhibit No. 50, JPG-8).

Applying the charges which BellSouth suggests be imposed for this information to BellSouth's reported call volumes in Florida in 2000 produces a "cost" for this information of \$274 million or an average cost per line of \$3.34! (Tr. 1791; 1820; Exhibit No. 50, JPG-8). Such a staggering number can not possibly pass the "straight face" cost test. Competition is hindered when an ALEC, which needs this information to bill its customers or to audit its own bills, sees its costs soar due to inflated charges. (Tr. 1813). The Commission should eliminate these charges.

## **6. BellSouth Must Permit the Resale of Advanced Services**

There is growing consumer demand for high-speed broadband services in the telecommunications market. ALECs are attempting to incorporate advanced services into their own service offerings due to this widespread demand; however, as is the case with the bundled offering of voice and data discussed above, they are met with great resistance from BellSouth. In particular, BellSouth refuses to offer DSL service for sale via resale to new entrants.

The availability of a viable DSL resale offering will allow ALECs to more easily bundle this offering with their own voice service without having to construct ubiquitous networks. This is a significant potential market entry mechanism. Such bundling will provide consumers with choice and help to open the local markets. The Commission should require resale of DSL as another means to open the local markets.<sup>40</sup> BellSouth should be required to introduce a wholesale DSL product and demonstrate, through commercial volume, that the service is useful and not simply a feigned effort at paper compliance.

## **7. BellSouth Must Provide Functional OSS at Parity with Its Own Systems**

Appropriately functioning OSS, which is at parity with the systems BellSouth uses for itself, is critical to the development of local competition. If entrants can not easily and accurately place, process and provision orders, they can not provide local service to end users. At a minimum, the Commission must require BellSouth to:

- Provide an appropriate and balanced change control process;
- Provide an interactive agent to process orders;

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<sup>40</sup>See discussion of *ASCENT* decisions in Issue 15.

- Provide fully parsed customer service records;<sup>41</sup>
- Provide telephone name and number migration;
- Provide more time to respond to rejected orders (30 days instead of the current 10 days);
- Eliminate the two order process for disconnecting and then moving a customer to a new provider. Instead provide a single order process to avoid loss of dial tone;
- Provide a single LSR to migrate an existing UNE-P to a line splitting arrangement.
- Correct missing notifier problem.
- Provide electronic ordering capabilities (LENS, TAG, EDI) for the UDC/IDSL loop; line sharing and ADSL loops that require conditioning (approximately 20% of ADSL loops) and line sharing orders; and non-designed UCL-ND loop product.

As to loop ordering discussed in the last bullet above, BellSouth must put in place electronic ordering systems that permit carriers to order loops without the need for manual handling. Electronic handling of orders is especially critical for UDC/IDSL loops, for line sharing and ADSL loops that require loop conditioning and for non-designed UCL-ND loops. Currently, many of these types of loop orders must be processed manually by BellSouth because BellSouth does not make any type of electronic ordering available. Therefore, a carrier must place its orders via fax and BellSouth representatives must retype each and every portion of the orders into BellSouth systems. Not only is this process extremely time consuming, it also introduces unnecessary errors into the ordering

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<sup>41</sup>The Georgia Public Service Commission has imposed this requirement on BellSouth as well as requiring telephone name and number migration, 30 days to respond to rejected orders, a single order process for disconnecting and moving a customer, and a single LSR to migrate a UNE-P customer to line splitting. *In re: Consideration of BellSouth Telecommunications, Inc.'s Entry into InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket Nos. 6863-U, 7253-U, 8354-U (October 19, 2001).

process. Further, for any order placed manually, a competitor must check the status of the order manually as well as submit changes, cancellations, or disconnects on that order manually.

In contrast, BellSouth's retail analogs for all of these loops CAN be ordered electronically. For example, the retail analog for the UDC/IDSL loop is the retail ISDN service, which can be ordered electronically. All of BellSouth xDSL services, both the designed and non-designed services, can be ordered electronically. Failure to implement electronic ordering of these products deprives competitors of a meaningful opportunity to compete. The Commission can significantly improve the viability of local competition for these types of services by requiring an electronic ordering process.

#### **8. BellSouth Must Be Prohibited from Anticompetitive Win Back Activity**

Win back is the process by which BellSouth attempts to convince a customer to return to it once the customer has chosen a competitive provider. BellSouth apparently assembles a list of customers who have disconnected from BellSouth, eliminates those customers who have moved out of its service territory, and then assumes the remaining customers have switched to a new entrant. These customers are then targeted for win back solicitations. (Tr. 306). As Commissioner Palecki noted, this process makes it easy for BellSouth win back personnel to get information about customers who have left BellSouth. (Tr. 307).

BellSouth's activities in this area have a very detrimental effect on competition. Therefore, the Commission should put controls in place which curb BellSouth's anticompetitive actions. For example, the Commission should require BellSouth to institute a Code of Conduct which absolutely



prohibits BellSouth employees from disparaging the services or products of others.<sup>42</sup> The Code of Conduct should also prohibit employees from providing false information about competitors, such as that they are going out of business.<sup>43</sup>

In addition, any win back policy should include the following components:

- BellSouth should be prohibited from engaging in any win back activities for at least 10 business days once a customer changes carriers.<sup>44</sup>
- BellSouth should be prohibited from marketing to the customer in the final bill.
- BellSouth should be prohibited from pricing its promotions below UNE rates.
- BellSouth should be prohibited from holding customers liable if they migrate to a competitor during the term of a win back promotion—this clearly discourages customers from choosing a new entrant to provide service. (Tr. 302).

In the context of a §271 case, the Louisiana Public Service Commission<sup>45</sup> recently placed restrictions on BellSouth's ability to engage in win back activities. It prohibited BellSouth from engaging in any win back activities for 7 days once a customer switches to another local telephone service provider. It also prohibited BellSouth's wholesale divisions from sharing information with its retail divisions. Finally, the Louisiana Public Service Commission prohibited BellSouth from including any marketing information in the final bill it sends to the customer. (Tr. 341-342). The

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<sup>42</sup>Since BellSouth does not condone disparagement of competitors (Tr. 363), it should have no objection to inclusion of this in a Code of Conduct.

<sup>43</sup>Pennsylvania has a Code of Conduct in place for incumbents to prevent anticompetitive activity.

<sup>44</sup>There is currently no such policy in place at BellSouth. (Tr. 318).

<sup>45</sup> See Footnote 27.

Florida Commission should take similar action in Florida.

The Commission's institution of the items discussed above will be a large step forward in opening Florida's local markets to competition so that all end users will have a choice for local service as envisioned by the Act.

## ISSUE 1

### **HAS BELLSOUTH MET THE REQUIREMENTS OF SECTION 271(C)(1)(A) OF THE TELECOMMUNICATIONS ACT OF 1996?**

**(A) HAS BELLSOUTH ENTERED INTO ONE OR MORE BINDING AGREEMENTS APPROVED UNDER SECTION 252 WITH UNAFFILIATED COMPETING PROVIDERS OF TELEPHONE EXCHANGE SERVICE?**

**(B) DOES BELLSOUTH CURRENTLY PROVIDE ACCESS AND INTERCONNECTION TO ITS NETWORK FACILITIES FOR THE NETWORK FACILITIES OF COMPETING PROVIDERS?**

**(C) ARE SUCH COMPETING PROVIDERS PROVIDING TELEPHONE EXCHANGE SERVICE TO RESIDENTIAL AND BUSINESS CUSTOMERS EITHER EXCLUSIVELY OVER THEIR OWN TELEPHONE EXCHANGE SERVICE FACILITIES OR PREDOMINANTLY OVER THEIR OWN TELEPHONE EXCHANGE SERVICE FACILITIES?**

**Joint ALECs Position:** \*BellSouth has failed to meet the requirements of Section 271(c)(1)(A).\*

(a) \*Yes. *On paper*, BellSouth has binding interconnection agreements. However, experience in the market indicates that BellSouth's network is not open to competitors as required by the Act.\*

(b) \*No. If BellSouth were providing appropriate access and interconnection to its network facilities, local competition would be widespread in Florida. Instead, it is negligible 5 ½ years after the Act's passage.\*

(c) \*No. If BellSouth were providing appropriate access and interconnection to its network facilities, local competition would be widespread in Florida. Instead, it is negligible 5 ½ years after the Act's passage.\*

### Track A's Requirements

This issue deals with whether or not BellSouth satisfies the requirements of § 271(c)(1)(A) (Track A) of the Act. In evaluating BellSouth's compliance with this section, the Commission must consider whether competitors have had an opportunity to compete in the Florida market as well as the *actual* status of local competition in Florida.<sup>46</sup> Such an evaluation stands in stark contrast to the paper promises BellSouth has set forth in this case.

The purpose of § 271(c)(1)(A) is to require market evidence that the Act's market opening provisions have been met *before* BellSouth is granted interLATA authority. This concept was explained in the Conference Committee Report on the Act:

The requirement [in 271(c)(1)(A)] that a BOC is "providing access and interconnection" means that the competitor has implemented the agreement and the competitor is operational. This requirement is important because it will assist the appropriate state commission in providing its consultation and in the explicit factual determination . . . that the requesting BOC has fully implemented the interconnection elements set out in the "checklist" under new section 271(c)(2).<sup>47</sup>

As the FCC has said, it is BellSouth's obligation to provide "actual evidence demonstrating . . . present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior."<sup>48</sup> Track A requires *actual* market experience to help state commissions judge whether nondiscriminatory access has been provided. (Tr. 1850). Thus, BellSouth must do more than show that it has agreements on paper with ALECs or that a certain

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<sup>46</sup>BellSouth admits that it is important for the Commission to look at the actual level of competition in Florida as it makes its decision in this case. (Tr. 323).

<sup>47</sup>Joint Explanatory Statement of the Committee of the Conference at p. 33.

<sup>48</sup>*Ameritech* at ¶55.

number of ALECs possess certificates or interconnection agreements<sup>49</sup> that would permit them to do business in the state. BellSouth must demonstrate that widespread commercial alternatives are available and that the level of competition in the state is consistent with what the Commission would expect if competitors had the same access to BellSouth's network as BellSouth itself does. That is, the most telling evidence that BellSouth provides entrants access to its network on terms that are nondiscriminatory and cost-based would be the emergence of measurable and meaningful local competition. (Tr. 1794). The Commission must critically examine the level of local competition in Florida to determine if it is even remotely consistent with BellSouth's claim of nondiscriminatory access.

#### **Local Competition in Florida is Minimal**

BellSouth claims that competition in Florida is "economically viable" and "irreversible." (Exhibit No. 13, CKC-4, p. 2). However, a review of the progress made via the three entry strategies (resale, UNEs, facilities-based) proves otherwise. Resale, the first entry method targeted by many would-be competitors after the passage of the Act, is flat at about 2.5% of the total market. (Tr. 1823). Most entrants have realized that resale is simply not a viable entry strategy because the economics are unattractive. Due to the very small margin between the wholesale and retail rates, carriers who used this strategy have either failed in the market or moved on to a different business model. (Tr. 1800).

As discussed above, while entry using UNEs is the most likely strategy to bring competition

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<sup>49</sup>BellSouth witness Cox admitted that such information tells the Commission nothing about how many competitors are actually providing service in Florida or how many new entrants have gone out of business. (Tr. 324-326).

to the average consumer or small business, UNE-based competition is today only in its infancy, even based on BellSouth's own numbers.<sup>50</sup> Such a strategy has yet to succeed in Florida due to the high rates BellSouth charges to lease UNEs as well as its refusal to provide combinations.

Finally, BellSouth has severely overstated competition for ALECs' use of their own facilities. The majority of the activity in this area has come from service to ISPs, the one niche area where ALECs have had some success. However, success in serving this limited group does not answer the question as to how ALECs are doing winning any portion of BellSouth's established customer base. When ISPSs are factored out of the analysis, ALECs serve approximately 0.6% of customers over their own facilities. Thus, when the appropriate adjustments are made, new entrants have a 5.2% share of the market. (Tr. 1827). Clearly, such a minute market share 5 ½ years after the Act's passage is prima facie evidence that BellSouth cannot possibly be providing access to its network to competitors in the same way it does for itself. Therefore, it cannot be found to have met Track A's requirements.

### **Introduction to Competitive Checklist Items**

#### **The "Track B" Portion of the Case**

As an initial matter, it is important to remember that the Commission has not heard a critical aspect of this case. Operational support systems (OSS) are integral to almost all of the 14 points on the Competitive Checklist--how well OSS operates in the marketplace, whether it can operate at commercial volumes, and whether it operates at parity with the systems BellSouth uses itself must be determined before any conclusion can be reached as to Checklist compliance. However, the

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<sup>50</sup>Exhibit No. 50, JPG-1.

Commission, in this portion of the docket, heard little about BellSouth's OSS.<sup>51</sup> Nor did the Commission hear evidence on performance measures, BellSouth's compliance or lack of compliance with such measures or the ALECs' real world experience with BellSouth in the marketplace. All of these issues will be considered by the Commission in what has come to be known as "Track B" of this case. That portion of the case will not consist of an evidentiary hearing, but rather will utilize a third party test by KPMG as well as a workshop, subsequent comment period, and Staff recommendation to the Commission. As the Commission considers this portion of the record related to BellSouth's §271 application, it must remember that no actual determination of compliance or non compliance can be made until the other portion of the docket is concluded. Both aspects of the case must be considered together.

### **The Burden of Proof**

As the FCC has noted, the burden rests with BellSouth to provide "actual evidence demonstrating . . . present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior."<sup>52</sup> Despite the pounds of paper BellSouth has filed in this case, it has failed to carry its burden and has presented empirical estimates of competition which are inconsistent with other evidence as well as discounted anecdotal information based on early announcements from ALECs that have either experienced financial difficulty or deployed technologies that fell short of expectations. (Tr. 1798).

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<sup>51</sup>Though Joint ALECs included OSS items in their discussion above regarding what must be done to open the Florida markets to competition, this was included to be fully responsive to the Commissioners' inquiries.

<sup>52</sup>*Ameritech* at ¶ 55.

### BellSouth Has Failed to Comply with the Competitive Checklist

The Act imposes on BellSouth the obligation to provide competitors with the tools needed to open the local market to competition via the three entry strategies. However, 5 ½ years after the Act's passage, the broad-based entry and widespread consumer choice envisioned by Congress is noticeably absent in Florida. Competition has not made significant inroads in the Florida market for numerous reasons.<sup>53</sup>

As discussed earlier, one of the main reasons that broad-based competition has failed to materialize is that the prices BellSouth charges its competitors are just *too high* to permit widespread competitive entry. While the Act requires UNEs rates to be set at cost-based prices, the prices BellSouth charges competitors in Florida are well above cost-based levels. As Mr. Gillan testified, if BellSouth had to serve its customers by leasing UNEs at the prices BellSouth offers, it would operate in the red! (Tr. 1811-1812; Exhibit No. 50, JPG- 7). Clearly, competitors cannot be successful when prices they must pay for network elements are excessive.

Each of the individual Checklist items is discussed below. BellSouth has failed to show compliance with a majority of them. Therefore, the Commission should advise the FCC that BellSouth has failed to meet the Act's requirements for interLATA entry.

#### ISSUE 2

**DOES BELLSOUTH CURRENTLY PROVIDE INTERCONNECTION IN ACCORDANCE WITH THE REQUIREMENTS OF SECTIONS 251(C)(2) AND 252(D)(1) OF THE TELECOMMUNICATIONS ACT OF 1996, PURSUANT TO SECTION 271(C)(2)(B)(I) AND APPLICABLE RULES PROMULGATED BY THE FCC?**

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<sup>53</sup>See discussion at pp. 5 - 7, above.

**(A) HAS BELLSOUTH IMPLEMENTED PHYSICAL COLLOCATION REQUESTS IN FLORIDA CONSISTENT WITH FCC RULES AND ORDERS?**

**(B) DOES BELLSOUTH HAVE LEGALLY BINDING PROVISIONING INTERVALS FOR PHYSICAL COLLOCATION?**

**(C) DOES BELLSOUTH CURRENTLY PROVIDE LOCAL TANDEM INTERCONNECTION TO ALECS?**

**(D) DOES BELLSOUTH CURRENTLY PERMIT THE USE OF A PERCENT LOCAL USAGE (PLU) FACTOR IN CONJUNCTION WITH TRUNKING?**

**(E) DOES BELLSOUTH CURRENTLY PROVIDE ALECS WITH MEET POINT BILLING DATA?**

**(F) HAS BELLSOUTH SATISFIED OTHER ASSOCIATED REQUIREMENTS, IF ANY, FOR THIS ITEM?**

**Joint ALECs:** \*No. BellSouth fails to provide appropriate trunk augmentation. The percentage of calls blocked on ALEC trunk groups is substantially greater than the percentage of blocked calls on BellSouth's retail trunk groups. In addition, ALECs are charged excessive rates for power in collocation space.\*

(a) \*No. BellSouth fails to provision collocation power at appropriate rates in contravention of this Checklist item.\*

(b) \*No position.\*

(c) \*No position.\*

(d) \*No position.\*

(e) \*No position.\*

(f) \*BellSouth improperly imposes financial responsibility for transporting traffic within a LATA, requires ALECs to establish inefficient interconnection trunking arrangements and prohibits ALECs from providing competing access service.<sup>54\*</sup>

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<sup>54</sup>Joint ALECs adopt WorldCom's argument on this subissue.



### Trunk Blockage

Section 251(c)(2)(A) of the Act requires BellSouth “to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with [BellSouth’s] network . . . for the transmission and routing of telephone exchange service and exchange access.” Such interconnection must be “at least equal in quality to that provided by [BellSouth] to itself or to . . . any other party to which BellSouth provides interconnect”<sup>55</sup> and must be provided “on rates, terms and conditions that are just, reasonable, and non-discriminatory, in accordance with the terms of the [interconnection] agreement and the requirements of [section 251] and section 252.”<sup>56</sup> BellSouth has failed to do this because the interconnection it provides to new entrants is not equal in quality to that which it provides itself.

New entrants experience significant trunk blockage which BellSouth itself does not experience. The FCC has determined that disparities in trunk group blockage are an indicator of a failure to provide interconnection which is “equal in quality” because trunk group blockage indicates that end users are experiencing difficulty receiving calls and this may have a direct impact on the customer’s perception of a new entrant’s service quality. (Tr. 1036).<sup>57</sup> The FCC has also determined that installation time for interconnection services in two-way trunking arrangements are indicators of whether the incumbent provides interconnection service under terms and conditions that

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<sup>55</sup>47 USC § 251(c)(2)(C).

<sup>56</sup>47 USC § 251(c)(2)(D).

<sup>57</sup>*In the Matter of Application of BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121 (rel. Oct. 13, 1998) (“Louisiana Order”) at ¶¶ 76-77; *Ameritech* at ¶¶ 240, 243.

are no less favorable than the terms and conditions the BOC provides to its own retail operations. (Tr. 1036-1037).

A brief review of BellSouth's *own* data on trunk blockage illustrates that it has failed to comply with this standard. Exhibit No. 35 is a trunk group service report from BellSouth's Performance Measurements and Analysis Platform (PMAP) website. It identifies the various types of trunk groups, including trunks from BellSouth's historical network (CTTG and Local Network), as well as BellSouth-administered ALEC trunks and ALEC-administered ALEC trunks. The latter two trunk groups carry more ALEC traffic. (Tr. 1238-1241). A comparison between the trunks that serve BellSouth and the trunks that are administered by BellSouth to serve ALECs demonstrates the disparity in the way BellSouth treats itself and the way it treats ALECs.

For example, BellSouth's own August 2001 data shows that for North Florida for BellSouth's local network for a blocking threshold over 2%, 2 of 377 of BellSouth's CTTG trunk groups were blocked; in South Florida, 0 of BellSouth's 191 trunk groups were blocked. At the 3% blocking level, 1 of 500 of BellSouth's local network trunk groups was blocked in North Florida and 0 of 291 in South Florida were blocked. (Tr. 1242). However, for ALEC trunk groups (BellSouth administered), 5 of 114 groups in North Florida were blocked over the 3% measured blocking threshold and 5 of 111 trunk groups were blocked in South Florida. For ALEC-administered trunk groups in North Florida, 6 of 388 trunk groups were blocked. For South Florida, 15 of 464 were blocked or 3.2%. (Tr. 1243-1244). In the FCC order granting SBC interLATA authority in Kansas

and Oklahoma<sup>58</sup>, the FCC held that the measured blocking threshold could not exceed 1%. And the RBOC in that case had 0 blocking observed over the threshold. In the FCC § 271 order in Massachusetts<sup>59</sup> less than 2% of the ALEC trunk groups exceed a threshold of 0.5%. (Tr. 1244). In the FCC 271 New York order<sup>60</sup>, the incumbent did not have blocking over 2% in a single month. (Tr. 1244). BellSouth clearly fails to meet the required standards.<sup>61</sup>

Exhibit No. 36 is BellSouth's trunk performance group data for May through July 2001. This data also shows discriminatory treatment between BellSouth and ALECs. For example, in North Florida for May 2001, BellSouth trunk groups with observed blocking greater than 3% were 0, while ALEC trunk groups with observed blocking greater than 3% were 4. (Tr. 1289-1290). In South Florida, for the same time period, it was 3 for BellSouth and 4 for ALECs. Region-wide for May 2001, BellSouth trunk groups with blocking greater than 3% were 26 while ALEC groups with blocking greater than 3% were 37. (Tr. 1291). On a percentage basis, for North Florida, BellSouth

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<sup>58</sup>*In the Matter of Joint Application by SBC Communications, Inc. Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00217 (rel. January 22, 2001).

<sup>59</sup>*In the matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprises Solutions) and Verizon Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988 (2001).

<sup>60</sup> See footnote 6.

<sup>61</sup>BellSouth witness Milner took issue with BellSouth's *own* report and said that BellSouth now uses a different report to analyze network blockage. (Tr. 1245). However, he also admitted that the analysis used in Exhibit No. 35 is the same method that the FCC used in reviewing RBOC 271 applications. (Tr. 1246). Further, the "new" report which BellSouth now wants to rely upon gives BellSouth the ability to lower blocking statistics by shifting blame for blocking situations to ALECs. Further, the report could mask blockage problems because it averages all geographical areas together. (Tr. 1246-1248).

experienced a percent blocking of 0 while ALECs experienced blockage of 3.6%. In South Florida, BellSouth experienced blockage of 1.01% while ALECs experienced blockage of 3.64%. Similar disparities between BellSouth and ALECs are provided on Exhibit No. 36 for June and July 2001.

Perhaps the most telling part of this analysis is found in the three-month summary. For the three-month period, the blocking difference between BellSouth's own trunk groups and ALEC trunk groups was an astounding **698%**! (Tr. 1295).<sup>62</sup> This certainly is not interconnection equal in quality to that which BellSouth provides itself.<sup>63</sup>

In this Commission's prior § 271 Order, it required BellSouth to assume responsibility for trunk capacity on its network:

Regarding complaints about blockages on the network, although TCG does have the responsibility to inform BellSouth via forecasts and regular communication, BellSouth must assume the responsibility for trunk capacity requirements on its network.<sup>64</sup>

The experience of NewSouth in the marketplace confirms that BellSouth has failed to heed the Commission's prior comments and has not fulfilled its § 271 obligation as it relates to trunk blockage. NewSouth, pursuant to the terms of its interconnection agreement with BellSouth, (Exhibit

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<sup>62</sup> This calculation is consistent with the blockage calculation the FCC performed in the Louisiana Order, see footnote 218. *See also*, Exhibit No. 37.

<sup>63</sup> In *In the Matter of Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprises Solutions, Verizon Global Networks, Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138 at ¶ 18 (rel. Sept. 19, 2001), the FCC said: "In prior section 271 applications, the Commission concluded that disparities in trunk group blockage indicted a failure to provide interconnection to competing carriers equal-in-quality to the interconnection the BOC provided to its own retail operations."

<sup>64</sup> Order No. PSC-97-1459-FOF-TL at 58.

No.38), provides regular forecasts to BellSouth regarding upcoming needed network upgrades. However, BellSouth does not adequately manage its network to avoid network blockages affecting NewSouth and its customers, despite receipt of such information.

NewSouth, rather than BellSouth, has had to initiate almost every request for trunk augmentation. BellSouth consistently resists NewSouth's requests for augmentation of BellSouth's reciprocal trunk groups. (Tr. 1037). For example, in a trunk blockage situation that occurred in Macon, NewSouth had to make *five* requests to BellSouth before the trunk group was augmented (Tr. 1311-1312; Exhibit No. 39), and the augmentation occurred *only* after there was blockage on the network.

Even after finally agreeing to trunk augmentation, it often takes BellSouth too long to provision the request which results in blockage for NewSouth customers. (Tr. 1022-1023). Though the blockage is BellSouth's responsibility, customers often blame the new entrant, in this case, NewSouth. (Tr. 1025). While NewSouth has diligently tried to work with BellSouth on this issue, BellSouth has failed to timely and effectively address these interconnection problems. (Tr. 1025-1026). While BellSouth claims that underutilization of network facilities is an inefficient way to manage a network (and NewSouth agrees), BellSouth is at no risk when it does a trunk augment at NewSouth's request. The parties' interconnection agreement provides recourse for BellSouth, via the use of penalties, in the unlikely event that the facilities NewSouth requests are underutilized. (Tr. 1043, 1066).

BellSouth implied at hearing that the trunk blockage situations NewSouth has experienced were due to "customer spikes" NewSouth caused by bringing on one large customer and not informing BellSouth. However, with the exception of one specific incident, customer "spikes" are

not the usual traffic pattern for NewSouth which typically experiences linear growth patterns. (Tr. 1070).

BellSouth's delays in providing interconnection trunks have caused irreparable harm to NewSouth and have forced NewSouth to delay bringing new customers on line. This has impacted both NewSouth's finances and its perceived quality and reliability among consumers. (Tr. 1039). NewSouth has received customer complaints and even lost customers as a result of the network blockage. (Tr. 1068). In addition, when there is a blockage problem, the customer perception is that NewSouth, as the new entrant, has caused the problem. (Tr. 1071-1072).

### Collocation

ALECs use collocation as one of the primary methods of interconnection and the FCC has recognized that collocation is a prerequisite to Checklist compliance.<sup>65</sup> Section 251(c)(2) of the Act requires BellSouth to provide for collocation at any technically feasible point within its network at the same level of quality that it provides central office space to itself. BellSouth recognizes that it must provide collocation on terms, rates and conditions that are just, reasonable and nondiscriminatory. (Tr. 803). However, BellSouth fails to comply with this Checklist item for the following reasons: 1) BellSouth has the ability to unilaterally modify critical terms and conditions relating to collocation without approval by the Commission or negotiations with entrants; 2) BellSouth recovers "extraneous expenses" which do not conform with cost-based pricing or the FCC rules; 3) BellSouth does not provide shared collocation as required by the FCC *Advanced Services*

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<sup>65</sup>*Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, ¶ 64.

*Order*<sup>66</sup>; and BellSouth fails to provide for adjacent off-site collocation.<sup>67</sup>

Further, as noted above, prices for collocation must be just and reasonable. However, the costs which BellSouth imposes on ALECs for power to their collocation space is not just and reasonable. For example, BellSouth charges NewSouth for much more power than it can physically use in violation of the Act's requirement of reasonable prices. NewSouth's collocation space contains equipment that draws an average of 27 amps of power, requiring a fused capacity of about 45 amps. (Tr. 1039). NewSouth uses a battery distribution feed board ("BDFD") that accepts a single power feed from BellSouth. (Tr. 1039). If there is any doubt about the size or capability of NewSouth's equipment, BellSouth has the right to inspect NewSouth's collocation space and equipment. (Tr. 836). However, instead of charging NewSouth based on the fused capacity or the maximum draw, as configured in NewSouth's BDFD and as specified in NewSouth's collocation applications, BellSouth charges NewSouth for the *maximum* amount of power that can be drawn from its power feed --225 amps. (Tr. 1040). Thus, BellSouth charges NewSouth for more power than it needs.

BellSouth has rebuffed all suggestions from NewSouth to alter this situation even though the situation could be remedied by a billing change only and would require no physical reconfiguration. Instead, BellSouth suggests that NewSouth go to the expense of a costly reconfiguration and preapplication process for every site, (Tr. 1040), when all that is needed is a record change to reflect

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<sup>66</sup>*In the Matter of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 99-48 (rel. March 31, 1999).

<sup>67</sup>Joint ALECs adopt AT&T's argument on these items.

that NewSouth can only use a certain maximum amount of amps. BellSouth's position on this issue results in charges<sup>68</sup> to NewSouth for thousands of dollars for power that NewSouth has not requested and does not use. (Tr. 1033). Thus, the prices BellSouth charges for power to the collocation space cannot be deemed to be reasonable.

### ISSUE 3<sup>69</sup>

**DOES BELLSOUTH CURRENTLY PROVIDE NONDISCRIMINATORY ACCESS TO ALL REQUIRED NETWORK ELEMENTS, WITH THE EXCEPTION OF OSS WHICH WILL BE HANDLED IN THE THIRD PARTY OSS TEST, IN ACCORDANCE WITH SECTIONS 251(C)(3) AND 252(D)(1) OF THE TELECOMMUNICATIONS ACT OF 1996, PURSUANT TO SECTION 271(C)(2)(B)(II) AND APPLICABLE RULES PROMULGATED BY THE FCC?**

**(A) DOES BELLSOUTH CURRENTLY PROVIDE ALL REQUIRED UNBUNDLED NETWORK ELEMENTS AT TELRIC-BASED PRICES?**

**(B) HAS BELLSOUTH SATISFIED OTHER ASSOCIATED REQUIREMENTS, IF ANY, FOR THIS ITEM?**

**Joint ALECs:** \*No. BellSouth fails to provide nondiscriminatory access to all required network elements at cost-based prices. If it did, the Commission see widespread competition in Florida.\*

(a) \*No. BellSouth does not provide unbundled network elements at TELRIC-based prices in compliance with the Act and applicable FCC rules. Even BellSouth could not operate at the rates it charges competitors for UNEs.\*

(b) \*No. BellSouth has been very slow to provide access to network combinations, thus delaying even the most fundamental UNE-based competition using the UNE platform. And, BellSouth continues to oppose access to new combinations of network elements for no reason other than to disrupt ALEC operations and increase ALEC costs.\*

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<sup>68</sup>And, BellSouth believes that this Commission should *not* investigate ways in which collocation power charges for ALECs can be lowered. (Tr. 842-844).

<sup>69</sup>These issues are addressed under Issue A above.



As discussed in Issue A and Issue 1 above, the best evidence that BellSouth is providing nondiscriminatory access to network elements at cost-based prices would be actual evidence of widespread choices for consumers in the local market. Such evidence is sorely lacking in this case.

See discussion under Issue A regarding TELRIC pricing, line splitting, and the provision of combinations. In addition, Joint ALECs adopt the argument of WorldCom on the issue of BellSouth's failure to comply with TELRIC pricing rules and offer prices that are cost-based.

#### **ISSUE 4**

**IN ORDER PSC-97-1459-FOF-TL, ISSUED NOVEMBER 19, 1997, THE COMMISSION FOUND THAT BELLSOUTH MET THE REQUIREMENTS OF SECTION 224 OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996, PURSUANT TO SECTION 271(C)(2)(B)(III). DOES BELLSOUTH CURRENTLY PROVIDE NONDISCRIMINATORY ACCESS TO THE POLES, DUCTS, AND CONDUITS, AND RIGHTS-OF-WAY OWNED OR CONTROLLED BY BELLSOUTH AT JUST AND REASONABLE RATES IN ACCORDANCE WITH THE REQUIREMENTS OF SECTION 224 OF THE COMMUNICATIONS ACT OF 1934 AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996, PURSUANT TO SECTION 271(C)(2)(B)(III) AND APPLICABLE RULES PROMULGATED BY THE FCC?**

**Joint ALECs Position: \*No position.\***

#### **ISSUE 5**

**IN ORDER PSC-97-1459-FOF-TL, ISSUED NOVEMBER 19, 1997, THE COMMISSION FOUND THAT BELLSOUTH MET THE REQUIREMENTS OF SECTION 271(C)(2)(B)(IV) OF THE TELECOMMUNICATIONS ACT OF 1996. DOES BELLSOUTH CURRENTLY PROVIDE UNBUNDLED LOCAL LOOP TRANSMISSION BETWEEN THE CENTRAL OFFICE AND THE CUSTOMER'S PREMISES FROM LOCAL SWITCHING OR OTHER SERVICES, PURSUANT TO SECTION 271(C)(2)(B)(IV) AND APPLICABLE RULES AND ORDERS PROMULGATED BY THE FCC?**

**(A) DOES BELLSOUTH CURRENTLY PROVIDE ALL CURRENTLY REQUIRED FORMS OF UNBUNDLED LOOPS?**

**(B) HAS BELLSOUTH SATISFIED OTHER ASSOCIATED REQUIREMENTS, IF ANY, FOR THIS ITEM?**

**Joint ALECs Position:** \*No. BellSouth has not appropriately implemented line sharing in Florida thus hindering ALECs in their provision of packages of voice and data services. In addition, BellSouth does not provide ALECs with equivalent access to loops that use NGDLC technology.\*

Joint ALECs adopt AT&T's, WorldCom's (see Issue 3) and KMC's arguments on this issue.

**ISSUE 6**

**DOES BELLSOUTH CURRENTLY PROVIDE UNBUNDLED LOCAL TRANSPORT ON THE TRUNK SIDE OF A WIRELINE LOCAL EXCHANGE CARRIER SWITCH FROM SWITCHING OR OTHER SERVICES, PURSUANT TO SECTION 271(C)(2)(B)(V) AND APPLICABLE RULES PROMULGATED BY THE FCC?**

**(A) DOES BELLSOUTH CURRENTLY PROVIDE BILLING FOR USAGE-SENSITIVE UNES?**

**(B) HAS BELLSOUTH SATISFIED ALL OTHER ASSOCIATED REQUIREMENTS, IF ANY, FOR THIS ITEM?**

**Joint ALECs Position:** \*No. BellSouth does not provide unbundled local transport that connects two points on an ALEC's network or that connects a point on an ALEC's network to a point on the network of a different ALEC, even where the facilities to provide such UNES are currently in place.\*

(a) \*No position.\*

(b) \*No.\*

Joint ALECs adopt the argument of WorldCom on this issue.

**ISSUE 7**

**DOES BELLSOUTH CURRENTLY PROVIDE UNBUNDLED LOCAL SWITCHING FROM TRANSPORT, LOCAL LOOP TRANSMISSION, OR OTHER SERVICES, PURSUANT TO SECTION 271(C)(2)(B)(VI) AND APPLICABLE RULES PROMULGATED BY THE FCC?**

**(A) DOES BELLSOUTH BILL FOR UNBUNDLED LOCAL SWITCHING ON A USAGE-SENSITIVE BASIS?**

**(B) DOES BELLSOUTH CURRENTLY PROVIDE UNBUNDLED LOCAL SWITCHING ON BOTH THE LINE-SIDE AND THE TRUNK-SIDE OF THE SWITCH?**

**(C) HAS BELLSOUTH SATISFIED OTHER ASSOCIATED REQUIREMENTS, IF ANY, FOR THIS ITEM?**

**Joint ALECs Position: \*No. BellSouth fails to provide non-discriminatory access to operator services and directory assistance routing and branding.\***

**(a) \*No position.\***

**(b) \*No position.\***

**(c) \*No. BellSouth fails to provide non-discriminatory access to operator services and directory assistance routing and branding.\***

Joint ALECs adopt the argument of AT&T on this issue.

## **ISSUE 8**

**DOES BELLSOUTH CURRENTLY PROVIDE NONDISCRIMINATORY ACCESS TO THE FOLLOWING, PURSUANT TO SECTION 271(C)(2)(B)(VII) AND APPLICABLE RULES PROMULGATED BY THE FCC:**

**(I) 911 AND E911 SERVICES;**

**(II) DIRECTORY ASSISTANCE SERVICES TO ALLOW OTHER TELECOMMUNICATIONS CARRIER'S CUSTOMERS TO OBTAIN TELEPHONE NUMBERS; AND**

**(III) OPERATOR CALL COMPLETION SERVICES?**

**(a) DOES BELLSOUTH CURRENTLY PROVIDE ALECS ACCESS TO ALL INFORMATION CONTAINED IN BELLSOUTH'S DIRECTORY LISTING DATABASE?**

**(b) DOES BELLSOUTH CURRENTLY PROVIDE SELECTIVE ROUTING IN FLORIDA?**

**(c) HAS BELLSOUTH SATISFIED OTHER ASSOCIATED REQUIREMENTS, IF ANY, FOR THIS ITEM?**

**JOINT ALECs POSITION:**

(I)-(III) \*No position.\*

(a) \*No position.\*

(b) \*No. BellSouth fails to provide nondiscriminatory selective routing in Florida.\*

(c) \*No position.\*

Joint ALECs adopt AT&T's argument on this issue.

**ISSUE 9**

**IN ORDER PSC-97-1459-FOF-TL, ISSUED NOVEMBER 19, 1997, THE COMMISSION FOUND THAT BELLSOUTH MET THE REQUIREMENTS OF SECTION 271(C)(2)(B)(VIII) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996. DOES BELLSOUTH CURRENTLY PROVIDE WHITE PAGES DIRECTORY LISTINGS FOR CUSTOMERS OF OTHER TELECOMMUNICATIONS CARRIER'S TELEPHONE EXCHANGE SERVICE, PURSUANT TO SECTION 271(C)(2)(B)(VIII) AND APPLICABLE RULES PROMULGATED BY THE FCC?**

**Joint ALECs Position: \*No position.\***

**ISSUE 10**

**IN ORDER PSC-97-1459-FOF-TL, ISSUED NOVEMBER 19, 1997, THE COMMISSION FOUND THAT BELLSOUTH MET THE REQUIREMENTS OF SECTION 271(C)(2)(B)(IX) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996. DOES BELLSOUTH CURRENTLY PROVIDE NONDISCRIMINATORY ACCESS TO TELEPHONE NUMBERS FOR ASSIGNMENT TO THE OTHER TELECOMMUNICATIONS CARRIER'S TELEPHONE EXCHANGE SERVICE CUSTOMERS, PURSUANT TO SECTION 271(C)(2)(B)(IX) AND APPLICABLE RULES PROMULGATED BY THE FCC?**

**Joint ALECs Position: \*No. BellSouth does not provide nondiscriminatory access to**

telephone numbers for assignment to other carriers.\*

Joint ALECs adopt AT&T's argument on this issue.

#### ISSUE 11

**IN ORDER PSC-97-1459-FOF-TL, ISSUED NOVEMBER 19, 1997, THE COMMISSION FOUND THAT BELLSOUTH MET THE REQUIREMENTS OF SECTION 271(C)(2)(B)(X) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996. DOES BELLSOUTH CURRENTLY PROVIDE NONDISCRIMINATORY ACCESS TO DATABASES AND ASSOCIATED SIGNALING NECESSARY FOR CALL ROUTING AND COMPLETION, PURSUANT TO SECTION 271(C)(2)(B)(X) AND APPLICABLE RULES PROMULGATED BY THE FCC?**

**Joint ALECs Position: \*No position.\***

#### ISSUE 12

**IN ORDER PSC-97-1459-FOF-TL, ISSUED NOVEMBER 19, 1997, THE COMMISSION FOUND THAT BELLSOUTH MET THE REQUIREMENTS OF SECTION 271(C)(2)(B)(XI) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996. DOES BELLSOUTH CURRENTLY PROVIDE NUMBER PORTABILITY, PURSUANT TO SECTION 271(C)(2)(B)(XI) AND APPLICABLE RULES PROMULGATED BY THE FCC?**

**Joint ALECs Position:\*No. BellSouth fails to adequately provision number portability.\***

Joint ALECs adopt AT&T's argument on this issue.

#### ISSUE 13

**IN ORDER PSC-97-1459-FOF-TL, ISSUED NOVEMBER 19, 1997, THE COMMISSION FOUND THAT BELLSOUTH MET THE REQUIREMENTS OF SECTION 271(C)(2)(B)(XII) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996. DOES BELLSOUTH CURRENTLY PROVIDE NONDISCRIMINATORY ACCESS TO SUCH SERVICES OR INFORMATION AS ARE NECESSARY TO ALLOW THE REQUESTING CARRIER TO IMPLEMENT LOCAL DIALING PARITY IN ACCORDANCE WITH THE REQUIREMENTS OF SECTION 271(C)(2)(B)(XII) AND APPLICABLE RULES PROMULGATED**

**BY THE FCC?**

**Joint ALECs Position:** \*No position.\*

**ISSUE 14**

**IN ORDER PSC-97-1459-FOF-TL, ISSUED NOVEMBER 19, 1997, THE COMMISSION FOUND THAT BELLSOUTH MET THE REQUIREMENTS OF SECTION 271(C)(2)(B)(XIII) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996. DOES BELLSOUTH CURRENTLY PROVIDE RECIPROCAL COMPENSATION ARRANGEMENTS IN ACCORDANCE WITH THE REQUIREMENTS OF SECTION 252(D)(2) OF THE TELECOMMUNICATIONS ACT OF 1996, PURSUANT TO SECTION 271(C)(2)(B)(XIII) AND APPLICABLE RULES PROMULGATED BY THE FCC?**

**Joint ALECs Position:** \*No. BellSouth has not paid compensation at the tandem interconnection rate to ALECs whose switches serve areas geographically comparable to areas served by BellSouth local tandems. BellSouth has not paid compensation where an ALEC provides FX service by assigning NXXs to a customer with a location outside the rate center where the NXX is homed.\*

Joint ALECs adopt WorldCom's argument on this issue.

**ISSUE 15**

**DOES BELLSOUTH CURRENTLY PROVIDE TELECOMMUNICATIONS SERVICES AVAILABLE FOR RESALE IN ACCORDANCE WITH THE REQUIREMENTS OF SECTIONS 251(C)(4) AND 252(D)(3) OF THE TELECOMMUNICATIONS ACT OF 1996, PURSUANT TO SECTION 271(C)(2)(B)(XIV) AND APPLICABLE RULES PROMULGATED BY THE FCC?**

**Joint ALECs Position:** \*No. BellSouth refuses to permit the resale of advanced services as required by the *ASCENT* decisions. Therefore, BellSouth is not in compliance with this Checklist item.\*

BellSouth refuses to provide for the resale of high speed data service over UNE loops that new entrants use to provide voice service. (Tr. 1620). This refusal significantly impacts competition because BellSouth controls more than 90% of the high speed Internet market in Florida.

(Tr. 1635). As consumer demand for access to advanced services continues to grow, resale of advanced services<sup>70</sup> is critical to encourage competition in this market segment which BellSouth currently dominates.

The District Court for the District of Columbia addressed the issue of resale of advanced services in *Association of Communications Enterprises v. FCC*<sup>71</sup>, in the context of a merger between SBC and Ameritech. The Court held that ILECs and their affiliates are obligated to provision “advanced services” on a wholesale basis, pursuant to § 251(c) of the Act to prevent incumbents from creating affiliates that would not be subject to the Act’s resale provisions. The Court said that “an ILEC may not sideslip § 251c’s requirements by simply offering telecommunications services through a wholly owned affiliate.”<sup>72</sup> That is, an incumbent may not sell DSL to an affiliate which then bundles that service for sale to end users. Similarly, *ASCENT II*<sup>73</sup> reaffirms the prohibition of evading the Act’s resale obligation through the use of a related company.

The clear meaning and intent of *ASCENT I* and *ASCENT II*, which must be read together, is to prevent incumbents from circumventing their resale obligation through the use of related companies.<sup>74</sup> BellSouth takes that one step further and buys DSL service from itself. (Exhibit No.

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<sup>70</sup>BellSouth admits that demand for DSL services is growing rapidly in Florida. (Tr. 698). BellSouth had a 48% increase in high speed customers in Florida in the first quarter of 2001. (Tr. 731).

<sup>71</sup> 235 F. 3d 662 (DC Cir. 2001) (“*ASCENT I*”).

<sup>72</sup>*ASCENT I* at 666.

<sup>73</sup>Case No. 00-1144 (June 26, 2001).

<sup>74</sup>The Court noted that if the FCC’s logic were followed it would allow any incumbent to avoid 251(c)’s resale obligations through the use of another company. *ASCENT I* at 665.

14, Item No. 9).

BellSouth attempts to discount the *ASCENT I* decision by saying it has no separate affiliate that sells advanced services, and, therefore the decision is inapplicable to it. (Tr. 226). However, the “arrangement” BellSouth has is even more suspect. BellSouth admits that it “acquires xDSL service from itself, which it combines with Internet access services.” (Exhibit No. 14, Item No. 9). Thus, rather than using a separate affiliate to avoid the obligation to resell DSL, BellSouth simply *buys the service from itself* to avoid its resale obligation. *ASCENT I* makes it clear that use of an affiliate company to package and resell DSL does not result in the avoidance of the resale obligation. Surely, selling the service to oneself cannot avoid it either, as such a “transaction” simply puts form over substance.

It is also important to note that the fine distinction of “buying services from oneself”, is lost on customers who *believe* they are buying DSL from BellSouth. (Tr. 1639). And BellSouth encourages that belief. One need only look at BellSouth’s advertisements for BellSouth’s Fast Access © Internet service to see that it is clearly marketed as a BellSouth telecommunications service. (Exhibit No. 14). For example, BellSouth’s advertisements describe “high speed DSL service.” The service is advertised to prospective retail end users in Florida. Users may receive one bill that includes charges for both voice service and Fast Access©. Further, BellSouth.net provides some customer service and customer billing and collection support functions for Fast Access© customers. (Exhibit No. 14). BellSouth advertises Fast Access© on its website and on its vans. (Tr. 287). Thus, the core principle of the *ASCENT I* case is applicable-- the incumbent can not be permitted to evade the Act’s resale requirements through the use of a related company.



The Indiana Utility Regulatory Commission (IURC) reached a similar conclusion recently when investigating SBC/Ameritech's compliance with § 271.<sup>75</sup> The IURC rejected SBC/Ameritech's argument that advanced services testing and performance measures were inappropriate because SBC/Ameritech does not provide advanced services on a retail basis, and is therefore not subject to the Act's resale obligations. The IURC noted that an ILEC cannot be permitted to set up an affiliate so as to circumvent the Act's resale requirements. Just as an incumbent cannot avoid its obligations through the use of an affiliate, BellSouth should not be able to avoid its obligations by selling services to *itself*. BellSouth can not be found to be compliant with this Checklist Item until it makes DSL available for resale pursuant to the *ASCENT* decisions.

#### ISSUE 16

**BY WHAT DATE DOES BELLSOUTH PROPOSE TO PROVIDE INTRALATA TOLL DIALING PARITY THROUGHOUT FLORIDA PURSUANT TO SECTION 271(E)(2)(A) OF THE TELECOMMUNICATIONS ACT OF 1996?**

**Joint ALECs Position:** \*No position.\*

#### ISSUE 17

**IF THE ANSWERS TO ISSUES 2 THROUGH 15 ARE "YES," HAVE THOSE REQUIREMENTS BEEN MET IN A SINGLE AGREEMENT OR THROUGH A COMBINATION OF AGREEMENTS?**

**Joint ALECs Position:** \*The answers to Issues 2 through 15 are not yes; BellSouth has failed to meet all items on the Competitive Checklist. Therefore, its application for interLATA authority should be denied.\*

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<sup>75</sup>*In the Matter of the Petition of Indiana Bell Telephone Company, Inc. d/b/a Ameritech Indiana Pursuant to I.C. 8-1-2-61 for a Three-Phase Process for Commission Review of Various Submissions of Ameritech Indiana to Show Compliance with Section 271(c) of the Telecommunications Act of 1996, Cause No. 41657, Decision on First Request for Expedited Dispute Resolution (June 12, 2001). SBC/Ameritech has appealed the IURC's decision but it remains the state of the law in Indiana.*

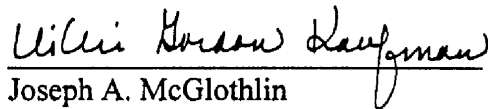
## ISSUE 18

### SHOULD THIS DOCKET BE CLOSED?

**Joint ALECs Position:** \* Yes; BellSouth's application should be denied and this docket should be closed.\*

### CONCLUSION

In this proceeding, the Commission has the opportunity to take direct action which will result in broad local choice for Florida consumers. By following the recommendations delineated above, the Commission can help make the paper promise of local competition a reality. It should seize that opportunity.



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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing the Post-Hearing Statement of Issues and Positions and Post-Hearing Brief of The Joint ALECs has been furnished by (\*) hand delivery or by U. S. Mail on this 6th day of November, 2001, to the following:

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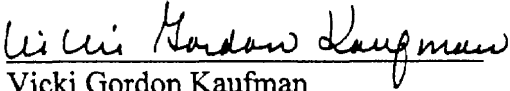
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