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December 10, 1998

VIA HAND DELIVERY

Blanca S. Bayo, Director
Florida Public Service Commission
Division of Records and Reporting
Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0870

981834-TP

Re: Petition of Competitive Carriers

Dear Ms. Bayo:

Enclosed for filing and distribution are the original and fifteen copies of the Petition of Competitive Carriers.

Please acknowledge receipt of the above on the extra copy enclosed herein and return it to me. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

VGK/pw
Encls.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth's Service Territory	)	Docket No. 981834-TP Filed: December 10, 1998

PETITION OF COMPETITIVE CARRIERS FOR COMMISSION ACTION TO SUPPORT LOCAL COMPETITION IN BELLSOUTH'S SERVICE TERRITORY

13904-98

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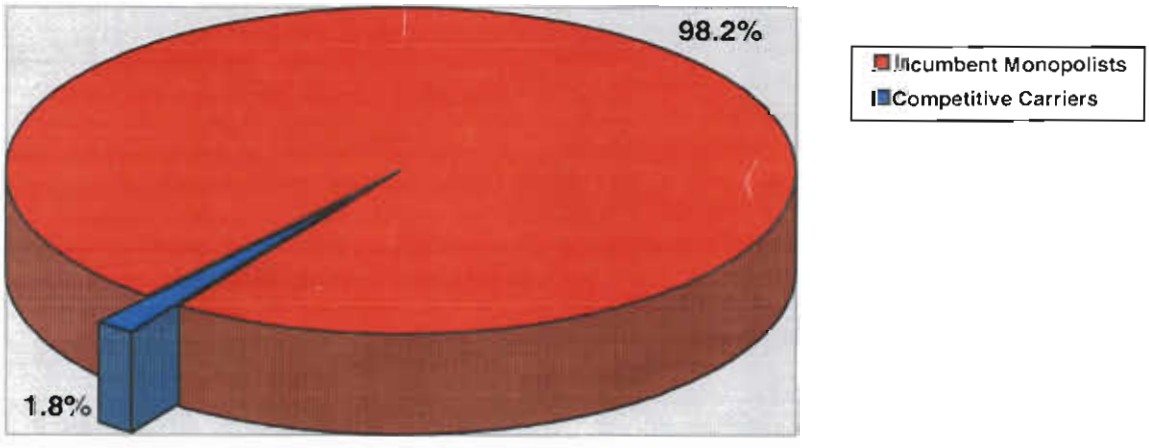
OVERVIEW

Nearly three years after the historic passage of the Federal Telecommunications Act of 1996, there is still little competition in Florida's local telephone market. Inhospitable pricing for network elements such as local loops and switching, operational barriers, and staunch resistance from BellSouth have thwarted the dozens of competitors trying to gain a foothold in the Florida local telecommunications marketplace. For Florida consumers to benefit from lower prices, advanced services like ADSL, innovation and jobs that competition will bring, the Florida Public Service Commission must act now to tear down the monopoly walls. That is why this petition is being filed. If competition is to thrive, the Commission must change its pricing and require BellSouth to treat new entrants (who must access BellSouth's networks and operations support systems and buy its services) as valued customers, rather than hostile forces attacking its citadel.

BELLSOUTH RETAINS CONTROL OF ITS FLORIDA MARKET

FLORIDA MARKET SHARE COMPARISON*



*Figures reflect statewide market, based on Commission's December 1998 report on Competition in Telecommunications Markets in Florida. Market sbare for BellSouth's service territory was not published.

The Florida Local Telephone Market

The Commission's recent annual report on the status of local competition in Florida paints a bleak picture. Florida's local telephone monopolies still control 98.2% of the overall local market, and an even greater 99.3% of the residential market.[1] That is not because the new entrants are not trying. To the contrary, more than fifty competitors provide local telephone service in Florida, and are investing hundreds of millions of dollars to do so. Typically, such an influx of new entrants would begin to create a noticeable shift in market share as competitive forces rewarded the most innovative and efficient firms. But this process has yet to occur in Florida, because the local monopolies -- and BellSouth in particular -- have a stranglehold on the market and are doing all they can to keep it that way.

The BellSouth Monopoly

BellSouth has by far the largest share of the Florida market, and the vast majority of local telephone lines in the Southeast. As a result, competitive carriers in the Southeast have more experience dealing with BellSouth than any other local telephone monopoly. And because BellSouth has been attempting to win approval from southeastern regulators to offer in-region long distance service, it has been required by state regulators enforcing the 1996 Act to explain its systems, policies and practices relating to local service.[2] By focusing on BellSouth first, the Commission can take

[1] Florida Public Service Commission's December 1998 report on Competition in Telecommunications Markets in Florida, p. 46. Note that figures from the Commission's report are from July 1998.
[2] The Telecommunications Act of 1996 provides that before Bell operating companies can offer in-region long distance service, they must demonstrate that they have opened their local markets to competition by meeting several specific requirements. *See* 47 U.S.C. § 271.

advantage of this groundwork and pave the way for competition throughout the State, and indeed the Southeast.

BellSouth Lacks Incentive to Open Its Markets

More than a year has passed since the Florida Public Service Commission gave a resounding "not yet" to BellSouth's request to enter the Florida long-distance market, finding that BellSouth had failed to meet several of the Act's fourteen competitive checklist items. Subsequent decisions by the FCC confirm that the Commission's decision was correct and demonstrate that BellSouth has made little progress in the last year.[3]

Florida ratepayers have for decades paid BellSouth (several times over) to build a vast local telephone network that reaches into virtually every home and business within BellSouth's service territory. By virtue of BellSouth's monopoly control over that network, it holds the keys to the development of local competition. But BellSouth's natural incentive is not to surrender its captive market. Early this year, BellSouth forecasted solid profit growth in part on the assumption that local competition "does not have significantly increasing adverse impact on earnings through 1998."[4] Thanks to BellSouth's bottleneck control of its network, this statement has become a self-fulfilling prophecy.

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[3] *See In re: Second Application by BellSouth Corp. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order (rel. Oct. 13, 1998) ("La. II Order"); *In re: Application of BellSouth Corp. to Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 97-231, Memorandum Opinion and Order (rel. February 4, 1998); *In re: Application of BellSouth Corp. to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order (rel. Dec. 24, 1997).

[4] BellSouth Form 8-K dated Jan. 22, 1998. An excerpt of an electronic copy is attached as Exhibit A.

Simply put, BellSouth's desire to enter the low-margin long-distance business does not provide sufficient incentive to open the family jewel chest of its high-margin local monopoly. As a U. S. District Court judge in Texas stated last month, about Southwestern Bell:

> **SWBT argues entering the long-distance market under section 271 is a "carrot" to encourage it to quickly open up the local telephone service market. Entering the long distance market may indeed be SWBT's carrot, but it is a small carrot, and keeping its local monopoly profits for as long as possible is SWBT's Lifestyles of the Rich and Famous all-you-can-eat buffet.**[5]

Likewise, U.S. West's chief financial officer recently stated that although it considered long distance to be a necessary part of the bundle of services that meet customers' needs, "[i]t's unlikely any of us (regional Bell operating companies) will make any money on long distance" after winning permission from the FCC. [6]

In a recent speech, Assistant Attorney General Joel Klein, head of the Antitrust Division of the Department of Justice, summarized the current situation. He noted that the Bell companies have "met with our staffs, they've met with the FCC staffs. They know pretty much what it takes to get one of these [Section 271] applications through, and they make the choice." The "choice" Klein was referring to involves "strategic cost-benefit analyses" in which Bell companies weigh how much long distance business they will gain versus how much local business they will lose if they comply with the FCC's requirements. [7] To date, the Bell companies have chosen not to open their local markets, but rather to stonewall and litigate in an effort to make the cost-benefit calculation as favorable as they can, for as long as they can.

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[5] *Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc.*, No. A98-CA-197 SS, slip op. at 5 n.3 (W.D. Tex. filed Nov. 9, 1998). A copy of the decision is attached as Exhibit B.
[6] See Nov. 18, 1998 Communications Today article attached as Exhibit C.
[7] November 23, 1998 speech given at Brookings Institution (attached as Exhibit D), pp. 31-33.

In conjunction with its litigation strategy, BellSouth has applied for long-distance authority throughout its nine-state region early and often, in a campaign to wear down regulators and force its way into the long-distance market before its local market is really open. BellSouth seeks to persuade regulators that it has in some way met some version of the fourteen-point checklist, while pleasing shareholders by not giving competitors what they actually need to enter the market. Thus, BellSouth has opposed pro-competitive pricing and has refused to make the operational changes necessary to allow new entrants to compete. The result has been a string of defeats before state regulatory authorities (including this one) and the FCC.

BELLSOUTH'S 271 ACTIVITY

STATE	NOTICE	STATE HEARINGS/RESULTS	FCC FILINGS
ALABAMA	6/18/97	Hearings held 8/97, 3/98, 10/98; no favorable 271 recommendation	None
GEORGIA	1/22/98	Hearing held 1/97; no favorable 271 recommendation	None
	2/23/97	Hearings held 3/97, 7/97; no favorable 271 recommendation	
	5/27/98	Comments filed 6/98; no favorable 271 recommendation	
FLORIDA	7/7/97	Hearing held 9/97; PSC ruled 11/19/97 BellSouth failed to meet 271 requirements	None
KENTUCKY	5/6/97	Hearing held 8/97; no favorable 271 recommendation	None
	6/19/98	Hearing held 8/98; no favorable 271 recommendation	
LOUISIANA	2/24/97	Hearing held 5/97; favorable recommendation given 9/5/97	Application denied 2/3/98
	7/2/98	Favorable recommendation given 7/15/98	Application denied 10/13/98

MISSISSIPPI	7/16/97	Hearing held 10/97; comments on revised SGAT filed 10/98; SGAT approved and favorable 271 recommendation given 11/9/98	None
NORTH CAROLINA	8/5/97	Hearing held 9/97; NCUC ruled 1/14/98 BellSouth failed to meet 271 requirements; second hearing postponed indefinitely	None
SOUTH CAROLINA	4/1/97	Hearing held 7/97; favorable 271 recommendation given 7/31/97	Application denied 12/24/97
TENNESSEE	12/12/97	Hearing held 5/98; no favorable 271 recommendation	None

ROADBLOCKS TO COMPETITION

UNES: The Quickest Path to Competition

In an effort to jump start local telephone competition across America, the 1996 Act established three methods for competitive carriers to enter the local market, only one of which can lead quickly to broad-scale competition:

1. Resale. This entry method allows new entrants to contract with incumbent monopolies to resell their local service. But the 1996 Act requires the wholesale price competitors must pay to be based on the costs incumbents avoid by not having to market, bill and collect for their services. In practice, this "avoided cost" standard has not proved sufficient to sustain long-term profits on a broad scale. For this reason and because of operational problems caused by RBOC OSS systems, AT&T and MCI WorldCom have discontinued resale strategies.[8]

[8] It is also worth noting that USN Communications Inc., a vocal ALEC proponent of using a resale strategy, and the reseller that Ameritech touted as proof that it faced genuine competition, announced recently that it

2. Interconnection. The Act also permits competitors to install their own loops, telephone switches and other facilities and interconnect them with the monopolies' networks. But it is economically infeasible to duplicate the monopolies' networks, which took a century and some 250 billion ratepayer dollars to build. With today's technology and economics, only a small part of the market -- larger business customers -- can profitably be served this way.

3. Unbundled network elements (UNEs). This entry method is the key to success, because it permits competitors to buy parts of the incumbents' networks at cost-based rates, which includes a fair profit for the incumbent. UNEs include things like the "loop" (the telephone wire between a customer's premises and the phone company's central office), switching, and the transport facilities that take calls to other local exchanges and to long-distance carriers. Using a UNE strategy, a new entrant can start its business with UNEs leased from the RBOC and then gradually substitute its own facilities for UNEs as the new entrant builds its customer base. Today, purchasing UNEs is the entry method that competitors need to provide widespread local telephone service, sooner rather than later.

Blocking the UNE Strategy

In its annual report on the status of local competition, the Commission noted three areas identified by competing carriers as limiting their ability to enter the Florida market:

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was laying off 650 employees and restructuring its business. See Nov. 5, 1998 Chicago Tribune article attached as Exhibit E.

(1) pricing, (2) service and technical issues, and (3) negotiation issues.[9] To these should be added UNE combination availability, which fits into all three categories. *Each* of these areas must be addressed fully and aggressively by the PSC before local competition can take root in Florida.

1. Lack of UNE combination availability

BellSouth refuses to permit competitors to buy UNEs in combination at cost-based rates if they "recreate" an existing BellSouth service. This Commission has rejected BellSouth's requirement that new entrants wishing to lease an existing loop-port combination rent an expensive, caged collocation space and connect the loop and port with jumper cables there.[10] But by declining to set cost-based prices for UNE combinations said to recreate BellSouth services, the Commission has effectively prevented new entrants from starting the process of building their own networks by first using UNEs leased from BellSouth.[11]

2. High UNE prices

Put simply, Florida has priced competitors out of the market. A number of factors have conspired to create uneconomic pricing:

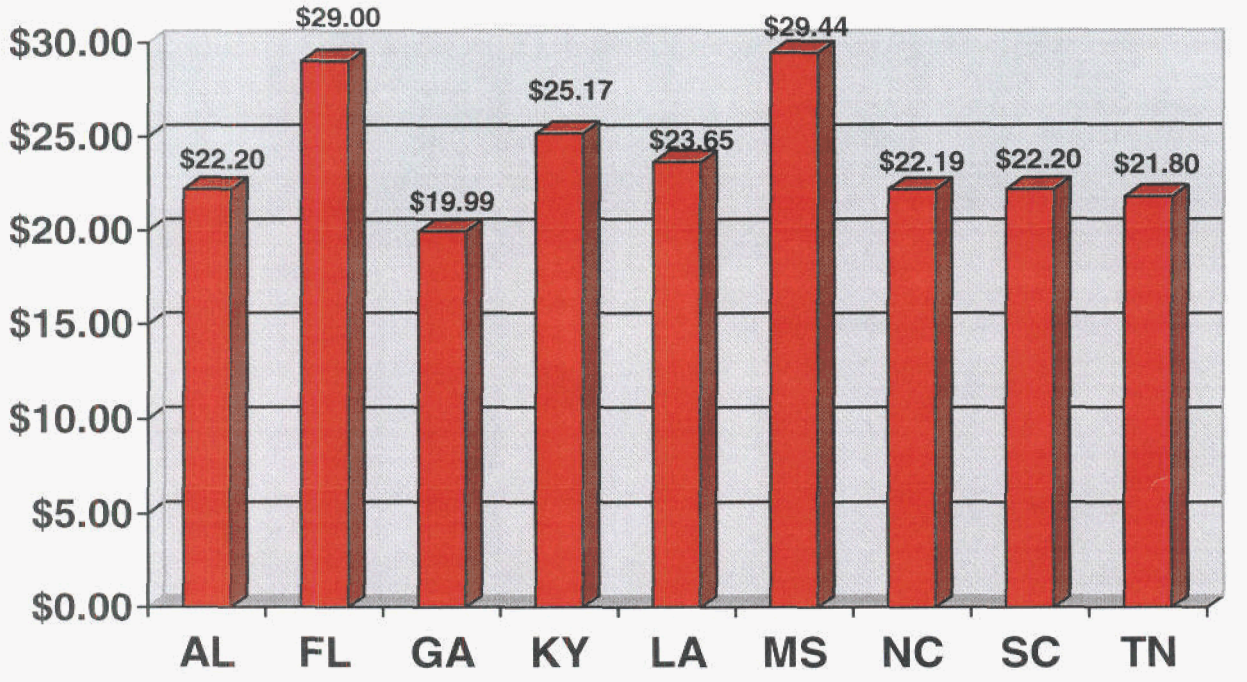
[9] December 1998 Florida Public Service Commission report on Competition in Telecommunications Markets in Florida, p. 26.

[10] *See* Final Order Resolving Interconnection Agreement Disputes, Addressing Retail Service Composition, and Setting Non-Recurring Charges, Order No. PSC-98-0810-FOF-TP, *In re: Motions of AT&T Communications of the Southeastern States, Inc. and MCI Telecommunications Corp. and MCImetro Access Transmission Services, Inc. to compel BellSouth Telecommunications, Inc. to comply with Order No. PSC-96-1579-FOF-TP and to set non-recurring charges for combinations of network element with BellSouth Telecommunications, Inc. pursuant to their agreement*, Docket No. 971140-TP (June 12, 1998).

[11] Instead, many new entrants purchase T1s (out of BellSouth's access tariff at prices substantially higher than UNE prices) from the customer's premises to the new entrant's switch, an entry method that is only practical for relatively large business customers.

♦ Florida has by far the highest local switching rate in the Southeast. At Florida's rates, for example, if a new entrant provides UNE service to a residential or small business customer that makes 400 calls monthly lasting 2 1/2 minutes each, the new entrant would pay BellSouth a monthly charge for unbundled switching of $10.00. In contrast, monthly switching costs in other BellSouth states would be $4.00 or less. Florida's local switching rates, combined with its other monthly charges (such as for the loop and switch port), make Florida second only to Mississippi in total recurring costs in the region.

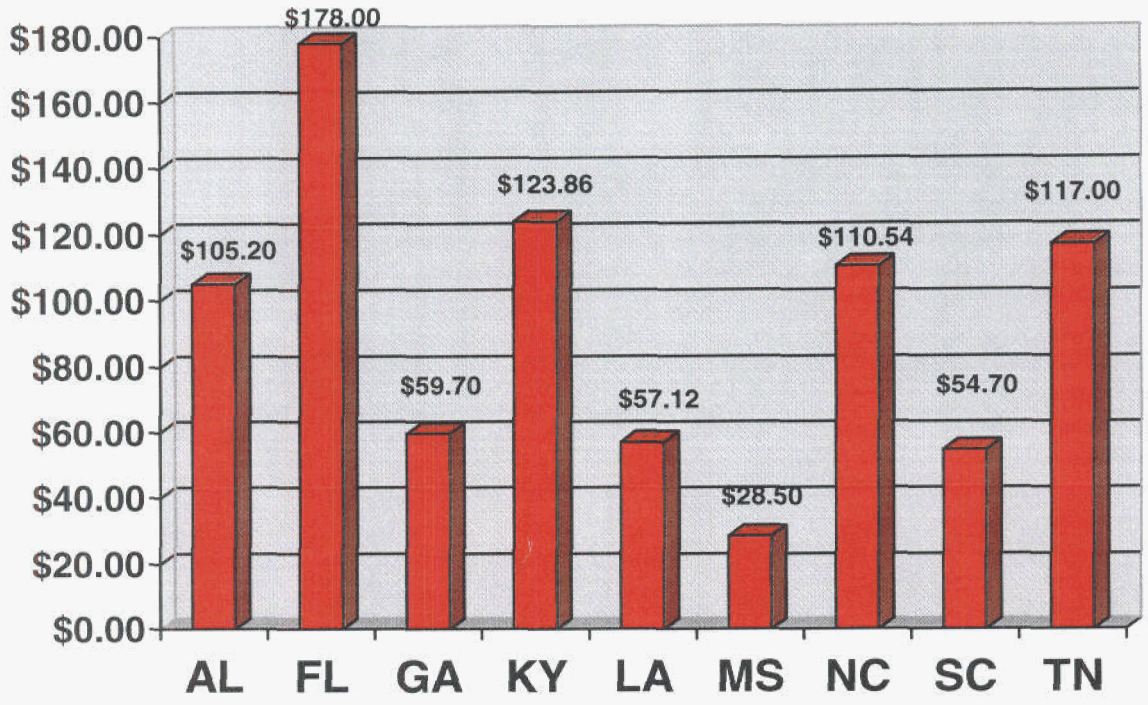
KEY FLORIDA RESIDENTIAL RECURRING COSTS COMPARED TO SAME COSTS IN OTHER STATES*



*Key residential recurring costs include those for the loop, switch port and local switching. Other recurring costs (such as for unbundled transport) are not included in these figures. Switching costs were calculated assuming 400 residential calls lasting 2 1/2 minutes each.

♦ Florida's rates for installing a new loop and local switch port are the highest in the Southeast. These "nonrecurring" costs are charged when the new service is initiated. A new entrant must recoup these costs before it can turn a profit on a customer ordering new service. If the customer decides to change carriers before the initial outlay is recovered, the new entrant sustains a loss. The following chart compares Florida's nonrecurring costs with those of other BellSouth states:

RESIDENTIAL NONRECURRING COST COMPARISON*

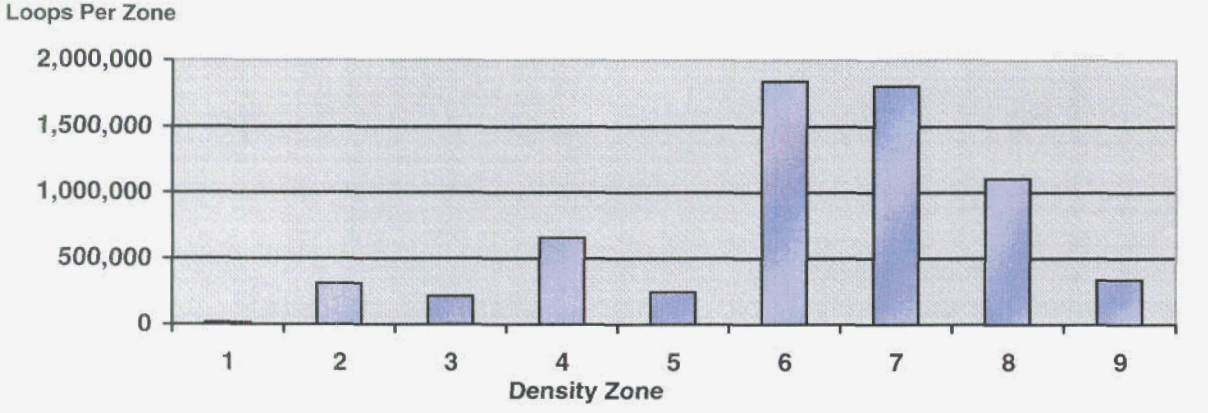


*Figures show one-time costs for an unbundled loop and a switch port used to serve a local residential customer. The Florida Commission has adopted substantially lower nonrecurring costs under AT&T's and MCI's interconnection agreements for the migration of an existing loop-port combination.

♦ Although the economic cost (which includes a fair profit) for BellSouth to provide loops varies greatly depending on population density and other factors such as terrain, the rates charged to new entrants do not. For example, the economic cost of a loop is only $4.74 per month in urban areas,[12] but competitive carriers still are charged the average of $17 per month. The net effect of averaging these costs is to increase rates artificially in places that otherwise might be served profitably. The following chart shows the relationship between density and loop cost:

Zone	1	2	3	4	5	6	7	8	9
No. loops per sq. mile	0-5	5-100	100-200	200-650	650-850	850-2550	2550-5000	5000-10,000	More than 10,000
BST retail rate[13]	$14.15	$14.15	$14.15	$14.15	$14.15	$14.15	$14.15	$14.15	$14.15
Current Loop rate	$17	$17	$17	$17	$17	$17	$17	$17	$17
Deaveraged loop[14]	$73.42	$29.74	$17.83	$14.33	$12.30	$10.06	$8.40	$7.41	$4.74

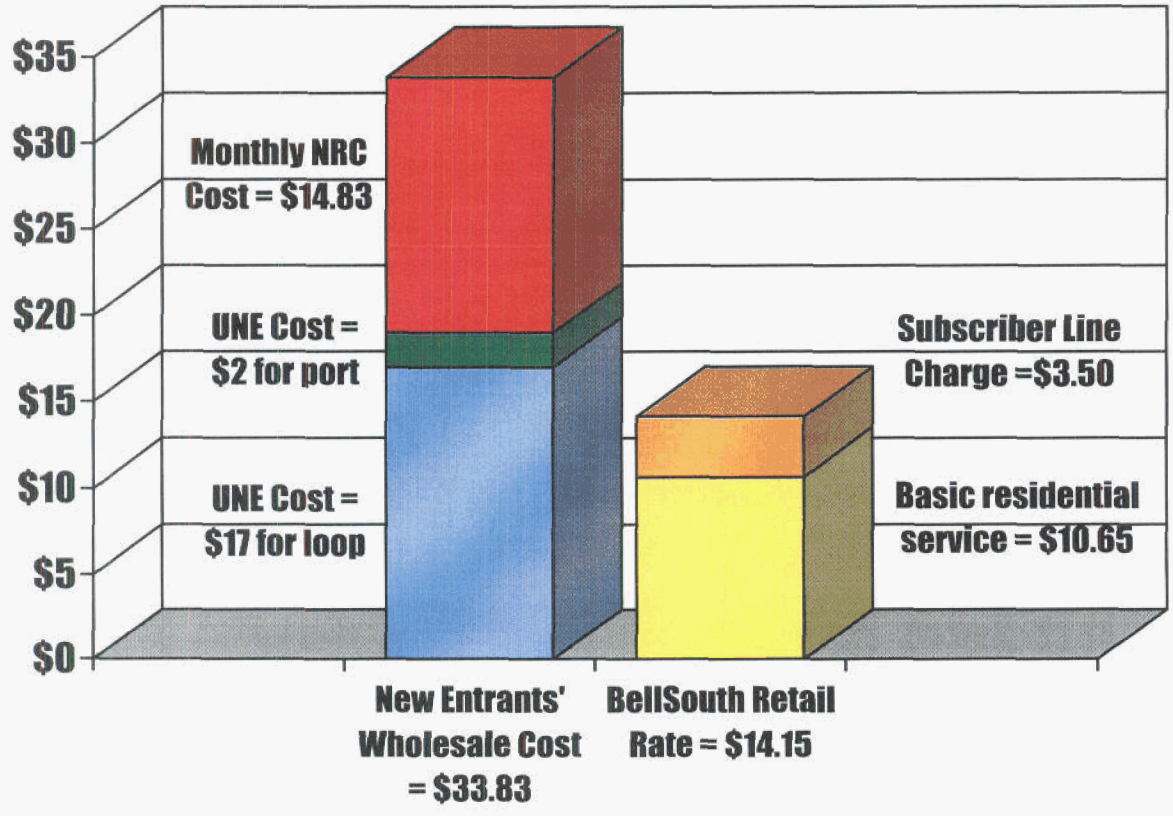
In fact, *most* loops in Florida cost less than the $17.00 that competitive carriers are required to pay, because the great majority are in high density zones:



[12] This deaveraged loop rate is based on the Hatfield 5.0 study. Although parties may disagree on what the deaveraged rate should be, there is no dispute that costs are much lower in urban areas than rural areas.
[13] BellSouth's rates vary slightly based on rate group but not by density zone; $14.15 represents an average BellSouth rate.
[14] These deaveraged loop rates are based on the Hatfield 5.0 study.

♦ The bottom line is that new entrants would be "breathing underwater" if they attempted to serve residential customers. Competitive carriers must pay monthly charges of $19 for a residential loop and switch port, plus usage based costs such as local switching. Computing nonrecurring costs on a monthly basis for the first year the customer is in service adds $14.83 to the amount competitive carriers must pay, for a total of $33.83, which does not include local switching and other usage-based charges. When these costs are compared to BellSouth's average residential retail rate of $14.15, it is clear why there is little opportunity for local competition for residential customers.

NEW ENTRANTS' COSTS VS. BELLSOUTH'S RETAIL RATES



3. Operational bottlenecks

Resolving pricing issues alone will not be enough to ensure a competitive local market. As the Texas Public Utilities Commission found with respect to Southwestern Bell, BellSouth "needs to change its corporate attitude and view [new entrants] as wholesale customers."[15] To market telephone service, new entrants also must (among other things) obtain reasonable access to BellSouth's network; order and provision UNEs and services from BellSouth; and hold BellSouth to reasonable performance standards. In other words, they must receive good answers to the questions any buyer would ask, such as:

a. How much does the product cost?

b. How do I order the product?

c. How do I obtain (or access) the product?

d. Is the product guaranteed?

Ordinarily, a wholesaler would take great pains to ensure that its customers were satisfied with the answers to all these questions. But BellSouth is no ordinary wholesaler -- perversely, the less it sells, the more it makes. Therefore, regulatory action is needed to open the market. The Commission must require that the necessary operational pieces be in place so new entrants can offer the quality service consumers demand.

♦ To serve most customers, competitive carriers must use the local loop that runs from the customer's premises to BellSouth's central office. If the competitor wants to connect the loop via a transport line to its own switch, BellSouth requires the competitor

[15] Texas Public Utilities Commission, Commission Recommendation, *Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market*, PUC Project No. 16251 (June 1, 1998).

to make the connection in a collocation space,[16] provided BellSouth determines that space is available and the competitor is willing to wait several months to get one. Less expensive and less cumbersome alternatives must be explored, both for ordinary loops and XDSL deployment.

♦ BellSouth's operations support systems must function efficiently to enable new entrants to order and provision service, as well as to bill customers and order maintenance and repair work from BellSouth. Although BellSouth has made some progress with its OSS in the last year, much remains to be done.[17] BellSouth still does not have in place integrated systems necessary to obtain information necessary to place orders, and its systems still involve far too much manual processing, which inevitably leads to delays and errors. The advent of advanced services like ADSL illustrates the importance of these systems, because competitors must be able to determine in advance whether those services can be provided over a customer's existing loop.

♦ BellSouth has steadfastly refused to accept performance standards that would hold it accountable to provide OSS and other functions within specified timeframes. And BellSouth refuses to put its money where its mouth is, by agreeing to financial incentives and penalties to undergird its performance. But it is Commission action in the short term and performance standards coupled with self-executing remedies in the longer term that will be required to overcome BellSouth's natural incentive to protect its local market.

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[16] BellSouth makes an exception for "T1" lines running from a customer's premises to the new entrant's switch. These T1s, which transmit up to twenty-four calls at once and therefore are practical only for large business customers, may be ordered out of BellSouth's access tariff. BellSouth will not sell new entrants the same facilities as a UNE combination at the substantially cheaper combined UNE prices.

[17] *See* La. II Order at ¶¶ 82-160.

Without adequate performance standards and remedies in place,[18] new entrants invest at their peril.

4. Negotiation quagmire

BellSouth's control of the local network gives it the upper hand at the bargaining table. That was true when the parties negotiated their interconnection agreements and it remains true when new entrants attempt to resolve disputes with BellSouth. To make matters worse, when negotiations fail and the Commission is enlisted to enforce an interconnection agreement, the process takes several months even when the competing carrier is in the right. Expedited dispute resolution is needed to speed the process. For example, MCImetro brought an enforcement complaint against BellSouth and proved breach of contract on twelve of thirteen counts, but only after litigation before the Commission lasting some nine months. Every day matters when a company is spending millions of dollars trying to push its way into an established monopoly market.

MAKING COMPETITION HAPPEN

BellSouth should not -- indeed, must not -- be allowed to continue to dictate the pace of local competition in Florida. Some states, most notably Texas, New York and Pennsylvania, have accelerated the march toward competition by state regulatory action that addresses head-on the key issues preventing competitors' inroads into Bell territory.

[18] The FCC recently addressed the issue of ensuring compliance with performance standards. It stated: "We would be particularly interested in whether [RBOC] performance monitoring includes appropriate, self-executing enforcement mechanisms that are sufficient to ensure compliance with the established performance standards. That is, as part of our public interest inquiry, we would inquire whether the BOC has agreed to private and self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention. The absence of such enforcement mechanisms could significantly delay the development of local exchange competition by forcing

Texas, New York and Pennsylvania are positioning themselves to be the first states to break out of the pack and experience broad-scale competition in both business and residential markets. Florida, with one of the largest markets in the United States, should be one of the next states to benefit from local competition, but it will not be unless this Commission seizes the initiative and takes action now.

Other States Are Leading the Way

The Texas PUC has taken a number of important steps to advance competition for Texas consumers. For example, it adopted a pro-competitive (but not perfect) pricing structure, and enforced UNE combination provisions in interconnection agreements, enabling competitors to offer end-to-end service using SWBT UNEs, as the Act intended. It initiated an implementation process *before* SWBT's 271 filing to require SWBT -- and competitive carriers -- to build interfaces necessary for UNE orders, and after the 271 filing established a thorough collaborative process to identify and resolve operational issues, such as access to loops, OSS and performance standards. The commission also adopted the "rope 'em and throw 'em" expedited dispute resolution process.

The New York PSC also has taken the initiative to advance competition. Among other things, the New York commission has insisted on third-party testing of OSS, which facilitates the detection and correction of system flaws. Likewise, the Pennsylvania PUC recently initiated a series of intensive workshops on the key issues preventing local competition. Among other things, the commission has focused on pricing as a barrier,

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new entrants to engage in protracted and contentious legal proceedings to enforce their contractual and statutory rights to obtain necessary inputs from the incumbent." La. II Order at ¶ 364.

and has explored adjusting its local switching rate, which, like the Florida rate, is among the highest in the country.

The Commission Should Act Now

The Florida PSC is fortunate to have the largest staff and most resources of any state in the region to undertake the sustained effort necessary to address fully the issues outlined herein in a manner similar to Texas, New York and Pennsylvania. Petitioners are requesting the Commission to take the following steps immediately:

1. Initiate a docket to address key pricing issues and the availability of end-to-end UNEs. By addressing these issues now, the Commission can resolve them fully before most interconnection agreements come up for renewal. Otherwise, these issues will remain a question mark until the year 2000 and perhaps beyond. The Commission should dispel uncertainty and thereby encourage investment in the Florida local market.

2. Establish a Competitive Forum to tackle operational issues. The Commission should establish a Competitive Forum, led personally by the Commission and its Staff, to (a) identify key operational issues (some of which are discussed above); (b) work through those issues and develop agreed-upon solutions; and (c) ensure prompt Commission hearings on unresolved issues. The workshops scheduled by the Commission on OSS and collocation are a good first step in this process, and can be incorporated into a larger framework for all operational issues, but much more needs to be done.

3. Establish independent third-party testing of OSS. Commissions across the country have struggled with the "he said-she said" debate between the RBOCs and their rivals regarding whether Bell companies' OSS systems are commercially viable. The

emerging solution to this problem is independent third-party testing in which all key aspects of OSS are "stress tested" to determine whether they can hold up under commercial volumes. Because third-party testing takes time to arrange, the Commission should adopt this solution, based on the New York model, at once.[19]

4. Establish rules for expedited dispute resolution. Interconnection agreements are of limited value if they cannot be enforced rapidly. Enforcement actions generally seek to compel compliance rather than collect damages -- the civil analog is obtaining a temporary restraining order, not litigating a damages claim. Regulatory enforcement should proceed as swiftly as similar civil cases. Petitioners therefore have requested a rulemaking for expedited dispute resolution, which follows closely the excellent work done by the Texas PUC in this regard.

THE BOTTOM LINE

The transition from regulated monopoly to free market competition only can be achieved through active regulatory involvement. If it seizes the initiative, this Commission can lead the Southeast into an era of competitive local telephone markets. Taking advantage of this historic opportunity will bring investment and innovation to Florida and its consumers, and accelerate the growth of advanced services like ADSL. Missing this chance will mean that Florida will watch as those benefits flow to other states. The Commission should rise to this challenge and push open the doors to local competition.

[19] The Commission can take advantage of the lessons learned from a lengthy experience in New York to move the process forward more rapidly in Florida, assuming BellSouth is cooperative.

PETITION FOR RELIEF

This Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth's Service Territory requests the Commission to take the following actions: (1) Establish a generic BellSouth UNE pricing docket to address a number of pricing issues affecting local competition; (2) Establish a Competitive Forum to address BellSouth operational issues; (3) Establish third-party testing of BellSouth's operational support systems; and (4) Establish a rulemaking for expedited dispute resolution applicable to all Florida local exchange carriers. Each request is discussed in detail below.

I. PARTIES

1. Petitioner Florida Competitive Carriers Association, Inc. ("FCCA") is a nonprofit association of twelve competitive telecommunications carriers and one national association of telecommunications carriers. FCCA is a Florida corporation whose business address is Post Office Box 10967, Tallahassee, Florida 32302. Persons who should receive copies of notices, orders and pleadings in this docket are:

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter Reeves McGlothlin Davidson
Decker Kaufman Arnold & Steen, P.A.
117 South Gadsden Street
Tallahassee, FL 32301
(850) 222-2525

2. Petitioner Telecommunications Resellers, Inc. ("TRA") is a national trade association representing the interests of service providers who offer a variety of services. TRA is a Delaware corporation whose business address is Post Office Box 2461, Gig Harbor, Washington 98335. Persons who should receive copies of notices, orders and pleadings in this docket are:

Andrew O. Isar
Director – Industry Relations
Telecommunications Resellers Association
4312 92nd Avenue, NW
Gig Harbor, WA 98335
(253) 265-3910

3. Petitioner AT&T Communications of the Southern States, Inc. ("AT&T") is a New York corporation authorized to do business in Florida. AT&T's business address for Florida operations is 101 North Monroe Street, Suite 700, Tallahassee, Florida 32301.

Persons who should receive copies of notices, orders and pleadings in this docket are:

Marsha Rule
Tracy Hatch
AT&T Communications of the Southern States, Inc.
101 North Monroe Street, Suite 700
Tallahassee, FL 32301
(850) 425-6364

4. Petitioner MCImetro Access Transmission Services, LLC ("MCImetro") is a Delaware corporation authorized to do business in Florida. MCImetro's business address for its Florida operations is Suite 700, 780 Johnson Ferry Road, Atlanta, Georgia 30342. Persons who should receive copies of notices, orders and pleadings in this docket are:

Dulaney L. O'Roark
MCI Telecommunications Corporation
780 Johnson Ferry Road
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5. Petitioner WorldCom Technologies, Inc. ("WorldCom") is a Delaware corporation authorized to do business in Florida. WorldCom's business address for its Florida operations is Suite 700, 780 Johnson Ferry Road, Atlanta, Georgia 30342. Persons who should receive copies of notices, orders and pleadings in this docket are:

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6. Petitioner Competitive Telecommunications Association ("Comptel") is a national industry association representing competitive telecommunications carriers and their suppliers. Comptel's 289 members include large nation-wide companies, as well as scores of smaller regional carriers providing local, long distance, internet and international services. Comptel is a Washington, D.C., corporation whose business address is 1900 M Street, NW, Suite 800, Washington, D.C. 20036. Persons who should receive copies of notices, orders and pleadings in this docket are:

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7. Petitioner MGC Communications, Inc. ("MGC") is a Nevada corporation authorized to do business in Florida. MGC's business address for Florida operations is 3301 North Buffalo Drive, Las Vegas, Nevada 89129. Persons who should receive copies of notices, orders and pleadings in this docket are:

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8. Petitioner Intermedia Communications Inc. ("Intermedia") is a Delaware corporation authorized to do business in Florida. Intermedia's business address for Florida operations is 3625 Queen Palm Drive, Tampa, Florida 33619. Persons who should receive copies of notices, orders and pleadings in this docket are:

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II. JURISDICTION AND STATUTES AUTHORIZING RELIEF

9. The Commission's authority to take the actions requested in this Petition is found in section 364.01(4), Florida Statutes, section 120.54, Florida Statutes, section 120.80(13)(d), Florida Statutes, and rules 25-22.012, .036, Florida Administrative Code.

III. STATEMENT OF SUBSTANTIAL INTERESTS

10. Petitioners are competitive local carriers with Certificates of Authority issued by the Commission that authorize them to provide local exchange service in Florida or organizations representing such carriers. Because of the barriers to local competition described herein, Petitioners have been prevented from competing in the Florida local exchange market on a broad scale, to the detriment of Florida consumers.

IV. DISPUTED ISSUES OF MATERIAL FACT

11. The facts stated in the Overview and below state the ultimate facts that entitle Petitioners to relief. Petitioners expect that BellSouth will dispute many of these facts.

V. INTRODUCTION

12. More than a year ago, on November 19, 1997, this Commission ruled that BellSouth failed to meet the requirements of Section 271 of the Telecommunications Act of 1996, finding that BellSouth failed to meet six checklist items (1, 2, 5, 6, 7(II) and 14). Final Order on BellSouth Telecommunications, Inc.'s Petition Filed Pursuant to Section 271(c) of the Telecommunications Act of 1996 and Proposed Agency Action Order on Statement of Generally Available Terms and Conditions, Order No. PSC-97-1459-FOF-TL, *In re: Consideration of BellSouth Telecommunications, Inc.'s entry into interLATA services pursuant to Section 271 of the Federal Telecommunications Act of 1996*, Docket No. 960786-TL (Nov. 19, 1997) ("Florida 271 Order").

13. Among other things, the Commission concluded that BellSouth had failed to provide nondiscriminatory access to its operations support systems (OSS), for example by providing interfaces requiring too much manual intervention and by failing to provide a pre-ordering interface that is integrated with an ordering interface at parity with BellSouth's own systems. (See Florida 271 Order at 96.) The Commission also found that BellSouth still needed to provide "performance measures that are clearly defined, permit comparison with BellSouth retail operations, and are sufficiently disaggregated to permit meaningful comparison." (Florida 271 Order at 185.)

14. Decisions by other commissions after the Florida 271 Order have confirmed the Commission's judgment. Most southeastern state regulatory commissions either have declined to give BellSouth a favorable recommendation in its 271 bids, or, in the case of North Carolina, expressly ruled that BellSouth has not yet met the 271 requirements.[1] (See table at pp. 5-6 above.)

15. The FCC has rejected BellSouth 271 applications three times in the past year. BellSouth's first application, for South Carolina, was rejected based on OSS failings and lack of performance measurements, among other reasons. *In re: Application of BellSouth Corp. to Provide In-Region, InterLATA Services in South Carolina,* CC Docket No. 97-208, Memorandum Opinion and Order (rel. Dec. 24, 1997). BellSouth's first Louisiana application was rejected less than two months later for much the same reasons. *In re: Application of BellSouth Corp. to Provide In-*

[1] The North Carolina Utilities Commission recently postponed a second 271 hearing scheduled to begin in December, to give BellSouth the opportunity to consider revisions to its SGAT in light of *In re: Second Application by BellSouth Corp. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order (rel. Oct. 13, 1998).

Region, InterLATA Services in Louisiana, CC Docket No. 97-231, Memorandum Opinion and Order (rel. February 4, 1998).

16. After BellSouth's second Louisiana application, the FCC issued a more comprehensive assessment, finding that BellSouth failed to meet *eight* checklist items (1, 2, 4, 5, 6, 7 (II and III), 11 and 14). *In re: Second Application by BellSouth Corp. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order (rel. Oct. 13, 1998) ("La. II Order"). Among other things, the FCC ruled against BellSouth's policy of providing collocation as the sole method for combining UNEs (La. II Order, ¶¶ 161-70); determined that BellSouth still had not demonstrated that it was offering nondiscriminatory OSS and provided an extensive list of OSS shortcomings (La. II Order, ¶¶ 82-160); and found that BellSouth's performance measurements continued to be inadequate (*see, e.g.*, La. II Order, ¶¶ 77, 92, 93, 111, 127-128, 130, 138, 147, 195, 245).

17. The FCC pointedly criticized BellSouth's failure to correct problems noted in its prior Louisiana decision:

> While we commend BellSouth for making significant improvements over the past eight months since we issued the *First BellSouth Louisiana Order*, BellSouth has filed a second application for Louisiana without fully addressing the problems we identified in previous BellSouth applications. This problem is particularly evident in BellSouth's provision of operations support systems. Because BellSouth does not satisfy the statutory requirements, we are compelled to deny its application of entry into the interLATA long distance market in Louisiana. In this regard, we caution that the Commission expects applicants to remedy deficiencies identified in prior orders before filing a new section 271 application, or face the possibility of summary denial.

La. II Order ¶ 5.

18. BellSouth's unsuccessful 271 campaign confirms that it is much more interested in obtaining authorization to offer in-region long distance service than it is in opening its local markets to competition. Local monopolies' 98.2% Florida market share demonstrates that local competition is developing at a glacial pace even though more than fifty competitive carriers are trying to break into the market.[2] Simply put, it is not in BellSouth's corporate interest to allow new entrants to compete for a piece of its core business market, and BellSouth has the bottleneck control to prevent them from doing so. Unless the Commission takes action, Florida will continue to see little progress in the development of competitive local markets.

VI. REQUEST FOR HEARING ON UNE PRICING

A. Background

19. The Commission established UNE prices for BellSouth during the arbitration of its interconnection agreements with competitive carriers. As a practical matter, the prices set in the consolidated AT&T-MCI arbitration established the prices for the industry in BellSouth's service territory. Unfortunately, the experience in the industry demonstrates that the rates established by the Commission effectively foreclose competition to serve most Florida consumers. Even if BellSouth's operations support services worked perfectly and it provided nondiscriminatory access to customer loops and other UNEs, competitive carriers would not be able to serve the great majority of Florida customers on a competitive basis. To jump start competition in the

[2] Florida Public Service Commission's December 1998 report on Competition in Telecommunications Markets in Florida, pp. 45-46.

local telephone market, it will be critical for the Commission to address pricing issues as soon as possible.

B. Key Pricing Issues

20. The Commission has the responsibility to establish cost-based rates for UNEs. Florida's UNE rates were set in the absence of market experience. New entrants' inability to penetrate the Florida local market provides strong evidence that Florida's rates are not truly cost-based, as does Florida's relatively high UNE costs compared to those in other BellSouth states. Some of the pricing issues the Commission should consider at once are the following:

1. Cost-based pricing for UNE combinations

21. In the past year, the Commission addressed a number of issues relating to the provisioning and pricing of unbundled network elements. *See* Final Order Resolving Interconnection Agreement Disputes, Addressing Retail Service Composition, and Setting Non-Recurring Charges, Order No. PSC-98-0810-FOF-TP, *In re: Motions of AT&T Communications of the Southeastern States, Inc. and MCI Telecommunications Corp. and MCImetro Access Transmission Services, Inc. to compel BellSouth Telecommunications, Inc. to comply with Order No. PSC-96-1579-FOF-TP and to set non-recurring charges for combinations of network element with BellSouth Telecommunications, Inc. pursuant to their agreement*, Docket No. 971140-TP (June 12, 1998) (Florida UNE Combination Order).

22. In the Florida UNE Combination Order, the Commission held, among other things, that AT&T's and MCImetro's contracts entitled them to lease combined network elements from BellSouth. The Commission further held that AT&T and

MCImetro were entitled to lease the combined UNEs at cost-based rates unless the combination recreated an existing BellSouth service, in which case the parties needed to negotiate a price.[3] The Commission determined that a loop-port combination does not recreate an existing BellSouth retail service, but left to the parties to negotiate what, if anything, might do so.

23. The Commission's decision to direct the parties to negotiate was premised on the expectation that the issue was capable of resolution in this manner. However, further negotiations concerning the loop-transport combination have proven futile. In those negotiations, BellSouth has taken the extraordinary position that the combination of a 4-wire DSI loop and DSI dedicated transport to an ALEC's switch "recreates" BellSouth MegaLink private line service and therefore will not be sold at UNE prices. If BellSouth insists that a combination that does not involve switching nonetheless recreates an existing BellSouth retail service, it is clear that negotiations cannot hope to serve the purpose envisioned by the Commission's decision. Commission action is therefore necessary.

2. Unbundled switching costs

24. Florida currently has the highest unbundled local switching rates in the Southeast and one of the highest rates in the country. An ALEC in Florida must pay $.0175 for the first minute of originating usage and $.005 for each additional minute on residential and business lines. The next highest rate in the Southeast is North

[3] With respect to the MCImetro contract, the Commission ruled that MCImetro must pay for UNE combinations based on the prices of the individual UNEs. (Florida UNE Combination Order at 24-25.) With respect to the AT&T contract, the Commission held that UNE prices generally only applied to UNEs ordered individually, except for combinations already in existence that do not recreate a BellSouth retail service. (Florida UNE combination Order at 44-45.)

Carolina, where ALECs pay $.004 for each minute.[4] Thus, if a residential or small business caller makes 400 calls a month averaging 2 1/2 minutes a call, an ALEC in Florida pays approximately $10 a month for local switching alone, while an ALEC in North Carolina pays $4. ALECs in other BellSouth states would pay less than $3. As a result, total recurring costs for new entrants in Florida are second in amount only to those in Mississippi in BellSouth's region.

3. Nonrecurring costs

25. Florida has the highest nonrecurring costs in the Southeast. For example, the standard nonrecurring cost for a local loop and a switch port is $178.00 in Florida. The second highest cost for these UNEs is found in Kentucky, where they cost $123.86. In other BellSouth states, the cost ranges from $117.00 (Tennessee) to $28.50 (Mississippi). The Commission made an important change in the Florida UNE Combination Order when it held that under the interconnection agreements in question, the nonrecurring costs for customer migrations are much lower (for example, $1.4596 for the first installation of a 2-wire or 4-wire analog loop and port). Further changes to the original determinations consistent with this recognition are necessary to make Florida's nonrecurring costs truly cost-based.

4. Deaveraged loops

26. Although the economic cost (which includes a fair profit) for BellSouth to provide loops varies greatly depending on population density and other factors such as terrain, the rates charged to new entrants do not. For example, the economic cost of a

[4] The North Carolina Utilities Commission is expected to issue new, permanent UNE rates shortly.

loop is only $4.74 per month in urban areas,[5] but competitive carriers still are charged the average of $17 per month. The net effect of averaging these costs is to increase rates artificially in places that might otherwise be profitably served.[6]

27. The Department of Justice recently explained the need for loop cost deaveraging:

> We continue to believe that the ability to obtain unbundled loops at appropriately deaveraged prices may be critical to enabling facilities-based CLECs to expand their service offering beyond centrally located large business customers (for whom these carriers can economically provide their own loops) to smaller and more dispersed small business or residential customers in urban areas served by central offices near the CLECs' facilities. The transition to an efficient, sustainable, and equitable competitive environment will require both the geographic deaveraging of loop prices to reflect differences in costs, and the development of explicit and competitively neutral subsidies to support universal service. The lack of geographic deaveraging, or even a transition plan towards deaveraging, may act as a barrier to efficient competition.

United States Department of Justice, *In re: Second Application by BellSouth Corp. Inc. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 97-208, pp. 21-22 (Aug. 19, 1998) (La. II DOJ Eval.). This Commission should address this issue at once.

C. The Commission Should Establish a UNE Pricing Docket

28. In view of the "lessons learned" and information gained as a result of the experience in the industry since UNE prices were first set, the issues identified above

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[5] This deaveraged loop rate is based on the Hatfield 5.0 study. Although parties may disagree on what the deaveraged rate should be, there is no dispute that costs are much lower in urban areas than rural areas.

[6] The Florida staff recently emphasized "that the Commission has not rejected geographic deaveraging as a policy matter," so this remains an open issue in Florida. *See* Staff Recommendation, *In re: Petition by Metropolitan Fiber Systems of Florida, Inc. for Arbitration with BellSouth Telecommunications, Inc. Concerning Interconnection Rates, Terms, and Conditions, Pursuant to the Federal Telecommunications Act of 1996*, Docket No. 960757-TP, p. 6 (Dec. 3, 1998).

should be addressed so that more pro-competitive pricing becomes available to ALECs as soon as possible. Petitioners urge the Commission to open a pricing docket and consider the issues delineated above in a proceeding that includes all interested competitive carriers and BellSouth. Such an inclusive proceeding will enable all of the carriers who will be significantly affected by the pricing decisions to participate in the resolution of issues that are critical to their survival in the marketplace, while assuring that the Commission has the most complete record and the best information on which to base its decisions. The inclusive proceeding will also provide a forum for smaller carriers, who do not have the requisite resources to negotiate with BellSouth on equal terms. Even if some pricing does not become available until new interconnection agreements are negotiated, action by the Commission now will ensure that all proceedings and appeals can be addressed by the time most contracts come up for renewal. Otherwise, prices will remain a question mark until well into the year 2000 and perhaps beyond. This Commission should dispel this uncertainty and correct pricing problems to encourage investment in the Florida local market.

VIII. REQUEST FOR A COMPETITIVE FORUM

A. Background

29. Resolving pricing issues will not, by itself, enable competition to flourish. Cost-based prices are of little benefit to competitive carriers if they are unable to obtain the necessary access to BellSouth's facilities (especially local loops), and to order and provision service, bill customers and ensure that customer lines are maintained and repaired properly. Because of the technical complexity involved, as

well as BellSouth's natural incentive not to assist new entrants in breaking into its market, progress in resolving these operational issues has been painfully slow. Simply leaving the parties to negotiate solutions puts competitive carriers at a disadvantage because of their inferior bargaining power, while regulatory action tends to be slow, cumbersome and inefficient. Smaller carriers are at a particular disadvantage because of they often lack the resources to mount full-scale negotiations or enforcement actions. A more innovative approach therefore must be taken if the pace of local competition is to be accelerated.

30. Petitioners therefore propose that the Commission initiate a Competitive Forum to move these operational issues forward. Several commissions have adopted this approach successfully. In Texas, for example, after the Texas Public Utilities Commission said "not yet" to Southwestern Bell's 271 filing, it implemented a thorough collaborative process to resolve dozens of issues arising under the 271 checklist.[7] This process involved a series of workshops focusing on one or more checklist items in which business people for the parties discussed existing problems with commission staff and sought to work out mutually agreeable solutions. The process continued in follow-up meetings in which the parties and staff monitored progress and determined additional action items. As a result, substantial improvements are underway.

31. Other states using similar approaches also have met with success. In New York, the parties engaged in extensive workshops to work through OSS issues and

[7] The Texas PUC did not wait for Southwestern Bell to file its 271 petition to begin work opening local markets. Before Southwestern Bell filed its 271 notice, the commission initiated an implementation process to require Southwestern Bell and ALECs to build interfaces necessary for UNE orders.

made progress that they had been unable to achieve without commission involvement. The New York commission also ordered third-party testing of Bell Atlantic's OSS to ensure that it was ready to handle commercial volumes. The Pennsylvania Public Utility Commission also has begun to take an active role, with two commissioners heading workgroups on pricing and entry issues. The California Public Utilities Commission also has used extensive workshops to work through issues of concern to competitive carriers. The Georgia Public Service Commission also has used a workshop successfully to address OSS issues. Much more work remains to be done on BellSouth's OSS, however.

32. The Commission's workshops on collocation and OSS are good first steps toward the sort of issue identification and resolution that must take place for competition to advance. These workshops should be brought within the framework of the Competitive Forum.

B. Operational Issues that Must Be Addressed

33. A host of operational issues must be resolved before true competition can take place. Although the parties have made progress addressing some issues in the past year, they have reached impasse on others, such as the ability of competitive carriers to obtain access to loops in an efficient manner. In addition, local telecommunications technology is developing rapidly and as a result new issues are emerging that must be resolved quickly. A preliminary list of key issues is attached as Exhibit F. Some of the key outstanding issues are discussed below:

1. Access to UNEs (including ADSL and HDSL loops)

34. BellSouth has installed the vast majority of loops within its service territory and it is unlikely that infrastructure will be duplicated by competitors in the near term, if ever. If new entrants are to serve the great majority of Florida consumers, they must obtain ready access to BellSouth's loop plant.

35. In theory, there are two ways that ALECs can access BellSouth loops using UNEs. One is to lease the customer loop, unbundled local switching and other network elements necessary to provide service. Until the Commission's UNE combination policy is revisited, the Florida UNE Combination Order effectively will prevent ALECs from using that method.

36. The second method new entrants can use to gain access to loops is to lease loops and collocation space from BellSouth and then provide transport, using the new entrant's facilities or BellSouth's unbundled transport, to the new entrant's switch. But BellSouth generally requires new entrants using this approach to lease expensive collocation spaces at central offices from which they wish to provide service.[8] The Commission is well aware of the problems new entrants have experienced with collocation. Spaces are expensive; BellSouth has long provisioning intervals; BellSouth contends there is limited space available so some new entrants are being turned away; and combining elements in collocation spaces is much less efficient than the method BellSouth itself uses. The problems with collocation must be addressed for ALECs that wish to use them, but more importantly, alternative methods must be

[8] BellSouth makes an exception for T1 lines running from a customer's premises to the new entrant's switch. These T1s, which transmit up to twenty-four calls at once and therefore are practical only for large business customers, may be ordered out of BellSouth's access tariff. BellSouth will not, however, sell new entrants the same facilities (*i.e.*, a DS1 loop and DS1 transport combination) at the substantially cheaper combined UNE cost. Competitive carriers should not be required to treat the loop-transport combination as if it were an access service or a resale service, as BellSouth purports to require.

explored and tested. The Commission's workshop on collocation was an important first step in this process, but much more work remains to be done.

2. Operation Support Systems (OSS)

37. As noted above, the Commission in the Florida 271 Order concluded that BellSouth failed to provide nondiscriminatory access to its OSS, noting a number of problems relating to pre-ordering, ordering, provisioning, billing and maintenance and repair. Although BellSouth has made improvements in the last year, major problems still remain. In the La. II Order issued just two months ago, the FCC found a host of problems with BellSouth's OSS, including the following:

- Failure to provide ability to integrate pre-ordering and ordering;
- Failure to offer nondiscriminatory access to due dates;
- Failure to demonstrate parity of order flow-through;
- Deficient performance for order rejection notices;
- Deficient performance for firm order confirmations;
- Disparate performance for average installation intervals;
- Failure to provide sufficient data to assess provision of completion notices;
- Failure to provided sufficient data to assess jeopardy notices;
- Failure to demonstrate nondiscriminatory OSS for ordering UNEs;
- Failure to demonstrate nondiscriminatory access to repair and maintenance functions; and
- Failure to provide sufficient evidence of compliance with obligation to provide competitors with nondiscriminatory access to billing information.

(La. II Order, ¶¶ 94-160.)

38. In addition to the problems noted above, there have been significant new developments since the record in the second Louisiana case was filed. For example, competitive carriers have experienced a number of problems attempting to order LNP since BellSouth recently began offering it. These and other problems will be discussed at the OSS workshop scheduled for December 16 and 17. That workshop should be a good first step in identifying issues that must be resolved.[9]

3. Performance measures

39. In its 271 Order, this Commission rejected BellSouth's proposed performance measurement system. (Florida 271 Order, pp. 176-86.) Almost a year later, the FCC in its La. II Order identified a number of flaws in BellSouth's performance measurements. inadequate. *See, e.g.*, La. II Order, ¶¶ 77, 92, 93, 111, 127-128, 130, 138, 147, 195, 245. The development of satisfactory performance measures and standards, which have been subjected to thorough initial auditing, along with self-executing, meaningful enforcement mechanisms, is key to providing BellSouth the necessary incentive to provide parity to new entrants. The Commission should ensure that three components are in place: (1) objective performance standards; (2) self-executing remedies; and (3) appropriately detailed reports and supporting data for all necessary performance measurements.

a. Performance Standards

40. As the Department of Justice recently stated, performance standards are "commitments or obligations to meet specified levels of performance." La. II DOJ Eval. at 38. In contrast to performance measures, which describe BellSouth's

[9] Petitioners also note that the Commission Staff has done an audit report on BellSouth's OSS. That report should be made public and used to further identify issues and develop proposed solutions.

performance after the fact, performance standards *require* a specified level of performance (such as an order completion interval of one day or an on-time order completion rate of 99%).

41. The FCC has made clear that when no retail analogues exist, it "will consider whether appropriate standards for measuring the performance of particular OSS functions have been adopted by the relevant state commission or agreed upon by the parties in an interconnection agreement or during the implementation of such an agreement." *In re: Application of Ameritech Michigan to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order at ¶ 141 (rel. Aug. 19, 1997) (Ameritech Michigan Order). In addition, the FCC has stated that the Act is intended to ensure that competitors have a meaningful opportunity to compete for local customers. *See, e.g., In the Matter of 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) ¶ 315 ("*First Report and Order*").

42. To provide ALECs a meaningful opportunity to compete, BellSouth must comply with performance standards for *all* services for which performance data is provided. *See* La. II DOJ Eval. at 38 (concluding that BellSouth must be subject to performance standards without limiting that requirement to situations in which no retail analogues exist).

43. BellSouth fails to provide *any* objective performance standards with which it will comply. With respect to services for which BellSouth contends there is no retail analogue, BellSouth does not provide comparative data, performance standards,

or appropriate benchmarks. BellSouth does provide comparative performance data in most cases when it concedes that a retail analogue exists. But BellSouth's performance measurements are not the same as objective performance standards, *i.e.*, "commitments or obligations to meet specified levels of performance." *See* Second DOJ Evaluation at 38. BellSouth only compares its performance in a given month with that provided to an ALEC or to ALECs in the aggregate. It does not specify in advance what level of performance (such as returning an FOC within twenty-four hours) by which its performance can be judged and on which ALECs can rely.

b. Self-Executing Enforcement Mechanisms

44. Performance measurements and reporting alone do nothing more than state after the fact whether BellSouth has violated the Act by providing inferior service to ALECs. Performance standards and remedies, unlike mere reports, *require ongoing performance at a reasonable and nondiscriminatory level.* The FCC specifically has noted that effective performance standards and remedies are the means to help ensure that local markets remain open after Section 271 entry. Ameritech Michigan Order ¶¶ 390-94. As the FCC has stated:

> We would be particularly interested in whether such performance monitoring includes appropriate, self-executing enforcement mechanisms that are sufficient to ensure compliance with the established performance standards. That is, as part of our public interest inquiry, we would inquire whether the BOC has agreed to private and self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention. The absence of such enforcement mechanisms could significantly delay the development of local exchange competition by forcing new entrants to engage in protracted and contentious legal proceedings to enforce their contractual and statutory rights to obtain necessary inputs from the incumbent.

La. II Order at ¶ 364.

45. Clearly defined performance *standards* that the parties can apply on their own without the need for constant litigation, and which this Commission can apply on the rare occasion when self-executing remedies are not in place or are ineffective, are therefore essential to enforcing the Act's requirement that BellSouth provide service to competitive carriers on reasonable, nondiscriminatory terms.

46. BellSouth has proposed no self-executing enforcement mechanisms. Thus, the critique made by the U.S. Department of Justice in the second Louisiana case holds true in Florida today:

> We find no evidence in the record that BellSouth has committed itself in any significant way to specific levels of performance or to any enforcement provisions to remedy inadequate performance. Rather, it appears that, as a general matter, CLECs who feel that BellSouth's performance is inadequate would need to file complaints with the Louisiana PSC and then, in the course of the resulting regulatory proceedings, establish the appropriate level of performance, whether BellSouth had failed to meet that performance level, and finally, establish the remedy. To be most effective in preventing backsliding, such issues should be resolved in advance, either in contracts between BellSouth and its competitors or through regulatory proceedings.

(La. II DOJ Eval. at 39.) So long as there is no system of self-executing enforcement mechanisms, the Commission will have no assurance that BellSouth will provide nondiscriminatory service to ALECs once BellSouth enters the in-region long distance market.

c. Performance Data and Reporting

47. BellSouth must produce performance measurement reports that satisfy at least three criteria. First, BellSouth's reports must include all appropriate performance measurements. *See, e.g.,* Ameritech Michigan Order ¶ 212 (noting required measurements that Ameritech failed to include in its reports); *In Re: Performance*

Measurements and Reporting Requirements for Operations Support Systems, Interconnection and Operator Services, CC Docket No. 98-56, Notice of Proposed Rulemaking (rel. April 17, 1998) (setting out measurements proposed as guidelines for state regulatory agencies). Second, BellSouth's performance measurements must be "sufficiently disaggregated to permit meaningful comparisons." Ameritech Michigan Order ¶ 212. Third, BellSouth should provide the Commission with a valid model that will permit it to analyze the data and draw statistically valid conclusions. As the FCC stated in its La. II Order: "We encourage BellSouth, in the future, to submit performance data in a way that permits statistical analysis, or otherwise explain how its performance data demonstrate compliance with the statutory nondiscrimination mandate." La. II Order ¶ 93.

48. The Department of Justice summed up the current situation well when it stated: "A general review of this data suggests that BellSouth's performance is deficient in several areas, but it is difficult even to evaluate the true picture: given the level of missing measures, incomplete data, and insufficiently disaggregated data, BellSouth has failed to provide a complete set of data in a manner necessary to analyze fully its performance." La. II DOJ Eval. at 28-29.

C. Proposal for a Competitive Forum

49. The experiences of Texas, New York, Pennsylvania and California demonstrate that progress on local entry can be made, but only by forward-thinking commissions willing to take the initiative to bring the parties together and work out solutions. Florida should build on these prior and ongoing procedures and establish a

procedure in this state to address the operational issues that remain outstanding. Petitioners propose the following procedural framework:

a. Workshops would be conducted at the Commission's offices and moderated by commissioners or Staff. Workshops would be organized to cover related issues. For example, separate workshops might be conducted on issues relating to access to loops and other UNEs; issues relating to OSS; and issues relating to performance measures and standards. Participants would be directed to have appropriate business representatives attend the workshops.

b. The issue list attached as Exhibit F would serve as a preliminary identification of issues to be addressed. Parties that wish to participate in the process should notify the Commission of their intention to do so, and then serve concise summaries of their positions concerning the issues identified in Exhibit F and concerning any additional issues they wish to raise. Based on these summaries, the Commission would schedule initial workshops and give parties notice of the issues to be discussed.

c. At the workshops, subject matter experts or other business representatives would provide summaries of the issues and proposed solutions. Following the summaries, the moderator would lead discussion designed to better understand the problems being addressed and the most effective solutions. The parties should be able to ask questions of one another in an effort to promote the exchange of information and the development of solutions acceptable to all parties. After the discussion, the moderator would summarize all agreed upon solutions and action items. After each workshop, the moderator would prepare a report for the Commission outlining the

identified issues, the parties' positions and any proposed solutions. Follow-up workshops would be scheduled to review completion of action items and continue the process until issues are resolved or impasse is reached.

d. With respect to issues on which the parties are unable to agree, the Commission Staff would recommend a proposed solution or recommend that no further action is necessary. The Commission would hold an evidentiary hearing on such issues to determine whether to adopt the recommendation.

IX. REQUEST FOR THIRD-PARTY TESTING OF OSS

Background

50. Once the process of identifying and resolving issues relating to OSS in the Competitive Forum has been completed, it will still remain to be determined if BellSouth's OSS can perform satisfactorily in real-world commercial conditions. In every 271 case brought by BellSouth, the parties have disputed vigorously whether BellSouth in fact provides nondiscriminatory access to its OSS. Although the FCC and most state commissions have determined (quite correctly) that BellSouth has not done so, commissions have struggled to understand the sometimes complex technical issues involved, and to untangle the "he said-she said" debate between the parties. Third-party testing, if properly designed, executed and monitored, is a way to cut through those disputes and ensure the development of OSS that will support local competition in Florida.[10]

[10] Of course, "the most probative evidence that OSS functions are operationally ready is actual commercial usage." Ameritech Michigan Order at ¶ 138. In addition to requiring third-party testing, the Petitioners urge the Commission to obtain performance data based on a reasonable period (not less than ninety days) of actual commercial operation before reaching any definitive conclusions regarding BellSouth's OSS. Only in this way can the Commission be assured that BellSouth truly has satisfied the FCC's requirements.

51. Third-party testing was adopted in New York this year after an extensive OSS collaborative process. KPMG Peat Marwick was selected as a third-party consultant, which in turn retained Hewlett Packard to build a "pseudo-CLEC" interface that would test all aspects of Bell Atlantic's systems, including ordering, pre-ordering, provisioning, maintenance, billing and usage. The objective of New York's third-party testing is *not* to develop a critique of Bell Atlantic's OSS, but rather to identify and fix problems so that ultimately ALECs can have verified access to OSS that can handle commercial volumes in a nondiscriminatory manner. Texas also actively is considering third-party testing procedures.

B. The Florida Commission Should Adopt Third-Party Testing

52. Third-party testing, when properly executed, offers key benefits that commend it for use in Florida. Three benefits are particularly important. First, such testing enables the tester to assess all OSS functions, for all order types. Thus, even if a particular aspect of BellSouth's OSS is not being used by ALECs extensively today, the Commission can be satisfied that it is operational, provided the test scenarios are sufficiently exhausted. Second, such testing, if properly designed, can provide insight regarding operational capabilities at large volumes. BellSouth must demonstrate that its systems hold up under such "stress-testing." Third, having a third-party conduct the tests and evaluate the data will give the Commission an objective view of the system's functionality. That evidence, when combined with satisfactory evidence of actual commercial usage delivered through a comprehensive and thoroughly audited performance measurement system, will enable the Commission to conclude whether BellSouth's OSS meets the FCC's requirements.

53. The Petitioners propose that the following procedure be used for third-party testing:

a. The development, testing and monitoring process must substantively involve an independent, technically skilled third party. The independent third-party consultant must be empowered to assure that comprehensive test scenarios are designed, that the test scenarios are executed in a manner that tests operational capabilities and load-carrying capacity, and that the performance is measured in a manner that is consistent with that which will be employed in the competitive marketplace.

b. Third-party testing should not begin until BellSouth has addressed the issues raised in the Competitive Forum and a resolution documented. The process for selecting the third-party consultant and establishing its scope of work should, however, begin immediately so as not to delay the process.

c. The consultant should prepare a detailed plan for a comprehensive test of BellSouth's OSS, including all pre-ordering, ordering, provisioning, maintenance and repair and billing functions, as well as testing of UNE combinations. The parties should have the opportunity to comment on the plan to ensure that the entire spectrum of OSS functions and business processes are tested. Any disputes regarding test scenario design should be documented by the consultant and if mutually agreeable solutions cannot be reached, the Commission Staff should provide the final resolution.

d. Test scenarios must be developed carefully to reflect as much as possible the real world experience of ALECs, including the mix of services and operational transactions that are crucial to the development of competition. For pre-ordering and ordering, this means that the pre-ordering transactions and order types must represent a

realistic sampling based on commercial experience and market entry plans of ALECs and all types of service delivery methods, as well as conversions from one service delivery method to another. It is also important that testing cover actual provisioning of the loops, ports, and other elements ordered, including LNP and ancillary services such as 911, directory assistance and listings, and combinations of these and other network elements. Only in this way can BellSouth show that it can provision UNEs, alone and in combination, in a timely fashion and at levels that might actually support commercial volumes. For billing, any testing scenarios must involve multiple end offices and a diversity of call types, because proof that BellSouth can bill from a single end office for a particular call type is not proof that it can bill for all service delivery methods across its entire network. Repair and maintenance requests should be included for all relevant service delivery methods and should be conducted on live operating service configurations where possible. Finally, it is vital that this effort be viewed not simply as testing the existence of an electronic interface, *but the underlying BellSouth business processes that are supported by means of computer automation and manual processing that will provide nondiscriminatory support.* Anything less will not achieve what is necessary for competition to develop, because BellSouth's legacy systems, processes and business rules have a direct impact on an ALEC's ability to do business.

e. The consultant should be required to use specifications provided by BellSouth to develop the systems on the ALEC side of the interface necessary to interact with BellSouth's OSS. BellSouth should not be permitted to provide side-bar guidance unless the same information, explanation, clarification and corrections are

immediately disseminated to all ALECs and promptly incorporated into BellSouth's governing documentation. As part of this process, the consultant should be required to evaluate BellSouth's change management process -- the process by which BellSouth makes changes to its OSS. Any interface adjustments, including but not limited to business rule modifications, changes and data requirement formatting, resulting from the testing process shall be implemented through the change control management procedure.

f. Parties should have the opportunity to verify what is being tested. In particular, they should receive a list of all documentation that the BellSouth provides to the consultant and copies of all communications between BellSouth and the consultant. The parties and the Commission must be able to verify that the consultant is using the same information that BellSouth provides to ALECs.

g. The third-party test itself should involve two steps, but these tests should not be initiated until there is mutual agreement that the quality gates for initiating the testing have been satisfied and that clear exit criteria exist. That is, the condition that must be satisfied in order to conclude that testing has completed successfully, must be set forth in advance. First, it should include a capacity test that uses a predetermined volume of orders to test pre-ordering and ordering systems expected in a commercial environment. As problems are found, they should be corrected and the system retested to ensure that the solutions work and do not cause problems in other parts of the system. Second, the process should include a functionality test that requires a "live" test of predetermined volume and order types that are flowed through the provisioning, maintenance, billing and performance measures processes. This part of the test should

last at least one billing cycle. In both parts of the test, the third-party tester would stand in the shoes of an ALEC and perform all tests as if they were being done with actual Florida consumers.

h. Finally, for the test to have any meaning, the results must be measured against the performance standards developed during the Competitive Forum. The process for gathering, computing and comparing performance results must be subjected to an advance audit to assure that the results produced are in accordance to documentation and approved procedures for self monitoring. Failure to satisfy performance standards should result in correction of the root cause of the problem and retesting as necessary. The results should be provided to the Commission and the parties within thirty days of successful test completion.

54. Some resources will be required to prepare and conduct the tests and to analyze test results, but experienced gained from other third-party testing in other states should serve to make the testing cost-effective.

X. REQUEST FOR RULEMAKING ON EXPEDITED DISPUTE RESOLUTION

55. The 1996 Act provides that incumbent local exchange companies have a duty to negotiate interconnection agreements with competitive carriers, and this Commission already has conducted eleven arbitrations on such agreements.[11] But interconnection agreements are of limited value if they cannot be enforced swiftly. For example, if BellSouth's actions are affecting a new entrant's ability to serve a customer, a Commission order coming several months after the fact provides little help

[11] See Florida Public Service Commission's December 1998 report on Competition in Telecommunications Markets in Florida, p. 26.

-- if the customer's problem is not solved quickly, it may well decide that changing carriers is not worth the trouble and go back to BellSouth. Further, telecommunications technology is changing rapidly; a favorable Commission order after several months of regulatory procedure often will be too little too late. Delay and preservation of the status quo favor BellSouth at the expense of competitive carriers. BellSouth, which has the natural incentive to move as slowly as possible to open its market, has taken and will continue to take unreasonable positions concerning the interpretation of interconnection agreements so long as doing so buys time at no cost.

56. The Commission's current dispute resolution procedures, which take months to unfold, thus play into BellSouth's hand. For example, in February this year MCImetro filed an enforcement complaint raising fourteen claims relating to OSS and other issues.[12] Even after the Commission adopted a somewhat more abbreviated schedule (at MCImetro's request) than originally ordered, the Commission did not issue its final order until November 5. Indeed, the case still has not been completed because BellSouth filed a motion for reconsideration that has not been ruled upon. Although the Commission's order granting relief to MCImetro on all but one of its claims was a strong statement in favor of competition, the lengthy process involved rewarded BellSouth for its refusal to abide by the parties' contract.

57. Under the Telecommunications Act of 1996, this Commission has the obligation to interpret and enforce approved interconnection agreements. Iowa Utilities Board v. FCC, 120 F.32d 753, 803-04 (8th Cir. 1997) cert. granted sub nom AT&T

[12] MCImetro's claim concerning reciprocal compensation was severed and put in a separate docket for reciprocal compensation claims.

Corp. v. Iowa Utilities Board, 118 S.Ct. 879 (1998). Petitioners submit that undue delay in the resolution of disputes arising under interconnection agreements is inconsistent with the pro-competitive goals of that Act.

58. Petitioners therefore request that the Commission initiate a formal rulemaking proceeding pursuant to Sections 120.54(7) and 120.80 (13(d), Florida Statutes, and Rule 28-103.006, F.A.C., for purposes of promulgating rules and regulations relating to post-interconnection dispute resolution. These rules should establish procedures that are necessary to ensure consistency with pro-competitive goals of the Telecommunications Act of 1996. Such rules are therefore specifically authorized by Section 120.80(13)(d), Florida Statutes, which allows the Commission to employ procedures consistent with that act. Because the Commission has specific statutory authority in Section 120.80(13)(d) to establish such procedural rules, the proposed rules will be entitled to an exception to the Administration Commission's uniform rules of procedure pursuant to Section 120.54(5)(a)2, Florida Statutes, which provides for exceptions "to the extent necessary to implement other statutes. . . ."

59. Such rules should provide for an informal settlement conference at which the Commission's Staff would attempt to mediate disputes without a formal evidentiary proceeding. If the complainant determined an informal settlement conference would not be appropriate in a particular case, a formal dispute resolution proceeding could be initiated. Under the formal dispute resolution procedure, parties would exchange pleadings that narrow the issues in dispute and a hearing would be held no later than sixty days after the filing of the complaint. Post-hearing submissions would be filed within five days after receipt of the hearing transcript and

the Staff recommendation would be filed in time for consideration no later than the first agenda conference scheduled thirty days or more after the filing of the post-hearing submissions.

60. If the complainant thinks that a dispute requires immediate attention, it may file a request for expedited ruling. Under that rule, the presiding officer would make a determination whether the complaint warranted an expedited ruling and, if so, schedule a hearing no later than thirty days after the filing of the complaint. The presiding officer would be authorized to issue a ruling at the hearing from the bench or permit post-hearing submissions by the parties, followed by a Staff recommendation and Commission decision.

61. Such rules should provide for an interim ruling pending dispute resolution. A party who files a complaint to initiate a dispute resolution (either formal or expedited) should have the opportunity to request relief during the pendency of the proceedings that consider the merits of the dispute. This provision would provide an interim remedy when the dispute compromises the ability of a party to provide uninterrupted services or precludes the provisioning of scheduled service.

XI. CONCLUSION

62. UNE pricing, OSS problems, lack of access to loops and a host of other issues, not to mention BellSouth intransigence, block the way to local competition in Florida's local exchange markets. Strong leadership by the Commission is required to make the transition from a regulated monopoly market to a robustly competitive one.

Petitioners urge the Commission to seize the initiative by taking the actions they have requested in this Petition.

WHEREFORE, Petitioners Respectfully request that the Commission take the following actions:

(a) Establish a generic BellSouth UNE pricing docket to address issues affecting local competition;

(b) Establish a Competitive Forum to address BellSouth operations issues;

(c) Establish third-party testing of BellSouth's OSS;

(d) Initiate a rulemaking proceeding to establish expedited dispute resolution procedures applicable to all local exchange carriers; and

(e) Provide such other and further relief that the Commission deems just and proper.

RESPECTFULLY SUBMITTED, this 10th day of December, 1998.

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CERTIFICATE OF SERVICE

I HEREBY Certify that a true and correct copy of the foregoing Petition for Relief has been furnished by hand delivery this **10th** day of **December, 1998,** to the following parties:

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Florida Public Service Commission
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Joseph A. McGlothlin

Joseph A. McGlothlin

EXHIBIT A

Date of Report (Date of earliest event reported):
January 22, 1998

BELLSOUTH CORPORATION
(Exact name of registrant as specified in its charter)

Georgia	1-8607	58-1533433
(State or other jurisdiction of incorporation)	(Commission file Number)	(IRS Employer Identification No.)

1155 Peachtree Street, N. E., Atlanta, Georgia 30309-3610
(Address of principal executive offices) (Zip Code)

Registrant's telephone number, including area code
(404) 249-2000

Item 5. Other Events

Fourth Quarter 1997 Earnings

On January 22, 1998, BellSouth announced earnings for the fourth quarter of 1997. See Exhibit 99 for a complete copy of the related press release.

1997-1998 Earnings Growth

BellSouth believes that normalized earnings growth could be in the low double digits through 1998. This forward-looking statement is based on a number of assumptions including, but not limited to: (1) economic growth and demand for wireline and wireless communications services continues in BellSouth's service territories; (2) BellSouth Telecommunications, Inc. is successful in furthering its cost reduction efforts; (3) the final resolution of the access reform and universal service orders of the FCC (and the resultant customer impacts) is reasonably revenue neutral; (4) local wireline and wireless service competition does not have significantly increasing adverse impact on earnings through 1998; (5) BellSouth's expectations as to the cost and success of its efforts for year 2000 compliance, including the success of its key suppliers and customers, are reasonably accurate; and (6) the current level of economic, monetary and political stability continues in foreign countries in which BellSouth has significant investments or operations. Any developments significantly deviating from these assumptions could cause actual results to differ materially from those in the above forward-looking statements.

Item 7. Financial Statements and Exhibits

(c) Exhibits

Exhibit No.

99 Press Release - Fourth Quarter 1997 Earnings

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SOUTHWESTERN BELL TELEPHONE COMPANY	§	
	§	
VS.	§	NO. A 98-CA-197 SS
	§	(CONSOLIDATED)
AT&T COMMUNICATIONS OF THE SOUTHWEST, INC., et al.	§	

JUDGMENT

BE IT REMEMBERED that on this the 6th day of November 1998, the Court entered an order resolving all remaining contested issues in the above-styled consolidated cause and dismissing those claims that have been rendered moot by previous orders of the Court, subsequent PUC rulings, subsequent agreements of the parties, or the passage of time. Accordingly, the Court enters the following judgment:

IT IS ORDERED, ADJUDGED, and DECREED that the PUC Arbitration Award is REVERSED IN PART and Part A, § 3 of the interconnection agreement between MCI and SWBT is AMENDED by this order to STRIKE the provision granting MCI the option to renew the agreement for successive one-year terms after the initial three-year term expires;

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the PUC Arbitration Award is otherwise AFFIRMED, all relief not specifically granted is DENIED, and all parties shall suffer their own costs.

SIGNED on this 6th day of November 1998.

SAM SPARKS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SOUTHWESTERN BELL TELEPHONE COMPANY	§	
	§	
VS.	§	NO. A 98-CA-197 SS
	§	(CONSOLIDATED)
AT&T COMMUNICATIONS OF THE SOUTHWEST, INC., et al.	§	

ORDER

BE IT REMEMBERED that on the 9th day of October 1998, the Court held a bench trial in the above-styled cause at which all parties were present through representation of counsel. The Court heard status reports and oral arguments on all claims. Without conceding any legal arguments or waiving objections, the parties discussed which issues are still contested in the above-styled cause and in the predecessor to this cause, consolidated Cause No. A-97-CA-132-SS. After consideration of the oral arguments, the numerous briefs, the voluminous administrative record, and the applicable law, the Court enters the following opinion and orders.

I. Background

This case is a consolidation of an appeal and cross-appeals of a second round of Texas Public Utility Commission ("PUC") rulings on local telephone interconnection agreements under the Federal Telecommunications Act of 1996 ("FTA"), Pub. L. No. 104-104, 110 Stat. 56. Congress enacted the FTA to foster rapid competition in the local telephone service market and to end the monopoly market of incumbent local exchange carriers ("ILECs"). *See Iowa Utils. Bd. v. Federal Communications Comm'n*, 120 F.3d 753, 791 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp.*

v. *Iowa Utils. Bd.*, 118 S. Ct. 879 (1998). Under the FTA, ILECs such as SWBT are required to negotiate with local service providers ("LSPs") who wish to enter the market–such as AT&T, MCI, and the other corporate defendants–in order to establish interconnection agreements whereby the LSPs may compete in the local telephone service market against the ILECs. *See* 47 U.S.C. § 252(a). To the extent the ILEC and LSPs cannot reach a voluntary agreement, they are to resolve their differences through compulsory arbitration. *See* 47 U.S.C. § 252(b). Parties may file suit in federal court seeking judicial review of the arbitrated interconnection agreements. 47 U.S.C. § 252(e)(6) ("In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.").

Judicial review of the interconnection agreements is limited to the arbitrated terms of the agreements and to whether those arbitrated terms comply with sections 251 and 252 of the FTA. *See id.* The scope of judicial review is limited to the record developed during the administrative proceeding. *See United States v. Carlo Bianchi & Co.*, 83 S. Ct. 1409, 1413 (1963) ("[I]n cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no *de novo* proceeding may be held."); *see also Chandler v. Roudebush*, 96 S. Ct. 1949, 1960 n.37 (1976) (discussing *Carlo Bianchi & Co.*). The PUC's interpretations of federal law—either the provisions of the statute itself or the applicable FCC regulations—are reviewed *de novo*. *See FEC v. Democratic Senatorial Campaign Comm.*, 102 S. Ct. 38, 42 (1981) (stating that courts are "the final authorities on statutory construction" and

therefore should not defer to administrative adjudications or rule-making that are "inconsistent with the statutory mandate"). The PUC's determinations of fact and its application of facts to law are reviewed under the "arbitrary and capricious" standard of review. *See Texas v. United States*, 866 F.2d 1546, 1555-56 (5th Cir. 1989) (stating that factual determinations of agencies are to be reviewed under the arbitrary and capricious standard, whereby the court is not to substitute its own opinion for the agency, but merely to examine whether the agency's conclusions are "rationally supported").

The parties sought the first round of PUC arbitration in 1996, and the PUC issued an Arbitration Award in November 1996, which resolved various disputes relating to the terms and conditions of interconnection, including the methodology for determining the compensation to which SWBT would be entitled under section 251 of the Act. In December 1996, the PUC issued an Order Approving Interconnection Agreement with respect to most of the corporate defendants; the PUC found that the proposed interconnection agreements, if revised as directed, "complie[d] with the standards of FTA96 § 252." The parties then filed the first PUC appeal in January and February 1997 in federal court pursuant to 47 U.S.C. § 252(e)(6) in what became consolidated Cause No. A-97-CA-132-SS. While that case was pending, the parties sought further arbitration before the PUC in 1997. The PUC entered its arbitration awards and orders in late 1997 and early 1998, and the parties filed suit in several separate actions in March 1998, which were thereafter consolidated in the above-styled cause.

On August 17, 1998, the Court stayed AT&T's claims for affirmative relief in the first PUC appeal and referred those claims to the Federal Communications Commission ("FCC"). On August 31, 1998, the Court entered an order denying SWBT's affirmative claims for relief in the first PUC

appeal on cross motions for summary judgment.[1] At the hearing of October 9, 1998, without conceding any points or waiving any arguments, the parties addressed which issues the Court still needed to resolve in the above-styled cause. The Court agrees with the parties' analyses of which issues still must be resolved in this case, and those issues are addressed in full below.

II. Southwestern Bell's Affirmative Claims

A. Combination Issue

Despite the obfuscation provided in the briefs and in the oral arguments, the combination issue is simple and comes down to a factual determination of whether SWBT made a deal. SWBT argues the PUC unfairly requires it to combine network elements. Under the Eighth Circuit's holding in the *Iowa Utilities Board* case, an ILEC cannot be forced to combine network elements. *Iowa Utils. Bd.*, 120 F.3d at 813. This point of law is beyond dispute. The PUC and the other parties opposing SWBT argue, however, that SWBT voluntarily agreed to combine network elements. In exchange for this promise, the LSPs waived their right to combine network elements themselves. This apparent deal benefitted SWBT by preventing competitors from having physical access to its facilities, as they would otherwise be provided under the FTA. SWBT counters that it only agreed to combine network elements at an agreeable price, and this one qualification renders the voluntary agreement unenforceable.

The PUC persuasively argues that it found SWBT made a knowledgeable business decision during the arbitration process to offer to voluntarily combine network elements. *See* PUC Response Brief [#50], at 29-30 (listing the PUC's factual determinations). The PUC reasonably and rationally

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[1] Additionally, on August 7, 1998, the Court dismissed SWBT's state-law claims in Cause No. A-97-CA-108-SS and Cause No. A-97-CA-171-SS for failure to state a claim for which relief could be granted due to federal preemption under the FTA.

held SWBT to this voluntary obligation as part of the interconnection agreement it approved.[2] Most importantly, the PUC's factual finding that SWBT voluntarily agreed to combine network elements at a price determined by the PUC is not arbitrary and capricious and will therefore be upheld. SWBT cannot be permitted to make representations to the PUC and LSPs and then back out after the agreement is finalized by the PUC. Under its duty to "resolve each issue . . . by imposing appropriate conditions," 47 U.S.C. § 252(b)(4)(C), the PUC has the authority to determine when a party has made a deal during the arbitration and enforce that deal. *See also AT&T Communications of the S. Cent. States, Inc. v. Bellsouth Telecomms., Inc.*, 1998 W.L. 608241, at *4-*5 (E. D. Ky. Sept. 9, 1998) (noting that "time is of the essence" in a state commission's enforcement of agreements under the FTA and recognizing the "clear intention of Congress to encourage the rapid deployment of new technology through competition and reduced regulation").[3]

Once the PUC determined that SWBT had made the deal to combine network elements and left the pricing issue to arbitration, the PUC had the duty to set a reasonable price for SWBT's

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[2] In making this decision, the PUC was cognizant that on rehearing on October 14, 1997, the Eighth Circuit made it clear that an FCC rule requiring ILECs (like SWBT) rather than LSPs (like AT&T and MCI) to combine elements could "not be squared" with the FTA. *See Iowa Utils. Bd.*, 120 F.3d at 813. The affirmative finding made by the PUC was that SWBT voluntarily waived its right not to combine elements due to a business decision, understanding it had no legal obligation not to combine.

[3] One thing that is clear from this litigation is that SWBT's primary tactic is stalling to delay local competition--and it is equally evident the LSPs will stall when it comes time for SWBT to enter the long-distance market under section 271 of the FTA. The PUC and the courts must have some power to put a shot clock on this four-corner offense, or else the monopolies will stall until the game is over.

SWBT argues entering the long-distance market under section 271 is a "carrot" to encourage it to quickly open up the local telephone service market. Entering the long-distance market may indeed be SWBT's carrot, but it is a small carrot, and keeping its local monopoly profits for as long as possible is SWBT's Lifestyles of the Rich and Famous all-you-can-eat buffet.

provision of combined network elements. As explained below in subpart IV(A), the Court determines the PUC set reasonable, cost-based rates.

B. SWBT's Other Issues

Of SWBT's remaining claims, only one merits further discussion. The PUC conceded that due to an oversight, it erroneously failed to correct the term of the MCI interconnection agreement to prevent any connection that is perpetually renewable. It is clear to the Court the perpetual renewal term should be stricken, and MCI should not be granted a perpetual unilateral option to renew. Therefore, the provision granting MCI the option to renew the agreement for successive one-year terms after the initial three-year term expires will be stricken. This clerical change will be effected in this written order. The rest of SWBT's allegations of "other specific errors" in Count VIII of its complaint fail to demonstrate any irrational factual findings or misapplications of the law by the PUC, and those claims for affirmative relief will therefore be dismissed with prejudice.[4]

III. MCI's Affirmative Claims

A. Requiring MCI to Obtain All or None of its Directory Assistance ("DA") and Operator Services ("OS") from SWBT

MCI alleges that the amended agreement approved by the PUC requires that, if MCI wishes to purchase any directory assistance or operator services from SWBT, MCI must agree to purchase all such services solely from SWBT for one year. MCI argues by barring MCI from utilizing

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[4] These other alleged errors of the PUC include failing to treat vertical features as separate elements and price them fairly; failing to approve "intervening law" language in the agreements; approving terms that allow only AT&T to require intervening law changes and get other benefits; requiring SWBT to pay MCI for the "value" of the MCI data accessed in the Line Information Data Base ("LIDB"); allowing only MCI to withhold disputed payment amounts instead of paying disputed amounts into escrow; and announcing its intent to conduct further proceedings that could change the agreements.

SWBT's services together with non-SWBT services, this "all-or-nothing" approach prevents MCI from designing its directory assistance and operator services in an efficient manner to serve the needs of its customers. MCI argues the decision is unreasonable, arbitrary, capricious, unsupported by substantial evidence, and not a product of reasoned decision making.

The PUC replies that this "all-or-nothing" argument is misleading, because MCI is not forced to purchase anything from SWBT and has the option to purchase (or not purchase) SWBT's DA or OS services in any number of 527 wire centers served by SWBT's central offices in the State of Texas. After due consideration of both parties' arguments, the Court finds the PUC's ruling is not arbitrary or capricious or contrary to the applicable law. It is reasonable to require MCI to make a decision as to whether to purchase "all or none" of SWBT's DA or OS services in each of the 527 wire centers.

B. Requiring MCI to Pay an "Additive" Amount for "Extended Area Service" Calls

MCI next challenges the PUC's requirement that MCI pay SWBT more than SWBT's cost of transporting and terminating optional Extended Area Service ("EAS") calls. EAS is considered a hybrid of local and long-distance service. It is a service that, for a flat rate, allows callers to make calls within a designated area that would normally be subject to time-sensitive long-distance charges. Optional EAS, which is involved in this case, allows individual telephone customers to purchase EAS services. The other category of EAS, mandatory EAS, requires every customer in two locations that would otherwise be in distinct long-distance areas to subscribe to EAS services.

MCI argues the PUC required MCI to pay SWBT an "additive" amount "in addition to cost-based transport and termination rates," in order to compensate SWBT for lost revenue. For the

interim period while SWBT develops the ability to track EAS calls on a per minute-of-use basis, the PUC required MCI to pay SWBT the additive as a $6.25 per month surcharge for each number transferred, or "ported," from SWBT to MCI. Once SWBT develops the ability to measure EAS calls on a per minute-of-use basis, MCI will be required to pay SWBT the additive at a rate of either $0.024 or $0.0355 per minute-of-use, depending on the customers involved. MCI argues the additive amount, in both its interim and permanent forms, is neither cost-based nor competitively neutral.

The PUC first argues MCI failed to timely challenge this "additive." *See* PUC Response at 58. Next, the PUC argues at length why this charge is good public policy, reasonable, and fair. *See Id.* at 58-60. MCI argues vigorously that the $6.25 charge is an inappropriate monopoly compensation charge. *See* MCI Reply [#39] at 10-13.

Regardless of whether MCI timely challenged the "additive" charge for EAS, the Court determines the charge is reasonable and legal under the FTA. Significantly, optional EAS would normally not fall within the category of local telephone service; instead, the service involved would be long-distance telephone service. Therefore, the strict requirements upon local exchange carriers in the FTA do not apply.

Moreover, even assuming the cost-based requirements for local telephone service in the FTA do apply, the PUC has been diligent in maintaining the benefits to consumers that optional EAS provides while still being fair to the ILEC and the LSPs and arriving at cost-based rates. The $6.25 additive charge is an interim charge that will only be in effect until it is possible to charge per minute of use of EAS. Once this transition is complete, the charge will be strictly cost based. Until that time, the PUC has implemented a reasonable charge to estimate cost-based rates. Reasonable

evidence suggests the $6.25 actually compensates SWBT for its costs of implementing the EAS agreement with MCI and is not merely artificial compensation for lost toll revenues, as MCI argues. Based on these conclusions, the Court does not find the EAS rates set by the PUC are contrary to the FTA, the EAS rates challenged by MCI will be upheld.

C. Failing to Set a Reasonable Schedule for Operations Support Systems Implementation

MCI's complaint alleges the PUC imposed an "unachievable schedule" for the transition to the use of an Electronic Data Interchange ("EDI") system. Namely, the PUC set the deadline at October 15, 1998. MCI offers no evidence in its briefs of why this deadline is "unattainable," and MCI seeks no relief at this time. Its briefs merely request the Court to "retain jurisdiction" over this issue. Furthermore, at the hearing, MCI stated that the PUC has modified the challenged terms, and MCI therefore seeks no ruling at this time. Therefore, the Court will dismiss this claim as moot.

D. Failing to Require Adequate Performance Compliance Mechanism

MCI challenges the system of compliance set up by the PUC, which allegedly allows SWBT to accrue positive credits for performing selected functions at a level better than parity. Those positive credits may be used to offset negative credits SWBT would otherwise be required to pay when it fails to meet the parity standards in the agreement. MCI argues this allows SWBT to "game" the system, insulate itself from the consequences of violation of the agreement, and discriminate against MCI in violation of the Act.

This allegation merely articulates a quarrel with the enforcement provisions the PUC has implemented in the arbitration. This claim is particularly weak, asking the Court to second-guess the PUC's discretionary decision. The credit system is merely a small part of an enforcement

structure that includes liquidated damages for non-compliance with the established performance criteria. MCI has alleged no reversible error by the PUC in this count.

E. Failing to Set Cost-Based Rates for Non-recurring Charges

This claim attacks the PUC's setting of: (i) a $7,500 charge for "NXX[5] migration," a charge assessed when an "entire NXX" switches carriers and (ii) the "Central Office Access Charge" ("COAC"), which is also challenged by AT&T, and discussed fully in subpart IV(A), below. MCI alleges the PUC improperly created these charges without basing them on cost.

"NXX migration" involves switching a block of 10,000 telephone numbers from one provider to another. In this case, it involves switching the numbers from SWBT to MCL SWBT's witness before the PUC testified that the cost of NXX migration is $10,000, and he listed several tasks that go into NXX migration, such as physically disconnecting all the current lines, revising Operating Support Systems, updating Directory Assistance Systems, modifying 911 Databases, and changing telephone directories. *See* PUC Response Brief, at 61. MCI and AT&T argued before the PUC that SWBT should receive no remuneration for NXX migration. The PUC reasonably arrived at $7,500, or seventy-five cents per number, as a NXX migration charge. The Court finds this fee is cost based and is not arbitrary and capricious, so the argument about whether NXX migration fees are required to be cost based is moot.

IV. AT&T's Affirmative Claims

A. Unlawful §36.82 non-Recurring Network Element Charges

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[5] An "NXX Code" is the first three digits of a normal 7-digit number.

The non-recurring network element charges are a one-time assessments SWBT can collect from AT&T or MCI (the "LSPs") every time a customer leaves SWBT and becomes an LSP customer that the LSP serves using unbundled network elements ("UNEs"). With regard to these non-recurring network element charges, SWBT argues they are too low, the LSPs argue they are too high, and the PUC argues they are just right. As discussed *supra* in Part II, SWBT challenges the prices which the PUC ultimately set for SWBT's combination of unbundled network elements. Conversely, the LSPs argue that the charges compensate SWBT for doing nothing and incurring no costs. The challenged charges include (A) an Analog Loop to Switch Port Cross-Connect Charge, (B) a Two-Wire Analog Loop Charge, (C) an Analog Line Port Charge, and (D) a Central Office Access Charges "COAC." These charges in combination constitute a one-time charge purportedly designed to compensate SWBT for converting one of its customers to an LSP. In the LSPs' claims for affirmative relief, they argue the charges are not cost-based and are arbitrary and capricious.

Although the PUC reasonably found SWBT voluntarily agreed to combine network elements, it also reasonably found SWBT did not agree to do so free of charge. SWBT offered cost studies on the first three categories of charges, and the PUC examined those studies and the other evidence and assessed charges lower than those recommended by SWBT. *See* PUC Response, at 39 & n.29. The LSPs argue that in many instances, SWBT will do no work and incur no cost, yet will still receive the charges. Therefore, the LSPs argue, the charges are not cost based. However, this argument is not convincing. Even if the charges are not equivalent to cost in every individual instance, the PUC still must arrive at a reasonable cost, which the PUC has done after diligent consideration. It would be impractical, if not impossible, to require the PUC to establish sliding scales of charges to accurately reflect the cost and work involved in every individual combination

of elements, based on the innumerable permutations of circumstances that could surround each incident. Sometimes SWBT's cost will be higher than the PUC-established charges and other times it will be lower, but that does not render the PUC's cost determination unreasonable by any stretch of the imagination.

The LSPs further argue the COAC duplicates other charges and is not supported by a cost study. Although the COAC was not supported by a cost study, it was supported by other evidence. The PUC heard testimony from SWBT witness Loehmann and AT&T witness Turner.[6] The PUC was persuaded by Loehman's testimony and set the COAC at the level suggested by him. The PUC was in a much better position to consider the witness's credibility; moreover, the Court reiterates that it is not permitted to second-guess the factual determinations of the PUC. The LSPs have failed to carry their burden of showing the PUC's determination on the COAC issue was arbitrary and capricious.

SWBT argues essentially that the rates set by the PUC for combined network elements are far too low. Much of this argument is based on SWBT's position that the UNE rates are only a fraction of the resale rates; and providing UNEs in a combined fashion is essentially the same as resale and should be priced accordingly. However, this overlooks the point that the LSPs have a statutory right to purchase UNEs at cost-based rates instead of buying services for resale at a twenty-one-percent discount off of the retail rates. The PUC found, and this Court agrees, that SWBT volunteered to combine UNEs. Therefore, the LSPs are entitled to UNE rates with cost-based

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[6] AT&T also offers evidence that was not in the administrative record and therefore cannot be considered in this appeal. *See* AT&T's Initial Brief [#27], exh. A. *See Chandler v. Roudebush*, 96 S. Ct. 1949, 1960 n.37 (1976); *United States v. Carlo Bianchi & Co.*, 83 S. Ct. 1409, 1413 (1963).

combination fees added.[7] As described above, the PUC carefully arrived at the $36.82 non-recurring combination fee, which AT&T attacks as excessive.

In short, the argument over the $36.82 combination fee is just another example of the PUC's unenviable task of arbitrating agreements between parties that will not agree on anything, including the PUC's reasonable and fair resolution of complex issues on which the ILEC's and LSPs' views are polarized.

B. Unlawful "Fill Factor" for Local Loop Rates

AT&T challenges the PUC's application of a forty percent "fill factor" for local loop rates. Local loops are the cables connecting a customer to the phone company's main wiring system. The fill factor represents the percentage of wiring in the cable that is actually dedicated for use. Therefore, when the fill factor is forty percent, sixty percent of the wiring is not dedicated for use and is available for later expansion.

The PUC argues AT&T failed to bring this argument in the challenge of the 1996 Arbitration Award. Regardless of the timeliness issue, however, the PUC cites evidence, *see* PUC Response Brief, at 51, supporting its forty-percent level as reasonable. Hence, AT&T's quarreling with the PUC's arrival at the forty-percent fill factor essentially asks the Court to second-guess the PUC's findings, which the Court is not permitted to do under the Act. AT&T's only argument that may conceivably have merit is that instead of setting the fill factor at a static forty-percent level, the PUC should make the rate "dynamic," increasing as the local loops get a higher "fill factor" as more of

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[7]To the extent this rate provides a windfall to the LSPs, that is merely a result of the statute as created by Congress and SWBT's calculated decision to combine network elements instead of giving access to its facilities to the LSPs so they could do it themselves.

the lines are used. However, AT&T fails to show the static forty percent fill factor is "arbitrary and capricious." The PUC reasonably asserts that even a "dynamic" fill factor will not change to a significant extent over the time covered by the agreement. *See* PUC Response Brief, at at 53. Therefore, the PUC has stated legitimate reasons supported by the evidence in the administrative record for setting the fill factor at forty percent, and this determination will not be disturbed.

Conclusion

The PUC has struggled through numerous hearing and thousands of documents in arbitrating the interconnection agreements between the parties under the FTA. The parties themselves have not been cooperative. It is amazing the PUC has been able to arrive at reasonable agreements in carrying out this task. The various claims and arguments in this consolidated cause fail to prove that the PUC acted contrary to the law or in an arbitrary and capricious manner on any of the challenged findings, and the PUC's rulings will be upheld.

This written opinion discusses the remaining contested issues in consolidated Cause No. A-98-CA-197-SS. The multitude of issues not discussed specifically in this order have either been rendered moot or decided by previous orders in consolidated Cause No. A-97-CA-132-SS.[1] The bottom line is that the Court affirms the rulings of the PUC as described below.

In accordance with the foregoing, the Court enters the following orders:

IT IS ORDERED that the PUC Arbitration Award is REVERSED IN PART and Part A, § 3 of the interconnection agreement between MCI and SWBT is AMENDED by this order to STRIKE

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[1] For example, the issue of state law preemption does not need to be further discussed as it applies to this case, although it clearly bars all claims asserted in Cause No. A-98-CA-345-SS, which was consolidated with this case by order of November 5, 1998.

the provision granting MCI the option to renew the agreement for successive one-year terms after the initial three-year term expires;

IT IS FURTHER ORDERED that the PUC Arbitration Award is otherwise AFFIRMED;

IT IS FURTHER ORDERED that all remaining affirmative claims of all parties are DISMISSED; and

IT IS FINALLY ORDERED that any and all pending motions are DISMISSED AS MOOT.

SIGNED on this 6th day of November 1998.

UNITED STATES DISTRICT JUDGE

EXHIBIT C

The $5 million worth of radio and base station equipment purchases could lead to as much as $50 million in business from NRTC over five years, according to Intek. NRTC will be eligible to receive a specified number of Intek common stock options if it meets certain ordering and volume timetables while implementing the five-year equipment purchase program.

Intek and NRTC will jointly develop 220 MHz narrowband networks using Intek's LM technology. Intek will be the exclusive supplier of radio equipment to NRTC, a national organization made up of 900 rural utilities. In addition, NRTC members will be able to utilize Intek's RoameR One brand name under an exclusive royalty agreement to sell LM-based equipment and airtime services in their territories.

Over time, the parties said that this will give rise to a nationwide, seamless 220 MHz network under the RoameR One brand name, with NRTC responsible for rural areas and Intek taking care of metropolitan areas. NRTC and Intek jointly participated in the FCC's 220 MHz license auction, winning a total of 189 licenses – including two 10-channel nationwide licenses – for approximately $12 million. (George Valenti, Intek Global, 816/920-1141.)

Subscribers Still Resist Learning Handsets' Full Functionality

Can the latest iterations of wireless handsets hitting the U.S. mobile communications do what their predecessors couldn't – namely, get subscribers to make use of features that manufacturers have built in to add to the satisfaction of utilizing mobile communications?

A new study prepared by International Data Corp. (IDC) analysts holds out the possibility that this will be the case, which would have ramifications for wireless operators grappling with the troublesome problem of churn.

Handset features, properly packaged for the high- and low-end segments of the cellular and PCS markets, can promote greater customer loyalty, according to Framingham, Mass.-based IDC. In its study surveying handset purchasing practices, the market research firm found that rather than price, features are the factor carrying the greatest weight in determining which handsets subscribers buy. The findings suggest that feature-rich handsets are best geared toward high-end customers, while phones accentuating voice telephony will go over better with low-end users.

All the same, a handset's seeming complexities continue to act as a barrier for many subscribers to understanding its full range of capabilities. "Surprisingly, less than half of respondents used any of the features available on their phones," said *Callie Pottorf*, research analyst in International Data's wireless and mobile communications practice. "The fact that few respondents use them means carriers have, in a sense, failed.

"Carriers should teach their subscribers how to use their handsets effectively." If they do, subscribers "will be more productive and may like their handsets better," Pottorf said, adding that happy subscribers are less likely to churn off their operators' networks. (Kara Murphy, International Data, 508/935-4136.)

WIRELINE NEWS

(www.CommToday.com/wlineindex.html)

Service Providers Tout 'Value Bundles'

In a time when some telecommunications services are practically given away, value has become a more important consideration than price, telecommunications executives said yesterday (11/17) at a Warburg Dillon Read conference to discuss industry trends.

The value-versus-price question is especially relevant to new long-distance providers that can't afford to undercut the rock-bottom rates offered by big providers like AT&T [T] and MCI WorldCom [WCOM]. "Some of these costs are approaching zero," said *David Ruberg*, chairman, president and chief executive officer of Intermedia Communications Inc. [ICIX]. "There's not much more you can do."

The strategy of Intermedia and others is to offer a "value bundle" that provides an array of services tailored to a particular customer. Long distance could be a part of that bundle but local service, Internet and data service are likely to play a role.

Customers are having difficulty keeping up with technology and service providers should help them sort through their options and provide the necessary services, Ruberg said, echoing recent advice from market researchers.

GTE [GTE] also is offering value bundles as a way to compete in long distance. The company's research suggests that bundled products sell better than individual products, chairman and chief executive officer *Charles Lee* said. "Our long-distance rates are competitive, but we never set out to be the price leader," Lee said. "We set out to be the value leader." GTE has 2.5 million long-distance subscribers, double the number it had last year.

With rates as low as five cents a minute, long-distance has little value other than as part of a bundle of services that meet customers' needs, U S West [USW] chief financial officer *Al Spies* said. "It's unlikely any of us (Bell operating companies) will make any money on long distance" after winning permission from the FCC, Spies said. "But long distance is very necessary as part of the product bundle."

AT&T Plans More Wholesale Activity

AT&T [T] plans to make wholesale a bigger segment of its business, said *Bob Annunziata*, president of the long-distance provider's business services division.

At the Warburg Dillon Read Global Telecom Conference yesterday (11/17) in New York, Annunziata announced that AT&T would try to increase the 15-20 percent share it currently holds in the $10 billion-12 billion wholesale market.

While AT&T's focus "will continue to be on retail," Annunziata said, the company hopes to grow its wholesale business by at least 15 percent a year. Selling wholesale service to other carriers will give AT&T the same market position in telecommunications that Intel has in computer chips, Annunziata said. The company wants to have a piece of every call. The company also has a growing willingness to lease capacity from other carriers where it makes sense, Annunziata said.

SBC Communications, Compaq To Jointly Market ADSL

SBC Communications Inc. [SBC], of San Antonio, Tex., and Compaq Computer [CPQ], of Houston, will jointly promote asymmetrical digital subscriber line (ADSL) services. The arrangement, which will be implemented in early 1999, calls for SBC and Compaq to co-market ADSL services to customers served by SBC's Pacific Bell and Southwestern Bell subsidiaries.

"This alliance marks another step in our ADSL deployment strategy and further enhances the value we provide our customers," said *Dave Gallemore*, executive vice president of strategic marketing for SBC Operations. "We are confident that by partnering with technology providers such as Compaq we will significantly increase our ability to be the leading provider of data communications for our customers."

SBC's ADSL technology moves data over copper phone lines at speeds of up to 1.5 Mbps, or 50 times faster than today's analog modems. Compaq PCs will be offered as a computing solution that is ideal for use with ADSL modems and services.

In recent months, SBC has taken several steps to provide ADSL service to its customers. In October, the company signed an alliance with Dell Computer to develop and deliver ADSL services on personal computers. In September, the company announced Pacific Bell had completed deployment of ADSL in 87 central offices in California, making the service available to 4.4 million households and 650,000 business customers. The company also has signed agreements with 22 Internet service providers, which act as authorized sales representatives for Pacific Bell's ADSL services, offering them to their business and residential customers. SBC is finalizing plans to deploy ADSL in other areas in its region over the next 18 months. (Jackie Himmelberg, SBC Communications Inc., 210/352-6969.)

EXHIBIT D

LUNCHEON SPEECH BY JOEL I. KLEIN

Assistant Attorney General--Antitrust Division
U.S. Department of Justice

MR. LITAN: Okay. I'm going to try to interrupt your lunch. It's time for the main event, but obviously go ahead and continue eating. For those of you walked in late, I'm Bob Litan from Brookings, and I have the distinct honor to introduce our luncheon speaker.

And since we have limited time, I don't want to spend a lot of time telling you a lot of what you already know about the distinguished background of our speaker today. He has had a distinguished background in private law practice, during part of the first term of the Clinton Administration, he was deputy White House counsel. And then he moved over the Justice Department, actually to take my job when I was there as deputy assistant attorney general of antitrust. He came over and has moved up to the assistant attorney general for antitrust and is now a household name, for good or for bad.

I asked Joel, I said, you must not be getting a lot of sleep these days? He said, no, but I'm having the time of my life. He said, where could you go in government where you can come to work everyday and have the exciting array of challenging issues and so forth that you have to deal with than in my job at the Justice Department. There's no question that that's true.

We're giving him a welcome respite today from his Microsoft duties to talk about another hot issue, telecom reform and the rule of the Justice Department in promoting competition. And where are we headed, whether the act was a good idea.

Joel, I'll just let you know, before you were here, we had a spirited debate up here this morning, and the consensus view was that the act was probably not the greatest thing since sliced bread. We anticipate that you'll give us perhaps a different message. But whatever you do, we welcome you, and we look forward to your remarks.

Joel Klein.

(Applause.)

MR. KLEIN: I may have taken your job, but I don't hold your views anymore, Bob.

I'm delighted to be here. And I'd like to thank Brookings and all of you for the opportunity to speak about these important issues. I should also make clear, by the way, as is known inside the antitrust division. It is not that I took Bob's job. Nobody could take Bob's job. I simply occupied his office when I arrived. Bob, as most people know, has this phenomenal amount of energy. And as people said, he would hold more meetings in an hour than I would in a week, so, I think, to keep the record straight.

Well, I was going to deliver some prepared remarks, but I saw that they had some questions in the packet that they gave all of you, and those of you in the audience that know me well, like Bill Lake, know that I have always been an overachiever. And so when I saw these questions, I thought, this is a chance for me to answer them and see if I could get a passing grade.

And then I looked at the first one, and I thought these were going to be sort of multiple choice type questions. But I looked at the first one, it says, was the Telecom Act a move in the right direction? Has it lived up to its promise? And if not, why not? And in preparing my answer to that, I ended up writing a lengthy essay and thought I would share it with you.

And, fundamentally, if I can -- and then I will answer some of the questions implicit in merger related issues as well without answering specific questions which those of you here in the room can answer, that is whether SPC-Ameritech and Bell Atlantic-GTE should be approved, and if not, why not?

But in answering the first question, let me make clear, I do think the Telecom Act was a step in the right direction. And I will explain why that is in a second. On the other hand, I think the reason Bob and the panel probably came to the conclusion that they did is because of the second question in that, has it lived up to its promise and, if not, why not? And I guess I suppose what the question really means is, whose promise, and why hasn't it quite done some of the things that at least on the Hill people thought it would do.

And the answer to the question, I think, is a little bit of a combination of enthusiastic legislative testimony, heightened legislative expectations, and some real hard technological issues. Let me say what I mean by that. In order for this act to have worked overnight, we're now approaching the third year, in order for it to have worked overnight, to have deregulated local telephony in the United States, it would have required some alternative means of access to the home. There would have had

to be a technology, whether it was cable, wireless, satellite, what-have-you, there would have to be a technology that could access the home in a fashion to compete head-to-head with the local wire.

If, as and when that happens, and it will happen, when that happens, then the hope and promise of this act will at that moment be realized immediately in the sense that there will then be more than one way to access the house, and people will then have direct facilities based competition. Indeed, that is the world we now see in business telephony. And the act, such as it is, has been an enormous success in that regard. There's been a great deal of competition. The rates have been driven down, and particularly large scale urban business users are enormously happy. And that's because CLECs have alternative facilities that they're able to use in these highly concentrated urban areas. South of 59th Street in Manhattan, for example.

But until that happens with respect to everybody's grandfather or grandmother, which is the concern that I think has led to some of the political problems with the act, we are stuck with this wonderful period known as mean time, and almost all these questions go to that problem. And it's actually a wonderful set of antitrust and deregulatory issues. And that is to say, first of all, the great paradox of deregulation is, every time you have a situation where you have highly regulated markets, that's typically because there's something in the nature of natural or a quasi-natural monopoly. And as a result of that, you have government regulation, whether that's with respect to telephony, electricity, to some degree with respect to cable. And then you try to deregulate that piece, what you create until you have alternative technology is what we in antitrust call an essential facilities problem. And that is the last mile of wire, or quarter of a mile of wire, or whatever, is not going to be replicated. I'm not going to go out and build wire to everybody's house in order to compete. And so, people who want to service those customers are going to have to compete with the current incumbent. And that single problem, which I will elaborate in my remarks today, that single problem is causing some 90 percent of the concerns that we now face.

But it doesn't matter for two reasons, as I'll demonstrate. One is, those concerns will be solved. The question is, how soon, but they will be solved. And, second, if they're not solved indigenously to the single wire problem, new technologies will solve them in any event. So, we're on the right course. Nothing bad is happening, it's just not happening as quickly as people would like.

Now, the one other piece, which I don't want to elaborate on today, but I just put in the mix, as hard as that set of problems is, it is made even harder by the fact that the current structure of this regulated local monopoly is one that's built on cross-subsidization and universal notions. And so, what you have is a system that, indigenous to itself, is able to accomplish its regulatory goals. But when you try to deregulate it, not only do

you have the problem of the single wire, but you have the problem of how do you extract subsidization from the cross-subsidization process. And what I mean by that, for example, is we have a lot of local telephony in the United States in which customers are actually paying less for the service than it costs to deliver.

And so that's okay in a monopoly because you can subsidize that by charging other customers high-end business users more than it costs to deliver, significantly more, and then you can use that surplus to pass it along in a rate regulated system. But, when you move to a deregulated system, that's not going to happen. And as a result of those two factors, single wire, and universal service, we are now seeing an enormous amount of strategic behavior by the incumbents. And that's understandably true on both sides of the equation.

Let me just try to explain to you what I think is really going on, and why I think the process of litigation and all these other things are out there. When two people use the same wire to service me, the cost of that wire is paramount. Everything you're hearing, all the huge discussions, that billions of talented economists that Brookings brings together, the question they have here about sort of a why has this deregulation led to what some observers believe is the most expensive exercise in cost modeling in history, et cetera.

The reason is, it's because let's just make it very simple, if you and I want to sell Bob Litan telephone service, and one critical component of my cost is your wire, we are going to fight like the devil over that price, because if Litan charges me too little, I'm going to take his business away from him. If on the other hand, he charges me too much, I'm not going to be able to effectively compete. And we're making predictive judgments, but this is what the fight is in an industry in which people have very strong entrenched positions, both the big long distance players, and to an even greater degree, the incumbent monopolist local exchange carriers.

And so what you have seen go on over the past three years is people making precisely this business decision in each of the given RBOCs. First of all, they're sitting down and saying, if we meet the standard that the government set, and the standard is not a complicated one, actually I think most of the RBOCs understand what it would take, in terms of pricing, in terms of operational support system and the like to meet it. But, where they have balked generally, not only, but generally is with respect to pricing, particularly with respect to the unbundled network platform, which is obviously a key component of this single wire phenomenon.

And what the calculation there is, if we meet those requirements, how much local business will we lose, what's the delta for us there, versus how much long distance business will we gain? So people sit down and make that calculation. Then they make a second calculation, there are two fundamental business

scenarios. The second calculation is, can we litigate to a better first calculation?

Can we, for example, by replacing the FCC's pricing authority, and putting it in the hands of local regulators, will that give us a better price decision? Will that give us a better rule on the uni platform? Can we get the court to say the uni platform is barred by the act, and what have you. And so you then make that calculation and say, for this period of time, it may take us two years, it may take us three years, but if we litigate we may get a chance to improve what we see as the respective inflow and outflow of cash, under the scenarios called for by the statute. And then they have to take into account, while they're litigating, the business that they are losing, because as I said at the outset, there are these competitive new carriers who at least have been able to pick off high end users, in the business economy.

And so this is exactly the calculation that is being made and the RBOCs came to the conclusion, as a business matter. And unfortunately the way the statute is structured, if they don't want to play, if they don't want to meet the requirements that the FCC sets out, they basically can file applications and they can complain the press, and they can take all the litigation they want, but in the end they know -- I mean, they've mate with our staffs, they've met with the FCC staffs. They know pretty much what it takes to get one of these applications through, and they make the choice. And all of this process is an ongoing one, in which people are making very strategic, cost-benefit analyses.

Now, that's where we are right now. The good news -- and so as a result we have seen a successful application. The good news is, at least from where I see the world, is I think this litigation strategy has begun to run out. I think the Supreme Court will answer the questions that were raised in the Eighth Circuit litigation against the FCC, and we'll get some pretty good rules, at least with some certainty, and hopes out of that. Second, I think the efforts to challenge the fundamental sort of constitutionality of the statute have run into some tough sledding, in terms of the court of appeals here in DC on 274-75, and the Fifth Circuit on 271. And it is my prediction that that litigation will ultimately come to a rest without the statute being imperiled.

And despite the number of challenges to the FCC's decisions rebuking individual applications, the D.C. circuit has overturned none of them. And so what's the structure that the current RBOCs are looking at. A world in which it looks like litigation is not going to give them a great deal of a rosier picture, with respect to the costs in this scenario. And on the other hand, they continue to lose through people who are positioning themselves, strategically. They continue to lose customers. And on the third hand, if you'll forgive me an inapt metaphor, they are concerned about the new technologies that might actually render their wire no longer an essential facility, with respect to local telephony.

So that's the structure of the market as I now see it, less than or fewer than three years out, after the passage of the '96 act. And so it is a matter of time when these forces will end up bringing together the kinds of things that I think the act ultimately contemplated. And I also think in that regard, what we are going to see both in the medium run here, and in the long run are two things that are going to be very good for consumers.

The first thing, you're beginning to see harbingers of this. For example, in New York, Bell Atlantic has made a calculation that appears to be closer to the way the FCC and DOJ have thought about this problem. Whether they will bring it to fruition is an important factual inquiry, but the structure of the agreement they have reached in New York suggests that this was an effort, if it's implemented, to attempt to meet the criteria. And when something like that starts to happen, the first short-term benefit consumers are going to see is the following. For the first time, if the RBOCs get through -- if a particular RBOC gets through the 271 process, they will then be able to sell long distance, and presumably the principal long distance carriers can sell local, and for the first time there will be two telephone companies fighting over the same consumer who is already a customer of each.

And that will, through the vertical integration and bundling, and the effort to create new and interesting, and distinguished -- differentiated products, that will lead to some non-trivial short-term residential competition. And it will squeeze some of either of the following out of the market. There will be some efficiencies from the vertical integration, long distance and local, that one can sell in single packages, there will also be whatever kind of monopoly rents remain and regulated monopoly prices will be driven out in that market, and whatever oligopoly pricing remains in long distance markets, there will be a tendency to drive that out. And so there will be some short term consumer benefits from that process. And that may not be immediately around the corner, but that's in the nature of the being.

And the second thing that will happen over time is, as we start it, there will be a different means of access to the home. And given the convergence we're now seeing, for the first time, in the not very distant future, we're going to see in a significant way various forms of media, of voice, of data, of video carried over a single wire. And so not only are you going to get the vertical integration of local and long distance, you are going to get digital convergence that enables consumers to get a great deal of new stuff. Thank you. They get a great deal of new stuff, on a single wire, wireless, satellite, or what have you.

So that is my view, and my hearty recommendation is that this is not a legislative initiative that ought to be undone, changed or modified, because whatever happens, new legislation would be subject to further litigation, further strategic posturing, and I actually think we're winding toward the end of the process of sort of defining the key parameters in the '96 act.

That brings me to the second half of the comments. While that has been going on, in this world of considerable dynamic uncertainty, driven by three factors, deregulation, technology, and globalization. In that world we're seeing a lot of merger activity. That is predictable, in such a situation. When people move from a highly regulated, structured industry, often cabined by national boundaries, to a world that we now face, people are starting to -- they have to position themselves, not just for the next three to five years, but really for the next 20 years.

And what they are doing is beginning to look toward potential mergers that have synergies, and opportunities for them. And doing merger analysis in this process, I would submit to you, is probably the hardest challenges, if not the single hardest challenge that the antitrust division faces. In part, it is because we are moving --

(In progress) -- as a result of the merger. And the simple question you're asking, just to get it out, is whether this merger on balance is going to create more market power, bad for consumers, or more efficiency, good for consumers. That's the single factual issue, but it's a predictive judgment.

It is hard enough to do, let me assure you, having been through this in several key cases recently, it's hard enough to do in mature markets, that are not going through deregulation. But, it is even harder in deregulatory markets. The reason is, is you don't have the antecedent market experience, known customers buying known products, with which to try to do your analysis. And so in certain kinds of measures your predictive judgments are of a double nature, one, you have to predict the effects of the deregulatory process on the competitive market, simultaneously with the effects of the merger in this evolving market. And that raises what has always been, I think probably one of the hardest, if not the hardest issue in merger analysis, and that is the issue of potential competition, which the levels of uncertainty are obviously significant.

And so that's the process we're going through. At the same time it's not simply deregulation, but national boundaries are going to be opened up. The 1996 telecoms agreement in the World Trade Organization will have an impact on that. People are beginning to think about transnational mergers. We saw one that didn't ultimately come to fruition, but the BT-MCI one. There's no question that the other major telephone companies throughout the world, and U.S. telephone companies are looking at each other, in terms of strategic alliances, kind of thing that AT&T did with MCI. I am sure, although I have no inside information, I'm sure others are looking. We already know that obviously French Telecom, Deutsche Telecom did a joint venture with Sprint several years back. But, that's all going on, as well.

And lastly, as I've said too many times to belabor the point, it's also an evolving highly dynamic technological situation. So that's

the landscape we are looking at. And I will tell you, as a result of that, I have no doubt that a significant number of mergers in this highly dynamic economy are going to go through. And indeed, some very big ones already have. The merger of AT&T Teleport, U.S. West Cablevision, obviously two of the RBOC mergers, Bell Atlantic Nynex, SBC Pac-Tel.

But, one should be careful, and I'm not trying to signal anything here, but I'm just trying to give you the nature of our process. People like to think that sort of what we do can be figured out simply by reading a couple of articles. But, the truth is, we spend an enormous amount of time evaluating these very complicated mergers, such as, for example, MCI Worldcom, the Prime Star merger with A Sky B, and the current major mergers before us. And we do that because in this dynamic shifting market, evidence matters to us, the current state of the market and looking out four or five years, and what we've learned since the last major merger matters to us. And so that is the nature of the process.

We take extensive, extensive evidence, including the business plans of not just the merging people, but other people who are accessing or potentially accessing those markets. We look at retrospectively what happened from those mergers that we approved. And we try to incorporate that information into our merger analysis. So I think it is especially hard for people to try to anticipate in some kind systematic way, the conclusions that we may come to.

There have been two major mergers that are relevant to this, that we have challenged. Although, as I said before, the large majority of mergers in this field have gone through. Both of those are at least worth thinking about, if you worked in this field, because I think they give you clues to the kinds of problems we're looking at, and the kinds of things that we're likely to do in future. First was the way we dealt with the Worldcom MCI merger.

Now, put aside, I don't want to get distracted on the important issue of dual jurisdiction between us and the Europeans, which I thought was handled extraordinarily well here, in terms of coming to an outcome that both antitrust authorities supported, and working together in a way that the parties weren't able to play one off against the other, and for us to effectively get the relief we wanted, which was significant relief, close to a $2 billion divestiture, largest single agreed upon divestiture in antitrust history, and involving the Internet backbone.

And essentially what the theory of that case was, which is very important into the whole theories about network effects that are going to become important, increasingly in antitrust enforcement, was these were two of probably three or four significant players in Internet backbone. And that the way that network worked most effectively is to create interdependencies among several key competitors. So that each had to rely on the other, in order to transport information. And as long as each had a reasonable

significant market share, there would be no tendency to try to degrade the other people's carriage, the other people's customers in a way that would lead those customers to move to you, because through a system almost of checks and balances, each of the significant players could actually have degraded each other. And so as a result of that, you reach a kind of -- essentially a live and let live competitive attitude.

And what we were concerned about in that case was that two of the three or four big players in this field would have been MCI and Worldcom. And so we insisted that one or the other of their Internet backbone had to be divested. And that was essentially a conclusion we came to reasonably early in our investigation, and while it took time to get the relief that we wanted, we ultimately got it. And that is the kind of thing in worlds of inter-connectivity we will be looking at.

The second case that I think is highly instructive on these issues of potential competition, and a sort of dynamic new technologies, is a decision on the periphery of this discussion, and that is the challenge we did to Prime Star, A Sky B. And just very briefly, in that situation what you had is three of these direct satellite operations, the high intensity, low satellite frequencies available in the United States. That particular medium had been shown to be the most effective way to compete with the cable monopolies. And our basic view is, we think the solution to the cable problem is competition. We think that's a better solution than regulation. But, until you get there, regulation is likely to be a part of the mix, for all the obvious reasons.

But, if you look at what has in any way effected the cable market, that has been this particular satellite, high frequency. And there are two big players so far, Direct TV, and Ecostar, who in rather short order had taken several million people. The one who had been in business a little longer had almost 5 million, the other had a million-plus. And many of those were former cable users. So this looked like a new potential form of competition that might begin to erode the cable base. The third frequency, the one at issue in this case, was essentially owned by MCI and Rupert Murdoch A Sky B. And they were going to go develop it, and they had business plans to make an aggressive challenge to cable, and Murdoch in particular had had a lot of experience with this technology in Europe, with his B Sky B programming, which had had a great deal of success.

And essentially, before they could bring those business plans to fruition, Prime Star, which is a consortium of cable companies, decided to buy or merge with the Rupert Murdoch-MCI group, and to then operate this third frequency. It was our view that of all the people out there who were not likely to aggressively compete with the cable monopolies, it would be the cable companies. It looked like a sensible insurance policy to buy, both because you would eliminate one potential aggressive competitor, and second because if the market moved, you would then have access to this last of the three circuits that were available.

So it looked good as a strategic insurance policy, but it didn't look very good for consumers, because it would be less likely that people would aggressively compete to undermine the cable monopolies. And that was involving significant issues of potential competition, and in our analysis we brought the case, as most of you know, the cable companies -- Prime Star abandoned the transaction about a month ago. And so that was like MCI Worldcom, a successful outcome from our point of view.

All of which leads me to my conclusion, and that is Washington is a terribly impatient place. We want things done, and we want them done quickly. And we want to see results immediately. We at the Justice Department have a longer-term view. We were there when we filed the AT&T case, we were there close to a decade later when we settled the AT&T case, and we were there in 1996, which was 12 years after that when the AT&T case led ultimately to the 1996 legislation. And through that process, we've seen some bumps on the road, some rosy predictions that didn't turn out to be so rosy, and some views that no matter what we did, we would never achieve real competition in long distance.

And because of the foresight of people like Tom Carper, and Bill Baxter, who had the wisdom to stay with this, I think a lot of good things have happened, and will continue to happen. And my strong recommendation to all the wonderfully wise and talented people on this panel, is to just take a good long breath and watch it happen, because it is going to happen.

Thank you very much.

(Applause.)

MR. KLEIN: All right. I have been asked if I would take a few questions. If anybody has a question, if you could just wait for the microphone, and then I'd be happy to answer it.

QUESTION: Gary Lidell, Joel.

MR. KLEIN: Hi, Gary.

QUESTION: I missed in your comments about time frames, do you have any sense of when you're going to --

MR. KLEIN: Well, first of all, I am not in a position to predict when the technology is going to move, and the way it's going to move. All I know is, it's moving, and I think there are factors that will accelerate it. As to when we're going to see 271 entry and some of the benefits that come from that, I continue to believe that's something that we're going to see in the next year to 18 months. And it's going to depend in part what the Supreme Court does and what the RBOCs then think are the potential strategic issues left after that. It's going to depend in part on whether this constitutional litigation basically goes away completely.

But, in that world, nevertheless, at least what we're hearing at the department is there is a greater willingness for some of the local incumbents to begin to do the kinds of things that I think are going to be necessary. So if you ask me, I would feel confident that certainly in the next three years we're going to see a good deal of activity, on this front, and probably in the next 18 months, a non-trivial amount.

QUESTION: Your discussion of telephone, you focused a great deal on the wire the last mile, et cetera. I don't think I heard the word wireless pass your lips, yet it strikes me that that's where the competition is likely to come from. And if I look at the performance – you also suggested that the RBOCs are going to come to their senses, and stop litigating, because it's a losing strategy.

If I look at the performance in the stock market, the only major company that has under performed the S&P, in a major way, is AT&T, which is pursuing the wire line strategy, with the purchase of TCI. It strikes me that it's likely to be the wireless strategy, not the wire line strategy that works. And that all this concern about the final mile may turn out to be, looking back, as if you've been regulating the railroads, without taking into account trucks and airlines.

MR. KLEIN: Well, if I didn't say it, I should have been clear. I mean, my view is the solution to this is alternative technologies, whether it's wireless, whether it's cable, whether it's satellite, what have you. And I believe that will happen. But, that doesn't mean that in the meantime, if that happens, then the wire problem will no longer be a problem. There will be an alternative means of access. But, when one is looking as a policy matter, one wants to have more than one iron in the fire.

I've said from day one, and I believe this is what led to the optimism on the Hill. I remember during these hearings people said, cable will deliver telephony, and this problem will go away very, very quickly. And had that happened, it would have gone away quite quickly. But, in the meantime, if we don't get a wireless solution that has ubiquity for consumers, then we do have this wire. And I still think there are benefits to be had out of the wire.

As for the RBOCs, I didn't say it's a foolish strategy to litigate, they are obviously – these people are in the business of protecting their shareholders and their interests, I just think it's an ultimately a strategy that is not going to have a lot of long-run staying power, because there's just so long you can litigate these kinds of issues. In the meantime, two things are happening. They are losing high end customers. And it may not be a big deal for anybody else, but I can tell you from listening to them, it's a big deal to them. And that's a process that will continue to move. And if they don't think there's any strategic gains to be had in litigation, that's going to change the equation.

And what I point to is at least the proposal that Bell Atlantic put on the table in New York, which suggests that I'm not imagining this.

QUESTION: Joel, a lot of those business plans to bring competing wires into the home depend on high speed or broad band Internet access. And right now there's a bit of a regulatory differential between the cable wire, and the telephone wire, the telephone companies have to unbundle everything, and the cable companies may or may not. Is that an issue that concerns you at all, is there anything the Justice Department would do in that area?

MR. KLEIN: It's an issue we haven't done anything about. And it would be important for me to, not having really analyzed it, to try to make a comment about it. It's something obviously that I have heard about and read about, but it's not an issue that we have played a major role on.

Anyone else? In the back?

QUESTION: *(Inaudible)* -- Bell Atlantic and GTE?

MR. KLEIN: Well, they're both under consideration right now, and all I can say is, stay tuned. That's -- we -- well, we don't predict in any event the conclusions of these matters. But, matters that are under investigation are not appropriate to speculate about.

QUESTION: You may have already answered this question in connection with your comments about Bell Atlantic and what they're doing in New York. But, one of the suggestions that Roger and I offered in a piece that we put out today is that we encourage the FCC to encourage the RBOCs, to make applications on less than a state-wide basis, on the theory that there is less of a risk, less of a downside risk if things go wrong, because as you know under the act, that if you let them in on the entire statewide basis, the only -- essentially the only thing you can do with them, other than slap them on the wrist is eventually have the nuclear bomb and say, well, we're going to take you out of that market. And that's not exactly the best kind of enforcement.

And so what we had suggested is, if you encourage a less than state wide entry, you're taking less risk, and you're also holding a carrot out there for them to continue to behave and not to discriminate, because there will be an incentive for them to behave, because they want the rest of the state. So do you have any particular views, or is this the first time you've heard this proposal?

MR. KLEIN: It's actually the first time I've heard of it. It's something obviously I think you'd have to probably amend the statute to accomplish.

QUESTION: Well, I don't think so. I think -- I mean, my view -- my view is that while the statute says state-wide application, the FCC has very broad discretion under the public interest test and if it defines the public interest to mean that we're willing to accept an application on a less than state-wide basis, we'll consider it. That would put a sign on the door. So I think that -- we'll be happy to give you a copy of the policy brief, and you can take it and look it over.

MR. KLEIN: Great. Okay. Well, thank you all. One last one. I'm sorry, ma'am.

QUESTION: How is the department looking at convergence mergers, where electric company, natural gas, telecom, cable, they're converging. How is the department looking at it, and in 20 years do you have any predictions about what type of players we're going to see?

MR. KLEIN: We're going to see very big players in 20 years. This is going to be a world of enormously complex corporate structures, as we go forward. Globalization, in and of itself, is going to do that. What are we going to see in terms of -- well, it would depend. For example, on cable-telco there's actually obviously restrictions in the statute itself, that Congress imposed on that kind of merger. And, you know, it's one thing when it's overlapping wires, partially because of the question of which wire will be the second wire, or wireless into the house.

And the same kinds of issues can come up in electricity, which is going to be, I think in many ways, the same, raise a lot of the same issues, both on merger policy, and with respect to deregulation. I actually had a lot to say about these issues in the context of electricity in a speech I made at the FERC, about 18 months ago, about some of the kinds of difficult predictive judgments we're going to have in that industry, as well.

Thank you all very much. I appreciate it.

MR. LITAN: Just quick closing remarks. We want to thank you very much for attending, and the controversy will live on. Thank you very much.

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Chicago Tribune

EXHIBIT E

Business

THURSDAY, NOVEMBER 5, 1998

Resellers of phone service run into limits

Struggles at USN highlight challenges

By Jon Van
TRIBUNE STAFF WRITER

Hard times for USN Communications Inc., the Chicago-based phone firm that's laying off 850 staffers and restructuring itself, illustrates how difficult it is to make money buying local phone service from Ameritech Corp. and reselling it.

When it was signed in 1996, USN's reseller agreement was touted by Chicago-based Ameritech as the wave of the future, and the dominant local phone provider cited its deals with USN as proof that it faces real competition and deserves federal permission to offer its customers long-distance service.

USN was followed by many others, including long-distance leaders AT&T Corp. and MCI Communications Corp., which also started reselling Ameritech's local service in 1996.

But last year, AT&T and MCI pulled the plug on local resale here and across the country, saying profit margins were so narrow that no one could make a profit at it.

At that time, Ameritech pointed to USN to suggest that some competitors did quite well as resellers. But USN's difficulties, which have been developing for the last half-year, tend to reinforce the notion that margins are too thin in local phone service resale to make a good business over the long haul, several observers said Wednesday.

"USN is run by people with a lot of industry experience who have some good ideas," said Dan O'Shea, editor of Upstart, a Chicago-based trade publication that covers competitive local phone service providers.

"What they've shown is that you can't do resale forever," O'Shea said. "You have to have a strategy to get your own facilities in place for the long term. More companies are starting to do that now."

By owning or leasing their own switches and optical fiber networks, competitive phone companies can better serve customers and control their own destinies, their executives argue. They may also resell Ameritech's service to some customers to gain market share, but will build their own facilities to serve those customers as soon as it is feasible.

Ameritech offers its service at wholesale prices that are roughly 20 percent less than it charges to retail customers, while long-distance phone companies sometimes provide wholesale rates in the range of 50 percent off retail.

"The only potential profit for a local service reseller is to keep overhead really low to make a little money off a narrow profit margin," said Andrew Lubetkin, a Winnetka-based telecommunications consultant. "One additional problem USN had was its strategy of targeting small businesses.

"They didn't segment that market into retail, finance, transportation and so on, but just lumped all small business together. That's a fairly unfocused approach, and I think it has hurt them."

Most early entrants into the resale of local phone service have discovered it's more complex and difficult than they imagined, said Roger Wery, the San Francisco-based vice-president of the Renaissance Worldwide consultancy.

"AT&T and MCI couldn't make money at it, but neither can the smaller, more nimble competitors," said Wery. "The local phone market is where money will be made in the future, and the incumbents that control that market are doing everything they can to protect their hold on it."

Things may change once the U.S. Supreme Court reviews a lower court decision suspending rules issued by the Federal Communications Commission that were intended to open up local markets to competition, said Robert Rosenberg, president of the Insight Research Corp., based in Parsippany, N.J.

"As things stand now, there's no future in reselling local service, at least not for the big national companies," Rosenberg said. "Some small local companies might succeed at it if they're well run."

EXHIBIT F

ISSUE LIST

1. Interconnection

   - Delay in providing trunks
   - Shutting down networks arbitrarily

2. Combinations of unbundled network elements (UNEs)

   - Combinations that BellSouth must provide
   - Whether BellSouth must provide combinations that "recreate" an existing BellSouth retail service
   - Process for enabling ALECs to combine UNEs
   - Permissibility of taking apart UNEs that already have been combined
   - Recurring and nonrecurring prices for UNE combinations

3. Physical collocation and alternatives

   - Terms on which BellSouth will provide collocation
   - Ordering difficulties
   - Alternatives to collocation

4. Selective call routing

   - Availability and adequacy of line class code method
   - Availability and adequacy of branding of operator services

5. Terms on which BellSouth will provide switching unbundled from local transport

6. OSS

   - Integration of ordering and pre-ordering functions

   - Pre-ordering issues
     - street address validation
     - provision of customer service records
     - access to product and service information
     - ability to reserve telephone numbers and obtain related information
     - access to due date information

- Ordering and Provisioning issues
    - Order flow through and manual processing of orders generally
    - Ability to order LNP
    - Ability to order split accounts electronically
    - Ability to place complex orders electronically
    - Ability to order complex directory listings electronically
    - Ability to order UNEs and UNE combinations electronically
    - Ability to check status of pending orders
    - Provision of electronic notices for service jeopardies, rejects, clarifications, competitive disconnects, etc.
    - Provision of timely FOCs
    - Provision of FOCs that take into account facility availability
- Maintenance and repair issues
- Billing issues
    - Billing for shared transport
    - Provision of terminating usage detail
- Change management
- Provision of business rules

7. Performance measures
    - Measurements to be reported
    - Disaggregation of measurement reporting
    - Performance standards
    - Parity assessment model
    - Verification and auditing of data
    - Self-executing enforcement mechanisms
    - Measurements for 911

8. Poles, ducts, conduits and rights of way
    - Methods
    - Procedures

9. Unbundled loops
    - Provision of loops, including XDSL loops
    - Due date intervals

10. Unbundled switching

- Vertical features
- AIN

11. White pages

12. Dialing parity

13. Reciprocal compensation

14. Resale

- Aggregation
- Terms on which ALECs may resell BellSouth Customer Service Arrangements