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September 30, 2002

VIA HAND DELIVERY

The Honorable Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: *Generic Docket to Consider Technology Advances*
Docket No. 02-00434

Dear Chairman Kyle:

Enclosed are the original and fourteen copies of the Responsive Comments of BellSouth Telecommunications, Inc. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH/jej

Enclosure

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

IN RE: ***Generic Docket to Consider Technology Advances***
Docket No. 02-00434

RESPONSIVE COMMENTS OF BELLSOUTH TELECOMMUNICATIONS, INC.

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits its Responsive Comments in accordance with the Pre-Hearing Officer's July 15, 2002 Order Denying Motion for Reconsideration.[1] For the reasons explained below, the Pre-Hearing Officer should exclude all existing Unbundled Network Element ("UNE") rates from the scope of this proceeding. Moreover, the Pre-Hearing Officer should exclude Covad's request to establish an initial rate for an end-to-end broadband UNE from the scope of this proceeding because: the Tennessee Regulatory Authority ("TRA" or "Authority") could not establish such an initial rate unless it first established the Digital Subscriber Line Access Multiplexers ("DSLAMs") in BellSouth's remote terminals as UNEs; Covad cannot make the "impairment" showing required by the federal Telecommunications Act of 1996 ("the Act") in order for the TRA to declare those DSLAMs as UNEs; and the TRA is already addressing the issues presented by Covad's request in other pending proceedings. Given that no other matters need to be addressed in this docket, the Pre-Hearing Officer should recommend that the TRA close this docket.

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[1] On July 26, 2002, the CLEC intervenors submitted an agreed motion for continuance which provided for their comments to be filed on August 29, 2002 and BellSouth's comments to be filed on September 30, 2002. On August 19, 2002, the TRA approved the Agreed Motion.

I. ALL EXISTING UNE RATES SHOULD BE EXCLUDED FROM THE SCOPE OF THIS DOCKET BECAUSE THE CLECS HAVE IGNORED THE PRE-HEARING OFFICER'S ORDERS.

On April 26, 2002, the Pre-Hearing Officer issued a "Notice of Filing" directing interested persons and entities to file comments regarding the scope of this docket. *See* Attachment A. The Notice provides that such comments should contain, among other things, a list of UNE rates from Docket No. 97-01262 that require review "*as a result of technology advances*." *Id.* (emphasis added). The Notice then plainly states that "*[e]ach* item listed shall include a detailed description of the technology advance impacting *that item*." *Id.* (emphasis added).

The CLECs ignored these plain directives. Rather than identifying specific UNE rates they believe should be reviewed in this docket, the CLECs argued that the TRA should review the rates for "all current UNEs" as well as the rates for any "new UNEs or new combinations of UNEs." *See* Consolidated CLEC Comments at 2. Also, rather than providing a detailed description of the technology advances impacting each UNE rate they believe should be reviewed in this docket, the CLECs generically and superficially discussed purported technology advances related to the deployment of fiber optic facilities, Asynchronous Transfer Mode ("ATM") switching, Digital Loop Carrier ("DLC") facilities, Next Generation Digital Loop Carrier ("NGDLC") facilities, so-called dual purpose line cards that provide both voice and DSLAM functionality, switching, and network modeling, without explaining how any of these purported advances might impact the rate of any

specific UNE. The Pre-Hearing Officer easily could have closed this docket at that point on the grounds that the CLECs did not comply with the Notice.

The Pre-Hearing Officer, however, gave the CLECs a second chance. The Order entered on June 13, 2002 provides that

> After considering these comments, the Pre-Hearing Officer finds that additional argument is needed to aid the Authority in developing a comprehensive list of the UNE rates to be fixed in this docket. Specifically, the Pre-Hearing Officer notes that the Consolidated CLECs' arguments focus on advances impacting loops and switching, yet their list includes elements other than loops and switching. Therefore, it would be beneficial if the Consolidated CLECs were to supplement their comments by providing *a detailed description of the technology advance impacting each item listed in the Attachment to the Consolidated CLEC Comments and describe in detail how that advance has reduced the cost of the item.* In addition, responsive arguments would also aid the Authority in evaluating technology advances.

Order at 3-4 (emphasis added). The ordering clause provides that "[t]he Consolidated CLECs shall supplement the Consolidated CLEC Comments as explained herein within thirty (30) days of the filing of this order." *Id.* at 4.

Instead of accepting this second chance, the CLECs filed a Motion for Reconsideration in which they made it clear that they "disagree that this is an appropriate way to proceed," bluntly claiming that the approach set forth in the June 13, 2002 Order "is not reasonable." *Motion for Reconsideration* at 3. On July 15, 2002, the Pre-Hearing Officer entered an *Order Denying Motion for Reconsideration.* That Order correctly finds that the "purpose of this docket is not to simply evaluate all UNE rates without a determination of whether those UNEs have been impacted by technology advances," explaining that "[i]f that were the

case, there would be no need for [the Authority's Order directing] the Pre-Hearing Officer to determine the scope of this docket." *Order Denying Motion for Reconsideration* at 4. The Order then concludes that the CLECs should do what they should have done in the first place:

> Because the purpose of this Docket is to evaluate those UNEs impacted by technology advances, it is necessary to determine which UNEs have been impacted by technology advances. The Pre-Hearing Officer finds that the June 13, 2002 Order *reasonably requested that the CLECs provide additional information so that the scope of the docket can be determined.* Given the foregoing, the Pre-Hearing Officer finds that the *Motion for Reconsideration* should be denied and the CLECs permitted an additional fifteen (15) days to supplement their comments of May 24, 2002.

Order Denying Motion for Reconsideration at 4 (emphasis added).

The time for the CLECs to file their supplemental comments in compliance with the *Order Denying Motion for Reconsideration* has come and gone. Not a single CLEC has filed *any* supplemental Comments that contain *any* description of *any* technology advance that purportedly impacts *any* existing UNE. *See* June 13, 2002 Order at 3. Not a single CLEC has filed *any* supplemental Comments that describe how *any* purported technology advance has reduced the cost of *any* existing UNE.[2] *See id.* at 3-4.

The CLECs may have abandoned their argument that technology advances warrant review of the rates for any existing UNE. Alternatively, the CLECs may have decided to simply ignore both the June 13, 2002 Order and the *Order*

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[2] One CLEC, Covad, filed supplemental comments asking the TRA to set initial rates for a *new* UNE. BellSouth's response to Covad's Supplemental Comments is set forth in Section III below.

Denying Motion for Reconsideration (which they did not appeal) and simply rely on the bare-bones comments they originally filed (which the Pre-Hearing Officer has already found to be insufficient to aid the TRA in developing a comprehensive list of the UNE rates to be fixed in this docket).[3] In either event, the Pre-Hearing Officer should exclude all existing UNEs from the scope of this docket.

II. THE *CONSOLIDATED CLEC COMMENTS* DO NOT SUPPORT THE REVIEW OF THE RATES FOR ANY EXISTING UNES.

Nothing in the Consolidated CLEC Comments specifically addresses the rates for any existing UNEs, and the CLECs have ignored the Pre-Hearing Officer's orders to file supplemental comments regarding the rates for any existing UNEs. The only thing in the record regarding the rates for existing UNEs, therefore, are the generic and superficial assertions set forth in the Consolidated CLEC Comments. As explained below, these assertions do not support the review of the rates for any existing UNEs.

A. The Purported Technology-Driven Changes in the Cost of Network Facilities Do Not Support the Review of Any Existing UNE Rates.

The CLECs suggest that transport costs have declined as a result of the deployment of fiber optic facilities. *See* Consolidated CLEC Comments at 3. This suggestion, however, is a red herring. The cost study from which the rates for the existing transport UNEs were developed did not consider the actual amount of fiber optic facilities BellSouth had deployed in Tennessee at the time that study was conducted. Instead, that cost study for transport elements was based on a

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[3] *See* June 13, 2002 Order at 3. *See also* Section II below.

forward-looking assumption of *100% fiber optic facilities deployment*. BellSouth's deployment of additional fiber optic facilities in its actual network, therefore, would have no bearing on the existing rates for transport UNEs that were developed on the basis of a theoretical network with 100% fiber optic facilities deployment.

The CLECs also suggest that transport costs have declined as a result of the deployment of ATM switching facilities. *See* Consolidated CLEC Comments at 3. This suggestion is another red herring. BellSouth has deployed ATM switches as an overlay network currently designed to carry packet data traffic, not circuit-switched voice traffic. Because BellSouth is not obligated to unbundle packet switching, the deployment of ATM switches has no bearing on the determination of UNE rates. Nothing in the Consolidated CLEC Comments explains how or why any purported technology advances with regard to network facilities that are not UNEs should have any impact on the rates for network facilities that are UNEs.

Finally, the Consolidated CLEC Comments devote less than one full page to a superficial discussion of DLC, NGDLC, and DLC line cards. *See* CLEC Consolidated Comments at 3-4. Each of these facilities is discussed in more detail in Covad's Supplemental Comments. BellSouth, therefore, addresses the CLECs' comments regarding these facilities in Section III below.

B. The Purported Technology-Driven Changes in the Cost of Switching Do Not Support the Review of Any Existing UNE Rates.

The CLECs claim that "ILECs are augmenting their circuit switched networks with packet switched networks." *See* CLEC Consolidated Comments at 4. This is

a reference to the deployment of ATM switches and, as discussed above, the deployment of ATM switches is irrelevant to the development of UNE costs. In fact, nothing in the Consolidated CLEC Comments explains how or why the deployment of ATM switches would decrease the costs associated with any existing UNE. Stated another way, because there are no existing UNEs for packet switching technology, no purported advances in packet switching technology are relevant to the rates for any existing UNEs. Thus, because BellSouth does not use ATM packet switches to provide any existing UNE, it would be inappropriate to consider BellSouth's deployment of ATM packet switches to be a technology advance that supports a review of the rate for any existing UNE.

The CLECs also state that there has been a "significant decline in overall per unit cost of switching." *See* CLEC Consolidated Comments at 4. Once again, this statement does not support the review of the rate for any existing UNE. The "per unit" costs of switching were determined based on the most current material prices, contract terms, network configurations, and demand at the time BellSouth submitted the cost studies from which the TRA derived the existing UNE switching rates. The existing UNE switching rates, therefore, are based on the investments required to serve a discrete demand, utilizing forward-looking equipment, as required by the Federal Communications Commission's ("FCC's") Total Element Long Run Incremental Cost ("TELRIC") principles. Year-over-year trends are irrelevant in such a forward-looking, long-run approach.

Finally, the TRA established the existing rates for switching UNEs only after it ordered extensive modifications to the cost studies BellSouth submitted for switch-related elements. As an example, BellSouth's contracts with switch vendors contain price discounts that vary depending on the type of equipment BellSouth purchases. The discounts to prices for new or replacement switching equipment, for example, typically are higher than the discounts to prices for equipment used to augment the capacity of existing switching equipment. When BellSouth submitted its cost studies for switch-related elements, it included a melded discount rate that took into account both the discounts to prices for new/replacement equipment and the discounts to prices for equipment used to augment the capacity of existing switches. [4]

The CLECs argued that only the higher discounts associated with new or replacement equipment should be used, and the TRA agreed. It required BellSouth to use only the higher discount rates in its switching cost studies which, of course, resulted in a substantial reduction in the rates for switching UNEs. Accordingly,

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[4] BellSouth's use of this melded discount rate in its cost studies was entirely appropriate. In response to BellSouth's Georgia/Louisiana 271 Applications with the FCC, AT&T argued that the use of such a melded discount rate was inappropriate. The FCC rejected this argument stating: "Rates that are generated based on forward-looking network should reflect the cost of purchasing a new network at a specific point in time. The state commission may reasonably take into account that there will be growth in that network in the future and that it may not be cost-effective to acquire all of the projected need at the onset." *See* Memorandum Opinion and Order, *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services In Georgia and Louisiana* at ¶82, CC Docket No. 02-35 (May 15, 2002).

even assuming the CLECs had demonstrated technology advances that warranted the review of any existing switching UNE (which they have not), they have done nothing to suggest that any resulting rate adjustments would not be offset by the artificially low switching rates the CLECs enjoy as a result of the switching-related adjustments ordered by the TRA.

C. The Purported Technology-Driven Changes in Network Modeling Do Not Support the Review of Any Existing UNE Rates.

The CLECs argue that "the years since the last cost case have also increased the ability of the parties to model the loop accurately." *See* Consolidated CLEC Comments at 6. The CLECs, therefore, urge the Pre-Hearing Officer to "require BellSouth to file in Tennessee its BSTLM[5] study as well as any cost studies Bellsouth has recently filed in other state proceedings," and they claim that "the new, adjusted studies should produce lower rates for all UNES." *Id.* at 2. BellSouth is at a loss to understand how changing from one cost model to another can constitute a "technology advance," but that is a moot issue.

As more fully explained BellSouth's response to the CLECs' Motion for Reconsideration,[6] the TRA's stated purpose of convening this docket is to consider whether technology advances have taken place that warrant the revisiting of the rates for certain UNEs *without completely starting the modeling process anew.* The CLECs, however, have ignored the limited purpose of this proceeding and have

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[5] BSTLM stands for BellSouth Telecommunications Loop Model.

[6] *See* Response of BellSouth Telecommunications, Inc. to CLECs' Motion for Reconsideration at 2-4.

asked the Pre-Hearing Officer to change the nature of this proceeding by forcing BellSouth to begin the modeling/cost study process anew, where not only would new technology be debated, but any and all modeling, cost inputs and cost study approaches would once again be opened to debate. The *Order Denying Motion for Reconsideration* makes it clear that this request is inappropriate:

> In [the March 13, 2002 *Report and Recommendation*], the Pre-Hearing Officer described the purpose of this Docket as establishing "rates for those BellSouth UNEs on which technology advances have had an impact." No objections to the *Report and Recommendation* were filed. At the April 16, 2002 Authority Conference, the Directors voted to accept the *Report and Recommendation* without modification . . . .
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> The purpose of this docket is not to simply evaluate all UNE rates without a determination of whether those UNEs have been impacted by technology advances.

Order Denying Motion for Reconsideration at 3-4. The Pre-Hearing Officer, therefore, should reject the CLECs' claims that BellSouth's use of the BSTLM in other states is a technology advance that warrants the review of any existing UNE rate.

III. COVAD CANNOT MAKE THE "IMPAIRMENT" SHOWING REQUIRED BY FEDERAL LAW IN ORDER FOR THE TRA TO ESTABLISH THE NEW UNE (AND THE INITIAL RATE FOR THAT NEW UNE) THAT COVAD SEEKS

In its Supplemental Comments, Covad asks the TRA to "set initial rates for a new UNE that would allow CLECs to provision xDSL service through Tennessee Remote Terminals that BellSouth has equipped with various advanced technologies." *See* Covad Supplemental Comments at 1. More specifically, Covad

is asking the TRA to establish an initial rate for a new "end-to-end Broadband UNE" that runs "from the customer's premises to BellSouth's Central Office" and "that allows competitors to provide DSL[7] services to any customer regardless of the technology that BellSouth deploys at a given [remote terminal]." *Id.* at 7.

A. Description of the Provision of DSL Service

Only the low frequency portion of the transmission spectrum available via a copper loop is used to carry voice traffic. DSL technology takes advantage of this fact by using the high frequency portion of the loop's spectrum to simultaneously carry data traffic. An end user, for example, can talk on the telephone at the same time she is surfing the Internet. In order to address Covad's request, it is necessary to briefly describe how DSL service is provided when Digital Loop Carrier ("DLC")[8] is not involved and how DSL service is provided when DLC is involved.

1. When Digital Loop Carrier is not involved.

To use the example above, assume that an end user is talking on the telephone at the same time she is surfing the Internet. When BellSouth employs DSL technology in a part of BellSouth's network where BellSouth has not also employed DLC, the voice traffic travels over the low frequency portion of the copper loop between the end user's premises and the central office at the same time that the data traffic travels over the high frequency portion of the same

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[7] DSL, which stands for Digital Subscriber Loop, is one of several technologies that can be used to provide high-speed data services (which often are referred to as "broadband" services) to end users.

[8] DLC is discussed in Section III.A.2 below.

copper loop -- in much the same manner that two cars in separate lanes can simultaneously travel on the same road. When the traffic arrives at the central office, a splitter separates the voice traffic in the low frequency from the data traffic in the high frequency. The voice traffic is directed to a circuit switch, and the data traffic is directed to a piece of equipment called a Digital Subscriber Line Access Multiplexer ("DSLAM").[9] Covad and other CLECs currently are providing DSL service in Tennessee (as well as in numerous other states throughout the country) by connecting UNE loops they lease from BellSouth to their own DSLAM equipment that they collocate in BellSouth's central offices. *See* Covad's Supplemental Comments at 3.

2. When Digital Loop Carrier is involved.

The provisioning of DSL service is a bit different when a DLC is involved. A DLC performs an analog to digital conversion that allows BellSouth to combine traffic from several end users and transport that combined traffic back to the central office over a single high-capacity transmission facility. Traffic from a given end user is carried to a remote terminal located in the field, where the DLC equipment combines that traffic with traffic coming from other end users. The combined traffic is then sent to the central office over a single large transmission "pipe." The facilities between the end user's premises and the remote terminal often are called "distribution" facilities, and the facilities between the remote

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[9] Many DSLAMs now have integrated splitters. When this type of DSLAM is used, the frequency splitting takes place within the DSLAM itself.

terminal and the central office (the large transmission "pipes") often are called "feeder" facilities. The use of DLC equipment makes BellSouth's network more efficient, and BellSouth had deployed DLC equipment extensively in its Tennessee network long before the federal Act went into effect.

When DLC is involved, because the DLC equipment inherently limits voice bandwidth available to a given end user to around 64 kilobits per second ("64 Kbps"), frequency splitting must occur to send voice traffic on to the DLC equipment and to send data traffic on to the DSLAM. As an example, assume that the end user discussed above (who is talking on the telephone at the same time she is surfing the Internet) is being served by DSL technology in a DLC environment. In that case, the voice traffic travels over the low frequency portion of the distribution facility that runs between the end user and the remote terminal at the same time that the data traffic travels over the high frequency portion of the same distribution facility. When the traffic arrives at the remote terminal, a splitter *at that remote terminal* separates the voice traffic from the data traffic.[10] The voice traffic is directed to the DLC for combination with the voice traffic from other end users, and the combined traffic is sent over a "feeder" facility to a circuit switch handling voice traffic. The data traffic is directed to a DSLAM *at the remote terminal* for combination with the data traffic from other end users, and the combined data traffic is sent to the central office and the ATM switch.

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[10] Many DSLAMs now have integrated splitters. When this type of DSLAM is used, the splitting takes place within the DSLAM itself.

In certain cases, particularly with Next Generation Digital Loop Carrier (NGDLC), it is possible (at least from a technical perspective) to use a particular type of line card (the "dual purpose line card" referenced in the Consolidated CLEC Comments) to provide xDSL functionality on an integrated basis. However, this line card will be functional if and only if the system has undergone expensive upgrades to provide the core DSLAM functionality. As explained in Section III.E below, however, BellSouth does not use DLC line cards to provide DSL service in Tennessee. To the extent that BellSouth is providing DSL service in a DLC environment in Tennessee, therefore, BellSouth is using "stand-alone" DSLAMs that it has placed in remote terminals.

B. Covad's request for a new "end-to-end broadband UNE" boils down to a request that the TRA declare that the DSLAMs BellSouth has placed in remote terminals are UNEs.

Covad acknowledges that CLECs already are providing DSL service to business and residential customers by connecting UNE loops they lease from BellSouth to DSLAMs that those CLECs have purchased and collocated in BellSouth Central offices. *See* Covad's Supplemental Comments at 3. Covad, therefore, does not even purport to need a new broadband UNE loop to provide DSL service when DLC is not involved (that is, when the DSLAM functionality takes place in the central office instead of at the remote terminal). Instead, Covad's request for a new UNE is limited to situations in which end users are served "through Tennessee Remote Terminals . . . ." *See* Covad Supplemental Comments at 1.

BellSouth already provides UNE loops and UNE subloops that allow CLECs like Covad to carry DSL signals between the premises of their end users and BellSouth's remote terminals. BellSouth already provides UNE loops and subloops that allow CLECs like Covad to carry DSL signals between BellSouth's remote terminals and the CLECs' collocation arrangements in BellSouth's central offices. The only element of the "end-to-end broadband UNE" that Covad seeks that is not already available as a UNE is the DSLAM located in BellSouth's remote terminals.

The real issue presented by Covad's request, therefore, is how Covad and other CLECs are going to obtain DSLAM functionality at remote terminals in order to provide relatively new DSL service -- which, for the most part, has become available in the past few years -- to their Tennessee customers. Are Covad and other CLECs going to do what BellSouth has had to do over the past few years -- deploy smaller DSLAMs in strategically-selected remote terminals and replace these DSLAMs with larger ones as demand for DSL service dictates? Or, are Covad and the other CLECs going to be granted unbundled access to the DSLAMs that BellSouth has deployed in the past few years in order to provide DSL service to their own customers?

It is easy to understand why Covad is pursuing the second of these options. As the FCC explained:

> investments in facilities used to provide service to nascent markets are inherently more risky than investments in well established markets. Customer demand for advanced services is also more difficult to

predict accurately than is the demand for well established services, such as traditional plain old telephone service (POTS).[11]

Rather than taking the risk of collocating DSLAMs in BellSouth's remote terminals so that they can provide their own DSL service (as BellSouth has done), Covad and the other CLECs have elected to sit on the sidelines and watch BellSouth buy the same DSLAMs they could have bought, deploy those DSLAMs at the same remote terminals that they could have deployed their own DSLAMs, and offer the same types of DSL service that they could have offered. Now that it has seen the results of the risks BellSouth has taken, Covad is asking the TRA to allow it and other CLECs to reap where they have not sown. Covad's request is inherently unfair, and it should be denied.[12]

C. Covad is not entitled to unbundled access to the DSLAMs BellSouth has placed in its remote terminals because Covad cannot make the "impairment" showing that is required by the federal Act.

The legal standard that governs Covad's request for unbundled access to the DSLAMs BellSouth has placed in remote terminals is not whether such access would make it cheaper and easier for Covad and other CLECs to do business.

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[11] See *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, at ¶314 (1999) ("UNE Remand Order").

[12] Further, granting requests like this will, in the long run, diminish competition and retard deployment of new technology, because both CLECs and incumbents will have diminished incentives to invest in the deployment of new technology. Additionally, as explained at pages 14-15 of the testimony of Keith Milner that BellSouth pre-filed in Docket No. 97-00309 (see Attachment C), Covad's request is not technically feasible to the extent that Covad is seeking unbundled broadband loops on a "line-at-a-time" basis.

Instead, because unbundling comes at a substantial cost and because it deters investment, Congress made "impairment" the touchstone for defining the circumstances when network elements must be unbundled. *See United States Telecom Association v. FCC,* 290 F.3d 415 (D.C. Cir. 2002). Under Section 251(d)(2) of the Act, the unbundling analysis must consider whether "failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." The D.C. Circuit Court of Appeals has held that network elements should not be unbundled under this statute when there is no reasonable basis to believe that competition is suffering from the type of impairment about which Congress was concerned. *United States Telecom. Ass'n*, 290 F.3d at 421. The TRA, therefore, cannot designate the DSLAMs in BellSouth's remote terminals as UNEs (and, therefore, it cannot establish an initial rate for a new end-to-end broadband UNE that would include those DSLAMs) unless Covad can make this mandatory "impairment" showing.

1. The "impairment" standard the FCC adopted in its *UNE Remand Order* has been struck down as requiring too much unbundling.

In its *UNE Remand Order*, the FCC adopted a standard for satisfying the federal Act's impairment requirement. On appeal, the D.C. Circuit Court of Appeals ruled that the standard the FCC adopted was overly-broad and resulted in too much unbundling. *See United States Telecom Ass'n*, 290 F3d. 415. The Court, for instance, stated that:

> the [United States Supreme] Court's point that if "Congress had wanted to give blanket access to incumbents' networks," it "would simply have said (as the [FCC] in effect has) that whatever requested element can be provided must be provided,"[13] suggests that the Court read the [federal Act] as requiring a more nuanced concept of impairment than is reflected in findings such as the [FCC's] – detached from any specific markets or market categories.

Id., 290 F.3d at 425-26. The Court further noted that

> Because the [FCC's] concept of "impairing" cost disparities is so broad and unrooted in any analysis of the competing values at stake in the implementation of the Act, we cannot uphold even the two non-universal mandates adopted by the [FCC] (for circuit switches and packet switches).

Id. at 428. As a result, the Court remanded the *UNE Remand Order* back to the FCC. *See id.* at 416. The FCC has not yet acted on this remand. Exactly what Covad must prove in order to satisfy the "impairment" requirement, therefore, is a matter of legal uncertainty.

One thing, however, is certain. If Covad could not satisfy the impairment standard the FCC adopted in its initial *UNE Remand Order* (which resulted in too much unbundling), Covad will not be able to satisfy a more stringent standard (that requires less unbundling) that the FCC will ultimately issue in compliance with the D.C. Circuit Court's opinion. As explained below, Covad could not satisfy the impairment standard the FCC adopted in its *UNE Remand Order* and, therefore, Covad clearly is not entitled to unbundled access to the DSLAMs BellSouth has placed in its remote terminals.

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[13] The D.C. Circuit was referring to the United States Supreme Court's decision in *Iowa Utilities Bd.*, 525 U.S. 366, 390 (1999).

2. Covad could not satisfy the impairment standard the FCC established in its *UNE Remand Order.*

In the *UNE Remand Order,* the FCC stated that "[t]he packet switching network element includes the necessary electronics (e.g. routers *and DSLAMS*)." *See UNE Remand Order* at ¶304 (emphasis added). The FCC then expressly stated "we decline at this time to unbundle the packet switching functionality, except in limited circumstances." *Id.* at ¶306. These limited circumstances are set forth in FCC Rule 51.319(c)(5), which states that an ILEC must provide unbundled packet switching only where all of the following conditions are satisfied:

> (i) The incumbent LEC has deployed digital loop carrier systems, including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section (*e.g.*, end office to remote terminal, pedestal or environmentally controlled vault);
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> (ii) There are no spare copper loops capable of supporting the xDSL service the requesting carrier seeks to offer;
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> (iii) The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Line Access Multiplexer at the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined under § 51.319(b); and
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> (iv) The incumbent LEC has deployed packet switching capability for its own use.

47 C.F.R. 51.319(c)(5).

The testimony of BellSouth witnesses John Ruscilli and Keith Milner that BellSouth pre-filed in Docket No. 97-00309 makes it clear that the circumstances in which this limited exception come into play do not exist in Tennessee. *See*

Attachments B and C. Accordingly, even under the "impairment" standard the FCC adopted in its *UNE Remand Order*, Covad would not be entitled to unbundled access to DSLAMs that BellSouth has placed in remote terminals.

The TRA acknowledged this in the BellSouth--Intermedia arbitration proceeding, in which the Directors (acting as arbitrators under section 252 of the federal Act) "voted unanimously to require BellSouth to provide access to packet switching capabilities as an unbundled network element *only when the limited circumstances identified in FCC Rule 51.319(c)(5)(i)-(iv) exist*."[14] More recently, both the Florida Public Service Commission and the Kentucky Public Service Commission considered requests for unbundled broadband loops that are similar to Covad's request. After conducting evidentiary hearings, both Commissions rejected those requests.

In its June 5, 2002 ruling in the BellSouth--Florida Digital Network arbitration proceeding, the Florida Commission found

> BellSouth's arguments regarding the impact [of a requirement to provide an unbundled broadband loop] on the ILEC's incentive to invest in technology developments to be most compelling. We have serious concerns that requiring BellSouth to unbundle its DSLAMs in remote terminals would have a chilling effect on broadband deployment. Furthermore, we do not believe that FDN has demonstrated that it would be impaired without access to a broadband UNE, because it does have the ability to collocate DSLAMs. While FDN has raised the expense of such collocation as a concern, the record reflects that the costs to install a DSLAM at a remote terminal

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[14] *See* Interim Order on Arbitration, *In re: Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 99-00948 at 36, (June 25, 2001).

> are similar for both BellSouth and FDN. As such, FDN has not demonstrated that it is any more burdensome for FDN to collocate DSLAMs in BellSouth's remote terminals than it is for BellSouth. Since the record does not reflect that FDN faces a greater burden than does BellSouth, we do not find that FDN is impaired in this regard. For these reasons, we find it is not appropriate at this time to require BellSouth to create a broadband UNE.[15]

Similarly, in the Kentucky BellSouth--Cinergy arbitration proceeding, the Kentucky Commission denied Cinergy's request for a broadband UNE, stating that "we must look to the long-term effects upon Kentucky of creating a packet-switching UNE. Future investments by BellSouth . . . would be discouraged."[16] The Kentucky Commission further concluded that Cinergy had not "demonstrated that obtaining additional UNEs from BellSouth is 'necessary' to enable it to provide service. While Cinergy is entitled to purchase DSL-capable loops, it should purchase its own additional equipment to provide the broadband services it seeks to offer." *Id.*

These decisions are entirely consistent with the D.C. Circuit's decision in *United States Telecom*. In fact, the D.C. Circuit echoed these very same concerns when it rejected the "impairment" standard that the FCC adopted in its UNE Remand Order. As the D.C. Circuit put it, "[i]f parties who have not shared the

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15 *See* Final Order on Arbitration, *In re: Petition by Florida Digital Network, Inc. for arbitration of certain terms and conditions of proposed interconnection and resale agreement with BellSouth Telecommunications Act of 1996*, Docket No. 010098-TP at 16-17. (June 5, 2002). This Order is the subject of pending motions for reconsideration.

16 *See* Order, *In the Matter of: Petition of Cinergy Communications Company for Arbitrations of an Interconnection Agreement with BellSouth Telecommunications, Inc., pursuant to U.S.C. Section 252,* Case No. 2001-00432 at 6 (July 12, 2002). This Order is the subject of pending motions for reconsideration.

risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines." *United States Telecom Ass'n*, 290 F.3d at 424.

In an attempt to support its request for an end-to-end broadband UNE, Covad claims that collocating its own DSLAMs in BellSouth's remote terminals "is not economically feasible." *See* Covad's Supplemental Comments at 6. The D.C. Circuit's opinion makes it clear that claims such as this one -- which do nothing more than address the amount of money a CLEC would need to spend -- have no place in the requisite "impairment" analysis. Instead, the Court indicated that while cost is a consideration in determining whether a CLEC is impaired, cost disparities of just any nature are not evidence of impairment, stating that "[t]o rely on cost disparities that are universal as between new entrants and incumbents in any industry is to invoke a concept too broad . . . to be reasonably linked to the purpose of the Act's unbundling provisions." *Id* at 426. According to the D.C. Circuit, the FCC's impairment analysis must focus on "cost differentials based on characteristics that would make genuinely competitive provision of an element's function wasteful." (*Id.* at 427).

No cost disparities exist with regard to collocating DSLAMs in remote terminals -- let alone any that "would make genuinely competitive provision of [a DSLAM]'s function wasteful." It is beyond dispute that CLECs can purchase DSLAMs from a variety of vendors at competitive prices -- Covad, for instance, has bought DSLAMs and collocated them in ILEC central offices throughout the entire

nation. *See* Joint Declaration (attached to Testimony of Terry L. Murray) at 3-4. Moreover, although Covad argues that the cost of applying for collocation at BellSouth's remote terminals is prohibitively expensive, *see* Covad's Supplemental Comments at 6 n.3, this argument fails to demonstrate any relevant cost disparities for at least two reasons. First, because collocation rates are cost-based, the pro-rata cost of physical collocation to Covad is no greater than the cost BellSouth incurs when it establishes a DSLAM at a remote terminal site. Second, Covad alludes to costs associated with submitting collocation applications at each and every one of the more than 6,000 remote terminals in Tennessee, but neither Covad nor any other CLEC would seriously consider collocating a DSLAM at all of those remote terminals. In fact, BellSouth itself has installed DSLAMs in less that 15% of its remote terminals in Tennessee. *See* Docket No. 97-00309, BellSouth's Response to Consolidated CLEC 1st Data Request, Item No. 83. (Attachment D).

Each time BellSouth has installed a DSLAM in one of its remote terminals, BellSouth has had to expend resources to: purchase the DSLAM; augment space at the remote terminal as necessary; resolve any power, zoning, and right-of-way issues; install the DSLAM in the remote terminal; and provision the facilities necessary to connect the DSLAM to the end user and to the central office. And BellSouth did not begin expending resources to deploy DSLAMs at remote terminals in Tennessee until *after* the passage of the federal Act. BellSouth and the CLECs, therefore, started the race to deploy the facilities necessary to provide DSL service in a DLC environment at the same time. There is no legal justification for the TRA

to grant unbundled access to these facilities so that CLECs can "catch-up" when nothing prevented CLECs from starting the race at the same time that BellSouth started the race.

Finally, the fact that CLECs are not entitled to unbundled access to DSLAMs does not mean that CLECs wishing to provide DSL service must build an entire network from scratch. As explained above, BellSouth provides UNE loops and UNE subloops that allow CLECs like Covad to carry DSL signals between the premises of their end users and BellSouth's remote terminals. BellSouth also provides UNE loops and subloops that allow CLECs like Covad to carry DSL signals between BellSouth's remote terminals and the CLECs' collocation arrangements in BellSouth's central offices. The only element of the "end-to-end broadband UNE" that Covad seeks that is not already available as a UNE, therefore, is the DSLAM located in BellSouth's remote terminals.[17] As noted above, however, CLECs can purchase DSLAMs from a variety of vendors at competitive prices, and BellSouth will allow CLECs to collocate their own DSLAMs at BellSouth remote terminals as required by the FCC's *UNE Remand Order.* CLECs, therefore, simply are not impaired in their ability to provide DSL service to end users who are served from

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[17] Covad is also requesting unbundled access to "suitable line cards" that may be deployed in a BellSouth DLC, but as explained in Section III.D below, BellSouth does not deploy line cards that are capable of providing DSL service in these systems. BellSouth, therefore, cannot be required to unbundle something that simply does not exist in its network. Moreover, even if BellSouth did use such line cards, those types of line cards provide packet switching functionality, and the FCC has ruled that incumbents like BellSouth are not required to unbundle network elements that provide packet switching functionality.

remote terminals, and CLECs are not entitled to unbundled access to BellSouth's DSLAMs.

D. Covad is not entitled to a new "end-to-end broadband UNE" because DSL is neither the only technology supporting the provision of broadband (data) service nor the most prevalent technology supporting the provision of such service.

Covad claims that BellSouth's deployment of DSLAMs at remote terminals has had "a dramatic negative impact on the ability of CLECs to provide data services *via xDSL technology* to Tennessee consumers . . . ." *See* Covad Supplemental Comments at 2 (emphasis added). As explained above, this claim is untrue. More important than the question of whether CLECs can provide xDSL technology to Tennessee consumers, however, are the questions of whether Tennessee consumers have choices when it comes to selecting a provider of broadband services and whether requiring the undbundling of DSLAMs at remote terminals would significantly enhance competition in the broadband market. As explained below, the answers are that today, consumers already have choices when it comes to selecting a provider of broadband services, and that unbundling DSLAMs at remote terminals would not significantly enhance competition in the broadband market.

Covad's Supplemental Comments ignore the fact that DSL technology is *not* the only technology that supports the provision of broadband data services to consumers. Instead, it is merely one such technology. Other technologies that

support the provision of broadband data services to end users include wireless, cable modem, and satellite.[18]

Moreover, DSL is not even the leading technology that supports the provision of broadband data services to consumers. As the FCC has noted, cable modem technology -- not DSL -- is leading the way in the provision of broadband service to consumers. In February 2002, for instance, the FCC stated that "[i]n the broadband arena, the competition between cable and telephone companies is particularly pronounced, *with cable modem platforms enjoying an early lead in deployment*."[19]

It was exactly this type of finding that the D.C. Circuit relied upon when it vacated the FCC's Line Sharing Order, in which the FCC had decided that the high frequency portion of the loop should be unbundled such that CLECs and ILECs could share the same loop to provide two different services (voice and data) simultaneously.[20] *See United States Telecom Ass'n*, 290 F.3d at 421. The Court

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18 *See In the Matter of Inquiry concerning High-Speed access to the Internet over Cable and Other Facilities*, FCC Order No. 0-355 at ¶43 (September 28, 2000) ("High-speed services are provided using a variety of public and private networks that rely on different network architectures and transmission paths including wireline, wireless, satellite, broadcast, and unlicensed spectrum technologies.").

19 Third Report, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, FCC Order No. 02-33 at ¶37 (February 6, 2002)(emphasis added).

20 When a CLEC uses the unbundled higher frequency portion of the loop to provide data services to an end user that is receiving voice services from the ILEC

reiterated that the FCC's own findings "repeatedly confirm both the robust competition, *and the dominance of cable*, in the broadband market." *Id.* at 428 (emphasis added). Specifically, the Court stated:

> The [FCC] also noted that the "most popular offering of broadband to residential consumers is via 'cable modems' . . .," that "no competitor has a large embedded base of paying residential customers," and that the "record does not indicate that the consumer market is inherently a natural monopoly." The most recent §706 Report (not in the record of this case) is consistent: As of the end of June 2001, cable companies had 54% of extant high-speed lines, *almost double the 28% share of asymmetric DSL.*

See 290 F.3d at 428-29 (emphasis added).

The Court then noted that "the [FCC] believes it was justified in focusing solely on DSL" in support of its decision to unbundle the high frequency portion of the loop "because that is what 'CLECs seek to offer when they request line sharing.'" *Id.* at 429. The Court unequivocally ruled that the FCC was mistaken and that it should have considered competitive conditions in the market. Noting that unbundling imposes significant costs on the ILEC and also acts as a disincentive to investment, the FCC explained that

> nothing in [the federal Telecommunications Act of 1996] appears a license to the [FCC] to inflict on the economy the sort of costs noted by Justice Bryer[21] under conditions where it had no reason to think doing so would bring on a significant enhancement of competition.

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over the low frequency portion of the same loop, the arrangement is referred to as "line sharing." The FCC Order unbundling the high frequency portion of the loop, therefore, is commonly referred to as the "Line Sharing Order."

[21] These costs include "disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource." *Id.* at 429.

> The [FCC's] naked disregard of the competitive context risks exactly that result.

Id. at 429. The D.C. Circuit, therefore, vacated the FCC's Line Sharing Order.

By myopically focusing on "the ability of CLECs to provide data services via xDSL technology," Covad is making the same mistake the FCC made: it is ignoring the irrefutable facts that data services can be provided by many different technologies and that nearly twice as many consumers receive data services via cable modem technology as receive data services via DSL technology. Far from being the only game in town when it comes to providing broadband data services, BellSouth is a distant second behind largely unregulated cable companies. Covad, therefore, is asking the TRA to impose regulatory-intensive unbundling requirements on facilities BellSouth uses to compete with the unregulated offerings of largely unregulated cable companies. Covad's request is contrary to both logic and the law, and it should be rejected out of hand.

D. Covad's assertions of "remonopolization" are meritless.

Covad asserts that BellSouth's deployment of technology at remote terminals in Tennessee is "leading toward the gradual remonopolization of data services by BellSouth." *See* Covad's Supplemental Comments at 1. This erroneous assertion is flatly refuted by the following findings of the FCC (which the D.C. Circuit cited with approval in *United States Telecom*):

> the most popular offering of broadband to residential consumers is via cable modems;
>
> no competitor has a large embedded base of paying residential customers;

the record does not indicate that the consumer market is inherently a natural monopoly; and

as of the end of June 2001, cable companies had 54% of extant high-speed lines, *almost double the 28% share of asymmetric DSL.*

See, 290 F.3d at 428-29. It is clear that BellSouth never had a monopoly on data services in the first place (which obviously negates any ability to "remonopolize" data services), and that nobody -- not even cable companies that provide more data services than any other entity -- is monopolizing the market for data services.

Covad further asserts that BellSouth's "deployment of fiber-based telecommunications technology" somehow "amounts to a gradual remonopolization of the local loop . . . ." *See* Covad's Supplemental Comments at 4, 8. Covad bases this claim on the erroneous assertion that when BellSouth deploys a DSLAM at a remote terminal, it "prevents the end users connected to those remote terminals from being able to order DSL service from any provider other than BellSouth." *Id.* This, however, is not the case. If an end user is served by DLC equipment housed in a remote terminal, CLECs may order services by which BellSouth will determine if any disconnected, but not retired, copper feeder exists that the CLEC could use to provide DSL service to the end user through a DSLAM that CLEC has collocated at a BellSouth central office.

Even if no spare copper facilities are available, the only thing that prevents CLECs from providing DSL service through remote terminals is their obstinate refusal to collocate their own DSLAMs at remote terminals in the hopes that they

can convince the TRA to allow them to "come in as equal partners on the successes, and avoid payment for the losers . . . ." *See United States Telecom Ass'n v. FCC*, 290 F.3d at 424. Moreover, despite the CLECs' decision to embark on this course of inaction, BellSouth is nowhere near monopolizing any broadband market because more end users are receiving data services via cable modems than are receiving data services via DSL technology.

Finally, far from being driven by some grand scheme to "remonopolize" the local loop or to "remove[] customers from the reach of competitive providers of DSL service," BellSouth's fiber deployment is governed by careful analysis of economics and technology. The methodology BellSouth employs in making decisions is outlined in its *Loop Technology Deployment Directives.* Fiber feeder placements occur in one of two configurations: (1) an "overlay", in which the fiber feeder is placed in parallel with existing copper feeder and (2) complete replacement and removal of the copper feeder cable. If the existing copper feeder is defective, impossible or uneconomical to maintain, or affected by a re-arrangement (a road move, for example), BellSouth typically replaces the copper feeder capacity with fiber and retires the copper feeder. Existing loop distribution facilities will be cross connected to the new fiber-fed DLC, and the resulting arrangements will be shown in BellSouth's Loop Facilities Administration and Control System ("LFACS"). Information on the retired copper feeder will be removed from LFACS since it is no longer capable of providing telephone service to a customer premises. Other instances that may result in the removal of copper

facilities from service at an existing service location include: (1) public requirements (such as road work or road moves); (2) non-discretionary replacements (such as damage to plant cause by storms); (3) rehabilitation of high operating cost distribution plant and; (4) feeder route facility additions with digital loop carrier.

E. To the extent that Covad suggests that BellSouth is using DLC line cards to provide DSL service in Tennessee, Covad is wrong.

Covad states that as an alternative to installing a DSALM at a remote terminal in order to provision DSL in a DLC environment, "[c]ertian modern DLC systems can support the provisioning of DSL service if they are equipped with suitable line cards, which are different from the line cards that are used for basic voice-only service." *See* Covad's Supplemental Comments at 6. Then, citing BellSouth's Responses to Data Request Nos. 86 and 87 in Docket No. 97-00309, Covad claims that "BellSouth admits that it is already using *this type of technology* to provide DSL service to 15,438 customers in Tennessee *through remote DSLAMs collocated at the [remote terminal]* . . . ." *Id.* at 7 (emphasis added). This statement could leave the erroneous impression that BellSouth is using DLC line cards to provide DSL technology in Tennessee, but that simply is not the case.

The Affidavit of William J. McNamara, III, which Covad cites in its Supplemental Comments, unequivocally states that "BellSouth has not deployed NGDLC dual purpose line cards in its NGDLC systems anywhere in BellSouth's nine-state network, including in Tennessee." *See* McNamara Affidavit (Attachment E) at ¶2. Moreover, Data Request No. 86 that Covad references asks for "the total

number of loops in Tennessee over which BellSouth currently provides [DSL] service of any kind or variety," and BellSouth's response states that it provides DSL service over 51,868 residential loops and 89 business loops in Tennessee.[22] *See* Attachment F. Data Request No. 87 asks for the number of "BellSouth FastAccess Internet Service customers" that are served "through [DSLAMs] deployed in BellSouth Remote Terminals in Tennessee," and BellSouth's response to that Data Request is 15,438 DSL circuits. *See* Attachment G. Nothing in either of these Data Requests or in BellSouth's responses to them makes any reference to any line cards whatsoever. Again, BellSouth is not using DLC line cards to provide DSL service in Tennessee.

IV. THE TRA SHOULD CLOSE THIS DOCKET BECAUSE THE ONLY ISSUE THAT IS APPROPRIATELY BEFORE THE TRA IS BEING ADDRESSED IN VARIOUS OTHER PROCEEDINGS.

As explained in Section I above, all existing UNE rates should be excluded from the scope of this proceeding because the CLECs have ignored the Pre-Hearing Officer's orders. The only matter arguably before the TRA in this docket, therefore, is Covad's request for an initial rate for a new end-to-end broadband UNE. As explained above, however, it is clear that Covad is not impaired in its ability to provide DSL service and, therefore, the TRA cannot establish the new

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[22] Harkening back to Covad's assertions of "remonopolization," it can hardly be said that BellSouth's provision of DSL service over less than 52,000 of the millions of loops it serves in Tennessee amounts to the "remonopolization" of either data services or the local loop.

end-to-end broadband loop (and, therefore, it cannot establish an initial rate for such a loop) as requested by Covad.

Even if that were not the case, the fact remains that issues raised by Covad's request are currently being addressed in at least three other proceedings. In the pending Cynergy-BellSouth arbitration proceeding, for instance, Cynergy is seeking the same type of end-to-end broadband UNE that Covad seeks in its Supplemental Comments. Moreover, to the extent that Covad's request raises issues related to DLC line cards, those issues already are being addressed in Docket No. 00-00544, which is the subject of an appeal pending before the U.S. District Court for the Middle District of Tennessee (Case No. 3-02-0830).[23] Finally, to the extent that Covad's Supplemental Comments may address issues related to BellSouth's provision of DSL service to CLEC voice customers, those issues are covered by the Settlement Agreement in Docket No. 97-00309, which provides that:

> The CLECs may request that the TRA open a generic contested case proceeding to address expeditiously the issue of BellSouth's provision of DSL service to CLEC voice customers and related OSS issues. BellSouth may raise any and all defenses to such complaint. Bellsouth will not oppose expedited treatment of such complaint.

See Attachment H. Covad is a party to this Settlement Agreement and, therefore, Covad should present any such issues in the generic contested case proceeding referenced in the Settlement Agreement.

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[23] A protective appeal is also pending in the Court of Appeals for the Middle Section of Tennessee (Case No. M2002-02054-COA-R12-CN).

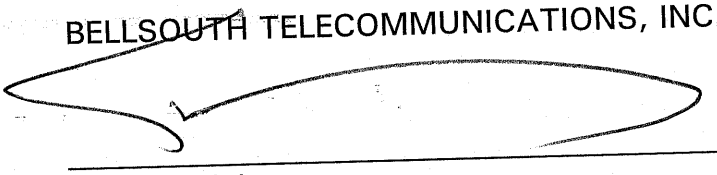
The TRA, therefore, is already in the process of addressing all of the issues presented in Covad's Supplemental Comments. To address one or more of these issues in this docket as well would be a duplicative and inefficient use of the TRA's administrative resources. Accordingly, the TRA should exclude Covad's request for the establishment of an initial rate for a new end-to-end broadband UNE from the scope of this docket.

CONCLUSION

For the reasons set forth above, the Pre-Hearing Officer should exclude all existing UNE rates from the scope of this docket. The Pre-Hearing Officer also should exclude Covad's request to establish an initial rate for an end-to-end broadband UNE from the scope of this docket. Given that no other matters need to be addressed in this docket, the Pre-Hearing Officer should recommend that the TRA close this docket.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2002, a copy of the foregoing document was served on the parties of record, via the method indicated:

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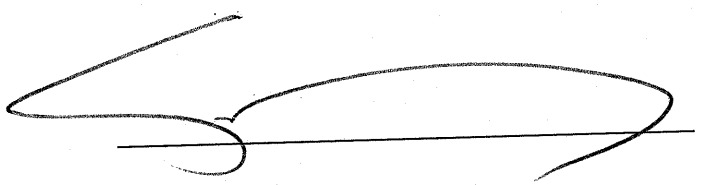

ATTACHMENT "A"

TENNESSEE REGULATORY AUTHORITY

460 James Robertson Parkway
Nashville, Tennessee 37243
Telephone (615) 741-2904

NOTICE OF FILING

DOCKET: 02-00434

IN RE: In re: Generic Docket to Consider Technology Advances

DATE: April 26, 2002

Interested persons and entities may file comments regarding the scope of the above-styled docket on or before **Friday, May 24, 2002.** Such comments should contain: (1) a list of those Unbundled Network Element ("UNE") rates from Docket No. 97-01262, *In re: Petition of BellSouth Telecommunications Inc. to Convene a Contested Case to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements*, requiring review as a result of technology advances and (2) a list of UNEs for which an initial rate is needed as a result of technology advances. Each item listed shall include a detailed description of the technology advance impacting that item. Comments shall be accompanied by a petition to intervene, unless previously filed, as provided for in Tenn. Code Ann. §§ 4-5-310 and 65-2-107 and Authority Rule 1220-1-2-.08. Any motion to alter the above date shall be filed with the Executive Secretary's Office and served on all parties of record as provided for in Authority Rule 1220-1-1-.10.

FOR THE TENNESSEE REGULATORY AUTHORITY:

Julie M. Woodruff, Pre-Hearing Officer

cc: Parties of Record

original in docket file

ATTACHMENT "B"

BELLSOUTH TELECOMMUNICATIONS, INC.

REBUTTAL TESTIMONY OF JOHN A. RUSCILLI

BEFORE THE TENNESSEE REGULATORY AUTHORITY

DOCKET NO. 97-00309

JULY 22, 2002

PROPRIETARY VERSION

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH") AND YOUR BUSINESS ADDRESS.

A. My name is John A. Ruscilli. I am employed by BellSouth as Senior Director for State Regulatory for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. ARE YOU THE SAME JOHN RUSCILLI THAT FILED DIRECT TESTIMONY IN THIS PROCEEDING?

A. Yes. On April 26, 2002, I filed direct testimony, including 16 exhibits.

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. The purpose of my rebuttal testimony is to respond to specific issues raised in the testimony filed on behalf of several parties in this proceeding. Specifically, I respond to portions of the pre-filed direct testimonies of Mr. Greg Darnell and

Ms. Sherry Lichtenberg on behalf of MCI WorldCom Communications, Inc., MCIMetro Access Transmission Services, LLC and Brooks Fiber Communications of Tennessee, Inc. (collectively "WorldCom"), Ms. Denise Berger on behalf of AT&T Communications of the South Central States, Inc. ("AT&T"), Ms. Terry Murray on behalf of Covad Communications Company ("Covad"), Mr. John Ivanuska on behalf of Birch Telecom of the South, Inc. ("Birch") and Mr. Joseph Gillan on behalf of the Southeast Competitive Carrier Association ("SECCA").[1]

Q. HOW IS THE REMAINDER OF YOUR REBUTTAL TESTIMONY ORGANIZED?

A. The remainder of my rebuttal testimony is structured into four sections: 1) General Comments; 2) Status of Local Competition and Track A Compliance; 3) Specific requirements of the Telecommunications Act of 1996 ("Act") or checklist item being addressed by the specific intervening party; and 4) Other issues, as raised by intervening parties, that do not relate to a specific checklist item. A list of acronyms used in my testimony is attached as Rebuttal Exhibit JAR-1.

[1] As of May 2002, the following were members of SECCA: Association of Communications Enterprises (ASCENT), AT&T of the Southern and South Central States, Birch Telecom, Inc., Cinergy Communications, Competitive Telecommunications Association, e.spire Communications, KMC Telecom, ICG Communications, ITC^DeltaCom, Inc., Network Telephone, NewSouth Communications, Nuvox communications, Talk America, Time Warner Telecom, US LEC Corp., WorldCom, Inc., XO Communications and Xspedius Corporation. The majority of these companies are operating as CLECs in Tennessee.

GENERAL COMMENTS

Q. DO YOU HAVE ANY GENERAL COMMENTS REGARDING THE TESTIMONY FILED ON BEHALF OF THE COMPETITIVE LOCAL EXCHANGE CARRIERS ("CLECs")?

A. Yes. As the Tennessee Regulatory Authority ("TRA" or "Authority") is aware, the purpose of this proceeding is to address BellSouth's compliance with the requirements of section 271 of the Act. As the FCC has noted, there will continue to be new and unresolved disputes about the precise content of an incumbent local exchange carrier's ("ILEC's") obligation to its competitors, disputes that do not involve *per se* violations of self-executing requirements of the Act.[2] The FCC determined that such issues would be more appropriately resolved in other (*i.e.*, non-section 271) proceedings. (*Id.*) Indeed, the FCC has stated that requiring resolution of every interpretive dispute would undermine the congressional intent of section 271 to give Bell Operating Companies ("BOCs") incentive to open their local markets to competition, finding that such "incentive would largely vanish if a BOC's opponents could effectively doom any section 271 application by raising a host of novel interpretive disputes in their comments and demanding that authorization be denied unless each one of those disputes is resolved in the BOC's favor.[3] Thus, it is clear that the Authority is not required to resolve every

[2] In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana, Memorandum Opinion and Order, released May 15, 2002, in CC Docket No. 02-35 ("BellSouth Order - GA/LA"), ¶208.

[3] In the Matter of Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, Memorandum Opinion and Order, released January 22, 2001, in CC Docket No. 00-217 ("SWBT Order – KS/OK"), ¶19.

interpretive dispute raised by the CLECs in this proceeding in order to find that BellSouth is compliant with the Act.

Moreover, as a number of other BellSouth witnesses note, in most cases the CLECs just keep repackaging the same old arguments that have already been rejected by seven other state commissions in BellSouth's region and by the FCC. Indeed, some of the issues raised, such as the integration of BellSouth's Trouble Analysis Facilitation Interface ("TAFI") and Electronic Communications Trouble Administration ("ECTA"), as discussed by Mr. Pate, have been rejected not only by other states in BellSouth's region, but also in various 271 proceedings around the country. The simple truth is that there is not much new here, but the CLECs just keep recycling their complaints, hoping that someone, somewhere, will finally agree with them.

STATUS OF LOCAL COMPETITION AND TRACK A COMPLIANCE

Q. DO YOU HAVE ANY GENERAL COMMENTS REGARDING BELLSOUTH'S TRACK A COMPLIANCE?

A. Yes. SECCA, through the testimony of Mr. Gillan, and Birch, briefly through the testimony of Mr. Ivanuska, are the only parties to question the level of competition that BellSouth has experienced and continues to experience in Tennessee. The requirements that BellSouth must meet to be in compliance with Track A are found in section 271(c)(1)(A) of the Act, which states in part:

> PRESENCE OF A FACILITIES-BASED COMPETITOR. – A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under Section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities…to one or more unaffiliated competing providers of telephone exchange service…to residential and business subscribers.

Based upon the provisions of the Act, the FCC has stated that:

> Such telephone service may be offered…either exclusively over [the competitor's] own telephone exchange service facilities or predominantly over [the competitor's] own telephone exchange facilities in combination with the resale of the telecommunications services of another carrier.

(BellSouth Order – GA/LA at ¶11).

No one, including Mr. Gillan, actually argues that there is not competition in the local markets in Tennessee. Indeed, the Authority's own reports to the legislature demonstrate that there is local competition in Tennessee. Obviously recognizing that fact, Mr. Gillan appears to want to turn the Track A issue into a market share test that he erroneously suggests BellSouth must meet before receiving approval to enter the interLATA market. Of course, the FCC has flatly and repeatedly rejected this approach, finding that:

> Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance. Accordingly, the applicant is not required to show that competitors have captured any particular market share.

(BellSouth Order – GA/LA at ¶14). Further, the FCC plainly stated that "the actual market share is irrelevant to our Track A analysis." (*Id.* at ¶15). Clearly, there is no market share requirement.

What the FCC requires is that "a BOC must show that at least one 'competing provider' constitutes 'an actual commercial alternative to the BOC,' which a BOC can do by demonstrating that the provider serves 'more that a *de minimus* number' of subscribers." (*Id.* at ¶11, footnotes omitted). BellSouth is required to demonstrate that facilities-based competition exists in Tennessee. As demonstrated in Direct Exhibit JAR-3 (Checklist Cross Reference Matrix) attached to my direct testimony, BellSouth meets the requirements of Track A.[4] Neither Mr. Gillan nor Mr. Ivanuska provide any evidence that indicates otherwise. In fact, neither witness specifically states that BellSouth is not in compliance with Track A.

Q. PLEASE RESPOND TO MR. GILLAN/SECCA'S CRITICISMS OF BELLSOUTH'S ESTIMATE OF THE CLECS' FACILITIES-BASED LINES.

A. Mr. Gillan challenges BellSouth's estimate[5] of CLECs' facilities-based lines by presenting his own flawed metric. As explained in my direct testimony, BellSouth utilizes data extracted from the E911 database as an indicator of the type of facilities-based lines[6] Mr.Gillan is addressing. The number of lines that

[4] Indeed, BellSouth's case is supported by Mr. Gillan's citations at page 9 of his testimony to the Joint Explanatory Statement of the Committee of Conference. This Authority has approved many interconnection agreements between BellSouth and CLECs, CLECs are clearly operating in Tennessee under these agreements, and these agreements are generally available (as is BellSouth's Generally Available Statement of Terms and Conditions or "SGAT") for any carrier to adopt and become operational as quickly as the carrier desires.

[5] BellSouth refers to its count of CLECs' facilities-based lines as an "estimate" because BellSouth cannot know with certainty how many lines CLECs are serving entirely over the CLEC's own facilities. BellSouth's counts of UNE loops, UNE-Ps and resold lines are not estimates, but are actual counts of these facilities that BellSouth provides to CLECs. Likewise, BellSouth's counts of E911 lines are not estimates, but rather are the number of lines the CLECs themselves have reported to the E911 database administrator.

[6] Mr. Gillan defines the term "facilities-based entry" as "entry other than through resale or UNEs, including UNE loops used in combination with a CLEC's own switching." (Gillan page 6, footnote 5).

the E911 database attributed to each CLEC, as indicated in my Direct Exhibits JAR-7 and JAR-8, are the number of lines the CLECs themselves have reported to the E911 database administrator. Use of E911 data has been relied upon by the Department of Justice,[7] and has obviously been accepted by the FCC in numerous section 271 proceedings including BellSouth's Georgia/Louisiana application. Nevertheless, Mr. Gillan's rework of BellSouth's facilities-based line estimates disregards, without comment, the CLEC E911 Listings.

Instead, in his Table 5, Mr. Gillan offers an alternative estimate of 59,457 CLEC facilities-based lines. However, my Direct Exhibit JAR-8 shows that there are at least 233,360 CLEC facilities-based lines.[8] Of course, Mr. Gillan does not directly challenge either the CLECs' own E911 Listings or unbundled network element ("UNE") loops or unbundled network element platforms ("UNE-Ps"), and he also does not challenge the CLECs identified in my Direct Exhibits JAR-7 and JAR-8.

Further, Mr. Gillan contends that BellSouth's estimate of facilities-based lines reflects a high proportion of Internet Service provider ("ISP") lines, which, in his view, are not "conventional end-users" and therefore should not be counted. His contention misses the mark. Mr. Gillan provides no evidence to support his

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[7] *See* DOJ Arkansas/Missouri Evaluation, CC Docket No. 01-194, fn. 8 (FCC filed Sept. 24, 2001) ("Estimated market share will vary depending on the methodology used to estimate facilities-based lines. The Department relied on entries in the E-911 database.")

[8] The quantity of 233,359 CLEC facilities-based lines is calculated by subtracting 52,365 UNE loops from 285,725 CLEC E911 listings. This adjustment is necessary because UNE loops are assumed to already be accounted for in the CLEC E911 listings. For UNE loops, the CLECs' switches are providing the dial-tone. UNE-P counts should not be subtracted from the CLEC E911 listings, however, because the UNE-P E911 listings are maintained by BellSouth. Other CLEC E911 listings would be associated with facilities-based end user connections that the CLECs provide themselves.

suggestion that the lines that CLECs have included in their E911 Listings contain a significant share of ISP lines. Nor is there any reason to believe they do, since E911 listings are designed to provide emergency services to numbers from which outbound calls can be made. Because lines that are dedicated to ISPs cannot typically support outbound calls, there is no reason for CLECs to enter such lines into the E911 database.

In any event, while Mr. Gillan does take issue with BellSouth's estimates of CLEC market share, even his own alternative estimates at Table 6 serve to confirm that BellSouth meets the Act's Track A requirement, and nowhere does Mr. Gillan assert that BellSouth fails to meet the Track A requirement.

Q. PLEASE ADDRESS MR. GILLAN'S ESTIMATION OF CONVENTIONAL LINES SERVED BY CLEC SWITCHES, AS SHOWN IN HIS TABLE 5.

A. In contrast to BellSouth's E911-based estimates that, as previously noted, both the DOJ and FCC have endorsed, Mr. Gillan contends that "interconnected minutes can be used to estimate the number of conventional lines (i.e., non-ISP lines) being served by CLEC switches." (*See* Gillan at page 12, lines 14-15). Mr. Gillan's MOU-based estimate of CLEC facilities-based lines is results-oriented and disingenuous. Indeed, this estimation technique requires more assumptions and raises more questions than the straightforward methods BellSouth uses in its estimates. In Table 5, Mr. Gillan divides an estimate of originating CLEC minutes per month for Tennessee by what he describes as an estimated "average minutes of use per line" to produce what he contends is a reasonable estimate of

the number of conventional lines (*i.e.*, non-ISP lines) being served by CLECs. The originating minutes that Mr. Gillian uses in his estimate include only the minutes that originate with CLEC customers and that traverse interconnection facilities. (*See* Gillan at page 12, lines 16-18).

Because Mr. Gillan's methodology does not account for the minutes that originate on CLECs' networks and that terminate somewhere other than BellSouth's network, his flawed analysis uses only a subset of the actual total CLEC originating minutes. It is no surprise, therefore, that Mr. Gillan's methodology produces results that fall far below the number of voice grade equivalent "conventional switched" lines the CLECs themselves reported in the E911 database.

Q. MR. GILLAN CONTENDS THAT ADJUSTMENTS ARE REQUIRED TO THE QUANTITY OF BELLSOUTH ACCESS LINES USED TO CALCULATE THE CLEC MARKET SHARE PERCENTAGE. PLEASE ADDRESS THE ADJUSTMENTS HE PROPOSES.

A. His adjustments are inappropriate. Neither the FCC, other 271 applicants, nor the Association for Local Telecommunications Services ("ALTS")[9] make such adjustments in citing CLEC market share. Of course, as I have explained, there is no CLEC market share threshold established in the Act. It is clear, however, that the ranges of CLEC market share as of February 2002 for BellSouth's area in Tennessee (i.e., 12.6% to 13.8%) are consistent with and, in fact, exceed the level

[9] ALTS is a major CLEC Industry Group. The current list of participating CLECs is attached to my testimony as Direct Exhibit JAR-2.

of other successful 271 applicants and are calculated in a similar manner. For example, the New York CLEC market share for Verizon (formerly Bell Atlantic) was approximately 7.3% at the time of its 271 application that was approved by the FCC. In other successful 271 applications, SBC reported CLEC market shares of 8.1% - 8.4% for Texas and 5.5% - 6.3% for Oklahoma. ALTS[10] reports its national CLEC market share on the same basis as that used by BellSouth, by other 271 applicants and by the FCC. Mr. Gillan's attempt to redefine the ILEC base in the market share calculation is unjustified and contrary to precedent and practice.

Q. PLEASE RESPOND TO MR. GILLAN'S CONTENTION THAT SPECIAL ACCESS LINES SHOULD BE INCLUDED WHEN CALCULATING CLEC LINE SHARE.

A. Mr. Gillan's contention is directly contrary to common sense and to established practice. Special access is a discrete and separate offering that the FCC has already determined is highly competitive.[11] Presumably for that reason, the DOJ uses only the number of BOC switched access lines – not special access lines – for market share evaluations.[12] Likewise, the FCC's Form 477 (which the FCC uses to calculate the Local Competition Report) defines end-user lines as lines

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10 ALTS' Annual Report on the State of the Local Telecom Industry, 2001; Released March 13, 2001.

11 *See*, generally, Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221 (1999), *aff'd, WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

12 *See, e.g., DOJ New York Evaluation*, CC Docket 99-295, at 9 (FCC filed Nov. 1, 1999); *DOJ Texas Evaluation*, CC Docket No. 00-4, at 8-9 & fn. 12 (FCC filed Feb. 14, 2000); *DOJ Kansas/Oklahoma Evaluation*, CC Docket No. 00-217, fns. 9 & 23 (FCC filed Dec. 4, 2000); *DOJ Pennsylvania Evaluation*, CC Docket No. 01-138, fns. 15-20 (FCC filed July 26, 2001) (citing Verizon *Business/Residential Lines* Ex Parte); *DOJ Arkansas/Missouri Evaluation*, CC Docket No. 01-194, fns. 5, 7-10 (FCC filed Sept. 24, 2001) (citing SBC *Access Lines* Ex Parte).

providing "voice telephone service", *i.e.*, "local exchange or local exchange access services that allow end users to originate and terminate local telephone calls on the public switched network." ALTS reports its national CLEC line share analysis using "end-user lines" and "switched access line" volumes. (ALTS 2001 Annual Report at 9, 11.)

Q. DOES SECCA, THROUGH MR. GILLAN'S TESTIMONY, OFFER ANY OF ITS OWN INFORMATION, EVEN IN THE AGGREGATE, AS A BASIS TO CHALLENGE BELLSOUTH'S CLEC LINE ESTIMATES?

A. No. Mr. Gillan chose only to rework BellSouth's estimates. Mr. Gillan does not, even in the aggregate, offer any information on local lines of SECCA members, information to which he would surely be privy. Mr. Ivanuska, however, stated in his testimony that Birch serves over **23,000** local access lines in Tennessee, which is slightly more than **15%** of the total CLEC line count estimated by Mr. Gillan on his Table 6. Considering the number of operational CLECs in Tennessee, I find it difficult to believe that Birch alone could be responsible for over **15%** of the local access lines that Mr. Gillan contends are served by CLECs in Tennessee. Rather than suggesting various other ways to estimate CLEC lines in Tennessee, Mr. Gillan could have simply requested the information from the members of SECCA and filed it as proprietary information in this docket. Of course, CLECs are required to report such data to the Authority on a monthly basis, so the Authority is certainly in a position to determine whether BellSouth's or Mr. Gillan's estimated CLEC line counts are more realistic.

In fact, the Tennessee Regulatory Authority Annual Report for the period July 1, 2000 to June 30, 2001, informed the General Assembly that:

> Tennesseans are seeing *significant competitive activity* in the business segments of the local telecommunications markets . . . . As of June 30, 2001, one hundred (100) facilities-based competitors were certificated to provide local telephone service in the state, with twenty-eight (28) of these providers offering services in Tennessee. These 28 competitors serve 335,598 lines in Tennessee, primarily business customers in the State's four (4) largest metropolitan areas. This represents 10% of Tennessee's total lines open to competition and *28% of the business lines subject to competition*. On June 30, 2001, new market entrants had invested *$489 million in equipment and facilities* in Tennessee since the passage of [the 1995 state telecommunications statutes and the federal Telecommunications Act of 1996]. In contrast, on December 31, 1996 only six (6) facilities-based competitors were offering local telephone service in Tennessee, serving 300 lines. In 1996 competitors had invested $56 million in equipment and facilities.

Annual Report at 36 (emphasis added).

Q. BEGINNING AT PAGE 18 OF HIS TESTIMONY, MR GILLAN SEEMS TO IMPLY, WITHOUT DIRECTLY STATING, THAT BELLSOUTH'S APPLICATION IS NOT IN THE PUBLIC INTEREST. CAN YOU COMMENT ON THIS?

A. Certainly. The notion that BellSouth's application might not be in the public interest is raised in the context of one of Mr. Gillan's more remarkable theories that he offers to the Authority. He seems consumed with the idea that it is somehow wrong for BellSouth to argue to the Authority that it has met the legislative mandates of section 271, part of a law enacted by Congress, while BellSouth is engaged in a contest of sorts with other CLECs and ILECs, as well as

with the FCC, concerning what the Act really means. Evidently in Mr. Gillan's world, it is wrong for BellSouth to contest an FCC rule or an agency pronouncement, even if BellSouth complies with and obeys all of the mandates it is challenging.

While I am not an attorney, I have worked with enough attorneys to know that this is a peculiar notion of jurisprudence, but then Mr. Gillan is not an attorney either, and it seems clear that his conclusion is based more on emotion than reason. His concept is particularly interesting since the courts have either reversed or remanded FCC orders on at least two occasions dealing specifically with UNEs. Apparently, Mr. Gillan believes that all of the ILECs should have simply accepted the FCC's UNE rulings and lived with them, even though the courts have now found, in some instances, that the FCC either acted inappropriately, or without adequately justifying its positions.

Contrary to Mr. Gillan's position, the fact that BellSouth or other ILECs[13] have taken exception to some of the FCC's rules enacting local competition is certainly not evidence that it would not be in the public interest to allow BellSouth into the long distance market. No doubt AT&T's long distance customers whose rates have recently been increased in Tennessee by AT&T would take exception to Mr. Gillan's view of what is in the public interest.

[13] Mr. Gillan fails to mention that CLECs have also been active in challenging various aspects of the Act and FCC Orders.

Q. IS YOUR CONCLUSION CHANGED BY MR. GILLAN'S DISCUSSION REGARDING "A GROWING RESOURCE IMBALANCE" BETWEEN INCUMBENTS AND CLECS? (*See* Gillan at pages 19-21).

A. Not at all. Mr. Gillan's Figure 1 purports to show the market capitalization of the seven regional Bell companies, as well as AT&T, MCI, WorldCom and Sprint as of the 4th quarter of 1995, just before the passage of the Act. In Figure 2, he purports to show the market capitalization of the four entities that now represent the former Bell companies, as well as Sprint, AT&T, MCI, WorldCom and four other CLECs. The conclusion that Mr. Gillan evidently wants the Authority to reach is that there is such an imbalance in the resources of the CLECs when compared to the ILECs that the CLECs cannot defend themselves and cannot negotiate reasonable wholesale arrangements, thus contributing to the CLECs' demise.

This theory - that the CLECs have dwindled to nothing, and are incapable of negotiating and arbitrating with BellSouth – is certainly interesting; however, like a lot of theories, it is not particularly consistent with the facts. Although clearly anecdotal, I invite the Authority to count the attorneys in the hearing room on the first day of the hearing in this case. If the CLECs follow their normal course, they will have two to three times the number of attorneys that BellSouth has participating in the hearing. My point is that these companies, without regard to Mr. Gillan's charts, seem to have no trouble whatsoever negotiating with BellSouth, nor with representing themselves before the FCC, the Authority and other state commissions when the time comes. The notion, based on these two

charts, that somehow the poor CLECs are not able to defend themselves is simply wrong .

Moreover, the information in Mr. Gillan's charts proves nothing. Indeed, if the point of the charts is to show that the ILECs have grown wildly while the CLECs have melted away as a result of the CLECs' inability to compete, then the kindest thing that can be said of the charts is that they are misleading.

It is hardly surprising that SBC and Verizon appear much more valuable in Figure 2 than they did in Figure 1, since those two companies have participated in successful mergers. A comparison of BellSouth's market capitalization from Figure 1 to Figure 2 shows that BellSouth has grown over that time frame, although not as much as SBC and Verizon, even though BellSouth has not merged with any other telecommunications company, nor has it acquired any other telecommunications company. Obviously, this demonstrates that a conservative, well-run company can increase its market cap without merging with or acquiring other companies.

However, Mr. Gillan's two charts certainly do not tell the whole story. As he probably is aware, and as I, as a stockholder of BellSouth, know all too well, BellSouth's market cap during this period has been substantially higher than what is reflected at the end point on Mr. Gillan's Figure 2. Indeed, BellSouth's market cap has been in excess of $80 billion during this period. The simple truth of the matter is that the downturn in the economy has significantly impacted the entire

telecommunications industry, for the ILECs and CLECs alike. While the CLECs may have fallen further, they rose higher as well.

Looking again at Mr. Gillan's Figure 1, it appears that MCI, when combined with WorldCom, had a market cap of approximately $23 billion at the end of 1995. Of course, in the ensuing years, MCI/WorldCom's market cap rose to a point well in excess of $150 billion. Indeed, as recently as January 2002, MCI/WorldCom had a market cap of $37 billion, which is well above its 1995 figures, although considerably below the market cap it achieved between 1996 and 2002. I do not offer an explanation as to why these figures moved up and down so dramatically, but certainly the drop from $37 billion in January 2002 to the insignificant amount shown on Mr. Gillan's Figure 2 is more attributable to the market's concerns about possible misdeeds at MCI/WorldCom than to the state of local competition in Tennessee, or anywhere else for that matter.

A cursory look at AT&T presents an equally interesting situation. According to Mr. Gillan's Figure 1, at the end of 1995, AT&T had a market cap that was two and a half times larger than any other company listed on the chart. Figure 2 shows that AT&T's market cap is now miniscule in comparison. Of course, Mr. Gillan does not offer any explanation for the demise of AT&T. He does not mention AT&T's buying spree, or the remarkable debt load that AT&T assumed. Rather, Mr. Gillan simply states that the "CLECs have seen their position deteriorate as investors became increasingly skeptical concerning local competition." (*See* Gillan at page 20, lines 9-10).

I would suggest that AT&T's declining fortune has little, if anything, to do with local competition. In BusinessWeek Online for November 6, 2000, an article addressing Mr. Armstrong's proposed restructuring of AT&T included the following:

> The restructuring is no magic bullet. And it's unlikely that execs who have been missing their financial targets as part of AT&T will suddenly become capable of hitting them now that they're on their own. Moreover, the four-way split promises to be a tremendous distraction for the next two years for even the most ardent of these managers. Salomon Smith Barney analyst Jack B. Grubman downgraded AT&T's stock to neutral the day of Armstrong's announcement, his second downgrade of the year. "The business is melting down," says Grubman.
>
> Armstrong is under tremendous pressure to fix AT&T's flagging stock price. The company's shares have tumbled 62% from their peak last year, to $24, and are trading at 20% less than when Armstrong was hired three years ago. Shareholders have dumped the stock largely because new businesses, such as broadband Net access and local telephone service over cable networks, are not growing fast enough to offset the rapid fall-off in consumer long-distance revenues. AT&T's revenues are expected to rise about 6% this year, to $66.9 billion, while net income increases 7%, to $5.9 billion.

A rational observer might conclude that AT&T's troubles were the result of a business plan gone wrong. While local competition via cable facilities (as opposed to facilities leased from the ILECs) was certainly a part of the mix, there were clearly other factors that have resulted in AT&T's loss of market cap. Of course, the article cited above says absolutely nothing about the conduct of ILECs having anything at all to do with the "melting down" of AT&T.

Interestingly, Sprint's market cap has hardly changed at all from 4th quarter of 1995 to June 21, 2002. One has to wonder why AT&T and MCI/WorldCom were

not able to maintain a decent market cap when Sprint was obviously able to act as an IXC, an ILEC and a CLEC and maintain its market cap.

Mr. Gillan's purpose in presenting these two charts simply is not clear. If his purpose for Figure 1 was to show that a number of companies all had measurable positive market caps, and his purpose for Figure 2 was to show the relative changes in the market caps of these companies from the end of 1995 through June 21, 2002, then these two charts truly are misleading. Mr. Gillan lists TWTC on his chart, which is Time Warner Telecom, Inc. ("Time Warner"). My review of Time Warner's publicly available financial information indicates that Time Warner has never had a market cap in excess of $1 billion, and I believe its market cap was considerably lower than $1 billion. Hence, given the scale that Mr. Gillan used on his Figure 2, it is not surprising that Time Warner is merely a speck on the chart.

On the other hand, if the purpose of the charts was to attempt to demonstrate graphically the relative bargaining position of an ILEC, such as BellSouth, and a CLEC, such as Time Warner, the charts again fail. According to the most recent 10-Q filed by Time Warner Telecom, Inc., 93 percent of the voting power of the common stock of Time Warner Telecom, Inc. is held by AOL Time Warner, Inc., Advance Telecom Holdings Corporation, and Newhouse Telecom Holdings Corporation. This is not a "mom and pop" operation going up against BellSouth.

In summary, I would note that these have not been easy economic times for any company. Clearly, some companies have fared worse than others, particularly

those companies that have assumed huge debt loads and whose accounting activities have been suspect. It is absurd, however, for Mr. Gillan to imply that there is some "resource imbalance" that makes it appropriate to find that it is not in the public interest to allow BellSouth into the long distance market. Indeed, given the poor state of the competitors as portrayed by Mr. Gillan, the public interest would seem to dictate that a stable, well-run company should be allowed into all competitive markets to ensure that the public has reliable sources of telephone service.

Q. PLEASE RESPOND TO MR. GILLAN'S ALLEGATION THAT BELLSOUTH IS COMMITTED TO "GUTTING" ITS UNBUNDLING OBLIGATION ESTABLISHED BY THE ACT. (*See* Gillan at page 4, lines 5 through 7).

A. Contrary to Mr. Gillan's allegation, BellSouth is not attempting to "eliminate the pro-competitive reforms of the Telecommunications Act." (*See* Gillan at page 22, lines 3-4). BellSouth is responding to the FCC's request for interested parties to provide comments in the FCC's upcoming Triennial Review of the Act. This FCC review is seeking industry-wide comments on UNEs and their implementation based upon the changes in the industry since the last review in 1999. In its UNE Remand Order,[14] the FCC outlined criteria that must be considered in order to determine whether or not a particular element should be classified as a UNE.

[14] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3690 (1999) ("UNE Remand Order").

One of the stated purposes of the FCC's Triennial Review of the Act is to reevaluate the availability of competitive alternatives to determine whether the unbundling requirements should be adjusted. BellSouth has responded to the FCC's request for comments, and the data gathered by BellSouth clearly indicates that the competitive market is robust and that competitors have alternatives other than obtaining each and every UNE from the incumbent. Ultimately, the FCC will consider all of the comments and evidence provided in the Triennial Review, and will render a decision regarding which network elements are required to be unbundled. Just as BellSouth is in compliance with the current obligations to unbundle its network, BellSouth will continue to comply with the requirements that result from the Triennial Review.

As demonstrated in my direct testimony, CLECs have deployed switches and facilities in Tennessee. CLECs have, in fact, obtained thousands of customers and are providing service to many of those customers over their own facilities. This level and type of competition is occurring not only in Tennessee, but throughout each state in BellSouth's region. As competition and facility deployment by CLECs has clearly increased in the last three years, it is appropriate that the FCC revisit its unbundling rules to ascertain the need for any revisions. Based on the existence of competition, and the ability of CLECs to serve customers throughout BellSouth's serving area, it is BellSouth's contention that the current requirements regarding unbundling of certain UNEs should be lessened.

Q. PLEASE RESPOND TO MR. GILLAN'S REQUEST THAT THE AUTHORITY "EXPRESSLY ORDER THAT BELLSOUTH MAY NOT WITHDRAW ANY NETWORK ELEMENT (OR REDUCE ANY OTHER WHOLESALE OBLIGATION) THAT IT OFFERS TODAY WITHOUT FIRST PETITIONING THIS AUTHORITY AND OBTAINING ITS APPROVAL...." (*See* Gillan at page 23, lines 2-5).

A. Mr. Gillan's request is inappropriate. The FCC has determined what will be a UNE at this point in time. State Commissions do have the authority to add UNEs to the list, subject to sections 251(d)(3)(B) and (C) of the Act and only if the additional UNEs satisfy the "impairment" standard set forth in the Act.[15] However, if the FCC removes an element that is currently on the list, the Authority cannot require BellSouth to continue to offer that element, which would be the effect of Mr. Gillan's request.

CHECKLIST ITEM 2

Q. PLEASE COMMENT GENERALLY ON THE TESTIMONY OF MR. DARNELL AND MR. GILLAN CONCERNING COST-BASED UNE RATES.

A. With regard to cost issues, to the extent that Mr. Darnell and Mr. Gillan may be asking this Commission to re-litigate the generic UNE dockets (Docket Nos. 97-01262 and 00-00544) in this proceeding, such action is neither necessary nor appropriate. The Authority has convened Docket No. 02-00434 in order to

[15] Mr. Gillan's second recommendation, that the TRA should "obtain BellSouth's agreement that the TRA has the authority to require additional unbundling" is also moot because the TRA already has such authority, subject to sections 251(d)(3)(B) and (C) of the Act.

determine whether any modifications to Tennessee UNE costs are appropriate as a result of technological advances. Parties to that docket submitted comments on May 24, 2002, and the Hearing Officer has requested additional comments this month. In light of the two extensive generic UNE proceedings that the Authority has already undertaken, and the current technology advances docket that has been opened, addressing cost issues in this proceeding would be duplicative of the Authority's time and resources.

Q. PLEASE RESPOND TO MR. DARNELL'S CONTENTION THAT BELLSOUTH'S TENNESSEE UNE RATES ARE NOT COST-BASED AND, THEREFORE, ARE NOT IN COMPLIANCE WITH THE ACT.

A. Mr. Darnell is wrong. The UNE rates currently in effect in Tennessee are cost-based, as determined by the Authority in its Order dated February 23, 2001[16] in Docket 97-01262 and its Final Initial Order dated April 3, 2002 in Docket 00-00544. As I discussed in my direct testimony, the rates BellSouth included on the Price List contained in its Statement of Generally Available Terms and Conditions ("SGAT") (*see* Direct Testimony and Exhibit CKC-5, Attachment A, filed April 26, 2002) will be modified to the extent the Authority revises rates in the future. Therefore, for all checklist items to which section 252(d) is applicable, BellSouth provides rates that meet the criteria of that section of the Act.

As BellSouth witness Daonne Caldwell testified before this Authority in those two generic UNE cost proceedings, BellSouth's cost methodology is compliant

[16] Indeed, in its February 23, 2001 Order, the Authority stated that "[t]he final prices are based on criteria specified by the Federal Telecommunications Act of 1996 ("the Act") and orders issued by the Federal Communications Commission ("FCC"), including FCC Order No. 96-325."

with the Act and with the FCC's First Report and Order. BellSouth utilized the FCC's published Total Element Long Run Incremental Cost ("TELRIC") methodology as the guideline to produce its cost support for UNEs. Thus, the costs are forward-looking and reflect a hypothetical efficient network design based on existing wire center locations, as set forth in FCC Rule 51.505 (forward-looking economic cost). Further, BellSouth's UNE costs were developed using a forward-looking cost of capital, forward-looking depreciation rates, and a reasonable allocation of forward-looking common costs. Embedded costs, retail costs, and opportunity costs were excluded from the UNE cost study.

Q. DOES THE SUPREME COURT'S REAFFIRMATION ON MAY 13, 2002[17] OF THE FCC'S TELRIC PRICING STANDARD HAVE ANY IMPACT ON THE UNE RATES THAT HAVE BEEN ESTABLISHED BY THE AUTHORITY?

A. No. The Supreme Court's reversal of the Eighth Circuit Court of Appeals invalidation of the FCC's TELRIC pricing standards has no impact on the UNE rates already established by the Authority. The UNE cost studies considered by the Authority in the generic UNE dockets were compliant with the FCC's requirements. Although the validity of the FCC's TELRIC pricing standards had been an issue in the courts for several years, BellSouth continued to develop its UNE costs pursuant to the FCC's methodology.

[17] Verizon Communications, Inc., et al. v. Federal Communications Commission, et al., Case Nos. 00-511, 00-555, 00-587, 00-590, 00-602, 535 U.S.____, 2002 WL 970643 (May 13, 2002).

Q. HAS THE ISSUE THAT MR. DARNELL RAISES REGARDING THE VINTAGE OF BELLSOUTH'S COST STUDIES BEEN ADDRESSED BY THE FCC?

A. Yes. Both the FCC and the D.C. Circuit Court have recognized that the local telecommunications environment is not stagnant. In several of its section 271 orders, the FCC has noted that states review their rates periodically to reflect changes in costs and technology and has cited to the D.C. Circuit's finding that "[i]f new [cost] information automatically required rejection of section 271 applications, we cannot imagine how such applications could ever be approved in this context of rapid regulatory and technological change." (*See* BellSouth Order-GA/LA at ¶96). Thus, Mr. Darnell's contention that BellSouth's UNE rates, as established by the Authority, are not cost-based due to the passage of time and technological advances is without merit.

As Mr. Darnell points out, some of BellSouth's UNE rates in Tennessee are interim. These interim rates are all subject to true-up when permanent rates are established in dockets that are currently pending before the Authority.

Q. PLEASE RESPOND TO MR. DARNELL'S CONTENTION THAT BELLSOUTH'S AUTOMATED REPORTING MANAGEMENT INFORMATION SYSTEM ("ARMIS") REPORTS FILED WITH THE FCC SHOW THAT BELLSOUTH'S PER-UNIT COST OF PROVIDING TELECOMMUNICATIONS SERVICE IN TENNESSEE HAS DECLINED. (*See* Darnell at page 8, lines 1 through 3).

A. First, let me explain that Mr. Darnell attempts to compare apples and oranges. ARMIS Reports necessarily include the investment in BellSouth's embedded network. Therefore, even if Mr. Darnell were correct in his conclusion that BellSouth's embedded per-unit costs have declined (and he is not), that finding would have no bearing on whether BellSouth's per-unit costs resulting from a forward-looking cost study based on a hypothetical, most efficient network have decreased or increased. Interestingly, in the recent United States Supreme Court argument about the validity of TELRIC, Mr. Donald Verrilli, representing WorldCom, conceded that: "loop costs have not come down" but rather have been "stable over time."[18]

Even though the year-over-year trends that can be derived from the ARMIS data are irrelevant to the forward-looking, long-run analysis that is required by the FCC costing methodology, I must make clear that BellSouth does not concur in Mr. Darnell's determination of what the ARMIS reports show. BellSouth has tried, but has not been able, to determine how Mr. Darnell arrived at his results. BellSouth's review of its ARMIS Reports shows that investment in loop plant and circuit switching equipment, when expressed on a "per loop" basis, have increased each year since 1996.

[18] Tr. of Oral Argument, Verizon Communications v. FCC, Nos. 00-511, at 74-75 (S. Ct. Oct. 10, 2001).

Q. PLEASE RESPOND TO MR. DARNELL'S CONTENTION THAT CERTAIN OF BELLSOUTH'S UNE RATES, AS ESTABLISHED BY THE AUTHORITY, ARE EXCESSIVE. (*See* Darnell at page 8).

A. As I previously explained, the Authority has established a set of TELRIC-compliant, cost-based rates. Although it is always possible to find a rate for a particular UNE in one state that is higher than the rate in another state, Mr. Darnell's labeling of the Tennessee UNE rates as "excessive" is simply incorrect. The Zone 1 UNE rate for an unbundled two-wire analog voice grade loop (the SL1) in Tennessee is $13.19. The comparable Zone 1 SL1 rates in BellSouth's other states range from $10.56 to $14.94. Likewise, the Zone 1 UNE-P rate in Tennessee is $14.18, and the comparable Zone 1 UNE-P rates in BellSouth's other states range from $10.79 to $14.89. Obviously, the Zone 1 SL1 UNE and UNE-P rates in Tennessee are not excessive.

Of course, the different deaveraging methodologies adopted by the various state commissions have an impact on the zone-specific rates; therefore, I will also provide a comparison of the statewide average SL1 UNE loop rate and the statewide average UNE-P rate in Tennessee to the other BellSouth states. The statewide average SL1 UNE loop rate in Tennessee is $14.92, and the comparable rates in BellSouth's other states range from $15.88 to $23.12. Likewise, the statewide average UNE-P rate in Tennessee is $15.82, and the comparable rates in BellSouth's other states range from $14.34 to $23.60. Looking at these two UNEs, which are the ones most often purchased by CLECs, it is difficult to ascertain how Mr. Darnell can refer to the Tennessee UNE rates as "excessive."

Q. HAS MR. DARNELL'S EMPLOYER (WORLDCOM) EVER INDICATED THAT IT WAS SATISFIED WITH THE UNE RATES IN ANY BELLSOUTH STATE?

A. Yes. Attached to my testimony as Rebuttal Exhibit JAR-3 is a letter that WorldCom sent to The Honorable Debby P. Sanderson (Senator-Florida). In this October 18, 2001 letter, WorldCom requested that:

> [t]he Legislature should direct the [Florida] Commission to lower the wholesale rates competitors must pay local phone companies such as BellSouth to lease parts of the public phone network to provide a competitive choice for local telephone service. Unless local phone companies' wholesale rates are lowered to a level that encourages – rather than prevents – widespread local residential competition, the savings and other benefits already being enjoyed by consumers in Georgia … may never make it to Florida."

(Emphasis added). The letter further states that "[o]ther states such as Georgia have set economically viable network rates to foster widespread local residential competition." (Emphasis added). Of course, in its order approving BellSouth's Georgia/Louisiana section 271 application, the FCC determined that BellSouth's Georgia and Louisiana UNE rates satisify the requirements of checklist item two. (BellSouth Order – GA/LA at ¶100).

Q. HOW DO THE RATES FOR A TYPICAL UNE-P IN TENNESSEE COMPARE TO THE GEORGIA RATES THAT WORLDCOM VIEWS AS BEING "ECONOMICALLY VIABLE?"

A. The UNE-P consists of an unbundled loop, unbundled port[19] and unbundled local switching.[20] To eliminate the effects of different deaveraging methodologies, I will use the statewide UNE-P rates in my comparison. The results are as follows:

	TN	GA
UNE-P statewide rate	$15.82	$14.34
Average switching rate per line	$ 3.23	$ 6.10
Total	$19.05	$20.44

These rates for Tennessee and Georgia are the current approved rates, and these rates are based on the same loop model and vintage. These Georgia rates are the rates that WorldCom urged the Florida legislature to strive for. Based on the above comparison, the Authority should have no concerns as to whether BellSouth's current UNE rates in Tennessee satisfy the requirements of checklist item 2.

Q. PLEASE COMMENT ON HOW THE FCC ADDRESSES COMPARISONS OF UNE RATES ACROSS STATES.

A. The FCC has recognized, in the context of section 271 applications, that UNE costs, and hence UNE rates, will vary across states. The first test the FCC applies to a set of UNE rates is that of TELRIC-compliance. As I have explained

[19] Both the Georgia Public Service Commission and the Tennessee Regulatory Authority determined that the cost of access to features is included in the port.

[20] Unbundled local switching is rated on a "per minute of use" basis. In order to perform a valid comparison of UNE-P rates from one state to another, it is necessary to calculate an average switching rate on a "per line" basis. To do this, BellSouth applies each state's switching rates to the same set of usage characteristics that represent typical monthly usage.

previously, the UNE rates established by the Authority are cost-based and are TELRIC-compliant; therefore, I would not expect the FCC to look to comparisons to other states when the FCC is given the opportunity to review BellSouth's Tennessee UNE rates.[21]

In the unlikely event, however, that the FCC were to find that the Tennessee UNE rates are not TELRIC-compliant, the FCC would then compare Tennessee's rates to the rates in other BellSouth states.[22] To perform this comparison, the FCC would use its hybrid cost proxy model ("HCPM") to compare loop and switching rate differences between Tennessee and other BellSouth states. Historically, the FCC has compared the rates in question to a set of rates in a state where it has made an affirmative finding of TELRIC-compliance. This process has been referred to as "benchmarking." At this point in time, if the FCC were to perform a benchmarking analysis for a BellSouth state, it could use either Georgia or Louisiana as the benchmark state, since it has found both states' rates to be TELRIC-compliant.

Q. USING THE BENCHMARKING PROCESS, DO THE TENNESSEE RATES COMPARE FAVORABLY TO THE GEORGIA RATES?

A. Yes. Indeed, Tennessee would pass the FCC's benchmarking analysis for either Georgia or Louisiana. The HCPM would estimate Tennessee's loop cost as

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[21] Such action is consistent with the FCC's findings in its Verizon Vermont section 271 decision where it stated that "we have previously held that we will not apply our benchmark analysis to reject UNE rates arrived at through a proceeding that correctly applied TELRIC principles." *See* FCC Verizon Vermont section 271 Order, ¶26, footnote 82.

[22] In cases where the FCC has determined that it was necessary to make such a comparison, it has always compared the rates in question to the rates in another state within the same BOC region.

$18.94 compared to Georgia's loop cost estimate of $15.20. The fact that HCPM estimates the Tennessee loop cost as being higher than the Georgia loop cost is not cause for concern. This simply means that Tennessee's statewide average loop rate is expected to be no more than 125% of Georgia's statewide average loop rate. In fact, Tennessee's statewide average loop rate is only 113% of the Georgia statewide average loop rate; thus, the Tennessee rate would clearly pass the FCC's benchmark analysis. The FCC does a separate benchmarking analysis for switching related elements. For this calculation, the FCC calculates an average monthly switching rate (as I have discussed previously) and includes the port rate. The results of the FCC's analysis would predict that Tennessee's switching rate should be no more than 111% of Georgia's switching rate. Because Tennessee's switching rate is actually 62% of Georgia's switching rate, there is no question that Tennessee would also pass this test.

Q. USING THE BENCHMARKING PROCESS, PLEASE EXPLAIN HOW THE TENNESSEE RATES WOULD COMPARE TO THE LOUISIANA RATES.

A. In fact, Tennessee's rates compare even more favorably to Louisiana than they do to Georgia. Tennessee's HCPM estimated loop cost of $18.94, when compared to Louisiana's HCPM estimated loop cost of $18.98, means that Tennessee's statewide average loop rate is expected to be no more than 100% of Louisiana's statewide average loop rate. In fact, Tennessee's statewide average loop rate is only 87% of the Louisiana statewide average loop rate; thus, the Tennessee rate would clearly pass the FCC's benchmark analysis. Likewise, the benchmarking analysis for switching related elements would predict that Tennessee's switching

rate should be no more than 93% of Louisiana's switching rate. Because Tennessee's switching rate is actually 63% of Louisiana's switching rate, there is no question that Tennessee would also pass this test.

Clearly the Authority has already determined that BellSouth's UNE rates are TELRIC-compliant and, as such, a benchmarking analysis is neither relevant nor necessary. In the unlikely event that the Authority were to agree with Mr. Darnell's contention that BellSouth's Tennessee UNE rates are "excessive," application of the FCC's benchmarking analysis to Tennessee's UNE rates indisputably reveals that the current UNE rates fall within the range that the reasonable application of TELRIC principles would produce. Consequently, UNE costs should not be an issue in this proceeding.

CHECKLIST ITEM 12

Q. PLEASE RESPOND TO MS. BERGER'S CONTENTION THAT BELLSOUTH IS NOT PROPERLY ROUTING OR BILLING CERTAIN CALLS AFTER CONVERTING CUSTOMERS TO UNE-P. (*See* Berger at pages 4 through 7).

A. The impact of this issue is not "significant" as Ms. Berger contends; moreover, it does not affect Tennessee CLECs or end-users. The situation that Ms. Berger addresses only occurs in Georgia due to the fact that the scope of the local calling area for Georgia's BellSouth retail customers taking flat-rate local service is smaller than the local calling area for those taking measured-rate local service. Because BellSouth used the measured rate local calling area as the basis for

providing local switching as a part of UNE-P in Georgia, UNE-P end users in Georgia were provided a local calling area consistent with that of measured rate service. This meant that unless a CLEC ordering UNE-P had selected LATA-wide termination of its traffic over BellSouth facilities, BellSouth would treat as local all calls originating with the CLEC's end users and terminating within the measured rate local calling area for that customer's location. For UNE-P customers that formerly had BellSouth's flat-rate service, there would thus be a very small number of calls that would have been treated as intraLATA toll calls when the end user obtained local service from BellSouth but that would now be treated as local calls under UNE-P.

Q. WAS THIS ISSUE ADDRESSED BY THE FCC IN ITS ORDER QPPROVING BELLSOUTH'S GEORGIA/LOUISIANA SECTION 271 APPLICATION?

A. Yes. This issue was addressed in the context of checklist item 12 – local dialing parity - and was raised by WorldCom, not AT&T. The FCC noted that this issue "does not in any way impair WorldCom's customers, who are still able to choose WorldCom for their intraLATA toll carrier and have benefited from an expanded local calling area. The FCC goes on to conclude, "[b]ecause this dispute has limited commercial impact and no other competitive LEC raises this issue, we do not find that this problem warrants a finding of noncompliance." (BellSouth Order - GA/LA at ¶269) The UNE-P calling scope issue, which is limited to Georgia, is being resolved and should have no bearing on the Authority's determination of BellSouth's compliance with section 271.

OTHER ISSUES NOT RELATING TO A SPECIFIC CHECKLIST ITEM

Q. PLEASE RESPOND TO MS. LICHTENBERG'S ALLEGATION THAT BELLSOUTH IS REJECTING CLEC ORDERS WHEN THE CLEC'S CUSTOMER REQUESTS BELLSOUTH LONG DISTANCE SERVICE. (*See* Lichtenberg at pages 13 through 14).

A. BellSouth is providing interstate and interLATA long distance though BellSouth Long Distance, Inc. ("BSLD"), its section 272 affiliate, per the requirements of the Act, in Georgia and Louisiana. As Ms. Lichtenberg stated in her testimony, BellSouth filed a Carrier Notification letter (SN91083138) on June 14, 2002, to inform all customers of BellSouth Interconnection Services that the long distance USOCs of PIC and LPIC associated with BSLD Carrier Identification Codes will not be valid on any Interconnection Resale and Unbundled Network Elements and UNE-P orders where the submitting carrier does not have an operational agreement with BSLD. If there is no operational agreement, then the LSR will be returned to the carrier for clarification.

As a separate affiliate of BST, BSLD needs to establish certain operational mechanisms with each CLEC in order to provide service to the CLECs' end users. These mechanisms include such things as establishing a method of billing, providing customer care and the ability to pass to both the CLEC and the end user information about its various long distance plans from which the end user can choose. Recognizing this need, BSLD contracted with BellSouth[23] to screen

[23] Posted on the BellSouth Corporation Web page in its Public Policy Section, under Transactions Between BellSouth Telecommunications, Inc. and BellSouth Long Distance Inc. as "First Amendment To Subscription Fraud Information Sharing Agreement." (*See* http://bellsouthcorp.com/policy/transactions/).

those CLECs that did not have a relationship with BSLD. Section 272 of the Act requires that BellSouth offer this same service to other carriers on a non-discriminatory basis, and BellSouth is willing to do so.

The important point here is that BSLD is not refusing to provide long distance service to the CLECs nor to the CLECs' end users. BSLD, however, does need specific information from - and an operational agreement with - any CLEC that wishes to offer BSLD long distance service to the CLEC's end user customers, to ensure that BSLD can bill for its services. Any CLEC that wishes to enter into an operational agreement with BSLD for long distance service should contact BSLD.

Q. PLEASE RESPOND TO MS. BERGER'S CONTENTION THAT BELLSOUTH IS VIOLATING ITS INTERCONNECTION AGREEMENT WITH AT&T REGARDING THE TREATMENT OF CALLS WITHIN A LATA. (*See* Berger at pages 2 through 7).

A. First, let me be clear that the issue raised by Ms. Berger is a contract dispute regarding the interconnection and billing obligations in the BellSouth/AT&T Interconnection Agreement. The FCC has made clear that, at any point in time, there will be new and unresolved interpretive disputes between carriers, and that such disputes are not required to be resolved in order for an ILEC to prove that it is in compliance with the Act. BellSouth and AT&T are actively working to resolve this issue through negotiations; however, if a mutually agreeable resolution cannot be reached, the dispute resolution provisions in the agreement should be followed. This issue need not be, and should not be, resolved in the

context of a section 271 proceeding.

The dispute centers around specific negotiated language that BellSouth and AT&T mutually agreed to include in their interconnection agreement in Tennessee, as well as in various other states, to address what traffic would be considered local for intercarrier (*i.e.*, reciprocal) compensation purposes. The following language in the BellSouth/AT&T Interconnection Agreement addresses this issue:

> 5.3.1.1 The Parties agree to apply a "LATAwide" local concept to this Attachment 3, meaning that traffic that has traditionally been treated as intraLATA toll traffic will now be treated as local for intercarrier compensation purposes, **except for those calls that are originated or terminated through switched access arrangements as established by the State Commission or FCC.** Nothing in this Agreement shall be construed in any way to constrain either Party's choices regarding the size of the local calling areas that it may establish for its end users.

(emphasis added).

Obviously, a plain reading of this contract language makes clear that, contrary to Ms. Berger's allegation, BellSouth and AT&T did not agree to "treat all of AT&T's calls that originate and terminate within the LATA as local calls." (*See* Berger at page 2, lines 15 through 16). Indeed, according to the mutually agreed upon language in the Agreement, traffic that is originated or terminated over switched access arrangements is specifically exempted from being considered as local traffic for purposes of intercarrier compensation.

Q. PLEASE EXPLAIN WHAT IS MEANT BY "SWITCHED ACCESS ARRANGEMENTS AS ESTABLISHED BY THE STATE COMMISSION OR FCC."

A. Switched access arrangements are established by this Authority and by the FCC via the switched access E6 tariffs. Thus, if AT&T purchases a switched access arrangement from either the interstate or intrastate tariff and originates or terminates traffic over that arrangement, such traffic is not considered to be local for purposes of intercarrier compensation.

Q. IS MS. BERGER CORRECT WHEN SHE STATES THAT "BELLSOUTH'S INTERPRETATION OF THE INTERCONNECTION AGREEMENT[S] DRASTICALLY REDUCES A CLEC'S ABILITY TO UTILIZE AN EFFICIENT NETWORK TOPOGRAPHY? (*See* Berger at page 3, lines 19 through 20).

A. No, she is not correct. Again, it is critical to remember that BellSouth and AT&T mutually agreed to the language in the agreement. BellSouth has varying provisions that address intercarrier compensation in different interconnection agreements, all of which were available to AT&T, and the language cited above in section 5.3.1.1 is the language that AT&T chose to include in its agreement. Indeed, AT&T could exercise its ability under section 252(i) to amend its interconnection agreement with BellSouth to contain alternative provisions from another approved interconnection agreement that BellSouth has with another CLEC.

The bottom line here is that AT&T and BellSouth have a dispute over interpretation of the language in section 5.3.1.1 of the interconnection agreement, and the two companies are currently engaged in settlement discussions. The agreement contains provisions for dispute resolution if the parties cannot reach a settlement. AT&T inappropriately seeks to use this section 271 proceeding to litigate an issue that is simply not relevant to a determination of BellSouth's having met the requirements of the Act.

Q. BOTH MS. MURRAY AND MR. DARNELL REQUEST THAT THE AUTHORITY REQUIRE BELLSOUTH TO PROVIDE CLECs WITH A BROADBAND UNE AND WITH DSL OVER UNE-P. IS THIS DOCKET THE APPROPRIATE FORUM FOR SUCH A REQUEST?

A. No. The purpose of this docket is to determine BellSouth's compliance with the 14-point checklist. As such, this docket is not the appropriate forum for the CLECs to ask the Commission to unbundle network elements that the FCC already has declined to unbundle. If the CLECs want unbundled access to Digital Subscriber Line Access Multiplexers ("DSLAMs") at BellSouth remote terminals ("RTs"), they should initiate an appropriate proceeding to seek that relief. In short, the FCC has been very clear on BellSouth's obligations on this issue; what the CLEC's want is for this Authority to go beyond those obligations. While the TRA can consider those issues, it should not consider them in this proceeding.

Q. WHAT STANDARD GOVERNS WHETHER CLECS ARE ENTITLED TO AN UNBUNDLED BROADBAND LOOP OR TO UNBUNDLED ACCESS TO DSLAMs?

A. Were the CLECs to seek unbundled access to DSLAMs in an appropriate proceeding, the Authority would have to apply the "impairment" standard established by the FCC in order to determine whether the CLECs were entitled to such relief. In United States Telecom Association v. FCC, 290 F.3d 415 (D.C. Cir. 2002), the D.C. Circuit held that, because unbundling comes at a substantial cost, Congress made "impairment" the touchstone for defining the circumstances when network elements must be unbundled. Under section 251(d)(2) of the Act, the unbundling analysis must consider whether "failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." (47 U.S.C. § 251(d)(2)). According to the Court of Appeals, network elements should not be unbundled when there is no reasonable basis to believe that competition is suffering from the type of impairment about which Congress was concerned. (United States Telecom. Ass'n, 290 F.3d at 421). The Authority, therefore, could not order the relief the CLECs are seeking unless it found that the CLECs are so impaired.

Q. WHAT WOULD THE CLECS HAVE TO PROVE IN ORDER TO MEET THIS "IMPAIRMENT" STANDARD?

A. This is a matter of great uncertainty. In remanding the FCC's unbundling rules for further consideration, the D.C. Circuit provided guidance about the kind of impairment analysis that the FCC must conduct in deciding whether to require that network elements be unbundled. According to the Court of Appeals, the FCC cannot adopt unbundling rules "detached from any specific markets or market categories." (*Id.* at 426). Unbundling requests must be rejected in any specific product or geographic markets where alternatives exist – i.e., where there is no real impairment. Consequently, the level of existing competition and availability of alternative facilities within specific markets must be the cornerstone of the FCC's impairment analysis. (*Id.* at 425-426).

The Court of Appeals also indicated that while cost is a consideration in determining whether a CLEC is impaired, cost disparities of just any nature are not evidence of impairment. As the Court of Appeals noted, "[t]o rely on cost disparities that are universal as between new entrants and incumbents in any industry is to invoke a concept too broad…to be reasonably linked to the purpose of the Act's unbundling provisions." Instead, according to the D.C. Circuit, the FCC's impairment analysis must focus on "cost differentials based on characteristics that would make genuinely competitive provision of an element's function wasteful." (*Id.* at 427).

As discussed above, this docket is not the appropriate forum for the Authority to consider a request to unbundle network elements that the FCC has already decided not to unbundle. In any event, until the FCC adopts an impairment analysis that is consistent with the D.C. Circuit's decision, holding hearings at the

state level to address the question of whether CLECs are "impaired" without expanding BellSouth's unbundling obligations to include packet switching in general or unbundled access to DSLAM functionality provided at RTs would be a waste of the Authority's limited administrative resources.

Q. SPECIFICALLY, WHAT HAS THE FCC DETERMINED REGARDING UNBUNDLING OF PACKET SWITCHING?

A. In its UNE Remand Order, the FCC stated that "[t]he packet switching network element includes the necessary electronics (e.g. routers *and DSLAMS*)." (*Id.* at ¶304 (emphasis added)). The FCC then expressly stated "we decline at this time to unbundle the packet switching functionality, except in limited circumstances." (*Id.* at ¶306). These limited circumstances are set forth in Rule 51.319(c)(5), which states that an ILEC must provide unbundled packet switching only where all of the following conditions are satisfied:

(i) The incumbent LEC has deployed digital loop carrier systems, including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section (*e.g.*, end office to remote terminal, pedestal or environmentally controlled vault);

(ii) There are no spare copper loops capable of supporting the xDSL services the requesting carrier seeks to offer;

(iii) The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Line Access Multiplexer at the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined under § 51.319(b); and

(iv) The incumbent LEC has deployed packet switching capability for its own use.

Thus, even when the FCC applied its overly-broad and inappropriate definition of "impairment" (that was subsequently struck down by the D.C. Circuit Court of Appeals), the FCC decided that is was improper to unbundle packet switching functionality in general and DSLAM functionality at RTs in particular, except in these very limited circumstances.

Q. HAS THE AUTHORITY PREVIOUSLY ADDRESSED THE ISSUE OF UNBUNDLED PACKET SWITCHING?

A. Yes. This issue was addressed in the Intermedia Arbitration case, Docket No. 99-00948. The Authority's Order dated June 25, 2001, concluded, "the Arbitrators voted unanimously to require BellSouth to provide access to packet switching capabilities as an unbundled network element only when the limited circumstances identified in FCC Rule 51.319(c)(5)(i)-(iv) exist."

More recently, at the Directors' Conference on May 21, 2002, the Directors declined to include the issue of unbundling of packet switching in Docket 00-00544, Generic UNE Docket for Line Sharing and Riser Cable and Terminating Wire. Covad had filed a Petition in which it asked the Authority to "extend the portion of its Order addressing the installation of dual purpose line cards in NGDLC terminals to include the installation of equivalent technology in BellSouth's remote DSLAMs." This request, if granted, would result in unbundled packet switching. The Authority's June 27, 2002, Order affirmed the decision "not to grant Covad the relief it seeks in this issue, and it should not be addressed at this time."

Q. DID THE FCC CONSCIOUSLY CONSIDER ADVANCED SERVICES WHEN IT DECIDED NOT TO UNBUNDLE THE DSLAM?

A. Yes. Throughout the UNE Remand Order in which it decided not to unbundle the DSLAM, the FCC demonstrated an acute awareness of and concern for advanced services. The FCC supported its decision to unbundle dark fiber, for instance, by noting that "unbundling of dark fiber is essential for competition in the provision of advanced services." (*Id.* at ¶196). The FCC also noted that "access to the subloop will facilitate rapid development of competition, encourage facilities-based competition, and promote the deployment of advanced services." (*Id.* at ¶207). The FCC also clarified that incumbents are required to "provide loops with all their capabilities intact, that is, to provide conditioned loops, wherever a competitor requests, even if the incumbent is not itself offering xDSL to the end-

user customer on that loop." (*Id.* at ¶191). It is clear, therefore, that the FCC was interested in establishing UNEs in a manner that allows CLECs to offer advanced services.

It is equally clear, however, that the FCC recognized that CLECs can provide their own DSL services without having unbundled access to the DSLAMs BellSouth has installed in remote terminals. In Paragraph 190 of the UNE Remand Order, for instance, the FCC stated that:

> Unbundling basic loops, with their full capacity preserved, allows competitors to provide xDSL services.
>
> * * *
>
> Without access to these loops, competitors would be at a significant disadvantage, and the incumbent LEC, rather than the marketplace, would dictate the pace of the deployment of advanced services.

The FCC further stated that "[a]ccess to unbundled loops will also encourage competition to provide broadband services." (*Id.* at ¶200). Thus, with one exception, the FCC determined that "the loop includes attached electronics, including multiplexing equipment used to derive the loop transmission capacity." (*Id.* at ¶175). Significantly, that one exception is that the loop does not include the DSLAM. (*Id.*). The FCC stated, "we include the attached electronics (*with the exception of DSLAMs*) within the loop definition. *By contrast*, as we discuss below, we find that the DSLAM is a component of the packet switch network element." (*Id.*, emphasis added). As noted above, the FCC then declined to require incumbents to unbundle the packet switch network functionality, which includes the DSLAM.

When it declined to require that ILECs unbundle DSLAMs, the FCC was well aware of the use of integrated digital loop carrier ("IDLC") by incumbent LECs. The FCC noted "carriers need unbundled subloops to serve subscribers currently served by IDLC[24] loops." (*Id.* at ¶217). More specifically, the FCC explained,

> In order to reach subscribers served by the incumbent's IDLC loops, a requesting carrier usually must have access to those loops before the point where the traffic is multiplexed. That is where the end-user's distribution subloop can be diverted to the competitive LEC's feeder, before the signal is mixed with the traffic from the incumbent LEC's other distribution subloops for transport through the incumbent's IDLC feeder. Accordingly, we find that denying access at this point may preclude a requesting carrier from competing to provide service to customers served by the incumbent's IDLC facilities. This would particularly affect consumers in rural areas, where incumbent LECs use the greatest proportion of DLC loops.

(*Id.*)

When it released its UNE Remand Order, the FCC also was well aware of the role that DSLAMs collocated in remote terminals play in the provisioning of xDSL service. In particular, the following language from the UNE Remand Order clearly establishes that the FCC was well aware that a CLEC would quite often have to collocate a DSLAM at a remote terminal in order to provide xDSL service over a UNE loop:

> competitors seeking to offer services using xDSL technology need to access the copper wire portion of the loop. In cases where the incumbent multiplexes its copper loops at a remote terminal to transport the traffic to the central office over fiber DLC facilities, a requesting carrier's ability to

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[24] IDLC, or integrated digital loop carrier, is a form of DLC. *See* UNE Remand Order at ¶217 ("IDLC technology allows a carrier to 'multiplex' and 'demultiplex' (combine and separate) traffic at a remote concentration point, or remote terminal, and to deliver the combined traffic directly into the switch, without first separating the traffic from the individual lines.").

> offer xDSL service to customers served over those facilities will be precluded, *unless* the competitor can gain access to the customer's copper loop before the traffic on that loop is multiplexed. Thus, we note that the *remote terminal has, to a substantial degree, assumed the role and significance traditionally associated with the central office*. In addition, in order to use its own facilities to provide xDSL service to a customer, a carrier must locate its DSLAM within a reasonable distance of the customer's premises, usually less than 18,000 feet. In both of these situations, a requesting carrier needs access to copper wire relatively close to the subscriber in order to serve the incumbent's customer.

(*Id.* at ¶218, emphasis added).

Q. PLEASE DISCUSS THE POLICY CONSIDERATIONS RELATED TO THE FCC'S DECISION NOT TO UNBUNDLE DSLAMS.

A. The FCC's decision to unbundle packet switching functionality (which it defined to include DSLAMs) only in the very limited circumstances described above is firmly grounded in sound public policy. The FCC came to this conclusion after carefully considering the manner in which proposed unbundled elements would affect a CLEC's ability to provide advanced services such as xDSL, recognizing how the existence of IDLC would impact the provisioning of advanced services such as xDSL, and noting that "the remote terminal has, to a substantial degree, assumed the role and significance traditionally associated with the central office." (*Id.* at ¶¶ 304, 306). In deciding not to require incumbents to unbundle packet switching functionality, the FCC acknowledged that the advanced services market is highly competitive, and it recognized that forcing ILECs to unbundle equipment used to provide competitive advanced services would only impede the further development of competition:

> [W]e are mindful that regulatory action should not alter the successful deployment of advanced services that has occurred to date. Our decision to decline to unbundle packet switching therefore reflects our concern that we not stifle burgeoning competition in the advanced service market. *We are mindful that, in such a dynamic and evolving market, regulatory restraint on our part may be the most prudent course of action in order to further the Act's goal of encouraging facilities-based investment and innovation.*

(*Id.* ¶316, emphasis added). The D.C. Circuit echoed these very same concerns when it rejected the "impairment" analysis that the FCC adopted in its UNE Remand Order, stating that "[i]f parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines." *See United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

Q. WOULD REQUIRING BELLSOUTH TO OFFER THE UNBUNDLED BROADBAND LOOP REQUESTED BY MS. MURRAY INCREASE THE AVAILABILITY OF DSL-BASED SERVICES IN TENNESSEE?

A. No. If the Authority were to accept Ms. Murray's proposal, the universe of end users who are able to receive both voice service and data service over the same line will not be expanded. Instead, CLECs would be able to provide broadband service only to those end users who already can get DSL service from BellSouth. End users who are served out of a central office or a remote terminal in which BellSouth has not located a DSLAM, however, would still not have access to DSL.

In contrast, without unbundling BellSouth's DSLAMs, CLECs can get a jump on BellSouth by collocating DSLAMs in a central office or remote terminal in which BellSouth has not yet deployed a DSLAM. Ample opportunities exist for CLECs to bring DSL service to BellSouth voice customers who cannot currently get that service from BellSouth. In the event CLECs choose to invest in these areas, customers who currently cannot get voice and data over a single line from any telecommunications service provider could then get voice and data over the same line from one or more CLECs. In addition, there are areas of Tennessee where no broadband is currently available. If CLECs chose to serve those areas, it could make broadband available to a greater number of Tennesseans.

Q. COULD YOU ADDRESS THE AUTHORITY'S PRIOR RULING ON DUAL PURPOSE LINE CARDS?

A. In its First Interim Order in Docket No. 00-00544, the Authority ordered BellSouth to install, for the CLECs' use, dual purpose line cards in the fiber-fed Next Generation DLC equipment in remote terminals on nondiscriminatory terms and at just and reasonable rates. BellSouth asked the Authority to stay this portion of its First Interim Order, and on May 21, 2002, the Authority voted to stay "[t]he decisions of the Authority memorialized in the First Interim Order" regarding these issues "for a period of six (6) months . . . ." See Order on Petition for Stay and Requests for Reconsideration and Clarification, Docket No. 00-00544 (June 27, 2002).

Two days after the Authority voted to stay this portion of its First Interim Order, the D.C. Circuit Court of Appeals vacated the FCC's Line Sharing Order, stating:

> Petitioners primarily attack the Line Sharing Order on the ground that the [FCC], in ordering unbundling of the high frequency spectrum of copper loop so as to enable CLECs to provide DSL services, completely failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite). We agree.

The Court noted the FCC's own findings that "repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market," and it explained that:

> mandatory unbundling comes at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource. And, as we said before, the Court's opinion in *Iowa Utilities Board,* though less explicit than Justice Breyer on the need for balance, plainly recognized that unbundling is not an unqualified good--thus its observation that the Commission must "apply *some* limiting standard, rationally related to the goals of the Act," and its point that the Commission "cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network." In sum, nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs noted by Justice Breyer under conditions where it had no reason to think doing so would bring on a significant enhancement of competition. The Commission's naked disregard of the competitive context risks exactly that result.

As a result, the Court held that "the *Line Sharing Order* must be vacated and remanded."

The CLECs, therefore, can gain no comfort from the Authority's order regarding line cards because: (1) the Authority stayed that Order; and (2) two days later, the FCC order that formed the basis of the Authority's original decision regarding

line cards was vacated.

Q. HAVE OTHER STATE COMMISSIONS CONSIDERED REQUESTS BY CLECS FOR UNBUNDLED BROADBAND LOOPS?

A. Yes. Both the Florida Public Service Commission and the Kentucky Public Service Commission recently considered such requests. After conducting evidentiary hearings, both commissions rejected the requests. In its June 5, 2002 ruling in the BellSouth/Florida Digital Network arbitration proceeding, the Florida PSC found that:

> BellSouth's arguments regarding the impact [of a requirement to provide an unbundled broadband loop] on the ILEC's incentive to invest in technology developments to be most compelling. We have serious concerns that requiring BellSouth to unbundle its DSLAMs in remote terminals would have a chilling effect on broadband deployment. Furthermore, we do not believe that FDN has demonstrated that it would be impaired without access to a broadband UNE, because it does have the ability to collocate DSLAMs. ... FDN has not demonstrated that it is any more burdensome for FDN to collocate DSLAMs in BellSouth's remote terminals that it is for BellSouth.

(See FPSC Order No. PSC-02-0765-FOF-TP, pgs. 16-17).

Likewise, in the Kentucky BellSouth/Cinergy arbitration proceeding, the Kentucky PSC denied Cinergy's request for broadband UNEs, stating "we must look to the long-term effects upon Kentucky of creating a packet-switching UNE. Future investments by BellSouth . . . would be discouraged." (See KPSC Order dated July 12, 2002 in Case No. 2001-00432, pg. 6). The Kentucky PSC further concluded that Cinergy has not "demonstrated that obtaining additional UNEs from BellSouth is 'necessary' to enable it to provide service. While Cinergy is

entitled to purchase DSL-capable loops, it should purchase its own additional equipment to provide the broadband services it seeks to offer." (*Id.*)

Q. ON PAGE 9, MR. DARNELL ARGUES THAT BELLSOUTH SHOULD BE REQUIRED TO CONTINUE TO PROVIDE ITS FASTACCESS DSL SERVICE WHEN IT LOSES THE VOICE SERVICE TO A UNE-P CLEC. PLEASE DESCRIBE BELLSOUTH'S RETAIL AND WHOLESALE DSL OFFERINGS.

A. BellSouth has both a wholesale DSL regulated transport service and a retail non-regulated DSL-based Internet access service. BellSouth offers the tariffed DSL transport service through BellSouth's Special Access FCC Tariff No. 1. This tariffed DSL service is a regulated telecommunications service offering, and it is designed for use by Internet service providers ("ISPs"), such as AOL, EarthLink, MSN and BellSouth's own ISP operations. BellSouth FastAccess Internet Service ("FastAccess") is BellSouth's retail high-speed DSL-based Internet access service. It uses the regulated DSL transport service as an input to the Internet access offering. FastAccess service is a non-regulated information service offering.

Q. PLEASE DISCUSS THE REGULATORY STATUS OF BELLSOUTH'S RETAIL FASTACCESS SERVICE AND BELLSOUTH'S WHOLESALE DSL SERVICE.

A. BellSouth's retail FastAccess service is a non-regulated enhanced service that is not within the jurisdiction of the Authority.[25] BellSouth's FastAccess service is a non-regulated enhanced service that consists of a DSL component (which can be thought of as a pipe) and Internet services (which can be thought of as water flowing through the pipe). Thus, in order to provide FastAccess service over a UNE loop, BellSouth must also provide DSL service over that UNE loop. BellSouth's FCC Tariff No. 1, however, states that BellSouth's provision of DSL requires the existence of an "in-service, Telephone Company [i.e., BellSouth] provided exchange line facility." F.C.C. Tariff No. 1, Section 7.2.17(A). A UNE loop is not an "in-service [BellSouth] provided exchange line facility."

Thus, if BellSouth were to place its tariffed wholesale DSL service on a UNE loop, BellSouth would be in violation of its federal tariff. This Authority clearly has no jurisdiction to alter that FCC Tariff.

To the extent that the CLECs may be asking the Authority to order BellSouth to change the way in which it offers its wholesale DSL service (which is a component of FastAccess service), that request is clearly beyond the Authority's jurisdiction because the wholesale DSL service is an interstate telecommunications service over which the FCC, and not the Authority, has jurisdiction. In fact, in an Order addressing GTE's DSL-Solutions-ADSL Service, the FCC found that "this offering, which permits Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the

[25] *See* In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations, (Computer II Final Decision); 77 FCC 2d 384 (1980).

Internet, is *an interstate service* and is *properly tariffed at the federal level.*"[26] The FCC, therefore, has exclusive jurisdiction over BellSouth's wholesale DSL service.

Q. CAN AN END USER THAT RECEIVES VOICE SERVICE FROM A CLEC ALSO RECEIVE BELLSOUTH'S FASTACCESS SERVICE?

A. Yes. While it is true that BellSouth does not provide DSL service over a UNE loop that a CLEC is using to provide voice service to its end user, BellSouth will provide its FastAcess service over a line that is being resold by a CLEC. Thus, if a CLEC wants to provide both voice and data service to an end user over a single line without collocating a DSLAM at a remote terminal, it can do so by reselling BellSouth's FastAccess service to that end user.

If, for instance, a CLEC's business customer wants four voice lines and one data line, the CLEC can use four UNE arrangements to provide the voice service and one resold line to provide the data service. This would allow the CLEC to retain this customer's business while waiting to see if additional business customers that are served from the same remote terminal begin ordering DSL service from the CLEC. If that occurs, the CLEC could choose to collocate a small DSLAM at that remote terminal, convert the one resold line to a UNE arrangement, and use the collocated DSLAM to provide DSL service over that UNE arrangement. If no additional customers served from that remote terminal request DSL service, the

[26] *See* Memorandum Opinion and Order, In the Matter of GTE Telephone Operating Cos. GTOC Tariff No. 1, 13 F.C.C. rcd 22,466 at ¶1 (October 30, 1998)(emphasis added).

CLEC could continue to provide that business customer's data service over a single resold line.

Q. ARE THERE ANY ADDITIONAL CONCERNS REGARDING DSL OVER UNE LOOPS?

A. Yes. Once a CLEC purchases a UNE loop from BellSouth, the CLEC has control over the entire loop, including the high-frequency portion of the loop. BellSouth has no right to use that loop for any purpose.[27] Ordering BellSouth to provide a service over a facility controlled by another company in order to provide a service to that company's customers would be the imposition of a very unusual affirmative obligation on BellSouth to assist a competitor. While the Act imposes certain affirmative obligations on BellSouth to assist competitors, this simply is not one of them.

Q. HAS THE FCC ADDRESSED WHETHER BELLSOUTH HAS TO PROVIDE ITS DSL SERVICE OVER UNE-P?

A. Yes. The FCC recently addressed BellSouth's practice of not providing its federally-tariffed wholesale DSL service over a UNE loop in its Order approving BellSouth's Georgia/Louisiana section 271 application. Parties to that proceeding

[27] If BellSouth wanted to use the high-frequency portion of the loop to provide ADSL or FastAccess, it would need to negotiate with the CLEC that purchased the loop from BellSouth. While this may seem trivial, there are hundreds of CLECs. In all likelihood, BellSouth could not establish any uniform agreement about the terms and conditions of using the high-frequency portion of the UNE loops that the CLECs lease from BellSouth. This would add tremendous complexity (not to mention time and expense) to the situation.

raised issues that are similar to those raised by the CLECs in this proceeding, and the FCC addressed those issues accordingly:

> BellSouth states that its policy "not to offer its wholesale DSL service to an ISP or other network services provider [ ] on a line that is provided by a competitor via the UNE-P" is not discriminatory nor contrary to the Commission's rules. Commenters allege that BellSouth will not offer its DSL service over a competitive LEC's UNE-P voice service on that same line. We reject these claims because, under our rules, the incumbent LEC has no obligation to provide DSL service over the competitive LEC's leased facilities. Furthermore, a UNE-P carrier has the right to engage in line splitting on its loop. As a result, a UNE-P carrier can compete with BellSouth's combined voice and data offering on the same loop by providing the customer with line splitting voice and data service over the UNE-P loop in the same manner. Accordingly, we cannot agree with commenters that BellSouth's policy is discriminatory.

(*Id.* at ¶157, emphasis added). The FCC, therefore, was squarely presented with the issue of whether BellSouth's policy of not providing its federally tariffed, wholesale DSL telecommunications service over a UNE loop violates federal law. The FCC found no such violation. To the contrary, the FCC explicitly and unequivocally found that BellSouth's policy is not discriminatory and, therefore, does not violate section 202(a) of the Act. By necessary implication, the FCC also found that BellSouth's policy does not amount to unreasonable denial of service pursuant to section 201 of the Act.

The FCC made these findings with regard to BellSouth's wholesale DSL telecommunications service – a service to which sections 201 and 202 of the Act apply. In light of these findings, it cannot seriously be argued that the same practice with regard to BellSouth's retail FastAccess service – an enhanced, non-regulated, non-telecommunications Internet access service to which the Act

simply does not apply – is somehow inappropriate.

Q. HOW DO OTHER DEVELOPMENTS IN THE BROADBAND INDUSTRY HELP REFUTE THE CLEC'S CLAIM THAT BELLSOUTH'S ACTIVITIES ARE ANTI-COMPETITIVE?

A. A race is underway in the broadband market, in which the number of cable modem subscribers was nearly twice that of DSL subscribers as of June 2001. In running this race, cable modem providers and other advanced services providers are relatively unfettered by regulation. At its March 14, 2002 Open Meeting, the FCC declared cable modem service an interstate "information service" and said Internet access delivered over cable is not subject to common carrier regulation that requires unbundling. Incumbent local exchange companies such as BellSouth, in contrast, face numerous regulatory constraints, such as remote terminal collocation, unbundling of packet switching in certain circumstances, line sharing and line splitting. BellSouth has made its investment decisions knowing these requirements. However, BellSouth also operates in an environment of regulatory uncertainty. CLECs continue to urge state commissions to require the unbundling of packet switching or to create the broadband equivalent of UNE-P. This occurs despite the undisputed facts that: (1) voice competition continues to grow, (2) BellSouth is not the dominant provider of advanced services, and (3) previous evaluation and findings by the FCC are consistent with BellSouth's position in this case.

FCC Chairman Michael K. Powell, in a speech to the National Summit on Broadband Deployment, October 25, 2001, stated:

> I believe strongly that broadband should exist in a minimally regulated space. Substantial investment is required to build these networks and we should limit regulatory costs and uncertainty. We should vigilantly guard against regulatory creep of existing models into broadband, in order to encourage investment. . . . Innovation is critical and can be stifled by constricting regulations.

The FCC issued a Notice of Proposed Rulemaking recently in a docket entitled: *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services et al.,* CC Docket No. 01-337. In Commissioner Powell's statement regarding that docket, released on December 12, 2001, he emphasized the importance of broadband deployment, and stated that the docket "is intended to develop further one more avenue of thinking about how regulation can serve to help (or hinder) broadband deployment." Of note, the FCC will "ask whether potentially robust competition among multiple types of broadband service providers suggests that we should avoid subjecting incumbents to the same regulatory burdens that we impose on these carriers with respect to their provision of local telephone service."

Stand-alone broadband is costly and risky. In assessing the viability of providing DSL over UNE-P, BellSouth determined that the additional operational costs associated with implementation along with the reduced profitability of stand-alone DSL, made the opportunity extremely unattractive. What is so incongruous about this issue now is that the CLECs are asking the Authority to force BellSouth to provide a highly competitive service in circumstances that BellSouth views as not

being in its best interests. In effect, BellSouth would become the advanced services provider of last resort. Such a concept is completely inconsistent with a competitive market.

Q. DOES BELLSOUTH HAVE THE DOMINANT SHARE OF THE BROADBAND MARKET?

A. No. In fact, cable modem, not DSL, is the prevalent technology in this market. The BellSouth voice customers in Tennessee who also have cable modem broadband service will not likely switch to BellSouth's ADSL service. Currently, a small fraction of BellSouth's 2.6 million access lines in Tennessee are equipped for DSL.[28] Quite frankly, there are far more potential customers for the CLECs that do not have BellSouth's DSL than that do have it.

In terms of total lines installed, cable modem is far ahead of other competing technologies, including xDSL, and is the leader of broadband deployment and market penetration. Attached to my testimony as Rebuttal Exhibit JAR-4 is the FCC's February 2002 Report on High-Speed Services for Internet Access. Table 5 shows that, as of June 30, 2001, cable represents 54% of total high-speed lines nationally, DSL represents 28%, and other categories represent 18%. Table 6 shows that, for Tennessee, there were 7 ADSL providers and 5 cable providers as of June 20, 2001. Table 7 shows that there were 22,902 ADSL lines in Tennessee as of June 30, 2001, compared to 96,119 cable lines.

[28] See BellSouth's proprietary response to Cinergy's First Data Requests, Item No. 1, in TRA Docket No. 01-00987, for the number of DSL ports provisioned in Tennessee.

Statistics published on the website for the National Cable & Telecommunications Association (NCTA)[29] show that 96.7% of TV Households have cable available, with 69.4% cable penetration of TV Households, which numbered 105 million as of February 2002. The same report shows that 66.4% of TV Households have cable modem available, with 6.8% subscribing to cable modem as of December 2001. Tennessee citizens have numerous providers from which to choose.

As the above evidence demonstrates, BellSouth does not have a monopoly for voice or advanced services; in fact, BellSouth does not serve the advanced services market in Tennessee ubiquitously. This evidence is entirely consistent with the opinion that the Court of Appeals for the District of Columbia issued recently in which it vacated the FCC's "Line Sharing Order." *See United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).

The Line Sharing Order required ILECs to unbundle the high frequency spectrum of copper loops to enable CLECs to provide DSL services. The D.C. Circuit vacated the FCC's order because the FCC had failed to take into account the substantial competition for DSL service today. (*Id.* at 428-29). Significantly, the Court noted that "[the FCC's] own findings (in a series of reports under §706 of the 1996 Act) repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market." (*Id.* at 428). The D.C. Circuit was appropriately concerned that unbundling requirements "come[] at a cost, including disincentives to research and development by both ILECs and CLECs and the tangled management inherent in shared use of a common resource." (*Id.*

[29] *www.ncta.com/industry_overview*

at 429). The D.C. Circuit concluded that "[the FCC's] naked disregard of the competitive context risks" inflicting costs on the economy where the competitive conditions would not allow the FCC to conclude that imposing those costs "would bring on a significant enhancement of competition." (*Id.*)

Just as the D.C. Circuit was concerned about the requirement that ILECs unbundle the high-frequency portion of the spectrum to allow CLECs to provide their own DSL service over the ILECs' loops in the face of substantial competition in the broadband market, this Authority should be concerned about a rule requiring BellSouth to continue to provide a service that is designed to be provided in tandem with its voice service when it is no longer the voice provider based on an alleged (and unproven) concern that BellSouth has market power in the high-speed Internet access market. The existence of significant competition in the high-speed Internet access market means that customers that want a CLEC's voice service *do have* an option for high-speed Internet access, and that BellSouth's decision not to continue to provide those customers with FastAccess service cannot have an appreciable negative effect on competition for local voice service. Further, given the competition in the high-speed Internet access market, the Authority certainly should not impose this burdensome, costly and inefficient requirement on BellSouth.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

DOCs #453539

AFFIDAVIT

STATE OF: Georgia
COUNTY OF: Fulton

BEFORE ME, the undersigned authority, duly commissioned and qualified in and for the State and County aforesaid, personally came and appeared John A. Ruscilli –Senior Director – State Regulatory, BellSouth Telecommunications Inc., who, being by me first duly sworn deposed and said that:

He is appearing as a witness before the Tennessee Regulatory Authority in Docket No. 97-00309 on behalf of BellSouth Telecommunications, Inc., and if present before the Authority and duly sworn, his testimony would be set forth in the annexed testimony consisting of 59 pages and 4 exhibit(s).

John A. Ruscilli

Sworn to and subscribed
before me on July 22, 2002

NOTARY PUBLIC

Notary Public, Gwinnett County, Georgia
My Commission Expires June 27, 2005

ATTACHMENT "C"

BELLSOUTH TELECOMMUNICATIONS, INC.

REBUTTAL TESTIMONY OF W. KEITH MILNER

BEFORE THE TENNESSEE REGULATORY AUTHORITY

DOCKET NO. 97-00309

JULY 22, 2002

Q. STATE YOUR NAME, YOUR BUSINESS ADDRESS, AND YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH").

A. My name is W. Keith Milner. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375. I am Assistant Vice President - Interconnection Operations for BellSouth. I have served in my present role since February 1996.

Q. ARE YOU THE SAME W. KEITH MILNER WHO FILED DIRECT TESTIMONY ON APRIL 26, 2002?

A. Yes.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY TODAY?

A. In my testimony, I will address allegations raised by parties in this proceeding regarding the means by which BellSouth has satisfied network-related items of the competitive Checklist set forth in Section 271(c)(2)(B) of the Telecommunications Act of 1996 ("the Act"). A list of acronyms used in my testimony is attached as Exhibit WKM-1.

CHECKLIST ITEM 4: LOCAL LOOP

Q. MS. TERRY MURRAY STATES THAT THE EFFECT OF BELLSOUTH REPLACING COPPER WIRES WITH FIBER-OPTIC TECHNOLOGY HAS EFFECTIVELY PLACED THE CUSTOMERS SERVED BY NEARLY HALF OF THE REMOTE TERMINALS ("RTs") IN TENNESSEE OFF-LIMITS TO DSL COMPETITION. DO YOU AGREE?

A. No. Her statement is absolutely not true. Moreover, BellSouth's decision to place fiber-optic technology in the feeder cable from the Central Office to the RT location is based solely on economics and the cost of providing facilities to serve BellSouth's customers. The decision has nothing to do with providing DSL capability for Bellsouth or its competitors.

I say her statement is not accurate because if a Competitive Local Exchange Carrier ("CLEC") wants to provide those customers who are served over fiber facilities in the feeder cable with DSL service, it has the same opportunity as BellSouth to place a remote Digital Subscriber Line Access Multiplexer ("DSLAM"), a piece of equipment that is necessary in order for the CLEC to provide DSL service, at the RT location. Ms. Murray acknowledges this is true, saying the "competitor can install a DSLAM at the RT to perform precisely the same function as the DSLAM that previously would have been located in the central office."

This is an important point that cannot be overlooked. Ms. Murray's basic complaint presumably revolves around the argument that in an all-copper world, a CLEC could

place one DSLAM in a central office, and be in a position to offer DSL service to all customers served out of that central office (provided the DSLAM was large enough). To provide DSL service in a fiber-fed Digital Loop Carrier ("DLC") environment, however, the CLEC must do exactly what BellSouth has had to do -- put DSLAMs in the individual RT locations rather than the central office. Since there are more RTs than central offices, Ms. Murray evidently concludes that CLECs must not be able to afford to install the DSLAMs for themselves, so BellSouth has placed the customers served by RTs "off limits" to CLECs.

That reasoning is nonsense. First, no CLEC would put a DSLAM in every RT. In fact, BellSouth has not installed DSLAMs (which it uses to provide DSL service in a DLC environment, just like the CLECs would use a DSLAM) in each of its RT locations. Instead, BellSouth targets locations with strong DSL sales potential. The proof of this conclusion can be found in Ms. Murray's testimony, where she acknowledges that BellSouth has 6,318 RTs in Tennessee and serves approximately 30% of its DSL customers through those RTs. I would expect Covad to do likewise and study which locations give Covad the greatest sales potential and deploy equipment in those locations.

Furthermore, placing a DSLAM in a RT is not necessarily the only solution when a Covad customer wanting DSL is served with fiber facilities in the feeder portion of the loop. Again, in order to create and market DSL services, CLECs have the same options available to them as BellSouth has for itself. Collocation of DSLAMs in BellSouth's central offices allows a CLEC such as Covad to provide its data services to those customers served entirely by copper loops (that is, customers who are not served by Digital Loop Carrier ("DLC")). For those customers who are served by DLC, one option

the CLEC has, other than to place a DSLAM in the RT, is to perform an electronic Loop Make-Up and locate an available copper loop from the demarcation point (end user's Network Interface Device ("NID")) all the way to the CLEC's collocation arrangement in the central office. Then, the CLEC would "reserve" the copper loop and issue an order for that copper loop and the customer's service would be moved from the DLC to the copper loop.

Q. NOTWITHSTANDING YOUR COMMENTS ABOUT PLACING DSLAMS IN CAREFULLY SELECTED REMOTE TERMINALS, ON PAGES 8-9 OF HER TESTIMONY, MS. MURRAY SUGGESTS THAT IN ORDER TO PROVIDE BROADBAND SERVICE AT PARITY WITH BELLSOUTH, THOUSANDS OF ADDITIONAL COLLOCATIONS OF DSLAMs WOULD BE REQUIRED AT TENNESSEE'S 6,318 RTs ON A ROUTE-BY-ROUTE BASIS. PLEASE COMMENT.

A. First, I would be surprised to learn that Covad actually deployed its DLSAMs in thousands of RT locations simply because BellSouth has deployed thousands of RTs. As I stated earlier, BellSouth has not deployed DSLAMs at every RT site and it would take time to do so. Thus, I disagree with Ms. Murray that to be at parity with BellSouth, Covad would have to collocate DSLAMs in each and every one of the thousands of RT locations. CLECs can place a DSLAM at the central office or at the RT location just like BellSouth has the capability to do. CLECs have the same capability to reach any customer of BellSouth's served from that RT location as does BellSouth. As for costs, since collocation rates are cost-based, the pro rata cost of physical collocation to the CLEC is no greater than the cost BellSouth must pay to establish a RT site. For broadband services, BellSouth faces the same hurdles and opportunities, as would any

CLEC. The potential customer segment to be served is the same for both parties so that any equipment deployed by either party involves an investment risk. For example, should BellSouth not fill up the ports on its own remote DSLAMs, it too runs the risk of not benefiting from economies of scale. CLECs are not precluded from offering DSL service where DLC is deployed. When BellSouth provides its Asymmetrical Digital Subscriber Line ("ADSL") service where DLC is deployed, BellSouth must install DSLAM equipment at the DLC location. Through the collocation process offered by BellSouth, a CLEC that wants to provide DSL service where DLC is deployed also can collocate its DSLAM equipment at BellSouth's DLC RT sites. This allows the CLEC to provide the high speed data access in the same manner as does BellSouth.

Q. ARE CLECs IMPAIRED IN THEIR ABILITY TO COLLOCATE THEIR DSLAM EQUIPMENT WITHIN BELLSOUTH'S RTs?

A. No. If sufficient space exists within a DLC RT, BellSouth will allow a CLEC to collocate its DSLAM in the RT, regardless of whether BellSouth has installed its own DSLAM at that RT. If sufficient space does not exist within the DLC and BellSouth has installed its own DSLAM at the DLC RT location, then BellSouth will make good faith efforts to augment the space at that DLC RT, such that the CLEC can install its own DSLAM at that DLC RT. In the unlikely event that BellSouth could not accommodate collocation at a particular RT where BellSouth has a DSLAM, BellSouth will unbundle the BellSouth packet switched network at that RT in accordance with FCC requirements. If sufficient space does not exist within the DLC RT and BellSouth has not installed its own DSLAM at that DLC RT location, then BellSouth will file a collocation waiver request with this Authority for that DLC RT site.

BellSouth uses various types of structures such as cabinets, huts, controlled environmental vaults ("CEVs"), etc. Huts and CEVs are usually air-conditioned; however, the cabinets are not. BellSouth uses "hardened" DSLAM equipment that can withstand extreme temperatures. Assuming Covad selects the appropriate equipment for a DLC environment, as does BellSouth, Covad should not experience any difficulties because the DSLAMs BellSouth uses for itself do not require unique arrangements for power or air conditioning.

Q. MS. MURRAY, ON PAGES 10-11 OF HER TESTIMONY, STATES "BELLSOUTH STILL HAS A TREMENDOUS COMPETITIVE ADVANTAGE IN CHOOSING WHERE TO SPEND MONEY ON RT AND NGDLC DEPLOYMENT." PLEASE COMMENT.

A. BellSouth's competitors have access to the same demographics as does BellSouth in order to develop customer profiles and markets. The "competitive advantage" to which Ms. Murray alludes is a result of an extensive undertaking, considering the risks, in both time and capital expenditures by BellSouth over the years in developing its network. Further, even though BellSouth has provided voice services for many years, BellSouth enjoys no inherent market or competitive advantage in the broadband market. CLECs and BellSouth face the same business risks relative to deployment of infrastructure necessary to facilitate providing DSL services to customers. The technology became available to both parties at the same time, and at that time, BellSouth had no incumbent advantage – the playing field was, and remains, level. As a matter of fact, BellSouth has only been deploying DSLAMs in RTs over the past few years. However, BellSouth made a conscious business decision, and took on the corresponding risk, to offer DSL

service to its customers, and BellSouth began deploying the necessary equipment. When BellSouth provides its own ADSL service where DLC is deployed, BellSouth must locate DSLAM equipment at the DLC RT location to access the copper sub-loop to the end user. A CLEC desiring to provide its DSL service where DLC is deployed must likewise collocate its DSLAM equipment at the DLC RT location. This will allow the CLEC to provide the high speed data service in the same manner as does BellSouth. CLECs thus face the same risks as does BellSouth. Ms. Murray seems to suggest that BellSouth, rather than Covad should assume all the investment risk of deploying DSLAMs and related equipment. Covad apparently wants to be in a position to benefit from BellSouth's taking on that risk without taking on those same risks for itself. That is hardly parity under the loosest use of that term. What Ms Murray is advocating is that the Authority ought to give Covad and its shareholders a benefit at the expense of BellSouth and its shareholders. If Covad is truly worried about its financial exposure, as the next paragraphs will show, Covad can minimize its investment risk by targeting specific locations for deployment and using smaller DSLAMs to get started. DSLAMs with as few as eight (8) ports are available should Covad wish to minimize its financial exposure.

Q. ON PAGES 7-8 OF MS. MURRAY'S TESTIMONY, SHE REFERENCES A JOINT DECLARATION FILING BEFORE THE FCC OF A BUSINESS CASE FOR RT COLLOCATION WHICH PURPORTEDLY CLAIMS THAT IT WOULD TAKE COVAD AN AVERAGE OF 14.2 YEARS JUST TO BREAK EVEN ON THE COST OF RT COLLOCATION. PLEASE COMMENT.

A. Presumably Ms. Murray relies on Covad's business case to try to cause the Authority to

believe that, notwithstanding what I have said above about the risks involved in providing DSL service, Covad should get some sort of advantage by having BellSouth buy the equipment Covad needs to compete with BellSouth. However, the Covad Business Case described in the Joint Declaration of Anjali Joshi, Eric Moyer, Mark Richman, and Michael Zulevic, which Ms. Murray uses to conclude that it would take Covad 14.2 years to recoup its investment in DSLAMs for RTs, is useless as any sort of analysis for the economic efficiencies of deploying DSLAMs in BellSouth's RTs. As I will explain below, Covad's analysis contains at least three fatal flaws.

First, Covad's assumed revenue per customer is wrong. Covad's Business Case assumed monthly revenue per customer of only $35. This rate is lower than the rates listed on Covad's Internet website (www.covad.com). For example, a visit to Covad's Internet website quickly reveals rates for businesses "starting at $89" and rates for residential customers "starting at $21.95 for four months…$39.95 after that." As a result, the assumed monthly rate of $35 is $54 too low for its least expensive service offered to business customers ($89) and almost $4 too low for its residential customers after the first four months. While BellSouth cannot determine Covad's true mix of business and residential customers, an assumption of 25% business and 75% residential would yield a weighted monthly average revenue per customer of $52.21 (($89 * 0.25) + (0.75 * $39.95)) beyond the first four months. Under these conservative assumptions, Covad's weighted monthly revenue per customer is incorrectly low by $17.21. Further, Covad's Business Case did not recognize revenues from any voice services (or features associated with voice services) that Covad and other CLECs could market to DSL customers.

The second error in Covad's analysis is its assumption that even after 14 years, Covad assumes it has managed to garner no more than 5% of the market for the customers served at the remote terminals in which Covad has installed DSLAMs. If Covad actually believes that after 14 years it will only have 5% of the customers, it needs to be in another business. Using the average revenue per customer per month derived from a mix of 25% business customers and 75% residence customers and a take rate as low as 10% yields significantly different economic results as I will demonstrate below.

Once one clicks the button on Covad's website titled "Why Covad", Covad makes the claim that "Covad offers DSL, IP and dial-up services to small and medium-sized businesses, home offices and home users. Our network currently covers more than 40 million homes and business and reaches approximately 40 to 45 percent of all US homes and businesses." Covad's website states further that "Covad was the first nation-wide DSL provider and today is more widely available than any other DSL provider. Covad gives its customers the greatest number of choices in ISPs and service speeds." These hardly seem like the words of a company that believes it can garner a mere 5% of the market.

Although I believe even a 10% take rate to be overly conservative for Covad, the table below depicts the financial outcomes of a 10% take rate and an average monthly revenue of $52.21:

	Year 1	Year 2	Year 3	Year 4	Year 5
Total RT Costs	$67,500,000	$0	$0	$0	$0
Cumulative Take Rate	10%	10%	10%	10%	10%
Total Customers Captured	22,500	22,500	22,500	22,500	22,500
Total Annual Revenue to Covad for Captured Customers	$14,096,700	$14,096,700	$14,096,700	$14,096,700	$14,096,700
Cumulative Revenue to Covad for Captured Customers	$14,096,700	$28,193,400	$42,290,100	$56,386,800	$70,483,500
Yearly Cash Flow	($53,403,300)	$14,096,700	$14,096,700	$14,096,700	$14,096,700

Note 1	Uses Covad's assumption for Total RT costs for collocation and DSLAMs ($67,500,000).
Note 2	Assumes Annual Revenue per Customer of $626.52.
Note 3	Total Customers Captured is determined by multiplying Covad's "Total Number of RT Customers" (225,000) * 10% Take Rate.
Note 4	Total Annual Revenue to Covad is determined by multiplying Total Customers Captured * $626.52
Note 5	Yearly Cash Flow for Year 1 is Total Annual Revenue to Covad minus Total RT Costs.
Note 6	Project goes Cash Flow positive in fifth year.

Thus, using even conservative market share capture and more realistic revenue per customer, Covad's project turns net cash flow positive during the fifth year rather than in 14.2 years.

Third, Covad assumes it will equip its DSLAMs to be capable of serving over 200 DSL customers but will serve only 15 customers per remote terminal location (Average Quantity of Customers per Remote Terminal (300) * 5% Take Rate). If Covad's expectation really is that it will serve only 15 customers from a given remote terminal site, why would Covad chose a DSLAM for its Business Case that is capable of serving hundreds of DSL customers? There are DSLAMs available to Covad that serve as few as eight (8) DSL customers (so-called "microRAMs" or "miniRAMs") that cost considerably less than Covad's assumed costs. If Covad thinks it will only serve 15 customers in a RT, then it ought to use one of these smaller DSLAMs. BellSouth has received price quotes for fully equipped 16-port miniRAMS for about $12,000 or $24,000 for a pair of miniRAMs. Adding $4000 per miniRAM for collocation and miscellaneous would bring Covad's DSLAM costs at a given location to $32,000. These miniRAMs would be capable of serving twice the number of customers that Covad has assumed, which ought to be a sufficient margin. Using these smaller DSLAMs, the RT Collocation Costs would be $24,000,000 instead of $90,000,000. ($32,000 * 750 remote Terminals.) Using appropriately sized DSLAMs in its Business Case (and a take rate of 10% and average monthly revenue per customer of $52.21) would result Yearly Cash Flows as shown below:

	Year 1	Year 2	Year 3	Year 4	Year 5
Total RT Costs	$24,000,000	$0	$0	$0	$0
Cumulative Take Rate	10%	10%	10%	10%	10%
Total Customers Captured	22,500	22,500	22,500	22,500	22,500
Total Annual Revenue to Covad for Captured Customers	$14,096,700	$14,096,700	$14,096,700	$14,096,700	$14,096,700
Cumulative Revenue to Covad for Captured Customers	$14,096,700	$28,193,400	$42,290,100	$56,386,800	$70,483,500
Yearly Cash Flow	($9,903,300)	$14,096,700	$14,096,700	$14,096,700	$14,096,700

Note 1: Project is Cash Flow positive in Year 2.

As the note indicates, in this scenario, Covad's provision of DSL in one of these RTs should go cash flow positive at some point in the second year, not in the 14th year as claimed by Ms. Murray.

To summarize, Covad's Business Case is seriously flawed and can in no way be used as an analysis of the economic efficiencies derived by a project to deploy DSLAMs. As I have noted, Covad assumed monthly revenue per customer that is too low. It also assumed DSLAM costs that are too high and a take rate that is too low. When Covad's

business case is properly adjusted, it is clear that Covad can enjoy healthy returns on its investments for DSLAMs deployed in remote terminals.

Q. HOW LONG HAS BELLSOUTH BEEN DEPLOYING DSLAMS IN ITS RT LOCATIONS TO PROVIDE DSL SERVICE IN A DLC ENVIRONMENT?

A. The deployment of DSLAMs at remote terminals to provision broadband services over DSL is a relatively new endeavor for BellSouth. While BellSouth and its predecessors have been deploying loops and circuit switches in Tennessee for many years, BellSouth has been deploying DSLAMs at RTs only over the last few years.

Over that time, BellSouth has not deployed DSLAMs ubiquitously at its RTs in Tennessee. At present, the percentage of RTs equipped with DSLAMs by structure (that is, each cabinet, hut, or building) is 9.9%. The percentage of RTs equipped with DSLAMs by site (that is, all structures at the same site) is 12.1%.

Q. IF A CLEC PURCHASED A DSLAM AND COLLOCATED IT IN A BELLSOUTH REMOTE TERMINAL, COULD THAT CLEC PURCHASE UNES FROM BELLSOUTH TO CONNECT THAT DSLAM TO THE CUSTOMER'S PREMISES AND TO THE CLEC's COLLOCATION ARRANGEMENT AT A BELLSOUTH CENTRAL OFFICE?

A. Yes. Once a CLEC has collocated a DSLAM within a BellSouth RT, BellSouth will sell the CLEC a UNE subloop between the RT and the customers' premises and a UNE

subloop between the RT and the BellSouth central office. BellSouth will provide these UNEs at the rates established by the Authority.

Q. MS. MURRAY ASKS THE TRA TO REQUIRE BELLSOUTH TO OFFER CLECS AN UNBUNDLED BROADBAND LOOP. CAN YOU COMMENT ON THIS REQUEST?

A. Yes. As Mr. Ruscilli explains in his testimony, this is not the appropriate proceeding for that type of request. Having said that, what I understand Ms. Murray to be asking is for BellSouth to provide CLECs with access to BellSouth's DSLAMs that are collocated in a RT on a "line-at-a-time" basis. In other words, assume that BellSouth is using a DSLAM that BellSouth has placed in a RT in order to provide DSL service to a customer. If Covad wins that customer, Ms. Murray is asking that BellSouth provide Covad with a single UNE loop that includes the packet switching functionality that is performed by that DSLAM in that RT so that Covad can use that single UNE loop to provide DSL-based Internet access service to that customer.

Q. DOES THE "LINE-AT-A-TIME" BROADBAND LOOP YOU HAVE JUST DESCRIBED RAISE ANY "TECHNICAL FEASIBILITY" ISSUES?

A. Yes. When the customer described accesses the Internet, the data arrives at the DSLAM at the RT that serves that customer, and it is packetized and intermingled with data that is being sent to and from other customers that are served by that DSLAM. These intermingled packets are then delivered to an Asynchronous Transfer Mode ("ATM") switch that separates these packets, determines where they should be routed, and then routs them over the packet switching network to the appropriate destination.

Thus if a single DSLAM served not only BellSouth customers, but Covad customers as well, the packets of the Covad customers would be intermingled with the packets of BellSouth's customers. These intermingled packets are of no use to anyone unless and until they are run through an ATM packet switch that separates Covad's packets from BellSouth's packets and routes the respective packets to the appropriate location.

ATM switching, however, is not a UNE, and no CLEC in this proceeding has argued that it should be. The only way to provide "line-at-a-time" unbundled broadband loops as requested by Ms. Murray, therefore, is to require BellSouth to include ATM packet switching in the offering. The TRA, however, cannot order that because the FCC has declined to unbundled ATM packet switching and no CLEC has (or can) argue that it is impaired in its ability to either self-provision ATM packet switching or to obtain ATM packet switching from a third party.

Q. MR. DARNELL, TESTIFYING ON BEHALF OF WORLDCOM, ON PAGE 5 OF HIS TESTIMONY, CLAIMS "RATES FOR MANY ELEMENTS INCLUDED IN BELLSOUTH'S FILING ARE EXCESSIVE BECAUSE THEY ARE BASED ON OUT-OF-DATE TECHNOLOGY…." IS HE CORRECT?

A. No. Mr. Darnell contends that BellSouth's rates are "based on out-of-date technology and are not based on the least cost, forward looking technology available in the marketplace today." (Darnell Testimony, page 5, lines 20-21) The only "technological advance" that Mr. Darnell purports lacking from BellSouth's cost studies is the deployment of so-called dual purpose line cards used in certain types of DLC equipment.

Dual purpose line cards allow provisioning of DSL service by providing DSLAM capabilities on the line card itself rather than via a stand-alone DSLAM. At present, there are no dual purpose line cards deployed in BellSouth's DLC equipment in Tennessee.

Notwithstanding that fact, Mr. Darnell's conclusion regarding these cards still is wrong for several reasons. First, dual purpose lines cards are not applicable to the cost development of voice grade UNEs. Second, a requirement to provide CLECs unbundled dual purpose line cards would in essence be a requirement to provide CLECs access to packet switching on an unbundled basis. The FCC, however, has specifically relieved ILECs of any obligation to unbundle packet switching if certain requirements are met. BellSouth's witness John Ruscilli discusses these requirements.

Mr. Darnell further claims that inclusion of these cards would "greatly increase the capacity of BellSouth Digital Loop Carrier (DLC) network" and that the "per voice grade equivalent feeder cost [would] dramatically decline." (Darnell Testimony, page 7, lines 3-4, 5-6) Mr. Darnell is wrong. In fact, deployment of dual purpose line cards would not increase the capacity of the DLC systems, nor would it reduce the cost of feeder on a per DS0 equivalent since an additional path is required from the remote terminal to the central office (i.e., the feeder portion of the loop) to carry the data (packet) traffic split by the dual purpose line card. Furthermore, the dual purpose line card consumes additional slots in the digital loop carrier system, thus reducing its capacity rather than increasing its capacity as Mr. Darnell incorrectly claims. Mr. Darnell's claim that "the capacity of the 2-wire copper distribution plant is greatly increased" is also untrue. (Darnell Testimony, page 7, lines 11-12) Introduction of DSL on a loop does not increase the distribution

plant's capacity. A dedicated path is still required from the RT to the NID at the customer's premises.

Q. MS. COLETTE DAVIS, TESTIFYING ON BEHALF OF COVAD, ON PAGES 24-27 OF HER TESTIMONY, STATES THAT BELLSOUTH STILL REFUSES TO PROVIDE DEMARCATION POINT INFORMATION IN ACCORDANCE WITH ITS INTERCONNECTION AGREEMENT WITH COVAD. DO YOU AGREE?

A. No. During the provisioning process for designed loops, BellSouth dispatches a technician. One of the functions performed during that dispatch is to tag the loop with relevant information. Generally, BellSouth does not dispatch a technician during the provisioning of Unbundled Copper Loops - Non-designed ("UCL-ND") loops. In these cases, where BellSouth has not dispatched a technician, BellSouth has no more information than does Covad as to where the exact demarcation point is located for a given loop. In the vast majority of cases, the demarcation point is located in office suites, individual apartments, etc. If Covad cannot find the demarcation point, its employees can contact BellSouth for further assistance and BellSouth will provide the Covad employees with the same information BellSouth provides it own employees.

I would note that a trial is presently underway in Georgia and Louisiana with expansion to BellSouth's entire region on July 29, 2002, to tag all UCL-ND loops. BellSouth believes this practice will resolve Covad's concerns in this regard. This change of practice will require a dispatch during the provisioning of every UCL-ND loop to tag the circuit. At this time, no extra charge will be assessed.

I have one more point that is germane to this issue. BellSouth created UCL-ND at the request of the CLECs. Because the loop is non-designed and there is no technician dispatched, there is no tag placed on the loop to mark the demarcation point. At some point, the CLECs complaints are based on things that are the result of BellSouth acceding to earlier demands of the CLECs. My concern about this situation where the CLECs find new problems every time BellSouth solves an earlier problem for them is compounded by the fact that through June 2002, there was only one (1) UCL-ND loop ordered by a CLEC in Tennessee.

CHECKLIST ITEM 8: WHITE PAGES LISTINGS

Q. ON PAGE 21 OF EXHIBIT 1 TO MR. IVANUSKA'S TESTIMONY ON BEHALF OF BIRCH, HE OUTLINES A DIRECTORY LISTINGS ISSUE THAT LED TO THE EXCLUSION OF SOME OF BIRCH'S CUSTOMERS' LISTINGS FROM THE BELLSOUTH DIRECTORY. PLEASE DESCRIBE THE ENVIRONMENT THAT CREATED THIS SITUATION.

A. The problem Mr. Ivanuska outlined was a result of two independent actions: (1) service orders being incorrectly issued by Birch which were identified and brought to Birch's attention by BellSouth's employees and (2) BellSouth's improper handling of partial migration orders. The result was the exclusion from the BellSouth white page directory of some listing information for a few of Birch's customers. In some cases, these listings were omitted from directories that were closed for publishing for the current year, even though each CLEC has the opportunity to review their customer listings prior to directory closing. BellSouth began formal discussions with Mr. Ivanuska on May 1, 2002, and

BellSouth Advertising and Publishing Corporation ("BAPCO") became involved on May 2, 2002. At that time, the problems were fully disclosed and understood by all parties.

Q. WHAT STEPS DID BELLSOUTH UNDERTAKE TO RESOLVE THIS SITUATION?

A. BellSouth worked with BAPCO to initiate an immediate manual intervention on all CLEC listing orders so that each listing could be verified as correct by each CLEC and thus be properly included in the appropriate directory listing information. BAPCO assigned a single point of contact in its customer service center for both Birch's employees as well as Birch's customers in order to ensure immediate attention to any problems referred to the single point of contact by Birch or by its affected customers. BAPCO, on its own, initiated an immediate distribution of Birch's listing records in all BellSouth directories and provided these records to Birch for its review and approval to ensure each customer's listing was included in all future directories.

Q. MR. IVANUSKA STATES THAT BELLSOUTH DID VERY LITTLE TO COMPENSATE BIRCH'S CUSTOMERS WHO HAD THEIR LISTINGS OMITTED FROM THE DIRECTORY. IS THIS TRUE?

A. Absolutely not. BAPCO offered a free bold listing in the next white page directory as well as a free Yellow Page™ listing in the same community directory as appropriate. BAPCO offered a free bold listing in an upcoming local directory that is in a market important to the customer and offered to assist Birch in scheduling and finalizing the decision on which directory to recommend based on the customer's desires. These offerings are consistent with compensation made to BellSouth retail customers with like

situations. To date, only four (4) Birch customers out of the eighteen (18) affected have contacted BAPCO concerning compensation. BellSouth has reached agreement with three (3) of those customers and is working towards agreement with the fourth customer. BellSouth regrets any inconvenience to Birch's customers but believes it responded appropriately.

Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes.

AFFIDAVIT

STATE OF: Georgia
COUNTY OF: Fulton

BEFORE ME, the undersigned authority, duly commissioned and qualified in and for the State and County aforesaid, personally came and appeared W. Keith Milner –Assistant Vice President – Interconnection Operations, BellSouth Telecommunications Inc., who, being by me first duly sworn deposed and said that:

He is appearing as a witness before the Tennessee Regulatory Authority in Docket No. 97-00309 on behalf of BellSouth Telecommunications, Inc., and if present before the Authority and duly sworn, his testimony would be set forth in the annexed testimony consisting of 20 pages and 1 exhibit(s).

W. Keith Milner

Sworn to and subscribed
before me on July 22, 2002

NOTARY PUBLIC

Notary Public, Gwinnett County, Georgia
My Commission Expires June 27, 2005

Tennessee Regulatory Authority
Docket No. 97-00309
Exhibit WKM-1

Transmittal Cover sheet for Milner Exhibit WMK-1

Glossary of Terms

ADSL.....Asymmetrical Digital Subscriber Line

ATM .....Asynchronous Transfer Mode

BAPCO...BellSouth Advertising and Publishing Corporation

CEV..... Controlled Environmental Vault

CLEC.....Competitive Local Exchange Carrier

DSLAM....Digital Subscriber Line Access Multiplexer

DSL..... Digital Subscriber Line

ISP.....Internet Service Provider

IXC.....Interexchange Carrier

NID.....Network Interface Device

NSP.....Network Service Provider

RT..... Remote Terminal

UCL-ND...Unbundled Copper Loop – Non Designed

UNE-P.....Unbundled Network Element - Platform

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'02 JUL 22 PM 1 47

July 22, 2002

EXECUTIVE SECRETARY

VIA HAND DELIVERY

Hon. Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *BellSouth Telecommunications, Inc.'s Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996*
Docket No. 97-00309

Dear Chairman Kyle:

Enclosed are five paper copies and a CD Rom version of BellSouth's Rebuttal Testimony for the following witnesses:

David Scollard	Alphonso Varner
Keith Milner	Ronald Pate
Milton McElroy	John Ruscilli
Al Heartley	Ken Ainsworth

Proprietary versions of the rebuttal testimony of John Ruscilli and Ken Ainsworth and the affidavits in Pate Exhibit RMP-1 filed recently with the FCC in connection with BellSouth's five state application contain proprietary information and are being submitted under separate cover subject to the terms of the Protective Order entered in this proceeding.

Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

455722

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2002, a copy of the foregoing document was served on the parties of record, via hand delivery, facsimile, overnight or US Mail, addressed as follows:

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ATTACHMENT "D"

ATTACHMENT "E"

PROPRIETARY

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Generic Docket to Establish UNE Prices for Line Sharing per FCC 99-355 and Riser Cable and Terminating Wire as Ordered in TRA Docket No. 98-00123*

Docket No. 00-00544

AFFIDAVIT OF WILLIAM J. McNAMARA, III

Appeared before me, WILLIAM J. McNAMARA, III, and testified as follows:

1. My name is William J. McNamara, III, and I am employed by BellSouth Telecommunications, Inc. My position at BellSouth is Research Director–Science and Technology, BellSouth Telecommunications, Inc. In the course of my work at BellSouth, I have personal knowledge regarding the matters described in this Affidavit.

2. BellSouth has not deployed NGDLC dual purpose line cards in its NGDLC systems anywhere in BellSouth's nine-state network, including in Tennessee. Indeed, BellSouth has only installed NGDLC dual purpose line cards at its technology laboratory in Atlanta, Georgia. Such installation is solely for technology evaluation and testing purposes.

3. During its technology evaluation, BellSouth has evaluated potential NGDLC dual purpose line card solutions and has determined that there are numerous issues that preclude use of the NGDLC dual purpose line cards at this time. I will discuss examples of these issues in the paragraphs below.

4. Currently, all of the NGDLC systems utilized in BellSouth's Tennessee network are produced by two manufacturers, Marconi Communications ("Marconi")

and Alcatel U.S.A ("Alcatel"). Currently, each of these companies supplies its own proprietary NGDLC single purpose line cards that must be used in its respective NGDLC system. For the foreseeable future, any NGDLC dual purpose line cards that might be deployed in these NGDLC systems would have to be obtained directly from the above-referenced manufacturers for use in their respective systems.

5. Turning first to the Marconi NGDLC system, BellSouth was provided with a developmental version of a NGDLC dual purpose line card that Marconi claimed would work in its NGDLC systems. Each developmental card was designed to serve two end users. Unfortunately, the card was designed in such a way that only one of the two end users could receive DSL service. In addition, in order to protect basic voice service, BellSouth required that the NGDLC dual purpose line card be capable of shutting off power to the DSL functionality in the event of a commercial power failure. The Marconi card did not have that capability.

6. Marconi has not produced any subsequent NGDLC dual purpose line cards for evaluation and does not have any NGDLC dual purpose line cards in commercial production. Marconi continues to work on a NGDLC dual purpose line card. The date such cards would be available is uncertain. Because BellSouth does not have a Marconi NGDLC dual purpose line card available for evaluation, it is impossible at this time to determine whether any further issues or problems may arise if and when Marconi delivers such a card for evaluation.

7. With regard to Alcatel line card systems, Alcatel has delivered a NGDLC dual purpose line card to BellSouth for BellSouth's evaluation. At this time, the Alcatel

NGDLC dual purpose line card cannot be deployed in BellSouth's network for the following reasons:

(a) The installation of the Alcatel NGDLC dual purpose line cards requires a software upgrade ("Release 11") to the Alcatel NGDLC systems. If the software upgrade is performed, BellSouth's TechNet terminal (a portable computer provided by Telcordia and used by BellSouth field technicians to provision service and to identify network problems affecting basic voice service) will no longer work on those Alcatel NGDLC systems. This means BellSouth's field technicians will not be able to use the TechNet terminals to provision service and diagnose and repair problems for customers served by the Alcatel NGDLC equipment, including customers who only obtain POTS service. Alcatel has acknowledged the problem and is working with Telcordia to determine the resolution but has been unable to provide a schedule under which this problem will be resolved. If BellSouth cannot use the TechNet terminals, it will result in delays for end user customers with provisioning needs and repair problems.

(b) Even if Alcatel could resolve the issues affecting the operation of the TechNet terminal, a second issue has been identified with Release 11, an issue that Alcatel has acknowledged but has been unable to resolve. BellSouth maintains records of the interface group through which each customer's service is provided. It does so by recording the number of the interface group to which the customer is assigned. Alcatel Release 11 changes the numbering of the interface groups. The consequence of this is that, if a customer served out of that system experienced a

problem, and a field technician were dispatched to repair that problem, the field technician using BellSouth's inventory records would be unable to identify the facilities serving the complaining customer. The result may be that the complaining customer's service is not repaired. Moreover, another customer, with functioning service, could find himself without service due to the attempt to repair the service of the complaining customer. These problems would arise whether the affected customers subscribe only to voice service or whether the customers subscribe to both voice and DSL service.

(c) Even if the other issues could be resolved, there are additional fundamental network architecture issues that Alcatel is aware of but has not yet resolved. In the absence of Alcatel's resolving those issues, BellSouth would be required to develop work arounds for provisioning, maintenance and repair. Such work arounds on BellSouth's part, if it were forced to put Alcatel's NGDLC dual purpose line card in its network, would take months to implement and would be incredibly inefficient. Specifically, BellSouth's existing network operating systems would have to be completely reworked in order to manually facilitate such work arounds. BellSouth expects that Alcatel will resolve its network architecture issue before BellSouth could implement these manual work arounds.

PROPRIETARY

FURTHER AFFIANT SAITH NOT.

William J. McNamara III

WILLIAM J. McNAMARA, III

Sworn to and subscribed before me, this 10 day of April, 2002.

Janice E Padgett

Notary Public

My Commission Expires:

Notary Public, Gwinnett County, Georgia
My Commission Expires Feb. 19, 2004

ATTACHMENT "F"

REQUEST: What is the total number of loops in Tennessee over which BellSouth currently provides Digital Subscriber Line (DSL) service of any kind or variety? In answering this question, please segregate your answer by Industrial/Consumer ADSL service on the one hand, and Business service ADSL on the other.

RESPONSE: The total number of loops in Tennessee over which BellSouth currently provides Digital Subscriber Line (DSL) service of any kind or variety is:

Residential (Industrial – 1.5 x 256K speed): 51,868
Business (all other speeds): 89

ATTACHMENT "G"

REQUEST: How many BellSouth FastAccess Internet Service customers are served through Digital Subscriber Line Access Multiplexers (DSLAMs) deployed in BellSouth Remote Terminals in Tennessee?

RESPONSE:

15,438 DSL circuits have been provisioned on behalf of BellSouth FastAccess Internet Service customers served through DSLAMS collocated at BellSouth remote terminals in Tennessee.

ATTACHMENT "H"

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth Telecommunications, Inc.'s Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996*

Docket No. 97-00309

SETTLEMENT AGREEMENT

In Docket No. 97-00309, the undersigned parties and BellSouth agree to the following:

1. The record in Docket No. 97-00309 will be closed as of July 31, 2002. No party will submit any further testimony, documentary evidence, argument, briefs, or opposition in this docket for consideration of the Tennessee Regulatory Authority. All of the parties agree to submit this case to the Directors for consideration and determination on its merits based on the existing record. The parties request that the Authority hold its public deliberations at a special session on August 26, 2002.

2. The parties agree that Docket No. 01-00362 ~~shall remain open for issues related to the performance of BellSouth's operational support systems. This docket shall not be used for challenges to BellSouth's compliance with 47 U.S.C. §271(c).~~ should be closed but the undersigned parties agree that this will not prevent any party from filing a complaint with the TRA regarding BellSouth's OSS and in such case all parties will urge the TRA to resolve such complaint on an expedited basis. No party shall file any complaint ~~in Docket No. 01-00362~~ regarding OSS prior to entry of an order by the TRA reflecting the TRA's

decision whether or not to recommend approval of BellSouth's 271 application.

3. In resolution of the contested issues in Docket 01-00193, the parties will request the Authority to adopt as the "Tennessee Performance Assurance Plan" the identical service quality measurement plan and self-effectuating enforcement mechanism adopted by the Florida Public Service Commission in Docket No. 000121-TP on February 14, 2002, as it exists today and as it may be modified in the future, plus the Tennessee Performance Measurements for Special Access contained in the Order Setting Performance Measurements, Benchmarks and Enforcement Mechanisms issued in this docket on June 28, 2002, as set forth in exhibit B to that order. If the FCC adopts national special access measurements, the parties reserve the right to argue to the TRA as to whether the FCC measures should supercede the Tennessee Measurements. The parties agree that the "Tennessee Performance Assurance Plan" will become effective no later than December 1, 2002. The parties further agree that until the "Tennessee Performance Assurance Plan" is implemented, BellSouth can use, on an interim basis, the "Georgia Performance Plan" approved by the FCC in BellSouth's Georgia/Louisiana 271 application. The parties agree that the "Tennessee Performance Assurance Plan," as defined above, shall continue until at least December 1, 2003, at

which time the Authority at its discretion may conduct a review of the then-existing plan, accept recommendations from interested parties, and make any appropriate modifications.

4. The CLECs may request that the TRA open a generic contested case proceeding to address expeditiously the issue of BellSouth's provision of DSL service to CLEC voice customers and related OSS issues. BellSouth may raise any and all defenses to such complaint. Bellsouth will not oppose expedited treatment of such complaint.

5. This agreement is solely for the purpose of settling this docket in Tennessee. Nothing in this agreement restricts the right of any party to take a contrary position in any other forum. The intervening parties and BellSouth agree that the fact that this case was resolved without further hearings will not be used as a basis for opposing Bellsouth's Tennessee 271 application at the FCC or for criticizing the TRA's recommendation of BellSouth's 271 application at the FCC. In the event that the TRA declines to act consistently with any portion of this agreement, then the agreement shall be void and shall in no manner be binding upon any party to this agreement.

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

Its: General Counsel - TN

XO TENNESSEE, INC.

Withdrawn

By: _____

Its: atty

TIME WARNER TELECOM OF THE MID-SOUTH, LP; NEW SOUTH COMMUNICATIONS CORP.

By: _____

Its: Attorney

MCI WORLDCOM, INC.; MCImetro ACCESS TRANSMISSION SERVICES, LLC; BROOKS FIBER COMMUNICATIONS OF TENNESSEE, INC.

By: _____

Its: Attorney

INTERMEDIA COMMUNICATIONS, INC.

WITHDRAWN

By: _____

Its: atty

DIECA d/b/a COVAD COMMUNICATIONS COMPANY

By: William H. Weber

Its: Vice President, External Affairs

ICG TELECOM GROUP, INC.

Withdrawn

By: _____

Its: _____

SOUTHEASTERN COMPETITIVE CARRIERS ASSOCIATION

Withdrawn

By: _____

Its: atty

SPRINT COMMUNICATIONS, LP

NOT PRESENT DURING HEARING DATES

By: _____

Its: _____

QWEST f/k/a LCI INTERNATIONAL TELECOM CORP.

By: JUST MONITORING

Its: H. [signature]

BELLSOUTH LONG DISTANCE, INC.

By: Herb Hartsoe by J. Phillips Not express permission

Its: General Counsel

KMC TELECOM III, INC.;
KMC TELECOM IV, INC.

NOT PARTY TO AGREEMENT; SEE STATEMENT IN RECORD & PAGE 7 OF THIS AGREEMENT

By: _____

Its: H. [signature]

COMMUNICATIONS WORKERS OF AMERICA

NOT PRESENT DURING HEARING DATES

By: _____

Its: _____

SBC TELECOM

By: Just monitoring

Its: _____

ASSOCIATION OF COMMUNICATIONS ENTERPRISES

NOT PRESENT DURING HEARING DATES

By: _____

Its: _____

ITC^DELTACOM

By: [signature]

Its: atty

US LEC OF TENNESSEE, INC.

withdrawn

By: _____

Its: attorney

AMERICAN COMMUNICATIONS SERVICES, INC.

withdrawn

By: _____

Its: atty

BIRCH TELECOM OF THE SOUTH, INC.

By: _____

Its: attorney

ERNEST COMMUNICATIONS, INC.

By: _____

Its: atty

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth Telecommunications, Inc.'s Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996*

Docket No. 97-00309

AT&T is not a party to this agreement, but AT&T will agree that this matter may be submitted to the Authority on the current record without further submissions or hearings.

AGREED TO:

AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, LLC; TCG MIDSOUTH, INC.

By: MA Watt

Its: Counsel

KMC TELECOM TAKES THE SAME POSITION AS AT&T.

KMC TELECOM III, INC. +

KMC TELECOM IV, INC.

by: H. LaDon Baltimore

ITS COUNSEL