BELLSOUTH TELECOMMUNICATIONS, INC.

REBUTTAL TESTIMONY OF JOHN A. RUSCILLI

BEFORE THE TENNESSEE REGULATORY AUTHORITY

DOCKET NO. 97-00309

JULY 22, 2002

PUBLIC 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

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[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 ** ** local access lines in Tennessee, which is slightly more than ** ** 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 ** ** 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 <u>never</u> 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 <u>Georgia</u> … may never make it to Florida."

(Emphasis added). The letter further states that "[o]ther states such as <u>Georgia</u> have set <u>economically viable</u> 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 <u>not</u> 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 <u>all</u> 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, <u>with one exception</u>, 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 <u>not</u> 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

[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) <u>only in the very limited circumstances</u> 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.

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[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 #455688

<u>AFFIDAVIT</u>

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