Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by BellSouth Corporation,	)	
BellSouth Telecommunications, Inc., and	)	
BellSouth Long Distance, Inc., for	)	CC Docket No. 97-208
Provision of In-Region, InterLATA	)	
Services in South Carolina	)	
	)	

EVALUATION OF THE UNITED STATES DEPARTMENT OF JUSTICE

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Summary of Evaluation

BellSouth's application to provide in-region interLATA service in South Carolina should be denied.

Applications under section 271 should be granted only when the local markets in a state have been fully and irreversibly opened to competition. This standard seeks to ensure that the barriers to competition that Congress sought to eliminate in the 1996 Act have in fact been fully eliminated and that there are objective criteria to ensure that competing carriers will continue to have nondiscriminatory access to the facilities and services they will need from the incumbent BOC.

At this time, BellSouth faces no significant competition in local exchange services in South Carolina. Lacking this best evidence that the local market has been opened to competition, the Department cannot conclude that its competition standard is satisfied unless BellSouth shows that significant barriers are not impeding the growth of competition in South Carolina. BellSouth has not done so in this application.

BellSouth has failed to demonstrate that it offers access to unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide telecommunications service, as required by the 1996 Act.

It has also failed to demonstrate its ability to provide adequate, nondiscriminatory access to the operations support systems that will be critical to competitors' ability to obtain and use unbundled elements and resold services.

It has failed to demonstrate that it offers cost-based prices for unbundled network elements that permit entry and effective competition by efficient competitors.

And, it has failed to measure and report all of the indicators of wholesale performance that are needed to demonstrate that it is currently providing adequate access and interconnection and to ensure that acceptable levels of performance will continue after section 271 authority is granted.

Competitive benefits in markets for interLATA services do not justify approving this application before BellSouth's local market has been fully and irreversibly opened to competition. BellSouth's estimates of the magnitude of those benefits rest on unconvincing analytical and empirical assumptions, but more importantly, its analysis fails to give adequate consideration to the more substantial benefits from increased competition in local markets that will be gained by requiring that local markets be opened before allowing interLATA entry.

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EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

The United States Department of Justice ("the Department"), pursuant to Section 271(d)(2)(A) of the Telecommunications Act of 1996 ("1996 Act" or "Telecommunications Act"),[1] submits this evaluation of the application filed by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively "BellSouth") on September 30, 1997, to provide in-region, interLATA telecommunications services in the state of South Carolina.

As the Department has previously explained, in-region interLATA entry by a Bell Operating Company ("BOC") should be permitted only when the local markets in a state have been fully and irreversibly opened to competition.[2] This standard seeks to ensure that the

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[1] Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in various sections of 47 U.S.C.).

[2] This open market standard is explained more fully in Application of SBC Communications, Inc. et al., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in the State of Oklahoma, Evaluation of the United States Department of Justice, CC Docket No. 97-121, at vi-vii and 36-51 (May 16, 1997) ("DOJ Oklahoma Evaluation") and in the Affidavit of Marius Schwartz ("Schwartz Aff."), attached to the instant Evaluation as Exhibit 1. Other aspects of the Department's criteria for evaluating applications under section 271 are addressed in the DOJ Oklahoma Evaluation and in

barriers to competition that Congress sought to eliminate in the 1996 Act have in fact been fully eliminated and that there are objective criteria to ensure that competing carriers will continue to have nondiscriminatory access to the facilities and services that they will need from the incumbent BOC.

In applying this standard, the Department will consider whether all three entry paths contemplated by the 1996 Act -- facilities-based entry involving construction of new networks, the use of unbundled elements of the BOC's network, and resale of the BOC's services -- are fully and irreversibly open to competitive entry to serve both business and residential consumers. To do so, the Department will look first to the extent of actual local competition as the best evidence that local markets are open. The degree to which such entry is broad-based will determine the weight the Department places on it as evidence. If broad-based commercial entry involving all three entry paths has not occurred, the Department will examine competitive conditions to see whether significant barriers continue to impede the growth of competition and whether benchmarks to prevent backsliding have been established. Wherever practical, this examination will focus on the history of actual commercial entry. The experience of competitors seeking to enter a market can provide highly probative evidence concerning barriers to entry, or the absence thereof. However, we do not regard competitors' small market shares, or even the absence of entry, standing alone, as conclusive evidence that a market remains closed to competition, or as a basis for denying an application under section 271. For a variety of reasons, potential competitors may not immediately seek to use all entry paths in all states, even if the barriers to doing so have been removed, and a BOC's entry into interLATA services should not be delayed because of the business strategies of its competitors.

Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Michigan, Evaluation of the United States Department of Justice, CC Docket No. 97-137 (June 25, 1997) ("DOJ Michigan Evaluation").

At this time, BellSouth faces no significant competition in local exchange services in South Carolina. Lacking this best evidence that the local market has been opened to competition, the Department cannot conclude that our competition standard is satisfied unless BellSouth proves that significant barriers are not impeding the growth of competition in South Carolina. That it has failed to do. Although BellSouth asserts that it has met the checklist and public interest requirements of section 271, but that assertion rests in large measure on BellSouth's view as to the nature of those requirements -- a view that is often at odds with the plain language of the statute and with the Commission's prior decisions, as well as the 1996 Act's underlying competition policy on which the DOJ bases its evaluation. While we believe that BellSouth has made important progress towards fulfilling its responsibilities under the Telecommunications Act to open its local markets to competition, the evidence available in the present application falls well short of demonstrating compliance with several critical prerequisites for approval. In particular, BellSouth:

- Has failed to demonstrate that it offers access to unbundled network elements "in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service," as required by the 1996 Act. 47 U.S.C. §251(c)(3).
- Has failed to demonstrate its ability to provide adequate, nondiscriminatory access to the operations support systems that will be critical to competitors' ability to obtain and use unbundled elements and resold services.
- Has failed to demonstrate that it offers cost-based prices for unbundled network elements that permit entry and effective competition by efficient competitors.
- Has failed to measure and report all of the indicators of wholesale performance that are needed to demonstrate that it is currently providing adequate access and interconnection and to ensure that acceptable levels of performance will

continue after section 271 authority is granted.

We discuss each of these deficiencies below, after addressing the threshold question of BellSouth's eligibility to apply under either Track A or Track B.

I. The Department Is Unable to Determine BellSouth's Eligibility to Use Track B Because the Record at This Stage of the Proceeding Is Ambiguous and Incomplete

Section 271(c)(1) of the 1996 Act requires the BOC seeking in-region interLATA authority to meet the requirements of either subparagraph (A) ("Track A") or subparagraph (B) ("Track B"). BellSouth contends that its 271 application should proceed under Track B, but also asserts in the alternative that it may satisfy Track A. The Department is not able to determine BellSouth's eligibility to proceed under Track B because the record contains little evidence on a key factual question necessary for such a determination. The additional information submitted in Reply Comments in this proceeding will permit the FCC to make a more informed judgment on this question. We conclude that BellSouth is not eligible to proceed under Track A.

A. It Is Not Clear Whether BellSouth Has Received a "Qualifying Request" for Access and Interconnection

Section 271(c)(1)(B) of the 1996 Act allows a BOC to seek entry under Track B if, among other things, it has not received a qualifying request for "the access and interconnection described in [section 271(c)(1)(A)]."[3] A "qualifying request," i.e., a request

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[3] Another prerequisite for a Track B application is that the BOC's Statement of Generally Available Terms and Conditions ("SGAT") has been approved or permitted to take effect by the applicable state regulatory commission. As BellSouth notes in its application, the Public Service Commission of South Carolina ("SCPSC") approved, with modifications, BellSouth's initial SGAT on July 20, 1997, and issued its written order on July 31, 1997. Public Service Commission of South Carolina, In re Entry of BellSouth Telecommunications, Inc., into InterLATA Toll Market, Docket No. 97-101-C, Order Addressing Statement and Compliance with Section 271 of the Telecommunications Act of 1996, Order No. 97-640 (July 31, 1997) ("SCPSC Order"). The SGAT accompanying BellSouth's application reflects further modifications and was approved by the SCPSC on September 9, 1997. The SGAT approved for purposes of BellSouth's South Carolina section 271 application was received by the SCPSC on Sept. 19, 1997. AT&T has appealed the SCPSC Order, but has not sought a stay of that decision. See AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., No. 3:97-2388-17 (D.S.C. filed Aug. 8, 1997). Given the status of that appeal, we do not dispute

that would preclude an application under Track B, is a "request for negotiation to obtain access and interconnection that, if implemented, would satisfy the requirements of section 271(c)(1)(A)."[4] A "qualifying request" must be from an "unaffiliated competing provider that seeks to provide the type of telephone exchange service described in section 271(c)(1)(A)."[5] In other words, the requesting carrier must intend to provide telephone exchange service to residential and business customers exclusively over its own facilities or predominantly over its own facilities in combination with the resale of another carrier's services. That request, however, "need not be made by an operational competing provider ... [but] may be submitted by a potential provider of telephone exchange service to residential and business subscribers."[6] In order to be a "qualifying request," the request must have been made at least three months prior to the BOC's application for interLATA authority.[7] Since BellSouth filed this application on September 30, 1997, an otherwise qualifying request is timely if made on

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that BellSouth has satisfied the approved SGAT requirement of section 271(c)(1)(B).

Section 271(c)(1)(B) also provides two exceptions that would permit a BOC to proceed under Track B despite having received what would otherwise constitute a "qualifying request"-- if a state commission certifies that the prospective competing providers making such requests "(i) failed to negotiate in good faith ..., or (ii) violated the terms of an agreement ... [by failing] to comply, within a reasonable period of time, with the implementation schedule contained in such agreement." 47 U.S.C. §271(c)(1)(B). No CLECs have been so certified by the SCPSC, and, therefore, these exceptions do not provide a basis for a Track B application by BellSouth.

[4] In re Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma, Memorandum Opinion and Order, ¶ 27, 12 FCC Rcd 8685 (1997) ("Oklahoma Order").

[5] Id.

[6] Id. BellSouth asserts that the FCC's position on this point is incorrect and asserts that Track B is foreclosed only if the BOC has received a request from a qualifying competing provider that actually meets the criteria of Track A. The Department disagrees with BellSouth's interpretation of the 1996 Act and concurs with the Commission's position.

[7] 47 U.S.C. §271(c)(1)(B): "A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1) of this section ... ."

or before June 30, 1997.

The Commission has recognized that the requirements of Track B will sometimes require a "difficult predictive judgment to determine whether a potential competitor's request will lead to the type of telephone exchange service described in section 271(c)(1)(a)."[8] Such a predictive judgment is required here with respect to ITC DeltaCom, Inc. ("DeltaCom").

DeltaCom is a regional carrier which provides long distance, access, and several other telecommunications services over its fiber-optic network in ten southeastern states, including South Carolina. In September 1996, DeltaCom applied to the SCPSC for certification to provide alternative local exchange telecommunications services in South Carolina and by January 1997 was certified. In March 1997, DeltaCom signed a negotiated interconnection agreement with BellSouth, that the SCPSC then approved in early April.[9] In the second quarter of 1997, DeltaCom announced its intention to offer local exchange service throughout its service area, including South Carolina. Moses Aff. ¶ 21. In August 1997, the SCPSC approved DeltaCom's tariff for both business and residential local exchange service offerings.[10] DeltaCom's affidavit in this proceeding states that it "has been financially committed to provide wire-line residential and business local exchange services throughout the State of South Carolina, and has been engaged in reasonable efforts to do so for some time. In addition ... although DeltaCom does not provide residential facilities-based services in South Carolina to date, it intends to do so under its South Carolina business plan ... ."[11]

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[8] Oklahoma Order ¶ 57.

[9] Affidavit of Steven D. Moses on Behalf of ITC DeltaCom, Inc. ¶ 21 ("Moses Aff."), attached to Comments of the Association for Local Telecommunications Services, CC Docket No. 97-208 (Oct. 20, 1997) ("ALTS Comments").

[10] Affidavit of Gary M. Wright ¶ 21 ("Wright Aff."), attached to Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208 (Sept. 30, 1997) ("BellSouth Brief"), as Appendix A-Volume 5, Tab 16.

[11] Moses Aff. ¶ 22.

DeltaCom provides additional information relating to its South Carolina business plans in a confidential exhibit attached to the Moses Affidavit filed with the Commission.

The record indicates that DeltaCom requested access and interconnection within the time period relevant for Track B[12] and that it is taking reasonable steps towards providing telephone exchange service in South Carolina, exclusively or predominantly using its own facilities. DeltaCom has an approved interconnection agreement, is certified as a CLEC, has substantial telecommunication facilities in place in South Carolina, and has an effective tariff for both residential and business local exchange services.[13] There is very little evidence, however, concerning DeltaCom's plans or efforts to provide "*residential* and business" service, as is required if DeltaCom's request is be considered a "qualifying request." DeltaCom provides little beyond its statement that it intends to offer residential service, and its statement is silent as to when it intends to do so.[14]

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[12] Neither DeltaCom nor BellSouth indicates when DeltaCom initially made its request for access and interconnection from BellSouth for South Carolina, but it is reasonable to assume that such request took place prior to its March, 1997 interconnection agreement with BellSouth, and hence prior to the June 30, 1997 cut-off date for "qualifying requests."

[13] See DeltaCom Confidential Exhibit ¶¶ 1-3.

[14] In a recent SEC filing, DeltaCom has indicated that it intends to provide business service but has made no mention of its residential service plans. Amendment No. 3 to Form S-1 Registration Statement Under the Securities Act of 1933, ITC /\ DeltaCom, at 3 (Oct. 22, 1997).

Several carriers in addition to DeltaCom claim they have submitted "qualifying" requests, but the statements of these other carriers appear to be even more ambiguous than DeltaCom's statements with respect to the provision of exclusively or predominantly facilities-based service, and whether and when service will be provided to residential customers. ACSI states that it "will provide facilities-based service to residential callers through multi-tenant dwelling units ("MDUs") and shared tenant service ("STS") providers where it makes economic sense." Affidavit of James C. Falvey ¶ 11 ("Falvey Aff."), attached to Opposition of ACSI, CC Docket No. 97-208 (Oct. 20, 1997) ("ACSI Opposition"), as Appendix A, Exhibit 1. AT&T states an "intention to serve residential and business customers throughout the region using unbundled network elements, resale, and interconnection" -- but not clearly indicating whether its service would be predominantly facilities-based -- and states that implementation of its request would have "enabled AT&T" to provide the service described in section 271(c)(1)(A). Comments of AT&T Corp. in Opposition to BellSouth's Section 271 Application for South Carolina, CC Docket No. 97-208, at 50 (Oct. 20, 1997) ("AT&T Comments"). While MCI intends to provide local telecommunications services to both business and residential customers through its own switches and other facilities, MCI has stated that it will not "expand into the

The Commission has indicated that in evaluating whether a request is a "qualifying request" it may consider whether the requester "is taking reasonable steps toward implementing its request in a fashion that will satisfy section 271(c)(1)(A)."[15] Such an inquiry is appropriate, and indeed is implicit in the Commission's conclusion that a qualifying request must be from a carrier "that seeks to provide the type of telephone exchange service described in section 271(c)(1)(A)."[16] It would be difficult to conclude that a carrier "seeks to provide" service if it is not taking reasonable steps to do so. Moreover, such a conclusion would not be warranted unless the requesting carrier intends to provide such service within a specified and reasonable time frame, against which the carrier's reasonable steps may be evaluated. Absent requirements of this kind, a BOC's ability to use Track B could be foreclosed indefinitely by the inaction of its competitors, contrary to the purpose of Track B.[17]

As noted above, there is very little evidence before the Commission at this time on which to evaluate DeltaCom's intentions and efforts to provide residential service. Nor is there any evidence on these issues in the state proceedings. The SCPSC refused to consider whether BellSouth was eligible to proceed under Track A or Track B, concluding that such questions "should be deferred to the FCC, since Federal law is involved in this issue."[18] In a

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other states in BellSouth's region" until BellSouth has complied with the 1996 Act's requirements in Georgia. Declaration of Marcel Henry on Behalf of MCI Telecommunications Corporation, attached to Comments of MCI Telecommunications Corporation, CC Docket No. 97-208, ¶ 15 (Oct. 20, 1997) ("MCI Comments"). Additional information in Reply Comments may also clarify whether and when these carriers seek to provide the types of service required under Track A.

[15] Oklahoma Order ¶ 58.

[16] Oklahoma Order ¶ 27.

[17] Oklahoma Order ¶¶ 54-56.

[18] Public Service Commission of South Carolina, In re Entry of BellSouth Telecommunications, Inc. into InterLATA Toll Market, Order Denying Petition For Rehearing or Reconsideration, Docket No. 97-101-C, Order No. 97-575, at 1 (July 7, 1997), attached to this Evaluation as Exhibit 4.

subsequent order addressing BellSouth's compliance with section 271, the SCPSC offered a "Review of Competition in South Carolina" in which it concluded that "none of BST's potential competitors are taking any reasonable steps towards implementing any business plan for facilities-based local competition for business and residential customers in South Carolina."[19] However, this conclusion is of limited value in assessing whether DeltaCom submitted a "qualifying request" since the SCPSC did not expressly address Track B issues[20] and because DeltaCom's statements concerning its plans to provide business and residential service in South Carolina were not in the record before the SCPSC. Moreover, since these issues were not considered in the state proceedings, DeltaCom's statements concerning its plans to provide residential service were first made available to BellSouth when DeltaCom submitted its affidavit in this proceeding. Thus, the record available to the Department at this time does not include any response from BellSouth to this affidavit.[21]

Because the present record on this critical issue is so sparse, the Department is unable to determine whether DeltaCom has submitted a "qualifying request," and therefore whether BellSouth is foreclosed from applying under Track B. The Commission will be in a better

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[19] SCPSC Order at 19.

[20] The SCPSC's conclusion is also of limited value in assessing whether AT&T or MCI have submitted "qualifying requests" since the SCPSC does not indicate, in reaching its conclusion, whether it regarded competitors which used unbundled network elements obtained from BellSouth to be using their "own" facilities. The FCC decided that unbundled elements obtained from a BOC would be regarded as a competing carrier's own facilities for purposes of assessing Track A and Track B issues after the SCPSC Order. See In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, Memorandum Opinion and Order, CC Docket No. 97-137, FCC 97-298, ¶ 101 ("Michigan Order").

[21] Because evidence that has been submitted to the FCC but not to the relevant state commission does not give the Department an opportunity to assess other parties' responses to that evidence and is not subject to cross-examination, as is often the case in state commission proceedings, such evidence often will be less persuasive to the Department than evidence which was first presented to the state commission. Because of the important role of state commissions in the section 271 process, we strongly encourage all interested parties to participate fully in state 271 proceedings, and urge the Commission to take any appropriate steps to encourage such participation.

position to assess this issue after receiving Reply Comments from BellSouth and other parties, which may provide additional information on this important issue.

B. The Requirements for a Track A Application Have Not Been Satisfied

BellSouth asserts in the alternative that it may be eligible to apply under Track A, which requires a demonstration that the BOC "is providing access and interconnection," pursuant to binding agreements approved under section 252, to "one or more unaffiliated competing providers of telephone exchange service ... to residential and business subscribers." Moreover, the competing providers must be providing local exchange service "exclusively" or "predominantly over their own telephone exchange service facilities."[22]

BellSouth acknowledges that it is unaware of any facilities-based providers that would satisfy the requirements of Track A but asks the Commission to conduct an inquiry into the status of such competition in South Carolina. There is no evidence in BellSouth's application -- or elsewhere in the record -- of the existence of such an operational provider in South Carolina at this time. Therefore, the requirements of Track A have not been satisfied.

II. BellSouth Has Failed to Demonstrate That It Is Offering Access and Interconnection That Satisfy the Checklist Requirements

Even if the Commission concludes that BellSouth may proceed under Track B, it should deny this application. BellSouth has not demonstrated that it is offering access and interconnection that satisfy critical requirements of the competitive checklist that are needed to fully open South Carolina's markets to competition.[23]

A. BellSouth Must Demonstrate That Each Checklist Item Is Legally and Practically Available to Competitors

Under Track B, as well as under Track A, an applicant is required to show that each

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[22] 47 U.S.C. §271(c)(1)(A).

[23] We express no view as to BellSouth's compliance or non-compliance with checklist requirements that are not specifically addressed in this Evaluation.

checklist item is available both as a legal matter and as a practical matter.[24] These requirements are clearly suggested by the statutory reference to "statements of generally available terms." This language indicates that checklist items must be *generally* offered to all interested carriers, be genuinely *available*, and be offered at concrete *terms*. A mere paper promise to provide a checklist item, or an invitation to negotiate, would not be a sufficient basis for the Commission to conclude that a BOC "is generally offering" all checklist items.[25] Nor would such paper promises provide any basis for the Department to conclude that the market had been fully opened to competition. Even in Track B states, where there has been no request for access and interconnection to a facilities-based provider seeking to provide residential service, the legal and practical availability of all checklist items will be important to competition, since competitors may need such access and interconnection in the future, as well as to compete now to provide resale service, and service of all kinds to business customers.[26]

B. The FCC May Rely on the Conclusions of State Commissions and the Department of Justice in Making Its Determinations

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[24] Although we disagree with BellSouth's assertion that it has satisfied this standard in South Carolina, we do not understand BellSouth to disagree that this is the standard it is legally obligated to meet. See, e.g., BellSouth Brief at 17 (all checklist items are "ready and waiting"); 19 (checklist items are available today); 33 (checklist satisfied by virtue of "legally binding offerings of its Statement and BellSouth's extensive, successful efforts to make the required items available in practice").

[25] The Commission has previously decided that the statutory distinction between "providing" (under Track A) and "offering" (under Track B) does not suggest a distinction in the meaning of those terms, but reflects merely the distinction between situations where a BOC "furnishes or makes . . . available pursuant to state-approved interconnection agreements" and situations where the BOC "makes . . . available pursuant to a statement of generally available terms." Michigan Order ¶ 114.

[26] The importance in general of ensuring that the necessary arrangements for local competition are in place before section 271 entry has been granted underscores the importance of scrutinizing an SGAT carefully to ensure that all significant issues are clearly resolved before a BOC can receive section 271 entry under Track B, because, post-entry, a BOC would clearly have an increased incentive to delay compliance by prolonging both (1) negotiations with competitors, and (2) the implementation of any necessary measures that would enable competition to take root. See, e.g., Schwartz Aff. at ¶¶ 9-24, 155-156, 180-190.

In making determinations regarding checklist compliance, the Commission of course must consider the evidence presented by the applicant and other parties. In addition, the 1996 Act requires that, before making any determination under section 271(d), the Commission shall consult with the commission of the state that is the subject of the application "in order to verify the [BOC's] compliance" with the checklist requirements. 47 U.S.C. §271(d)(2)(B). It also requires the Commission to consult with the Attorney General, and to give "substantial weight" to the Attorney General's evaluation of an application. 47 U.S.C. §271(d)(2)(A). Notwithstanding these consultation requirements, under the plain language of the 1996 Act, *the Commission* must determine checklist compliance; it "shall not approve . . . an application . . . unless *it* finds"[27] checklist compliance, in addition to compliance with section 272 requirements and the public interest standard.

While the Commission must make its own findings on all section 271 issues, a state commission's evaluation of BOC compliance with the checklist may provide valuable assistance to the Commission in the section 271 process. Indeed, to the extent the state commission (1) has applied the proper legal standards, consistent with the 1996 Act and any applicable Commission regulations, and (2) has made reasoned decisions based on an adequate record, the Commission may properly rely on a state commission's conclusion as a basis for its own determinations concerning checklist compliance.

The Commission also may rely on the conclusions of the Department of Justice as a basis for its own determinations. However, the role of the Department differs from that of the state commissions in three respects. First, a state commission may limit its assessment of checklist compliance to evidence of conditions within its state. However, some checklist determinations -- such as determinations on OSS issues, where each of the BOCs generally has deployed a single region-wide system -- may as a practical matter require determinations

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[27] 47 U.S.C. §271(d)(3) (emphasis added).

that affect states throughout a BOC's entire region. In considering such issues, the Commission may confront situations in which one state concludes that a BOC's OSS arrangements comply with the checklist, while another state examining the same arrangements finds checklist deficiencies. The Department will apply a uniform standard for all states in a BOC's region, and a uniform standard that applies to all BOCs. Second, the 1996 Act requires the Commission to consult with states only on issues of checklist compliance; the obligation to consult with the Department is not limited in this manner. Third, the 1996 Act does not require the Commission to give special weight to state commission views, but requires the Commission to give "substantial weight" to the evaluation of the Attorney General.

C. BellSouth Has Not Demonstrated That It Is Providing Access to Network Elements in a Manner That Allows Requesting Carriers to Combine Them

Section 251(c)(3) requires incumbent LECs to provide unbundled network elements "in a manner that allows requesting carriers to combine such elements in order to provide ... telecommunications service." BellSouth has failed to show that it is offering or providing access to unbundled elements in accordance with this requirement.[28] Its interconnection agreements and its SGAT fail to state adequately the terms and conditions under which BellSouth will provide unbundled elements so that they may be combined, and BellSouth has also failed to demonstrate that it has the practical ability to provide unbundled elements to requesting carriers with satisfactory performance in commercial quantities.

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[28] 47 U.S.C. §271(c)(2)(B)(ii) sets forth the general requirement that the BOC's access and interconnection agreements or statement of terms include "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." In addition, the competitive checklist specifically requires the provision of "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services" (47 U.S.C. §271(c)(2)(B)(iv)), "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services" (47 U.S.C. §271(c)(2)(B)(v)), "[l]ocal switching unbundled from transport, local loop transmission, or other services" (47 U.S.C. §271(c)(2)(B)(vi)), and "[n]ondiscriminatory access to databases and associated signaling necessary for call routing and completion" (47 U.S.C. §271(c)(2)(B)(x)).

1. The SCPSC Has Made No Specific Findings as to Whether BellSouth Is Offering Unbundled Network Elements in a Manner That Allows Them to Be Combined

In Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997) ("Iowa Utilities Board"), the Eighth Circuit upheld many of the Commission's regulations defining and mandating access to unbundled network elements, and rejected many of the arguments against those regulations that would have limited the ability of competing carriers to use combinations of network elements.

The Court held that the Commission properly defined network elements to include more than the "physical components of an incumbent LEC's network that are directly involved in transmitting a phone call from one person to another," specifically noting that elements could include "the technology and information used to facilitate ordering, billing, and maintenance of phone service," even if some of those elements might also be characterized as "services." Id. at 808.

The Court also held that "a competing carrier may obtain the ability to provide telecommunications services entirely through an incumbent LEC's unbundled elements." Id. at 814 (emphasis added). It therefore rejected the arguments of incumbent LECs that competing carriers should be required to use facilities of their own, in addition to whatever unbundled elements they obtained from incumbents, to offer "finished services." Id.

The Court, however, invalidated the Commission's rules which required incumbents to combine network elements at the request of competing carriers, id. at 813, and, in the order on rehearing, section 51.315(b) of the Commission's rules, which prohibited the separation of existing combinations of elements. Iowa Utilities Board v. FCC, No. 96-3321, Order On Petitions For Rehearing, 1997 WL 658718, at *2 (8th Cir. Oct. 14, 1997). In doing so, however, it recognized the explicit statutory requirement that unbundled elements be provided

in a manner that allows requesting carriers to combine such elements, noting that "the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them." Iowa Utilities Board, 120 F.3d at 813.

Prior to the Iowa Utilities Board decision, BellSouth and the SCPSC had taken the position that new entrants could not order unbundled network elements which when combined would permit them to offer services duplicating BellSouth's retail services. BellSouth's initial South Carolina SGAT and interconnection agreements provided that BellSouth would provision and bill requests for combinations of network elements as resale orders. Because this initial SGAT did not permit competitors to combine network elements to provide finished services, there was no basis for presenting evidence -- either in the hearings leading up to the approval of the initial SGAT or in the SCPSC arbitration proceedings -- concerning the manner in which BellSouth would provide separated network elements so that entrants could combine them, or whether BellSouth had the practical ability to do so.

After the Iowa Utilities Board decision, BellSouth submitted and the SCPSC approved a revised South Carolina SGAT on which BellSouth relies for this section 271 application. No additional hearings were held on this revised SGAT, and the SCPSC order approving the revised SGAT contains no discussion or specific findings that its provisions would allow requesting carriers to combine network elements in a reasonable and nondiscriminatory manner. BellSouth addresses the provision of unbundled elements in a manner that permits them to be combined in section II.F. of this revised SGAT, which states:

> CLEC-Combined Network Elements
>
> 1. CLEC Combination of Network Elements. CLECs may combine BellSouth network elements in any manner to provide telecommunications services. BellSouth will physically deliver unbundled network elements where reasonably possible, e.g., unbundled loops to CLEC collocation spaces, as part of the network element offering at no additional charge. Additional services desired by CLECs to assist in their combining or operating BellSouth unbundled network elements are available as negotiated.

> 2. Software Modifications. Software modifications, e.g., switch translations, necessary for the proper functioning of CLEC-combined BellSouth unbundled network elements are provided as part of the network element offering at no additional charge. Additional software modifications requested by CLECs for new features or services may be obtained through the bona fide request process.[29]

As we explain below, this offering does not satisfy the checklist requirements regarding unbundled elements.

2. BellSouth Has Not Demonstrated That It Is Offering Unbundled Elements in a Manner That Would Permit Requesting Carriers to Combine Them to Provide Telecommunications Services

BellSouth's South Carolina revised SGAT is legally insufficient, because it fails to describe whether or how BellSouth will provide unbundled elements in a manner that will allow them to be combined by requesting carriers. First, the SGAT does not adequately specify *what* BellSouth will provide, the *method* in which it will be provided, or the *terms* on which it will be provided, and therefore there is no basis for a finding that BellSouth is offering "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)" as the checklist requires.[30] Second, BellSouth's application does not demonstrate that it has the practical capability to provide unbundled elements in a manner that would permit competing carriers to combine them.

a. BellSouth's SGAT Fails to Set Forth the Necessary Terms and Conditions to Enable Competitors to Combine Unbundled Network Elements

BellSouth's SGAT states that it "will physically deliver unbundled elements where reasonably possible . . . as part of the network element offering at no additional charge." BellSouth SC Revised SGAT, at II.F.1. This provision, however, is completely unclear as to

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[29] South Carolina Public Service Commission, BellSouth Telecommunications, Inc.'s Statement of Generally Available Terms and Conditions, In the Matter of Entry of BellSouth Telecommunications, Inc. into InterLATA Toll Market, Docket No. 97-101-C, at II.F (Sept. 19, 1997) ("BellSouth SC Revised SGAT"), attached to BellSouth Brief as Appendix B-Volume 1, Tab 1.

[30] 47 U.S.C. §271(c)(2)(B)(ii).

which elements are included in this offering. As Iowa Utilities Board recognized, certain unbundled network element -- such as operations support systems -- may be intangible and physically integrated into the telephone network. 120 F.3d at 808-809. For such network elements, as well as certain physical elements such as transport and signaling, it may be claimed that it is not reasonably possible to provide access on a physically-separated basis. Nonetheless, BellSouth's SGAT fails to specify exactly which elements fall into this category. With respect to these unspecified elements, BellSouth fails to describe how they will be delivered, and whether it intends to impose some additional charge, or whether it will simply not provide the capability for CLECs to combine those elements.

BellSouth's South Carolina Revised SGAT states that BellSouth will perform, at no additional charge, software modifications that are "necessary" for the "proper functioning" of CLEC-combined elements, but it does not identify what translations are available under this provision or what the procedures are for obtaining these translations. BellSouth SC Revised SGAT at II.F.2.

Even more fundamentally, the BellSouth South Carolina Revised SGAT does not even specify what combinations of network elements it proposes to separate and require the CLEC to combine, a defect that will make it exceedingly difficult for a CLEC to plan for the use of such elements. Even CLECs that plan to use some facilities of their own will need to purchase some "sets" of facilities and functionalities, and if it is not known whether they will be provided as a single element or in several pieces, it would not be possible for new entrants to plan their business. Moreover, this SGAT does not state what charges, if any, would be levied by BellSouth to modify existing elements so that they may be combined.

While the BellSouth South Carolina Revised SGAT appears to acknowledge the need for methods and procedures for providing unbundled elements in a manner that would allow them to be combined, the critical details are unspecified, and appear to be left largely as

subjects for future negotiation. This approach, in our view, is inconsistent with BellSouth's obligation to offer specific and legally binding commitments with respect to its offering of unbundled elements.

This lack of clarity also precludes a finding that BellSouth is offering "nondiscriminatory" access to unbundled elements at the statutorily-required prices, as required by the checklist. For example, at least with respect to some combinations, it appears from the BellSouth South Carolina Revised SGAT that instead of providing requesting carriers with supervised access to its network to allow them to do the work of combining the BellSouth network elements, BellSouth would require a new entrant to collocate its own facilities in a central office in order to combine these elements.[31] In many cases, however, it would appear to be far less costly to allow CLECs to obtain supervised access to BellSouth's network so that they may perform the work of combining elements in a manner that would enable them to provide telecommunications services "entirely" with unbundled elements obtained from an incumbent, without contributing any facilities of their own.[32]

In the absence of any record concerning the costs or practical implementation issues relating to alternative methods of providing unbundled elements so that they may be combined -- indeed in the absence of any clear indication of how BellSouth itself proposes to fulfill this statutory requirement -- we do not believe that BellSouth has demonstrated

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[31] The only specific description in the SGAT that arguably addresses arrangements by which a competing carrier may combine unbundled elements specifies that BellSouth may deliver unbundled loops to CLEC collocation spaces. BellSouth SC Revised SGAT, at II.B.6.

[32] For example, unbundled loops and switching might be combined simply by connecting the loop from the customer's premises to the port of the local switch at the main distribution frame. It would appear that BellSouth could permit requesting carriers to have supervised access to its network to perform this simple operation without any substantial additional investment. A requirement that requesting carriers invest in additional collocation facilities in order to combine these elements might unnecessarily add costs to the provision of telecommunications services. The Department has reached no conclusions as to the requirements needed to ensure that unbundled elements may be combined. Our point is simply that BellSouth has not addressed these issues sufficiently, thereby precluding any finding that its offering is sufficient to satisfy this statutory requirement.

compliance with the checklist.

b. BellSouth Has Failed to Establish That It Is Operationally Ready to Provide Unbundled Network Elements in a Manner That Allows Requesting Carriers to Combine Them to Provide Telecommunications Services

BellSouth also must show that it has the practical capability of providing unbundled elements in a manner that permits them to be combined. At least some methods of meeting this requirement would appear to require the development and testing of new capabilities. In terms of implementing any arrangements necessary to combine elements, we would look to see how BellSouth would perform any additional functions necessary to allow elements to be combined by a CLEC. As it is not even clear what those practices will be, BellSouth has not yet demonstrated that it possesses the technical capability to satisfy this requirement in a reliable, commercially acceptable manner. Thus, for all the reasons stated above, BellSouth has not satisfied its burden of showing that it has the practical ability to provide these elements as required by the checklist.

c. If Competing Carriers Cannot Combine Unbundled Network Elements, Then Efficient Entry Would Be Seriously Impeded

BellSouth's failure to establish that it will offer unbundled elements in a manner that will allow other carriers to combine them to offer telecommunications services has substantial implications for the development of competition in South Carolina. The 1996 Act establishes a legal right for competing carriers to combine unbundled network elements and to provide services entirely through the use of unbundled network elements, and the Commission repeatedly has emphasized the importance of that right for competition in local exchange and access markets.[33] However, the decision in Iowa Utilities Board to vacate rule 51.315(b) has created great uncertainty about the manner in which unbundled elements will be provided to CLECs, and in turn, the costs that CLECs will incur in combining them in order to provide

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[33] 47 U.S.C. § 251(c)(3); Michigan Order ¶¶ 332-33.

services.

The resolution of these issues, of course, may be enormously important to promoting efficient competitive entry. The most economically efficient means for CLECs to serve a large segment of customers in the foreseeable future may be through the use of combinations of unbundled elements, whether a CLEC uses only combinations of elements purchased from incumbent LECs, or uses such elements in conjunction with network elements of its own. If appropriate means can be found to ensure that elements are provided in a manner that allows CLECs to combine them without large expenditures, alternative providers of local services may be able to serve many consumers using unbundled elements. Conversely, if unbundled elements are provided in a manner that requires CLECs to incur large costs in order to combine them, many customers -- especially residential customers -- may not have any facilities-based competitive alternative for local service for a considerably longer period of time.

In light of the substantial competitive implications of this issue, we believe that a BOC should be required to clearly articulate the manner in which it proposes to offer unbundled elements so that they may be combined and demonstrate that it has the practical ability to process orders and provision them in that manner. Moreover, in the absence of a more complete record on which to evaluate the issue, we are particularly concerned about proposals to relegate these issues to a bona fide request procedure, as BellSouth proposes in this application. Such a procedure may be both necessary and desirable for dealing with a variety of access and interconnection issues involving new services or unusual circumstances, but the bona fide request process sometimes may serve only to create additional opportunities for delay and litigation. It should not serve as a substitute for demonstrating the availability of basic checklist requirements.

The implication in BellSouth's South Carolina revised SGAT that it will require CLECs to establish collocation facilities in order to combine elements also has important

competitive ramifications. Such a requirement would entail substantial cost and delay for CLECs wishing to use combinations of elements.[34]

In short, BellSouth's failure to show checklist compliance in this area should not be regarded as a mere technicality. Rather, that failure carries with it a substantial threat to the viability of competition using unbundled network elements, one of the key entry vehicles established by the 1996 Act.

D. BellSouth's Wholesale Support Processes Are Deficient

Efficient wholesale support processes -- those manual and electronic processes, including access to OSS functions, that provide competing carriers with meaningful access to resale services, unbundled elements, and other items required by section 251 and the checklist of section 271 -- are of critical importance in opening local markets to competition. As explained in the Michigan Order, the Commission employs a two-part standard in evaluating checklist compliance with respect to OSS access. Michigan Order ¶ 136.

First, it will consider "whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them." Id. As to the *functionality* of those systems, the Commission determined that "[f]or those functions that the BOC itself accesses electronically, the BOC must provide equivalent electronic access for competing carriers" and that "the BOC must ensure that its operations support systems are designed to accommodate both current demand and projected demand of competing carriers for access to OSS functions." Id. ¶ 137. As to the *support* of those systems, the Commission made particularly detailed determinations:

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[34] For example, DeltaCom, the only CLEC pursuing physical collocation in South Carolina, states that it will have taken more than a year to negotiate and implement its collocation arrangement. Moses Aff. ¶ 19.

> A BOC ... is obligated to provide competing carriers with the specifications necessary to instruct competing carriers on how to modify or design their systems in a manner that will enable them to communicate with the BOC's legacy systems and any interfaces utilized by the BOC for such access. The BOC must provide competing carriers with all of the information necessary to format and process their electronic requests so that these requests flow through the interfaces, the transmission links, and into the legacy systems as quickly and efficiently as possible. In addition, the BOC must disclose to competing carriers any internal "business rules," including information concerning the ordering codes [including universal service ordering codes ("USOCs") and field identifiers ("FIDs")] that a BOC uses that competing carriers need to place orders through the system efficiently.

Id. (footnotes omitted).

Second, the Commission will consider "whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter." Id. ¶ 136. Here, "the Commission will examine operational evidence to determine whether the OSS functions provided by the BOC to competing carriers are actually handling current demand and will be able to handle reasonably foreseeable demand volumes." Id. ¶ 138. The Commission has stated that the "most probative evidence" of operational readiness is actual commercial usage and that carrier-to-carrier testing, independent third-party testing, and internal testing, while they can provide valuable evidence, "are less reliable indicators of actual performance than commercial usage." Id.

The Commission's OSS standards reflect the fact that entrants relying on unbundled network elements or resale will also be dependent on incumbents' provision of efficient and reliable operations support systems. An aggregation of "minor" OSS problems may, collectively, place entrants at a substantial competitive disadvantage to BellSouth, because they would prevent those entrants -- regardless of their own efforts -- from marketing and providing services with the same degree of efficiency, reliability, and quality offered by BellSouth.

When the Commission evaluates OSS issues prior to the "stress testing" provided by

actual commercial use at competitively significant volumes, it must make difficult predictive judgments about the likely commercial significance of an applicant's failure to provide OSS functionality that is identical or precisely comparable to the functionality available for the applicant's own use. Actual commercial use may indicate in some cases that isolated limitations in OSS offerings will not materially impact competition. For that reason, we do not believe that the Commission should require "perfection" in OSS offerings as a condition of section 271 approval. However, when evidence from commercial use at competitively significant volumes is unavailable, as is the case here, the Commission should continue to examine carefully all concerns about the adequacy of OSS offerings. It is precisely because these complex issues are so difficult to evaluate, and because of their substantial competitive impact, that the Commission should insist that potentially significant OSS problems be resolved *before* the BOCs enter the interLATA market. Regulatory solutions in this area will be exceedingly difficult if the BOCs themselves have no incentives to resolve these problems.[35]

BellSouth's present application falls well short of satisfying the standards articulated by the FCC. Although BellSouth has devoted substantial resources to the development and implementation of the requisite systems, much additional work remains to be done. As to the current interfaces offered by BellSouth for pre-ordering and ordering functions, we conclude that BellSouth has failed to demonstrate that they will allow for effective competition, and BellSouth's ongoing efforts to address our concerns on this score are still incomplete. The record indicates numerous complaints from CLECs that they have not yet been able to obtain sufficient information from BellSouth to permit them to complete the development of their own OSSs. BellSouth's systems have experienced little commercial use, but that limited

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[35] See Schwartz Aff. ¶¶ 126-140, 154-157, 179-182; and Supplemental Affidavit of Marius Schwartz on Behalf of United States Department of Justice ¶¶ 35-43 ("Schwartz Supp. Aff."), attached to this Evaluation as Exhibit 2.

experience suggests potentially serious system inadequacies that have not yet been fully addressed. Moreover, the limited capacity of key systems suggests that performance problems are likely to be far more serious when competitors begin to order unbundled elements or resale services in competitively significant volumes. As explained in Appendix A, attached to this Evaluation and in the Friduss South Carolina Affidavit, attached to this Evaluation as Exhibit 3, BellSouth's failure to institute all of the necessary wholesale performance measurements,[36] prevents a determination that BellSouth is currently in compliance with checklist requirements or that compliance can be assured in the future.

In concluding that BellSouth has failed to comply with the checklist requirements governing OSS, we are mindful of the SCPSC's contrary conclusion. That conclusion was reached, however, before the Commission provided its detailed decision on OSS issues in the Michigan Order. Indeed, other state commissions in the BellSouth region, including the Alabama and Georgia commissions and the staff of the Florida commission, have expressed serious concerns about the adequacy of BellSouth's systems in the wake of the Commission's Michigan Order.[37]

Although BellSouth's OSS fails to satisfy checklist requirements, we are encouraged by some aspects of BellSouth's OSS efforts, particularly by BellSouth's work with an independent software vendor to develop an inexpensive, PC-compatible software package that

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[36] Affidavit of Michael J. Friduss - South Carolina ¶¶ 77-78 ("Friduss SC Aff."), attached to this Evaluation as Exhibit 3.

[37] See Alabama Public Service Commission, In re Petition for Approval for a Statement of Generally Available Terms and Conditions Pursuant to §252(f) of the Telecommunications Act of 1996 and Notification of Intention to File to Petition for In-Region, InterLATA Authority with the FCC Pursuant to §271 of the Telecommunications Act of 1996, Docket 25835, Order (Oct. 16, 1997) ("Alabama Order"); Florida Public Service Commission, In re Consideration of BellSouth Telecommunications, Inc.'s Entry into InterLATA Services Pursuant to Section 271 of the Federal Telecommunications Act of 1996, Docket No. 960786-TL, Staff Recommendation (Oct. 22, 1997) ("FPSC Staff Recommendation"); "Telephony," Communications Daily, Oct. 30, 1997 ("GAPSC Article").

is compatible with BellSouth's EDI interface.[38] BellSouth states that it undertook this work "[t]o assist CLECs of all sizes that want to use EDI without extensive development effort on their side of the EDI interface" and that the software "is readily available to even the small CLEC." Id. The Department supports this approach, which can benefit both CLECs and BOCs by making multiple alternatives available to CLECs while requiring the BOC to support only a single interface on its end. Moreover, such software has the potential, if combined with integrated support for an application-to-application pre-ordering interface, to provide even the smallest CLEC with an integrated pre-ordering/ordering environment such as that presently used by BellSouth's retail representatives.

In Appendix A to this Evaluation, we explain in greater detail numerous concerns about BellSouth's performance and capabilities in providing access to OSS, as well as its deficiencies in reporting wholesale performance. In short, based on the record in this application, we cannot conclude that BellSouth has demonstrated that it satisfies the checklist requirements relating to its operations support systems.

III. The South Carolina Market Is Not Fully and Irreversibly Open to Competition

The 1996 Act requires the Commission to consult with the Attorney General on all applications under section 271, and authorizes the Attorney General to provide an evaluation of such applications "using any standard the Attorney General considers appropriate."[39] The 1996 Act does not limit the Department's evaluation to any of the specific findings that the Commission is required to make, under section 271(d)(3), before approving an application. Indeed, it does not limit the evaluation to those findings, collectively, though of course the evaluation may be relevant to any or all of those findings. In any event, the Commission is required to accord "substantial weight" to the Department's evaluation.

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[38] Affidavit of William N. Stacy, Checklist Compliance (Operations Support Systems) ¶ 53 ("Stacy OSS Aff."), attached to BellSouth's Brief as Appendix A-Volume 4a, Tab 12.

[39] 47 U.S.C. §271(d)(2)(A).

The Department has concluded that it should evaluate section 271 applications under a standard that requires an applicant to show that the markets in a state have been fully and irreversibly opened to competition. A detailed explanation of that standard, and the reasons the Department has adopted it, is provided in the attached Affidavit and Supplemental Affidavit of Dr. Marius Schwartz, and in previous evaluations submitted by the Department.[40]

In the absence of broad-based commercial entry using the three entry paths contemplated by the 1996 Act, the Department will closely examine competitive conditions in a state, to determine whether significant barriers to competition have been removed, and whether there are objective criteria to ensure that competing carriers receive appropriate access to essential inputs, even after an application under section 271 has been approved. Under this standard, BellSouth has not shown that the market in South Carolina is fully and irreversibly open to competition, and its application should be denied.

A. The Minimal Level of Competition in South Carolina Does Not Provide Evidence That Local Markets Are Fully and Irreversibly Open

At this time, BellSouth faces no significant competition in local exchange services in South Carolina. The competitive situation in South Carolina is reviewed in more detail in Appendix B to this Evaluation. We are not aware of any operational facilities-based local exchange competitor at the present time. As of September 11, 1997, only 573 residential lines and 1785 business lines had been resold in the entire state.[41] Of the 573 resold residential lines identified in BellSouth's application, over 90% were resold by a single company, which has only a resale arrangement with BellSouth, and, therefore, would presently be unable to provide facilities-based competition. The resale of lines to business is only slightly more robust and diverse. Eleven companies are reselling at least a single business line, though three companies account for approximately 98% of BellSouth's 1785

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[40] See DOJ Oklahoma Evaluation at 36-51; DOJ Michigan Evaluation at 29-31.

[41] Wright Aff. ¶ 24.

resold lines.

Despite the limited operations today of competitors, a substantial number of companies have expressed an interest in providing local services in the state. As of the date of BellSouth's application, 83 telecommunications carriers had executed agreements with BellSouth, and sixteen companies had been certified to provide competing local telephone service in South Carolina. Seven of those companies -- ACSI, AT&T, DeltaCom, Hart Communications, Intermedia, KMC Telecom, and MCI -- have approved interconnection agreements for services other than resale. Two companies -- ACSI and DeltaCom -- are moving towards the provision of facilities-based local service.

ACSI currently provides non-switched dedicated services, including special access, data services, and private line services, over its own fiber optic facilities in Columbia, Charleston, Greenville, and Spartanburg. ACSI plans to have an operational switch in Greenville during in the first quarter of 1998, which it will use to serve business customers. ACSI is currently providing resold services to a small number of business customers in South Carolina. ACSI has not yet purchased UNEs from BellSouth, but plans to do so when its switch is operational.

As noted in Part I, DeltaCom has indicated that it plans to provide facilities-based local exchange services, and has been moving towards fulfilling that plan.[42] It plans to do so either through the use of a network entirely owned by DeltaCom or through the partial use of BellSouth facilities.[43]

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[42] Moses Aff. ¶ 22.

[43] AT&T and MCI have expressed their intention to provide local exchange services to both residential and business customers in the state using either unbundled network elements or resale. AT&T requested unbundled network elements from BellSouth in March 1996 and interconnection in June 1996 to provide local exchange services via resale, unbundled network elements, and on a facilities basis in South Carolina. A final arbitrated agreement between AT&T and BellSouth was approved on June 20, 1997; AT&T objected to several of the agreement's provisions and filed an appeal with the U.S. District Court of South Carolina on July 18, 1997. AT&T has not begun to provide any local telecommunication services in South

Given the current minimal level of competition in South Carolina, despite the apparent interest in entering South Carolina by a significant number of competitors, there is no reason to presume that the market is fully open to competition. Therefore, we examine competitive conditions more carefully to see whether any significant barriers continue to impede the growth of competition in South Carolina.

B. Substantial Barriers to Resale Competition and Competition Using Unbundled Elements Remain in Place in South Carolina

As noted above, only two companies, ACSI and DeltaCom, appear to be making substantial efforts at this time to construct new telecommunications networks in South Carolina. These companies, when they become fully operational, may provide important competitive alternatives for consumers, but overall, investment in new facilities appears to have been relatively less attractive to CLECs in South Carolina than in some other states, a fact that may well reflect the demographic and economic characteristics of the state.

The limited investment in new facilities means that for the immediately foreseeable future, competition to serve the large majority of South Carolina consumers -- most residential customers and customers of all kinds outside of the largest urban areas of the state -- can occur only through resale or the use of unbundled network elements. Competitors seeking to use those two entry vehicles will be critically dependent on BellSouth.

As explained in Parts II.C, and D of this Evaluation, BellSouth has failed to show that competitors can be assured of appropriate access to essential inputs, i.e., that they will receive unbundled elements from BellSouth in a manner that allows them to combine those elements, and that they will have the legally-required access to OSSs that will permit them to compete

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Carolina, according to AT&T, because of BellSouth's OSS inadequacies, the lack of cost-based pricing for combined unbundled network elements, and the very low wholesale discount rate.

MCI has only recently entered the South Carolina market. MCI's interconnection agreement, based in part on the terms obtained by AT&T in its arbitration order, contemplates the purchase of unbundled network elements from BellSouth. According to MCI, plans to provide local exchange service in South Carolina are not progressing because of the lack of adequate OSS and the inability of BellSouth to provision unbundled network elements.

effectively through the use of resale or unbundled elements. In addition to those deficiencies, BellSouth has failed to show that unbundled elements are currently offered, or will be offered in the future, at prices that will permit entry and effective competition by efficient firms, and has failed to show that it will provide objective measures of its wholesale performance that will ensure that competitors receive nondiscriminatory access to inputs now and in the future.

1. BellSouth Has Not Demonstrated That Current or Future Prices for Unbundled Elements Will Permit Efficient Entry or Effective Competition

Competition through the use of unbundled network elements will be seriously constrained, and may even be impossible, if those elements are not available at appropriate prices. In evaluating pricing arrangements as part of its competitive assessment, the Department will ask whether a BOC has demonstrated that its current prices are, and future prices will be, supported by a reasoned application of an appropriate methodology.

Reasoned Application Of An Appropriate Methodology. In order to conform to the Act, rates for interconnection and access to unbundled elements must be "just, reasonable, and nondiscriminatory," 47 U.S.C. §251(c)(2)(D), see also 47 U.S.C. §252(d)(1), (1)(A)(ii), and "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable)," 47 U.S.C. §252(d)(1)(A)(i); such rates "may include a reasonable profit," 47 U.S.C. §252(d)(1)(B). There have been no judicial decisions concerning the types of rate-making methodologies that are consistent, or inconsistent, with these statutory requirements. In our view, however, there are a variety of forward-looking cost methodologies that are consistent with the statutory requirements, and with the Department's standard for evaluating whether markets are fully and irreversibly open to competition.

Such methodologies, if properly applied, will create incentives for efficient investment by incumbents and potential entrants; will permit effective competition by new entrants on an equal footing, in which the relative efficiency of entrants and incumbents is suitably rewarded

by the marketplace; and will stimulate price competition and service improvement for consumers. As well established economic principles make clear, forward-looking costs govern prices and entry decisions in competitive markets, and thus, those principles best promote competition in a market moving from a regulated monopoly to a competitive market.[44]

A variety of forward-looking methodologies also are likely to lead to prices that are "nondiscriminatory." As we have previously explained, the real cost of a network element to a BOC will be its own forward looking economic cost; charging a higher price to its competitor therefore may be discriminatory and anticompetitive.[45] Prices based on forward-looking economic costs will allow a BOC to obtain the "reasonable profit" allowable under the Act; monopoly profits a BOC might seek at its competitors' expense, thereby depriving customers of the benefits of cost-based prices, would be excluded.

Recognizing that the use of forward-looking cost methodologies is consistent with the 1996 Act and will further its procompetitive purposes and benefit consumers, a significant number of state PUCs have chosen to adopt such methods, see e.g., Local Competition Order ¶ 681, n.1687,[46] as has the Commission,[47] and other federal administrative agencies in related

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[44] See, e.g., Stigler, G., The Theory of Price III (4th ed. 1987); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 and 95-185, FCC 96-325, ¶ 705 & n.1716 (rel. Aug. 8, 1996) ("Local Competition Order"). See also Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989) (ratemaking on the basis of forward-looking costs "mimics the operation of the competitive market"); MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1116-17 (7th Cir.), cert. denied, 464 U.S. 891 (1983) ("it is current and anticipated cost, rather than historical cost, that is relevant to business decisions to enter markets and price products").

[45] Comments of the United States Department of Justice, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, at 28-30 (filed May 16,1996) ("DOJ Local Competition Comments").

[46] According to a recent NARUC report, Telecommunications Competition 1997, Table 4 (Sept. 1997), 32 of 51 reporting commissions have said that they employ some form of forward-looking cost based pricing, including TELRIC or TSLRIC, while 18, including South Carolina, have not adopted such a pricing methodology. The Department does not express an opinion on whether states' characterizations of their pricing methodologies as based on forward looking

contexts.[48] Of course, the label attached to a particular methodology is not determinative; it is the substance that counts.

If the prices for unbundled network elements in a state are derived through a methodology other than a forward-looking economic cost methodology, we could not conclude that market is fully open to competition unless, after careful consideration of the reasoning behind the prices on a case-by-case basis, we were able to determine that the alternative standard on which prices are based is consistent with the 1996 Act and permits entry and effective competition by efficient firms.[49]

Some ratemaking methods that were designed to operate in and to preserve a regulated monopoly environment would seem to be fundamentally inconsistent with that standard. For example, use of the "Efficient Component Pricing Rule" to establish prices for unbundled network elements would insulate a BOC's retail prices from competition, thereby discouraging entry in markets where current retail prices exceed competitive levels.[50] Such

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costs in this report are accurate.

[47] Michigan Order ¶¶ 289-294.

[48] In recent years, for example, the Interstate Commerce Commission and its successor, the Surface Transportation Board, have regulated railroad rates on the basis of forward-looking costs. See, e.g., West Tex. Util. Co. v. Burlington N.R.R., No. 41191, 1996 WL 223724 (I.C.C.) (S.T.B. May 3, 1996), aff'd 114 F.3d 206 (D.C. Cir. 1997); Bituminous Coal -- Hiawatha, Utah, to Moapa, Nevada, 10 I.C.C. 2d 259 (1994); Omaha Pub. Power Dist. v. Burlington N.R.R., 3 I.C.C. 2d 123 (1986).

[49] The 1996 Act also requires that all retail services be made available for resale at a wholesale discount (47 U.S.C. §251(c)(4)), and requires states to set the wholesale discount based on an "avoided" cost methodology (47 U.S.C. §252(c)(3)). It follows that a state must also explain how it has set the resale discount consistent with the 1996 Act, including articulating the methodology it has used and how it has applied the methodology. Issues have been raised by several commenters about whether BellSouth's 14.8% resale discount is consistent with the 1996 Act. While the Department does not analyze that issue in this evaluation, as there are several other grounds for denial of the application, this pricing issue would have to be considered before any approval of entry in South Carolina would be possible.

[50] See, e.g., In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Reply Comments of the United States Department of Justice, CC Docket No. 96-98, at 11-13 (filed May 30, 1996) ("DOJ Local Competition Reply

effects would impede the transition from regulated monopoly telecommunications markets to de-regulated, competitive markets, and would deprive consumers of the benefits of price competition and new investments in telecommunications services.

Similarly, in the pre-Act regulated monopoly environment, universal service objectives were often promoted by insulating incumbent LECs from competition so that they could charge prices substantially above cost for some services, and use the resulting revenues to provide other services at or below cost. At least in some cases, if unbundled network elements are priced above cost, competitors could be discouraged from entering, or if they did enter, could be forced to bear a disproportionate share of the cost of supporting universal service objectives. In any event, their ability to compete on the merits would thereby be impaired.[51]

Whatever methodology is used, a reasoned application to the particular facts is needed. We expect that in most cases, a BOC will be able to demonstrate this by relying on a reasoned pricing decision by a state commission. However, if a state commission has not explained its critical decisions, or has explained them in terms that are inconsistent with procompetitive pricing principles, the Department will require further evidence that prices are consistent with its open-market standard.

Future Prices. Expectations concerning future prices can be as important, or even more important, than current prices. A market will not be "irreversibly" open to competition if there is a substantial risk that the input prices on which competitors depend will be increased to inappropriate levels after a section 271 application has been granted. Such a price increase obviously could impair competitive opportunities in the future. As important, a

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Comments")

[51] All providers of telecommunication services, including but not limited to those that use unbundled elements, "should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service." 47 U.S.C. § 254(b)(4).

substantial *risk* of such a price increase can impair competition *now*. Competitors that wish to use unbundled elements in combination with their own facilities will incur significant sunk costs when they invest in their own facilities. Such investment will not be forthcoming *now* if there is a substantial risk that increases in the prices for complementary assets, i.e., unbundled elements, will raise a competitor's total costs to a degree that precludes effective competition.

This does not mean that the prices must be permanently unchangeable. Such rigidity would be undesirable, both because costs change over time, and because adjustments to rate-making methodologies may be appropriate as market conditions change. However, competitors must have sufficient confidence about future prices to justify prudent investments in entry.[52] The basis for such confidence may be provided either by a BOC or by a state commission, through a variety of mechanisms such as long-term contractual arrangements, commitments to appropriate methodologies, and the like. Without some basis for confidence that future prices will be appropriate, we will not consider a market to be fully and irreversibly open to competition.

Pricing of Unbundled Elements in South Carolina. In South Carolina, BellSouth has not demonstrated that current prices permit entry and effective competition by efficient firms, and there is great uncertainty concerning the prices that will be available in the future. Given this uncertainty, it is not surprising that there is no real competition using unbundled elements now, or that competitors' plans to compete in the future are subject to many contingencies.

BellSouth has not attempted to establish independently, in this proceeding, that it offers appropriate prices for unbundled elements. Instead, it relies solely on the determinations of the SCPSC, which it erroneously characterizes as "definitive" or

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[52] As Professor Schwartz explained in his affidavit, "[p]rohibitively high prices would render the new access arrangements [i.e., to unbundled network elements] meaningless; to permit efficient local entry, entrants must have adequate assurance that BOC prices for these inputs will remain reasonable and cost-based after interLATA relief is granted." Schwartz Aff. ¶ 22.

"conclusive" for purposes of its application.[53] However, based on the record in this proceeding, we do not believe the conclusions of the SCPSC, standing alone, support a finding that the market in South Carolina is fully and irreversibly open to competition.

The SCPSC has not articulated a forward-looking cost methodology. Indeed, it has stated that it "has not adopted a particular cost methodology." SCPSC Order at 56. Instead, the prices contained in the SGAT were incorporated from several sources, including the BellSouth/AT&T arbitration, existing tariff rates, and rates negotiated in interconnection agreements with other carriers. Id. at 53. There is no explanation of the costs on which they are based.[54]

With respect to the rates derived from the BellSouth/AT&T arbitration, the SCPSC states only that the rates were "within the bounds" of the cost studies provided by the parties in that arbitration, and that "many" of the rates were within the Commission's proxy rate ranges. Id. at 55. As to prices derived from negotiated interconnection agreements, the SCPSC states only that such rates "were certainly not set by the parties without reference to the cost of the services to be provided." Id. And the SCPSC offers no explanation for its conclusion that rates derived from preexisting tariffs conform to the cost-based pricing requirements of the 1996 Act.

These explanations are surely insufficient to demonstrate that BellSouth's unbundled element prices will permit efficient competition. While there is no single cost methodology

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[53] BellSouth Brief, at 37, 40.

[54] For example, the current wholesale rate structure in South Carolina for unbundled network elements does not include any variation in prices according to the actual costs in unbundled network elements across the state or any explanation as to when such geographically deaveraged prices would become available. In states with significantly varying loop densities, for example, we would expect there to be different unbundled loop prices made available to competitors. We recognize that the process of de-averaging may need to be accomplished over some transition period, but encouraging efficient entry requires that cost-based wholesale rates are the objective of a wholesale pricing structure. The SCPSC has not attempted to explain its departure from this approach here.

that is required, surely some consistently applied methodology is needed.[55] In weighing conflicting cost studies presenting by opposing parties, there must be some reasoned explanation for a decision to accord greater weight to one rather than the other.

The fact that a rate has been negotiated in an interconnection agreement provides no basis for concluding that such a rate is competitively appropriate on a permanent basis for all parties. As the Commission has recognized, incumbent LECs may be able to exercise substantial market power in such negotiations.[56] Potential entrants may accept rates substantially in excess of cost, particularly if by doing so they can avoid the substantial cost and delay of arbitration proceedings, or secure more favorable terms with respect to other provisions of their agreement.

The problems with current unbundled element prices are compounded by the great uncertainty concerning future prices. The SCPSC has expressly refused to articulate the methodology, if any, that it will use to establish "permanent" rates, and thus there is no assurance that the "permanent" rates will permit efficient competition using unbundled elements. The "true up" and "price cap" mechanisms in place in South Carolina do not solve these problems. To the extent BellSouth relies on the subsequent "true-up" of current prices to conform to final prices, as a safeguard against excessive current prices, this would not apply to many of the prices in the SGAT, such as those derived from pre-existing tariffs, that are not subject to "true-up". Moreover, where no methodology for permanent pricing has been established a "true-up" only leads to additional uncertainty as to what prices competitors ultimately will have to pay for elements ordered in the interim. The SCPSC's "price cap" on

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[55] See DOJ Oklahoma Evaluation, at 61 ("The [Oklahoma Corporation Commission] arbitrator's decision on the AT&T application did not recommend 'any particular methodology or cost study be adopted at this time.'").

[56] Local Competition Order ¶ 55. See also Schwartz Aff. ¶ 188 ("There is great asymmetry in these bargaining powers--since the dominant incumbent is content to preserve the status quo, while the entrant is clamoring for an agreement.").

those prices subject to true-up does not adequately address this uncertainty as it only limits, at most, increases on elements already ordered, not prospective price increases on elements generally, which could end up being priced substantially higher than the interim rates. Thus, these mechanisms do not preclude the possibility that in the near future, unbundled element prices may increase significantly, in ways that are both unpredictable and anticompetitive.[57]

In short, the record in this application does not establish that either current or future prices for unbundled elements will permit efficient firms to enter and compete effectively. Because of this deficiency, we cannot conclude that the market is fully and irreversibly open to competition using unbundled elements.

The Commission Has Authority To Take Account of Pricing. Although BellSouth apparently concedes that a state commission's conclusions do not bind the Commission as to Track A/ Track B issues, nonprice elements of the checklist, or the public interest test, it argues that "[t]he SCPSC's pricing determinations are conclusive" for section 271 purposes and that the Commission lacks authority to take account of a state's wholesale pricing structure.[58] From the Department's standpoint, this argument is plainly wrong, as the 1996 Act mandates that the Department undertake a competitive assessment using "any standard the Attorney General considers appropriate"[59] and that the Commission must give "substantial weight" to this Evaluation.[60] In our view, an assessment about whether the local market has been "fully and irreversible opened to competition"--the inquiry we deem appropriate under this statutory mandate--necessarily requires some assurance that the prices in place--and

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[57] See DOJ Oklahoma Evaluation at 62 ("Since it is not yet known what the final Oklahoma prices will be or how they will be determined, the provision for a true-up is hardly sufficient assurance that competitors will in fact be charged cost-based prices now or later.").

[58] BellSouth Brief, at 37.

[59] 47 U.S.C. §271(d)(2)(A).

[60] Id.

which will continue to be available--reflect procompetitive pricing principles. The Commission is free to give effect to our Evaluation about the pricing structure however it chooses; but in order to follow the statutory directive of giving substantial weight to our Evaluation, the Commission must retain--by necessary implication--the authority to do so in exercising its authority under section 271.

2. Bell South Has Failed to Institute Performance Measurements Needed to Ensure Consistent Wholesale Performance

A conclusion that a market has been "fully and irreversibly opened to competition" requires both a demonstration that the competitive conditions currently in place will foster efficient competition, as well as assurances that those conditions will remain in place after a section 271 application has been granted. In terms of wholesale performance -- where a BOC's systems will be critical to enabling its competitors to succeed in the marketplace -- an appropriate means of "benchmarking" performance is needed. As we have explained previously, we examine whether a BOC has established (1) performance measures and reporting requirements so that wholesale performance can be measured; (2) performance standards -- i.e., commitments made by the BOC as to its anticipated levels of performance; and (3) performance benchmarks -- i.e., a track record of performance. These steps will permit an assessment of current performance and will enable competitors and regulators to more effectively address any post-entry "backsliding" from prior performance through contractual, regulatory, or antitrust remedies.

BellSouth has made several important commitments to gather and maintain performance data. First, BellSouth has implemented a data warehouse, separate from the mainframe computers on which its OSSs run, in which raw data relating to performance can be stored and through which it can be queried and analyzed.[61] Second, BellSouth states that it

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[61] Affidavit of William N. Stacy, Checklist Compliance (Performance Measures) ¶ 13 ("Stacy Performance Aff."), attached to BellSouth Brief as Appendix A-Volume 5, Tab 13.

is capturing for subsequent analysis "[e]very order processed by BellSouth for both its retail units and its CLEC customers." Id. ¶ 14. Third, BellSouth states that it plans to allow CLECs to directly access the data warehouse to perform their own analyses. Id. ¶ 15. BellSouth is to be commended for committing itself to such a system for gathering, storing, and providing access to performance data. BellSouth's approach is clearly a desirable way to proceed, and we strongly support these commitments.

Notwithstanding this desirable architecture, as discussed in Appendix A and the Friduss SC Aff., BellSouth has failed to "provide[] sufficient performance measures to make a determination of parity or adequacy in the provision of resale or UNE products and services to CLECs." Friduss SC Aff. ¶ 78.[62] Most significantly, BellSouth is not providing actual installation intervals, instead relying on the "percentage of due dates missed." Yet the type of measurement upon which BellSouth relies is not sufficient to demonstrate parity: if BellSouth were to miss 10% of scheduled due dates for both BellSouth retail operations and CLEC customers but missed the scheduled date by an average of one day for its own customers and an average of seven days for CLEC customers, BellSouth's measurement would be equal and yet would conceal a significant lack of parity. As the Department and the Commission have previously concluded, "[p]roviding resale services in substantially the same time as analogous retail services is probably the most fundamental parity requirement in Section 251."[63]

In addition, BellSouth has no performance measurements for pre-ordering functions; few measurements for ordering functions; and no measurements for billing timeliness, accuracy and completeness. BellSouth is also missing numerous significant measurements

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[62] If a BOC can establish that an effective substitute can serve the same purpose as the measures outlined here, the Department, of course, would be willing to consider the use of a substitute measure.

[63] Appendix A to DOJ Michigan Evaluation at A-12, quoted with approval in Michigan Order ¶ 167.

involving service order quality, operator services, directory assistance, and 911 functions. Also, while BellSouth has committed to measuring firm order confirmation cycle time and reject cycle time, the development of these measurements is incomplete and thus results are not yet available. Collectively, these deficiencies prevent any conclusion that adequate, nondiscriminatory performance by BellSouth can be assured now or in the future.

Given BellSouth's lack of performance measures in a number of crucial areas, we also are unable to determine whether BellSouth has established performance standards that are enforceable as to these areas, as well as a track record, or benchmark, of wholesale performance. As is true with our analysis of OSS generally, our insistence on performance benchmarks does not require any particular level of use in South Carolina. Appropriate benchmarks may be established through commercial performance elsewhere in the BellSouth region. In the event that a BOC is not able to set a benchmark through actual use -- though we doubt that any region will not have some actual competitive entry -- the Department would consider other means of ensuring adequate performance, including enforceable performance standards and other means of demonstrating wholesale capability -- i.e., carrier-to-carrier testing, independent auditing, or internal testing. In this case, however, BellSouth has not yet instituted the necessary performance measures, adopted enforceable performance standards, or demonstrated a satisfactory performance benchmark (through actual use or otherwise). Thus, given our inability to conclude that the necessary protections against backsliding are in place, we cannot conclude that the market has been fully and irreversibly opened to competition.

C. BellSouth's "Public Interest" Arguments Do Not Justify Approval of This Application

BellSouth erroneously contends that the benefits of allowing its entry now into the interLATA market in South Carolina warrant approval of this application under the "public interest" standard. BellSouth and its economic experts significantly overvalue the benefits of

the BOC's long distance entry now, and undervalue the benefits to be gained from opening BellSouth's local markets, as explained in the Supplemental Affidavit of Marius Schwartz.

We agree that there could be competitive benefits from BOC entry into long distance markets, but the estimates of the size of those benefits provided by BellSouth and some of its economic experts, as well as experts retained by the BOCs in previous section 271 entry applications, appear on closer analysis to rest on unconvincing analytical and empirical assumptions. Schwartz Supp. Aff. ¶¶ 60-84. The economic incentives of the BOCs to cut prices substantially on entering interLATA markets are considerably weaker than the BOCs' experts claim. Id. ¶¶ 63-76. Long-distance markets already are significantly more competitive than local markets. Particularly, higher-volume residential and business customers benefit from considerable rivalry. Id. ¶¶ 18, 79, 84. The BOC experts that have estimated large price reductions from BOC interLATA entry, based on experiences with SNET and GTE, have exaggerated the benefits realized by consumers from interLATA competition by those ILECs, by failing to take into account the best available rates from the interexchange carriers already in the market and focusing primarily on undiscounted AT&T rates, and the less favorable of the rate plans AT&T offers. Id. ¶¶ 80-83. This does not mean that consumers have realized no benefits from entry by ILECs such as SNET, but the BOCs' experts have not provided an analysis that would adequately support the large benefits they project from BOC entry.

Still more important, BellSouth and its economic experts, as well as experts retained by BOCs in previous entry applications, have failed to give adequate consideration to the more substantial benefits to be gained from requiring that the BOC's local markets be opened before allowing interLATA entry. Their analyses have simply assumed that the requirements of section 271 would be satisfied, or addressed the benefits of local competition in a cursory manner that undervalues their importance. The Department's analysis and that of Dr. Schwartz, in contrast, give full consideration to competitive effects in both the interLATA

and the local markets. Because the local markets are both much larger than interLATA markets and still largely monopolistic, the benefits from opening the BOCs' local markets to competition prior to allowing BOC interLATA entry are likely to substantially exceed the benefits to be gained from more rapid BOC participation in long distance markets. Id. ¶¶ 14-25. Ensuring BOC cooperation requires conditioning BOC long distance market entry on the Department's standard of local markets being fully and irreversibly open. Experiences with regulating other complex new access arrangements (e.g., interLATA toll, intraLATA toll, and open network architecture) indicates that opening local markets would take much longer without this cooperation. And thus the Department's entry standard, far from delaying competition, promotes it, more than would dependence on post-interLATA entry enforcement to compel the BOCs to open their local markets. Id. ¶¶ 35-59.

Finally, the Department's analysis recognizes, as the analyses by the BOCs' experts do not, that authorization of BOC interLATA entry will not promote local entry if substantial barriers to local entry remain in place. BellSouth and its experts focus only on the incentives of interexchange carriers and other providers to enter the local markets. The Department does not endorse that aspect of BellSouth's analysis, which fails to take into account important differences between various types of entrants. Id. ¶ 29. But, more significantly, BellSouth and the BOCs' experts fail to appreciate that regardless of the incentives a provider may have to enter local markets, if it does not have an adequate opportunity to enter, then entry will not occur. Id. ¶¶ 30-34. Under the 1996 Act, for that opportunity to exist, the BOC must be presently willing and able to provide at cost-based rates what competitors require for entry at various scales of operation, using interconnected separate facilities, unbundled elements and resale. BellSouth has not shown that this opportunity now exists in South Carolina, and so its interLATA entry would not be in the public interest.

IV. Conclusion

BellSouth has not satisfied the requirements of the competitive checklist, and has not taken all measures needed to ensure that local markets in South Carolina are fully and irreversibly open to competition. For these reasons, BellSouth's application for in-region interLATA entry in South Carolina under section 271 of the Telecommunications Act should be denied.

Respectfully submitted,

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