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Washington, D.C. 20554

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CC Docket No. 97-208

In the Matter of

Application by BellSouth Corporation,  
BellSouth Telecommunications, Inc., and  
BellSouth Long Distance, Inc., for  
Provision of In-Region, InterLATA  
Services in South Carolina

To: The Commission

**BRIEF IN SUPPORT OF APPLICATION BY BELL SOUTH FOR  
PROVISION OF IN-REGION, INTERLATA SERVICES IN SOUTH CAROLINA**

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## EXECUTIVE SUMMARY

The Commission has labored since passage of the 1996 Act to establish the preconditions for competitive local telephone markets. BellSouth has worked equally hard to fulfill its responsibilities under the Act. Yet, as is the case in other parts of the country, facilities-based local competition is limited in much of BellSouth's service territory. Outside of the most obviously profitable cities and service categories, potential local competitors appear unwilling to seize the opportunities Congress, regulators, and BellSouth have made available.

Competition in interLATA services likewise has stalled. Congress determined that entry by the Bell companies is the best way to end years of lock-step price increases by the incumbent long distance carriers, yet the Commission and the Department of Justice have thus far opposed such entry. SNET and GTE meanwhile are energizing long distance competition in their local service areas, highlighting what is being lost by keeping Bell companies on the sidelines.

Twenty months of experience under the 1996 Act shows it is futile and enormously costly to delay interLATA competition while waiting for facilities-based local competition to spread to both business and residential customers. If incumbent long distance carriers believe they can prevent Bell companies from capturing a piece of the long distance market simply by focusing their local entry on lucrative business customers, that is what they will do. Residential callers pay the price, including foregone long distance savings of about \$7 billion each year.

With this application, BellSouth offers a solution. Rather than relying solely on regulation, the Commission can use its authority under section 271 to let market forces jump-start competition in local and interLATA services. South Carolina is the perfect laboratory for proving this more promising approach, for several reasons.

First, BellSouth has fully complied with the local competition provisions of the 1996 Act in South Carolina. The South Carolina Public Service Commission (“SCPSC”) unanimously concluded after exhaustive inquiry that BellSouth has done everything it reasonably can to facilitate local competition. Among other things, BellSouth has voluntarily negotiated over 80 interconnection and resale agreements with requesting carriers in South Carolina; filed and received approval of a statement of generally available terms and conditions that satisfies all statutory and regulatory requirements; invested hundreds of millions of dollars to make interconnection and network access available to local competitors; and demonstrated its ability to process competitors’ orders and furnish local facilities and services upon request.<sup>i</sup>

The SCPSC’s detailed factual findings, developed in its capacity as a trier of fact after a full evidentiary review, with the benefit of decades of experience in overseeing local telecommunications in South Carolina, establish BellSouth’s satisfaction of all relevant requirements under sections 251 and 252. They rule out the possibility that shortfalls of local competition are attributable to BellSouth rather than the business decisions of potential competitors themselves.

BellSouth has also followed the guidance regarding interLATA entry given by this Commission in its Michigan Order<sup>ii</sup> to the extent possible while preserving BellSouth’s right to

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<sup>i</sup> See Order Addressing Statement and Compliance with Section 271 of the Telecommunications Act of 1996, Entry of BellSouth Telecommunications, Inc., into InterLATA Toll Market, Docket No. 97-101-C, Order No. 97-640 (SCPSC Jul. 31, 1997) (“Compliance Order”).

<sup>ii</sup> Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, FCC No. 97-298 (rel. Aug. 19, 1997) (“Michigan Order”).

have a court decide whether those requirements are consistent with the Act based on the facts as they exist in South Carolina. As part of its commitment to working cooperatively with the Commission, BellSouth even has included extensive evidence requested by the Commission notwithstanding pending proceedings that bear on the relevance and necessity of such evidence.

Second, and despite BellSouth's efforts to ease their entry, potential competitors are not entering the residential market in South Carolina on a facilities basis. AT&T, MCI, and Sprint have all disavowed an intention to offer such service. Compliance Order at 19. No potential provider had taken any substantial steps to offer facilities-based service to residential customers as of three months ago, which is the relevant time under "Track B." 47 U.S.C. § 271(c)(1)(B).

The situation in South Carolina reflects a general problem: potential local competitors are turning their backs on residential and rural customers to pursue more profitable opportunities and keep the Bell companies out of long distance. Although the Commission cannot solve this problem by further regulating incumbent LECs, it can break the logjam by authorizing interLATA competition under Track B, thereby sending a signal that long distance carriers and other potential local providers cannot delay interLATA competition by tailoring their local entry.

This application may be proper under "Track A" (47 U.S.C. § 271(c)(1)(A)) as well. One competitor in South Carolina recently has taken steps that may indicate an intention to provide residential service — possibly in a belated effort to thwart BellSouth's Track B application. To resolve this issue and develop a full record, the Commission should request that parties who provide or intend to provide local services in South Carolina detail their current and planned services in their comments on this application.

Third, the benefits to consumers of granting this application are crystal clear. Over five years, fuller competition as a result of BellSouth's interLATA entry will result in nearly 13,000 new jobs in South Carolina and increase the gross state product by more than \$1.2 billion. BellSouth has submitted to the SCPSC a proposed tariff that would establish basic interLATA rates at least five percent below those of AT&T. This tariff would guarantee low-volume callers, who are most in need of price relief, the opportunity to realize savings from a long distance carrier they know and can trust.

These benefits will be secured without any threat of harm to competition. The traditional justification for excluding Bell companies from interLATA services is that they might dominate interexchange markets through cost misallocation or discrimination. Yet the 1996 Act, together with longstanding Commission regulations and market realities, renders such misconduct inconceivable. The local exchange in South Carolina is open to competitors. BellSouth will start with zero market share in a business dominated by entrenched incumbents with vast resources and high sunk costs, factors that make successful predation unimaginable. Commission rules and procedures have successfully protected regulated ratepayers when incumbent local exchange carriers have entered other markets adjacent to the local exchange. The Commission has confirmed that the 1996 Act gives it ample authority to deter anticompetitive behavior and to facilitate detection of potential violations of the Act. The SCPSC and South Carolina Attorney General likewise have committed themselves to protecting against any possible harm from BellSouth's in-region, interLATA entry.

The unqualified benefits of granting this application have been recognized by those who are most affected. Included in Appendix D to this application are more than 450 letters from South Carolinians who support BellSouth's request for permission to compete, sent by the Governor and Attorney General of South Carolina and other representatives at the local and State levels, public and private educational institutions, non-profit organizations, community and business leaders, and ordinary business and residential consumers.

Fourth, BellSouth's entry into interLATA services likely will end long distance carriers' lack of interest in South Carolina's local markets. As the SCPSC found, the major long distance carriers "will no longer be able to pursue other opportunities secure in the knowledge that [BellSouth] cannot invade their market until they build substantial local facilities." Compliance Order at 66-67. AT&T, MCI, and Sprint also will be freed of all restrictions on offering bundled service packages, adding an additional dimension to local competition.

The SCPSC has determined that the "last avenue" to achieving Congress's goal of competition across all telecommunications markets in South Carolina is to allow BellSouth to provide interLATA services. Id. at 7-8, 66-67. This Commission will be slowing competition in South Carolina if it fails to embrace and act on this finding by the state agency that is closest to the facts.

**TABLE OF CONTENTS**

EXECUTIVE SUMMARY ..... i

I. BELL SOUTH MAY PROCEED UNDER TRACK B ..... 4

    A. BellSouth Has Taken All Required Steps to Open Local Markets  
    in South Carolina ..... 5

        1. BellSouth Has Negotiated Agreements with Numerous CLECs .. 5

        2. BellSouth Has Obtained State Approval of its Statement of  
        Generally Available Terms and Conditions ..... 6

    B. No CLEC Has Taken Reasonable Steps Toward Providing  
    Facilities-Based Residential Service in South Carolina ..... 8

    C. Information Held by BellSouth’s Competitors May Demonstrate  
    that BellSouth Has Satisfied Track A as Well ..... 15

II. BELL SOUTH’S STATEMENT MAKES INTERCONNECTION AND  
ACCESS AVAILABLE IN COMPLIANCE WITH THE ACT’S  
COMPETITIVE CHECKLIST ..... 17

    A. BellSouth Is Providing Nondiscriminatory Access to its  
    Operations Support Systems ..... 21

    B. All Fourteen Checklist Items Are Legally and Practically Available ..... 33

    C. Performance Measurements ..... 54

III. BELL SOUTH SATISFIES THE REQUIREMENTS OF SECTION 272 ..... 57

IV. BELL SOUTH’S ENTRY INTO THE INTERLATA SERVICES  
MARKET WILL PROMOTE COMPETITION AND FURTHER  
THE PUBLIC INTEREST ..... 66

    A. The Scope of the Public Interest Inquiry ..... 68

    B. The Current Long Distance Oligopoly Limits Competition ..... 72

- C. Market Evidence Confirms that BellSouth’s Entry into the InterLATA Market in South Carolina Will Benefit Consumers ..... 75
  - 1. Evidence of Competition Where LECs Have Been Allowed to Offer Long Distance. .... 76
  - 2. BellSouth Is Suited to Break Up the Interexchange Oligopoly in South Carolina ..... 78
- D. BellSouth’s Entry into the InterLATA Market, Subject to Extensive Statutory and Regulatory Safeguards, Presents No Risk to Competition ..... 85
  - 1. Regulation and Practical Constraints Make “Leveraging” Strategies Impossible to Accomplish ..... 85
  - 2. Actual Experience with LEC Participation in Adjacent Markets Disproves Theories about Anticompetitive Potential ..... 98
- E. The Effect of BellSouth’s Entry on Local Competition ..... 102
- CONCLUSION ..... 106
- APPENDIX A (Verifications and Anti-Drug Abuse Act Certifications)

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To: The Commission

**BRIEF IN SUPPORT OF APPLICATION BY BELLSOUTH FOR  
PROVISION OF IN-REGION, INTERLATA SERVICES IN SOUTH CAROLINA**

Pursuant to section 271(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 271(d)(1), BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. (collectively, "BellSouth") hereby seek authorization to provide interLATA services originating in the State of South Carolina, including all services treated as such under 47 U.S.C. § 271(j). BellSouth has satisfied each of the four requirements for approval of its application. Part I of this Brief explains that, pursuant to section 271(c)(1), BellSouth has received state approval of a statement of the terms and conditions under which it generally offers interconnection and network access to competitive local exchange carriers ("CLECs")<sup>1</sup> and is

<sup>1</sup> We use the term "CLECs" to refer to both potential and actual competitors, consistent with the Commission's use of this term. See Memorandum Opinion and Order, Application of SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, FCC No. 97-121, ¶ 35 (rel. June 26, 1997) ("Oklahoma Order").

eligible to apply for interLATA entry on the basis of that statement pursuant to section 271(c)(1)(B). Part II shows that BellSouth's statement satisfies the competitive checklist of section 271(c)(2)(B). Part III confirms that BellSouth will abide by the safeguards of section 272.<sup>2</sup> Part IV demonstrates that approving BellSouth's application "is consistent with the public interest, convenience and necessity." 47 U.S.C. § 271(d)(3). This Brief and supporting affidavits are available in electronic form at <<http://www.bellsouthcorp.com>>.

Virtually all of the issues presented by this application were fully briefed and argued before the SCPSC. Pursuant to section 271(d)(2)(B) — which provides state commissions a formal consultative role on local issues in section 271 proceedings — the SCPSC established a docket to consider BellSouth's eligibility to provide interLATA services in its State. Compliance Order at 2. That docket involved a full four months of review, including discovery, hearings, and evidentiary submissions from long distance carriers and other potential competitors that oppose BellSouth's interLATA entry.<sup>3</sup> Acting as the trier of fact, the SCPSC adduced evidence,

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<sup>2</sup> BellSouth intends to offer in-region, interLATA services in South Carolina through BellSouth Long Distance, Inc., which will operate in accordance with the requirements of section 272. However, all references to BellSouth Long Distance, Inc. should be understood to encompass any affiliate of BellSouth Telecommunications, Inc. (or its successors or assigns that provide wireline telephone exchange service) that operates consistent with this application's representations regarding the future activities of BellSouth Long Distance, Inc. The Commission should confirm when it approves this application that no further authorization, under section 214 or otherwise, is necessary for these entities to commence providing in-region, interLATA and international services in South Carolina.

<sup>3</sup> In addition to BellSouth, ACSI, AT&T, Communications Workers of America, the Consumer Advocate for the State of South Carolina, LCI, MCI, the South Carolina Cable Television Association, South Carolina Competitive Carriers Association, South Carolina Telephone Coalition, and Sprint all participated in the SCPSC's proceedings. BellSouth contacted each of these entities in an effort to narrow the issues in dispute for this proceeding. See App. D at Tab 2

evaluated the credibility of witnesses who were exposed to cross examination under oath, and reached conclusions on a record containing over 1600 pages of live and prepared sworn testimony and another 1500 pages of pleadings. All parties who wished to be heard had that opportunity, and the SCPSC had the opportunity to assess these parties' positions and credibility. The record of the SCPSC's proceedings is reproduced as Appendix C of this application.

Following its review, the SCPSC certified in a unanimous decision that "none of [BellSouth'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." Compliance Order at 19. The SCPSC based this certification not only on the testimony of potential competitors themselves, but also on its intimate knowledge of local markets, acquired in the course of reviewing scores of local interconnection and resale agreements, issuing certificates of public convenience, and generally "tak[ing] every step available to [the SCPSC] to encourage and to foster local competition in the State of South Carolina." Id. at 20.

The SCPSC also provided an in-depth analysis of BellSouth's checklist offerings. Id. at 27-59. After reviewing the terms of BellSouth's statement of generally available terms and conditions and extensive evidence regarding BellSouth's actual ability to furnish each of the items it formally holds out, the SCPSC concluded that "[a]lthough not all of the functions, capabilities, and services in the Statement have been requested by CLECs for use in South

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(copies of BellSouth letters). That effort has not resulted in any narrowing of the issues to date. BellSouth will, however, notify the Commission within five days of the filing of this application if its efforts do narrow disputed issues.

Carolina,” BellSouth had “demonstrated that it is functionally able to provide [these] items in South Carolina when ordered by a CLEC.” Id. at 5-6.

Finally, the SCPSC concluded that BellSouth’s “entry into the interLATA market in South Carolina would lead to increased long distance competition and more choices for consumers, which is in the public interest.” Id. at 61. The SCPSC noted BellSouth’s commitment to set its basic rates at least 5 percent below those of AT&T. Id. at 6. On the other side of the coin, the SCPSC explained that extensive “legal obligations and safeguards,” at both the federal and state levels, protect against any possible adverse effects from BellSouth’s entry. Id. at 65-66. The SCPSC also considered and rejected arguments that these benefits would be offset by a reduction in local competition if BellSouth were permitted to compete for long distance customers. Id. at 63. The SCPSC found, to the contrary, that “local competition may speed up considerably” and that BellSouth’s entry “will create real incentives for the major [interexchange carriers] to enter the local market rapidly in South Carolina, because they will no longer be able to pursue other opportunities secure in the knowledge that [BellSouth] cannot invade their market until they build substantial facilities.” Id. at 66.

These findings by the expert agency responsible for overseeing telecommunications markets in South Carolina provide the framework for BellSouth’s application.

**I. BELLSOUTH MAY PROCEED UNDER TRACK B**

This Commission held in its Oklahoma Order that a Bell company may apply for interLATA relief on the basis of an approved or effective statement of generally available terms and conditions under Track B where no potential competitors are taking reasonable steps toward

providing facilities-based service to business and residential customers. Oklahoma Order ¶¶ 57-

58. The SCPSC determined after a full review that this is precisely the situation in South Carolina, and this shortfall of local competition is not attributable to any failing by BellSouth.

**A. BellSouth Has Taken All Required Steps to Open Local Markets in South Carolina**

BellSouth has done its part to allow competitive entry by negotiating agreements with individual CLECs and offering interconnection and network access through its statement of generally available terms and conditions.

*1. BellSouth Has Negotiated Agreements with Numerous CLECs*

“BellSouth has devoted substantial resources involving the efforts of hundreds of employees and the expenditure of hundreds of millions of dollars to meet or to exceed the requirements of the 1996 Act to open its local markets to competition.” Compliance Order at 20. BellSouth’s negotiators have devoted countless hours to fielding CLEC requests, negotiating arrangements that meet individual CLECs’ needs, and obtaining state approval of the resulting agreements. As a result of these efforts, BellSouth has executed agreements with 83 different telecommunications carriers in South Carolina. See Wright Aff. Ex. 1 Attach. WPE-A (App. A at Tab 16). BellSouth’s SCPSC-approved agreements and the SCPSC orders approving them are reproduced in Appendix B of this application.<sup>4</sup> All the agreements, except BellSouth’s

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<sup>4</sup> The SCPSC has approved BellSouth’s agreements with the following 67 telecommunications carriers: 360° Communications Company; ALEC, Inc.; Alliance Telecommunications, Inc.; ALLTEL Mobile Communications, Inc.; American MetroComm Corporation; American Communication Services, Inc. (ACSI); Annox, Inc.; AT&T; AT&T Wireless Services, Inc.; AXSYS, Inc.; BellSouth Personal Communications, Inc. d/b/a BellSouth Mobility DCS; BTI Telecommunications, Inc.; Cellco Partnership d/b/a Bell Atlantic NYNEX Mobile, Columbia

agreement with AT&T, were completed without the need for an SCPSC arbitration order. A copy of the SCPSC's decision in the AT&T/BellSouth arbitration is reproduced in Appendix B (at Tab 69).<sup>5</sup> No other carrier has sought arbitration or identified any outstanding dispute with BellSouth that would require arbitration.

2. *BellSouth Has Obtained State Approval of its Statement of Generally Available Terms and Conditions*

BellSouth has also actively invited entry by CLECs through its Statement of Generally Available Terms and Conditions ("Statement"). The Statement sets out specific terms and

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Cellular Telephone Company, Andersen Cellular Telephone Company (BANM); Comm South Companies; Comm. Depot, Inc.; Competitive Communications, Inc. (CCI); Cybernet Group; Data & Electronic Services, Inc. (DES); DeltaCom, Inc.; EZ Phone, Inc.; FiberSouth, Inc.; Georgia Comm South, Inc. and Fla. Comm South; GNet Telecom, Inc.; GTE Mobilnet Incorporated; GTE Mobilnet of Florence, South Carolina Inc.; GTE Mobilnet of South Carolina Inc.; Hart Communications Corporation; ICG Telecom Group, Inc.; Inter-World Communications; Interlink Telecommunications, Inc.; Intermedia Communications, Inc. (ICI); Interstate Telephone Group; JETCOM, Inc.; KMC Telecom Inc.; LCI International Telecom Corp.; National Tel; Netel, Inc.; Nextel Communications, Inc.; NOW Communications, Inc.; OmniCall, Inc.; Palmer Wireless, Inc.; Payphone Consultants, Inc.; Powertel, Inc.; Preferred Carrier Services, Inc.; Prime Time Long Distance Services, Inc.; Public Service Cellular, Inc.; RGW Communications, Inc.; SouthEast Telephone, LTD; Southern Phon-Reconnek; Sterling International Funding, Inc. d/b/a Reconex; Supra Telecommunications & Information Systems, Inc.; Tel-Link, L.L.C. d/b/a Tel-Link, L.L.C. and Tel-Link of Florida, L.L.C.; Tele-Sys, Inc.; Teleconex, Inc.; The Telephone Company of Central Florida; TriComm, Inc.; TTE, Inc.; U.S. Dial Tone, Inc.; U.S. Long Distance, Inc. (USLD); Unidial Communications, Inc.; United States Cellular Corporation and Central Florida Cellular Telephone Company; US LEC of North Carolina, L.L.C.; Vanguard Cellular Financial Corp.; WinStar Telecommunications, Inc.; and Wright Businesses, Inc. BellSouth's agreements with MCImetro Access Transmission Services, Inc., and Time Warner Communications were recently approved and are reproduced in Appendix D.

<sup>5</sup> AT&T has appealed the SCPSC's arbitration decision to the United States District Court. AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., No. 3:97-2164-17 (D.S.C. filed Jul. 18, 1997). The arbitration decision remains fully effective.

conditions under which BellSouth offers to provide interconnection and access to its network, as well as resale opportunities on a nondiscriminatory basis to any requesting CLEC in South Carolina. These offerings reflect the Act and federal and State rules and decisions, as well as what BellSouth has learned about CLECs' requirements in the course of negotiating its numerous interconnection agreements. See Varner Aff. ¶¶ 17-18, 23-24 (App. A at Tab 14). In order to ease entry by CLECs (and particularly smaller CLECs) that do not want to negotiate carrier-specific terms, and to establish a useful model for carriers that do want to negotiate, the Statement sets out offerings regarding all of the capabilities needed to compete in the local market in "as straightforward and simple" a way as possible. Varner Aff. ¶ 13.

Pursuant to section 252(f) of the Act, the SCPSC approved BellSouth's Statement, with modifications, on July 31, 1997, finding that "the rates, terms and conditions of interconnection, unbundling and resale in the Statement comply with Section 251 and 252(d) of the Act" and "reflect in a very specific and detailed way the [SCPSC's] rulings in the BellSouth-AT&T arbitration proceeding." Compliance Order at 27.<sup>6</sup> On September 9, 1997, in response to a Motion for Clarification filed by AT&T, the SCPSC approved further modifications to the Statement to make the document more consistent with the Eighth Circuit's decision in Iowa Utilities Board v. FCC, 1997 U.S. App. LEXIS at 18183, \*48 (July 18, 1997). See App. D at

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<sup>6</sup> See Varner Aff. ¶¶ 5-11 (discussing SCPSC modifications). AT&T has appealed the SCPSC's approval of the Statement notwithstanding its own decision to arbitrate a custom-tailored interconnection agreement rather than relying upon the terms contained in the Statement. 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). The Statement and the Compliance Order remain in full effect and AT&T's appeal does not affect this application under section 271.

Tab 9 (SCPSC order); see also Varner Aff. ¶¶ 5-12. A copy of the Statement reflecting the modifications approved by the SCPSC is provided as an exhibit to the Affidavit of Alphonso Varner (App. A at Tab 14).

**B. No CLEC Has Taken Reasonable Steps Toward Providing Facilities-Based Residential Service in South Carolina**

Despite all these efforts by BellSouth, no CLEC made any significant, timely effort to provide the sort of facilities-based competition that legislators “consistently . . . contemplated” when drafting the 1996 Act. S. Conf. Rep. No. 104-230, at 148 (1996) (“Conference Report”). As the SCPSC has certified, “none of [BellSouth’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.” Compliance Order at 19.

Congress recognized that facilities-based local competition may not emerge immediately in every State. See Oklahoma Order ¶ 43 (citing Conference Report at 148). Yet legislators wanted to ensure that Bell companies would open local markets and enhance long distance competition even in those States where facilities-based competition is slower to develop. The House Commerce Committee thus drafted Track B “to ensure that a BOC is not effectively prevented from seeking entry into the long distance market because no facilities-based carrier which meets the criteria specified in the Act sought to enter the market.” H. R. Rep. No. 104-204, at 77 (1995) (“House Report”); see Conference Report at 148.<sup>7</sup>

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<sup>7</sup> See also 142 Cong. Rec. H1152 (daily ed. Feb. 1, 1996) (statement of Rep. Hastert) (“section 271(c)(1)(B) provides that a BOC may petition the FCC for this in-region authority if it has . . . not received . . . any request for interconnection from a facilities-based competitor that meets the criteria in section 271(c)(1)(A)”); 141 Cong. Rec. H8458 (daily ed. Aug. 4, 1995) (statement of

In South Carolina, the SCPSC has concluded that potential competitors, and particularly the large interexchange carriers, are positioned to become facilities-based CLECs but are “pursu[ing] other opportunities” instead. Compliance Order at 66-67. If Track B were not available in such instances companies such as AT&T, MCI, and Sprint would have a strong incentive to continue delaying facilities-based local entry so as to protect their own shares of the interLATA market against Bell company competition. See Oklahoma Order ¶ 56. In the words of the Commission, “Track B appropriately safeguards the [Bell companies’] interests where there is no prospect of local exchange competition that will satisfy the requirements of section 271(c)(1)(A).” Id. ¶ 55.<sup>8</sup>

In some cases the Bell company’s eligibility to file under the Commission’s standard can readily be established. For instance, Track B would be available where potential competitors have sought only resale agreements, but would not be available under the Commission’s test if a

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Rep. Tauzin) (Track B available unless “the exclusively or predominantly facilities based provider described in subparagraph (A)” has requested interconnection and access from the BOC).

<sup>8</sup> The Commission has read section 271(c)(1)(B) to condition Bell company interLATA entry on the absence of a request for negotiation to obtain access and interconnection “from a prospective competing provider of the type of telephone exchange service described in section 271(c)(1)(A).” Oklahoma Order ¶ 31 (emphasis added). This interpretation of Track B is the subject of an appeal before the U.S. Court of Appeals for the District of Columbia. See SBC Communications, Inc. v. FCC, No. 97-1425 (D.C. Cir. to be argued Jan. 9, 1998). BellSouth believes the Commission’s position is incorrect and Track B is foreclosed only if the BOC has received a request from a qualifying “competing provide[r]” that actually meets the criteria of Track A as of “the date which is 3 months before the date the company makes its application.” 47 U.S.C. § 271(c)(1)(B). In South Carolina, BellSouth had not received any such request, which alone establishes BellSouth’s eligibility to file under Track B. See Wright Aff. ¶ 4 (no facilities-based provider of business and residential service on June 30, 1997).

CLEC had committed itself to provide facilities-based service to businesses and residences under a reasonable timetable and was in compliance with that schedule. Where the request for interconnection is open-ended and potential competitors have neither ruled out nor committed themselves to providing facilities-based service to residential and business customers, however, the Commission must “engage in a difficult predictive judgment.” Oklahoma Order ¶ 57. This assessment must be informed by the requester’s actions as well as its words. Thus, the Commission has held that a request can preclude an application under Track B only if the requester (1) has made a request that on its face will, if implemented, “lead to the type of telephone exchange service described in section 271(c)(1)(A)” and (2) is “taking reasonable steps toward implementing its request in a fashion that will satisfy section 271(c)(1)(A).” Id. ¶¶ 54, 57, 58.<sup>9</sup>

In deciding whether requesting carriers are reasonably proceeding toward providing facilities-based service to residential and business customers, the Commission’s inquiry must address the state of local competition as of “3 months before the date the [Bell] company makes its application.” 47 U.S.C. § 271(c)(1)(B). Congress established this cut-off date to “ensure” the Bell companies’ ability to file Track B applications when facilities-based local competition is not developing despite an open market. Conference Report at 148. Because of the three-month cut-off, interexchange carriers and other CLECs cannot “game” the system by waiting until the BOC

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<sup>9</sup> In the Oklahoma Order, the Commission set out its “reasonable steps” standard as part of an illustrative example involving a second section 271 application for a given State. Oklahoma Order ¶ 58. A CLEC’s status as a qualifying potential Track A competitor at a given moment would not, however, depend upon whether the incumbent Bell company has previously filed a section 271 application.

is close to filing (or has filed) its application, and then professing a desire to provide facilities-based local service. See Oklahoma Order ¶ 56 (construing Track B in light of CLECs' incentive to game section 271 process). Accordingly, the relevant question under Commission precedent is whether — as of June 30, 1997 — any potential facilities-based competitor had made a request for interconnection and access from BellSouth in South Carolina that satisfied the two-part test set forth above.

In answering this question, the Commission must look to the SCPSC's assessment of the local market. Like other state commissions, the SCPSC has been "doing the hard job of promoting competition in [its] jurisdiction" and thus is intimately familiar with the activities of BellSouth and new entrants alike. Chairman Reed E. Hundt, Speech to Commission Staff (Washington, D.C. May 27, 1997) <<http://www.fcc.gov/speeches/hundt/spreh.726.html>>. State commissions are responsible for licensing CLECs, 47 U.S.C. § 253(b), for ensuring that CLECs may obtain access and interconnection at reasonable prices, id. § 252(d), for reviewing interconnection agreements between CLECs and incumbent Bell companies, id. § 252(e), and for resolving any implementation disputes that may arise and enforcing agreement terms, see Iowa Utils. Bd., 1997 U.S. App. LEXIS at 18183, \*48. In South Carolina, for instance, the SCPSC has had the benefit of not only extensive hearings on local competition issues generally, but also its review of carrier-specific agreements and applications for local service authority, as well as its experience arbitrating an agreement between BellSouth and AT&T. Compliance Order at 19-20. This extensive experience puts the SCPSC in the best position to make the "highly fact-specific"

determination whether any CLEC in South Carolina is taking reasonable steps to become a facilities-based competing provider of business and residential service. Oklahoma Order ¶ 60.

Section 271(d)(2)(B) reflects the state commissions' unique expertise by requiring this Commission to "consult with the State commission . . . in order to verify the compliance of the Bell operating company with the requirements of subsection [271](c)," including fulfillment of Track A or Track B.<sup>10</sup> Moreover, section 271(c)(1)(B) authorizes state regulators to "certify" if a CLEC has "(i) failed to negotiate in good faith as required by section 252, or (ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement." Like the inquiry into whether a carrier is "taking reasonable steps toward implementing a request in a fashion that will satisfy section 271(c)(1)(A)," resolving these issues requires familiarity with local markets and the activities of local competitors. Congress evidently believed that this expertise resides with the state commissions. Consistent with the structure of the 1996 Act, therefore, this Commission should defer to the SCPSC's determination that "none of [BellSouth'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." Compliance Order at 19.

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<sup>10</sup> Where the Commission has been subject to a comparable instruction to "consul[t] with" the Secretary of State on foreign policy matters, it has decided to "defer to the State Department." Cable News Network, Inc., File No. 907-DSE-L-85 (IB, rel. Nov. 19, 1985). Here "the value of federalism" provides an additional reason for according deference, University of Tenn. v. Elliot, 478 U.S. 788, 798 (1986), to minimize "friction" between federal and state officials. Sumner v. Mata, 449 U.S. 539, 550 (1981).

The SCPSC's conclusion is, moreover, amply supported by the materials provided in the Appendices to this application. Most of the requests for negotiations that BellSouth has received are exclusively for resale of BellSouth's local services and thus could never lead to facilities-based Track A service. Wright Aff. ¶ 6. Of all the CLECs with signed interconnection agreements, only 26 indicated in negotiations that they might at some future time provide facilities-based local exchange services. Id. And of these 26 CLECs, only nine have sought certification from the SCPSC to provide competitive local exchange services in South Carolina. Id. ¶ 6 & Ex. 1 Attach. WPE-A.

Unlike other BellSouth States, no carriers have ordered unbundled loops from BellSouth in South Carolina. Milner Aff. ¶ 37 (App. A at Tab 9). Only one carrier has requested an unbundled switch port in South Carolina. Id. ¶ 50. And, as discussed below, just three requesters (ACSI, ITC DeltaCom, and Time Warner) have placed self-provided facilities in South Carolina. Wright Aff. ¶ 9.

ACSI has fiber-optic networks in Columbia, Charleston, Greenville, and Spartanburg, South Carolina and has executed an SCPSC-approved interconnection agreement with BellSouth. Wright Aff. ¶¶ 10-13. However, ACSI told the SCPSC that it has installed those facilities not "as a local service provider, but rather only as an access provider" — which does not count for purposes of Track A and Track B. Compliance Order at 19; see 47 U.S.C. § 271(c)(1)(A) (excluding exchange access from scope of telephone exchange service for purposes of BOC interLATA entry). Indeed, the SCPSC concluded, based on ACSI's own testimony, that ACSI "had no business plan or firm commitment to place the necessary facilities in South Carolina to

begin to provide [facilities-based] competition” and “had no intent to compete for residence customers in South Carolina,” as well as that ACSI’s “decision not to compete in South Carolina is related not to any action on the part of [BellSouth], but rather its own business decision to deploy its capital in other areas, such as Georgia, Texas, New Orleans and Baltimore.”

Compliance Order at 19. The most recent information available to BellSouth confirms that, although ACSI may in the future serve South Carolina businesses over its networks, it will not seek to offer facilities-based service to residential customers in the State. Wright Aff. ¶¶ 11-12.

A second CAP that has signed an SCPSC-approved interconnection agreement with BellSouth — ITC DeltaCom — also has fiber-optic networks in place. Id. ¶¶ 14-21. ITC DeltaCom did not provide — and was not taking any steps to provide — facilities-based local exchange service in South Carolina as of June 30 of this year. Id. ITC DeltaCom’s more recent activities are discussed in Part I (C), below.

The third facilities-based provider, Time Warner Communications, owns fiber routes in Columbia, South Carolina. Time Warner Communications has focused its local telephony initiatives in BellSouth’s region almost entirely on business customers. When and if the company enters the local exchange market in South Carolina, it is expected to focus exclusively on business customers. Wright Aff. ¶¶ 22-23 & Attach. WCE-C.

The SCPSC has confirmed that CLECs’ failure to move more quickly to launch facilities-based local service — particularly for residential customers — is due solely to their own business decisions, for BellSouth has not “taken any action to prevent or to retard the development of local competition in South Carolina.” Compliance Order at 20. As Professor Glenn Woroch of

the University of California at Berkeley demonstrates, the simple fact is that demographic and economic conditions unrelated to BellSouth's offerings make other States more attractive candidates for competitive local entry, at least as long as BellSouth can be kept out of long distance in South Carolina. *Woroch Aff.* ¶¶ 16-19, 21, 86-92 (App. A at Tab 15). Although AT&T and other interLATA incumbents will argue that this means that long distance competition should also be delayed in South Carolina, Congress decided otherwise. Under the Act and Commission precedent Track B ensures that customers in South Carolina will not be penalized simply because CLECs' priorities lie elsewhere.

**C. Information Held by BellSouth's Competitors May Demonstrate that BellSouth Has Satisfied Track A as Well**

Of course, BellSouth does not have access to complete information about its actual and potential competitors. It is possible that some CLEC recently started to take reasonable steps to meet a specific, near-term schedule for rolling out facilities-based residential service. That, however, would not affect BellSouth's ability to file under Track B on the basis of market conditions as they stood three months before the date of this application.

It is even possible that CLEC(s) in South Carolina have begun to offer facilities-based service to residential as well as business subscribers in South Carolina in recent weeks, perhaps in an effort somehow to stop BellSouth's entry into long distance. In particular, just six days after the SCPSC's July 24 vote to approve the Statement and BellSouth's proposed application under Track B, ITC DeltaCom filed a retroactive tariff for local service, backdated with an effective date of January 23, 1997. See *Wright Aff. Ex. 1 Attach. WPE-E* (ITC DeltaCom tariff). ITC DeltaCom's new tariff was noticed to the SCPSC at its meeting on August 21, 1997. ITC

DeltaCom also is now giving potential residential customers in Greenville, South Carolina directly contradictory information whether it serves residential customers in that city. Compare Affidavit of David S. Wyatt (App. D at Tab 5 ) with Affidavit of Beth B. Hughes (App. D at Tab 6). Such conduct may be part of an improper attempt to thwart approval of BellSouth's application without actually moving ITC DeltaCom into the residential market, or it may reflect that ITC DeltaCom just recently determined to enter the local residential market in Greenville.

The Commission should get to the bottom of the matter. To develop a full record supporting its decision on this application, the Commission should request that all commenters give specific details regarding their telephone exchange service operations, if any, in South Carolina, including descriptions of all services now being offered and furnished, all steps currently being taken to enter the market, and timetables for introducing new services.<sup>11</sup> The Commission should issue an Order to that effect immediately, to give commenters the greatest possible notice.

If the evidence shows that ITC DeltaCom or some other carrier(s) are in fact offering facilities-based service to residential and business customers in South Carolina, Track A (as well as Track B) would be satisfied and BellSouth's application could go forward on that basis. Likewise, if the evidence shows that a CLEC has begun supplementing facilities-based service to business customers with resale of BellSouth's residential service in South Carolina, BellSouth

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<sup>11</sup> Such information could, of course, be filed with the Commission in accordance with the same confidentiality procedures adopted in prior section 271 proceedings. See, e.g., Protective Order, Application of SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Oklahoma, 12 FCC Rcd 6157 (1997).

would be eligible for interLATA relief under both Track A and Track B. The Department of Justice has explained that the Act “does not . . . require that each class of customers (i.e., business and residential) must be served over a facilities-based competitor’s own facilities.” Addendum to DOJ Oklahoma Evaluation at 3, CC Dkt. No. 97-121 (May 21, 1997). “[I]t does not matter whether the competitor reaches one class of customers — e.g., residential — only through resale, provided the competitor’s local exchange services as a whole are provided ‘predominantly’ over its own facilities.” *Id.*<sup>12</sup> Furthermore, the requirements of Track A can be satisfied by a combination of CLECs, rather than the activities of just one CLEC alone. See Michigan Order ¶¶ 82-85. To apply these standards, however, it is critical that the Commission collect the best available information from those parties who have it.

**II. BELLSOUTH’S STATEMENT MAKES INTERCONNECTION AND ACCESS AVAILABLE IN COMPLIANCE WITH THE ACT’S COMPETITIVE CHECKLIST**

Whenever CLECs in South Carolina decide they are ready to compete, they will have ready and waiting under the terms of their existing agreements and/or BellSouth’s Statement each of the fourteen checklist items. See 47 U.S.C. § 271(c)(2)(B). The affidavits submitted with this brief, including particularly the Affidavits of W. Keith Milner and Alphonso J. Varner, and the two affidavits of William N. Stacy, explain exactly how BellSouth makes each of the Act’s fourteen checklist items available to any CLEC that requests them.

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<sup>12</sup> Supplementing facilities-based residential service with resold business service would qualify just as much as the opposite combination.