

discriminatory. See Bradbury Aff. ¶ 28 n.23 (citing conclusions to that effect of the Department of Justice and several state commissions).

BellSouth's assertion (see Stacy OSS Aff. ¶¶ 43-45) that CLECs should devise their own workarounds is disingenuous. The only potentially practical alternative for a large CLEC -- integrating LENS with EDI through development of a Common Gateway Interface (CGI) -- would require BellSouth to provide technical specifications that BellSouth has admitted it has not provided and that it concededly "'discontinued'" work on five months ago. Bradbury Aff. ¶ 43 & n.32 (quoting BellSouth testimony); see id. ¶¶ 35-52 (describing BellSouth's failure to provide specifications needed for CGI and inadequacy of other alternatives). Thus BellSouth's own actions have ensured that no large CLEC could successfully avoid the dual entry problem LENS imposes.

Second, LENS does not provide CLECs with the same pre-ordering capabilities that BellSouth provides its own customer representatives. Unlike BellSouth, CLECs dependent upon LENS are unable to (1) reserve a firm due date for most transactions; (2) validate a customer's address once at the outset of the call, rather than repeatedly, screen after screen, while the customer is on the line; (3) match BellSouth's ability to access and reserve telephone numbers; (4) have ready access to customer service record information; or (5) obtain advance notice of system changes. Id. ¶¶ 53-93. Contrary to BellSouth's assertion, not only would a CLEC's decision to use LENS in its so-called "Firm Order Mode" (i.e., for ordering as well as pre-ordering) not solve all of these problems, it would create additional disadvantages that would further undercut the CLEC's ability to compete. Id. ¶¶ 97-103.

ii. **Ordering and Provisioning:** Because BellSouth has not yet deployed its "permanent" EDI interface, large CLECs must choose between "PC EDI" (a

personal computer-based software package designed for CLECs with small order volumes) and "interim Phase I EDI" (designed for larger CLECs). See Bradbury Aff. ¶¶ 114-116 & nn.72-75. Neither option affords a large CLEC access equivalent to what BellSouth enjoys.

Interim Phase I EDI is inherently discriminatory for several reasons. First, CLECs cannot use it to order the full range of BellSouth services (including services accounting for hundreds of millions of revenue dollars) or to submit complex orders as BellSouth itself does. Id. ¶¶ 131-134 & nn.87-89. Second, many of the services and transactions for which it is intended require manual, rather than electronic, processes. For example, with Phase I EDI, not only do many simple orders fall out for manual processing, but BellSouth transmits back to CLECs basic messages -- such as error notices, notices of rejection, jeopardy notices, and status reports -- only via facsimile rather than electronically over the interface. Id. ¶¶ 119-130. Third, messages delivered over Phase I EDI are delivered not in real time but via a batch process, causing delays of up to 30 minutes for receipt of orders and increasing the risk that due dates and telephone number requests will not be honored. Id. ¶¶ 135-137. Finally, the firm order confirmation and completion notices that BellSouth transmits are barebones transmissions that do not identify the services actually ordered and installed by BellSouth. Id. ¶¶ 138-140.

In addition, AT&T's experience in placing resale orders with BellSouth confirms that BellSouth's ordering interface is not operationally ready. For example, AT&T orders continue to be rejected because AT&T lacks the knowledge of BellSouth's business rules that are required to send error-free orders to BellSouth. Id. ¶¶ 166-195. Moreover, BellSouth's systems take not hours but days to send rejection notices to AT&T, further augmenting provisioning delays. Id. ¶¶ 231-232. And for those orders that are not rejected, BellSouth has regularly failed to meet provisioning intervals that are themselves substantially more liberal than the intervals BellSouth

claims it can meet. Id. ¶¶ 237-239 and n.138. As a result, AT&T cannot offer its customers the timely and reliable service necessary to engage in full-scale marketing and high-volume local exchange competition in Louisiana. Id. ¶ 13.

iii. **Repair and Maintenance:** BellSouth also has not yet deployed an interface capable of providing CLECs with machine-to-machine access to repair and maintenance functions. Its EBI interface has only "'limited functionality'" (id. ¶ 147 (quoting Stacy Aff. (OSS) ¶ 82)) that makes it unsuitable for use with basic resold services, and its TAFI interface not only is incapable of providing status information on many kinds of trouble reports but is a proprietary non-standard interface that cannot be integrated with a CLEC's systems and thus requires dual data entry. Bradbury Aff. ¶¶ 141-145.

b. **Future Deployment:** BellSouth has plans to deploy interfaces that, for ordering and provisioning and repair and maintenance, would have at least the capability of providing non-discriminatory access. Id. ¶¶ 8 n.6, 146, 151 n.94, 154, 163. But these interfaces are not available today, and BellSouth's promises to deploy them in the future are insufficient to meet its burden of proof under Section 271. Ameritech Michigan Order ¶ 55. As for preordering, however, the future is even more bleak. Although in March, 1997, AT&T and BellSouth agreed to specifications for an electronic communications interface that would have eliminated the many functional limitations that plague the current LENS system, BellSouth announced in July, 1997 that it would not honor those specifications and would instead deploy an interface that will perpetuate those same LENS problems. Bradbury Aff. ¶¶ 104-110. At this point, therefore, BellSouth has not even made a paper promise to deploy a nondiscriminatory preordering interface.

c. **Inadequate Assistance:** Despite this Commission's admonition that BOCs must "adequately assist[] competing carriers to understand how to implement and use all of the OSS functions available to them" (Ameritech Michigan Order ¶ 136), BellSouth's record is one of resistance and neglect. AT&T first requested electronic access to BellSouth's OSS more than two years ago, in the aftermath of Georgia state legislation authorizing local service competition. Bradbury Aff. ¶ 13 & Att. 1. For months BellSouth refused to acknowledge any obligation to provide such access, claiming that a "'PC to PC fax interface'" was all it was required to provide. Id. at Att. 1, at 5-6 (quoting BellSouth letter to AT&T of May 16, 1996). AT&T thus had to seek and obtain an order from the Georgia Public Service Commission compelling BellSouth to provide electronic interfaces, which the Georgia PSC has since had to reaffirm twice in response to continued BellSouth opposition and footdragging. Id. Att. 1, at 3-8.

Given this record, it should not be surprising that BellSouth's assertion (Br. 26) that it has "provided CLECs with all information . . . [and] training they may need to use BellSouth's systems effectively" is untrue. BellSouth has consistently refused to provide AT&T with complete and accurate information regarding its business rules, which the Commission has recognized are crucial to efficient processing of CLEC orders. Ameritech Michigan Order ¶ 137; see Bradbury Aff. ¶¶ 166-195. Similarly, despite repeated requests from AT&T for training in the use of LENS, BellSouth has provided only two sessions that essentially consisted of demonstrations of the LENS system, has offered trainers who have been unable to answer questions concerning error messages or required procedures beyond the narrow "script" that BellSouth created for the sessions, and failed to update its LENS Users Guide for more than

three months, thereby leaving CLECs without guidance on how to use numerous important functions that BellSouth changed or added in the interim. Id. ¶¶ 196-203.

d. UNEs: In the Ameritech Michigan Order, the Commission made it clear that BOCs must ensure that CLECs are able to gain nondiscriminatory access to OSS equally for each of the three entry routes. Ameritech Michigan Order ¶ 133. In particular, the Commission recognized that BOCs must provide CLECs with nondiscriminatory OSS access for serving customers not only with individual network elements, but through "combinations of network elements" as well. Id. ¶ 160.

BellSouth has failed to comply with these obligations. BellSouth has yet to demonstrate that CLECs can transmit orders for individual UNEs electronically to BellSouth and that BellSouth can electronically receive and flow them through its legacy systems on an "end-to-end" basis. See Bradbury Aff. ¶¶ 209-212. BellSouth's systems also are incapable of being used to order existing UNE combinations: BellSouth's witness Mr. Stacy admits that BellSouth has "not yet undertaken [the] development" needed to make "our electronic interfaces . . . accommodate UNE combinations." Stacy OSS Aff. ¶ 59. Indeed, he states only that "BellSouth will make available separate UNEs which the CLECs can then combine themselves with a collocation arrangement." Id. BellSouth similarly has made no effort to provide the technical interface specifications or other assistance entrants will need to order network elements that the entrants themselves would combine. Bradbury Aff. ¶¶ 206-207 & Att. 37. Finally, the pre-ordering, maintenance and repair, and billing interfaces that BellSouth offers in connection with UNEs do not begin to provide nondiscriminatory access. See id. ¶¶ 58 n.44, 213-217.

* * *

In summary, BellSouth has failed even to commit to provide nondiscriminatory electronic interfaces, has not yet deployed interfaces that are capable of meeting the statutory requirements,

and has not adequately supported the interfaces it has deployed. For these independent reasons, BellSouth has not met its checklist obligations with respect to OSS. This noncompliance is further confirmed by the scant record BellSouth submitted on its performance to date, which illustrates how far BellSouth has to go to open its markets to competition.

2. BellSouth's Performance Data Confirms That It Is Not Providing Nondiscriminatory Access To CLECs.

BellSouth's application does not begin to satisfy the Commission's further requirement that BOCs submit data demonstrating that they are providing nondiscriminatory access to CLECs. Ameritech Michigan Order ¶ 128. Consistent with BellSouth's view that "[i]t is for BellSouth -- not the Commission . . . -- to determine what evidence to present" (BellSouth S.C. Reply Br. 51), BellSouth has again failed to provide data for most of the performance measurements specifically identified as necessary in the Commission's prior orders. Moreover, BellSouth has continued to withhold relevant performance data from the Commission which conclusively demonstrate that BellSouth is not providing nondiscriminatory performance for CLECs. And in the very few instances in which BellSouth provides comparative data on its performance for CLECs and for its own local retail operations, BellSouth attempts to conceal its discriminatory behavior by presenting its data in ways that obscure meaningful performance comparisons. Ironically, however, notwithstanding those distortions, BellSouth's own data confirm that it is not providing nondiscriminatory performance for CLECs.

Before discussing these defects in more detail, it should be noted that BellSouth's legal objection to providing performance data that the Commission found necessary is frivolous. BellSouth claims that "the Commission may not enforce substantive performance standards for other checklist items under the rubric of access to OSSs" because "[w]hat happens after CLECs' requests have made it through BellSouth's systems is governed not by the Act's OSS provisions

but rather by the checklist requirements (if any) that address the underlying item ordered." BellSouth Br. 35 n.31 (emphasis added). Nowhere does BellSouth attempt to explain how, in practice, this purported distinction would make any difference; nor could it, given that the Act independently and expressly requires nondiscriminatory access to both UNEs and resale. E.g. §§ 251(c)(3), 251(c)(4)(B), 271(c)(2)(B)(ii), (xiv). The "rubric" under which the Commission discusses the BOC's provision of nondiscriminatory access to UNEs and resale services is thus immaterial, because the obligation to provide such access is founded directly in the Act.

a. **BellSouth omits most performance measures:** In the Ameritech Michigan Order, the Commission provided substantial guidance to BOCs concerning the performance data needed to show that nondiscriminatory access is being provided to CLECs. In addition to its extended analysis of several performance measures that the Commission found essential to any showing that parity is being provided to CLECs, including average installation intervals and the timeliness of firm order confirmations and order rejections, the Commission identified a number of additional performance measurements that should be submitted with future applications under section 271, including service order and provisioning accuracy, held orders, bill quality and accuracy, and comparative performance data for unbundled network elements. See Ameritech Michigan Order ¶¶ 164-172, 185-188, 212. Further guidance was also provided in Appendix D of the Commission's Bell Atlantic/NYNEX Merger Order, which listed 22 performance measurements which those BOCs were required to monitor and report to the Commission.²⁹

²⁹ Application of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp., File No. NSD-L-96, Memorandum Opinion and Order, FCC 97-286 (rel. August 14, 1997) ("Bell Atlantic/NYNEX Merger Order").

Despite this guidance, BellSouth has failed to submit with its application data on any of the following performance measurements found to be necessary in the Commission's prior orders: (1) average installation intervals, (2) service order accuracy or provisioning accuracy, (3) held orders, (4) the timeliness of firm order confirmations, (5) the timeliness of order rejections, (6) the timeliness of order completion notifications, (7) bill quality and accuracy, or (8) comparative performance data for unbundled network elements. Pfau Aff. ¶¶ 22-51. These omissions are fatal to BellSouth's application. For example, as the Commission stated with respect to average installation intervals in its Ameritech Michigan Order, "[w]ithout data on average installation intervals comparing [the BOC's] retail performance with the performance provided to competing carriers, the Commission is unable to conclude that [the BOC] is providing nondiscriminatory access to OSS functions for . . . ordering and provisioning," and thus unable to approve the BOC's section 271 application. Ameritech Michigan Order ¶ 167.

b. BellSouth's data confirm that its performance is discriminatory:

Beyond this failure of proof, BellSouth has deliberately withheld from the Commission data that it has been reporting to CLECs on the return of firm order confirmations ("FOCs") and order rejections to CLECs -- data which show that BellSouth's performance for CLECs is discriminatory and inadequate. Thus, BellSouth's performance data show that BellSouth was returning firm order confirmations to AT&T within 24 hours only 62 percent of the time in August and only 56 percent of the time in September. Pfau Aff. ¶¶ 40-41; Bradbury Aff. ¶¶ 226-227. Moreover, this poor performance occurred despite the fact that BellSouth has unilaterally limited its FOC measure to only those "orders that flow through mechanically and entirely without human intervention" -- a limitation that has no basis in the AT&T-BellSouth Agreement -- thereby excluding from its FOC measurement those CLEC orders most likely not

to meet the contractual standard. Pfau Aff. ¶ 44. Even when manipulated in this way, however, BellSouth's data clearly show that BellSouth is failing to meet even its contractual obligations, let alone its statutory obligations to provide AT&T with the virtually instantaneous response that its own customer service personnel receive.

Likewise, BellSouth's own data show that it is not providing nondiscriminatory performance to CLECs with respect to the timeliness of order rejections. AT&T, like BellSouth's own personnel, should receive electronic notice of order rejections "relatively instantaneous[ly]." Ameritech Michigan Order ¶ 188. But BellSouth's data show that it is providing notice of order rejection to AT&T within one hour only 6 percent of the time. Pfau Aff. ¶ 47; Bradbury Aff. ¶¶ 231-232. This poor performance results directly from BellSouth's failure to mechanize its order rejection process, in violation not only of the Act but of its contractual obligation to provide AT&T with electronic order rejection notices "no later than March 31, 1997." AT&T-BellSouth Agreement, § 28.6.4; Pfau Aff. ¶ 47.

BellSouth's failure to provide the same fully electronic processing of CLEC orders that it provides for its own local retail orders is also confirmed by the limited data that BellSouth has provided on order flow through. Those data show that only 25 percent of CLEC orders in July, 34 percent in August, and 39 percent in September were processed by BellSouth on a flow through basis without human intervention. Pfau Aff. ¶¶ 66, 92; Bradbury Aff. ¶¶ 233-234.³⁰

³⁰ In light of the Commission's further requirements that all BOC performance measures must be "clearly defined" and that a BOC's section 271 application must be complete when filed (Ameritech Michigan Order ¶¶ 212, 50), no weight should be given to BellSouth's attempt to avoid this obvious inadequate performance for CLECs by adjusting its order flow through data on the basis of some undisclosed "BST analysis" of "SOER errors" for which BellSouth provides no information. See Pfau Aff. ¶¶ 67, 92; Bradbury Aff. ¶¶ 234-236.

c. **BellSouth's comparative data further confirm discriminatory performance:** In the very few instances in which BellSouth submits comparative data regarding its performance both for CLECs and for its own local retail operations -- a grand total of seven provisioning and maintenance measurements (see Stacy Performance Aff. Exs. WNS-9 & WNS-9B) -- BellSouth's submission still does not establish nondiscriminatory performance for CLECs. In the first place, BellSouth's use of "statistical process control" charts to identify discriminatory conduct is inappropriate. Statistical process control was developed to monitor whether a single process that transforms inputs into outputs, such as a manufacturing operation, is operating within expected boundaries based on its historical performance. It was never designed or intended to detect discrimination between two different groups of customers during the same period of time. Pfau Aff. ¶¶ 69-75.

Even if statistical process control could be applied to identify discrimination, however, BellSouth's application of the process here is plainly designed to conceal discrimination rather than to reveal it. BellSouth has set its "control limits" so broadly that they should create a virtual immunity from claims of discrimination. Id. ¶ 76. Indeed, the test proposed by BellSouth for determining whether a difference in performance is discriminatory -- a disparity in performance in excess of three standard deviations from the mean -- has been specifically rejected as too lax by the courts in discrimination cases. See, e.g., Rendon v. AT&T Technologies, 883 F.2d 388, 397-98 (5th Cir. 1989); Palmer v. Shultz, 815 F.2d 84, 92 (D.C. Cir. 1987); Pfau Aff. ¶ 77.

Even with these improper assumptions, however, BellSouth's statistical process control charts do not support its claim of nondiscriminatory performance. For September (the most recent month for which data are provided), BellSouth's data actually demonstrate that its

performance for CLECs was discriminatory (that is, outside of BellSouth's overly broad control limits) for 5 of the 28 resale performance charts. Pfau Aff. ¶ 82. Moreover, BellSouth's charts for "residential resale non-dispatch" -- a category that accounted for 69 percent of CLEC order volume and 83 percent of BellSouth's order volume -- show that even BellSouth's overall year-to-date performance for CLECs was discriminatory for 3 out of the 7 resale measures provided by BellSouth, and that its performance in meeting residential resale non-dispatch provisioning appointments was so far outside of BellSouth's control limits in September that it quite literally fell clear off the chart. Id. ¶ 86. Thus, notwithstanding the one-sided assumptions upon which BellSouth's statistical process control charts are based, those charts actually demonstrate that BellSouth is not providing nondiscriminatory access to CLECs.

d. **BellSouth has failed to demonstrate adequate capacity:** BellSouth's claim that its systems have adequate capacity to handle CLEC transactions (Br. 26-27) is belied by AT&T's own experience. When AT&T modestly increased its order volume in August, the BellSouth Regional Street Address Guide ("RSAG") -- access to which is vital for the placing of orders -- became inaccessible for prolonged periods of time. The problem lasted for nearly a month. See Bradbury Aff. ¶¶ 285-296. BellSouth's problem handling volumes of this magnitude, when AT&T was beginning its entry into the market, raises serious concerns that its systems will be unable to handle the greater volumes to come.

Even leaving aside the RSAG problem, BellSouth's claims of sufficient capacity are highly suspect. Although BellSouth has now doubled its estimates and claims the ability to handle "at least 10,000 local service requests per day" regionwide (see Stacy OSS Aff. ¶ 120), BellSouth does not contend that it has actually enhanced its order processing capacity. Instead, it has merely altered its assumption from a 10-hour production day to a 20-hour day. See

Bradbury Aff. ¶¶ 302-305. Even accepting BellSouth's capacity figures at face value, they amount to only approximately 1,100 orders per day, in total for all competitors, for each of the nine States in the BellSouth region -- which would still be insufficient to support meaningful competition. See DOJ South Carolina Eval. App. A, A-28 to A-30. Moreover, although BellSouth asserts that it has tested the capacity of its interfaces and systems, it is unclear whether it has even finished stress testing. BellSouth Br. 26-27; Stacy OSS Aff. ¶ 118; Bradbury Aff. ¶ 314. BellSouth, therefore, has not proven that its OSS are able to handle both present and reasonably foreseeable demand. Ameritech Michigan Order ¶¶ 137-138.

3. The LPSC's Conclusion That CLECs Have Nondiscriminatory Access To OSS Is Arbitrary And Capricious and Contrary To the Evidence

Notwithstanding the LPSC's ultimate conclusion, the proceedings before the Louisiana PSC confirm that BellSouth is not providing nondiscriminatory access to its OSS. Following the submission of direct and rebuttal testimony on OSS from numerous witnesses over the course of seven days of hearings, the LPSC's Chief ALJ concluded that BellSouth had failed to demonstrate that it is currently providing nondiscriminatory access to its OSS. See ALJ Recommendation at 24-30;³¹ Norris Aff. ¶¶ 5-11. The Chief ALJ's opinion included a detailed discussion of the evidence supporting her conclusions with respect to OSS including: BellSouth's failure to introduce any evidence of operational experience or testing showing that its interfaces would perform as well as BellSouth claimed they would (ALJ Recommendation at 24); evidence that several BellSouth interfaces required human intervention, while BellSouth's own systems can communicate with each other without manual intervention (id. at 25-27); evidence that

³¹ Docket U-22252, Consideration and Review of BellSouth Telecommunications, Inc.'s Preapplication Compliance with Section 271 of the Telecommunications Act of 1996, ALJ Recommendation dated August 14, 1997 ("ALJ Recommendation").

BellSouth's OSS discriminated in the kinds of information or services provided to competitors as compared to that provided to BellSouth (*id.* at 26); and evidence indicating that BellSouth's OSS lacked capacity to support competitive services (*id.* at 27-28). The Chief ALJ's findings were endorsed by the LPSC staff, (*see* Norris Aff. ¶ 17), and are consistent with the conclusions of the Commissions in Alabama, Florida, and Georgia, and the Department of Justice.

Remarkably, less than one week after the Chief ALJ's recommendation, the LPSC's Compliance Order³² resolved all of the OSS issues, explaining its decision in a single three-sentence paragraph. This paragraph did not address, much less refute, the detailed findings and analyses underlying the ALJ's conclusion that BellSouth was not providing nondiscriminatory access, and it also ignored this Commission's detailed analysis of OSS compliance requirements in the Ameritech Michigan Order.

The principal basis cited by the LPSC for its OSS ruling was a four-hour technical conference -- not transcribed, and which the ALJ did not attend -- that was held by three of the Commissioners. As described in the affidavit of Sharon Norris, at the conference BellSouth provided a demonstration of a system it devised for CLEC ordering; AT&T and MCI (but not other CLECs that requested time) were then given a brief opportunity to respond, and provided fresh evidence of discriminatory access. *See id.* ¶¶ 12-18. Given this limited scope, nothing occurred -- or could have occurred -- at this technical conference that could provide a substantial basis for refuting the ALJ's detailed findings and conclusions.

Indeed, the comments of one of the Commissioners suggest that the outcome of the conference was pre-ordained. At an open meeting prior to the conference, one Commissioner,

³² Docket U-22252, Consideration and Review of BellSouth Telecommunications, Inc.'s Preapplication Compliance with Section 271 of the Telecommunications Act of 1996, Order U-22252A, dated Sept. 5, 1997 ("LPSC Compliance Order").

in opposing a motion (which was in fact defeated) to permit all CLECs to cross-examine BellSouth and make their own presentations at the conference, explained, "[w]e want this to be a demonstration by Bell to show us that their OSS's work." Norris Aff. ¶ 12 n.8. Given its lack of foundation, the LPSC's recommendation on OSS issues should be accorded no weight.

E. BellSouth Has Failed to Demonstrate That It Is Offering To Resell Its Services In Accordance With Sections 251(c)(4) and 271(c)(2)(B)(xiv)

BellSouth has failed to comply with its checklist obligation to make telecommunications services "available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." § 271(c)(2)(B)(xiv). Section 251(c)(4) requires BellSouth to offer for resale at wholesale rates "any telecommunications service." Moreover, the Commission has made clear that the "language [in section 251(c)(4)] makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings . . . [and that] no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings."³³ Despite the Act's plain language and this Commission's explicit holding, BellSouth, with the approval of the LPSC, has violated the resale requirements of the Act by placing four separate "unreasonable" and "discriminatory . . . limitations" (§ 251(c)(4)(B)) on the resale of contract service arrangements ("CSAs").

First, the LPSC held, at BellSouth's urging, that all "BellSouth [CSAs] which are in place as of [January 28, 1997,] the effective date of [the LPSC's AT&T Arbitration] Order[,]"

³³ Local Competition Order ¶ 948 (emphasis added). The Eighth Circuit affirmed this and all other FCC rules relating to resale restrictions, holding that "the FCC has jurisdiction to issue these particular rules and . . . its determinations are reasonable interpretations of the Act." Iowa Utils. Bd., 120 F.3d at 819. Indeed, the Eighth Circuit expressly rejected the BOCs' objections "to the FCC's determinations that discounted and promotional offerings are 'telecommunications service[s]' that are subject to the resale requirement of subsection 251(c)(4)." Id.

shall be exempt from mandatory resale." LPSC AT&T Arbitration Order at 4; see SGAT XIV.B. This flat prohibition on entry -- which was entirely unexplained by the LPSC -- is plainly antithetical to the Act's most basic goals of opening local markets. It excludes from resale competition all customers BellSouth was able to lock in using CSAs both before the Act and for a full eleven months after the Act became effective.

Second, the LPSC found, and BellSouth's SGAT provides, that wholesale "discounts do not apply" to CSAs signed after January 28, 1997. SGAT XIV.B; LPSC AT&T Arbitration Order at 4. This restriction also plainly violates the Commission's ruling that "the wholesale requirement" applies to "all promotional and discount service offerings." Local Competition Order ¶ 948. The lack of any wholesale discount for CSAs just as effectively prevents CLECs from competing as does the flat ban on resale: Without a discount reflecting the costs that BellSouth reasonably could avoid, a CLEC is disadvantaged because it bears its own "marketing, billing, collection, and other costs," (§ 252(d)(3)), as well as those corresponding costs of the ILEC.

Third, "BellSouth's [L]PSC-approved approach of restricting the resale of CSAs to the end user for whom the CSA was established" (Br. 67 n.43) constitutes yet another independent violation of the Act. This restriction prevents CLECs from reselling CSAs both to a new individual end user, as well as to an aggregate group of end users, a policy which, again, already has been expressly prohibited by this Commission, both in the Local Competition Order and in the Texas Preemption Order.³⁴ It is also a patently "discriminatory conditio[n]" (§

³⁴ See Local Competition Order ¶¶ 948, 951, 953 ("it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in [the] aggregate, under the relevant tariff, meets the minimal level of demand"); Texas Preemption

(continued...)

251(c)(4)), because BellSouth itself is not restricted in this manner and may offer any of its CSAs to any customer or group of customers seeking such service. This restriction alone therefore violates the Act, but the cumulative effect of these three limitations makes CSAs effectively unmarketable to any customer. See McFarland Resale Aff. ¶¶ 12-16.

Lastly, BellSouth has also refused even to disclose the CSAs it has signed in Louisiana. See Order U-22145-A, at 3-4 (LPSC June 10, 1997).³⁵ This refusal is another discriminatory limitation that precludes a finding of compliance with this checklist item even if all the other BellSouth restrictions were removed. Thus, even if CLECs were permitted to resell a CSA to a new end user or group of end users, CLECs plainly cannot resell CSAs that BellSouth hides from them. Although CLECs may be able to obtain information about some CSAs through other means in some instances, see McFarland Resale Aff. ¶ 17 n.3, BellSouth's policy still discriminates against CLECs in violation of the Act, because BellSouth, unlike CLECs, possesses complete and perfect information about all of its CSAs. Finally, public disclosure of CSAs is also pro-competitive because of the risk that ILECs will use CSAs as a tool of their "market power" to "preserve their market position" and to "shift[] their customers to

³⁴ (...continued)

Order ¶ 220 (invalidating state law that "precludes new entrants from providing competitive centrex services through resale due to their inability to aggregate small users into a large group").

³⁵ The LPSC based its approval of BellSouth's refusal to disclose CSAs on the need to protect proprietary customer information. Id. The complete withholding of CSAs, however, is not "narrowly tailored" (Local Competition Order ¶ 939) to that concern, which can be addressed in myriad less restrictive ways. E.g., Competition in the Interstate Interexchange Marketplace, CC Docket 90-132, Report and Order, ¶¶ 121-22 (6 FCC Rcd 5880, 5902) (1991) (in lieu of entire contracts containing sensitive customer information, requiring detailed summary of contract terms and rates).

nonstandard offerings" like CSAs to "avoid the statutory resale obligation." Local Competition Order ¶¶ 939, 948.

BellSouth's multiple attempts to justify its resale restrictions on CSAs, for the most part, have already been rejected by the Commission. In any event, each conflicts with the clear language and purpose of the Act.

First, BellSouth claims that the decision of the LPSC to approve BellSouth's multiple resale restrictions was a "decision on [a] local pricing matter" that is "determinative." Br. 67. Neither claim is true: three of the four BellSouth CSA restrictions (i.e., the flat ban on resale of pre-January, 1997 CSAs, the ban on resale to new end users, and the refusal to disclose CSAs) are not even arguably "pricing matters" but are simply unlawful resale restrictions. The remaining restriction -- excluding from the wholesale discount all CSAs signed after January, 1997 -- is also not a pricing matter. In approving that restriction, the LPSC assuredly did not purport to follow § 251(d)(3) and "determine wholesale rates" for CSAs by "excluding . . . [the] costs that will be avoided" by BellSouth; it simply disagreed with this Commission's ruling and excluded CSAs from any wholesale discount because of its view that applying the Act would be "unfair." LPSC AT&T Arbitration Order at 4. Because this Commission has already squarely held that the "wholesale requirement" applies to "all promotional or discount service offerings," Local Competition Order ¶ 948, the LPSC's holding is not valid. In all events, as AT&T has already explained, in a section 271 application, the Commission has exclusive authority to determine checklist compliance, including BellSouth's pricing for CSAs. The LPSC's decision is not therefore "determinative."

Second, BellSouth relies on the claim that CSAs are "already discounted" and that applying an additional discount would "'greatly overstate the costs avoided by BellSouth'" Br.

68, 69 (quoting Comments of South Carolina PSC, CC Docket 97-208). That excuse, however, does not permit BellSouth or a state commission to refuse to apply the Act's resale pricing standard to CSAs: a reasonable incumbent clearly avoids substantial "marketing, billing, collection, and other costs" when a competitor resells one of its CSAs, and the Act requires that those costs be "exclud[ed]" when determining wholesale rates. § 252(d)(3).³⁶ BellSouth certainly may not, without even attempting to meet its burden to show that avoidable costs for CSAs vary from the standard discount, simply refuse to apply any wholesale discount. Cf. Local Competition Order ¶¶ 951, 953 ("incumbent LECs may prove that their avoided costs differ when selling in large volumes," but they may not simply restrict resale of volume discounts).

Third, BellSouth defends the restrictions on the ground that they enable it to meet competition and thereby to retain customers and the "contribution to total cost recovery that they represent." Br. 68; see Varner SC Reply Aff. (CC Docket 97-208) ¶¶ 41-42, 44-45.

However, there is not, and could never be, a "meeting competition" defense to the ILECs' duties under sections 251 and 252 of the Act. These provisions were enacted to promote competition by allowing new entrants to offer competitive alternatives. The very intent, and inevitable effect, of these obligations is to create competition that would cause ILECs to lose individual customers. That is why the Act provides that all ILEC retail services, including BellSouth's CSAs, must be available for resale at wholesale rates computed under the statutory

³⁶ For example, the incumbent LEC would avoid the costs it would otherwise incur in individually negotiating with particular end-users, identifying the end-user's needs and matching them with available CSAs, and in billing and collecting from that end-user. Indeed, the avoided costs with individually negotiated CSAs might well require a higher discount because certain costs, such as those associated with the special billing arrangements often required by high-volume end-users, are typically quite substantial.

avoided cost standard. That is also why the Commission's rules bar restrictions on the customers to whom CSAs and other services can be resold where, as here, CSAs are concededly offered at rates that cover all BellSouth's incremental costs of serving the customers and that make a contribution to its total cost recovery.

Moreover, even if there could be a "meeting competition" defense under the 1996 Act, BellSouth's rationale would not justify its refusal to provide an avoided cost discount for resold CSAs. When an incumbent LEC customer is lost to a reseller receiving an avoided cost discount, the incumbent receives the wholesale revenue from the CLEC, and avoids costs, which results in the collection of the same net revenues, and the same contribution to total costs, making the transaction revenue neutral.

Additionally, the Commission has already determined that wholesale discounts for CSAs are necessary to prevent ILECs from using them to "shift[] their customers to nonstandard offerings," Local Competition Order ¶ 948, and, despite BellSouth's claim (Br. 69) to the contrary, the facts presented in this application dramatically underscore the wisdom of that rule. To begin with, BellSouth's SGAT provides it with unfettered discretion to use CSAs, and BellSouth could immunize any customer from reseller competition by declaring that the customer faces competition and then developing a CSA for it. See McFarland Resale Aff. ¶ 24. Indeed, an examination of publicly disclosed CSAs in South Carolina demonstrates that BellSouth offers a wide variety of local services in its CSAs. Id. ¶ 19 & n.5. Moreover, BellSouth's tariff permits it to use CSAs so long as a "reasonable potential" for bypass of BellSouth's services exists. See Br. 66. Of course, because the Act opens all of the local market to competition,

every BellSouth service is arguably subject to bypass, with the effect that BellSouth has both the ability and the incentive to use CSAs for nearly any service and to nearly every customer.³⁷

Moreover, the record in this case shows that BellSouth is in fact using that ability and is acting to foreclose competition through anticompetitive use of CSAs. As described in the affidavit of Patricia McFarland, ¶¶ 24-26, BellSouth has been entering into CSAs in increasingly larger numbers, and has coupled that activity with restrictions on the resale of CSAs. These actions, taken together, have served to lock up hundreds of millions of dollars of revenue provided by large business customers in its region. Id. And, in Louisiana, BellSouth's refusal to disclose CSAs publicly makes it more difficult to detect that abuse, because CLECs cannot "scrutinize the terms of each and every BellSouth CSA" in Louisiana and thus do not "have all the information they need to challenge" BellSouth's effort to evade tariff restrictions on the use of CSA.³⁸ Despite BellSouth's effort to withhold such evidence in Louisiana, there is more than an ample basis to support the Commission's conclusion that applying wholesale discounts to CSAs is necessary to prevent ILECs from evading their resale obligations.

Finally, the Commission's refusal to permit the resale restrictions BellSouth has imposed on its CSAs is not "at odds" with the underlying rationale of CSAs, as BellSouth contends. Br. 67 n.43. To the contrary, "the Commission has never permitted a dominant carrier to justify, on the basis of competitive necessity, . . . a customer-specific offering not generally available

³⁷ Indeed, the Commission has indicated that it will consider unlawful contract tariffs, such as BellSouth's, that permit a carrier an "unfettered ability" to determine whether a competitive situation exists that could trigger the use of a CSA. Southwestern Bell Tel. Co., CC Docket No. 97-158, Order, ¶ 45 (Nov. 14, 1997) ("SBC RFP Order").

³⁸ BellSouth South Carolina Reply Comments at 63. Compare id. (trumpeting public disclosure of CSAs as a method for CLECs to detect abuse) with Br. 69 (relying on unspecified LPSC "procedures" to protect against abuse).

to similarly-situated customers," SBC RFP Order ¶¶ 15, 49-52 (emphases added), which is unquestionably true with BellSouth's CSAs resold by CLECs. Because contract offerings are not even permitted -- let alone permitted with the significant resale restrictions that BellSouth seeks to impose -- unless the CSA is "generally available to similarly situated customers," id., BellSouth's restrictions on CSAs also necessarily violate § 251(c)(4)(B).

Moreover, the Commission has just recently re-emphasized that contract offerings are not permitted (even when generally available) "before [a] market is open to competition" where a carrier "can disadvantage its rivals by denying them access to key inputs," and thus "forestall the development of competition by foreclosing or deterring market entry." Id. ¶¶ 15, 51. This is because the dominant carrier's "long-term interest [may be] to deprive entrants of the opportunities to achieve significant economies [of scale] by locking in large customers using customer-specific, long-term contracts before a competitor enters on a facilities basis." Id. ¶ 49. As described above, this scenario is precisely what is occurring here, and what will likely continue absent the Commission's firm adherence to a policy of unrestricted availability of CSAs with a wholesale discount, as the Act requires.

In summary, because BellSouth's resale restrictions on CSAs blatantly violate the Commission's existing rules and create discriminatory conditions for CLECs, allowing BellSouth to foreclose competitive entry, the Commission should find that BellSouth has failed to comply with this checklist item.

II. BELLSOUTH CANNOT PROCEED UNDER EITHER "TRACK A" OR "TRACK B" IN LOUISIANA

BellSouth's noncompliance with its checklist obligations is so pervasive and so damaging to local competition, both in Louisiana and elsewhere, that the Commission should reject BellSouth's application on that basis. There is thus no need for the Commission to consider

whether the requirements of Track A or Track B are otherwise satisfied by BellSouth at this time. Should the Commission decide to address those issues, however, it is plain that Track A and Track B are each foreclosed to BellSouth.

A. There Are No "Competing" Facilities-Based Providers of Local Exchange Service in Louisiana

In order to proceed under § 271's "Track A," a BOC must establish the existence of one or more entities that are "actually in the market and operational," and that are competing with the BOC by presenting a viable "commercial alternative to the BOC." Ameritech Michigan Order ¶ 75; SBC Oklahoma Order ¶ 14.³⁹ BellSouth claims (Br. 8-17) that it satisfies this requirement because there are a number of companies providing PCS service in Louisiana. Alternatively, BellSouth asserts (Br. 17) that the existence of a "competing" provider is satisfied by the alleged presence in Louisiana of potential competitors that "are entering the Louisiana market." Neither PCS providers nor potential future competitors, however, satisfy § 271(c)(1)(A)'s requirement of an actual "competing" provider of local exchange service.

1. PCS is Not a Viable Alternative to Wireline Service Today.

Section 271(c)(1)(A) unambiguously requires a BOC to demonstrate the existence of a "competing" facilities-based provider of local exchange service. It is axiomatic that an entity cannot be "competing" with the BOC unless it is providing a product that is viewed by the market as a substitute for wireline local exchange service. Although the PCS spectrum might someday be used to provide products that would be viable substitutes for wireline local service for a broad range of customers, PCS service as it is actually offered today is not capable of

³⁹ In the Matter of 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, CC Docket No. 97-121, Memorandum Report and Order, FCC 97-228 (rel. June 26, 1997) ("SBC Oklahoma Order").

substituting for wireline service except for a tiny number of consumers with highly idiosyncratic characteristics and preferences. See Roderick Aff. ¶¶ 8-11; Hubbard/Lehr Aff. ¶¶ 56-59.

This is so for essentially two reasons. First, the PCS systems that have been deployed to date were designed and built to meet the needs of mobile individuals desiring high speed hand-off capability. The equipment and technology needed to offer that capability ensures that PCS will necessarily be more costly to provide than traditional wireline service, and would not be priced competitively with wireline service for the average user. See Roderick Aff. ¶¶ 8-11; Hubbard/Lehr Aff. ¶¶ 56-59.

Second, the very mobility of PCS service makes it unattractive for many users. Although single individuals needing mobile communication capability, and who would therefore purchase either PCS or cellular service anyway, might in some cases cancel their wireline service, for most users, e.g., multi-resident households and businesses desiring multiple extensions working off of one phone number, PCS service would not be a viable substitute, because those users would need to purchase additional expensive equipment to transmit the cellular phone signal to multiple extensions. Roderick Aff. ¶ 10.

BellSouth's own evidence confirms that PCS does not meaningfully "compet[e]" with wireline. As the study conducted by its expert shows, only 3 percent of Louisiana PCS users eliminated their wireline service when they chose PCS. See BellSouth Denk Report at Table 3 (App. D, Tab 5, at 5). This demonstrates that PCS does not function as a substitute for wireline service in any meaningful way.

Notably, it is useful to contrast the proof that BellSouth has adduced here with Ameritech's proof in its Michigan application. There the Commission found persuasive the fact that Brooks Fiber, a small entrant, was providing service to 22,000 new customers. See

Ameritech Michigan Order ¶ 65. Although that number was small relative to the number of customers Ameritech served, the Commission found it sufficient to demonstrate that competition with Ameritech was at least possible at some non-de minimis level satisfactory for Track A. But inherent in that finding is the presumption that each of Brooks Fiber's new customers would otherwise have obtained Ameritech's wireline service. See Roderick Aff. ¶ 11; Hubbard/Lehr Aff. ¶ 56. There was thus no reason to think that Brooks Fiber, if otherwise able to expand its offering, could not attract new customers.

Here, however, BellSouth's own evidence shows that the opposite is true. BellSouth's study, even accepted at face value, demonstrates that 97 percent of Louisiana PCS users do not view PCS as a substitute for their land line phone. And the reasons for that are obvious. The limitations of PCS as offered today simply make it impractical to use as the sole source of basic local exchange service to most business and residential users.⁴⁰ There is thus no reason to think that providers of PCS service as currently offered will ever obtain anything more than a de minimis share of the Louisiana wireline market. Accordingly, PCS providers are not currently "competing" providers within the meaning of "Track A."

2. Only Operational Providers of Local Exchange Service Count for Purposes of "Track A."

BellSouth alternatively claims (Br. 17) that because a number of wireline CLECs are in the process of entering the Louisiana local exchange market, it is possible that Track A has been satisfied (Br. 20). This claim is frivolous.

⁴⁰ Cellular services were expressly excluded from the definition of local exchange services under Track A. See § 271(c)(1)(A) ("[F]or the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services"). Because PCS, as it is currently offered, has the same characteristics as cellular (see Roderick Aff. ¶¶ 4-7), there is no reason to treat it differently under Track A.

It is BellSouth's burden as the applicant to establish that it can proceed under Track A, SBC Oklahoma Order ¶ 6, and BellSouth has fallen woefully short of that obligation here. BellSouth's evidence (Br. 18-20) shows only that a number of CLECs are in the final stages of preparation for entry into the local exchange market on a facilities basis. At present, however, BellSouth's own evidence (Br. 18-20) demonstrates that those companies are currently offering only exchange access or resold exchange service. Because Track A requires the existence of an "operational" provider of local exchange service (not exchange access) on a predominantly facilities basis, SBC Oklahoma Order ¶ 14, BellSouth may not proceed under Track A.

B. Track B is not Available in Louisiana.

Apparently recognizing the deficiencies in its showing under Track A, BellSouth alternatively claims (Br. 21) that it may proceed under Track B if there are no "Track A" providers currently providing service in Louisiana, and that "BellSouth might qualify" under Track B based on a separate finding that no CLEC is taking "reasonable steps" to become a qualifying "Track A" provider. Neither claim has any merit.

BellSouth's argument that Track B is available whenever Track A is not is squarely foreclosed by the Commission's SBC Oklahoma Order. In that Order the Commission held that once a BOC has received a request for access and interconnection from a provider that would, once the request has been implemented, qualify as a "Track A" competitor, the BOC may not proceed under Track B so long as the requesting carrier is taking "reasonable steps" towards entry. SBC Oklahoma Order ¶¶ 27, 57-58. Because there is no dispute that numerous CLECs have requested access and interconnection to provide facilities-based service, BellSouth could not proceed under Track B unless all the requesting carriers had failed to take reasonable steps to enter the local exchange market.