

done.⁴¹ does not allow the Department and the Commission to independently judge what proportion of the errors are attributable solely to CLEC failures and what proportion could have been prevented if BellSouth were providing adequate documentation and support. Since the BOCs are obligated to provide adequate documentation and support and because the lack of such documentation and support totally undermines the ability of CLECs to prevent errors, BOC claims of "CLEC errors" should not be heard so long as OSS documentation and support is inadequate. Rather, we would expect BellSouth to justify its support for its wholesale functions or to improve its support services so that they are adequate.

C. Operational Readiness

As discussed further below, the Department concludes that BellSouth's systems presently have limited capacity and have not been proven effective for handling large, competitively significant volumes of demand. Past experience suggests that limited commercial use at small volumes does not provide an adequate basis upon which to judge the performance of systems that will need to handle a much larger volume of orders.

System capacity is a critical component of operational readiness. On the issue of capacity, the Department has previously stated that a BOC must show that its systems "allow competitors to serve customers . . . in reasonably foreseeable quantities, or that its [systems] are scalable to such quantities as demand increases." DOJ Oklahoma Evaluation at 29. The Department explained that "reasonably foreseeable [meant] those quantities that competitors collectively would ultimately demand in a competitive environment where the level of competition was not constrained by any

⁴¹ See, e.g., Stacy OSS Aff. ¶¶ 111-12, Ex. WNS-41 (confidential exhibit).

limitations of the BOC's interfaces or processes, or by other factors the BOC may influence." *Id.* The Commission has determined that it "will examine operational evidence to determine whether the OSS functions provided by the BOC to competing carriers are actually handling current demand and will be able to handle *reasonably foreseeable demand volumes.*" *Michigan Order* ¶ 138 (emphasis added).

BellSouth has not demonstrated that its pre-ordering systems are operationally ready. BellSouth represents that it has internally tested LENS to support 160 simulated users.⁴² However, the existing capacity appears to be woefully inadequate for either existing⁴³ or foreseeable demand. Because BellSouth's OSS operates region wide, the user figures are for the total number of simultaneous users among for all CLECs throughout BellSouth's region. It would appear that competitively significant marketing efforts would quickly exhaust available capacity.

Neither has BellSouth demonstrated that its ordering systems are operationally ready, especially in light of the manual processes involved. BellSouth states that it received and processed only about 5,000 orders region wide in August. This total volume is only a fraction of the volume

⁴² Stacy OSS Aff. Ex. WNS-45.

⁴³ AT&T reports a recent incident in which less than half of sixty users could adequately use LENS. AT&T Bradbury Aff. ¶ 258; *see also id.* ¶¶259-61; MCI King Decl. ¶ 86. If the total number of LENS users at that point in time was no greater than 160, this suggests that BellSouth's testing was flawed. If the total number was greater than 160, then usage has already exceeded tested capacity.

at which Pacific Bell and Ameritech systems failed due to their reliance on manual processing,⁴⁴ and BellSouth has experienced major problems with errors at even this low volume.⁴⁵

If one considers foreseeable volumes, the situation is even more problematic. According to BellSouth's October 20, 1997, 8-K filing with the SEC, BellSouth currently has nearly 23 million access lines in its region, having added just over 1 million access lines in the last year. Using the PIC change measure described in the Michigan order, one would estimate that there are about 17,000 PIC changes per business day in BellSouth's region.⁴⁶ A survey recently reported in *Communications Daily* stated that nearly 20% of residential customers would change, and an additional 17% would consider changing, local carriers; if one assumes that at least a similar proportion of business customers will change local carriers, one could estimate from this an average of roughly 18,400 to 33,600 lines per business day changing region wide.⁴⁷ Finally, the one million access lines BellSouth added in the last year would translate to roughly 4,000 access lines added per business day. In a

⁴⁴ See *MCI v. PacBell*, Cal. PUC No. 96-12-026 (Sept. 24, 1997), at 27, 29 (finding that MCI ceased marketing after PacBell built up backlogs of 4,000 to 5,000 orders and that, by PacBell's own admission, its systems did not offer their competitors resold services at parity).

⁴⁵ For example, LCI states:

In the brief time that LCI has been using BellSouth's EDI interface for ordering and provisioning, LCI has encountered excessive delays in the receipt of firm order confirmations; excessive delays in the provisioning of orders; manual processing of orders that should flow-through electronically to BellSouth's OSS; orders that have been "lost" in BellSouth's system; and substantial delays in obtaining resolution of problems due to the lack of sufficient personnel who have been adequately trained in EDI applications.

LCI Comments at ii; see also *id.* at 4-5 (for example, it has taken an average of seven days for LCI to receive FOCs).

⁴⁶ *Michigan Order* n. 494. This calculation is based on the total number of access lines in BellSouth's region and uses the figure cited in the Michigan order of at least 30 million PIC changes per year. *Id.*

⁴⁷ "Telco-Cable," *Communications Daily*, Oct. 28, 1997.

competitive environment. BellSouth will experience far greater order volumes than it is presently projecting. Moreover, as the Department and FCC have previously recognized, in sizing its systems, BellSouth cannot depend on uniform volumes but must account for, and be prepared to handle, variations in daily ordering volumes, and even significant spikes.⁴⁸ BellSouth has not demonstrated, either through actual commercial usage or even with other (less reliable) evidence such as internal testing with high volumes of test orders or third-party audits, that it can and will be able to do so.

The Commission has stated that “[a] BOC must ensure that its operations support systems are designed to accommodate both current demand and projected demand of competing carriers for access to OSS functions.” *Michigan Order* ¶ 137. BellSouth states that has designed the capacity of its ordering systems based on CLEC forecasts. Stacy OSS Aff. ¶ 120. BellSouth provides projected volumes, Stacy OSS Aff. Ex. WNS-43, WNS-44, which its says incorporate available CLEC forecasts, *id.* ¶ 120. But its exhibits provide only the final numbers and do not explain the degree to which those numbers rely on CLEC forecasts or even what those forecasts are. This undercuts the Department’s ability to judge the adequacy of BellSouth’s showing on this point.

Finally, we are concerned that CLEC forecasts may be “constrained by . . . limitations of the BOC’s interfaces or processes.” DOJ Oklahoma Evaluation at 29, or by other impediments to competition, including those discussed in the Department’s evaluation of this application. A BOC’s wholesale support capacity should be measured against likely demand in a market that is otherwise fully open to competition.

⁴⁸ See *Michigan Order* ¶ 199; DOJ Michigan Evaluation, App. A at 15-16.

III. Performance Measures

Performance benchmarks are important both for demonstrating that the market is currently open to competition and for facilitating meaningful post-entry oversight that ensures that the market opening is irreversible. The BOCs must therefore define the relevant measures, gather and report the appropriate data on a regular basis, and derive the applicable benchmarks from the performance so measured. While BellSouth has made several commendable commitments with regard to gathering and storing performance data, BellSouth's proposed permanent performance measurements⁴⁹ are deficient. BellSouth omits numerous critical measurements—measurements as fundamental as average installation intervals, for example—and these omissions preclude “a determination of parity or adequacy in the provision of resale or UNE products and services to CLEC’s in the state of South Carolina.” *Friduss SC Aff.* ¶ 78.

A. System Architecture and Design

BellSouth has made several important commitments with regard to gathering and maintaining performance data. First, BellSouth's existing legacy OSSs run on multiple mainframe computers. BellSouth states that “[t]he query systems on [these] computers are not flexible and cannot be easily manipulated to produce the measurements required to monitor parity between retail and wholesale customers.” *Stacy Performance Aff.* ¶ 13. To overcome these limitations and “enable effective

⁴⁹ Of the three categories of performance measurements that BellSouth discusses—initial measurements, AT&T measurements, and permanent measurements, *see Stacy Performance Aff.* ¶ 16—the permanent measurements are by far the most significant. Based on discussions with BellSouth, the Department understands that it is only these permanent measurements that BellSouth is committing to regularly produce on an ongoing basis for CLECs and regulatory authorities. As stated above, one important purpose of performance measurements is to detect backsliding and thus facilitate meaningful post-entry oversight that ensures that the market opening is irreversible. The Department sees no basis for concluding that performance measurements not regularly produced and generally available on an ongoing basis will serve this important function.

ongoing production of measurements which monitor parity and provide meaningful data on a readily available basis." BellSouth has implemented a data warehouse, separate from the mainframe computers on which its OSSs run, in which raw data relating to performance can be stored and through which it can be queried to produce performance measurements. *Id.* ¶¶ 13, 14. The flexibility that can result from this type of architecture should make it easier for BellSouth to develop, maintain, and provide effective performance measurements.

Second, BellSouth states that it is capturing and storing in the data warehouse for subsequent analysis "[e]very order processed by BellSouth for both its retail units and its CLEC customers." *Id.* ¶ 14. The use of sampling can result in numerous disputes as to the statistical validity and thus the adequacy of the sampling technique, and poor sampling techniques can readily distort the view of the performance being measured. Therefore, storing data for all orders is obviously a more desirable approach than storing data for only a limited sample of orders.⁵⁰

Third, BellSouth states that it plans to allow CLECs to directly access the data warehouse to perform their own analyses. *Id.* ¶ 15. BellSouth has not described exactly how CLECs would access the data warehouse or what types of data each CLEC would be able to access. Allowing a CLEC to access, not only data relating to itself, but also summary CLEC data and summary BellSouth data could provide CLECs a flexible tool for generating their own performance measures. The greater

⁵⁰ BellSouth has not, however, described what data it will track other than for orders. More generally, BellSouth has not listed the data elements that are being stored in the data warehouse. As a result the Department cannot ascertain exactly what performance measures BellSouth will be able to support using the data maintained in its data warehouse and thus cannot judge the adequacy of BellSouth's implementation of the data warehouse. The Department encourages BellSouth, as well as other BOCs that implement a data warehouse for performance measures, to identify and describe in future applications the complete list of data elements stored in such data warehouses.

degree of disaggregation that the data warehouse will support. *see* Friduss SC Aff. ¶¶ 31-34, the more powerful and useful this tool will be.

BellSouth is to be commended for committing itself to such a system for gathering, storing, and providing access to performance data. While the information that BellSouth has provided is not sufficient to judge the status or the adequacy of its implementation, BellSouth's approach is clearly a desirable one, and the Department strongly supports these commitments. We urge other BOCs to adopt a similar approach.

B. Actual Installation Intervals

Notwithstanding this desirable architecture, BellSouth's proposed permanent performance measurements fall considerably short of what is needed. Most significantly, BellSouth is not providing actual installation intervals, instead relying on a measurement of the percentage of provisioning appointments met. As described below, the Department and the Commission have previously determined that this measurement is an inadequate substitute. For this reason alone, BellSouth has failed to satisfy its evidentiary burden to "demonstrate that it is provisioning resale orders within the same average installation interval as that achieved by its retail operations." *Michigan Order* ¶ 166.

As the Department and the Commission have previously concluded, "[p]roviding resale services in substantially the same time as analogous retail services is probably the most fundamental parity requirement in Section 251."⁵¹ In discussing this issue, the Commission has explained that an ILEC that "to a significant extent, [processes] retail orders for itself more quickly than it is processing

⁵¹ DOJ Michigan Evaluation at A-12, quoted with approval in *Michigan Order* ¶ 167.

resale orders for competitive carriers . . . would not be meeting its obligation to provide equivalent access to those OSS functions” and that average installation intervals are critical to determining whether nondiscriminatory access is being provided. *Michigan Order* ¶ 167, 168. Accordingly, in the *Michigan Order*, the Commission concluded:

[W]e find that submission of data showing average installation intervals is fundamental to demonstrating that Ameritech is providing nondiscriminatory access to OSS functions. Such data is direct evidence of whether it takes the same time to complete installations for competing carriers as it does for Ameritech, which is integral to the concept of equivalent access. By failing to provide such data in this application, Ameritech has failed to meet its evidentiary burden.

Michigan Order ¶ 171. The same reasoning applies equally to BellSouth and yields an identical conclusion with respect to BellSouth’s current application.

Contrary to BellSouth’s assertions, Stacy Performance Aff. ¶ 52, a measurement of the percentage of provisioning appointments met does not adequately describe BellSouth’s performance: it does not permit direct comparisons to BellSouth’s retail performance and thus is not sufficient to demonstrate parity, even if when combined with data demonstrating that provisioning appointments are being assigned on a non-discriminatory basis.⁵² Fundamentally, a report that shows the side of the line on which an order falls, either met or missed, does not reveal where it is in the range.⁵³ As to provisioning appointments met, if all CLEC customers receive service on the due date while all

⁵² While BellSouth purports to provide “data on actual intervals for provisioning various services,” Stacy Performance Aff. ¶ 52, an examination of the data cited, Exhibit WNS-10 to that affidavit quickly reveals that is not the case. The charts are clearly labeled “Issue to Original Due Date Intervals” or “Issue to Due Date Average Interval.” At best, due date intervals can show that BellSouth is assigning due dates to CLECs and itself on a non-discriminatory basis. While this is important, this is not the same as an installation interval.

⁵³ The difference is similar to whether a college course is graded with a letter grade such as A, B, C, D, or F or merely on a pass/fail basis. Pass/fail grades do not reveal where passing students stand with respect to one another in the class.

BellSouth retail customers receive service in half the scheduled time, then a report of provisioning appointments met will show parity of performance, not revealing the discriminatory difference in performance between BellSouth and the CLEC. Likewise, as to provisioning appointments missed, if all BellSouth retail customers receive service after one additional day while all CLEC customers receive service after five additional days, then a report of provisioning appointments met will again show parity of performance and fail to reveal the discriminatory difference.

C. Other Missing Measures

As described in the Friduss affidavit, BellSouth's permanent performance measures are missing numerous other significant measurements. For example, BellSouth has no measurements for pre-ordering functions, and it has few measurements for ordering functions. Other significant missing measurements include Service Order Quality, Orders Held for Facilities, Billing Timeliness, Accuracy, and Completeness; and 911 Database Update Timeliness and Accuracy.⁵⁴ Thus, BellSouth has yet to establish sufficient performance measurements to satisfy the Department's competitive assessment.⁵⁵

Notably, a number of these missing elements are among those listed in the Michigan Order as necessary parts of a BOC's evidentiary showing. The Commission found that Ameritech had failed

⁵⁴ In discussions with the Department, BellSouth has indicated that some omitted measurements are under consideration but have not yet been adequately defined at this point. In this regard, the Department reiterates that for performance reports to be meaningful and useful, the relevant measures must be specifically and clearly defined. Without such definition, the reports will be meaningless if not actually misleading to a CLEC or regulator. "For example, cycle-time performance measures are dependent on the specific definition of start and stop times, while reliability measures are dependent on the specific definition of what constitutes a failure." Friduss SC Aff. ¶ 23.

⁵⁵ As we have noted previously, we are open to considering alternate measures for assessing wholesale performance; we are not, however, able to conclude that a local market has been fully and irreversibly opened unless the important indicators of wholesale performance are being measured and reported on a regular basis.

to meet its "fundamental duty with regard to the evidentiary burden required to demonstrate that it is providing nondiscriminatory access to all OSS functions." *Michigan Order* ¶ 204, and concluded:

[I]n order to provide us with the appropriate empirical evidence upon which we could determine whether Ameritech is providing nondiscriminatory access to OSS functions, Ameritech should provide, as part of a subsequent section 271 application, the following performance data, in addition to the data that it provided in this application: (1) average installation intervals for resale; (2) average installation intervals for loops; (3) comparative performance information for unbundled network elements; (4) service order accuracy and percent flow through; (5) held orders and provisioning accuracy; (6) bill quality and accuracy; and (7) repeat trouble reports for unbundled network elements.

Michigan Order ¶ 212 (footnotes omitted). As stated above with respect to average installation intervals, the Commission's reasoning on these other performance measurements applies equally to BellSouth, and thus the omission of these measurements warrants an identical conclusion with respect to the inadequacy of this application.

EXHIBIT 5

**United States
Department of Justice
South Carolina
Section 271 Evaluation**

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

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

EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

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November 4, 1997

Table of Contents

Table of Contents	ii
Summary of Evaluation	iv
I. The Department Is Unable to Determine BellSouth's Eligibility to Use Track B Because the Record at This Stage of the Proceeding Is Ambiguous and Incomplete	4
A. It Is Not Clear Whether BellSouth Has Received a "Qualifying Request" for Access and Interconnection	5
B. The Requirements for a Track A Application Have Not Been Satisfied	12
II. BellSouth Has Failed to Demonstrate That It Is Offering Access and Interconnection That Satisfy the Checklist Requirements	12
A. BellSouth Must Demonstrate That Each Checklist Item Is Legally and Practically Available to Competitors	13
B. The FCC May Rely on the Conclusions of State Commissions and the Department of Justice in Making Its Determinations	14
C. BellSouth Has Not Demonstrated That It Is Providing Access to Network Elements in a Manner That Allows Requesting Carriers to Combine Them	16
1. The SCPSC Has Made No Specific Findings as to Whether BellSouth Is Offering Unbundled Network Elements in a Manner That Allows Them to Be Combined	17
2. BellSouth Has Not Demonstrated That It Is Offering Unbundled Elements in a Manner That Would Permit Requesting Carriers to Combine Them to Provide Telecommunications Services	19
a. BellSouth's SGAT Fails to Set Forth the Necessary Terms and Conditions to Enable Competitors to Combine Unbundled Network Elements.	20

b.	BellSouth Has Failed to Establish That It Is Operationally Ready to Provide Unbundled Network Elements in a Manner That Allows Requesting Carriers to Combine Them to Provide Telecommunications Services	23
c.	If Competing Carriers Cannot Combine Unbundled Network Elements, Then Efficient Entry Would Be Seriously Impeded . . .	23
D.	BellSouth's Wholesale Support Processes Are Deficient	25
III.	The South Carolina Market Is Not Fully and Irreversibly Open to Competition	31
A.	The Minimal Level of Competition in South Carolina Does Not Provide Evidence That Local Markets Are Fully and Irreversibly Open	32
B.	Substantial Barriers to Resale Competition and Competition Using Unbundled Elements Remain in Place in South Carolina	34
1.	BellSouth Has Not Demonstrated That Current or Future Prices for Unbundled Elements Will Permit Efficient Entry or Effective Competition	35
2.	Bell South Has Failed to Institute Performance Measurements Needed to Ensure Consistent Wholesale Performance	45
C.	BellSouth's "Public Interest" Arguments Do Not Justify Approval of This Application	48
IV.	Conclusion	51

Summary of Evaluation

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

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

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

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

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

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

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

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

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
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Provision of In-Region, InterLATA)
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EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

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

As the Department has previously explained, in-region interLATA entry by a Bell Operating Company ("BOC") should be permitted only when the local markets in a state have

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

been fully and irreversibly opened to competition.² This standard seeks to ensure that the barriers to competition that Congress sought to eliminate in the 1996 Act have in fact been fully eliminated and that there are objective criteria to ensure that competing carriers will continue to have nondiscriminatory access to the facilities and services that they will need from the incumbent BOC.

In applying this standard, the Department will consider whether all three entry paths contemplated by the 1996 Act -- facilities-based entry involving construction of new networks, the use of unbundled elements of the BOC's network, and resale of the BOC's services -- are fully and irreversibly open to competitive entry to serve both business and residential consumers. To do so, the Department will look first to the extent of actual local competition as the best evidence that local markets are open. The degree to which such entry is broad-based will determine the weight the Department places on it as evidence. If broad-based commercial entry involving all three entry paths has not occurred, the Department will examine competitive conditions to see whether significant barriers continue to impede the growth of competition and whether benchmarks to prevent backsliding have been established. Wherever practical, this examination

² This open market standard is explained more fully in Application of SBC Communications, Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in the State of Oklahoma, Evaluation of the United States Department of Justice, CC Docket No. 97-121, at vi-vii and 36-51 (May 16, 1997) ("DOJ Oklahoma Evaluation") and in the Affidavit of Marius Schwartz ("Schwartz Aff."), attached to the instant Evaluation as Exhibit 1. Other aspects of the Department's criteria for evaluating applications under section 271 are addressed in the DOJ Oklahoma Evaluation and in Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Michigan, Evaluation of the United States Department of Justice, CC Docket No. 97-137 (June 25, 1997) ("DOJ Michigan Evaluation").

will focus on the history of actual commercial entry. The experience of competitors seeking to enter a market can provide highly probative evidence concerning barriers to entry, or the absence thereof. However, we do not regard competitors' small market shares, or even the absence of entry, standing alone, as conclusive evidence that a market remains closed to competition, or as a basis for denying an application under section 271. For a variety of reasons, potential competitors may not immediately seek to use all entry paths in all states, even if the barriers to doing so have been removed, and a BOC's entry into interLATA services should not be delayed because of the business strategies of its competitors.

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

BellSouth:

- Has failed to demonstrate that it offers access to unbundled network elements “in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service,” as required by the 1996 Act. 47 U.S.C. §251(c)(3).
- Has failed to demonstrate its ability to provide adequate, nondiscriminatory access to the operations support systems that will be critical to competitors’ ability to obtain and use unbundled elements and resold services.
- Has failed to demonstrate that it offers cost-based prices for unbundled network elements that permit entry and effective competition by efficient competitors.
- Has failed to measure and report all of the indicators of wholesale performance that are needed to demonstrate that it is currently providing adequate access and interconnection and to ensure that acceptable levels of performance will continue after section 271 authority is granted.

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

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

Section 271(c)(1) of the 1996 Act requires the BOC seeking in-region interLATA authority to meet the requirements of either subparagraph (A) (“Track A”) or subparagraph (B) (“Track B”). BellSouth contends that its 271 application should proceed under Track B, but also

asserts in the alternative that it may satisfy Track A. The Department is not able to determine BellSouth's eligibility to proceed under Track B because the record contains little evidence on a key factual question necessary for such a determination. The additional information submitted in Reply Comments in this proceeding will permit the FCC to make a more informed judgment on this question. We conclude that BellSouth is not eligible to proceed under Track A.

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

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

³ Another prerequisite for a Track B application is that the BOC's Statement of Generally Available Terms and Conditions ("SGAT") has been approved or permitted to take effect by the applicable state regulatory commission. As BellSouth notes in its application, the Public Service Commission of South Carolina ("SCPSC") approved, with modifications, BellSouth's initial SGAT on July 20, 1997, and issued its written order on July 31, 1997. Public Service Commission of South Carolina, In re Entry of BellSouth Telecommunications, Inc., into InterLATA Toll Market, Docket No. 97-101-C, Order Addressing Statement and Compliance with Section 271 of the Telecommunications Act of 1996, Order No. 97-640 (July 31, 1997) ("SCPSC Order"). The SGAT accompanying BellSouth's application reflects further modifications and was approved by the SCPSC on September 9, 1997. The SGAT approved for purposes of BellSouth's South Carolina section 271 application was received by the SCPSC on Sept. 19, 1997. AT&T has appealed the SCPSC Order, but has not sought a stay of that decision. See AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., No. 3:97-2388-17 (D.S.C. filed Aug. 8, 1997). Given the status of that appeal, we do not dispute that BellSouth has satisfied the approved SGAT requirement of section 271(c)(1)(B).

Section 271(c)(1)(B) also provides two exceptions that would permit a BOC to proceed under Track B despite having received what would otherwise constitute a "qualifying request"-- if a state commission certifies that the prospective competing providers making such requests "(i) failed to negotiate in good faith ..., or (ii) violated the terms of an agreement ... [by failing] to comply, within a reasonable period of time, with the implementation schedule contained in such agreement." 47 U.S.C. §271(c)(1)(B). No CLECs have been so certified by the SCPSC, and,

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

therefore, these exceptions do not provide a basis for a Track B application by BellSouth.

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

⁵ Id.

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

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

request is timely if made on or before June 30, 1997.

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

DeltaCom is a regional carrier which provides long distance, access, and several other telecommunications services over its fiber-optic network in ten southeastern states, including South Carolina. In September 1996, DeltaCom applied to the SCPSC for certification to provide alternative local exchange telecommunications services in South Carolina and by January 1997 was certified. In March 1997, DeltaCom signed a negotiated interconnection agreement with BellSouth, that the SCPSC then approved in early April.⁹ In the second quarter of 1997, DeltaCom announced its intention to offer local exchange service throughout its service area, including South Carolina. Moses Aff. ¶ 21. In August 1997, the SCPSC approved DeltaCom's tariff for both business and residential local exchange service offerings.¹⁰ DeltaCom's affidavit in this proceeding states that it "has been financially committed to provide wire-line residential and

⁸ Oklahoma Order ¶ 57.

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

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

business local exchange services throughout the State of South Carolina, and has been engaged in reasonable efforts to do so for some time. In addition ... although DeltaCom does not provide residential facilities-based services in South Carolina to date, it intends to do so under its South Carolina business plan”¹¹ DeltaCom provides additional information relating to its South Carolina business plans in a confidential exhibit attached to the Moses Affidavit filed with the Commission.

The record indicates that DeltaCom requested access and interconnection within the time period relevant for Track B¹² and that it is taking reasonable steps towards providing telephone exchange service in South Carolina, exclusively or predominantly using its own facilities. DeltaCom has an approved interconnection agreement, is certified as a CLEC, has substantial telecommunication facilities in place in South Carolina, and has an effective tariff for both residential and business local exchange services.¹³ There is very little evidence, however, concerning DeltaCom’s plans or efforts to provide “*residential* and business” service, as is required if DeltaCom’s request is to be considered a “qualifying request.” DeltaCom provides little beyond its statement that it intends to offer residential service, and its statement is silent as to

¹¹ Moses Aff. ¶ 22.

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

¹³ See DeltaCom Confidential Exhibit ¶¶ 1-3.

when it intends to do so.¹⁴

The Commission has indicated that in evaluating whether a request is a "qualifying request" it may consider whether the requester "is taking reasonable steps toward implementing its request in a fashion that will satisfy section 271(c)(1)(A)."¹⁵ Such an inquiry is appropriate, and indeed is implicit in the Commission's conclusion that a qualifying request must be from a carrier "that seeks to provide the type of telephone exchange service described in section

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

Several carriers in addition to DeltaCom claim they have submitted "qualifying" requests, but the statements of these other carriers appear to be even more ambiguous than DeltaCom's statements with respect to the provision of exclusively or predominantly facilities-based service, and whether and when service will be provided to residential customers. ACSI states that it "will provide facilities-based service to residential callers through multi-tenant dwelling units ("MDUs") and shared tenant service ("STS") providers where it makes economic sense." Affidavit of James C. Falvey ¶ 11 ("Falvey Aff."), attached to Opposition of ACSI, CC Docket No. 97-208 (Oct. 20, 1997) ("ACSI Opposition"), as Appendix A, Exhibit 1. AT&T states an "intention to serve residential and business customers throughout the region using unbundled network elements, resale, and interconnection" -- but not clearly indicating whether its service would be predominantly facilities-based -- and states that implementation of its request would have "enabled AT&T" to provide the service described in section 271(c)(1)(A). Comments of AT&T Corp. in Opposition to BellSouth's Section 271 Application for South Carolina, CC Docket No. 97-208, at 50 (Oct. 20, 1997) ("AT&T Comments"). While MCI intends to provide local telecommunications services to both business and residential customers through its own switches and other facilities, MCI has stated that it will not "expand into the other states in BellSouth's region" until BellSouth has complied with the 1996 Act's requirements in Georgia. Declaration of Marcel Henry on Behalf of MCI Telecommunications Corporation, attached to Comments of MCI Telecommunications Corporation, CC Docket No. 97-208, ¶ 15 (Oct. 20, 1997) ("MCI Comments"). Additional information in Reply Comments may also clarify whether and when these carriers seek to provide the types of service required under Track A.

¹⁵ Oklahoma Order ¶ 58.