determined that Brooks Fiber, MFS WorldCom, and TCG were qualifying competing providers of telephone exchange service in Michigan for purposes of Track A. Id. ¶ 85. In reaching that conclusion, the Commission did not consider the prices charged by these carriers or the details of their service offerings. The Commission directly rejected claims that some level of geographic penetration was required. Id. ¶ 76. And the Commission considered the number of subscribers served by these competing providers only insofar as it held that anything more than "a de minimis number" would always be sufficient given Congress's rejection of a "metric" test. Id. ¶¶ 77-78.

True, the Commission asked in the Michigan Order whether the "competing providers" offered "an actual commercial alternative to the BOC" and left open the possibility that a carrier with a de minimis number of subscribers might fail this test. Id. But the Commission's "actual commercial alternative" standard simply requires that the competitor must provide service in an ordinary commercial manner, offering some group of the incumbent BOC's customers a viable option of alternative telephone exchange service. Thus, in the Oklahoma Order, the Commission determined that Brooks Fiber was not a competing provider because it did not offer residential service "on a commercial basis" in that State. Oklahoma Order ¶ 20. Following up on this theme, the Michigan Order confirmed that so long as the number of customers served by the competitor is not "so small" as to create doubt that commercial service is truly available, it is irrelevant whether the competitor constrains the BOC's pricing or meets any other standard of competitive significance. Michigan Order ¶ 77.

The Commission's "commercially operational" standard is readily satisfied by PCS providers in Louisiana. PCS providers offer their service aggressively and widely to callers in Louisiana. See Wright Aff. ¶¶ 111-120. As the Declaration of William Denk explained and Mr. Denk's reply declaration further discusses, about 17 percent of PCS customers in Louisiana reported purchasing PCS as a substitute for wireline local service. These include 3 percent of PCS customers who eliminated wireline service, 4 percent who added PCS instead of another wireline, and 10 percent who subscribed to PCS instead of wireline service when initiating service. See Denk Reply Decl. ¶ 2.[9] PCS also is used as a substitute for local wireline service where both PCS and wireline service has been ordered, insofar as PCS subscribers commonly use their PCS phone to make calls that they otherwise would have placed over a wireline connection. See BellSouth Br. at 16 (discussing per-call substitution). Given that the Act places no floor on the number of customers that must be served by a competing provider and Congress rejected efforts to set one, such widespread substitution easily qualifies PCS as "an actual commercial alternative."[10]

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[9] Making an elementary mistake, AT&T confuses the number of customers who disconnected their wireline phones to take PCS service with the total number of customers who ordered their PCS service as a substitute for wireline local service. AT&T at 68. Some parties have suggested that the above figures cannot be accepted without disclosure of the actual questions asked of PCS users. Those questions are provided as an attachment to the Denk Reply Declaration.

[10] ALTS suggests that if PCS were being substituted for wireless calling, BellSouth would be porting more numbers to PCS providers. ALTS at 4. Number porting would occur only where landline service is disconnected in favor of wireless service, which represents only a small part of wireline substitution. Moreover, Sprint indicates PCS providers may not offer number portability to their customers, which would preclude porting any of BellSouth's wireline

As discussed in BellSouth's Application, moreover, PCS providers currently offer telephone exchange service that is price-competitive with BellSouth's wireline service for a significant number of customers. BellSouth Br. at 17. The Reply Affidavit of Aniruddha Banerjee further confirms this. Dr. Banerjee explains that, as shown by his initial affidavit, "PCS offerings in Louisiana, on a price basis alone, represent for a segment of consumers feasible substitutes for comparable wireline local and interLATA toll services offered by BellSouth." Banerjee Reply Aff. ¶ 6. Based on the PrimeCo and Sprint Spectrum plans in place at the time of his initial affidavit, Dr. Banerjee concluded that between 1.4 percent and 4.0 percent of BellSouth's local customers could consider switching to PCS based on price alone. The more aggressive PCS pricing plans currently being offered further increase the likelihood of such switching: for instance, Sprint's 180-minute calling plan would be cost-competitive with wireline service for approximately 7 percent of BellSouth's customers. Id. ¶ 7. For a significant group of subscribers, therefore, PCS is "both a functional and an economic substitute" for wireline local service. Id. ¶ 3(A).

In the face of such evidence that PCS providers meet the requirements of section 271(c)(1)(A), CLECs argue that the Commission should throw the test established by Congress out the window and rely instead on the fact that Congress did not want cellular carriers to qualify as Track A carriers. They rely principally upon legislative history (discussed in BellSouth's Application) suggesting that the House Commerce Committee thought cellular carriers would not

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numbers. See Sprint at 12-13 & n.19.

qualify under Track A because cellular service is not a substitute for wireline service. House Report at 77. But as BellSouth has explained, BellSouth Br. at 14, this reference to substitutability was made at a time when the draft legislation did require comparability of "price, features, and scope." House Report at 8. Deleting this language was identified as a "big major change" to the Committee proposal, 141 Cong. Rec. H8451, 8452 (daily ed. Aug. 4, 1995); it thus is reasonable to conclude that Track A's specific language excluding cellular providers was thought necessary (and thus simultaneously added as part of the same manager's amendment, see id. at 8445 (daily ed. Aug. 4, 1995)), precisely because Track A no longer required that the competing telephone exchange service be an economic substitute.

ALTS maintains that the specific exception for cellular should be read as an exception for PCS as well because "Congress would have no reason to distinguish between PCS and cellular for the purpose of Track A." ALTS at 2; see also ACSI at 9-10. Congress, of course, did distinguish between PCS and cellular when drafting Track A. They had good reason to do so. If cellular had been included, Bell companies could have secured interLATA relief under Track A in every state solely by amending existing interconnection agreements with unaffiliated cellular carriers — without any additional local entry. See BellSouth Br. at 14-15. This risk did not exist with PCS providers, who were just preparing to offer their services.

The important point is that when Congress excepted cellular, it did not except other commercial mobile radio services ("CMRS") such as PCS, even though legislators were well aware that non-cellular CMRS existed. See 47 U.S.C. § 332(d)(1) (broadly defining CMRS). Given this legislative decision, there is no room for the Commission to invoke concepts such as

"regulatory balance" between PCS and cellular, ACSI at 11, particularly where section 271 does not involve regulation of either service.

Nor is it significant that Congress expected the first Track A competitors to be cable television companies. See id. Although cable executives' expressions of interest in providing facilities-based local service triggered the drafting of Track A,[11] Track A eligibility was not limited to cable companies. This legislative history of Track A provides no more reason to exclude PCS providers from coverage under Track A than CAPs or incumbent interexchange carriers.

Finally, and contrary to Sprint's argument, it is not material for purposes of section 271(c)(1)(A) that PCS providers may want different checklist items than wireline CLECs. As this Commission has made clear, "the varying needs of competing CLECs" do not constitute a basis for delaying interLATA competition pursuant to Track A. Michigan Order ¶ 115. Because BellSouth is under "a concrete and specific legal obligation to furnish" PrimeCo, Sprint Spectrum, and MereTel checklist items "upon request," the fact that these PCS providers have not sought all checklist items is legally irrelevant. Id. ¶ 110; see BellSouth Br. at 22-23.

III. BELLSOUTH HAS SATISFIED ALL FOURTEEN CHECKLIST REQUIREMENTS

BellSouth demonstrated before the Louisiana PSC and again in its Application that it has opened the local market in Louisiana by making available to CLECs all fourteen checklist

[11] See House Report at 77 (cable industry has potential to offer Track A competition); 142 Cong. Rec. H1149 (daily ed. Feb. 1, 1996) (statement of Rep. Fields).

items.[12] Opponents of BellSouth's application respond in various ways. First, they note that there are imaginable items, such as pre-combined UNEs, that BellSouth does not currently offer. The short answer is that if BellSouth does not currently offer a local facility or service, this is because it is not required by the checklist and the Commission is specifically forbidden from mandating that it be offered as a condition of interLATA relief. 47 U.S.C. § 271(d)(4).

Second, the opponents claim (directly or indirectly) that BellSouth cannot prove its offerings are practically available until CLECs actually order them in significant volumes. This argument is just a dressed-up version of the rejected claim that a Bell company must find a buyer for all items to satisfy the checklist. See Michigan Order ¶ 115 ("we believe that Congress did not intend to require a petitioning BOC to be actually furnishing each checklist item.").

This argument asks the Commission to do exactly what the 1996 Act forbids — hold back one group of competitors (Bell companies who seek to offer interLATA services) to protect another group of competitors (AT&T, MCI, and Sprint). All the checklist requires in a Track A application is that checklist items be legally and practically available. Id. ¶ 110. As Chairman

[12] Once a single CLEC has access to a particular checklist item under the express terms of its agreement, other CLECs typically can obtain access to that item by virtue of "Most Favored Nation" ("MFN") clauses in their own agreements. See BellSouth Br. at 36. CLECs have negotiated MFN clauses that provide access either to the entirety of other agreements or to portions thereof, at the CLEC's option. See, e.g., KMC Agreement, § 24.0 (Application App. B, Tab 25); PrimeCo Agreement § XVI.B.E. 1, 2, 3 (Application App. B, Tab 28).

Kennard has explained, "The law [requires] the Bells to show only that the doors to their networks are open, not necessarily that any competitors have walked through them."[13]

Third, large CLECs and DOJ complain that BellSouth's Statement (Application App. C at Tab 62) and interconnection agreements do not anticipate each and every request a CLEC might make of BellSouth, particularly in the area of combining UNEs. As a threshold matter, checklist compliance is outside the antitrust issues Congress wanted DOJ to consider in assessing Bell company applications.[14] Checklist matters fall instead within the scope of this Commission's consultation with the Louisiana PSC, 47 U.S.C. § 271(d)(2)(B), which has found BellSouth in compliance. Moreover, by relying on wholly theoretical arguments that CLECs might in the future be unable to obtain what they have not yet asked for, or might find the checklist items inadequate to compete, DOJ bases its evaluation on nothing more than the say-so of CLECs, particularly AT&T and MCI. These carriers are trying to block long distance competition while standing on the sidelines of the local market. Their abstract concerns ignore the hundreds of pages of detailed UNE specifications BellSouth provides to CLECs (and has filed with this Application). See Milner Aff. Ex. WKM-9. These CLECs ignore as well the fact that BellSouth has delivered thousands of unbundled loops and other UNEs and completed

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[13] Seth Schiesel, Atop FCC, Still Trying to Be Nice, New York Times, Nov. 10, 1997, at D1.

[14] See 142 Cong. Rec. H1176 (daily ed. Feb. 1, 1996) (statement of Rep. Jackson-Lee) ("substantial weight" to be accorded to the views of the Attorney General is limited to her "expertise in antitrust matters"); id. at H1178 (statement of Rep. Sensenbrenner) ("FCC's reliance on the Justice Department is limited to antitrust related matters").

dozens of collocation arrangements — any of which could be used to accomplish UNE combinations if a CLEC actually tried.

Realistically viewed, DOJ's demand to review additional terms that will be negotiated between BellSouth and CLECs is just part of DOJ's strategy of holding up interLATA competition until AT&T, MCI, and perhaps Sprint finally enter the local market. Likewise, this approach allows DOJ to exercise the very power it unsuccessfully sought from Congress — regulating local telephony via the section 271 process. This Commission should not acquiesce in DOJ's power-grab. Nor should this Commission countenance DOJ's strategy of blocking immediate competition in order to orchestrate more perfect entry at some indefinite future date, given that Congress enacted the 1996 Act to free market forces.

Finally, CLECs cite problems that supposedly have arisen in the course of implementing interconnection and resale agreements. There have been some difficulties, as would be expected with new technical arrangements. But operational perfection is not the standard of checklist compliance. Michigan Order ¶ 278 ("holding Ameritech to an absolute-perfection standard is not required by the terms of the competitive checklist"); id. ¶ 203 (same). As explained in BellSouth's Application, BellSouth has appropriately tested its systems and has promptly and responsibly addressed implementation issues as they have arisen. BellSouth also has helped CLECs correct their own mistakes. These steps have ensured the operational readiness of all required checklist items.

A. Pricing

CLECs argue that the Commission may freely review the Louisiana PSC's pricing determinations, despite the Eighth Circuit's contrary ruling. See AT&T at 40-41; MCI at 55-56; Sprint at 40-41; ACSI at 12. Under sections 251 and 252 "state commission determinations of the just and reasonable rates that incumbent LECs can charge their competitors for interconnection, unbundled access, and resale" are "off limits to the FCC." Iowa Utils. Bd., 120 F.3d at 804. Because the checklist's pricing standard is that rates for interconnection, UNEs, and resale must be "in accordance with the requirements" of sections 251 and 252, 47 U.S.C. § 271(c)(2)(B)(i), (ii), (xiv), the Louisiana PSC's express determination that BellSouth's rates satisfy the Act leaves no federal issue for the Commission to decide.

As explained in the Application, the Louisiana PSC held an in-depth cost proceeding after which it established cost-based rates that have been incorporated into the Statement and — where lower than BellSouth's interim rates — into BellSouth's agreements via a true-up process. BellSouth Br. at 40; Varner Aff. ¶¶ 29-30 (discussing rates). Even DOJ, one of the chief advocates of federal interference with state pricing authority, acknowledges that such "a reasoned pricing decision by a state commission" should be sufficient under section 271. DOJ at 22. DOJ further states that it "is satisfied that [the Louisiana PSC's] methodology embodies the basic concepts of forward-looking cost-based pricing, and is consistent with the Department's competitive standard." DOJ at 22-23.

Lacking any plausible basis upon which to attack the Louisiana PSC's methodology, CLECs focus on the deliberations of the Louisiana PSC's independent expert, saying that she

was not given sufficient time to review the record. AT&T at 35-38; MCI at 53-55. In the South Carolina section 271 proceedings, CC Docket 97-208, CLECs have faulted the South Carolina PSC for going too slowly in setting permanent rates and deciding to set interim rates while evaluating permanent cost studies. See MCI South Carolina at 38-44; AT&T South Carolina at 41-42; see also Sprint South Carolina, at 23-27. Now, the same CLECs fault the Louisiana PSC for moving too quickly to establish permanent rates. They cannot have it both ways. In fact, the Louisiana consultant did evaluate BellSouth's cost studies for compliance with the 1996 Act and state rules, and proposed a variety of modifications. Caldwell Reply Aff. ¶¶ 6-8. In fact, the consultant continued her analysis even after submitting written testimony so as to present a complete evaluation. See id. ¶ 39.

AT&T appears to argue not just that the Louisiana PSC's expert spent too little time evaluating BellSouth's prices, but also that the Louisiana PSC should have relied solely upon the views of its ALJ. AT&T at 38-39. AT&T gives no reason why a state commission should not gather whatever information it deems necessary to review the recommendations of its hearing examiners.

Nor is there merit to complaints that the expert gave short shrift to particular issues. AT&T insists, for instance, that BellSouth's switch port rate is high and that the Louisiana PSC's expert must therefore have made a mistake in approving it. AT&T argues that there should be no charge for use of vertical features because "the ILEC incurs no cost in providing those features since they are part of the processor functionality." AT&T at 36 (citing AT&T's Follensbee ¶¶ 4, 16, 40-43). AT&T ignores that processor functions are usage-sensitive

activities, such that usage has an associated forward-looking cost. Caldwell Reply Aff. ¶ 36. Moreover, AT&T ignores other forward-looking costs associated with vertical features, including the labor involved to complete switch translations and the "right-to-use" ("RTU") fees BellSouth must pay to vendors, which account for approximately 40 percent of the costs applicable to a 2-wire analog port. Id. ¶ 37.

Equally misguided are opponents' broad accusations that BellSouth's cost studies include embedded costs. AT&T at 32-34, 38; MCI at 57-59. BellSouth's rates for interconnection, unbundled network elements, and collocation were developed using "the most efficient telecommunications technology currently available, given existing wire center locations." Caldwell Reply Aff. ¶ 14. In asserting that BellSouth's prices are based on historical costs, CLECs ignore that any time BellSouth began with historical data, it adjusted that data to reflect only costs that BellSouth will incur in the future. BellSouth did not ignore historical experience, but rather built upon that experience to estimate what it would cost to provide service over a forward-looking, efficient network. Id. ¶¶ 27-31.

Opponents' specific claim that Universal Digital Loop Carrier ("UDLC") is "outdated" — and that BellSouth's rates thus do not reflect cutting-edge technology — arises from the belief that the unbundled loop and unbundled switch port should be a combined offering, rather than offered on an unbundled basis as the Eighth Circuit has held. See Caldwell Reply Aff. ¶ 29; Iowa Utils. Bd. v. FCC, 120 F.3d at 814-15. In any event, BellSouth has investigated several alternative methods and found no basis to assume cost savings. See Caldwell Reply Aff. ¶¶ 29-30.

Other CLECs question whether BellSouth's "non-recurring charges reflect forward-looking economic costs." ALTS at 16; see ACSI at 16-18. The Reply Affidavit of Daonne Caldwell addresses the procedures used to develop BellSouth's forward-looking non-recurring costs. Caldwell Reply Aff. ¶¶ 41-44. Moreover, AT&T's argument that BellSouth based non-recurring costs on outdated time estimates is wrong. Caldwell Aff. ¶ 42. Moreover, AT&T's and MCI's assumption that the provisioning of UNEs can be accomplished with little or no human intervention is not borne out by the currently available technology. Id. CLECs also ignore that unbundling relates to network elements, not services, and thus confuse the costs of migrating packaged services with the costs of provisioning elements. Id. ¶ 43.

CLECs and DOJ further criticize BellSouth's Application on the basis that BellSouth's wholesale rates are not geographically deaveraged. MCI at 55-56; Sprint at 40-41; AT&T at 37; ACSI at 15-16; ALTS at 16-17; DOJ at 23-26. The cost-based pricing requirement of section 252(d)(1) does not require deaveraging, and no additional pricing requirements may be imposed upon the states through the section 271 decisions. See BellSouth Br. at 41-42. Thus, while BellSouth does not oppose rate deaveraging in principle, this is an issue CLECs must address to the Louisiana PSC. See Varner Aff. ¶ 32 ("unbundled [local] loop rates should not be deaveraged until such time as the State Commission can fully evaluate all the implications of such a policy change"). Likewise, if DOJ has strong reasons for preferring deaveraged rates, it should participate in the state cost proceedings where rates are established.

Beyond this, arguments that BellSouth must come up with a plan for geographic rate deaveraging even before the Louisiana PSC implements a plan for universal service reform make

no sense. If deaveraging for UNEs and for retail rates are not coordinated, this will only aggravate existing discrepancies between cost-based rates for CLECs and retail rates set by state regulators. For instance, CLECs suggest they are ignoring residential customers largely because BellSouth's cost-based loop rate is high compared to the retail rate for residential service. ACSI at 19-20; see also Sprint South Carolina at 36-41.[15] Yet if UNE rates were geographically deaveraged without parallel reforms to retail prices, this gap would grow for many residential customers, and facilities-based residential competition would be that much further off.[16]

Finally, this Commission is poorly positioned to fault incumbent LECs and the state commissions for the pace of intrastate rate rebalancing. The Commission made clear in its Universal Service Order that it is in no particular hurry to resolve universal service issues, saying: "At present, the existing system of largely implicit subsidies can continue to serve its

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[15] Such comparisons between cost-based loop rates and BellSouth's retail residential rates (as set by the Louisiana PSC in accordance with its own pricing policies) say nothing about BellSouth's compliance with section 252(d)(1).

[16] The head of the Antitrust Division has focused on the slow pace of universal service reform as reason why CLECs are not entering the local market, and he may even be using his evaluations of section 271 applications as a way of prodding such reform. See Address by Joel Klein, Assistant Attorney General, Antitrust Division, The Race For Local Competition: A Long Distance Run, Not a Sprint, at 13 (Nov. 5, 1997) ("residential customers still will not get the full benefit of competition if we continue to rely on a system of implicit — as opposed to explicit — subsidies that make at least some of them unattractive to competitive carriers") (Ex. 15). Mr. Klein, of course, bears no direct accountability to the rural customers whose rates would jump as a result of sudden rebalancing. Moreover, even if it were appropriate for the Justice Department to send messages to state regulators in its own evaluations of Bell company application, state commissions' priorities cannot be set by a Bell company and thus could not — under any conceivably fair construction of the public interest test — constitute a basis for denying relief under section 271 once the checklist has been satisfied.

purpose, and our current implementation of section 254 relies principally on the continuation of existing mechanisms." Report and Order, Federal-State Joint Board on Universal Service, 12 FCC Rcd 8776, 8786, ¶ 17 (May 8, 1997). The Commission should not penalize Bell companies whose state commissions have made similar decisions.

B. Combinations of Network Elements

CLECs such as AT&T, MCI and Sprint — who generally have eschewed building local facilities of their own — say that BellSouth has not been sufficiently clear in explaining how it will allow CLECs to accomplish their job of combining network elements purchased on an unbundled basis. BellSouth, however, has laid out in detail the terms of its standard UNE and interconnection offerings and has long stood willing to negotiate customized arrangements upon request. Thousands of UNEs and a variety of interconnection arrangements including collocation have been supplied to CLECs. See generally Milner Aff. Given that BellSouth has specified what it makes available on an unbundled basis and has actually furnished unbundled elements for CLECs to combine however they like, it is unclear what additional specificity CLECs and DOJ could legitimately want. Indeed, it appears that these parties are using calls for additional paper procedures as just another indirect try at overturning the Eighth Circuit's holding that CLECs, not incumbent LECs, bear responsibility for UNE combinations.

As a preliminary matter, it should be noted that the limited market experience with UNE combinations is due to CLECs' own strategic choices, which provide no basis for denying BellSouth and consumers the benefits of in-region, interLATA relief. See Michigan Order ¶¶ 108-115. For well over a year, the major interexchange carriers devoted all their energies to

an ill-conceived litigation campaign to force incumbent LECs to combine UNEs on CLECs' behalf. See Iowa Utils. Bd., 120 F.3d at 813-15. While waging this war, the carriers had no interest in negotiating with BellSouth regarding facilities and services for combining UNEs. In fact, CLECs still have not asked to begin such negotiations. Varner Aff. ¶ 35. Now that they have lost in court, however, the interexchange carriers seek to blame BellSouth for their own failure to pursue specific arrangements for combining UNEs. See AT&T at 12-14; MCI at 38-39; Sprint 46-50. DOJ joins its litigation partners in this effort, evidently seeing an opportunity to broker deals between CLECs and the Bell companies and thus exercise front-line regulatory powers denied it under the Act.

This effort by the interexchange carriers and DOJ to turn their courtroom loss directly into a regulatory victory is outrageous. Whatever its view of the Eighth Circuit's final decision, the Commission should acknowledge that CLECs bear responsibility for not pursuing — during the course of litigation over the UNE "platform" — the option of combining UNEs for themselves. Moreover, interexchange carriers will not have any incentive to deal seriously with genuinely disputed issues until they know the Commission will not try to excuse them from the court of appeals' decision through the 271 process. The Commission should state unequivocally that CLECs' failures to pursue UNE combinations will not count against BellSouth, thereby shifting the interexchange carriers' attention from legal briefing to genuine business negotiations.

To establish a stable background for intercarrier negotiations, moreover, the Commission should confirm that it will abide by the Eighth Circuit's holdings on UNE combinations. This would end such nonproductive submissions as Sprint's proposed pretexts for violating the Eighth

Circuit's decision. Sprint at 50-52.[17] Yet, from the Commission's perspective, it would involve nothing more than articulating a position already set out in the Commission's filings with the Supreme Court. See Petition for a Writ of Certiorari, FCC v. Iowa Utils. Bd., at 28 (Nov. 1997) ("the court's disposition of Rule 315(b) . . . binds the FCC" as well as state authorities and "may therefore present the final opportunity for this Court to address that issue").

Nor should this Commission be swayed by rhetorical claims that UNE combinations are the key to residential competition. See, e.g., DOJ at 14-16. As BellSouth has explained in Docket 97-208, rebundling UNEs is not economically attractive to serve residential customers in most BellSouth states, including Louisiana, because state regulators set wholesale rates for resale services so low. UNE combinations could be profitable only in the business market, where facilities-based competition already is developing. See Ex Parte Letter of Kathleen Levitz, Vice President-Federal Regulatory, BellSouth, CC Docket 97-208 (Dec. 4, 1997) (Ex. 16). For residential customers in Louisiana, therefore, the terms of UNE combinations are a non-issue.

When CLECs begin realistically to consider UNE combinations in the Louisiana marketplace, they will find that BellSouth already makes available UNEs on terms that allow them to be combined. BellSouth's Statement, its approved interconnection agreements, and its technical descriptions of particular UNEs describe what BellSouth will provide, how BellSouth will provide it, and the terms upon which it will be provided. See Varner Reply Aff. ¶¶ 32, 34-

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[17] Sprint simply disregards that checklist item (ii), 47 U.S.C. § 271(c)(2)(B)(ii), requires compliance with the same UNE provisions of sections 251 and 252 interpreted by the court of appeals, and that the Commission may not depart from this express statutory standard. 47 U.S.C. § 271(d)(4).

35. In particular, section II.B of the Statement describes the UNEs BellSouth offers, section II.C. provides a process for requesting additional UNEs, and section II.F provides that BellSouth will make UNEs available in a way that enables CLECs to combine them.[18] BellSouth's technical service descriptions, filed as Exhibit WKM-9 to the Affidavit of Keith Milner, set out the precise manner in which BellSouth makes UNEs available, whether ordered on a stand-alone basis or for combination with other BellSouth UNEs.

No party to this proceeding claims that it has tried to combine UNEs purchased from BellSouth and been unable to do so, let alone that such a failure was attributable to a shortage of information from BellSouth. Nor will competitors who seek to combine UNEs be solely dependent upon BellSouth. It strains credulity to argue that a competitor such as AT&T, which owns a million-mile switched fiber-optic network of its own,[19] must count on BellSouth to tell its technicians how to connect an unbundled loop to an unbundled switch element.

Sprinkling its pleading with accusations of procedural misconduct, Sprint claims that BellSouth is concealing its true policies on UNEs, and in fact intends to impose resale rates for purchases of end-to-end UNEs where the CLEC performs the combining. Sprint at 42. Sprint's over-inflated rhetoric lacks any basis in fact. The Statement's UNE rates apply to any order of

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[18] MCI theorizes that BellSouth might "stop providing network elements it currently offers on the grounds that they are in fact combinations." MCI at 42. Of course, BellSouth could not withdraw any offerings required under its Statement or Louisiana PSC-approved agreements without exposing itself to enforcement proceedings. This Commission also has enforcement powers under section 271(d)(6), insofar as mandatory checklist items are concerned.

[19] See FCC Fiber Deployment Update End of Year 1996, Tables 1 & 2 (Aug. 1997).

UNEs, see Statement § II.F, except where the CLEC asks BellSouth to provide the UNEs on a preassembled, "switch-as-is" basis and thus effectively orders a retail service for resale, see id. § XIV.A.

The supposedly contrary "evidence" cited by Sprint and other CLECs pertains to negotiated agreements signed before the Eighth Circuit upheld the legality of FCC rules requiring incumbents to sell end-to-end UNEs. See 120 F.3d at 813-15. Some of those agreements treat UNE combinations that are the equivalent of a BellSouth retail service as resale orders. Varner Reply Aff. ¶ 30. However, upon the conclusion of the Eighth Circuit appeals process, these agreements may be modified according to their terms. Id.

Changing course, and implicitly conceding that BellSouth has in fact established specific offerings to allow UNE combinations, opponents then complain about the specifics of those offerings. In particular, AT&T and MCI question the legal sufficiency of collocation, the method designated by Congress for gaining access to UNEs. 47 U.S.C. § 251(c)(6); see AT&T at 14-21; MCI at 40-41; see also DOJ at 14-15 (reciting AT&T claims).[20]

AT&T first claims that collocation "creates a serious risk that customers will be left without service for extended periods of time during cutover." AT&T at 15; AT&T's Falcone/Lesher ¶¶ 39-40. Whether collocation is used or not, the facility of an existing customer must be disconnected if AT&T chooses to use that same facility as a UNE. Consequently, some outage will occur in this situation, regardless of whether collocation or some other method is

[20] Issues relating to BellSouth's implementation of its specific collocation obligations are discussed in Part III(F)(1), below.

used to access the UNEs. Moreover, AT&T's argument ignores that in actual practice BellSouth is able to cut-over loops to CLECs within a 15-minute window at least 98 percent of the time. Milner Aff. ¶ 45; Milner Reply Aff. ¶ 6. While this sample involves a single CLEC in Georgia, it conclusively shows that there is no necessary correlation between collocation and long service outages of the sort alleged by AT&T. Indeed, BellSouth offers an "SL2" loop conversion service that uses a manual (rather than the standard automated) conversion process to ensure that conversion times do not exceed 15 minutes. See Milner Reply Aff. ¶ 8.

AT&T next argues that collocation is inadequate because "[t]here is no guarantee that each of [BellSouth's collocation] locations will have space available for CLECs' equipment." AT&T at 17. Congress anticipated space constraints by making virtual collocation available wherever physical collocation is not, and thus AT&T's concerns could not be given further weight. 47 U.S.C. § 251(c)(6) see Local Interconnection Order, 11 FCC Rcd at 15798, ¶¶ 585, 602-607.

Moreover, AT&T's hypothetical worries are factually unfounded. See AT&T's Falcone/Lesher ¶¶ 52-56 (speculating about possible shortages without any factual support). There is ample room in BellSouth's central offices today. As the Reply Affidavit of Keith Milner explains, adequate collocation space exists in all of BellSouth's central offices in Louisiana. Milner Reply Aff. ¶ 3. (Indeed, AT&T has not reported a single instance where it has requested collocation and been denied.) Whether this situation changes in the future will be determined principally by CLECs' entry strategies. For example, if CLECs were to decide that

resale is the most attractive entry option in Louisiana, collocation demand would never increase significantly.

AT&T further argues that requiring CLECs to recombine network elements at a collocation cage will prevent CLECs from competing by lowering their service quality. AT&T at 18-19. That is simply incorrect, for BellSouth will make available to CLECs the UNEs needed to replicate BellSouth's retail service precisely, at the same level of quality used to serve BellSouth's retail customers. Varner Aff. ¶ 66; Statement § II.E. AT&T's argument that the 22 gauge wire used for collocation wires will be problematic, AT&T's Falcone/Lesher ¶ 76, ignores that cross connections need not be subject to the "supposed inherent frailty of the 22 gauge wire" and that, in any event, 22 gauge wire has been used for central office cross connections and jumpers for many years. Milner Reply Aff. ¶ 43. AT&T's claims about additional loop length, AT&T's Falcone/Lesher ¶ 81, are absurd, given that the addition will involve just 50 feet on a two and one-half mile loop. Milner Reply Aff. ¶ 44.

There is likewise no merit to complaints that collocation requires CLECs to make up-front investments in order to recombine UNEs. AT&T at 19. To assist smaller CLECs, BellSouth will negotiate arrangements allowing collocation payments to be spread over time. Varner Aff. ¶ 71. But the critical point is that facilities-based entry always requires some investment, and these particular investments in collocation are required by Congress's decision that collocation should be the means by which CLECs gain "access to unbundled network elements." 47 U.S.C. § 251(c)(3). Moreover, CLECs having no other facilities have been allowed to order the full complement of end-to-end UNEs precisely because combining UNEs

requires up-front investment. "[O]ur decision requiring the requesting carriers to combine the elements themselves," the Eighth Circuit explained in upholding this rule, "increases the costs and risks associated with unbundled access as a method of entering the local telecommunications industry and simultaneously makes resale a distinct and attractive option." Iowa Utils. Bd, 120 F.3d at 815. If the costs of which AT&T complains did not exist, there would be no even arguable distinction between resale and facilities-based competition, and incumbent LECs could not be required to sell end-to-end network elements in the first place.

In short, there is no basis for DOJ's assertion that the record contains "substantial evidence" showing the inherent insufficiency of collocation to enable UNE combinations. DOJ at 14-15. If BellSouth's collocation arrangements satisfy its general obligations to provide interconnection and network access under checklist items (i) and (ii) — which they do, see infra at 74-77 — then they also are adequate to enable CLECs to combine UNEs in accordance with the Act.

In any event, CLECs and DOJ are wrong when they suggest that supposed hardships associated with collocation could justify requiring incumbent LECs to grant broader access to their central offices, such as direct access to the LEC's central office equipment. See AT&T at 21, DOJ at 15. Attempting to distinguish Bell Atlantic v. FCC, 24 F.3d 1441 (D.C. Cir. 1994), AT&T asserts that CLECs' "temporary access [to the incumbent's equipment] for reconnection purposes" is not "necessarily" a taking, because it is not a "permanent physical occupation." AT&T at 22. However, the Supreme Court has directly rejected AT&T's argument that intermittent access to property is not a permanent physical occupation. In Nollan v. California

Coastal Comm'n, 483 U.S. 825 (1987), the Court held that a permanent physical occupation occurs whenever "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." Id. at 832.[21] Thus, requiring incumbents to afford CLECs physical access to the incumbent's central office equipment would run directly afoul of the prohibition on unauthorized takings articulated in Bell Atlantic.

AT&T also argues that the "plain terms"of section 251(c)(3) provide an authorization for a taking that goes beyond the authorization of collocation set out in section 251(c)(6). According to AT&T, the requirement of access to network elements "at any technically feasible point" allows the Commission to mandate physical access to any of the incumbent's facilities. Again, however, AT&T relies upon a theory that has already been rejected by the courts.

In Bell Atlantic, the D.C. Circuit held that the Commission's right under section 201(a) to order incumbent LECs "to establish physical connections with other carriers" did not provide the Commission with the authority to order physical collocation because it did not specifically authorize a taking. 24 F.3d at 1446-47. The statutory command of access "at any technically feasible point" is no closer to the needed authorization. When used in sections 251(c)(2)(B) and (c)(3), the recurring phrase "any technically feasible point" refers to a distinct location "within the

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[21] See also Kaiser Aetna v. United States, 444 U.S. 164, 180 (1979) (holding that a taking occurs when the government grants an easement allowing third parties to have intermittent access to property rights); Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1582 (Fed. Cir. 1993) (holding that "a permanent physical occupation need not be continuous and uninterrupted.").

carrier's network." 47 U.S.C. § 251(c)(2)(B). A CLEC interconnects at this "point" in the incumbent's network, or a UNE begins or ends at it. Physical collocation, on the other hand, is a method of installing the "equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6). Physical access to the incumbent's equipment would be another sort of procedure associated with interconnection and access "at the premises of the local exchange carrier," not a network "point" of interconnection or access.

Section 251(c)(3) thus has nothing to do with the UNE combination issue AT&T addresses. And it certainly is not the "clear warrant" that the Commission must possess in order to authorize physical intrusions. 24 F.3d at 1446. Had Congress wished to grant the Commission or the states the sweeping power envisioned by AT&T, rather than the narrow authorization of collocation established in section 251(c)(6), it would have explicitly done so.

Reading the requirement of interconnection "at any technically feasible point" as AT&T suggests would, in fact, unacceptably render section 251(c)(6) superfluous. AT&T's reading of section 251(c)(3) subsumes section 251(c)(6), reducing the latter to a mere illustration of the far broader power granted in section 251(c)(3). But as the Commission has acknowledged, section 251(c)(6) was thought necessary to give the Commission authority "previously found lacking." Local Interconnection Order, 11 FCC Rcd at 15779, ¶ 551. Section 251(c)(3) does not address physical access to incumbent ILECs' facilities at all, and certainly cannot be read to swallow Congress's specific response to the Bell Atlantic decision.

C. Nondiscriminatory Access to Operations Support Systems

After reviewing CLECs' comments regarding BellSouth's operations support systems, issuing more than 100 data requests, and reviewing the systems for itself in three different technical demonstrations, the Louisiana PSC determined that BellSouth's systems "do in fact work and operate to allow potential competitors full non-discriminatory access." Order U-22252-A, Consideration and Review of BellSouth's Telecommunications, Inc.'s Preapplication Compliance with Section 271, Docket No. U-22252, at 15 (LPSC Aug. 20, 1997) ("Compliance Order"). That finding is squarely within the scope of the Louisiana PSC's consultative role under section 271(d)(2)(B); it rests on greater scrutiny of BellSouth's systems than any federal agency has ever undertaken and is correct.

1. The Louisiana PSC's Determination Should Guide this Commission

Like the Louisiana PSC, DOJ expresses great interest in the capabilities of BellSouth's OSSs. Unlike the State commission, however, DOJ (by its own admission) has not bothered to figure out what those capabilities are. Rather, DOJ concedes that it has relied exclusively upon its own comments filed in connection with BellSouth's section 271 application for South Carolina. This involved "[p]utting aside BellSouth's legal arguments," BellSouth's "efforts to explain" to DOJ staff that the Department's prior comments were factually wrong, as well as changes to BellSouth's systems since the South Carolina application was filed. DOJ at 19; see also Stacy OSS Aff. ¶¶ 67, 126-129 (discussing recent doubling of tested interface capacity and implementation of new capabilities as of October 6, 1997). In short, DOJ has commented upon

its own evaluation of BellSouth's South Carolina application, not upon BellSouth's current satisfaction of the Act's OSS requirements.

All this makes DOJ's criticism of the Louisiana PSC for failing to "articulate the analysis it performed in assessing OSS compliance" particularly ironic. DOJ at 18. Quite unlike DOJ, the Louisiana PSC has been able to explain to this Commission that it did review the evidence before it. The PSC has described its deliberative process in detail and specifically discussed the steps it took to verify compliance with the OSS requirements of the checklist. Louisiana PSC at 3-7, 27-28. The Louisiana PSC also has stated the legal standard it applied — "full nondiscriminatory access," id. at 28 — whereas DOJ can only represent that its "analysis of wholesale support processes flows . . . most fundamentally from our recognition that these processes are critical to facilitating competition." DOJ at 17. Very simply, DOJ admits that it has neither credible investigative procedures nor a meaningful standard of review, whereas the Louisiana PSC has fulfilled its consultative duties to a tee.

In its ceaseless effort to minimize the Louisiana PSC's consultative role, however, DOJ suggests that what really matters is the findings of other state commissions that do not even have a role in this proceeding. Citing only the Florida PSC, DOJ says the Louisiana PSC's conclusions do not warrant deference because "other state commissions in BellSouth's region have concluded that the same systems approved by the LPSC were insufficient." DOJ at 19 & n.32. This claim is contrary to section 271(d)(2)(B), as well as misleading: state regulators throughout BellSouth's region in fact agree that BellSouth's systems are sufficient.