

the database entries for its own customers."⁶⁵⁸ The Commission further found that, for facilities-based carriers, "nondiscriminatory access to 911 and E911 services includes the provision of unbundled access to [a BOC's] 911 database and 911 interconnection, including the provision of dedicated trunks from the requesting carrier's switching facilities to the 911 control office."⁶⁵⁹

226. BellSouth's offer of access to 911 and E911 services is contained in section VII.A of the SGAT. This section provides in full:

A. Access to 911/E911. BellSouth provides CLECs equal access to 911/E911 service and for CLECs to provide customer numbers and address information to 911 providers on the following terms:

1. 911/E911 Service. Basic 911 and Enhanced 911 provide callers access to the applicable emergency services bureau by dialing a three-digit universal telephone number.
2. Equal Access. A CLEC's customers will be able to dial and reach emergency services bureaus providing 911/E911 service in the same manner as BellSouth customers.
3. Basic 911 Service Provisioning. For basic 911 service, BellSouth will provide to a CLEC a list consisting of each municipality that subscribes to Basic 911 service. The list will also provide, if known, the E911 conversion date for each municipality and, for network routing purposes, a ten-digit directory number representing the appropriate emergency answering position for each municipality subscribing to 911. The CLEC will be required to arrange to accept 911 calls from its end users in municipalities that subscribe to Basic 911 service and translate the 911 call to the appropriate 10-digit directory number as stated on the list provided by BellSouth. The CLEC will be required to route that call to BellSouth at the appropriate tandem or end office. When a municipality converts to E911 service, the CLEC will be required to discontinue the Basic 911 procedures and begin using E911 procedures.
4. E911 Service Provisioning. For E911 service, a CLEC will be required to install a minimum of two dedicated trunks originating from the CLEC's serving wire center and terminating to the appropriate E911 tandem. The dedicated trunks shall be, at a minimum, DS-0 level

⁶⁵⁸ *Id.* The Commission concluded in the *Ameritech Michigan Order* that this duty to maintain the 911 database "includes populating the 911 database with competitors' end user data and performing error correction for competitors on a nondiscriminatory basis." *Id.*

⁶⁵⁹ *Id.*

trunks configured either as a 2-wire analog interface or as part of a digital (1.544 Mb/s) interface. Either configuration shall use CAMA-type signaling with multifrequency ("MF") pulsing that will deliver automatic number identification ("ANI") with the voice portion of the call. If the user interface is digital, MF pulses, as well as other AC signals, shall be encoded per the u-255 Law convention. The CLEC will be required to provide BellSouth daily updates to the E911 database. A CLEC will be required to forward 911 calls to the appropriate E911 tandem, along with ANI, based upon the current E911 end office to tandem homing arrangement as provided by BellSouth. If the E911 tandem trunks are not available, the CLEC will be required to route the call to a designated 7-digit local number residing in the appropriate Public Service Answering Point ("PSAP"). This call will be transported over BellSouth's interoffice network and will not carry the ANI of the calling party.

5. Rates. Charges for 911/E911 service are borne by the municipality purchasing the service. BellSouth will impose no charge on CLECs beyond applicable charges for BellSouth trunking arrangements.

6. Detailed Practices and Procedures. The detailed practices and procedures contained in the E911 Local Exchange Carrier Guide For Facility-Based Providers determine the appropriate practices and procedures for BellSouth and CLECs to follow in providing 911/E911 services.⁶⁶⁰

227. BellSouth claims that its SGAT offers to customers of competing LECs "access to the type of 911 service selected by the governmental body of the area in which they reside in a manner identical to the 911 service supplied to BellSouth's own customers."⁶⁶¹ BellSouth also states that it has provided facilities-based competing carriers with 211 trunks for E911 services in its region, including 4 trunks in South Carolina, and that "it routinely monitors call blockage on E911 trunk groups and, in coordination with the CLEC, takes corrective action using the same trunk serving procedures for E911 trunk groups from CLEC switches as for E911 trunk groups from BellSouth switches."⁶⁶² Moreover, BellSouth asserts that it has instituted procedures to maintain the 911 database entries for competing LECs with the same

⁶⁶⁰ SGAT § VII.A.

⁶⁶¹ BellSouth Milner Aff. at para. 55; *see also* BellSouth Application at 45.

⁶⁶² BellSouth Application at 45-46; *see also* BellSouth Milner Aff. at paras. 57, 59.

accuracy and reliability that it maintains the database entries for its own customers.⁶⁶³ The South Carolina Commission found that BellSouth meets this checklist requirement.⁶⁶⁴

228. MCI contends that BellSouth "does not adequately set forth in its SGAT the procedures that it will use to provide 911/E911 . . . services as required by the Act." although MCI does not specify what is lacking in BellSouth's SGAT. We disagree with MCI. Rather, we conclude that BellSouth's SGAT, on its face, offers sufficient detail to make a *prima facie* case that BellSouth has satisfied this part of the checklist.⁶⁶⁵ BellSouth has pled facts and provided appropriate supporting evidence which, if true, are sufficient to establish that it offers nondiscriminatory access to 911 and E911 services.⁶⁶⁶

229. As the Commission stated in the *Ameritech Michigan Order*, once the applicant has made a *prima facie* showing that it complies with a checklist item, "opponents of the BOC's entry must, as a practical matter, produce evidence and arguments necessary to show that the application does not satisfy the requirements of section 271, or risk a ruling in the BOC's favor."⁶⁶⁷ No commenter has alleged that BellSouth is not currently populating and maintaining the 911 database for competitors' customers with the same accuracy and reliability as for its own customers.⁶⁶⁸ Nor has any commenter contended that BellSouth is not providing equivalent access to the 911 database or to dedicated trunks.

230. We note that BellSouth states that "any errors found in the data supplied by CLECs are faxed back to the CLEC along with the error code."⁶⁶⁹ We addressed above, in our discussion of BellSouth's offer of access to OSS functions, our concerns that notifying

⁶⁶³ BellSouth Application at 46; BellSouth Milner Aff. at para. 54 & Ex. WKM-4.

⁶⁶⁴ *South Carolina Commission Compliance Order* at 46-47.

⁶⁶⁵ See *supra* para. 37 (discussing the requirement that a BOC present, in its application, a *prima facie* case that all of the requirements of section 271 have been satisfied).

⁶⁶⁶ See *Ameritech Michigan Order* at para. 44.

⁶⁶⁷ *Id.* at para. 44.

⁶⁶⁸ One party, DeltaCom, asserts that, for a limited period of time after BellSouth outsourced the task of updating the 911 database, DeltaCom customers were not entered accurately into the 911 database. ALTS Moses (DeltaCom) Aff. at para. 16. DeltaCom, however, provides no information on the extent of the problems it encountered nor the period of time during which it encountered these problems. Moreover, DeltaCom acknowledges that they have been informed that BellSouth corrected all of the problems. *Id.* BellSouth, in reply, states that it is aware of only one instance where a customer was not included in the 911 database due to human error, but that it adopted procedures to prevent this problem from happening again and the problem has not recurred. BellSouth Milner Reply Aff. at para. 20.

⁶⁶⁹ BellSouth Application at 46; BellSouth Milner Aff. at para. 54 & Ex. WKM-4. We also note that, according to BellSouth, 15 new entrants are using a mechanized process to send 911 database updates to BellSouth. BellSouth Application at 46; BellSouth Milner Aff. at para. 59.

competing carriers of errors via fax could lead to significant delays.⁶⁷⁰ We would be concerned if this manual notification process leads to untimely notification or to problems with the accuracy and the integrity of the 911 database, and would reevaluate our conclusion herein should such evidence be presented in future applications.⁶⁷¹ With respect to 911 and E911 services, however, no party contends that the fact that BellSouth notifies competing carriers via facsimile about errors has led to a lack of parity or problems such as incorrect end-user information being sent to emergency personnel. We therefore find, based on the record before us in this application, that BellSouth has met its burden to demonstrate that it offers nondiscriminatory access to 911 and E911 services and complies with this part of checklist item (vii).

VII. JOINT MARKETING

A. Background

231. Section 271(d)(3)(B) prohibits the Commission from approving a BOC's application for in-region, interLATA authorization unless it finds that "the requested authorization will be carried out in accordance with the requirements of section 272." Section 272(g) allows BOCs and their affiliates to joint market their services, with certain restrictions.⁶⁷² In adopting rules implementing this section with respect to inbound telemarketing in the *Non-Accounting Safeguards* proceeding, the Commission sought to balance the BOCs' continuing equal access obligations pursuant to section 251(g) with their right under section 272(g) to market and sell the services of their section 272 affiliates.⁶⁷³ The Commission concluded that, pursuant to section 251(g), BOCs must continue to inform new local exchange customers of their right to select the interLATA carrier of their choice and take the customer's order for the interLATA carrier the customer selects.⁶⁷⁴ Specifically, the BOCs must provide any customer who orders new local exchange service with the names and, if requested, the telephone numbers of all of the carriers offering interexchange services

⁶⁷⁰ See discussion *supra* paras. 117-121.

⁶⁷¹ See generally *Ameritech Michigan Order* at paras. 256-279.

⁶⁷² Specifically, section 272(g)(1) prohibits a section 272 BOC affiliate from marketing or selling telephone exchange services provided by the BOC unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services. Section 272(g)(2) prohibits a BOC from marketing or selling interLATA service provided by a section 272 affiliate within any of its in-region states until the company is authorized to provide interLATA services in such state under section 271(d). Section 272(g)(3) clarifies that the joint marketing and sale of services permitted under section 272(g) shall not be considered to violate the nondiscrimination provisions of section 272(c).

⁶⁷³ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22046-47.

⁶⁷⁴ *Id.* at 22046.

in its service area.⁶⁷⁵ The Commission found that, as part of this requirement, a BOC must ensure that the names of the interexchange carriers are provided in random order.⁶⁷⁶ The Commission further concluded that this "continuing obligation to advise new customers of other interLATA options is not incompatible with the BOCs' right to market and sell the services of their section 272 affiliates under section 272(g)."⁶⁷⁷ Thus, the Commission found that "a BOC may market its affiliate's interLATA services to inbound callers, provided that the BOC also informs such customers of their right to select the interLATA carrier of their choice."⁶⁷⁸

232. In the *Ameritech Michigan Order*, the Commission held that Ameritech's proposed inbound telemarketing script would violate the equal access requirements of section 251(g).⁶⁷⁹ In that proceeding, Ameritech stated that, on an inbound call, Ameritech's service representative would inform the customer:

You have a choice of companies, including Ameritech Long Distance, for long distance service. Would you like me to read from a list of other available long distance companies or do you know which company you would like?⁶⁸⁰

If the customer chose a particular long distance company at this point, the order would be processed accordingly. If the customer requested a listing or telephone numbers of other available companies, the service representative would read from the entire list and ask the customer for its choice of long distance carrier.⁶⁸¹ The Commission in the *Ameritech Michigan Order* held that, "[m]entioning only Ameritech Long Distance unless the customer affirmatively requests the names of other interexchange carriers is inconsistent on its face with our requirement that a BOC must provide the names of interexchange carriers in random order."⁶⁸² The Commission stated that such a practice would allow Ameritech Long Distance to gain an unfair advantage over other interexchange carriers. The Commission relied upon the *Non-Accounting Safeguards Order* to conclude that, pursuant to the BOC's obligation to provide nondiscriminatory treatment under section 251(g), a BOC must provide, in random

⁶⁷⁵ *Id.* at 22046. A customer orders "new service" when the customer either receives service from the BOC for the first time, or moves to another location within the BOC's in-region territory. *Id.*

⁶⁷⁶ *Id.*

⁶⁷⁷ *Id.* at 22047.

⁶⁷⁸ *Id.*

⁶⁷⁹ *Ameritech Michigan Order* at paras. 375-76.

⁶⁸⁰ *Id.* at para. 375.

⁶⁸¹ *Id.*

⁶⁸² *Id.* at para. 376.

order, the names and, if requested, the telephone numbers of all available interexchange carriers.⁶⁸³

233. In the section 271 application before us, BellSouth urges the Commission to approve its proposed telemarketing script, under which the BellSouth service representative would inform the customer that there are numerous choices for long distance providers, offer to read a list of all available interexchange carriers in random order, and recommend BellSouth's long distance affiliate.⁶⁸⁴ BellSouth proffers as an example of its telemarketing script:

You have many companies to choose from to provide your long distance service. I can read from a list the companies available for selection, however, I'd like to recommend BellSouth Long Distance.⁶⁸⁵

BellSouth asserts that these company names will be read in random order if the customer requests that they be read. According to BellSouth, based on the customer's response, the order will be completed with the appropriate long distance carrier as requested.⁶⁸⁶

234. BellSouth and Ameritech argue that such a script is acceptable under the *Non-Accounting Safeguards Order*, which, they claim, struck a balance between a BOC's continuing equal access obligations pursuant to section 251(g) and the right of a BOC and its affiliate to market services jointly under section 272(g).⁶⁸⁷ These parties claim that the *Ameritech Michigan Order* is inconsistent with the *Non-Accounting Safeguards Order* because the *Ameritech Michigan Order* nullifies the second part of that balance -- the BOC's statutory joint marketing right.⁶⁸⁸ BellSouth and Ameritech also argue that requiring a BOC to recite a list of every available interexchange carrier even when the customer has made up her mind would be so burdensome and annoying to customers that it would effectively prevent the BOC from joint marketing on inbound calls.⁶⁸⁹ BellSouth and Ameritech further contend that prohibiting their proposed scripts would raise First Amendment concerns.⁶⁹⁰

⁶⁸³ *Id.* (citing *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22046).

⁶⁸⁴ BellSouth Application at 63-65; BellSouth Varner Aff. at paras. 230-31.

⁶⁸⁵ BellSouth Varner Aff. at para. 230.

⁶⁸⁶ *Id.* at para. 231.

⁶⁸⁷ BellSouth Application at 63-64; Ameritech Comments at 12-13.

⁶⁸⁸ BellSouth Application at 64-65; Ameritech Comments at 12-16.

⁶⁸⁹ BellSouth Comments at 64; BellSouth Reply Comments at 86; Ameritech Comments at 14-15.

⁶⁹⁰ BellSouth and Ameritech claim that restrictions on joint marketing as set forth in the *Ameritech Michigan Order* raise First Amendment concerns by restricting truthful statements about lawful activities, absent evidence that these restrictions are needed to achieve a "substantial" government interest. BellSouth Comments

235. AT&T, on the other hand, urges us to continue to reject telemarketing scripts such as Ameritech's or BellSouth's.⁶⁹¹ AT&T asserts that the *Ameritech Michigan Order* is consistent with section 272(g)(2), which forbids identifying only one interexchange carrier during inbound calls, and the *Non-Accounting Safeguards Order*, which made clear that marketing must be consistent with the equal access requirements of 251(g).⁶⁹² TRA claims that BellSouth's admission that it does not intend to comply with *Ameritech Michigan Order's* conclusion shows that, even before attaining section 271 authority, BellSouth will not follow the Commission's section 272 rules with which it disagrees.⁶⁹³

B. Discussion

236. We take this opportunity to address the issue of whether BellSouth's proposed inbound telemarketing script is consistent with the requirements of the statute. We do not require applicants to submit proposed marketing scripts as a precondition for section 271 approval, nor do we expect to review revised marketing scripts on an ongoing basis once section 271 authorization is granted. Applicants are free to tell us how they intend to joint market, although we do not require them to do so. Our intention in addressing this issue here is to establish a safe harbor, so that the BOCs will have some guidance on what we view as consistent with sections 251(g) and 272. We emphasize that we are not concluding here that any other scripts are *per se* lawful or unlawful. We conclude that BellSouth's script is acceptable, and, under the analysis set forth below, we would also find that the script filed by Ameritech in its section 271 application for Michigan would be acceptable, should it file a new application.

237. We conclude that BellSouth's telemarketing script as proffered in the record is in fact consistent with the requirements of sections 251(g) and 272(g), as discussed in the *Non-Accounting Safeguards Order*. We agree with BellSouth and Ameritech that a BOC, during an inbound telephone call, should be allowed to recommend its own long distance affiliate, as long as it contemporaneously states that other carriers also provide long distance service and offers to read a list of all available interexchange carriers in random order.⁶⁹⁴ In the *Non-Accounting Safeguards Order*, the Commission stated that the BOCs' existing obligation to provide any customer who orders new local exchange service with the names

at 65 n.23; Ameritech Comments at 15-16 n.19. Ameritech claims that the Commission's only explanation for finding its script unacceptable was a purely speculative conclusion that its marketing script would let Ameritech Long Distance gain an unfair advantage over other interexchange carriers. Ameritech Comments at 15-16 n.19. BellSouth contends that requiring BOCs to list all available interexchange carriers yet prohibiting them from recommending their own long distance affiliates might also unconstitutionally coerce them to deliver messages with which they disagree. BellSouth Comments at 65 n.23.

⁶⁹¹ AT&T Comments at 58-59; *see also* CFA Reply Comments at Attach. 1 at 38.

⁶⁹² AT&T Comments at 59 n.40.

⁶⁹³ TRA Comments at 33-34.

⁶⁹⁴ BellSouth Application at 63-65; Ameritech Comments at 11-16.

and, if requested, the telephone numbers of all of the carriers offering interexchange services in its service area in random order was not incompatible with the BOCs' right to joint market.⁶⁹⁵ The Commission concluded that a BOC could market its affiliate's long distance services to inbound callers as long as the BOC also informed those customers of their right to select the interexchange carrier of their choice and provided the names and numbers of all interexchange carriers in random order.⁶⁹⁶ Thus, the *Non-Accounting Safeguards Order* sought to balance a BOC's continuing equal access obligations pursuant to section 251(g) with the right of a BOC and its affiliate to market services jointly under section 272(g).

238. In considering the issue of whether BellSouth's marketing script meets the requirements of sections 251(g) and 272(g), we find that the Commission's decision in the *Ameritech Michigan Order* placed too much weight on the equal access obligations, and too little weight on the BOCs' right to jointly market local and long distance services.⁶⁹⁷ We note that the equal access obligations requiring BOCs to provide the names and telephone numbers of interexchange carriers in random order were written at a time when BOCs could not provide (and therefore could not market) long distance service.⁶⁹⁸ Now that BOCs, upon authorization to provide in-region, interLATA services, are permitted under the Act to market their services jointly, we must harmonize the existing equal access requirements with their right under the Act to engage in joint marketing.

239. We thus conclude that, even if a BOC's inbound marketing script markets the services of its long distance affiliate, the script is acceptable as long as the BOC contemporaneously fulfills the equal access requirements described in the *Non-Accounting Safeguards Order* -- *i.e.*, offers to read, in random order, the names and, if requested, the telephone numbers of all available interexchange carriers.⁶⁹⁹ In fact, the *Non-Accounting Safeguards Order* cited with approval a proposal submitted by NYNEX in that rulemaking docket similar to the BellSouth script, in which NYNEX would first inform the customer that he or she had a choice of carriers including the BOC's long distance affiliate, then offer to read a random list of interexchange carriers if the carrier did not at that point choose an interexchange carrier.⁷⁰⁰ As BellSouth and Ameritech point out, section 272(g) confers upon

⁶⁹⁵ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22047.

⁶⁹⁶ *Id.* at 22046-47.

⁶⁹⁷ See BellSouth Application at 64-65; Ameritech Comments at 12-16.

⁶⁹⁸ See Letter from Susanne Guyer, Executive Director -- Federal Regulatory Policy Issues, NYNEX, to William F. Caton, Acting Secretary, FCC, CC Docket No. 96-149, at 2-4 (Oct. 23, 1996) (NYNEX Oct. 23, 1996 *Ex Parte* in CC Docket No. 96-149).

⁶⁹⁹ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22046.

⁷⁰⁰ BellSouth Comments at 63-64; Ameritech Comments at 13-14. Under NYNEX's proposal, the NYNEX representative would inform the customer that a number of companies provide long distance service, including NYNEX Long Distance Company, and offer to send material regarding NYNEX Long Distance. If the customer indicated that he or she wanted another long distance carrier, NYNEX would then process the presubscription

BOCs authority to market and sell services of their long distance affiliates, and does not contain any exception for inbound calls or calls from new customers.⁷⁰¹ We therefore conclude that BOCs are permitted under the statute to market their long distance affiliates' services during inbound calls. We further conclude that section 272(g) allows a BOC to mention its affiliate apart from including that affiliate on a random list of available interexchange carriers.⁷⁰²

VIII. CONCLUSION

240. For the reasons discussed above, we deny BellSouth's application for authorization under section 271 of the Act to provide in-region, interLATA services in the state of South Carolina. We conclude that BellSouth is not eligible to proceed under Track B. BellSouth also has not demonstrated that it generally offers each of the items of the competitive checklist in section 271(c)(2)(B) as required by the Act. In particular, BellSouth has not demonstrated that it generally offers adequate operational support systems, nondiscriminatory access to unbundled network elements, and contract service arrangements at a wholesale discount. We find that BellSouth has demonstrated compliance with checklist item (vii)(I), nondiscriminatory access to 911 and E911 services. Except as otherwise provided herein, we make no findings with respect to BellSouth's compliance with other checklist items or other parts of section 271. Finally, we conclude that BellSouth's inbound telemarketing script is consistent with the Act.

IX. ORDERING CLAUSES

241. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 271 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 271, BellSouth Corporation's application to provide in-region interLATA service in the State of South Carolina filed on September 30, 1997, IS DENIED.

242. IT IS FURTHER ORDERED that the motion to dismiss filed by AT&T and LCI on October 1, 1997, IS DENIED.

243. IT IS FURTHER ORDERED that the motion to strike filed by BellSouth on December 4, 1997, IS GRANTED in part and DENIED in part, as described herein.

request: if the customer wanted to hear more about NYNEX Long Distance, the representative would then provide more information; and if the customer indicated that he or she was uncertain as to which carrier to choose, the representative would offer to read a random list of interexchange carriers including NYNEX Long Distance. NYNEX Oct. 23, 1996 *Ex Parte* in CC Docket No. 96-149, at 3.

⁷⁰¹ BellSouth Application at 63; Ameritech Comments at 12.

⁷⁰² See BellSouth Application at 65; Ameritech Comments at 14. Because we conclude that BellSouth's proposed script is consistent with the statute, we do not address BellSouth's and Ameritech's First Amendment arguments.

244. IT IS FURTHER ORDERED that the motion to strike filed by BellSouth on December 19, 1997. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

APPENDIX

**BellSouth Corporation's 271 Application for Service in South Carolina
CC Docket No. 97-208
List of Commenters**

1. Alliance for Public Technology
2. American Communications Services, Inc. (ACSI)
3. Ad Hoc Coalition of Telecommunications Manufacturing Companies and Corporate Telecommunications Service Managers
4. Ameritech
5. Association for Local Telecommunications Services (ALTS)
6. American Council on Education and National Association of College and University Business Officers
7. AT&T Corp.
8. Bell Atlantic
9. BellSouth Corporation
10. Competition Policy Institute
11. Competitive Telecommunications Association (CompTel)
12. Consumer Federation of America
13. GenCorp., The Gleason Works, Norfolk Southern Corp., PNC Bank, Zurn Industries, Inc.
14. Hyperion Telecommunications, Inc.
15. Independent Payphone Service Providers for Consumer Choice
16. Intermedia Communications, Inc.
17. Institute for Educational Leadership, Inc. (The)
18. Keep America Connected!
19. KMC Telecom Inc.
20. Latin Women and Supporters
21. LCI International Telecom Corp.
22. Low Tech Designs, Inc.
23. Management Education Alliance
24. MCI Telecommunications Corporation
25. National Association of Black Accountants, Inc.
26. National Association of Commissions for Women
27. National Association of Development Organizations
28. National Association of Partners in Education, Inc.
29. National Business League
30. National Cable Television Association
31. National Hispanic Council on Aging
32. National Trust for the Development of African American Men, Inc. (The)
33. Organizations Concerned About Rural Education
34. Paging and Narrowband PCS Alliance of the Personal Communications Industry Association
35. Pilgrim Telephone, Inc.

36. South Carolina Cable Television Association
37. South Carolina Consumer Advocate Philip S. Porter
38. South Carolina Public Service Commission
39. Sprint Communications Company L.P.
40. Teleport Communications Group, Inc. (TCG)
41. Telecommunications Resellers Association (TRA)
42. Triangle Coalition for Science and Technology Education
43. United Homeowners Association
44. United Senior Health Cooperative
45. U S WEST, Inc.
46. Vanguard Cellular Systems, Inc.
47. WorldCom, Inc.
48. Letters from officials, businesses and citizens of South Carolina

**SEPARATE STATEMENT OF
CHAIRMAN WILLIAM E. KENNARD**

Re: Application of BellSouth Corporation et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina (CC Docket No. 97-208).

BellSouth has made significant progress towards opening the market for local telephone service in South Carolina, as is demonstrated in its application to provide in-region interLATA service and by the record in this proceeding. In addition to beginning to build a solid foundation for local competition, BellSouth has helped this Commission analyze the conditions that Congress specified must be met before we have the authority to grant an application under section 271 of the Communications Act.

I look forward to even greater cooperation between the Commission and BellSouth and the other Bell operating companies (BOCs), as we jointly endeavor to hasten BOC entry into in-region long distance service. As I have previously stated, by working together *before* a section 271 application is filed, the Commission and BOC staffs, as well as state representatives, the Department of Justice, and other interested parties, can seek to eliminate uncertainties and resolve potential disputes that otherwise could interfere with a BOC's attempt to satisfy the requirements of section 271. Commission staff have begun to initiate such discussions with various BOCs and other parties. I am committed to seeing that this dialogue continues and grows in an open process, and I am committed to the goal of creating and expanding choice and value for consumers in local and long distance telephone service. I look forward to the Commission being able to declare a local market open.

Congress has created the framework that the Commission must follow in evaluating applications filed under section 271. It is imperative that we implement that framework in a way that promotes competition and is faithful to the letter of the statute. Although our duty in this regard compels us to deny the BellSouth application before us, I believe that BellSouth's efforts have moved us much closer to the day when a BOC will have satisfied the conditions for entry into in-region long distance service. That day is fast approaching.

**Separate Statement
of
Commissioner Susan Ness**

Re: Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina

Although framed as a denial of an application, today's order in truth sends a positive message: the newly reconstituted Commission is committed to enforcing the law as Congress wrote it, so that consumers in *all* telecommunications markets can enjoy the benefits of competition.

The thousands of pages of pleadings and the detailed debates over arcane statutory provisions must not obscure the simple legislative bargain that governs Bell company entry into long distance. Once Bell companies fulfill their responsibilities to eliminate barriers to entry in the local marketplace, the barrier to their entry into the long distance market will in turn be removed. Today's order eliminates all doubt that the new Commission will enforce that sequence.

At the heart of the Telecommunications Act is Congress's recognition that new entrants in the formerly monopolized local exchange market cannot be expected to spend the many billions of dollars necessary to build ubiquitous, fully redundant local networks. Under the statute, the incumbent providers must make available their network facilities, elements, and services under conditions that allow for genuine competition. When these statutory requirements are satisfied in any given State, the Bell company will be allowed to provide long distance service originating in that State.

The current record clearly demonstrates that, while progress has been made, BellSouth has not yet fulfilled its market-opening responsibilities in South Carolina. New entrants currently do not have nondiscriminatory access to the local facilities and services essential to compete effectively with the incumbent carrier. New entrants' orders are not processed as reliably and efficiently as those submitted by BellSouth itself. Terms and conditions for collocation of competitors' facilities have not yet been fully specified, much less implemented. BellSouth has asserted its right to physically disassemble the piece-parts of its network when they are sought by a competitor, but it has not yet specified how it will meet its corresponding obligation to permit its competitors to reassemble those piece-parts themselves. Cost-based prices for network elements, collocation, and transport and termination have yet to be established.

No one can reasonably expect new entrants to invest their resources -- and risk their reputations -- to entice consumers to subscribe to their services unless they can count on the incumbents' cooperation in effectuating a seamless transfer of service and, thereafter, in reliably delivering all promised network elements, facilities, and services.

In sum, BellSouth's unfulfilled responsibilities unfortunately leave us no alternative but to deny the application.

Getting to Yes

I have long promoted competition in all sectors of the telecommunications marketplace, and I firmly believe that the long distance restriction should be eliminated as soon as possible, consistent with the statute. I agree with BellSouth and with the South Carolina Commission that the American consumer will benefit from intensified competition in the long distance market, and I look forward to the day when I can cast my vote to approve a Section 271 application.

To this end, this Commission stands ready to work cooperatively with any Bell company that is truly committed to fulfilling its part of the statutory bargain. At the request of the Bell operating companies, we laid out a "road map" in the *Ameritech Michigan* order, offering substantial guidance on how the Bell companies can secure Section 271 approval. Today's order provides additional guidance.

Our experience with Section 271 applications is now sufficient that we can and should formulate a new "*getting to yes*" strategy. The state commissions, Justice Department, and the FCC should collaborate constructively with the Bell companies and their would-be competitors to identify those market-opening tasks that remain unfinished and to devise practical means for successfully completing them. Such a pro-active approach may well lead more quickly to mutually satisfactory resolutions than *post hoc* review of measures that have already been implemented. I strongly encourage the Bell companies -- and their competitors - - to accept this invitation.

Perspective on Pricing

Our order today does not address the issue of pricing -- whether the prices BellSouth charges to new entrants for unbundled network elements, transport and termination, and collocation are based on cost, as the statute requires. Pricing matters are not decisional in this case, and the state commission has not finished its own work on this critical matter.

While we do not address the sticky issue of pricing in our order today, I nonetheless write separately to elaborate on the principles guiding my decisions in this area.

First, the rulings by the U.S. Court of Appeals for the Eighth Circuit clearly are the law of the land today. The pricing provisions of our *Interconnection Order* have been voided. Thus, in arbitrating any open issues brought to them for resolution, the state commissions have the responsibility to follow the Telecommunications Act and make their own decisions on pricing, subject to review in the federal district courts and then the courts of appeal. The overwhelming majority of states appear to be using forward-looking economic cost principles -- a very positive development for competition. In any event, the 8th Circuit ruling makes it clear that these decisions are for the state commissions to make when called upon to arbitrate interconnection disputes.

Second, I do not read the 8th Circuit's rulings as curtailing the FCC's role in determinations on Bell company applications to offer long distance services. Just as the Court found that interconnection arbitrations are assigned by Section 252 to the states, determinations of checklist compliance and the public interest are expressly assigned by Section 271 to the FCC. This Commission is required to "consult" with the states on the requirements of the competitive checklist and is required to give "substantial weight" to the views of the Attorney General, but specific determinations of compliance with the checklist, conformity with Section 272, and the public interest are the responsibility of the FCC.

Given that Congress enjoined the FCC from giving "any preclusive effect" even to the views of the Attorney General, I can find no statutory basis for treating the determinations of state commissions -- whether on pricing or on any other checklist items -- as dispositive for Section 271 purposes. Nor can I see how we might give the Attorney General's views "substantial weight" if a state commission's contrary opinion on any subject is to be deemed definitive.

It has been suggested that it is disrespectful of the 8th Circuit for us to evaluate pricing matters in the Section 271 context. I do not agree. It certainly would not be my intention to disregard an order of the Court. If I thought the 8th Circuit had foreclosed us from considering whether unbundled network element prices are based on cost (as the checklist requires) or are consistent with promoting efficient entry in the local telephone marketplace (as we might consider in making a public interest determination), then, of course, I would abide by both the spirit and effect of that order.

But I do not believe that the 8th Circuit's ruling was intended to have such a sweeping effect and do not assume that the Court meant to so circumscribe our decisionmaking under Section 271. Congress's directive that our Section 271 determinations are reviewable only by the U.S. Court of Appeals for the District of Columbia Circuit reinforces this conclusion.

Third, I believe that there is a workable solution that both state and federal officials can agree upon. Some states are uncomfortable with the FCC determining for purposes of Section 271 that forward-looking cost-based pricing is essential for competition, even though the state commissions are completely free to develop their own pricing methodology for

purposes of Section 252. Similarly, this Commission would not be comfortable approving a Section 271 application if the prices for unbundled network elements, transport and termination, and collocation are set so as to discourage efficient competitive entry in the local market.

The Justice Department has proposed an approach that may bridge the differing state and federal perspectives. Specifically, the Department advocates that the FCC examine, in a Section 271 application, whether the prices are based on a "reasoned application of an appropriate methodology," a flexible formulation set forth in the Department's submission in this docket. A number of leading state commissioners have responded favorably to this approach. While I cannot speak for my colleagues, I, for one, am prepared to endorse it.

The circumstances of an adjudicatory proceeding involving a single party's application that must be resolved within a 90-day deadline do not permit negotiation and consensus-building involving five FCC commissioners and dozens of state commissions. But this middle-ground solution holds great promise. Moreover, resolution of our jurisdictional controversies may be advanced by (1) the widespread substantive agreement, both throughout the states and internationally, on the importance of using forward-looking economic costs; and (2) the prospects for a collaborative, multi-jurisdictional, *getting-to-yes* process for addressing Section 271 issues.

I note that the South Carolina commission has acknowledged that the current prices in BellSouth's statement of generally available terms are not the product of any particular methodology -- thus, it would be difficult to conclude that the prices are based on any articulable notion of what the statute means by "cost." But the state commission plans to resolve interconnection pricing issues in the near future, so there is no reason to assume that any current problems with interconnection prices will not be cured before BellSouth files its next application for South Carolina.

Hastening the Arrival of Local Competition

The Telecommunications Act is based on the premise that entrepreneurial companies are willing to compete if barriers that have previously stood in their way are removed. Experience in South Carolina bears this out. Although the biggest cities and biggest potential customers are elsewhere, scores of companies have expressed an interest in entering the local market in South Carolina: over eighty had signed interconnection agreements at the time of BellSouth's application, and dozens more requests for interconnection were pending.

I cannot believe that these companies have explicitly or tacitly agreed to hold back their efforts to penetrate the market, in the shared hope that doing so will foreclose BellSouth from entering the long distance market. A far more probable explanation for the nascent state of competition is that opening the local market is proving to be an immensely complicated

process and that, despite the progress BellSouth has made to date in implementing its responsibilities under Section 251, a great deal more remains to be accomplished.

If all parties work together in a spirit of cooperation, we can achieve for the consumer the benefits of robust local and long distance competition. I hope that we will see continued progress in the new year, such that we will be able to "get to yes" -- to conclude that BellSouth has fulfilled its responsibilities fully and can in turn properly be authorized to bring additional competition to the long distance market.

**SEPARATE STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH**

Re: Application of BellSouth Corporation et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina (CC Docket 97-208).

It is Christmas Eve in Washington, DC. The FCC issues an Order. Lawyers, accountants, and others who battle the regulatory wars of Section 271 have Christmas stockings filled with goodies. It has been a good year for those who earn a living through the industry of telecommunications regulation. But has it been a good year for the People of South Carolina? What will Santa leave in their stockings?

This Order today should not be narrowly about regulation, or even narrowly about BellSouth. It should be about the People of South Carolina and what will be good for them. The People of South Carolina, like all Americans, are not experts in federal regulation. They do want lower prices, and they do not want the federal government to get in the way of lower prices. Generally, competition leads to lower prices; too much regulation does not.

There are dozens of local telephone companies in South Carolina. Today, there is facilities-based local competition for none of them, but there are hope and promise for such competition in the BellSouth region. With this local competition, are the hope and promise of lower prices.

Today, hundreds of long-distance carriers offer service in South Carolina. All local telephone companies in South Carolina, except one, can also offer long distance services. That one exception is BellSouth, and with this Order, there are hope and promise that it too may one day offer long distance service in South Carolina.

In the Order released today, the Commission concludes that BellSouth has not yet met the statutory requirements that would enable to provide long distance service to the citizens of South Carolina. We recognize, however, that BellSouth has invested millions of dollars to try to create an organizational structure that will foster competition. For nearly two years, BellSouth has worked to develop new operational service support systems consistent with regulations -- hundreds of millions of dollars annually throughout the BellSouth region. The Commission explicitly commends BellSouth for its efforts and the progress that it has made in opening its local market to competition.

It should come as no surprise that BellSouth has made and continues to make such efforts. Throughout the proceedings, many South Carolinians have repeated the theme that BellSouth is a "good corporate citizen" in South Carolina. It supports local schools. It supports civic organizations. It involves itself with the life of the community. By Statute, being a good corporate citizen is not a specific regulatory factor to consider under Section 271. It provides, however, hope and promise that competition will come to South Carolina, and that is the real Christmas present for the State.

**SEPARATE STATEMENT OF
COMMISSIONER MICHAEL K. POWELL**

Re: Application of BellSouth Corporation et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina (CC Docket No. 97-208).

In denying BellSouth's bid to enter the long distance market in South Carolina, we recognize that the company has taken some significant steps in meeting the prerequisites for entry established by Congress under section 271. BellSouth's application is deficient in certain important areas, such that we cannot approve it in its present form. Nevertheless, these deficiencies can be corrected, and I encourage BellSouth to double its efforts to find workable and creative approaches that will enable it to satisfy the Act's requirements, which are designed to offer would-be local competitors a fighting chance to compete. I hope BellSouth accepts this challenge and returns to us with a more viable application that will lead to residents of South Carolina having an expanded number of choices for their local and long distance providers. I believe BellSouth can get there, but I caution that newspaper advertisements and letter writing campaigns will not remedy the deficiencies we have identified in this order.

If BellSouth (or any applicant) is to be successful in future applications, it must understand the ground rules. Moreover, it must have some confidence that if it takes further steps to allow competitors to win away its customers, the company will be rewarded in kind with the right to compete in the long distance market. We must always endeavor to place the seeds of section 271 success in the hands of the BOC applicants. With respect to the present application, we have attempted to offer clear guidance in a number of areas. Nonetheless, we could have done much more if we had had the time and resources to work more cooperatively with BellSouth to reach agreement on many of the checklist items, rather than having to retreat into the bowels of the Commission to slog through a 33,000 page application. Section 271 review is inefficient if it results in an applicant having to file two and three times just to obtain a clear picture of what it is doing right and what it is doing wrong. I believe we must do more or adopt a new approach to this process if we hope to provide the clarity that BOCs and new entrants need to open up local markets.

Accordingly, I want to commend my colleagues for attempting with me to clarify our interpretation of Track B, as well as for applying the competitive checklist to BellSouth's application, despite the fact that we found Track B unavailable to BellSouth. I believe that both BOCs and entrants need as much direction as we can possibly provide. In the past, there has been an inclination to fight the section 271 battle at the Track A/B "shore." Such an approach wastes time and resources, detracts from the thoroughness of our checklist analysis and clouds the guidance that incumbents and competitors alike desperately need. While I acknowledge that our interpretation of section 271 is an evolving one, I believe that our efforts in this order to flesh out the circumstances in which Track B and certain checklist items are or are not satisfied constitute a step in the right direction.

In addition, I believe the Commission, the BOCs and potential competitors must do much more to offer workable solutions to the vexing problems that are impeding the arrival of local competition. The proper standards and benchmarks for OSS is one such area. How to ensure the viable use of unbundled network elements (UNEs) in light of current legal precedent is another. Consider our own treatment of UNEs in the present application. We note, correctly, that a BOC must offer UNEs in a manner that allows them to be recombined by the new entrant. In this order, however, we fault BellSouth's collocation proposal, but offer no possible solution of our own. Rather, we (like the Department of Justice) reject the application on the grounds that the BOC failed to satisfy its burden of proving that it has met the checklist. I do not question that the BOC does and should bear the burden of proof, but I believe we could do much more to help develop and implement a workable, collaborative framework for promoting compliance with section 271, rather than relying on burdens of proof and other adjudicative devices to dispense with these applications.

In this regard, let me say more about the UNE problem. In its recent *Rehearing Order*,¹ the Eighth Circuit held that new entrants, rather than incumbents, must rebundle network elements. By its holding, the court undermined an intellectual construct. Notwithstanding the Eighth Circuit's interpretation, the network elements that the Commission has held must be "unbundled" are not actually tangible, physical elements that can be unplugged and replugged as easily as an electric cord from a wall socket. With the exception, perhaps, of loops and ports, the "unbundling" of network elements is not a physical process but a cost allocation fiction. Most UNE's -- though representing discrete functional capabilities that one can offer and charge for separately -- cannot in any real sense be dissociated from the software and hardware that control their operation. Thus, it seems ridiculous to suggest that incumbent LECs can physically unbundle most network elements, or that a new entrant can actually pick up those elements and recombine them, be it in a collocation cage or elsewhere.

The Commission and the various parties should stop perpetuating this myth. The UNE problem is arguably just a math problem that we should proactively address. That is, in the current environment, we should be dedicating our efforts toward crafting a method for allocating costs for UNEs that simulates the fiction of unbundling and rebundling, rather than spending time pretending that there are actually ways to take these elements apart, hand them to an entrant, and have that entrant put them back together like pieces in a Lego play set. In short, pending further review of the Eighth Circuit decisions, I believe we should invite proposals whereby a BOC would voluntarily recombine elements for a modest charge -- a "glue charge." While we await further guidance from the courts, I would encourage both BOCs and new entrants to participate actively in finding a glue charge structure or other UNE framework that they can live with, lest we find ourselves playing "catch up" in the event the courts do not reinstate our previous rulings.

¹ See *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *modified on reh'g*, No. 96-3321 (Oct. 14, 1997).

Finally, I respect the genuinely held view of some that the statute confers independent jurisdiction on the Commission to establish pricing rules. I merely note that such an interpretation is not universally shared among the Commissioners. In particular, some of us question whether such an interpretation of section 271 is consistent with the Eighth Circuit's prior holdings regarding the states' ratemaking authority. I feel no need, however, to debate this legal point here. This interpretation has been challenged and is squarely presented in the mandamus action presently before the Eighth Circuit. Oral argument in that proceeding is scheduled for later next month. The Court itself will undoubtedly shed light on this important question.