

of BST's 1FR service by itself because the latter service includes neither toll calls nor vertical services."<sup>65</sup> In other words, the only way to create comparability between wireline local exchange service and PCS is to transform the former into a high-end service. And even having so gerry-rigged the analysis, the best BellSouth can claim is that only those "BST customers with 'low' to 'medium' usage of local and intraLATA toll services" would be candidates "to switch to PCS offerings if minimum cost were the sole criterion for doing so," which in light of the many differences between PCS and wireline local exchange service listed above, it seldom, if ever, would be.<sup>66</sup> Of course, "customers with 'low' to 'medium' usage of local and intraLATA toll services" would likely be the last customers to acquire all the "bells and whistles" necessary to create any kind of price comparability between PCS and wireline local exchange service.

A BellSouth residential subscriber in Louisiana using wireline local exchange service can obtain unlimited local calling for between \$10.97 and \$12.64 per month. A BellSouth small business subscriber in Louisiana using wireline local exchange service can obtain unlimited local calling for between \$28.68 and \$33.00 per month.<sup>67</sup> And included in these unlimited local calling plans are unlimited free calls placed to toll free numbers. With Sprint PCS, a residential user would pay a higher amount -- \$16.99 -- for 15 minutes of incoming and outgoing airtime (including airtime associated with calls to toll free numbers), with a per-minute charge thereafter of \$0.40. A small business user would pay Sprint PCS an amount comparable to that which it would pay BellSouth

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<sup>65</sup> BellSouth Application at Appendix A, Tab 1, Affidavit of Aniruddha Banerjee at 6 - 7.

<sup>66</sup> *Id.* at 21.

<sup>67</sup> BellSouth.com. Residential/Small Business Products and Services, Louisiana.

for unlimited wireline local exchange service for 100 minutes of incoming and outgoing airtime (including airtime associated with calls to toll free numbers), with a per-minute charge thereafter of \$0.35.<sup>68</sup> AT&T Wireless would provide the residential user with twice the number of airtime minutes offered by Sprint PCS, but charge a monthly rate roughly twice that which the residential user would pay for unlimited local calling using wireline local exchange service. With AT&T, a small business customer would get 150 minutes of incoming and outgoing airtime for what it would pay BellSouth for unlimited local calling using wireline local exchange service.<sup>69</sup>

Obviously recognizing the weakness of its price and service comparability showings, BellSouth also proffers the results of a survey which purports to establish that a significant segment of Louisiana consumers are replacing wireline local exchange service in whole or in part with PCS.<sup>70</sup> Not surprisingly, the questions posed in the BellSouth survey are vague, confusing and unlikely to produce meaningful results. For example, questions one ("Is your cellular phone your primary business phone?") and three ("Which phone do you use more: your cellular phone? home phone?") do not address the issue of substitutability, and indeed, may well simply confirm the "complementary" nature of PCS service. Question 4 ("If the price of cellular service got cheaper so that it cost about the same as your home phone, would you use the cellular phone completely and get rid of your home phone?") poses a hypothetical question which, as shown above, does not reflect today's market. Responses to the final question ("Do you have a home phone in addition to your cellular phone?") are meaningless without supplemental information regarding the respondents. For

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<sup>68</sup> Sprint PCS.com, Pricing and Coverage. Service Plans, Louisiana.

<sup>69</sup> AT&T.com, Consumer Catalog, AT&T Digital PCS, Southwest Region

<sup>70</sup> BellSouth Application, Appx. D, Tab 14.

example, is the respondent living in a residence in which phone service is available but not in his or her name, or in a dormitory or barracks where phone service is not available, or in a hotel where phone service is provided in his or her room.

Apparently cognizant of the facial inadequacies of its survey, BellSouth resorts to "individual case studies" of PCS users. In so doing, BellSouth trumpets the very types of "anecdotal evidence" it has so stridently abused competitors for relying upon. As explained by the author of the report upon which BellSouth relies for these gems, "selected follow up interviews have been included in the Research Findings section to provide additional insight into the results of the study."<sup>71</sup>

In short, while the Commission "envision[s] PCS providers offering a broad array of services, including services that could potentially extend, replace, and compete with wireline local exchange service,"<sup>72</sup> that day has not yet arrived. Moreover, if and when it does, it will reveal nothing with respect to BOC compliance with Congressional directives to open their local exchange/exchange access markets to competition. BellSouth should not be permitted to so easily avoid its statutory responsibilities.

**C. BellSouth Has Not As Yet Fully Satisfied The  
14-Point "Competitive Checklist"**

A BOC that seeks in-region, implemented the competitive checklist" if proceeding under Track A or has "generally offered" in a SGATCs "all items included in the competitive

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<sup>71</sup> Id. at Appx. A, Tab 6, Declaration of William C. Denk.

<sup>72</sup> Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services (Report and Order), 12 FCC Rcd. 15668 at ¶ 6.

checklist," if proceeding under Track B.<sup>73</sup> Under either Track A or Track B, the network access and interconnection made available by the BOC must encompass each of the fourteen items incorporated into the Section 271(c)(2)(B) 14-point "competitive checklist." Failure by the BOC to provide or generally offer one or more of the "competitive checklist" items will be fatal to the BOC's application.<sup>74</sup>

BellSouth's Application must be rejected because the carrier has not "met its burden of showing that it has . . . [made available] access to . . . [all fourteen "competitive checklist" items] in accordance with the requirements of Section 271(c)(2)(B)."<sup>75</sup>

**1. Deficiencies in BellSouth's Operations Support Systems Persist**

TRA's resale carrier members report that BellSouth has yet to correct previously identified deficiencies in its operations support systems ("OSS"), upgrade the personnel assigned to support wholesale services, or eliminate discriminatory or anticompetitive conduct targeted against competitive providers of local exchange service. Indeed, the most common assessment of BellSouth's performance by TRA's resale carrier members is that things have not improved significantly since the last time BellSouth petitioned for in-region, interLATA authority in the States of South Carolina and Louisiana. While TRA's resale carrier members generally give their BellSouth account representatives favorable assessments, they express continued frustration with the overall

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<sup>73</sup> 47 U.S.C. § 271(d)(3)(A).

<sup>74</sup> Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543 at ¶ 105.

<sup>75</sup> Id.

performance of BellSouth both in its provision of wholesale services and unbundled network elements.

A common complaint among TRA's resale carrier members is the high percentage of rejected orders they continue to experience with BellSouth<sup>76</sup> and the unwillingness of the carrier to assist in rectifying the underlying problem. Most of the "order rejects" involve such simple matters as the use or absence of a period in conjunction with an abbreviation or the use of one abbreviation rather than another, but the results are the same regardless of the reasons that individual orders are rejected. Such problems should be easy to remedy, but BellSouth declines to make available the information necessary to do so.<sup>77</sup> Indeed, in one instance, a TRA resale carrier member acquired a database for several hundred thousand dollars at BellSouth's suggestion only to find that the information in the database was insufficient to ensure acceptable orders. Aggravating this problem, BellSouth continues to reject orders for the first "error" found rather than identifying any

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<sup>76</sup> In reviewing earlier applications for in-region, interLATA authority filed by BellSouth, the Commission found that "a significant number of orders submitted by competing carriers via BellSouth's electronic interface are rejected, resulting in substantial delays in processing new entrants' orders." 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 Louisiana (Memorandum Opinion and Order), 13 FCC Rcd. 6245 at ¶ 23.

<sup>77</sup> The Commission has previously noted BellSouth's "failure to provide sufficient information concerning BellSouth's 'internal editing and data formatting requirements' necessary for competing carriers' orders to be successfully processed through both BellSouth's interface and its internal systems." 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 (Memorandum Opinion and Order), 13 FCC Rcd. 539 at ¶ 110.

additional errors" in the service order, which means that a single order may be rejected multiple times as each additional "error" prompts an additional order reject.<sup>78</sup>

Another commonly cited problem among TRA's resale carrier members is the persistent slippage in the dates for new installations, aggravated by untimely notice to the resale carrier of the attendant delay.<sup>79</sup> As a result, the resale carrier is faulted by its customer not only for missing an installation date, but for failing to advise the customer until the last moment, or after the fact, that an anticipated installation will be delayed.<sup>80</sup> Rendering this problem all the more egregious is that the overwhelming majority of the new installations are "as is" conversions.

Also drawing criticism from TRA's resale carrier members are delays by BellSouth in correcting service outages and effecting other repairs for resale carrier customers. Exacerbating this problem is the conduct of BellSouth representatives following the delays. BellSouth personnel continue to make disparaging remarks to customers of TRA's resale carrier members, suggesting that the problems they are experiencing wouldn't be occurring if they had not converted their service to a resale carrier.

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<sup>78</sup> The Commission has criticized BellSouth for not "readily communicat[ing] the cause for rejection of . . . [an] order," contrasting this approach with "the on-line edits in BellSouth's own systems [which] instantaneously advise BellSouth representatives of any errors and prevent them from releasing orders until the errors have been corrected." 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 Louisiana (Memorandum Opinion and Order), 13 FCC Rcd. 6245 at ¶ 27.

<sup>79</sup> BellSouth was found previously to have "failed to provide . . . order jeopardy notices in substantially the same time and manner as BellSouth provides to its retail operations." Id. at ¶¶ 31, 39 - 40.

<sup>80</sup> As the Commission has recognized, "[i]t is critical that a BOC provide a competing carrier with timely notice if the BOC, for any reason, can no longer meet the scheduled due date, so that the competing carrier can inform its customer of the delay before it occurs and reschedule the time for service installation." Id. at ¶ 39.

Persistent complaints are also voiced by TRA's resale carrier members regarding BellSouth personnel assigned to "CLEC Order Centers" and "CLEC Repair Centers." The quality of the personnel and the adequacy of their training are commonly questioned. These support personnel are often characterized as lacking in the knowledge and experience necessary to perform the functions which they have been assigned.<sup>81</sup>

Also consistently faulted by TRA's resale carrier members are BellSouth's electronic interfaces. For example, TRA's resale carrier members contrast the seven screens of windows required to process an order using BellSouth's Local Exchange Navigation System ("LENS") with the streamlined electronic ordering processes utilized by facilities-based interexchange carriers.<sup>82</sup> TRA's resale carrier members also emphasize the need to utilize manual systems to process all but the smallest and the simplest orders.<sup>83</sup> Complex orders and orders for service over a threshold number of lines for a single account must all be processed manually within the BellSouth system.

Discriminatory treatment of resale carriers by BellSouth also has been the subject of persistent complaints by TRA's resale carrier members. For example, resale carriers are billed subscriber change charges when a customer converts to their service. Retail customers are not billed any comparable charges and BellSouth does not pay the resale carrier a like charge if a customer

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<sup>81</sup> The Commission has previously faulted BellSouth for the "poor performance" of its service centers, noting that "BellSouth's service centers were inefficient and had inadequately trained employees." *Id.* at ¶ 26.

<sup>82</sup> TRA nonetheless commends BellSouth for its efforts to develop interfaces which, as described by BellSouth, are "compatible with inexpensive, commercially available hardware and software and require[] no additional development by a CLEC." BellSouth Brief at 21. TRA also commends BellSouth for providing "manual access to OSS[]". *Id.* at 19. BellSouth is correct that these options are critical to entry by smaller carriers into the local market.

<sup>83</sup> As BellSouth acknowledges, while electronic ordering is available for 34 resale services, only four of those are complex. BellSouth Brief at 25.

switches from the resale carrier to BellSouth. BellSouth also imposes on resale carriers the full multi-line business subscriber line charge ("SLC") for every line used by their customers even if individual customers are single line business or centrex users, indirectly treating customers of resale carriers differently than BellSouth retail customers are treated.

While BellSouth is given high marks by TRA's resale carrier members for making voice mail and other voice messaging services available for resale, the carrier unfortunately declines to offer such services at discounted rates. Moreover, BellSouth does not allow for the seamless transition of voice mail services to a customer who has converted his or her service to a resale carrier, instead requiring the customer to reprogram his or her voice mailbox even within the context of an "as is" service conversion.

As noted above, the general assessment of BellSouth's wholesale operation by TRA's resale carrier members is that little, if any, improvement has occurred over the past twelve months. As one of TRA's resale carrier members noted by way of illustration, in the long distance industry, one order entry representative is needed for every three customer service representatives, while the reverse is true in dealing with BellSouth. Simply put, TRA's resale carrier members do not agree with BellSouth's assessment that "[s]hould CLECs place orders for checklist items . . . they will find BellSouth ready, willing, and able to furnish each item at the requisite level of quality and quantity."<sup>84</sup> Nor do TRA's resale carrier members concur with BellSouth's view that the difficulties they have experienced and continue to experience are "isolated problems."<sup>85</sup>

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<sup>84</sup> BellSouth Brief at 16.

<sup>85</sup> Id. at 17.

**D. Grant Of The BellSouth Application Would Not Be Consistent With The Public Interest, Convenience And Necessity**

The final evaluative task assigned to the Commission under Section 272(d)(3) is the determination of whether grant of the in-region, interLATA authorization sought by BellSouth would be "consistent with the public interest, convenience, and necessity."<sup>86</sup> The public interest standard is a necessarily broad test incorporating a host of considerations. As the Commission has noted, "[c]ourts have long held that the Commission has broad discretion in undertaking . . . public interest analyses."<sup>87</sup> Indeed, "section 271 grants the Commission broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region, interLATA market is consistent with the public interest."<sup>88</sup>

**1. The Commission May Properly Consider In Its Public Interest Analysis BellSouth's Refusal To Make Available To New Market Entrants Existing Combinations Of Network Elements**

BellSouth declares in its Application that a plan proposed by AT&T pursuant to which "a CLEC would send an electronic signal to the switch to put the already-combined . . . [loop and switch port] into service for its customer . . . is flatly inconsistent with the Eighth Circuit's decision in *Iowa Utilities Board*."<sup>89</sup> BellSouth goes on to argue that "[a]bsent a reversal of the Eighth Circuit's holding on this point, the Commission has no authority to order BellSouth

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<sup>86</sup> 47 U.S.C. § 271(d)(3)(C).

<sup>87</sup> Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543 at ¶ 384.

<sup>88</sup> *Id.* at ¶ 383.

<sup>89</sup> BellSouth Brief at 40.

involuntarily to provide the electronic access to the pre-assembled elements AT&T seeks."<sup>90</sup> While strongly disagreeing with the Eighth Circuit's reading of Section 251(c)(3), TRA acknowledges that the Court held that Section 251(c)(3) does not require incumbent LECs to make available "assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements)."<sup>91</sup> This ruling, however, does not foreclose consideration by the Commission of a BOC's failure to make available existing combinations of network elements. Rather, it simply precludes the Commission from directing an incumbent LEC to offer pre-assembled combination of network elements.

As the Commission has properly recognized, "[S]ection 271 grants the Commission broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region, interLATA market is consistent with the public interest."<sup>92</sup> "Courts have long held that the Commission has broad discretion in undertaking such public interest analyses," and "[t]he legislative history of the public interest requirement in section 271 indicates that Congress intended the Commission, in evaluating section 271 applications, to perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act."<sup>93</sup> It is thus clear that "Congress granted the Commission broad discretion

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<sup>90</sup> Id.

<sup>91</sup> Iowa Util. Bd v. FCC, 120 F.3d 753 at 794

<sup>92</sup> Application of Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543 at ¶ 383.

<sup>93</sup> Id. at ¶¶ 384, 385.

under the public interest requirement in section 271 to consider factors relevant to the achievement of the goals and objectives of the 1996 Act."<sup>94</sup>

"The 1996 Act's overriding goal is to open all telecommunications markets to competition."<sup>95</sup> Congress "sought to open local telecommunications markets to previously precluded competitors not only by removing legislative and regulatory impediments to competition, but also by reducing inherent economic and operational advantages possessed by incumbents."<sup>96</sup> Recognizing, however, that BOCs "have little, if any, incentive to assist new entrants in their efforts to secure a share of the BOCs' markets," the Congress embodied in Section 271 "a critically important incentive for BOCs to cooperate in introducing competition in their historically monopolized local telecommunications markets."<sup>97</sup>

To facilitate competitive entry into the local exchange market, Congress "require[d] incumbent LECs, including BOCs, to share their networks in a manner that enables competitors to choose among three methods of entry into local telecommunications markets, including those methods that do not require a new entrant, as an initial matter, to duplicate the incumbent's networks."<sup>98</sup> Recognizing that new market entrants "will adopt different entry strategies that rely to varying degrees on the facilities and services of the incumbent and that such strategies are likely to evolve over time," Congress "did not explicitly or implicitly express a preference for one

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<sup>94</sup> Id. at ¶ 385.

<sup>95</sup> Id. at ¶ 10.

<sup>96</sup> Id. at ¶ 13.

<sup>97</sup> Id. at ¶ 14.

<sup>98</sup> Id. at ¶ 13.

particular entry strategy, but rather sought to ensure that all procompetitive entry strategies are available."<sup>99</sup> The Commission's "public interest analysis of a section 271 application, consequentially, must include an assessment of whether all procompetitive entry strategies are available to new entrants."<sup>100</sup>

The Commission has made clear that mere compliance with the "competitive checklist" is not sufficient to establish that grant of in-region, interLATA authority to a BOC is consistent with the public interest, convenience and necessity. As reasoned by the Commission, "Congress' adoption of the public interest requirement as a separate condition for BOC entry into the in-region, interLATA market demonstrates that Congress did not believe that compliance with the checklist alone would be sufficient to justify approval under section 271."<sup>101</sup> Thus, the Commission has signaled that it will make a "case-by-case" determination . . . examin[ing] a variety of factors in each case . . . [including whether] the various methods of entry contemplated by the 1996 Act . . . [are] truly available."<sup>102</sup>

The Commission has found that "the ability of new entrants to use unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress's objective of promoting competition in the local telecommunications market."<sup>103</sup> The Commission has further correctly concluded that "limitations on access to combinations of

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<sup>99</sup> Id. at ¶ 387

<sup>100</sup> Id.

<sup>101</sup> Id. at ¶ 13.

<sup>102</sup> Id. at ¶ 13.

<sup>103</sup> Id. at ¶ 332.

unbundled network elements would seriously inhibit the ability of potential competitors to enter local telecommunications markets through the use of unbundled elements, and would therefore significantly impede the development of local exchange competition."<sup>104</sup> As the Commission explained, "in practice, it would be impossible for new entrants that lack facilities and information about the incumbent's network to combine unbundled elements from the incumbent's network without the assistance of the incumbent." Moreover, as the Commission has noted, "dismantling of network elements, absent an affirmative request, would increase the costs of requesting carriers and delay their entry into the local exchange market, without serving any apparent public benefit."<sup>105</sup>

In short, the Commission has found that the public interest lies in opening the local exchange market to competition and that access to combinations of unbundled network elements is integral to achieving this goal. The Commission has recognized that Congress intended for it to exercise broad discretion in structuring and conducting its public interest analysis under Section 271, and that such analysis must include an assessment of whether all three of the market entry vehicles made available in the 1996 Act are truly available. And the Commission has concluded that permitting BOCs to dismantle existing network platforms before providing them to new market entrants as unbundled network elements would seriously diminish the viability of unbundled network elements as a market entry option. Given these predicates, the Commission would certainly be on solid ground in considering a BOC's failure to make available to new market entrants existing

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<sup>104</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶¶ 10 - 23.

<sup>105</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Order on Reconsideration), 12 FCC Rcd. 12460 (1997), *pet. for rev. pending sub. nom.*, Southwestern Bell Telephone Co. v. FCC, Case No. 97-3389 (Sept. 5, 1997).

combinations of network elements in assessing whether the public interest would be served in granting the BOC authority to enter the in-region, interLATA market.

2. **BellSouth Has Not Demonstrated That Local Exchange Competition Has Taken Root In The State of Louisiana**

Obviously, a critical element of a public interest analysis involving market entry is the competitive impact of such entry.<sup>106</sup> TRA agrees with the Commission that the inclusion of a public interest test among the Commission's evaluative requirements reflects a Congressional mandate that the Commission assess the impact of BOC provision of in-region, interLATA service on both nascent local and existing long distance competition.<sup>107</sup> Certainly, the public interest test is not a license for the Commission to reduce or expand the "competitive checklist;" Section 271(d)(4) makes this clear.<sup>108</sup> Congress clearly intended a more "macro" analysis involving a broad assessment of competitive and consumer impacts.

It is TRA's strongly-held belief that the public interest would not be served by authorizing BellSouth to originate interLATA service within the State of Louisiana until such time as consumers in at least the largest metropolitan areas within the State are able to select among two or more established facilities-based providers of local exchange/exchange access service and

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<sup>106</sup> Id.; see, e.g., FCC v. RCA Communications, Inc., 346 U.S. 86, 90 - 91 (1953).

<sup>107</sup> Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543 at ¶¶ 385 - 88.

<sup>108</sup> 47 U.S.C. § 271(d)(4). As the Commission recognized, a proposed amendment that would have eliminated the public interest test because it was duplicative of the "competitive checklist" was soundly defeated by the Senate. Cong. Rec. 57960 - 7971 (daily ed. June 8, 1995). Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543 at ¶ 389.

interstate switched access charges have been reduced to reflect the economic cost of originating and terminating long distance traffic. By established facilities-based providers, TRA is referring to competitive local exchange carriers that are, and have been for some modicum of time, operational and are providing dial tone and other local services to a significant number of customers. A critical mass of customers is an essential element because a provider's ability to attract customers is a demonstration of its and its service's operational viability, which in turn confirms the BOC's compliance with the Telecommunications Act's mandate that services and facilities provided to a new market entrant must be at least of equal quality to that the BOC provides to itself. Market share, while not a perfect indicator, is also a useful gauge of the viability of competition in a market.<sup>109</sup> As the Commission has recently noted:

The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban and rural) in the relevant state, and at different scales of operation (small and large).<sup>110</sup>

As monopoly or near monopoly providers of local exchange/exchange access service, the BOCs retain the ability to (i) hinder competitive entry into local markets; (ii) undermine the competitive viability of new entrants into the local market; and (iii) adversely impact existing providers of interLATA service. The BOCs will retain the ability to impede local, and diminish long

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<sup>109</sup> See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

<sup>110</sup> Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543 at ¶ 391.

distance, competition so long as they retain control of local "bottleneck" facilities. This ability to act anticompetitively will diminish only when competitive providers of local exchange/exchange access service who are not dependent upon BOC network services establish a solid competitive foothold, thereby eroding the local "bottleneck." Until a BOC's control of "bottleneck" facilities no longer encompasses the larger part of the population of a State, authorizing the BOC to originate interLATA service within that State would not only not serve, but would be directly contrary to, the public interest. Such a premature action would deny the residents of the State not only the potential benefits of local exchange/exchange access competition, but reduce the existing benefits to those consumers of long distance competition.

The telephony provisions of the 1996 Act are designed, among other things, to open the monopoly local exchange/exchange access markets to competitive entry, eliminating "not only statutory and regulatory impediments to competition, but economic and operational impediments as well."<sup>111</sup> It belabors the obvious, however, to state that an order of magnitude difference exists between theoretically "contestable" and actually "contested" markets. While competitive potential may ultimately evolve into actual competition significant enough to discipline BOC market power, the lag in time before competition actually emerges may, and likely will, be substantial. And this lag in time will be exacerbated by BOC resistance to competitive entry and the competitive provision of local exchange and exchange access service. As succinctly put by the Commission:

We recognize that the transformation from monopoly to fully competitive markets will not take place overnight. We also realize that the steps taken thus far will not result in the immediate arrival of fully-effective competition. Accordingly, the Commission and state

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<sup>111</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 3.

regulators must continue to ensure against any anticompetitive abuse of residual monopoly power, and to protect consumers from the unfettered exercise of that power.<sup>112</sup>

As noted previously, monopolists do not readily relinquish market power. As the Commission has recognized, "[b]ecause an incumbent LEC currently serves virtually all subscribers in its local serving area, an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market."<sup>113</sup> BOCs and other incumbent LECs can erect a variety of economic and operational barriers to competitive entry into, and competitive survival in, the local market. History teaches that the BOCs will actively seek as a profit maximizing strategy to forestall competition by interposing these barriers. TRA submits that BOC market conduct will be adequately disciplined only when local dial tone can be obtained from other facilities-based providers with proven competitive capabilities, and that the only incentive strong enough to motivate the BOCs to permit such facilities-based competitive entry is their desire to provide in-region, interLATA services.

TRA believes that the experience of its resale carrier members in dealing with AT&T in the long distance market is instructive here. When non-facilities based or "switchless" resale was born in the late 1980s, AT&T possessed a market share in the range of 75 percent; MCI's market share was roughly ten percent, with Sprint lagging behind at around six percent.<sup>114</sup> During the

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<sup>112</sup> Ameritech Operating Companies: Petition for Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region (Memorandum Opinion and Order), 11 FCC Rcd. 14028, ¶ 130 (1996).

<sup>113</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 10.

<sup>114</sup> Long Distance Market Shares (First Quarter 1998), Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Table 6 (July 1998).

following decade, AT&T lost more than a third of its market share, while MCI and Sprint increased their market shares by more than fifty percent and WorldCom seized five percent of the market.<sup>115</sup> During this interim period, the dealings of TRA's resale carrier members with AT&T were marred by persistent and substantial anticompetitive abuses, while MCI generally declined to provide service to resale carriers.<sup>116</sup> Only Sprint and WilTel aggressively sought the business of resale carriers and structured their operating systems to accommodate resale. It has only been of late that AT&T has

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<sup>115</sup> Id.

<sup>116</sup> A survey by TRA of its resale carrier members in 1994 showed that anticompetitive abuses were limited almost exclusively to AT&T. Thus, for example, nearly 80 percent of respondents identifying AT&T as their long distance network provider reported that AT&T had used their confidential and proprietary information to solicit their customers, indicated that such abuses occurred "very frequently," "frequently" or "regularly" and were "very serious" or "serious," and confirmed that they had lost a "large number" or a "medium number" of customers as a result of such abuses. For all the rest of the long distance network providers combined, there were only two reports of "frequent" or "regular" abuse and only three reported instances of "very serious" or "serious" abuses and "large numbers" or "medium numbers" of lost customers. With respect to service provisioning, TRA's survey revealed similar discrepancies among AT&T and the other long distance network providers. Thus, survey respondents reported that, with rare exceptions, most network providers provisioned service orders within fifteen days, with the large majority of orders being processed within ten days. In contrast, the vast majority of respondents who used AT&T reported provisioning intervals for outbound service of between sixteen days and more than one hundred and twenty days, with delays generally in the sixteen to sixty day range. With respect to "800" service, more than two thirds of the AT&T respondents reported delays of twenty-six days or more, ranging upward to one hundred and twenty days. Likewise, the survey revealed that AT&T rejected upwards to six times the number of service orders rejected by other long distance network providers. As a result, a majority of the survey respondents identifying AT&T as their network provider characterized "jamming" as a "very serious" or "serious" problem, while among respondents who identified other carriers as their network providers only a small handful so characterized "jamming." Yet another example of anticompetitive abuse relates to incomplete, inaccurate or untimely call detail reporting. Of the survey respondents identifying AT&T as their network provider, more than two thirds reported that "unbilled toll" remained a problem, while less than twenty percent of all other respondents so indicated. Not surprisingly, the vast majority of survey respondents that utilized AT&T as their network provider described their relationship with AT&T as "poor" or "fair," while the overwhelming majority of respondents who used the networks of Sprint or WilTel rated their relationships with these carriers as "good," "very good" or "excellent," with the greatest number rating their relationships "very good."

begun to view resale carriers as the large, desirable customers the FCC perceived them to be in 1991.<sup>117</sup>

As the dominant player in the long distance market, AT&T had the ability and the incentive to act in an anticompetitive manner toward resale carriers. After all, seven out of every ten customers acquired by resale carriers were previously AT&T customers. In sharp contrast, Sprint and WilTel had a strong economic incentive to deal with resale carriers. More than nine out of every ten customers resale carriers placed on the Sprint network had been customers of Sprint's long distance competitors and WilTel had positioned itself in the market as a wholesale provider. As a result, Sprint and WilTel welcomed resale carriers and actively worked to enhance service provisioning, billing and security to benefit resale carriers, while AT&T abused its forced relationship with resale carriers, acting to affirmatively undermine their competitive viability. Only when AT&T's market share approached 50 percent and the other facilities-based providers had achieved a strong market position did AT&T begin to reform its conduct with respect to resale carriers. Other earlier offered incentives, such as price cap regulation or reclassification as a nondominant carrier, had proven to be insufficient to incent such reformation.

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<sup>117</sup> Competition in the Interstate, Interexchange Marketplace (First Report and Order), 6 FCC Rcd. 5880, ¶ 115 (1991), 6 FCC Rcd. 7255 (1991), 6 FCC Rcd. 7569 (1991), 7 FCC Rcd. 2677 (1992), *recon.* 8 FCC Rcd. 2659 (1993), 8 FCC Rcd. 3668 (1993), 8 FCC Rcd. 5046 (1993), *recon.* 10 FCC Rcd 4562 (1995) ("[R]esellers, like other users, are valued customers -- in fact, they are large customers. It is not reasonable to assume that AT&T will refuse to present them with viable service options at reasonable rates."). The Commission was correct in one respect, resale carriers are among the largest purchasers of interexchange services in the Nation. For example, the resale carriers listed in the FCC's report of long distance market share provide billions of dollars in revenues annually to long distance network service providers. Long Distance Market Shares (First Quarter 1998) at Table 6.

History is repeating itself in the local market. Like AT&T, the BOCs have sought to thwart competition by anticompetitive abuse of market power; their ability and incentives to do so, however, is greater than AT&T's both because their market share is substantially larger and their control of essential facilities is far more pervasive. While the Commission has recognized that the "transition from monopoly to competition" will not be an easy one and has promised "swift, sure and effective" enforcement of the rules adopted to open local markets to competition, it has nonetheless acknowledged that in the event that it fails in its enforcement responsibilities, "the actions [taken] . . . to accomplish the 1996 Act's pro-competitive, deregulatory objectives may prove to be ineffective."<sup>118</sup>

TRA submits that only an entity which has operated within a legally protected monopoly environment, confronting competition only at the fringes of its market, would claim with a straight face that the public interest would be well served by sanctioning its entry into a competitive market in which it could use its market power in its monopoly stronghold to disadvantage competitors without first ensuring that that monopoly bastion had been, or at least could be, breached by competitive providers. The market BellSouth seeks to enter is now served by a half dozen national networks supplemented by dozens of regional networks, and populated by hundreds of providers.<sup>119</sup> More than five years ago, the Commission found this market to be "substantially

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<sup>118</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 20.

<sup>119</sup> Motion of AT&T to be Reclassified as a Non-Dominant Carrier (Report and Order), 11 FCC Rcd. 3271, ¶¶ 57 - 62 (1995); Fiber Deployment Update: End of Year 1997, Kraushaar, J. M., Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, 6 - 14 (July 1998).

competitive."<sup>120</sup> And since that time, the market share of AT&T has fallen another ten percentage points and the market share of carriers beyond the "big three" has nearly doubled.<sup>121</sup>

Standing in stark contrast is the local exchange/exchange access market. While BellSouth characterizes the "competition . . . in Louisiana's local exchange market" as "vigorous," it can only point to roughly 4,000 lines served by wireline facilities-based competitors using their own facilities and roughly 50,000 lines served by all competitors, primarily on a resale basis.<sup>122</sup> In other words, competitors, by BellSouth's calculations, currently serve approximately two percent of the nearly 2.5 million access lines in the State of Louisiana, while BellSouth controls roughly 98 percent of the market.

As the Commission has recognized, introducing competition into the local exchange/exchange access market is key to realization of the Congressional goal of "opening all telecommunications markets to competition."<sup>123</sup> Infusion of competition into this "monopoly bottleneck stronghold" was intended by Congress "to pave the way for enhanced competition in *all* telecommunications markets."<sup>124</sup> As the Commission explained, "[c]ompetition in local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumers of *local* services, but also because competition eventually will

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<sup>120</sup> Competition in the Interstate, Interexchange Marketplace (Report and Order), 6 FCC Rcd. 5880 at ¶ 36.

<sup>121</sup> Long Distance Market Shares (First Quarter 1998), Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Table 5 (July, 1998).

<sup>122</sup> BellSouth Brief at ii, 3, 6.

<sup>123</sup> Conference Report at 113.

<sup>124</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 4 (emphasis in original).

eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition."<sup>125</sup>

The sequence, hence, is critical to furtherance of the public interest. First, given that "incumbent LECs have no economic incentive, *independent of the incentives set forth in sections 271 and 274 of the 1996 Act*, to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services,"<sup>126</sup> local exchange/exchange access competition will not emerge, or will not emerge as quickly, if BOC entry into the in-region, interLATA market is authorized prematurely. Thus, in order to secure for the public the benefits of local competition, grant of in-region, interLATA authority must follow competitive entry into the local exchange/exchange access market. Only after the benefits to be derived from such competitive entry have been secured should the focus shift to "promoting greater competition in the long distance market."<sup>127</sup> As the Commission has explained, local exchange/exchange access competition will "pave the way for enhanced competition in all telecommunications markets."<sup>128</sup> As set forth by the Commission, the proper sequence is:

Under section 251, incumbent local exchange carriers . . . , including the Bell Operating Companies . . . , are mandated to take several steps to open their networks to competition . . . Under Section 271, *once the BOCs have taken the necessary steps*, they are allowed to offer long distance service in areas where they provide local telephone service.<sup>129</sup>

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<sup>125</sup> Id. (emphasis in original).

<sup>126</sup> Id. at ¶ 55 (emphasis added).

<sup>127</sup> Id. (emphasis in original).

<sup>128</sup> Id. (emphasis in original).

<sup>129</sup> Id. (emphasis in original).

Moreover, just as the Commission has recognized that the public will benefit from local exchange/exchange access competition, so too has it acknowledged that the BOCs retain the incentive and the ability to utilize their "bottlenecks" control of essential facilities to disadvantage IXC rivals.<sup>130</sup> While the Congress and the Commission have endeavored to establish various structural and accounting safeguards to curb BOC abuse of market power, only the market forces unleashed by competitive entry into the local exchange/exchange access market will adequately discipline BOC market behavior.<sup>131</sup> Thus, the secondary goal of "promoting greater competition in the long distance market" will only be achieved if the proper sequence is followed.

The existence of widespread local exchange/exchange access competition addresses several concerns critical to a public interest analysis. First, it provides demonstrable evidence that local markets have indeed been opened to competitive entry. Given the number and diversity of the economic and operational barriers to entry that the Commission has acknowledged exist,<sup>132</sup> the only viable way to confirm that local markets have actually been opened is to ascertain that new market entrants have established competitive footholds. As the Commission has recognized, such difficult to detect stratagems as BOC failure to provide such basic functions as ordering, provisioning, maintenance and repair on a nondiscriminatory basis can severely disadvantage competitors.<sup>133</sup>

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<sup>130</sup> Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended (Report and Order), 11 FCC Rcd. 21905 at ¶¶ 10 - 13.

<sup>131</sup> Id. at ¶¶ 1 *et. seq.*; Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996 (Report and Order) 11 FCC Rcd. 17539 (1996); 47 U.S.C. § 272.

<sup>132</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶¶ 10 - 20.

<sup>133</sup> Id. at ¶ 518.

Second, widespread local exchange/exchange access competition confirms that the fourteen items on the "competitive checklist" have truly been "fully implemented." Full implementation requires actual operational viability, not mere paper promises, and operational viability generally can only be determined in a commercial setting. Competitors will readily identify flaws that might otherwise go unnoticed.

Third, widespread local exchange/exchange access competition ensures that the public will in fact derive the benefits competitive local service offerings should afford. Fourth, such competition will enhance the likelihood that long distance competition will not be adversely impacted by BOC entry into the in-region, interLATA market. Consumers benefit from actual, not theoretical, competition. Market behavior is constrained by actual, not theoretical, market forces.

Simply put, the proof of the pudding is in the eating. If there is little or no local exchange/exchange access competition, the odds are that the petitioning BOC has not completely opened its markets and fully implemented all items on the "competitive checklist." As noted above, history teaches that monopolists do not readily relinquish market control. Economics teaches that corporations will generally pursue profit-maximizing strategies. Logic, therefore, dictates that the Commission should proceed with caution in dolling out the sole incentive BOCs have to take actions that would otherwise be directly contrary to their interests.

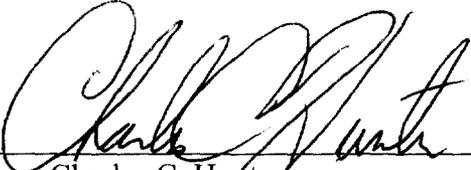
**III.**

**CONCLUSION**

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to deny the Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. under Section 271(d) of the Communications Act, as amended by Section 151 of the Telecommunications Act to provide interLATA service within the "in-region State" of Louisiana. As demonstrated by TRA above, BellSouth has failed to satisfy the requirements for providing in-region, interLATA service set forth in Section 271(c), and to establish that the authorization it requests is consistent with the public interest, convenience and necessity, as required by Section 271(d)(3).

Respectfully submitted,

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