

claim that this gateway fails to provide the nondiscriminatory access required by the 1996 Act. Contrary to MCI's accusation, MCI's Green Aff. ¶¶ 173-174, BellSouth had completed its work on ECTA Gateway in November 1997. Stacy OSS Aff. ¶¶ 176, 216; Stacy OSS Reply Aff. ¶ 68. MCI's claim that there has not been any commercial usage of the ECTA Gateway, MCI's Green Aff. ¶¶ 173-174, is also unfounded; AT&T has used ECTA Gateway. Stacy OSS Reply Aff. ¶ 68.

TRA complains that BellSouth has delayed repair resale services and makes disparaging remarks about CLECs. TRA at 27. OmniCall also accuses BellSouth personnel of making disparaging comments regarding customer non-payment rights. OmniCall at 3-4. These vague allegations lack specifics, and BellSouth has been unable to verify the allegations. Funderburg Reply Aff. ¶¶ 52, 58. BellSouth does not intentionally delay service. All BellSouth employees are trained to refrain from making disparaging remarks about CLECs. Id.

Billing. BellSouth provides CLECs with access to billing information in substantially the same time and manner as the access provided to BellSouth's retail customers. Stacy OSS Aff. ¶ 181.

AT&T asserts that BellSouth's production of the Access Daily Usage File ("ADUF") is unsatisfactory. AT&T at 44-45. As of July 24, 1998, BellSouth has been providing a daily ADUF to AT&T, and will make these same records available to other interested CLECs. Scollard Reply Aff. ¶ 2. BellSouth provides records for all interstate and intrastate toll calls originating from or terminating to unbundled switch ports, with a single exception. Id. Since BellSouth does not currently bill terminating intrastate access associated with the toll calls it carries, switch recordings for these types of calls are not currently produced. Id. BellSouth will implement the mechanized capacity to provide records for these types of calls by October 31,

1998. Id. Until that time, BellSouth will work with CLECs to develop an alternative compensation process for the charges that CLECs are owed for terminating these calls. Id. To date, no CLEC has contacted BellSouth to discuss this issue. Id.

AT&T also argues that BellSouth is unable to provide supposedly daily access usage reports in conjunction with the ADUF provided to AT&T. AT&T's Hamman Aff. ¶ 21. However, the only reports that are contemplated in conjunction with the ADUF are two control reports that AT&T is suppose to provide to BellSouth. Scollard Reply Aff. ¶ 3. AT&T has yet to produce these reports. Id.

Sprint complains about errors in its wholesale bills. Sprint's Closz Aff. ¶¶ 81-83. While BellSouth seeks to avoid any billing error, the isolated errors reported by Sprint are not a basis for concluding that BellSouth is not in compliance with the requirements of the 1996 Act. The billing issues raised by Sprint affect only a very small percentage of the BellSouth/Sprint transactions and all issues raised by Sprint prior to June 1998 have been resolved at the service representative level, without any need for escalation. Scollard Reply Aff. ¶ 4.

Contrary to the suggestion of OmniCall, BellSouth's billing processes provide all CLECs with the ability to obtain CSAs at the appropriate discount rates. Id. ¶ 6. OmniCall's other billing objection, that BellSouth bills the FCC multiline business Subscriber Line Charge when OmniCall orders business services from BellSouth for resale, is not in fact a billing error, but proper billing of the appropriate rate under BellSouth's FCC tariff. Id.

Capacity. BellSouth retained Ernest & Young to perform an independent, third-party audit of BellSouth's OSS, pursuant to the Commission's wishes. South Carolina Order, 13 FCC Rcd at 593, ¶ 97. After testing the assertions BellSouth made about the features, capacities, and operational readiness of the interfaces it provides for CLECs, Ernst & Young concluded that

these interfaces “fairly present[] in all material respects the performance of BellSouth’s operating support systems.” Putnam Aff. ¶ 20. DOJ criticizes the Ernst & Young study as incomplete. DOJ at 36-37. According to DOJ, the level of information supplied by Ernst & Young “is plainly inadequate.” DOJ at 36. Ernst & Young did not provide the tests and documents upon which the audit assertions were based. In keeping with the Attestation Standards of the American Institute of Certified Public Accountants and the audit standards of the United States Securities and Exchange Commission. Putnam Reply Aff. ¶ 4. These materials are attached to Mr. Putnam’s reply affidavit. Id.

The Ernst & Young audit tested BellSouth’s OSS in accordance with standards of the American Institute of Certified Public Accountants. Putnam Reply Aff. ¶ 6. These standards allow for audits of client systems at client locations, and the Ernst & Young’s testing in this matter was in keeping with these standards. Id. AT&T’s criticism of the audit for having been conducted in an environment “controlled” by BellSouth therefore has no merit. AT&T at 47.

2. *UNE Combinations*

BellSouth provides access to unbundled network elements (“UNEs”) in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of the Communications Act. See BellSouth Br. at 37-41. Although not required to do so under the 1996 Act, BellSouth also provides CLECs the following assembled UNE combinations: (1) loop and cross-connect; and (2) port and cross-connect; (3) port and cross-connect and common transport; (4) loop distribution and NID; (5) loops with loop concentration and cross-connect; (6) loop and NID. Varner Aff. ¶ 68. Additional UNE combinations can be accomplished by CLECs using physical or virtual collocation, and BellSouth is willing to consider other methods of access that are consistent with the 1996 Act. CLECs may order UNEs and network element combinations using EDI. Stacy

OSS Aff. ¶¶ 86, 90-91, 103, 143-144 & Ex. WNS-30 (UNEs); id. ¶¶ 100-103 (UNE combinations); Stacy OSS Reply Aff. ¶¶ 38-39 (UNEs); id. ¶¶ 44-54 (UNE combinations). Electronic interfaces and processes are available for maintenance and billing of UNEs as well. See Stacy OSS Aff. ¶¶ 164, 175 (maintenance and repair); Stacy OSS Reply Aff. ¶ 70 (same); Scollard Aff. ¶¶ 5, 9-10, 20-23, 25 (billing); Scollard Reply Aff. ¶ 2, 5 (same); Stacy OSS Aff. ¶ 183 (same).

As DOJ concedes, CLECs' access to BellSouth's UNEs must be assessed "in light of the Iowa Utilities decision." DOJ at 11. That decision establishes that section 251(c)(3) "does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services." Iowa Utils. Bd. v. FCC, 120 F.3d 753, 813 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998). Until the Supreme Court rules on the pending appeal of that decision, the Eighth Circuit's interpretation of section 251(c)(3) is controlling.¹⁰ It is thus beyond dispute — for purposes of Bellsouth's Application — that CLECs themselves are responsible for recombining physically separated UNEs.

BellSouth may fulfill its statutory obligations by delivering physically separated UNEs to a CLEC's collocation cage, and allowing the CLEC there to recombine those elements however it wishes. While section 251(c)(3) generally requires incumbent LECs to provide "access to network elements on an unbundled basis" in a manner that permits their combination, section

¹⁰ As a practical matter, the pending Supreme Court review reduces the significance of the UNE combination issue in this proceeding. If the Supreme Court reverses the Eighth Circuit's ruling, BellSouth will of course comply with the Court's interpretation. If, however, the Court affirms the Eighth Circuit's ruling, that will finally put to rest CLECs' repeated and improper attempts to circumvent the Court of Appeals' holding.

251(c)(6) specifically instructs those same LECs to provide “for physical collocation of equipment necessary for . . . access to unbundled network elements.” 47 U.S.C. § 251(c)(3), (6). By making physical and virtual collocation available at prices approved by the Louisiana PSC and on clearly stated, nondiscriminatory terms, BellSouth satisfies the 1996 Act’s requirement of providing nondiscriminatory access to network elements.

Even though collocation is the only method of access to UNEs set out in the 1996 Act, AT&T questions the legal sufficiency of collocation, asserting that the “express language of the Act forecloses” any limitation on the ability of CLECs to decide how to gain access to UNEs. AT&T at 12. AT&T’s assertion is not supported by anything in the 1996 Act’s “express language.” On the contrary, the Commission staff has recognized that collocation alone may satisfy the access requirements for network elements. See Letter from William E. Kennard, Chairman, FCC, to Sen. John McCain and Sen. Sam Brownback at ii-5 (Mar. 20, 1998) (“[A]t a minimum, Bureau staff believes that the BOC must demonstrate that at least one of the methods it offers satisfies the statutory nondiscrimination requirement. Bureau staff believes that a BOC may satisfy this requirement by, for example, providing physical or virtual collocation, direct access, mediated access, logical or electronic methods of combining network elements, or combining the elements on behalf of competing carriers for a separate charge.”) (emphasis added).¹¹

¹¹ AT&T attempts to twist this statement to stand for the proposition that requesting carriers are not limited to collocation, but can choose any method of access to network elements. AT&T at 13. However, the statement addresses the obligations of BOCs, not the rights of CLECs. The statement’s plain language is that a BOC, “by providing physical or virtual collocation,” “satisfies the nondiscriminatory requirement” of section 251(c)(3). Recognizing that it cannot dispute this clear meaning, in a footnote AT&T retreats to the contention that the statement was merely part of a tentative “dialogue” and therefore should be ignored. AT&T at 14, n.4. While the staff summaries from which this statement is taken are not binding on the

AT&T claims that collocation is, in AT&T's tempered phrase, "inherently unreasonable, discriminatory, and an anticompetitive method of combining unbundled network elements." AT&T at 16. However, it defies reason to contend that Congress believed that collocation — the only method of access that it set out in the Act — was by its very nature "unreasonable," "discriminatory," and "anti-competitive." See In re Nofziger, 925 F.2d 428, 434 (D.C. Cir.) ("Legislatures are presumed to act reasonably and statutes will be construed to avoid unreasonable and absurd results"), cert. denied, 493 U.S. 1003 (1991). Nor, as explained below, are any of AT&T's claims of discrimination defensible on their own terms.

AT&T argues that physical collocation impermissibly requires CLECs to 'own or control some portion of a telecommunications network,' in violation of the Eighth Circuit's opinion. AT&T at 14. AT&T's position is premised on a misunderstanding of the nature and function of collocation. Collocation space is not a "portion" of a network, any more than the lobby of an incumbent LEC's central office, or a manhole, are portions of a network. Rather, physical collocation is an arrangement under which an incumbent LEC makes UNEs available to CLECs at a location on the incumbent LEC's property. Indeed, the Act defines physical collocation as the placement of "equipment necessary for interconnection or access to unbundled network elements" at "the premises of the local exchange carrier." 47 U.S.C. § 251(c)(6).

Commissioners, they unambiguously reflect the views of the staff. Moreover, in presenting these summaries to Senators McCain and Brownback, Chairman Kennard cast doubt on AT&T's contention that CLECs may choose any form of access they desire. "While the checklist imposes a nondiscriminatory access requirement on the BOCs, it leaves to the BOCs substantial discretion to determine the best way to design and engineer their networks to meet this obligation." Letter from William E. Kennard, Chairman, FCC, to Sen. John McCain and Sen. Sam Brownback at 3 (Mar. 20, 1998).

AT&T's technical attacks on collocation are no more persuasive. AT&T complains that establishing physical network connections to combine UNEs at a collocated space "introduces an unacceptably high risk of human error." AT&T at 16; DOJ at 14. However, connecting a network is a routine part of local telephone operations; this method of adding new locations to the CLECs' network is precisely analogous to the manner in which BellSouth establishes service to customer premises not previously served by its network. Milner Aff. ¶ 24. This routine practice is neither cumbersome nor labor intensive. Id. ¶ 25. Moreover, to speed and simplify the collocation process, BellSouth allows CLECs to pre-wire their frames, which avoids the need to coordinate customer cutovers with BellSouth or to crowd the frame with more than one technician. Id. BellSouth is committed to employing the appropriate forces to meet the demands of CLECs. Milner Reply Aff. ¶ 10.

AT&T asserts that installing new cross-connections on distributing frames will put unnecessary stress on the frame's jumper wires, which may lead to service interruptions. AT&T's Falcone Aff. ¶ 113. This assertion is also incorrect. The cross-connection between a given unbundled switch port and a CLEC's collocation arrangement need only be made once. After a CLEC first adds an unbundled switch port to its network, it may associate that port with a new telephone number, or change service features, by the same electronic processes BellSouth uses. Milner Reply Aff. ¶ 15. In any event, AT&T's contention that the 22-gauge wire used by BellSouth is too frail to support cross-connections has no basis in fact: BellSouth has used this gauge wire for cross-connections for years without problem. Id. In the highly unlikely event that the 22-gauge wire were suddenly unable to withstand the minimal "pulling and tugging" associated with cross-connections, the solution to the problem would be to use a larger gauge of wire, not to reject the method of access set out by Congress in the 1996 Act. Id.

AT&T contends that requiring CLECs to access UNEs through collocation imposes volume and constraints due to “the number of new connector blocks that can be added to existing MDFs.” AT&T at 19. While it is true that there is a finite amount of space on BellSouth’s main distribution frames, BellSouth has been successfully managing increasing demand for years. Milner Rebuttal Aff. ¶ 14. BellSouth will make all necessary additions to its frames, as well as to the other facilities (such as switches and loop facilities) that CLECs need as part of the collocation process. Id.

AT&T also suggests that BellSouth could not accommodate demand for physical collocation if faced with the “rush of orders that a state-wide service offer to residential and small-business customers would generate.” AT&T at 18. DOJ expresses the same concern that BellSouth may not be able to handle the collocation requirements that would accompany “a mass-market launch.” DOJ at 13. BellSouth must demonstrate that it presently can “handle reasonable fluctuations in service orders,” not unforeseeable orders that cover an entire state. Michigan Order, 12 FCC Rcd at 0649-50, ¶ 199 (emphasis added). AT&T and MCI have both publicly renounced any intention of actually attempting such “mass-market” entry.¹² BellSouth will undoubtedly have some advance notice before any state-wide collocation orders are placed. AT&T’s further claim that “it would take BellSouth over 4 years just to provide AT&T with space in every central office in Louisiana,” AT&T at 18, is premised on the erroneous

¹² MCI has announced it will no longer market local residential telephone service. Nick Ravo, MCI Has Stopped Pursuing Local Residential Customers, N.Y. Times, April 15, 1998, at B-6. AT&T has indicated that its purchase of TCG was intended to speed AT&T’s entry into the local business market. AT&T News Release, AT&T and TCG to Merge, Jan. 8, 1998 <<http://www.att.com/press/0198/980108.cha.htmr>>. In this proceeding, AT&T has indicated that its “ADL” service “is available only to large business long-distance customers.” AT&T at 75 n.28.

assumption that BellSouth would build out one physical collocation space at a time. BellSouth will devote the resources needed to meet CLEC demand, and is ready to have concurrent collocation projects in place for AT&T, just as it has done for other CLECs. Tipton Reply Aff. ¶ 14.

AT&T also complains that BellSouth has not provided testing of the combined loop and switch port. AT&T's Falcone Aff. ¶ 121. But it is AT&T, and not BellSouth, that will perform loop/port combinations, and will do so by whatever method AT&T believes is appropriate. Milner Reply Aff. ¶ 17. BellSouth has no obligation to test a combination that will be accomplished solely by AT&T, and by a process that AT&T will determine.

The only evidence regarding BellSouth's ability to provide collocation space persuasively demonstrates that BellSouth can and will meet its collocation obligations and deadlines. BellSouth has accepted all requests for collocation. Tipton Reply Aff. ¶ 13. BellSouth's average installation interval of 117 days for collocation is within the time frame to which BellSouth has committed. Milner Aff. Ex. WKM-2.

While some CLECs complain about these installation intervals, ALTS at 17, n.10; AT&T at 16-20; Sprint at 45, they are comparable to those available elsewhere in the industry. Tipton Reply Aff. ¶ 9. Indeed, as WorldCom notes, a "period of three to four months required to implement a collocation agreement is not necessarily disruptive, because it occurs when the CLEC is also taking other preparatory market entry steps." WorldCom's Porter Aff. ¶ 11. AT&T's criticism that BellSouth's provisioning intervals omit some aspects of the collocation process is unfounded. AT&T's Falcone Aff. ¶ 75. BellSouth has committed to intervals for all activities that are within its control. Tipton Reply Aff. ¶ 10. Some aspects of the collocation

process, such as the period of time that it takes to secure a government permit, or the time a contractor takes to install equipment, are properly excluded from BellSouth's interval. Id.

Contrary to CLEC assertions, there is also adequate space for collocation. See Excel at 6; Intermedia at 20. At present, BellSouth has no known shortage of collocation space in any of its central offices in Louisiana, nor has BellSouth had to present any petitions for waiver for collocation to either the Louisiana Public Service Commission or the Federal Communications Commission. Tipton Reply Aff. ¶ 16. BellSouth allows CLECs to obtain less than 100 square feet for physical collocation when an equipment arrangement enclosure is not used; this accommodation conserves central office space. Milner Reply Aff. ¶ 11. BellSouth also offers virtual collocation, and if in the future BellSouth identifies a shortage of space for physical collocation at a particular location, BellSouth will (after filing a petition for waiver with the Louisiana Public Service Commission along with the required documentation to establish the floor space shortage) continue to offer virtual collocation at that location in lieu of physical collocation. Tipton Reply Aff. ¶ 16.

While some CLECs criticize BellSouth's cageless collocation, ALTS at 18, AT&T's Falcone Aff. ¶ 30, BellSouth has been offering this form of collocation for more than two years. Tipton Reply Aff. ¶ 4. To date, one carrier has requested non-enclosed collocation space. Id.

Intermedia contends that CLECs cannot collocate any switching equipment in cageless collocation space. Intermedia at 18. BellSouth allows switching equipment as part of physical collocation, and there is no reason, other than CLEC preference, that precludes the use of cageless collocation for this equipment. Tipton Reply Aff. ¶ 5.

AT&T contends that the amount of information that BellSouth has provided regarding its collocation policies is insufficient. AT&T at 25-30. However, BellSouth has comprehensively

set out the terms of collocation in its Collocation Handbook, which was submitted to the Commission as part of Bellsouth's Application. Tipton Aff. Ex. PAT-1. While DOJ asserts that the "important policies and practices" contained in this handbook are not covered by the SGAT, DOJ at 11 n.19, section 15(a)(1) of the SGAT and Louisiana PSC rules expressly incorporates the Collocation Handbook into BellSouth's SGAT. Tipton Reply Aff. ¶ 7. Furthermore, BellSouth's Local Interconnection and Facility Based Ordering Guide has also been incorporated into BellSouth's SGAT.¹³ BellSouth was required to file these documents (as well as its Resale Ordering Guide) with the Louisiana PSC. Louisiana PSC September 5, 1997 Order. The Louisiana PSC also requires BellSouth to file any changes to these documents with the Commission. Id. The Louisiana PSC maintains these documents as public records, and they are available for public inspection. Id.

DOJ suggests that collocation imposes "unnecessary costs" as compared to DOJ's preferred alternative of having BellSouth combine UNEs for CLECs. DOJ at 9. The costs to which DOJ objects are the costs of combining physically separate elements, and they are an inherent part of providing facilities-based service, as opposed to resale service. To insist, as DOJ does, that collocation costs are "substantial and unnecessary," ignores the holding of the Eighth Circuit. See Iowa Utils. Bd., 120 F.3d at 815 ("[O]ur decision requiring the requesting carriers to combine the elements themselves increases the costs and risks associated with unbundled access

¹³ Order Approving the SGAT to Modifications, Order No. U-22252-A, Docket No. U-22252, at 7 (Louisiana PSC, Sept. 5, 1997) (Application App. C, Tab 136) ("BellSouth shall make the relevant provisions currently contained in its 'Local Interconnection and Facility Based Ordering Guide' and 'Negotiations Handbook for Collocation' part of the SGAT.") ("Louisiana PSC September 5, 1997 Order").

as a method of entering the local telecommunications industry and simultaneously makes resale a distinct and attractive option.”).

AT&T and DOJ also object to specific details of BellSouth’s collocation rates, contending that BellSouth must specify a uniform rate for all aspects of collocation. AT&T at 29-30; DOJ at 22-24. In BellSouth’s view, the Commission lacks jurisdiction over the pricing of collocation terms as a result of the Eighth Circuits’ ruling that state commissions hold exclusive jurisdiction over pricing of local facilities and services. See BellSouth v. FCC, No. 98-1019 (D.C. Cir., oral argument scheduled for September 25, 1998). BellSouth has provided monthly recurring charges for floor space, power, and cross-connects, as well as the non-recurring charges for physical collocation. SGAT, Attach. A. These rates have been approved by the Louisiana PSC. Other aspects of collocation cannot accurately be priced on a general basis because they are dependent on specific CLEC requirements for space, for equipment, and for power. To aid CLECs in estimating the costs of meeting their specific collocation needs, however, BellSouth now makes available appropriately redacted records regarding similar Louisiana collocation work that was priced on an ICB basis. Tipton Aff. ¶ 20. These records serve as a guide to CLECs attempting to estimate their collocation costs, as well as a check to reassure CLECs that the eventual costs of their collocation is cost-based. This approach reflects that while BellSouth cannot set prices in advance that will fairly reflect the full range of collocation possibilities, BellSouth is willing to provide information to enable CLECs to benefit from the guidance prior pricing quotes provide when setting their business plans.

DOJ acknowledges that there are certain collocation costs that cannot be calculated in the abstract. “[T]here may be instances in which it would be justifiable to postpone addressing certain pricing issues because of the practical impossibility of doing otherwise.” DOJ at 23.

However, DOJ nevertheless concludes that it is “far preferable” for BellSouth to provide “a firm pricing formula or methodology for determining prices where it is not feasible to determine specific prices in advance.” Id. However, all of BellSouth’s collocation rates are based on the forward-looking cost study and general methodology that was reviewed and approved by the Louisiana PSC. Caldwell Reply Aff. ¶ 34.

DOJ points out that where BellSouth has been forced to provide a rate for space preparation, it has done so. DOJ at 23, n.45. But this proves nothing except regulators’ power. DOJ concerns itself only with the existence of the rate, and not whether it is genuinely cost-based and reasonable for all CLECs and BellSouth. DOJ also appears troubled that there are often “very substantial variations in the prices charged for the identical collocation component.” Id. at 23-24. There is nothing surprising about the fact that BellSouth’s costs are different in different states; after all, all costs — and not just those involved in collocation or even telecommunications — vary by state, whether they are labor costs, equipment costs, construction costs, or power costs. This is one reason why Congress designated state commissions, rather than DOJ or this Commission, to review local rates to determine whether they are cost-based.

AT&T and DOJ criticize BellSouth for not amending its interconnection contracts to provide for cost-based pricing of UNEs. AT&T at 26; DOJ at 11 n.19. AT&T contends that allowing BellSouth to rely on its SGAT would permit BellSouth “to game the application process” by revising its SGAT on the “eve of filing.” AT&T at 26. According to AT&T, BellSouth “could then rush in to this Commission” and rely on the new SGAT language, without revealing “what strings” are attached. Id. It would be procedurally impossible for BellSouth to rely on such a strategy. Before any change to BellSouth’s SGAT can be effective, it must be filed with the Louisiana PSC, which then has 90 days to review the submission. Last minute

changes of the kind contemplated by AT&T would not be effective without state commission review, and would therefore not be a part of the SGAT that would be reviewed by this Commission. Nor would changes to BellSouth's SGAT prevent CLECs from negotiating new terms for themselves. CLECs are not bound by the SGAT, but may negotiate their own terms and conditions as part of custom-tailored interconnection agreement.

Taking its cue from AT&T, DOJ asserts that "[t]he fact that competitors may only obtain cost-based UNEs through the SGAT, if they are to be used in combinations, may discourage such entry, because, in considering a business plan for competitive entry, the advantages of an interconnection agreement with definite terms and enforcement provisions could be a critical factor." DOJ at 11 n.19. DOJ's position reveals a lack of familiarity with the interconnection process in Louisiana and other states.

Any CLEC can incorporate the UNE section of the SGAT into its interconnection agreement. Varner Aff. ¶ 18. Thus, there is no basis for DOJ's concern that CLECs cannot be confident that they have "definite terms and enforcement provisions" for UNEs. As the Commission has stated, a BOC has provided a particular checklist requirement if it has "a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements." Michigan Order, 12 FCC Rcd at 20601-02, ¶ 110. DOJ's suggestion that interconnection agreements must be amended every time there is even the slightest improvement or modification to BellSouth's UNEs (including modifications made at the request of CLECs) would discourage and greatly delay modifications. All modifications, even small technical adjustments or accommodations made at the request of the CLEC, could not be implemented for months, since any change to an interconnection agreement would have to be

filed with the Louisiana PSC, which has 90 days to review all modifications. 47 U.S.C. § 252(e)(4).

CLECs' and DOJ's complaints about collocation are in reality a prelude to their primary theme: regardless of the Eighth Circuit's holding, this Commission should force BellSouth to offer additional bundles of pre-combined network elements. AT&T's suggested solution is use of BellSouth's recent change process. AT&T at 21-22. This method is nothing more than an attempt to end-run the Eighth Circuit's holding, and obtain use of a pre-assembled local network at the cost-based prices Congress established for those competitors who legitimately "do [some] of the work" of building a network. Iowa Utils. Bd., 120 F.3d at 813.

AT&T contends that the CLECs should be permitted "to use the recent change capacity of the switch to combine unbundled loops and unbundled switching electronically." AT&T at 20. Under AT&T's plan, BellSouth would keep an existing loop and switch port physically connected upon the CLEC's request. AT&T's Falcone Aff. ¶ 191. The CLEC would send an electronic signal to "electronically uncombine the loop and switch port" and then "electronically reconnect the loop and switch elements." Id. ¶ 190. In this way, AT&T would not need collocation space, nor would it use any of its own facilities or equipment to combine UNEs. According to AT&T, recent change "avoids" the "wasteful tasks" of "physically removing the cross-connection wires on the frame to terminate service and then reinstalling wires to establish service for the new customer." Id. In other words, it allows AT&T to avoid the task of combining the network elements itself, as required by the Eighth Circuit's decision. See Iowa Utils. Bd., 120 F.3d at 815. AT&T's recent change proposal requires that the loop be connected to the switch before the switch's recent change instructions can have any effect — and this includes AT&T's proposed "instructions" to "disconnect" the loop and switch. In requiring that

the loop be connected to the switch before combining a loop and switch, AT&T's proposed recent change approach violates the Eighth Circuit's decision. As the Commission has explained, a "[c]entral" aspect of the Eighth Circuit's "holding is the premise that elements are 'unbundled' for purposes of Section 251(c)(3) only if they are physically separated, a proposition that the incumbent LECs had urged the court to adopt." United States' Petition for a Writ of Certiorari at 25, FCC v. Iowa Utils. Bd. (No. 97-831, Nov. 1997).¹⁴

The recent change process also is besieged by technical limitations. First, AT&T concedes that "systems are not yet available" to perform the recent change process it advocates. AT&T's Falcone Aff. ¶ 208. Moreover, even if this process were available, it could not be used for all CLEC customer orders. The recent change process could only be used for existing facilities. CLECs would need to utilize other arrangements (i.e., collocation) to serve new lines and customers, as AT&T again admits. Id. ¶ 192 (acknowledging that "some physical work must be done" to combine a new BellSouth loop with a switch port).

AT&T further concedes that even though the elements remain physically connected, the recent change process requires an interruption of service — the same outcome AT&T finds so objectionable when using collocation. Id. ¶ 191. In order to use the recent change process for combining network elements, moreover, CLECs would require control of shared switching

¹⁴ AT&T contends that BellSouth is "misreading" the Commission's characterization of the Eighth Circuit's opinion. AT&T at 21. This assertion is without merit. The Commission's petition is unambiguous, expressly acknowledging that the Eighth Circuit accepted the incumbent LECs' argument that "unbundled" means "physically separated." Indeed, in its own certiorari petition to the Supreme Court, AT&T contended that the Eighth Circuit held "that LECs could not provide network elements 'on an unbundled basis' within the meaning of § 251(c)(3) unless the LECs separated the network elements from one another before furnishing them." AT&T's Petition for a Writ of Certiorari at 23, AT&T v. Iowa Utils. Bd. (No. 97-826, Nov. 1997). It thus is preposterous for AT&T suddenly to contend that the Eighth Circuit's decision "supports [the] use of the recent change approach." AT&T at 21-22.

capacity. However, the FCC has explained that “the incumbent LEC is not required to relinquish control over operations of the switch.” Local Interconnection Order, 11 FCC Rcd at 15708, ¶ 415.

As AT&T itself notes, the recent change process also triggers a takings issue. AT&T at 13 n.3. AT&T dismisses this issue as “frivolous,” but can do so only by ignoring the ramifications of its proposal. The unfettered “electronic” access that is a part of recent change would interfere with BellSouth’s property rights just as much as a requirement that BellSouth open the doors of its central offices to AT&T. Cf. United States v. Morris, 928 F.2d 504, 511 (2d Cir.), cert. denied, 502 U.S. 817 (1991) (characterizing computer “hacking” as a form of trespass). In the end, AT&T is forced to admit that recent change “is not a panacea.” AT&T’s Falcone Aff. ¶ 214.

Far less enthusiastic about AT&T’s recent change proposal, DOJ instead proposes a stark hobson’s choice: either provide CLECs with pre-combined network elements, or grant CLECs direct physical access to BellSouth’s network. Insisting that even as a “theoretical matter” collocation does not provide adequate access for combining network elements, DOJ suggests that the Eighth Circuit’s ruling “was premised” on the assumption that incumbent LECs’ would offer CLECs direct access to their networks. DOJ at 14-15. DOJ criticizes BellSouth for refusing to offer this direct access. But inherent in direct access are network safety issues and constitutional problems.

It is hornbook law that “one of the most essential sticks in the bundle of rights that are commonly characterized as property” is the right to exclude others. See Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)). Indeed, “the right to exclude others is perhaps the quintessential property right.” Nixon v. United

States, 978 F.2d 1269, 1286 (D.C. Cir. 1992); see Kaiser Aetna, 444 U.S. at 179-80 (“the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation”). It makes no difference that this access proposed by DOJ might be transitory and controlled. See Nollan v. California Coastal Comm’n, 483 U.S. 825, 832 (1987) (holding that a permanent occupation occurs whenever “individuals are given a permanent and continuous right to pass to and fro . . . even though no particular individual is permitted to station himself permanently upon the premises.”); Kaiser Aetna, 444 U.S. at 180 (holding that a taking occurs when the government grants an easement allowing third parties to have intermittent access to property rights); Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1582 (Fed. Cir. 1993) (holding that “a permanent physical occupation need not be continuous and uninterrupted”) (internal citation omitted).

The Commission’s limited takings authority under the Act cannot support the intrusion upon BellSouth’s property rights that AT&T demands. See Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994). In the Bell Atlantic case, the Commission had ordered incumbent LECs to provide collocation space within their central offices to competitors, so that the competitors could install their own transmission equipment. Bell Atlantic, 24 F.3d at 1444. The incumbent LECs would have recovered their “reasonable costs” of providing collocation. Id. at 1445 n.3. Yet at the time that the Commission issued this requirement, the Act did not contain express language authorizing such access to the facilities of incumbent LECs. Id. at 1446. The Court of Appeals therefore vacated the order as arbitrary and capricious on the basis that the Act did “not supply a clear warrant to grant third parties a license to exclusive physical occupation of a section of the LECs’ central offices.” Id.

Congress was aware of this limitation in drafting the 1996 Act, and for that reason expressly provided for collocation. See 47 U.S.C. § 251(c)(6); H.R. Rep. No. 104-204, at 73 (1995) (“House Report”) (“[T]his provision is necessary . . . because a recent court decision indicates that the Commission lacks the authority under the Communications Act to order physical collocation.”) (citing Bell Atlantic). This is the Act’s only statutory authorization for CLEC entry into the incumbent LEC’s premises. Had Congress intended to grant CLECs a further right of access to the facilities and networks of incumbent LECs in connection with their responsibility for recombining UNEs, it would have included the necessary “clear warrant” authorizing this access. Congress did not do so, thus putting any further encroachments on incumbent LECs’ property rights beyond the Commission’s power.

DOJ’s suggestion that direct access is required of BellSouth also ignores that “the incumbent LEC is not required to relinquish control over operations of the switch,” Local Interconnection Order, 11 FCC Rcd at 15708, ¶ 415, and that direct access would jeopardize the security of BellSouth’s network, Milner Aff. ¶ 43. DOJ’s only response to these problems is to blame BellSouth. According to DOJ, “BellSouth is itself responsible,” because it insists on initiating “unnecessary connections and disconnections on its distribution frames.” DOJ at 15 n.28. Ignoring BellSouth’s constitutional rights, and sweeping aside concerns about harm to the network, DOJ insists that direct access to its network is required of BellSouth, unless BellSouth knuckles under and provides CLECs with the pre-combined platform of network elements at cost-based rates. See id. at 16 (“BellSouth, of course, also has the option of providing existing combinations of UNEs without first separating them, either permanently, or as an interim solution pending deployment of methods for recombining them that would not substantially bar competitive entry.”). Unless the Supreme Court concludes otherwise, BellSouth does not have to

choose between direct access and providing pre-combined network elements. As Congress indicated, and this Commission has recognized, collocation alone is a satisfactory method of access.

3. *Pricing*

CLECs and DOJ raise objections to the specific UNE, interconnection, and reciprocal compensation prices set by the Louisiana PSC, implicitly contending that this Commission has jurisdiction to review them. These criticisms are both irrelevant and unfounded. BellSouth's pricing for UNEs and UNE combinations is cost-based (Varner Aff. ¶¶ 7,12, 27-32; Varner Reply Aff. ¶ 32); BellSouth's cost-studies from which its UNE rates were derived used forward-looking costs, and not embedded costs (Varner Aff. ¶¶ 7, 12, 27-32; Varner Reply Aff. ¶ 32); BellSouth's cost studies for nonrecurring charges are accurate and reliable (Varner Aff. ¶ 7, 12, 27-32; BellSouth's rates are geographically deaveraged (*id.*); and BellSouth's charges for vertical features are cost-based. *Id.* As set out by BellSouth's D. Daonne Caldwell, BellSouth's rates are cost-based, and the Louisiana PSC's hearings and conclusions about these rates are entitled to deference. See generally, Caldwell Reply Aff.

It is not surprising that CLECs attempt to relitigate before this Commission the pricing issues about which they failed to persuade the Louisiana PSC. It is not surprising that DOJ (which did not bother to participate in the Louisiana pricing proceeding) finds the Louisiana PSC's review lacking, and suggests that it could have done a better job. Nor is it unexpected that DOJ attempts to force its pricing methodology upon state commissions, by creating a presumption against any methodology other than the forward-looking economic cost methodology that it prefers. DOJ at 19.

The comments and criticisms of DOJ and CLECs are simply irrelevant. The Eighth Circuit has unambiguously held that "state commission determinations of the just and reasonable rates that incumbent LECs can charge their competitors for interconnection, unbundled access, and resale" are "off limits to the FCC." Iowa Utils. Bd., 120 F.3d at 804. The Commission should accept and acknowledge this limitation, even if CLECs and DOJ do not.

C. Checklist Item 3: Access to Poles, Ducts, Conduits, and Rights-of-Way

Section 271(c)(2)(B)(iii) requires BellSouth to provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way owned or controlled by BellSouth at just and reasonable rates in accordance with the requirements of section 224. As discussed in BellSouth's opening brief, BellSouth's approved agreements provide CLECs such non-discriminatory access on terms that fulfill all statutory and regulatory requirements. See BellSouth Br. at 41; Milner Aff. ¶¶ 50-51. BellSouth has for years provided cable television and power companies with access to poles, ducts, conduits and rights-of-way in Louisiana, so these arrangements are routine for BellSouth. Milner Aff. ¶ 50-51.

In its comments, AT&T claims that BellSouth discriminates in providing access to records showing the location of BellSouth's existing facilities. AT&T at 69-70. BellSouth maintains at great expense comprehensive records of its facilities, in both paper and electronic formats, because it needs this information in its role as the owner of these facilities. Kinsey Aff. ¶¶ 8-9. CLECs, however, have specific areas of interest (the localities in which they offer or plan to offer service), and do not usually have any legitimate need for access to the entire data set accumulated by BellSouth. Id. BellSouth has hence established processes by which CLECs may obtain access to the records they need. Id. ¶ 10. It is true that these processes make the records available to CLECs somewhat more slowly than to internal BellSouth personnel and contractors.

Id. ¶¶ 9-10. BellSouth is willing to make its comprehensive records available to CLECs so that they may access this information in the same fashion as BellSouth personnel, provided they bear the costs of expurgating proprietary information and preparing the copies of the records. Id. ¶ 9. To date, no CLEC has expressed any interest in pursuing this option. Id.

AT&T also complains that BellSouth has not clearly defined in its standard agreement for poles, ducts, conduits, and rights-of-way certain intervals for providing information to CLECs. AT&T at 69-70. AT&T refers to the fact that if CLECs choose not to view records themselves, they may have BellSouth review the records or survey facilities for them. Kinsey Aff. ¶ 11. In such cases, the time required to perform these tasks depends on the amount of records or magnitude of facilities about which the CLEC is inquiring, so there can be no meaningful standard intervals. Id. In cases where BellSouth reviews records and/or conducts surveys and determines that facilities are not available for a CLEC's use, however, BellSouth will always inform the CLEC within 45 days of the CLEC's request. Id.

Sprint argues that the existence of 14 signed license agreements for CLEC access to BellSouth's poles, ducts, conduits, and rights-of-way in Louisiana does not prove that BellSouth is actually providing CLECs with access to these structures. BellSouth is not required to show it is physically affording these CLECs access to BellSouth's structures, although access is in fact being provided. Kinsey Aff. ¶ 21; Michigan Order, 12 FCC Rcd at 20602, ¶ 111.

Sprint also complains that BellSouth requires CLECs to apply for separate licenses for each set of poles, ducts, conduits, or rights-of-way that they wish to occupy. Sprint at 58-59. BellSouth requires individual applications for each set of structures a CLEC wishes to occupy as a means of recording the attachments and/or occupancies that are in place and for billing purposes. Kinsey Aff. ¶ 7. This requirement does not unnecessarily lengthen the application

process for CLECs, see Sprint at 58-59, because each application is independent of all other applications and is processed without regard to other submissions. Kinsey Aff. ¶ 7.

D. Checklist Item 4: Unbundled Local Loops

Sprint and e.spire claim that BellSouth “promised” 107 loops to CLECs in Louisiana, but did not provision that many. Sprint at 53; e.spire at 23. This is incorrect. As of June 1, 1998, BellSouth had provisioned 107 loops to CLECs in Louisiana (and 18,749 loops in its nine-state region) as of June 1, 1998. Milner Aff. ¶ 52; Milner Reply Aff. ¶ 23. Moreover, the systems used in connection with loop offerings are in place. EDI supports ordering of unbundled loops, Stacy OSS Aff. ¶¶ 86, 103 & Ex. WNS-30; Stacy OSS Reply Aff. ¶ 39, while CLECs use the ECTA Gateway for access to the maintenance OSS supporting unbundled network elements, Stacy OSS Aff. ¶ 175; Stacy OSS Reply Affidavit ¶ 70. Billing systems for unbundled loops are discussed in the affidavit of David Scollard. Scollard Aff. ¶ 5.

e.spire further declares that because BellSouth has not provisioned a “significant” number of unbundled loops for CLECs, it has not satisfied the Act’s requirements. e.spire at 23, 26. BellSouth considers 18,749 loops “significant.” But in any event, the Commission itself has made clear that checklist compliance is not contingent upon the entry strategies or order volumes of CLECs that have a vested interest in keeping Bell companies from competing in the interLATA market.¹⁵

¹⁵ Michigan Order, 12 FCC Rcd at 20605, ¶ 111 (“[r]equiring a BOC petitioning under Track A actually to furnish each checklist item . . . is inconsistent with the statutory scheme, because it could create an incentive for potential local exchange competitors to refrain from purchasing network elements in order to delay BOC entry into the in-region, interLATA services market”).

MCI also accuses BellSouth of hoarding loops that are served by Next Generation Digital Loop Carrier ("NGDLC") equipment. MCI's Grochowski Aff. ¶¶ 8-11. BellSouth is doing no such thing. BellSouth does not reserve any unbundled loops for its own use, but rather makes all of its loops, including rare NGDLC loops, available to all CLECs on nondiscriminatory terms. Milner Reply Aff. ¶ 25.

MCI and Intermedia object that while BellSouth makes available to CLECs unbundled loops that have been conditioned to handle digital subscriber line ("xDSL") service, BellSouth does not provide "upgraded xDSL electronics" for such service. MCI's Grochowski Aff. ¶¶ 12-16; Intermedia at 22-24. MCI is merely warming over a UNE combination argument that it lost in the Eighth Circuit. The xDSL equipment demanded by these CLECs is a loop and another UNE in combination, rather than the provision of unbundled ADSL capable loops. Milner Reply Aff. ¶ 26. This combination is the equivalent of providing a retail high-speed data retail service. Id.

MCI further suggests that BellSouth is somehow preventing MCI from offering ISDN to customers whose copper loops are more than 18,000 feet long. MCI's Grochowski Aff. ¶ 7. What MCI characterizes as discrimination is actually a technical limitation of ISDN that equally affects all customers served by copper loops, including BellSouth's customers. Milner Reply Aff. ¶ 24.

Sprint second-guesses the Louisiana PSC's ruling on NID access, stating that BellSouth should, when there are no spare terminals on the BellSouth NID, allow CLECs to access the customer's inside wiring by disconnecting BellSouth wires. Sprint at 51-52; Order U-22145, at 29. The Louisiana PSC explained its holding by noting that it would violate the National Electric Code to ground BellSouth's loop via anything but the NID, and allowing a CLEC to

disconnect and re-ground the loop “appears to be fraught with potential damage to BellSouth’s loop.” Order U-22145, at 29 (Louisiana PSC Jan. 28, 1997) (Application App. C, Tab 188). This is entirely consistent with the Commission’s ruling that incumbent LECs need not allow new entrants to connect their loops directly to the incumbent’s NID. Local Interconnection Order, 11 FCC Rcd at 15697-98, ¶ 394. Still, Sprint declares that since the South Carolina PSC has ruled differently than the Louisiana PSC (and this Commission), BellSouth should have to prove there are special conditions in Louisiana that differ from conditions in South Carolina. Sprint at 51. As discussed in Part II.A, above, Sprint’s attempt to rely upon an arbitration decision in another state is wholly misplaced. The Louisiana PSC and the Commission rulings on this matter cannot be countermanded by a different state commission, particularly where nothing in the Act supports a CLECs’ request to dismantle the incumbent’s facilities in order to make room for its own. When no spare terminals are available within the BellSouth NID, CLECs must use the NID-to-NID method set out by this Commission. See Milner Reply Aff. ¶ 29.

Several CLECs contend that BellSouth has been deficient in filling orders for unbundled loops. AT&T at 17; AT&T’s Falcone Aff. ¶¶ 65-67; MCI at 38, 63; MCI’s Henry Aff. ¶¶ 60-62; Sprint’s Closz Aff. ¶¶ 50-86; e.spire at 21-25; KMC at 22-23; KMC’s Pipes Aff. ¶ 14. These CLECs have mistaken nondiscriminatory access for ideal access. BellSouth is not required to provision network elements to CLECs perfectly and without error. The standard for checklist compliance is “parity,” not “perfection”: Bell companies must “do unto others as [they] would do unto [themselves],” even if CLECs desire for their customers to receive a higher level of