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

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In the Matter of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98

OPPOSITION OF COVAD COMMUNICATIONS COMPANY TO PETITIONS FOR RECONSIDERATION OF BELL ATLANTIC AND BELLSOUTH

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OPPOSITION TO PETITIONS FOR RECONSIDERATION OF
BELLSOUTH AND BELL ATLANTIC

Covad Communications Company (Covad), by its attorney, hereby opposes the petitions for reconsideration filed by BellSouth[1] and Bell Atlantic[2] in the above-captioned dockets.[3] Although the arguments raised by BellSouth and Bell Atlantic merely reiterate the exact same arguments already considered and rejected by the Commission, Covad highlights the importance of the Commission's reassertion of its dedication to the implementation of line sharing. As Bell Operating Companies (BOCs) like Bell Atlantic and BellSouth step up their retail xDSL deployments, they have developed new delay techniques, such as the instant petitions, in an effort to prevent competitive LECs like Covad from gaining access to the procompetitive benefits of line sharing. The Commission must reject these attempts to further delay the deployment of competitive broadband services.

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[1] BellSouth Petition for Reconsideration, CC Docket No. 98-147 (Feb. 9, 2000).
[2] Bell Atlantic Petition for Clarification and/or Reconsideration, CC Docket 98-147 (Feb. 9, 2000).

BACKGROUND

In an Order and Further Notice of Proposed Rulemaking adopted in March 1999, the Commission tentatively concluded that it had authority to require line sharing and sought comment on that tentative conclusion.[4] On November 18, 1999, the Commission adopted rules addressing spectrum management and line sharing obligations pursuant to Section 252 of the Telecommunications Act of 1996 ("1996 Act").[5] In the *Line Sharing Order*, the Commission held that line sharing meets the statutory standard for unbundled network elements and must be provided by incumbent local exchange carriers (incumbent LECs) to any requesting carrier.[6] The instant petitioners participated extensively in this proceeding.

On February 9, 2000, both Bell Atlantic and BellSouth filed Petitions for Reconsideration and/or Clarification of the *Line Sharing Order*. Bell Atlantic seeks reconsideration of three discrete issues raised in the Commission's *Line Sharing Order*. Importantly, Bell Atlantic does not raise any new or different issues than those it raised before the Commission in its comments and ex parte submissions surrounding the initial notice. First, Bell Atlantic once again argues that the Commission's 180-day implementation timetable was too short and the Commission should permit Bell Atlantic to extend it. Second, Bell Atlantic again asserts that competitive CLECs do not need access to the physical loop facility for xDSL testing purposes. Finally, Bell Atlantic again argues that competitive LECs, not incumbents, should have the burden to prove to each state commission that removing load coils and repeaters for loops over 18,000 feet will not "significantly degrade" voice service.

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[3] 47 C.F.R. § 1.429; see *Petitions for Reconsideration of Action in Rulemaking Proceedings*, Report No. 2390 (rel. Feb. 28, 2000), 65 Fed. Reg. 12004 (Mar. 7, 2000).

[4] *Advanced Services First Report and Order and FNPRM,* 14 FCC Rcd at 4808, para. 98.

[5] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Docket No. 98-147, FCC 99-355 (rel. Dec. 9, 1999) ("*Line Sharing Order*").

BellSouth seeks reconsideration of the rule, adopted in the *Line Sharing Order*, that any xDSL technology approved by one state is presumed deployable in every other state. BellSouth argues that each state's network is different and thus raises different issues related to xDSL services, warranting separate litigation of xDSL compatibility in each state. BellSouth thus seeks a rule requiring competitive LECs to prove in every state that a new xDSL technology will not significantly degrade existing services.

I. The Commission's 180-day implementation timetable is based on the record developed in the line sharing rulemaking and the need to bring an immediate end to discriminatory incumbent LEC practices.

In the *Line Sharing Order*, the Commission concluded, based on the extensive record developed in its rulemaking proceeding, that lack of access to the high frequency portion of the local loop materially diminished the ability of competitive LECs to offer xDSL services to residential and small business users, delayed broad facilities-based market entry, and materially limited the scope and quality of competitor service offerings.[7] The Commission found that line sharing was a vital addition to the list of federal UNEs, because it would encourage the widespread and rapid deployment of broadband services to the entire nation, particularly

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[6] *Line Sharing Order* ¶ 25; 47 C.F.R. § 51.319(h).

[7] The Commission concluded that mandating access to the line sharing UNE was crucial to the development of competition for two principal reasons. First, incumbent LECs offer their own retail xDSL products by "line sharing" with themselves (by offering their retail xDSL service on the same loop as their voice service), giving them a discriminatory competitive advantage over carriers who cannot access the upper frequencies of the loop. Incumbent LECs were thus able to leverage their existing monopoly in the voice market into the xDSL market by refusing to provide competitors the ability to offer xDSL service over the same loop as the incumbent's voice service. The Commission concluded that "the inability of competing carriers to provide xDSL-based services over the same loop facilities that the incumbents use to provide local exchange service makes the provision of competitive xDSL-based services to customers that want a single line for both voice and data applications -- typically small businesses and mass market residential consumers -- not just marginally more expensive, but so prohibitively expensive that competitive LECs will not be able to provide such services on a sustained economic basis." *Line Sharing Order* at ¶ 39. The Commission noted that "the 1996 Act does not permit the leveraging of a historic monopoly into a nascent industry or market. See generally, 47 U.S.C. § 251." *Line Sharing Order* at ¶ 29 n.53. *See* also *Line Sharing Order* at ¶ 33 ("There is no question that incumbent LECs are offering xDSL on the same line as their voice service, and competitive LECs are at a significant disadvantage in offering xDSL-based services over the same line that is used to provide voice service."). Second, the Commission noted that Section 706 of the Act "encourages us to facilitate

residents and small businesses in rural areas.[8] Most importantly, the Commission concluded that there was "no evidence of substantial technical, economic, operational, or practical barriers to incumbent LEC line sharing with competitors."[9]

In the *Line Sharing Order*, the Commission took an additional step, concluding that rapid deployment of line sharing was the only means of ensuring "that residential and small business consumers receive the benefits of competition and innovation promised in the Act."[10] Thus, not only did the Commission conclude that there were no technical or operational barriers to immediate deployment of line sharing, the Commission also concluded that incumbent LECs must make line sharing fully available to requesting carriers by a date certain: 180 days after release of the order, or June 6, 2000. The Commission concluded:

> We find that unbundling this network element is technically feasible, presents no substantial operational issues, is legally justified, and serves the public interest. We also find that line sharing promises to bring broadband access to residential and small business consumers, and conclude that incumbents should be able to provide line sharing within 180 days of release of this Order.[11]

The Commission required line sharing as a UNE based in large part on the comments of state Commissions[12] that absent a federal rule mandating line sharing, incumbent LECs would continue to discriminate against competitors by requiring them to purchase a second, stand-alone loop to provide xDSL services. At the same time, the Commission concluded, incumbent LECs

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consumer access to low cost, high speed advanced services," and that line sharing supports that mandate. *Id. See* Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

[8] The Commission concluded that line sharing would encourage broadband deployment in rural areas, where spare copper facilities are less common. "Without a requirement that the incumbent LEC must provide competitors with access to the high frequency portion of these loops, only the voice service provider that already controls the entire loop can provide xDSL-based service to that customer. In virtually all cases, this provider will be the incumbent LEC." *Line Sharing Order* at ¶ 38.

[9] *Line Sharing Order* at ¶ 5.

[10] *Line Sharing Order* at ¶ 13.

[11] *Line Sharing Order* at ¶ 13.

[12] *See, e.g.*, Oklahoma CC Comments, CC Docket Nos. 98-147 and 96-98, at 11 ("the OCC is convinced that line sharing, if it is to be accomplished, must be mandated by the FCC").

would provision their own retail xDSL services over the same loop as their voice service (and impute zero cost to themselves for the loop), thus raising competitors' costs to more than double the incumbents' own costs.[13] This disparity continues today, with alarming implications for competition. While Bell Operating Companies, for example, all offer their retail customers the ability to purchase xDSL service over the same line as their voice service, saving the customers installation time and money, those companies persist in denying their competitors the same opportunity, in bald violation of federal law.

Incumbent LECs have a clear economic incentive to delay the implementation of line sharing as long as possible. Without line sharing, competitive LECs remain unable to compete with incumbent retail xDSL offerings that price-squeeze competitors out of the market. Bell Atlantic's instant petition is a further effort to delay line sharing implementation. It is important that this Commission not take at face value Bell Atlantic's representation that "it is becoming increasingly clear" to parties participating in the New York xDSL collaborative "that the Commission grossly underestimated the level of complexity and resources involved in implementing line sharing."[14] The only thing any party other than Bell Atlantic underestimated is the length to which Bell Atlantic will go to delay implementation of line sharing. For example, Bell Atlantic agreed for several months that it would install splitters in its central office space, but less than three weeks ago informed competitors for the first time that it would not meet the June 6 deadline if the splitter is installed in anywhere other than the competitive LEC's own

[13] *See Line Sharing Order* at ¶ 40 (Because "a competitive LEC providing xDSL to a customer subscribing to an incumbent LEC's voice service must provide a second customer loop for the customer's xDSL service, effectively doubling the line access charges for that customer's voice and xDSL services, and providing a distinct cost advantage to incumbent LEC-provided xDSL products. The record shows that the combined collocation and unbundled loop costs, exclusive of incremental and fixed network, equipment, and overhead costs, incurred by a competitive LEC seeking to deploy xDSL service can exceed 100% of the retail price for the comparable shared-line xDSL that the incumbent offers to the same customer that the competitor is vying for."). *Line Sharing Order* at ¶ 40.

space (an architecture that Bell Atlantic opposed before the Commission). In addition, Bell Atlantic informed competitors in New York that it would install a splitter pursuant to the collocation intervals in New York – meaning competitive LECs would have to wait more than three months for splitter installation – despite the clear requirement in the Line Sharing Order that competitive LEC splitters be installed in the same time period as Bell Atlantic installs its own retail splitters.[15]

Perhaps most importantly, Bell Atlantic's petition for an industry-determined line sharing implementation schedule was argued and rejected by the Commission below. In an *ex parte* filing with the Commission, Bell Atlantic argued that a Commission-mandated implementation schedule would "force incumbent carriers to prematurely enter into an ILEC-CLEC line sharing arrangement by allowing incumbent carriers virtually no time to upgrade their systems to accommodate line sharing."[16] Bell Atlantic's petition now argues once again that carriers "are in the best position to develop implementation approaches that are amenable and reasonable for all parties."[17] The Commission expressly addressed this argument in the *Line Sharing Order*, concluding that although the negotiation process is the proper vehicle for incorporating new UNEs into carrier agreements, state commissions should ensure that line sharing is fully implemented within 180 days of its adoption.[18] Other than its misrepresentation that "it is

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[14] Bell Atlantic Petition at 7.

[15] *See Line Sharing Order* at ¶ 77 ("it should take no longer to obtain and install such equipment in response to a competitive LEC's request than it would take the incumbent to procure and install the same equipment for itself. Any failure to make this accommodation in a reasonably prompt manner would constitute a violation of the incumbent LEC's section 251 unbundling obligations.")

[16] Letter from Bell Atlantic to Lawrence E. Strickling, Chief, Common Carrier Bureau, at 2 (Oct. 21, 1999). BellSouth also filed ex parte comments urging the Commission to adhere to the negotiation process outlined in Section 252 rather than impose a separate line sharing implementation schedule. Letter from Kathleen Levitz, Vice President – Federal Regulatory, BellSouth, to Lawrence E. Strickling, Chief, Common Carrier Bureau at 2 (Oct. 15, 1999).

[17] Bell Atlantic Petition at 2.

[18] *Line Sharing Order* ¶ 162.

becoming increasing clear" that a Commission-mandated timetable was inappropriate, Bell Atlantic raises no new argument that validates reconsideration of that timetable.

II. Competitive LEC access to the physical loop for testing is vital to the proper deployment of line-shared loops.

Bell Atlantic asks the Commission to reconsider its conclusion that competitive LECs using line-shared loops can obtain access to the loop for testing, suggesting that voice services will be somehow compromised if competitors have access to the entire loop.[19] This method of testing, called metallic loop testing (MLT), is the most reliable manner for determining the transmission capabilities of a copper loop. Moreover, MLT is the manner in which incumbents, including Bell Atlantic, presently test line-shared loops. Therefore, the mandate in Section 252 that all elements be provisioned according to nondiscriminatory terms and conditions precludes incumbents from denying the same testing access to competitors as they afford themselves.

An explanation for Bell Atlantic's request is found in the proposed line sharing tariff that Bell Atlantic has filed in New York. While Bell Atlantic agrees in that tariff that the cost of the line-shared loop is zero, it attempts to pass along several new recurring charges in an effort to make line sharing as expensive as purchasing a stand-alone loop. For example, Bell Atlantic attempts to charge competitive LECs a "make-up" charge of 25% of the UNE loop rate, ostensibly to "make up" for the profit they lose every time a competitor wins a customer. Bell Atlantic concedes in its tariff filing that such a "make up" charge is not TELRIC based, and this Commission has already addressed and rejected Bell Atlantic's proposal.[20]

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[19] Bell Atlantic Petition at 3-4.

[20] The Commission rejected Bell Atlantic's argument that a zero loop price would result in a short-fall in revenue to the incumbent LEC that should permit the incumbent to charge a "short-fall," non-TELRIC based cost. *See Line Sharing Order* at ¶¶ 151-52 ("Bell Atlantic argues that, if the Commission sets the price of the high-frequency portion of the loop at its long-run incremental cost (LRIC), this would deprive incumbent LECs of revenues needed to support voice services. Bell Atlantic explains that, if the price of voice service is set below cost, and the price of other services provided over the local loop are set at incremental cost, then the incumbent LEC may be unable to

Perhaps recognizing that the New York Commission would (properly) reject this gambit, Bell Atlantic also proposes a two-dollar per month per-loop recurring charge for "testing." As Bell Atlantic conceded in the New York xDSL collaborative, this charge applies for loops regardless of whether Bell Atlantic actually ever has to test the loop. It is simply a profit maker. But Bell Atlantic cannot justify that charge if – as the law now stands – competitive LECs are permitted their own physical access to the loop for testing. Covad does not want Bell Atlantic to test its loops – Covad will test its own loops. Indeed, it is of vital importance to Covad's ability to service its customers that it be able to locate trouble on the line and pinpoint the cause of outages – Covad simply cannot offer any quality of service guarantees if it cannot test the loop itself. The Commission recognized the importance of this test access, and ordered incumbent LECs to "provide requesting carriers with access to the loop facility for testing, maintenance, and repair activities. We require that, at a minimum, incumbents must provide requesting carriers with loop access either through a cross-connection at the competitor's collocation space, or through a standardized interface designed to provide physical access for testing purposes. Such access must be provided in a reasonable and nondiscriminatory manner."[21] While Bell Atlantic phrases its petition as requesting that the Commission "clarify" that competitive LECs can only access the upper frequencies of the loop for testing, it is clear that Bell Atlantic seeks otherwise; indeed, it suggests that a carrier finding a problem with the data frequencies of the loop "can submit a trouble report to the incumbent carrier, who would test and make any necessary repairs

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recover the common costs of the network, including the cost of the loop. . . . We reject Bell Atlantic's argument. To the contrary, we conclude that requiring line sharing and pricing it on the basis of TELRIC should not affect the ability of the incumbent LEC to recover costs associated with providing voice service.").

[21] *Line Sharing Order* at ¶ 118.

on the physical loop facility."[22] Clearly, Bell Atlantic does not like the rule that gives competitive LECs access to the physical loop for testing. But Bell Atlantic leaves out one crucial fact: there is no other way for competitive LECs to test the physical loop than by attaching test equipment to the loop itself.[23] This is why the Commission granted competitive LECs access to the physical loop for testing. And Bell Atlantic now offers no new reason – other than arguments already made and rejected – as to why it should have the ability to deny competitors testing ability.

III. Bell Atlantic presents no justification for reconsideration of the Commission's decision to prevent incumbents from unilaterally determining what loop technologies competitors can deploy.

Finally, Bell Atlantic urges the Commission to reconsider its rule denying incumbent LECs the ability to act as technology gatekeepers by requiring them to affirmatively prove to the appropriate state commission that they are justified in denying loops to a requesting carrier.[24] Instead, Bell Atlantic seeks a rule that would place the burden on competitors to seek redress from the state commission each time an incumbent LEC denied a loop to a requesting carrier based on the incumbent's technical parameters. The Commission properly placed on incumbent LECs seeking to deny competitors the opportunity to order a line-shared loop the burden to justify that refusal. The Commission's decision was based on extensive evidence in the record of the two docketed proceedings (CC Dockets 98-147 and 96-98) that incumbent LECs attempted to bar deployment of innovative services by limiting competitors to ordering loops that comport with the incumbents' own retail xDSL offerings. For example, the Commission in the Line

[22] Bell Atlantic Petition at 4-5.
[23] Bell Atlantic does not explain how competitive LECs would maintain their ability to test the physical loop if "incumbent carriers need only provide competitive carriers with access to the higher frequency portion of the loop for testing purposes." Bell Atlantic Petition at 5.
[24] Bell Atlantic Petition at 6-7.

Sharing Order ordered SBC to dismantle its Selective Feeder System (SFS), which the Commission concluded discriminated in favor of SBC's own retail services. In addition, the Commission required incumbent LECs, as it had on numerous prior occasions, "to provide loops with all their capabilities intact whenever the competitive carrier requests access to the high frequency portion of the loop, even if the incumbent itself is not offering xDSL-based services to the customer on that loop."[25] Because of this history of discrimination, the Commission removed an important discriminatory weapon from the incumbent LEC arsenal – the ability to refuse to provide a loop to a competitor and then force the competitor to seek recourse from the state commission to redress that refusal. Obviously, no customer would wait the months it would take to litigate those issues, and the incumbent would have succeeded in preventing the loss of another customer to competition. By placing the burden on the incumbent, the Commission has removed the ability of the incumbent to discriminate in such a manner.

Importantly, the competitive LEC cannot act improperly where the burden is on the incumbent, for the simple reason that if the loop in question indeed is, as the incumbent claims, unable to support service – the competitive LEC will not be able to offer service over the loop. The incumbent loses nothing – other than the ability to discriminate – in having the burden of justifying its denial of a loop over which a competitor seeks to offer service. If the loop cannot, as the incumbent claims, support the service, the matter is closed.

IV. There is no reason for the Commission to reconsider its decision that state Commissions, not incumbent LECs, should decide when incumbent-favoring interfering technologies should be retired.

Bell Atlantic seeks reconsideration of the Commission's decision that regulators should be empowered to order incumbent LECs to relocate or remove interfering technologies such as

[25] *Line Sharing Order* at ¶ 83.

AMI T1. Bell Atlantic argues that "market forces, rather than regulation" should dictate when and how incumbent LECs should remove such interfering technologies. Once again, Bell Atlantic's argument is based not on any new facts or evidence, but rather on its recognition that the Commission has removed yet another of its favorite tools of discrimination. It is a fundamental principle of economics that monopolists like Bell Atlantic have no incentive to innovate. Bell Atlantic has more to gain by not only refusing to innovate in its own offerings, but to do whatever it can to bar competitors from offering innovative services. Maintaining AMI T1 and other interfering technologies is a classic exercise of that anticompetitive behavior. Because such technologies essentially infect binder groups so as to bar the deployment of most competitive DSL services, Bell Atlantic has no incentive whatsoever to remove them. Market forces thus would fail completely to support competition, and only regulation can ensure that Bell Atlantic does not maintain its network in such a way as to actively bar competition. Where a state commission determines that Bell Atlantic can reassign its AMI T1 technology, or replace it, in order to promote competition, Bell Atlantic must be required to do so. Bell Atlantic has absolutely no incentive to do so by itself.

V. The Commission should reject BellSouth's attempt to delay line sharing by forcing competitive LECs to litigate the exact same technical issues in each and every state.

BellSouth's sole issue on reconsideration is its argument that the Commission should alter its conclusion that any xDSL technology successfully deployed in one state is presumed acceptable for deployment throughout the country. Again, BellSouth (as well as Bell Atlantic) raised this argument repeatedly with the Commission in the underlying rulemaking. Indeed, BellSouth went into great detail on this issue in its reply comments, arguing that "this approach is

flawed because it will fail to identify [network] incompatibilities in at least four respects."[26] BellSouth outlined the possible harmful consequences of creating a presumption that any xDSL technology will not harm the network. In addition, Bell Atlantic contended that this "'one size fits all' presumption will put quality service to end users at risk"[27] and that "[t]he Commission's interim presumptions rest on the fallacious assumption that the successful deployment of a new technology on a single network, regardless of its scale, scope, location, network architecture, and operational environment, automatically qualifies such technology for deployment on networks nationwide."[28] BellSouth's reconsideration argument that "[i]t is improper to assume that each incumbent LEC's network is engineered on a one size fits all basis" is thus repetitive of points already raised before the Commission and expressly rejected.[29]

On the substance of BellSouth's contention, it is clear that BellSouth seeks to delay competitive entry into its markets by forcing competing carriers to litigate, in every BellSouth state, the issue of the technical feasibility of the xDSL technology the carrier seeks to deploy. In essence, BellSouth seeks to protect its monopoly by denying competitors the ability to offer any innovative services that BellSouth itself does not offer. By requiring competitors to seek the permission of state commissions to offer such services, BellSouth stifles competition and preserves the market for itself for an extensive period of time. Because innovation is the enemy of the monopolist, BellSouth's tactics are transparent.

The Commission properly concluded that proof of successful technical deployment of xDSL technologies need not be duplicated in fifty states. Notably, BellSouth is unable to offer a

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[26] Reply Comments of BellSouth Corporation at 28 (July 22, 1999).
[27] Comments of Bell Atlantic at 16 (June 15, 1999).
[28] Reply Comments of Bell Atlantic at 18 (July 22, 1999).

single justification for its argument other than the repetitious assertion that "all incumbent LECs' networks are not identical."[30] Why does the Commission's decision to deny BellSouth this delay technique "essentially guarantee[] that customers' services will suffer"? BellSouth cannot come up with any reason beyond the rhetorical assertion that it must be so because BellSouth says so. Indeed, BellSouth's broad assertion that "[n]etwork architectures are configured differently between various locations and local exchange carriers," unadorned by any explanation as to why that affects the viability of xDSL technologies, is inapposite to the question of whether a copper-based technology is technically feasible.[31] The Commission properly rejected such hollow arguments the first time around, and it should do the same now.

CONCLUSION

For all these reasons, Covad respectfully requests that the Commission conclude that the issues raised on reconsideration by Bell Atlantic and BellSouth are merely repetitious of the exact same arguments raised by commenting parties in this proceeding and rejected by the Commission in the *Line Sharing Order*. As such, the Commission should summarily dismiss the instant petitions in order to remove any uncertainty or delay that may be caused by prolonged consideration of the meritless issues raised. In the alternative, the Commission should reject the petitions on the substantive grounds outlined by Covad above.

Respectfully submitted,

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[29] "We reject the argument of certain commenters that the third criterion [presumption of DSL compatibility] will lead to interference in the network, due to differing mixes of deployed technologies in the local networks." *Line Sharing Order* ¶ 198 (citing BellSouth Reply Comments at 28-30; Sprint Reply Comments at 16-19).
[30] BellSouth Petition at 3.
[31] BellSouth Petition at 2.

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