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

In The Matter of	)	
Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and Belltouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana	)	**CC Docket No. 01-277**

OPPOSITION OF THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES

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SUMMARY

The Association of Communications Enterprises ("ASCENT"), a national trade association representing smaller providers of competitive telecommunications and information services hereby urges the Commission to deny as premature the Joint Application filed by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. (collectively "BellSouth") for authority to provide in-region, interLATA service in the States of Georgia and Louisiana, pursuant to Section 271 of the Communications Act of 1934, as amended, 47 U.S.C. § 271. As ASCENT will demonstrate herein:

- BellSouth unlawfully denies resale carriers any opportunity for Section 251(c)(4) resale of xDSL-based advanced services, thereby "severly hinder[ing] the ability of other carriers to compete."

- Assesses inflated rates, both recurring and non-recurring, for unbundled loops and platform services, in violation of the Commission's total element long-run incremental cost pricing guidelines.

Given that failure by BellSouth to "satisf[y] an individual checklist item of the competitive checklist constitutes [an] independent ground[] for denying . . . [its] application," the Commission should not, indeed cannot, grant BellSouth the authority it seeks here unless and until each of these flaws has been fully rectified.

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The Association of Communications Enterprises (ASCENT"),[1] through undersigned counsel and pursuant to Public Notice, DA 01-1486 (released June 21, 2001), hereby opposes the joint application ("Application") filed by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc. (collectively "BellSouth") for authority to provide in-region, interLATA service in the States of Georgia and Louisiana, pursuant to Section 271 of the Communications Act of 1934 (the "Act"), as amended by the Telecommunications Act of 1996.[2] As ASCENT will demonstrate herein, BellSouth has not satisfied "the ultimate burden of proof that

[1] ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services. ASCENT is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers, as well.

[2] 47 U.S.C. § 271.

its application satisfies all of the requirements of section 271."[3] Because BellSouth has, therefore, not "take[n] the steps required to open its [Georgia and Louisiana] local markets to full competition," it should not "be rewarded with section 271 authority to enter the long distance market" in either Georgia or Louisiana.[4]

3. BellSouth Unlawfully Fails to Provide for Section 251(c)(4) Resale of xDSL-based Advanced Services

[3] Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York (Memorandum Opinion and Order), 15 FCC Rcd. 3953, ¶ 44 (1999) (*subsequent history omitted*).

[4] Id. at ¶ 15.

Section 251(c)(4) of the Act requires incumbent local exchange carriers ("LECs") "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[5] Section 251(c)(4) further prohibits incumbent LECs from "impos[ing] unreasonable or discriminatory conditions or limitations on the resale of such telecommunications service."[6] As the Commission long ago recognized, "the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position."[7] Undoubtedly for this reason, Congress expressly precluded the Commission from granting an application for in-region, interLATA authority until it had first determined that the applying carrier was, among other things, making available its "[t]elecommunications services . . . for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)."[8] Acknowledging this

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[5] 47 U.S.C. § 251(c)(4).

[6] Id.

[7] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 939 (1996) (*subsequent history omitted*).

[8] 47 U.S.C. §§ 271(c)(2)(B), 271(d)(3).

restriction, the Commission, recognizing that failure to "satisf[y] an individual checklist item of the competitive checklist constitute[d an] independent ground[] for denying . . . [an] application," has held that a carrier's imposition of unreasonable restrictions on the resale of its telecommunications services "renders . . . [its] application deficient."[9]

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[9] Application of Bell South Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana (Memorandum Opinion and Order), 13 FCC Rcd. 20599, ¶ 50 (1998) (*subsequent history omitted*); Application of Bell South Corporation, Be Brief in Support of Joint Application at 144 - 49. BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., 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, ¶ 63 fn. 225 (1998) (*subsequent history omitted*).

In its Application, BellSouth concedes that it does not make available for Section 251(c)(4) resale any xDSL-based advanced services.[10] BellSouth acknowledges that "[a]dvanced services, such as xDSL transmission, are 'telecommunications mandate.[11] BellSouth contends, however, that it may avoid its 251(c)(4) resale obligations as they relate to xDSL-based advanced services by bundling those services with Internet access, and by structuring all other xDSL-based advanced services it provides as "wholesale" offerings designed for use by Internet service providers ("ISPs"),[12] with the specific intent in both instances of denying competitors the ability to resell xDSL-based advanced services. In short, it is BellSouth's position that it can lawfully manipulate its provision of xDSL-based advanced services for the sole purpose of avoiding its Section 251(c)(4) resale obligations.

The Commission has made clear that it will not allow incumbent LECs to hinder competition by resale providers through the distortion of its pro-competitive initiatives. Thus, for example, the Commission squarely rejected Verizon's attempt to use the agency's pro-competitive

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[10] Brief in Support of Joint Application at 144 - 49.

[11] Id. at 144.

[12] BellSouth, however, concedes that this "wholesale" offering has been acquired by entities other than ISPs, or competitive LECs or other carriers. Affidavit of Eric Fogle at ¶ 10.

line-sharing mandate to avoid its Section 251(c)(4) resale obligations as they relate to xDSL-based advanced services.[13] Characterizing Verizon's position "as based on a misapplication of this Commission's line sharing rules," the Commission took Verizon to task for distorting the agency's line sharing mandate to "severely hinder[] the ability of other carriers to compete."[14]

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[13] Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Service in Connecticut (Memorandum Opinion and Order), CC Docket No. 01-100, FCC 01-208, ¶ 31 (July 20, 2001).

[14] Id. at ¶¶ 31 - 32.

Unlike Verizon, BellSouth here distorts not one, but two, of the Commission's pro-competitive initiatives in its effort to achieve an anti-competitive end. The first of the carrier's stratagems involve the Commission's effort to "stimulate the development and deployment of broadband services to residential markets in furtherance of the Commission's mandate to encourage the deployment of advanced telecommunications capability to all Americans" by "encourag[ing] incumbents to offer advanced services to Internet Service Providers at the lowest possible price."[15] The rationale underlying the Commission's action was that "consumers would . . . benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services" if incumbent LECs could offer ISPs volume and term discounts without having to make such discounted offerings available to resale carriers at the additional discounted rates required by Section 251(c)(4).[16] Isolating xDSL-based advanced services offerings designed for use by ISPs as input components to their Internet access service was deemed acceptable because the incumbent LEC would still have to make available for Section 251(c)(4) resale xDSL-based advanced services provided to residential and business end-users.[17] As the Commission explained, this latter holding "reinforce[d] the resale requirement of the Act by

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[15] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Second Report and Order), 14 FCC Rcd. 19237 at ¶ 20.

[16] Id.

[17] Id. at ¶ 19.

ensuring that resellers are able to acquire advanced services sold by incumbent LECs to residential and business end-users at wholesale rates, thus ensuring that competitive carriers are able to enter the advanced services market by providing consumers the same quality service offerings provided by incumbent LECs."[18]

[18] Id. at ¶ 20.

BellSouth's machinations render this essential predicate false. If an incumbent LEC can limit its provision of xDSL-based advanced services exclusively to offerings designed for ISPs, then the Commission will not have "ensur[ed] that competitive carriers are able to enter the advanced services market by providing consumers the same quality service offerings provided by incumbent LECs."[19] To the contrary, the Commission would have ensured that resale carriers are precluded from providing xDSL-based advanced services in competition with incumbent LECs. To avoid this anti-competitive result, the Commission must make clear that a precondition to the exemption from Section 251(c)(4) resale afforded offerings designed for ISPs is the provision of resold xDSL-based advanced services offerings which can be obtained at statutory discounts for resale to both residential and business consumers.

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[19] Id.

The second of BellSouth's twin stratagems to avoid Section 251(c)(4) resale of xDSL-based advanced services involve the Commission's determination that Internet access services provided by ISPs are "information services" not subject to the discounted resale obligations of Section 251(c)(4). The Commission opted to "maintain[] the non-carrier status of Internet service providers" while confirming the applicability of Section 251(c)(4) to xDSL-based advanced services because it perceived such continuity would "benefit[] the public interest."[20] The Commission elected to continue to exempt Internet access service from carrier regulation as a means of enhancing "the level of competition, innovation, investment, and growth in the enhanced service industry over the past two decades."[21] In so doing, however, the Commission made clear that this regulatory scheme would only work if "the underlying market for provision of transmission facilities . . . is subject to sufficient pro-competitive safeguards."[22] Section 251(c)(4) is one of the "pro-competitive safeguards" mandated by Congress to ensure that "the underlying market for provision of transmission facilities is competitive."[23] And the Commission has already found that an incumbent LEC's failure to provide for Section 251(c)(4) resale "severely hinders the ability of other carriers to compete."[24]

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[20] Id.

[21] Federal-State Joint Board on Universal Service (Report to Congress), 13 FCC Rcd 11501, ¶ 95 (1998).

[22] Id.

[23] Id.

[24] Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Service in Connecticut (Memorandum Opinion and Order), CC Docket No. 01-100, FCC 01-208 at ¶ 32.

The underlying flaw in BellSouth's argument, accordingly, is that BellSouth is the provider of the underlying transmission facilities through which its high-speed Internet access service is provided. BellSouth cannot avoid the Section 251(c)(4) obligations that apply to these facilities and the services provided thereover simply by bundling them with an information service. As the Commission explained, "[c]ompanies that are in the business of offering basic interstate telecommunications functionality to end users are 'telecommunications carriers,' and therefor are covered under the relevant provisions of sections 251 and 254 of the Act."[25] "These rules apply regardless of the underlying technology those service providers employ, and *regardless of the applications that ride on top of their services*."[26] In other words, while BellSouth is not required to provide for discounted resale of its Internet access service, it may not avoid its Section 251(c)(4) obligations as they relate to the xDSL-based advanced services it uses to provide high-speed Internet access service.

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[25] Federal-State Joint Board on Universal Service (Report to Congress), 13 FCC Rcd 11501, ¶ 105.

[26] Id. (emphasis added).

BellSouth has yet to provide for the meaningful resale of xDSL-based advanced services six years following enactment of the Telecommunications Act of 1996. If the Commission were to sanction BellSouth's current ham-handed effort to avoid its Section 251(c)(4) resale of xDSL-based advanced services, there never will be any meaningful resale of such services by BellSouth or any other incumbent LEC. Every other incumbent LEC will happily jump on the BellSouth bandwagon as they have with each new rationale offered by one or another of the incumbent LECs for avoiding Section 251(c)(4) resale of xDSL-based advanced services. Given that the Commission has confirmed the importance of Section 251(c)(4) resale of xDSL-based advanced services as a means of "ensuring that competitive carriers are able to enter the advanced services market by providing to consumers the same quality service offerings provided by incumbent LECs,"[27] it cannot now lawfully act to effectively eliminate discounted resale of such services. As the Commission has acknowledged, such an action would " "severely hinders the ability of other carriers to compete."[28]

The solution is manifest. BellSouth does not need to offer for Section 251(c)(4) resale xDSL-based advanced service offerings truly designed for use by non-affiliated ISPs. Nor

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[27] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Services (Second Report and Order), 14 FCC Rcd. 19237 at ¶ 20.

[28] Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Service in Connecticut (Memorandum Opinion and Order), CC Docket No. 01-100, FCC 01-208 at ¶ 32.

does BellSouth need to offer for Section 251(c)(4) resale Internet access service provided by either it or its affiliates to end users. In order for these statements to hold true, however, BellSouth must make available for Section 251(c)(4) resale on a non-volume/non-term basis the same array of xDSL-based advanced service offerings it utilizes to provide its Internet access service and that it provides on a wholesale basis to ISPs.

4. The Recurring and Nonrecurring Rates BellSouth Assesses for Access to Unbundled Loops Cannot Be Justified

BellSouth claims that "[t]he unbundled network element rates that the [Georgia Public Service Commission ("GPSC") and the Louisiana Public Service Commission ("LPSC")] have established (and that BellSouth offers) comply fully with the 1996 Act and this Commission's rules."[29] Rates assessed for unbundled network elements ("UNEs"), both recurring and non-recurring, pass statutory muster only if basic Total Service Long-Run Incremental Cost ("TELRIC") principles were followed in computing the charges and "the resulting rates are within the range that

[29] Brief in Support of Joint Application at 40.

reasonable application of TELRIC would produce."[30] BellSouth's unbundled loop and UNE-platform charges meet neither of these criterion fully.[31]

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[30] Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Service in Pennsylvania (Memorandum Opinion and Order), CC Docket No. 01-138, FCC 01-269, ¶ 55 (September 19, 2001) (*subsequent history omitted*).

[31] BellSouth has implicitly acknowledged that its rates for local switching and daily usage feeds are overstated in Georgia, by proposing substantially lower rates early this month. The proposed switching rates have been reduced by roughly a third and the BellSouth proposes to more than halve its DUF charges. It is noteworthy that the proposed rates, which BellSouth trumpets as TELRIC compliant, are substantially lower than those the carrier charges in Louisiana.

Compared with charges in other states in which in-region, interLATA authority has been granted, BellSouth's unbundled loop and UNE-platform charges appear not just inflated, but in many instances grossly inflated. Set forth below is a listing of the percentage by which BellSouth's unbundled loop recurring charges (as reported by BellSouth to the Commission[32]) exceed like Verizon rates in New York and Massachusetts and like Southwestern Bell Telephone Company rates in Texas, Oklahoma and Kansas:

	New York	Massachusetts	Texas	Oklahoma	Kansas
Louisiana Loop					
Zone 1	9%	-8%	6%	6%	9%
Zone 2	87%	45%	71%	71%	71%
Zone 3	152%	142%	155%	185%	108%
Georgia Loop					
Zone 1	20%	1%	15%	15%	20%
Zone 2	31%	2%	20%	20%	20%
Zone 3	36%	30%	37%	-1%	12%

As is apparent, BellSouth's loop rates exceed those assessed by Verizon and SWBT in all instances but two, with Louisiana charges in Zone 2 in the high double digits higher and in Zone 3 well into the triple digits higher, and with Georgia rates averaging roughly 20 percent higher across the board. Comparable differences exist with respect to platform rates and DSL loop charges in Louisiana, with double digit percentage differences in Zone 2 and triple digit percentage differences in Zone 3. Loop installation charges in Georgia and Louisiana also exceed comparable charges in New

[32] Letter from Glenn T. Reynolds to Magalie Roman Salas, Secretary, Federal Communications Commission, filed in CC Docket No. 01-277 on October 17, 2001.

York, Massachusetts, Texas, Oklahoma, and Kansas by upwards to more than 180 percent.

The above-described rate differentials are clearly not justified by cost differences between these various states as revealed through application of the Commission's Universal Service Fund ("USF") cost model.[33] For example, Louisiana's loop costs are roughly comparable to those of Oklahoma, while Georgia's loop costs are roughly comparable to those of Kansas. Louisiana's loop rates range from 6 percent to 185 percent higher than Oklahoma's loop rates, with a weighed average rate differential of roughly 33 percent. Georgia's loop rates range from 12 percent to 20 percent higher than Kansas' loop rates, with a weighed average rate differential of roughly 20 percent.[34]

Certainly rate differentials of this magnitude cannot be said to be within the range that reasonable application of TELRIC would produce. Not surprisingly, these differentials reflect methodogical failings, most notably a failure by BellSouth to faithfully and consistently apply the Commission's "most efficient network configuration" pricing principles. In Louisiana, BellSouth, instead of relying upon the single lowest cost network configuration to compute its rates, factored in three or more network "scenerioes," seriously understating in so doing economies of scope and

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[33] Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Service in Kansas and Oklahoma (Memorandum Opinion and Order), 16 FCC Rcd 6237, ¶ 82 - 86 (2001) (*subsequent history omitted*).

[34] Id.

scale.[35] In Georgia, the carrier employed a statistical sample of its historical network design which overstates rates by failing to take fully into account the most efficient, lowest cost network configuration.

[35] BellSouth compounds the problems inherent in its multi-network costing approach by incorporating cost allocation factors which reflect its existing network.

These pricing differentials are also attributable BellSouth's use of inadequate fill factors, excessive capital costs, anemic productivity factors, and inflated loading factors, each contributing to rate inflation. The fill factor for distribution cable utilized to compute BellSouth Louisiana unbundled loop rates was 41 percent, with the factor used to compute the carrier's Georgia unbundled loop rates being only slightly higher at 48 percent. The Commission has previously questioned the use of a 40 percent fill factor, citing with approval factors in the 50 to 75 percent and above range.[36] The cost of capital used to compute BellSouth Louisiana rates exceeded ten percent, at least two full percentage points more than the carrier needs to secure necessary equity and debt infusions. The productivity factors BellSouth used to compute its UNE rates are a mere fraction of the 6.5 percent productivity factor recognized by the Commission as appropriate in the

[36] Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks, Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts (Memorandum Opinion and Order), 16 FCC Rcd. 8988, ¶ 39 (2001) (*subsequent history omitted*).; Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Service in Pennsylvania (Memorandum Opinion and Order), CC Docket No. 01-138, FCC 01-269 at ¶ 58; Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Service in Kansas and Oklahoma (Memorandum Opinion and Order), 16 FCC Rcd 6237 at ¶ 80.

access charge context.[37] Finally, the loading factors employed by BellSouth reflect the carrier's historical experience and hence reflect embedded, rather than forward-looking, costs.

Because BellSouth's rates are not TELRIC compliant in either Georgia or Louisiana, the carrier has not satisfied the second element of the competitive checklist.

CONCLUSION

By reason of the foregoing, the Association of Communications Enterprises urges the Commission to deny as premature the Joint Application filed by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc., for authority to provide in-region, interLATA service in the States of Georgia and Louisiana, and to require, as mandated by Section 271(d)(3) of the Act, full compliance with the competitive checklist before BellSouth is granted such authority.

Respectfully submitted,

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[37] Access Charge Reform (Sixth Report and Order), 15 FCC Rcd. 12962, ¶ 157 (2000) (subsequent history omitted).

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I, Charles C. Hunter, do hereby certify that a true and correct copy of the foregoing document was served by first class mail, postage prepaid, on the individuals list on this 22nd day of September, 2001:

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