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

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

OPPOSITION OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

The Commission must deny BellSouth's application for authority to provide long distance services in Georgia and Louisiana, because BellSouth does not provide nondiscriminatory access to unbundled network elements ("UNEs"), and therefore, does not satisfy Checklist Item ii. BellSouth effectively has precluded competitive entry through its inadequate and discriminatory Operations Support Systems ("OSS") performance. In particular, BellSouth has failed to provide OSS to competing carriers in a nondiscriminatory manner, to create reliable OSS databases, and to develop an adequate change management system. Moreover, BellSouth's rates for several UNEs as well as for Daily Usage Files do not satisfy the Commission's TELRIC test, and therefore are in violation of Checklist Item ii.

Separate and apart from BellSouth's failure to comply with Checklist Item ii, it is not in the public interest to grant BellSouth's application, and therefore, the application must be denied. BellSouth has engaged in repeated unlawful winback activities throughout its entire region, including in Georgia and Louisiana. Namely, BellSouth takes advantage of its position as the incumbent local exchange carrier and the provider of wholesale inputs and services to unlawfully market its services to customers of competing carriers. BellSouth illegally uses proprietary and customer information in its marketing efforts, for example, by contacting a customer of a competing carrier after the customer has requested service from the competing carrier, but before BellSouth has turned on that customer's service. This activity is explicitly prohibited by section 222 of the Communications Act of 1934, as amended ("the Act") and the Commission's rules and orders. Further, BellSouth makes disparaging and untrue comments about its competitors in an effort to regain (or retain) the customer. BellSouth's actions undermine the competitive process and deny customers a meaningful opportunity to choose their

own provider. The Commission cannot reward BellSouth's blatant disregard for the Act and the Commission's rules and orders by granting the 271 application.

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The Competitive Telecommunications Association ("CompTel"), by its attorneys, submits these comments in opposition to the Joint Application of BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth") to provide in-region, interLATA services in Georgia and Louisiana, pursuant to section 271 of the Communications Act of 1934, as amended (the "Act").[1]

In Georgia and Louisiana, BellSouth has not demonstrated compliance with Checklist Item ii due to its significant problems provisioning Operations Support Systems ("OSS"). Similarly, the rates for several unbundled network elements ("UNEs") and for Daily Usage Files ("DUFs") do not satisfy the Commission's section 271 TELRIC test in Georgia and in Louisiana, and thus the Joint Application does not satisfy the pricing prong of checklist item ii. Finally, BellSouth's unlawful winback activities throughout the entire BellSouth region, and

1 *See Public Notice, Comments Requested on the Application by BellSouth Corporation for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the States of Georgia and Louisiana*, CC Docket No. 01-277, DA 01-2286 (Oct. 2, 2001).

in Georgia and Louisiana in particular, preclude a finding by the Commission that approval of the instant 271 application is in the public interest.

CompTel is the premier industry association representing competitive telecommunications providers and their suppliers in the United States. CompTel's member companies include the nation's leading providers of competitive local exchange services and span the full range of entry strategies and options. It is CompTel's fundamental policy mandate to see that competitive opportunity is maximized for all of its members, both today and in the future. CompTel members, though using a variety of business strategies, have encountered repeated problems while conducting business with BellSouth. Throughout these comments, CompTel discusses the experiences of several representative members, including the following: ITC^DeltaCom Communications, Inc., a facilities-based carrier based providing telecommunications services predominantly to small and medium-sized business customers; e.spire Communications, Inc., a facilities-based carrier providing telecommunications services predominantly to small and medium-sized business customers; Z-Tel Communications, Inc., a carrier providing a broad range of telecommunications services via the unbundled network element platform; KMC Telecom (KMC), a facilities-based carrier that competes in eight of the nine BellSouth legacy states, including Georgia and Louisiana, utilizing a switched, high-capacity fiber optic network;[2] and Birch Telecom, Inc., a multi-regional UNE and facilities-based provider of telecommunications services to small to medium-sized business and residential customers.

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[2] CompTel also supports the comments filed today by KMC Telecom, Inc., which demonstrate that BellSouth's loop performance does not meet the standards established by this Commission. BellSouth's competitors continue to be hampered by missed installation appointments, inadequate pending facility notification, botched hot cuts and chronic outages. In terms of missed installations, for example, BellSouth's own data

I. BELLSOUTH'S POOR OSS PERFORMANCE PRECLUDES A FINDING BY THE COMMISSION THAT BELLSOUTH HAS SATISFIED CHECKLIST ITEM II.

BellSouth is preventing competitive entry through its inadequate and discriminatory OSS performance. Section 271(c)(2)(B)(ii) ("Checklist Item ii") requires BellSouth to provide "non-discriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252(d)(1)."[3] The Commission has determined that "access to OSS functions falls squarely within an incumbent LEC's duty under section 251(c)(3) to provide unbundled network elements under terms and conditions that are just and reasonable, and its duty under section 251(c)(4) to offer resale services without imposing any limitations or conditions that are discriminatory or unreasonable."[4] As part of its statutory obligation, BellSouth must provide nondiscriminatory access to OSS functions that support each of the three modes of competitive entry envisioned by the 1996 Act: UNEs, resale, and competitor-owned facilities. Despite this clear statutory mandate, BellSouth has failed to provide OSS to competing carriers in a nondiscriminatory manner, to create reliable OSS databases, and to develop an adequate change management system; therefore, BellSouth's 271 application must be denied.[5]

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indicates that it missed over one-fourth of the two-wire analog loop installs for KMC Telecom, Inc. in Georgia and the DS-1 installs for KMC in Louisiana in August 2001.

3 47 U.S.C. § 271(c)(2)(B)(ii).

4 *Application by 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 3952, 3990, para. 84 (1999) ("*Bell Atlantic New York 271 Order*").

5 Although much of the supporting information about BellSouth's failure to provide nondiscriminatory access to OSS results from carriers' experiences in Georgia, these problems apply with equal force in Louisiana, as BellSouth has asserted that its OSS "are regional in nature." BellSouth Brief at 4. Indeed, BellSouth relies on the Georgia OSS test to demonstrate its performance in Louisiana. *See id.*

A. BellSouth Does not Provide Nondiscriminatory Access to Operations Support Systems ("OSS").

BellSouth does not satisfy Checklist Item ii, because it does not provide competing carriers access to ordering functions in substantially the same time and manner as its retail operations. Competing carriers have experienced repeated and persistent problems with the OSS interfaces that BellSouth has made available to carriers, including Local Exchange Navigation System ("LENS"), Telecommunications Access Gateway ("TAG"), and Electronic Data Interchange ("EDI"). Specifically, BellSouth retail representatives have tools available to them that BellSouth denies to competing carriers. As one example, in Georgia, BellSouth provides information about pending orders electronically to its retail operations. Thus, BellSouth retail representatives can view customer accounts to determine whether a particular customer has order requests pending (such as for an additional line, service call, or other item). BellSouth has refused to provide this same electronic "flag" to competing carriers,[6] therefore, competing carriers do not view the same information as BellSouth retail. Instead, where a retail customer has a pending order with BellSouth, BellSouth refuses to process a request to transfer the customer to a competing carrier; BellSouth returns the order to the competing carrier for "clarification" and additional information.[7] This process causes CLECs to incur additional and unnecessary expenses, which results in customer orders being delayed, and ultimately makes a competitor's marketing efforts less efficient. (It also gives BellSouth an opportunity to engage in unlawful winback opportunities, which are discussed further below.) By not receiving the same

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6 *See* Exhibit 1: Affidavit of Mary Conquest, ITC^DeltaCom at 2.

7 *Id.* This is frequently a problem with small and medium-size business customers that have a multitude of telephone lines and may be unaware that they still have an order outstanding with BellSouth.

flag or notice as BellSouth's retail arm, CLECs do not have access to ordering functions in substantially the same time and manner as BellSouth's retail personnel.

BellSouth is fully aware that competing carriers are unable to access information regarding pending service orders through any of the OSS interfaces,[8] but has failed to implement the necessary changes to provide competing carriers with such information. In August 2000, more than fourteen months ago, CompTel member ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") and the competing carrier community submitted a change request asking that the pending service indicator be added to TAG pre-order information.[9] To date, ITC^DeltaCom's change request still awaits release assignment.[10]

In sum, because BellSouth has unlawfully refused to provide CLECs with the same pending order information as BellSouth's own retail operations, the Commission must find that BellSouth fails Checklist Item ii.

B. BellSouth's Change Management Process Does Not Provide Competing Carriers with a Meaningful Opportunity to Compete

BellSouth has failed to implement an adequate change management process and, therefore, BellSouth is not providing competing carriers with nondiscriminatory access to OSS. The Commission repeatedly has stated that to provide nondiscriminatory access to OSS, a BOC must first "demonstrate that it has deployed the necessary systems and personnel to provide

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8 *See* Exhibit 2: Memorandum to Competitive Local Exchange Carriers from BellSouth Interconnection Services (Aug. 16, 2001) (stating "**At this time, CLECs are unable to view CSRs utilizing circuit information Additionally, Billed To Numbers (BTN), Pending Service Orders (PSO) nor the Local Service Freeze (LSF) indicators can be viewed. BellSouth is continuing to analyze and develop solutions to outstanding CRS issues.**" (emphasis in original)).

9 Exhibit 1: Affidavit of Mary Conquest at 2-3.

sufficient access to each of the necessary OSS functions and . . . is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them."[11] As part of this determination, the Commission evaluates the existence of "an adequate change management process and evidence that the BOC has adhered to this process over time."[12] BellSouth does not satisfy this test.

Competing carriers have experienced repeated and persistent problems with the implementation of BellSouth's change management process, such that they have been effectively denied a meaningful opportunity to compete. As an initial matter, competing carriers were not given the chance to influence third-party testing of the BellSouth change control process. Worse yet, competing carriers have never been provided with sufficient information to understand the change management process itself. Further, on a going forward basis, BellSouth has decided to preclude competing carriers from having any input into the design and continued operation of the change management process.

One result of BellSouth's foreclosure of competitors involvement with the change management process is that competing carriers have been substantially impaired by BellSouth's process for prioritizing change requests ("CRs"). Competing carriers use the change request process to request modifications to the OSS interfaces. Implementation of these change requests is critical to a carrier's ability to have access to, and use of, the OSS interfaces in order to compete effectively with the BOC. Under BellSouth's change management process, BellSouth has the sole discretion to determine which CRs it will implement each month. As a matter of

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10 *Id.* at 3. Prior to the ENCORE Release 9.4 in July 2001, competing carriers had access to certain pending order information through LENS. BellSouth has stated that the LENS defect will not be corrected prior to January 2002, at the earliest.

11 *Bell Atlantic New York 271 Order*, 14 FCC Rcd at 3999, para. 102 (citing *Ameritech Michigan Order*, 12 FCC Rcd at 20659).

practice, BellSouth implements each month only the top thirty (30) change requests from carriers. CLECs must compete with three of BellSouth's internal units to have their CRs included within the top thirty. BellSouth does not permit CLECs to prioritize their change requests or to have all change requests presented and scheduled for a release.[13] Compounding this problem, BellSouth does not give CLECs adequate information regarding the status of pending CRs.

In the CLECs' experience, BellSouth gives preference to its own internal units regarding the processing of CRs. For example, between June 2000 and April 2001, CLECs prioritized 65 requests. To date, only twenty-four percent (24%) of those requests have been implemented, and seventy-three percent (73%) of these requests still are waiting to be committed to a release.[14] Upon information and belief, BellSouth processes a higher percentage of requests from its three internal units than from CLECs.

Even when BellSouth implements a competing carrier's change request, carriers have no control over which of their outstanding requests will be implemented. For example, on August 4, 2000, CompTel member ITC^DeltaCom filed a prioritized CR with the BellSouth Change Control Group (CR 0127) requesting that the pending service indicator be added to the TAG pre-order information.[15] To date, even though this CR is important to a CLEC's ability to compete, more than fourteen months later, ITC^DeltaCom's request awaits release assignment.[16]

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12 *Id.*

13 Exhibit 1: Affidavit of Mary Conquest at 3.

14 *Id.* (also citing KPMG Consulting's observation 86, BellSouth Florida OSS Evaluation, which states that the BellSouth Release Management Team does not provide all prioritized Change Requests to the BellSouth IT Team for development and implementation).

15 *Id.*

16 *Id.*

Further, ITC^DeltaCom has no control over when, or even if, BellSouth will implement this critical CR.

Since CLECs do not have any input into the order in which CRs are implemented, BellSouth may downgrade and delay a critical CR by unilaterally categorizing it as "Minor." For example, in August 1999, AT&T requested a parsed customer service record ("CSR"), and the CLEC community agreed upon the requirements in November 2000. BellSouth, however, assigned this request as a Minor release not to be deployed until January 5, 2002. Further, the proposed delivery does not contain all of the requirements agreed upon by BellSouth and the CLEC community.[17]

BellSouth's change management process is largely non-transparent; BellSouth has maintained total control over this process since its inception. Competing carriers are denied the opportunity to test the change control systems, do not have sufficient input on an ongoing basis into those systems, and are unable to have their change requests processed in an adequate manner. As a result, CLECs are unable to obtain access to the necessary OSS functions in a manner that enables them to compete meaningfully.

C. BellSouth Has Not Implemented Reliable Operations Support Systems

BellSouth does not satisfy Checklist Item ii, because it does not provide competing carriers with adequate OSS. To compete effectively in the local market, competing carriers must have access to adequate information through OSS. To date, competing carriers have experienced repeated and persistent problems with BellSouth's interfaces, including LENS,

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17 *Id.*

TAG, and EDI. Specifically, as CompTel member Birch Telecom, Inc. explains in its comments, often these interfaces are partially degraded or there is a loss of functionality.

The outages BellSouth reports in its Georgia 271 application do not adequately portray the extent of BellSouth's actual outages. William Stacy's affidavit in support of BellSouth's application includes only those outages that are greater than twenty minutes. The affidavit, therefore, does not include the numerous outages that are under twenty minutes in duration.

These repeated outages, as well as the CLECs' inability to rely on OSS interfaces, have an adverse impact on the quality of the services that a CLEC can provide to its customers in Georgia. Each LENS outage interferes with a CLEC's ability to serve new or potential customers. During these outages, CLECs are unable to order resold services, verify customer information, obtain customer service records, or make feature changes. Similarly, EDI outages also interfere with a CLEC's ability to conduct its business, as CLECs rely on EDI to order UNEs.

BellSouth seeks to capitalize on operational and provisioning problems competing carriers experience that are attributable to BellSouth's failure to provide basic wholesale services. Specifically, due to BellSouth's poor and unreliable OSS systems, competing carriers are impaired in their ability to initiate and to provide uninterrupted service to customers. Overall, without a reliable OSS system, competing carriers incur additional expenses, risk missing due dates, and face customer dissatisfaction and churn when consumers blame the competing carrier, not BellSouth for these problems.

Furthermore, BellSouth has used its poor and unreliable OSS systems to its advantage in its efforts to win back customers that have chosen other carriers. As part of

BellSouth's unjust and unlawful marketing (discussed below in more detail), BellSouth representatives make disparaging comments about the service of its competitors. The alleged shortcomings of the competing carrier, however, are due to BellSouth's inadequate OSS, not to the actual conduct of the competing carrier. Until BellSouth's OSS interfaces are reliable, BellSouth cannot be deemed to be in compliance with Checklist Item ii.

II. BELLSOUTH'S RATES FOR SEVERAL UNES AND FOR DUFS FAIL TO SATISFY THE COMMISSION'S TELRIC TEST IN VIOLATION OF CHECKLIST ITEM II.

BellSouth's rates for several UNEs and for DUFs in Georgia and Louisiana are demonstrably inconsistent with the Commission's TELRIC pricing standard. As noted, Checklist Item ii requires BellSouth to provide "non-discriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252(d)(1)."[18] Under section 252(d)(1), which is the pricing prong of Checklist Item ii, a BOC must show that its prices for interconnection and UNEs are based on forward-looking, long-run incremental costs. As demonstrated below, under the Commission's section 271 TELRIC test, the rates for several UNEs and for DUFs in Georgia and Louisiana fail to satisfy the pricing prong of Checklist Item ii.

A. Overview of the FCC's "TELRIC Test" for Checklist Item ii Analysis

In determining whether a BOC's UNE rates satisfy Checklist Item ii, the Commission utilizes its Hybrid Cost Proxy Model ("HCPM" or "Synthesis Model" or "USF Cost Model") to compare UNE costs and rates across states. The operating principle of the FCC's

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[18] 47 U.S.C. § 271(c)(2)(B)(ii).

analysis is that relative UNE rates between states should be consistent with relative cost differences, and that these relative cost differences are reasonably measured by the HCPM. As the Commission has found:

> Our USF cost model provides a reasonable basis for comparing cost differences between states. We have previously noted that while the USF cost model should not be relied upon to set rates for UNEs, **it accurately reflects the relative cost differences among states (emphasis added)**.[19]

In other words, when evaluating UNE rates within the context of a 271 application, the Commission employs its USF cost model to compare UNE rates in the applicant state against rates in other states for which the Commission has found rates to be TELRIC compliant. If the difference in rates is roughly equal to the differences in costs, then the Commission declares the rates to be TELRIC compliant (or consistent with what a TELRIC analysis would produce).

The Commission has relied heavily on its "TELRIC Test" in its recent section 271 orders in Kansas/Oklahoma and Massachusetts. In the Kansas/Oklahoma proceeding, the Commission evaluated the UNE loop rate (benchmarking rates to Texas) using the TELRIC Test, and in the Massachusetts proceeding, the Commission reviewed the loop and switching UNE rates (benchmarking rates to New York). In the Kansas/Oklahoma Order, the Commission expressed concern that the loop rate difference between Oklahoma and Texas was not cost justified:

> In taking a weighted average of loop rates in Oklahoma and Texas, we find that Oklahoma's rates are roughly one-third higher than those in Texas . . . Using a weighted average of wire-center loop costs, the USF cost model indicates that loop costs in SWBT's Oklahoma study area are roughly 23 percent higher than loop costs in its Texas study area. We therefore attribute this portion of the differential, roughly two-thirds of it,

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19 *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell for the Provision of In-Region, InterLATA Services in Kansas and Oklahoma, Memorandum Opinion and Order*, 16 FCC Rcd 6237, 6277, para. 84 (2001) ("*KS-OK 271 Order*").

> to differences in costs. The remainder of the differential, however, is not *de minimis*, and we cannot ignore its presence.[20]

In this statement, the Commission expresses concern that the difference in loop rates is not cost justified, where costs are measured with the HCPM. As a result of these concerns, SBC lowered its loop rates in Oklahoma to be consistent with the TELRIC Test, resulting in approval of its section 271 application:

> The weighted average of the Oklahoma discounted loop rates is roughly 11 percent higher than the weighted average of the loop rates in Texas. This differential between Oklahoma promotional and Texas rates is well within the 23 percent differential suggested by the USF cost model, and so we conclude that the discounted rates meet the requirements of the Act.[21]

In the end, after the voluntary rate reduction in the Oklahoma loop rate, the 11% rate difference was below the 23% cost difference estimated by the HCPM. As a consequence, the Commission deemed the loop rate TELRIC compliant.

During the review of the Massachusetts 271 application, Verizon "voluntarily" reduced its switching rates to a level consistent with that of New York to gain approval for its application. In approving the application, the Commission stated that the New York switching rates were appropriate for Massachusetts because:

> [a] weighted average of Verizon's voluntarily-discounted Massachusetts rates … and corresponding rates in New York shows that rates in Massachusetts are roughly five percent lower than those in New York. A comparison based on the USF model of costs in Verizon's study area in Massachusetts and New York for these same elements indicates that the costs in Massachusetts are roughly the same as the costs in New York.[22]

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20 *Id.* at paras. 83-5 (citations omitted).

21 *Id.* at para. 86 (citations omitted).

22 *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, 9001, para. 25 (2001).

Again, the Commission relied on relative cost difference as measured by the HCPM to evaluate compliance with the pricing prong of Checklist Item ii.

B. BellSouth's Application Fails the TELRIC Test for Certain UNEs in Georgia and Louisiana

Based on the Commission's TELRIC test, if Texas is used as the benchmark state,[23] the rates for unbundled local switching in both Georgia and Louisiana are excessive.[24] In addition, transport rates (transport plus tandem switching) fail the TELRIC test in Georgia, but pass in Louisiana. Appropriate switching and transport rates are critical to competition – especially in serving residential and small business markets. Until such time as the rates for these checklist items are corrected to be compliant with the Commission's TELRIC Test, the Commission should reject the application.[25]

The attached affidavit of George S. Ford provides a rigorous analysis of the UNE rates in Georgia and Louisiana under the Commission's TELRIC Test. As demonstrated in more detail in the Ford Affidavit, although certain UNE rates, such as loops, appear to comply with the

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23 Because the HCPM "accurately reflects the relative cost differences among states," the HCPM also can be used to evaluate UNE rates within a BOC territory or across different BOC regions. Although the Commission in past 271 orders has utilized reference states that are geographically proximate and have a common BOC, those requirements are unnecessary and have no material impact on the validity of the TELRIC Test. The HCPM is designed to fully account for geographic differences across states. If, as the Commission contends, the HCPM reliably detects cost differences across states, then it must hold true across states regardless of geographic proximity, teledensity, or other factors. If not, then the HCPM does not properly account for these relevant factors and consequently cannot be relied upon to measure differences in rates across any pair of states.

24 *See* Exhibit 3: Affidavit of George S. Ford, Z-Tel Communications, Inc. at paras. 3-4.

25 Further, there is growing concern among the competing carriers that the DUF rate in Texas is too high, because it understates the deployment of fiber and other issues. As a result, even when compared to the current Texas rates – which, if anything, exceed TELRIC themselves – the rates for Georgia and Louisiana are excessive. Georgia and Louisiana's rates will be even more excessive in comparison with the rates in Texas as

TELRIC Test, the rates for unbundled local switching in Georgia and Louisiana and transport elements in Georgia fail to satisfy the TELRIC Test:

The TELRIC Test for Georgia[26]				
	P_i/P_R	C_i/C_R	Pass/Fail	Over-Statement of TELRIC
Loop	1.17	1.14	Fail*	2%
End-Office Switching	1.24	1.04	Fail	19%
Transport	1.80	0.90	Fail	100%

The summary data presented above show that the rates for unbundled local switching and transport are materially in excess of TELRIC when Texas is used as the benchmark. As shown in the table, the Georgia UNE rates for loops, end-office switching, and transport are not compliant with TELRIC, if Texas is used as the reference. The loop figure also is greater than TELRIC by two percent, however, this difference may be acceptable under the Commission's *de minimis* exception. By no means, however, do the rates for switching and transport satisfy the Commission's TELRIC test, and therefor these rates cannot satisfy Checklist Item ii.

The rates in Louisiana fair better than the Georgia rates under the Commission's TELRIC test:

The TELRIC Test for Louisiana[27]				
	P_i/P_R	C_i/C_R	Pass/Fail	Over-Statement of TELRIC
Loop	1.13	1.37	Pass	
End-Office Switching	1.18	1.11	Fail	6%
Transport	1.35	2.15	Pass	

the Texas Commission refines its cost analysis and updates Texas rates to reflect newer cost information.

26 A detailed explanation of the data underlying this chart is contained in the Ford Affidavit, attached hereto.

27 A detailed explanation of the data underlying this chart is contained in the Ford Affidavit, attached hereto.

Whereas the loop, switching, and transport rates in Georgia rates fail the TELRIC test in varying degrees, the only Louisiana UNE rate that fails the TELRIC test are those for end-office switching. If, however, the Louisiana rate for end-office switching was reduced by six percent, then it would pass the TELRIC Test with Texas as the reference state. At present, however, the Louisiana rate for end-office switching does not satisfy the TELRIC Test, and therefore, that application does not satisfy Checklist Item ii.

C. BellSouth's DUF Rates Are Inconsistent with TELRIC

BellSouth's rates for DUFs in Georgia and Louisiana are grossly excessive, and should be rejected by the Commission as inconsistent with TELRIC and Checklist Item ii. The DUF charge is a UNE charge assessed on purchasers of unbundled local switching and can constitute a significant portion of the total UNE cost of the combination of UNEs known as the UNE Platform. The cost of generating a DUF should not vary significantly by BOC and state. Generating a DUF is a software and OSS capability, which cost should not vary significantly because the development of software design and OSS capabilities are undertaken on a national, indeed, international basis. This is particularly true for BellSouth, as BellSouth expressly states that it uses the same OSS throughout its operating territory.

The DUF charge is typically based on a per-message (per-call) basis. On average, a residential or small business customer will make 425 calls per month.[28] In Texas, the DUF charge is $0.003 per message, producing an average DUF charge per customer per month of

[28] Message statistics are provided in the HCPM output files (Input worksheet Cells C21, C22, C23, and C24). This estimate of calls is consistent with Z-Tel billing data from Verizon in New York (about 400 calls per customer month).

$1.28. Similarly, in New York, the monthly DUF charge for 425 calls is about $0.85.[29] In Louisiana, until recently, the DUF charge was $0.005 per message for an average monthly charge per customer of $2.13. The DUF charge in Georgia, alternately, is $5.95 per customer month – 365% greater than in Texas, and 600% greater than in New York.[30]

Table 4. DUF Charges+ by State[31]

State	DUF/message	State	DUF/message
GA	0.014	TX	0.003
LA	0.014	NY	0.002
TN	0.003		

Notably, recent cost proceedings in Louisiana, Florida and Tennessee changed the DUF rates in those state. In Tennessee, the DUF rates were set at $0.003 – a level more consistent with the rates in New York and Texas.[32] In Louisiana, the commission increased the DUF rate to $0.014 per message, for an average monthly cost of $5.95 per customer, in parity with the unreasonably high rates in Georgia.

A straight TELRIC Test for DUF rates is difficult because there is no rate element in the HCPM comparable to the DUF. At the same time, however, BellSouth uses the same systems to generate DUFs throughout its region, and the rates for the DUF set by the Tennessee Commission are generally comparable to other states that have received section 271 authorization, including New York and Texas. Indeed, since computer processor costs do not vary by state or by ILEC, there seems little justification for any material differences in DUF rates

29 The estimate for New York is based on the recommended rates from the open cost proceeding in that state.

30 Exhibit 3: Affidavit of George S. Ford at para. 28.

31 *Id.*

32 The state commission in Florida also modified the DUF rate by increasing the DUF to $0.014 per message, for an average monthly cost of $5.95 per customer.

across the county. Certainly, however, rate differences of 600% in the forward-looking costs of efficient providers should raise serious concerns about TELRIC compliance. Excessive DUF charges have a significant impact on the ability of CLECs to compete, especially for CLECs, such as Z-Tel Communications, that serve residential consumers. An additional $2-$5 per month for a DUF above the cost for other UNEs can destroy a business case for entry.[33] The Commission simply should not grant a section 271 application while this important competitive issue persists. At a minimum, prior to granting 271 approval, the Commission should require BellSouth to reduce its DUF rates to levels consistent with the rate in Texas and Tennessee, $0.003 per call.[34]

III. BELLSOUTH'S UNLAWFUL WINBACK ACTIVITIES PRECLUDE A FINDING BY THIS COMMISSION THAT THE PUBLIC INTEREST WOULD BE SERVED BY GRANTING BELLSOUTH'S APPLICATION.

BellSouth has engaged in unlawful and anticompetitive winback efforts that directly undermine local competition in Georgia and Louisiana. Therefore, it is not in the public interest for the Commission to grant BellSouth's application. Section 271(d)(3)(C) of the Act prohibits the Commission from granting a section 271 application unless it finds that "the

33 Exhibit 3: Affidavit of George S. Ford at para. 31.

34 Even after reducing its DUF charges, BellSouth's DUF rates may not conform to TELRIC principles. The Commission should encourage states to closely evaluate these charges in future proceedings. BellSouth requires DUF information to bill for UNEs and relies on DUF information for its own operations. Moreover, BellSouth provides DUF information to independents (in at least some of its states) without charge. It is far from clear whether any charge unique applied to CLECs is appropriate, nor is it clear that BellSouth has included total demand – including its own use of DUF information to bill its end users – in rate development. Consequently, although BellSouth's DUF charges clearly must be reduced to make them plausibly TELRIC-compliant, further investigation and reduction will be necessary to make such rates TELRIC-accurate.

requested authorization is consistent with the public interest."[35] This public interest determination is an independent test that must be satisfied separate and apart from the fourteen-point checklist. In evaluating whether BellSouth's 271 application is in the public interest, the Commission must consider whether approval of the 271 application would foster competition in both the local and interLATA markets. As illustrated below, throughout the BellSouth region, including Georgia and Louisiana in particular, BellSouth is purposefully preventing competitive entry in the local market through a pattern and practice of unlawful winback efforts.

A. BellSouth Illegally Uses Proprietary Carrier and Customer Information in its Marketing Efforts.

Throughout its region, BellSouth has engaged in efforts to "win back" customers who either were, or have taken steps to become, customers of competing carriers in violation of the Act and FCC rules and orders. The Commission repeatedly has stated that carrier change information, such as a preferred carrier change request submitted by a competing carrier, is carrier proprietary information, and therefore, under section 222(b) of the Act, carriers are prohibited from using this information for marketing purposes.[36] Despite this explicit prohibition on the use of carrier change information, BellSouth unlawfully uses proprietary carrier and customer information – gained by virtue of its position as the incumbent carrier and

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35 47 U.S.C. § 271(d)(3)(C). *See Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd 18354, 18360, para. 9 (2000) (stating that the Commission must not approve a 271 application unless it finds that the BOC's entry into in-region, interLATA market is "consistent with the public interest, convenience, and necessity.").

36 *See Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance, Second Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 1508, 1572, para. 106 (1998) (stating that "carrier change information is carrier proprietary information" and that pursuant to section 222(b) of the Act, carriers are prohibited from using this information for marketing purposes.).

provider of wholesale inputs and services – and shares this information with its retail operations in order to retain customers that otherwise would migrate to a competing carrier. Specifically, upon learning of a customer's imminent cancellation of service, such as through a preferred carrier change order, BellSouth routinely contacts the customer prior to the execution of the change order to attempt to retain or "win back" that customer.[37] During these winback attempts, BellSouth maliciously disparages the competing carrier's operations and quality of service.

As one example, in March 2001, CompTel member e.spire Communications, Inc. ("e.spire") executed a contract with a customer to provide telecommunications services in Georgia.[38] After the parties executed the contract, but before the customer began receiving service, BellSouth contacted the customer to market BellSouth's own services. Specifically, during a site visit to a different e.spire customer and in the presence of an e.spire employee, a BellSouth employee telephoned a BellSouth Account Manager, identified e.spire's customer, and stated that the customer was leaving BellSouth. BellSouth then contacted e.spire's customer; two days later the customer terminated its contract with e.spire.[39]

Furthermore, on numerous occasions, BellSouth's sales personnel have represented to e.spire's customers that e.spire is "going out of business." In June 2001, at least two e.spire customers in Alabama informed e.spire that a BellSouth sales person, contacted the companies and made representations that e.spire "will cease operations by the end of June 2001,"

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37 *See* Exhibit 4: Affidavit of James C. Falvey, e.spire Communications, Inc., on behalf of the Southeastern Competitive Carriers Association, filed in the matter of *BellSouth Telecommunications, Inc. Entry into InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 6863-U, at para. 4 (July 13, 2001) (stating that "[a]fter e.spire secures a new customer and before the customer's services are converted to e.spire, BellSouth has contacted on at least several occasions the e.spire customer and convinced them to remain with BellSouth or to switch to BellSouth).

38 Exhibit 4: Affidavit of James C. Falvey at para. 6.

39 *Id.*

an accusation now known to be false. This email boasts that he (the BellSouth sales person) can "install complex new service faster than anyone else" and that he knows "shortcuts that nobody else knows."[40]

As yet another example, in an attempt to gain a customer of ITC^DeltaCom, BellSouth sent an email to that customer: (1) asserting that ITC^DeltaCom has lost money for the past five years; (2) questioning whether ITC^DeltaCom would remain financially competitive; (3) and insinuating that ITC^DeltaCom might not be responsive to local loop troubles.[41] BellSouth's communication with the e.spire and ITC^DeltaCom customers were not isolated incidents. Instead, BellSouth has engaged in a pattern and practice of similar anti-competitive and illegal winback efforts throughout Georgia.

B. BellSouth Violates Interconnection Agreements and Takes Advantage of its Role as the Wholesale Provider when Engaging in Winback Efforts.

In Georgia and Louisiana, BellSouth is the primary – and in many circumstances, only – wholesale vendor for UNEs and resale. BellSouth also uses its position as a wholesale provider to attempt to win back the customers of its competitors. For example, in March 2001, ITC^DeltaCom received several reports from customers stating that BellSouth representatives contacted ITC^DeltaCom customers directly and quoted substantial charges for installing telecommunications services. As one example, on March 13, 2001, a BellSouth representative contacted a potential ITC^DeltaCom customer, and told him that BellSouth would complete the

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40 Exhibit 5: Email from BellSouth to e.spire customer (June 5, 2001). BellSouth engages in unlawful winback activities throughout its entire region. Although Redman made the comments to a customer in Alabama, his comments go to the heart of the problem, and are precisely the type of statements made by BellSouth representatives throughout the BellSouth region.

41 *See* Exhibit 6: Email from BellSouth to Potential ITC^DeltaCom customer (Mar. 13, 2001).

necessary construction for free if the customer was a BellSouth customer, but since he is an ITC^DeltaCom customer, he would have to incur the construction expenses.[42] In addition to the malicious intent of the call, BellSouth's direct contact with the customer violates the terms of the interconnection agreement between ITC^DeltaCom and BellSouth, which requires BellSouth representatives to contact ITC^DeltaCom, not the customer, regarding ITC^DeltaCom's orders.

BellSouth apparently is using the proprietary information obtained from carriers through the BellSouth wholesale unit for the benefit of its own retail units. As KMC Telecom reports in its comments, BellSouth's winback activities follow almost immediately the submission by KMC of orders to switch end user customers. KMC Telecom also is experiencing BellSouth's refusal to remove Presubscribed Local Carrier freezes on end user accounts, thus preventing customers from switching to KMC.

To compound these illegal winback efforts, BellSouth offers special "promotional" offers to its winback customers at significant discounts. In some instances, BellSouth will offer winback customers a special promotional rate for 90 days, with an option to continue that same rate for three years.[43] These "promotional" rates, which are available only to winback customers, substantially hinder the ability of competing carriers to compete in the marketplace and harm the public interest by limiting the number of options available to consumers, particularly in rural areas. Due to the already high cost of the UNE platform in zones 2 and 3 in Georgia and Louisiana, competing carriers are unable to compete with BellSouth's promotional rates, which offer a standard (up to 20%) discount on the retail price regardless of the zone and the rate group served.

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42 Exhibit 7: Affidavit of Neil C. Thompson (Mar. 22, 2001).

43 *See, e.g.,* Exhibit 4: Affidavit of James Falvey at para. 8 (stating that an e.spire sales person had learned that BellSouth offered a 20% discount to customers if they returned to BellSouth).

C. BellSouth's Winback Activities Are Being Investigated Throughout its Region.

BellSouth's winback efforts already have triggered investigations in Alabama, Florida, Georgia, and South Carolina.[44] The Georgia Public Service Commission ("Georgia Commission") recently adopted an order prohibiting BellSouth from engaging in winback activities for a seven-day period after a customer switches local providers.[45] Additionally, as a condition to recommending BellSouth's 271 application, the Louisiana Public Service Commission prohibited BellSouth from engaging in any winback activities for a period of seven days once a customer switches to another local exchange provider, including (a) prohibiting BellSouth's wholesale divisions from sharing information with its retail divisions such as notice that certain end users have requested to switch local service providers, and (b) prohibiting BellSouth from including any marketing information in its final bill sent to customers that have switched providers.[46] Moreover, unable to deter BellSouth's unlawful winback activities, carriers have filed formal complaints against BellSouth both before this Commission and the states.[47]

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44 *See Investigation of BellSouth Telecommunications "Win back" Activities, Procedural and Scheduling Order*, Georgia Docket No. 14232-U (July 23, 2001); *BellSouth Full Circle Promotion, Generic Proceeding Considering the Promulgation of Telephone Rules Governing Promotions*, Alabama Public Service Commission, Docket Nos. 27989 and 15957 (Apr. 2, 2001); Letter from Rick Moses, Chief, Bureau of Service Quality, Florida Public Service Commission to Nancy H. Sims, BellSouth Telecommunications, Inc. (May 2, 2001); *see also Investigation into Allegations of Anticompetitive Behaviors and Practices of BellSouth Telecommunications, Inc.*, Florida Public Service Commission Docket No. 00-1077-TL.

45 *Investigation of BellSouth Telecommunications "Win back" Activities, Procedural and Scheduling Order*, Docket No. 14232-U (July 23, 2001).

46 *Consideration and Review of BellSouth Telecommunications, Inc.'s Pre-Application Compliance with Section 271 of the Telecommunications Act of 1996 and Provide a Recommendation to the Federal Communications Commission Regarding BellSouth Telecommunications, Inc.'s Application to Provide interLATA Services Originating in-Region,* Docket No. U-22252(E), Order, para. 3 (Sept. 21, 2001).

47 On October 2, 2001, e.spire filed a formal complaint with the Commission. The Enforcement Bureau subsequently dismissed the complaint without prejudice on procedural grounds, and requested that the parties engage in mediation before re-filing. Carriers also filed a complaint with the Public Service Commission of South Carolina

The seven-day waiting periods adopted by the Georgia and Louisiana commissions are insufficient to protect competing carriers from BellSouth's unlawful winback efforts. As an initial matter, the seven-day period adopted in Georgia only is an interim measure pending Georgia's investigation into BellSouth's activities; thus, there is no guarantee that the Georgia commission will mandate a permanent block on BellSouth's marketing efforts for seven days after the customer's service is turned on. Further, the seven-day periods in both Georgia and Louisiana do not begin to run until the customer's service actually is turned on. As discussed above, however, BellSouth unlawfully uses carrier and customer information to market customers after the customer has submitted a carrier change request but *before* BellSouth implements the carrier change. Since the state actions do not address the period before the customer's service is activated, and since BellSouth already blatantly disregards section 222 of the Act and the Commission's rules and orders, the state protections clearly are insufficient to prevent BellSouth's unlawful activity.

BellSouth's repeated and persistent unlawful and anti-competitive winback efforts demonstrate that it is not in the public interest to grant BellSouth's application. Section 222(b) of the Act restricts BellSouth from using proprietary carrier and customer information to market customers, yet BellSouth blatantly disregards the Act as well as the Commission's rules and orders in its marketing efforts. BellSouth's efforts directly undermine the ability of carriers to sustain entry in the local markets in both Georgia and Louisiana, and therefore the Commission should deny the application.

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challenging BellSouth's winback activities. On October 16, 2001, the Public Service Commission of South Carolina found in favor of the complainant and ordered BellSouth to cease marketing activities for 10 days after the customer switch. Although the Public Service Commission of South Carolina has voted on the complaint, the final order in that proceeding has not yet been released.

IV. CONCLUSION

For the foregoing reasons, BellSouth's application to provide in-region interLATA services in both Louisiana and Georgia must be denied.

Respectfully submitted,

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October 22, 2001

CERTIFICATE OF SERVICE

I, Alice Burruss, certify that on this 22nd day of October, 2001, I served copies of the foregoing Comments of the Competitive Telecommunications Association in the Georgia and Louisiana 271 Proceeding by hand on the following:

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Alice Burruss

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DC01/KASHJ/164137.1

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

In the Matter of	)	
	)	
Application of BellSouth Corporation	)	
To Provide In-Region, InterLATA	)	Docket No. 01-277
Long Distance Services Under Section	)	
271 of the Telecommunications Act of 1996	)	

AFFIDAVIT OF MARY CONQUEST
ON BEHALF OF ITC^DELTACOM COMMUNICATIONS, INC.
D/B/A ITC^DELTACOM

I, Mary Conquest, being of lawful age and duly sworn upon my oath, depose and state:

INTRODUCTION

My name is Mary Conquest. I am an independent contractor for ITC^DeltaCom Communications, Inc., ("ITC^DeltaCom"), and my business address is 600 Boulevard South, Huntsville, Alabama 35802. I received a masters certificate from George Washington University for project management. I have been employed in the telecommunications industry for over thirty-five years. I began my career with Southern Bell in 1966. I held various positions within BellSouth over that time period as an employee and as a consultant. My last position with BellSouth was as a Certified Project Manager in IT. I also have been engaged as a consultant to BellSouth in the area of billing. As part of the billing assignment, I supported their development of J Billing ("UNE-P") and Single C

Order Process. I retired from BellSouth in December of 1996. My consultant assignment for BellSouth occurred between 1997-1999. As a former manager of BellSouth's Regional Service Order Support (RSOS) staff, I am very familiar with BellSouth's legacy systems. I was an ITC^DeltaCom employee between December of 1999 and September of 2000. In October of 2000, I became an independent consultant to ITC^DeltaCom in the areas of OSS – ordering systems and gateway support to ILECs, including but not limited to BellSouth.

SUMMARY

The areas of concern that ITC^DeltaCom has regarding BellSouth performance and OSS access fall primarily into two categories:

- the disparity of BellSouth's OSS Interfaces
- ITC^DeltaCom's overall concerns regarding Prioritization of Change Requests (CR's)

I. BELLSOUTH'S OSS INTERFACES DISCRIMINATORY

BellSouth retail personnel have access to OSS systems which indicate pending activity against an account. The indicator "PSO" pending service order is used to advise activity is scheduled to occur. Competing carriers, such as ITC^DeltaCom, however, do not have access to this same indicator through any of the OSS interfaces. ITC^DeltaCom filed with the BellSouth Change Control group a request (CR 0127) on August 4, 2000, requesting this data to be added to the TAG pre-order information. Prior to bell's implementation of ENCORE Release 9.4 on July 28, 2001, LENS was able to present this flag.

Currently, the LENS defect is scheduled to have the functionality returned on January 5, 2002, in Release 10.3. ITC^DeltaCom's request to have this information added to TAG, which is prioritized, however, still awaits release assignment. The inability to know orders are pending against the account costs the CLEC time in clarification, error resolution and customer dissatisfaction.

II. THE CHANGE CONTROL PROCESS IS FLAWED

The process for prioritizing Change Requests (CR's) and the slotting of CR's for a Release Package at BellSouth is lacking control and definition. BellSouth refuses to disclose how a release is packaged. Minor versus Major release definitions are loosely applied. An example is the Parsed CSR, which was requested by AT&T on 8-12-99. The CLEC community agreed upon requirements in November 2000. This is a large programming effort for CLECs, yet it has been assigned a Minor release to be deployed 1-05-02. Also it should be noted the delivery does not contain all the requirements agreed upon by BellSouth and the CLEC community. In Florida, KPMG has posted Observation 86, which further supports my comments that the process is flawed. Attached is EXHIBIT 1, the KPMG Observation #86. Again BellSouth claims programming hours and release capacity are proprietary. CLEC's do not have the ability to have all requests presented and scheduled for a release. AT&T's analysis shows that 65 requests were prioritized by the CLECs between 6-28-00 and 4-

25-01, of which only 24% were implemented. 73% are still waiting to be committed to a release.

CONCLUSION

I strongly recommend on behalf of ITC^DeltaCom, that BellSouth be required to provide to the CLEC's a metric which clearly establishes programming hours available for Major and Minor Releases. And I further recommend that BellSouth be penalized for taking functionality away from the CLECs, which was retained by **their own retail** organizations.

I declare under the penalty of perjury that the facts stated herein are true and correct, to the best of my knowledge, information and belief.

Mary Conquest

Mary Conquest
IT Development

SWORN TO and subscribed
before me this 22nd day
of October, 2001.

Nanae S. Edwards
Notary Public

My Commission Expires: 2/15/2004

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

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

AFFIDAVIT OF
GEORGE S. FORD, Z-TEL COMMUNICATIONS, INC.

I. Qualifications

1. My name is George Ford. My business address is 601 South Harbour Island Boulevard, Tampa, Florida 33602. I am the Chief Economist of Z-Tel Communications, a CLEC that offers competitive local and long distance exchange services to residential consumers in more than thirty states.

2. In 1994, I received a Ph.D. in Economics from Auburn University where my graduate work focused on the economics of industrial organization and regulation with course work emphasizing applied price theory and statistics. In that same year, I became an Industry Economist at the Federal Communications Commission in the Competition Division of the Office of the General Counsel. The Competition Division of the FCC was tasked with ensuring that FCC policies were consistent with the goals of promoting competition and deregulation across the communications industries. In 1996, I left the FCC to become a Senior Economist at MCI Worldcom where I was employed for nearly four years. While at MCI Worldcom, I filed declarations at both federal and state regulatory agencies and performed economic studies on a variety of topics. I have maintained an active research agenda on communications issues and have published research papers in a number of academic journals *Journal of Law and Economics*, the *Journal of Regulatory Economics*, the *Review of Industrial Organization*, among others. I am a contributing author to the *International Handbook on Telecommunications Economics*. I regularly speak at conferences, both

at home and abroad, on the economics of telecommunications markets and regulation.

II. Purpose

3. The purpose of this statement is to evaluate the UNE rates in Georgia and Louisiana using the methodology set forth by the Federal Communications Commission ("FCC") in its Oklahoma-Kansas and Massachusetts 271 Orders. This methodology, which might be called the "TELRIC Test", evaluates the TELRIC compliance of UNE rates by comparing the relative costs of providing service across states. Given its prior use in earlier 271 proceedings, the FCC's TELRIC Test is a reasonable tool by which to evaluate whether the UNE rates in Georgia and Louisiana are TELRIC compliant. My analysis indicates that the UNE rates for loops in both states pass the FCC's TELRIC Test, if Texas is used as the reference state. Alternately, switching rates fail in both states, and fail by a large margin in Georgia. Transport rates (transport plus tandem switching) fail the TELRIC test in Georgia, but pass easily in Louisiana. With respect to these principal components of the UNE-Platform, the switching and transport rates in Georgia warrant careful scrutiny by the Commission and, in my opinion, should be reduced.

4. In addition to my TELRIC analysis of UNE rates for loops, switching, and transport in Georgia and Louisiana, I evaluate the TELRIC compliance of UNE rates for the daily usage file (DUF) in both states. While ignored in earlier TELRIC test evaluations by the Commission, the DUF amounts to a substantial portion of UNE-P costs, particularly in Georgia and Louisiana. DUF charges amount to more than 20% of the costs of the (principal elements of the) UNE-Platform in Georgia and Louisiana, but only 6% of such costs in Texas. The current DUF rates in Georgia and Louisiana are exceedingly high, and the Commission should reject BellSouth's application until the DUF rates are reduced to levels more consistent with TELRIC.

III. The TELRIC Test for Georgia and Louisiana

The Commission's Use of the TELRIC Test

5. The pricing prong of checklist item two requires a BOC to demonstrate that it provides UNEs in accordance with section 252(d)(1) of the Act.[1] For section 271 purposes, a BOC must show that its prices for interconnection and unbundled network elements are based on forward-looking, long-run incremental costs. In determining whether a BOCs UNE rates satisfy this standard, the FCC utilizes its Hybrid Cost Proxy Model ("HCPM" or "Synthesis Model" or "USF Cost Model") to compare UNE costs and rates across states. The operating principle of the FCC's analysis is that relative UNE rates between states should be consistent with relative cost differences, and that these relative cost differences are reasonably measured by the HCPM. As the FCC indicated:

> Our USF cost model provides a reasonable basis for comparing cost differences between states. We have previously noted that while the USF cost model should not be relied upon to set rates for UNEs, it accurately reflects the relative cost differences among states (emphasis added).[2]

6. When evaluating UNE rates within the context of a 271 application, the Commission employs its USF cost model to compare UNE rates in the applicant state with rates in other states for which the Commission has found rates to be TELRIC compliant. If the difference in rates is roughly equal to the differences in costs, then the FCC declares the rates to be TELRIC compliant (or consistent with what a TELRIC analysis would produce).

7. For example, the Commission applied its "TELRIC Test" in the orders approving 271 applications in Oklahoma/Kansas and Massachusetts. In Oklahoma, the FCC evaluated the UNE loop rate, whereas in Massachusetts the loop and switching UNE rates were scrutinized with the TELRIC Test. For Oklahoma, the FCC expressed concern that the loop rate difference between Oklahoma and Texas was not cost justified:

> In taking a weighted average of loop rates in Oklahoma and Texas, we find that Oklahoma's rates are roughly one-third higher than those in Texas (ft. omitted). ... Using a weighted average of wire-center loop costs, the USF cost model indicates that loop costs in SWBT's Oklahoma study area are roughly 23 percent higher than loop costs in its Texas study area (ft.

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[1] 47 U.S.C. § 271(c)(2)(B)(ii).

[2] FCC KS-OK 271 Order, ¶ 84.

> omitted). We therefore attribute this portion of the differential, roughly two-thirds of it, to differences in costs. The remainder of the differential, however, is not *de minimus*, and we cannot ignore its presence. [3]

In this statement, the FCC expresses concern that the difference in loop rates is not cost justified, where costs are measured with the HCPM.

8. During the 271-review process, SBC reduced its loop rates in Oklahoma. With respect to the reduced loop rates in Oklahoma, the FCC concluded:

> The weighted average of the Oklahoma discounted loop rates is roughly 11 percent higher than the weighted average of the loop rates in Texas. This differential between Oklahoma promotional and Texas rates is well within the 23 percent differential suggested by the USF cost model, and so we conclude that the discounted rates meet the requirements of the Act.[4]

After the voluntary rate reduction in the Oklahoma loop rate, the 11% rate difference was below the 23% cost difference estimated by the HCPM. As a consequence, the FCC deemed the loop rate TELRIC compliant.

9. During the review of the Massachusetts 271 application, Verizon "voluntarily" reduced its switching rates during the Massachusetts 271 proceeding to a level consistent with that of New York. The FCC concluded that the New York switching rates were appropriate for Massachusetts because:

> [a] weighted average of Verizon's voluntarily-discounted Massachusetts rates ... and corresponding rates in New York shows that rates in Massachusetts are roughly five percent lower than those in New York. A comparison based on the USF model of costs in Verizon's study area in Massachusetts and New York for these same elements indicates that the costs in Massachusetts are roughly the same as the costs in New York.[5]

Again, the relative cost difference as measured by the HCPM was used to evaluate the relative rate differences across states.

10. The TELRIC test is particularly useful when UNE rates are established in an ad hoc fashion, possibly as part of a carrier-to-carrier or carrier-to-regulator negotiation. However, because the HCPM "accurately reflects the relative cost differences among states," the HCPM also can be used to evaluate UNE rates

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[3] FCC KS-OK 271 Order, ¶ 83-5.

[4] FCC KS-OK 271 Order, ¶ 86.

[5] FCC Massachusetts 271 Order, ¶ 25.

determined in a formal state cost proceeding. Either the HCPM "accurately reflects relative cost differences" or it does not, and the Commission's use of the TELRIC test, based on the HCPM, in numerous proceedings indicates that the Commission believes that the model does accurately reflect cost differences. Applying the TELRIC test only to rates determined in an ad hoc fashion seems to be an arbitrary and capricious limitation of the test's applicability.

11. In addition, any argument that reference states be geographically proximate or share a common BOC heritage is groundless. While the Commission has in past 271 orders noted its preference for reference states that are geographically proximate and have a common BOC, those requirements are unnecessary and have no material impact on the validity of the TELRIC Test. The HCPM is designed to fully account for geographic differences across states. If, as the FCC contends, the HCPM reliably detects cost differences across states, then it must do across any potential pair of states regardless of geographic proximity, teledensity, or other factors. If not, then the HCPM does not properly account for these relevant factors and consequently cannot be relied upon to measure differences in rates across any pair of states.

12. Different BOC heritage or different rate structures is unproblematic for most UNEs. Loops are defined in a sufficiently homogeneous manner across BOCs so that direct comparisons are legitimate. Using publicly available usage and ARMIS data, different rate structures can be normalized for comparison purposes. For example, sufficiently general indicia of switching and transport costs and rates can be constructed so that valid comparisons can be made (as I have done here). Thus, there is no requirement that a geo-proximate or common BOC reference state be used.

The TELRIC Test Methodology

13. Using the language from the FCC's 271 Orders, the TELRIC Test can be defined more formally as follows. Let the cost for an unbundled element in the subordinate or applicant state i be C_i and in some reference state be C_R. Further, let the TELRIC loop costs determined by the state commissions be P_i and P_R, respectively. While the HCPM is used to produce values for C_i and C_R, the FCC stated that the estimates from the HCPM do not equal necessarily the absolute level of TELRIC costs, i.e., $P_i \neq C_i$ and $P_R \neq C_R$. However, the agency does contend that the HCPM's output accurately reflects the relative cost differences among states. Thus, the TELRIC Test is defined as

$$\frac{P_i}{P_R} \leq \frac{C_i}{C_R}, \tag{1}$$

a condition which simply indicates that the ratio of UNE rates must be (approximately) equal to or less than the ratio of HCPM costs.

14. Though not indicated in Equation (1), it is possible to pass the TELRIC Test if the ratio of prices is only marginally higher than the ratio of costs. As the FCC noted in the Oklahoma-Kansas 271 Order, it was disturbed by the fact an 8% reduction [1 – 1.23/1.33] in the Oklahoma loop rate was required to satisfy the TELRIC test and this reduction was "not de minimus." It is possible, however, that a smaller difference would not render a UNE rate out of compliance. Thus, at a minimum, any difference requiring an 8% or larger reduction in the UNE rate to satisfy the TELRIC Test must be a meaningful difference requiring further scrutiny. The actual level of "de minimus" is probably lower than what an 8% reduction would remedy, but to date the FCC has offered no further information as what is the "de minimus" difference. It may be the case that the *de minimus* standard is best determined on a case-by-case basis, because a number of factors may be relevant to its determination.

15. To illustrate the application of Equation (1), consider the Oklahoma and Texas loop comparison. Prior to the arbitrary reduction in Oklahoma loop rate, the FCC determined that the UNE rates in Oklahoma were "roughly one-third higher than those in Texas," implying that P_i/P_R is 1.33. The HCPM indicated, however, that loop costs are only "23 percent higher than loop costs" in Texas, implying that C_i/C_R is 1.23. Obviously, 1.33 is not less than or equal to 1.23, leading the FCC to express concern over the initial Oklahoma loop rate. Once the Oklahoma loop rate was reduced, the ratio of prices was only 1.11, which is below the cost ratio of 1.23. Thus, the reduced Oklahoma loop rate passed the TELRIC Test.

Data

16. Table 1 summarizes the HCPM Cost estimates and UNE rates for Texas (the reference state), Georgia, and Louisiana. Estimates and rates for loops, end-office switching (port and usage), and transport are provided.[6] HCPM estimates are

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[6] I am assuming, for present purposes, that the Texas UNE rates are TELRIC compliant. However, there are a number of reasons to suspect that the Texas UNE rates are in excess of TELRIC. As a result, even when compared to the current Texas rates – which, if anything, exceed TELRIC themselves – some of the UNE rates in Georgia and Louisiana are excessive. This can only