

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Performance Measurements and Standards For Interstate Special Access Services)	CC Docket No. 01-321
)	
Petition of US West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate US West's Provision of Federally Tariffed Interstate Services)	CC Docket No. 00-51
)	
Petition of Association for Local Tele- Communications Services for Declaratory Ruling)	CC Docket Nos. 98-147, 96-98, 98-141
)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended)	CC Docket No. 96-149
)	
2000 Biennial Regulatory Review- Telecommunications Service Quality Reporting Requirements)	CC Docket No. 00-229
)	
AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self-Executing Remedies) Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services)	RM 10329

COMMENTS OF BELL SOUTH CORPORATION

BELL SOUTH CORPORATION

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BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries ("BellSouth"), hereby submits its comments in response to the *Notice of Proposed Rulemaking* ("Notice") released on November 19, 2001 in the above referenced proceeding.¹

¹ *In the Matter of Performance Measurements and Standards for Interstate Special Access Services, et al.*, CC Docket No. 01-321, *Notice of Proposed Rulemaking*, FCC 01-339 (rel. Nov. 19, 2001) ("Notice").

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I. INTRODUCTION AND SUMMARY

1. Competition is the underpinning of the Telecommunications Act of 1996. To achieve this goal, the Commission has long recognized that its actions must streamline regulation, remove regulatory barriers and increase consumer choice. The fundamental question faced by the Commission in this proceeding is whether special access performance measures would contribute to the achievement of this competitive objective. The answer is that such measures would not advance competitive goals.

2. Adoption of performance measures for interstate special access operates at the polar opposite of the types of Commission actions that are necessary for competition to flourish. Rather than streamlining regulation, mandated performance measures increase regulation in an unprecedented way. They likewise increase regulatory barriers because the uneven application of such measures has disruptive market effects. Finally, consumer choice is stunted. Rather than market mechanisms defining the price and quality of special access services, mandated performance measures substitute regulatory fiat for market-based selection.

3. Since the time that interstate access charges were first conceived and implemented, the Commission has refrained from interfering with LEC operations or engaging in micromanagement of a LEC's business. As was the case then, there continues to be today a wide variation in the way in which LECs provide their services. Never before has the Commission attempted to homogenize LEC operations and curtail the ability of a LEC to make decisions that make sense in light of its specific circumstances.

4. At a time when the market was far less competitive than it is today, the Commission did not engage in the type of restrictive regulation that performance measures represent. The Commission recognized that whether or not a LEC was providing service in an unreasonable

manner was a question that required an analysis of many facts. The Commission could not fulfill its statutory obligation by adopting a set of rigid requirements and holding carriers to a strict liability standard for any deviation. There is a wide range of practices that can satisfy the statute's just and reasonable standard. The Commission cannot act arbitrarily to truncate the statutory standard.

5. To suggest, as the *Notice* does, that the benefit of imposed performance measures makes the provisioning process transparent misses the point. Customers are fully aware of how special access is provided. Transparency is not a real benefit. The proponents of performance measures are trying to goad the Commission to act in a manner that it has consistently avoided in the past. On the thinnest of allegations, the Commission is supposed to adopt an extreme regulatory response and pursue a course that is more intrusive than that ever followed by the Commission since access charges were first introduced in 1984.

6. The competitive environment faced by LECs in the provision of special access makes the contemplated increased regulation of special access through the enactment of performance measures wrong. BellSouth competes in the marketplace and serves a diverse customer body. Not all customers place the same emphasis or value on provisioning metrics. There are many combinations of attributes that make up the price/performance continuum. The regulatory focus on performance measures elevates provisioning above all other attributes. The regulatory imposition of performance measures would force LECs to shift resources to these elements and potentially have to sacrifice other service elements that are also important to customers.

7. The regulatory mandate of special access performance measures would not be competitively neutral and would distort the interaction of competitive forces in the marketplace. ILECs and others (if any) subject to the performance measure regulations would be unable to

compete efficiently against providers of transport services not subject to such heavy-handed regulation. Subject carriers would find themselves with a cost structure that is not competitive in the marketplace. More importantly, the competitive disadvantage resulting from this aberrant cost structure would not be of the carriers making or control.

8. The most puzzling aspect of proposed performance measures for special access is that such a regulatory approach represents a significant departure from the competitive policies and objectives to which the Commission has steadfastly adhered over the last three decades. The Commission has sought to foster competition in the telecommunications market. Its pro-competitive policy has been comprehensive, enveloping all industry participants. Contrary to the implications here, the Commission's pro-competitive policy does not exclude ILECs. The Commission, recognizing the success its policies have had in bringing competition to the interstate access market, has granted ILECs pricing flexibility. The essence of pricing flexibility is to permit ILECs to negotiate contract offerings that have differing mixes of price/performance characteristics based on customer demand. While this mechanism is well suited to address market demand for enhanced performance levels associated with special access services, such market-based, competitive solutions are incompatible with the type of regulatory-imposed performance measures that are being contemplated here.

9. Pricing flexibility aside, there is no reason for the Commission to introduce a level of regulation that has never been imposed since interstate access charges were first implemented after the break-up of the Bell System. Some proponents of performance measures have argued that such measures are necessary to prevent discrimination between carrier customers and end user customers. These arguments are bogus. It is specious to suggest that ILECs can or do engage in conduct that favors end user special access customers. Such a discriminatory plan

does not make any sense. The largest special access customers are carriers. It would be contrary to the financial interest of the ILEC to favor its end user customers over its carrier customers. Apart from the fact that there is no economic incentive to engage in such discriminatory conduct, such conduct could not escape detection.

10. Other proponents of special access performance measures argue that such measures are necessary in order for CLECs to compete with ILECs for local services. This argument attempts to equate special access services with UNEs. Special access services are not UNEs and they are not necessary for CLECs to compete with ILECs. A report prepared by the Eastern Management Group, which is attached to these comments, concludes that purchasers of special access in BellSouth's territory are highly likely to have multiple choices of competitive alternatives to BellSouth's special access services.

11. It would be poor public policy for the Commission to interfere with the operation of economic forces in the determination of price/quality attributes of special access. The Commission cannot legislate an outcome that is inconsistent with the market outcome without injuring competition and competitors. Mandated performance measures for special access epitomize regulation at its worst.

12. While it is clear that the Commission should not adopt special access performance measures, another line of inquiry in the *Notice* relates to the Commission's authority to adopt such measures. The Commission has jurisdiction over interstate special access services, which are provided by ILECs pursuant to Title II of the Communications Act. As a general matter, Title II confers upon the Commission a variety of mechanisms to regulate charges, practices, classifications or regulations as they pertain to such interstate services. Nevertheless, the Commission's powers are not unlimited or boundless. Instead, Section 201 of the

Communications Act establishes the legal standard – just and reasonable – that the Commission must apply in its regulation of the charges, practices, classifications and regulations pertaining to interstate services.

13. With regard to special access performance measures, the actions that the Commission can take consistent with its statutory authority vary. For example, Section 201 confers upon the Commission general rulemaking authority. If the Commission were to exercise such authority for the purpose of enacting special access measures, such rules would be rules of general applicability, not specific metrics, because the specific metrics would be regulations that pertain to offer of service and would have to be set forth in a LEC's interstate tariff. For the Commission to adopt specific metrics, the Commission would have to employ the process and procedures set forth in Section 205 of the Act.

14. Under Section 205, the Commission must first identify the existing tariff provisions that address provisioning aspects that are unjust and unreasonable. Because LEC tariffs differ in these respects, the Commission must, under the statute, engage in a LEC-specific analysis. Even if the Commission finds a specific tariff provision unlawful, such finding, alone, is not sufficient for the Commission to prescribe special access performance metrics. The statute requires that the Commission issue an order finding that the prescribed regulation is fair and reasonable. In order for the Commission to fulfill this requirement the decision must be based on a record and reflect reasoned decision-making. In this context, the Commission would have to address why the prescribed regulations are reasonable in light of the competitive environment and the fact that the Commission in the past in a far less competitive environment never required such regulations. Essentially, the Commission will have to find that competition in the special access

market creates the need for intrusive regulation and then rationalize that finding with its prior policy decisions that provide for reduced regulation with the development of competition.

15. The statute provides the Commission specific enforcement powers to ensure just and reasonable conduct on the part of common carriers and prescribes specific remedies for violations of Commission rules or orders. In using its enforcement powers, the Commission cannot act arbitrarily nor can it deviate from the Act's express provisions.

16. Section 503(b) of the Communications Act, which governs forfeitures, precludes the application of an automatic, self-executing penalty. The statute requires that the Commission apply specific criteria on a case-by-case basis in determining forfeiture amounts. A predetermination of forfeiture amounts would fly in the face of the statute's express requirements and could not withstand judicial scrutiny.

17. Similarly, the Communications Act governs the award of damages. While an individual may seek damages under the Act, such damages are limited to amounts that are related to damages actually sustained and proved. There is absolutely no authority under the Act for the Commission to establish a system of self-effectuating liquidated damages.

18. The Commission's policy has always been to promote competition, not individual competitors. It should not abandon this policy now by adopting special access performance measures. By focusing on ILECs, such performance measures would not be competitively neutral and would provide a huge market and regulatory advantage to the ILECs' competitors without any benefit to competition. In the competitive environment that exists for special access, special access performance measures are a poor concept that should not be enacted.

II. THE COMMISSION SHOULD NOT ADOPT PERFORMANCE MEASURES FOR INTERSTATE SPECIAL ACCESS SERVICES.

19. The penultimate question before the Commission is whether the Commission should adopt performance measures for interstate special access services. The *Notice* frames the issue as one of an evaluation of the relative benefits and burdens that may be associated with such measures. The purported benefit of performance measures identified in the *Notice* is that such measures would supposedly provide a greater transparency of the incumbent LECs' special access provisioning process.² The counterweight is the burden that imposition of performance measures creates. The *Notice* mentions the cost of reporting as a potential burden and recognizes that other burdens can be associated with performance measures.³ In BellSouth's view, the overarching detriment associated with agency imposed special access performance measures is the distortion such regulatory action creates in the competitive market place. If the Commission prescribes performance measures, it substitutes regulation for the unencumbered operation of competitive market forces. Such a result is at odds not only with the goals of the Telecommunications Act of 1996, but with the Commission's own pro-competitive policies that predate the Telecommunications Act.

20. The perceived benefit of "transparency" of the provisioning process is suspect. The local exchange carriers ("LECs") have provided special access for nearly eighteen years. During that time, the Commission has never seen fit to dictate the specific terms by which LECs provide access services. Take the example of installation intervals. When the Commission reviewed the first access tariffs, it directed LECs to file installation intervals in their access tariffs with the

² *Notice*, ¶ 13.

³ *Id.*

1985 annual filing.⁴ This requirement was never implemented. The Commission waived the tariff requirement, recognizing that publication of intervals for each and every service type would be voluminous.⁵ The Commission further acknowledged that such intervals would likely change frequently and that revising the intervals through tariff filings would unnecessarily increase administrative expenses.⁶

21. From the very beginning of access, the Commission refrained from interfering with LEC operations or engaging in micromanagement of the LEC's business. There existed then and there continues to exist today a wide variation in the way in which LECs provided their services. Never before has the Commission attempted to homogenize LEC operations and curtail the ability of a LEC to make decisions that make sense in light of its specific circumstances.

22. Even at a time when the market was far less competitive than it is today, the Commission did not engage in the type of restrictive regulation that performance measures represent. The Commission recognized that whether or not a LEC was providing service in an unreasonable manner was a question that required an analysis of many facts. The Commission could not fulfill its statutory obligation by adopting of a single set of rigid requirements and holding carriers to a strict liability standard for any deviation.

23. Put in another way, under the Communications Act, a LEC must provide service in a just and reasonable manner. The statutory standard of just and reasonable is not a single point. There is a wide variety of practices that can fall within the range of outcomes that are just and

⁴ *In the Matter of Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145 Phase I, *Memorandum Opinion and Order*, 97 F.C.C.2d 1082, 1216 (1984).

⁵ *In the Matter of Petitions for Waiver Concerning 1985 Annual Access Tariff Filings*, *Memorandum Opinion and Order* (Mimeo No. 5007), 1985 FCC Lexis 3191, *17-*18, ¶¶ 18-19 (June 7, 1985).

⁶ *Id.*

reasonable. The Commission cannot arbitrarily truncate the statutory standard. Even where a LEC holds itself out to provide service in a manner consistent with a particular performance measure, failure to meet the measure does not axiomatically mean that the LEC has acted unreasonably. Such a determination can only be made after consideration of all of the relevant facts and circumstances.

24. To ensure LEC compliance with its statutory obligations, the Commission has relied on the Section 208 complaint process as the mechanism for aggrieved parties to seek redress. It is the appropriate mechanism where the predominant question is one of fact, such as whether the LEC has acted unreasonably with regard to the provisioning of special access services.

25. To suggest, as the *Notice* does, that the benefit of imposed performance measures makes the provisioning process transparent misses the point. Customers are fully aware of how special access is provided. Transparency is not the issue. The proponents of performance measures are trying to goad the Commission to act in a manner that it has consistently avoided in the past. On the thinnest of allegations, the Commission is supposed to adopt an extreme regulatory response and pursue a course that is more intrusive than any ever followed by the Commission since access charges were first introduced in 1984.

26. The competitive environment faced by LECs in the provision of special access makes the contemplated increased regulation of special access through the enactment of performance measures absurd. BellSouth has to compete in the marketplace and serve a diverse customer body. Not all customers place the same emphasis or value on provisioning. There are many combinations of attributes that make up the price/performance continuum. The regulatory focus on performance measures elevates provisioning above all other attributes. The regulatory

imposition of performance measures would force LECs to shift resources to these elements and potentially have to sacrifice other service elements that are important to other customers.

27. Currently, BellSouth, in its service offerings, balances the needs of all of its customers. It must do so to remain competitive. If BellSouth fails to be responsive to its customers, it will lose them. A fundamental problem associated with regulatory-imposed performance measures is that the Commission eviscerates BellSouth's ability to be responsive in the marketplace. Such regulation places BellSouth at a competitive disadvantage.

28. Proponents of performance measures for special access approach the topic as if adoption and implementation of such regulations would be cost free, at least to the special access user. Such an assumption is wrong. Any performance measures that require LECs to undertake activities such as modifying systems, gathering data, and reporting data, represent potential cost increases associated with providing service. Such costs are appropriately recovered from customers.⁷

29. Unless every provider of special access equivalents, including non-carrier providers, were subject to the same performance measures and regulations – a highly unlikely outcome – ILECs would find themselves with a cost structure that is not competitive in the marketplace. More importantly, the competitive disadvantage resulting from this aberrant cost structure would not be of the ILECs making or within their control. In essence, the regulatory mandate of special access performance measures would not be competitively neutral and would distort the interaction of competitive forces in the marketplace. ILECs and others (if any) subject to the

⁷ Indeed, if the Commission imposes new regulatory requirements, it must provide for a mechanism by which carriers can recover their costs. For price cap regulated LECs, the Commission must afford such carriers an exogenous adjustment equal to the full cost of implementing and complying with the new regulations.

performance measure regulations would be unable to compete efficiently against providers of transport services not subject to such heavy-handed regulation.

30. The most puzzling aspect of proposed performance measures for special access is that such a regulatory approach represents a significant departure from the competitive policies and objectives to which the Commission has steadfastly adhered to over the last three decades. The Commission has sought to foster competition in the telecommunications market. Its pro-competitive policy has been comprehensive, enveloping all industry participants. Contrary to the implications here, the Commission's policy does not exclude ILECs. The Commission, recognizing the success its policies have had in bringing competition to the interstate access market, modified its regulation of ILECs in its *Pricing Flexibility Order*.⁸ The *Pricing Flexibility Order* granted flexibility in the form of streamlined introduction of new services, geographic deaveraging of certain rates, the removal of interexchange services from price cap regulation, and a framework that enabled LECs to offer contract tariffs (Phase I) and to remove dedicated transport and special access service from price cap regulation (Phase II) based on competitive showings. The Phase I and II pricing flexibility framework was specifically enacted to afford ILECs the flexibility they needed to be responsive in an increasingly competitive market.

31. The essence of pricing flexibility is to permit ILECs to negotiate contract offerings that have differing mixes of price/performance characteristics based on customer demand. While this mechanism is well suited to address market demand for enhanced performance levels associated with special access services, such market-based, competitive solutions are

⁸ *In the Matter of Access Charge Reform, et al.*, CC Docket No. 96-262, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221 (1999) (“*Pricing Flexibility Order*”).

incompatible with the type of regulatory – imposed performance measures that are being contemplated here.

32. There are several reasons for such incompatibility. The mere suggestion that the Commission may intervene and establish performance standards chills the negotiation process. Instead of negotiating a mutually acceptable offering, the focus shifts to the regulatory process. The issue becomes one of prognosticating the likelihood that the Commission will act and the form that such action will take. In short, regulatory gaming becomes the primary focus.

33. Even worse than the regulatory gaming that is encouraged by the threat of Commission action is a Commission-imposed set of performance measures. Such action substitutes a regulatory approach for the give and take of the marketplace. Essentially, regulatory-imposed performance measures takes away the flexibility just given to the ILECs to negotiate market-based special access services.

34. The *Notice*, in addressing the *Pricing Flexibility Order*, notes that the pricing flexibility order did not confer non-dominant status on the ILECs that satisfy Phase I or II competitive criteria for pricing flexibility and did not go so far as to find that incumbents do not have market power with respect to the services subject to pricing flexibility. While this may be the case the Commission did find:

The pricing flexibility framework we adopt in this Order is designed to grant greater flexibility to price cap LECs as competition develops, while ensuring that: (1) price cap LECs do not use pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior; and (2) price cap LECs do not increase rates to unreasonable levels for customers that lack competitive alternatives. In addition, these reforms will facilitate the removal of services from price cap regulation as competition develops in the marketplace, without imposing undue administrative burdens on the Commission or the industry.⁹

⁹ *Pricing Flexibility Order*, 14 FCC Rcd at 14225, ¶ 3.

35. Thus, the pricing flexibility plan was a comprehensive regulatory approach in which the degree of regulation was adjusted to reflect competitive developments. Having granted BellSouth Phase I pricing flexibility for dedicated transport and special access in 39 MSAs and Phase II pricing flexibility in 38 MSAs, it is impossible to reconcile the regulatory intrusion represented by Commission mandated performance measures in light of the Commission's comprehensive pricing flexibility plan that extracts the Commission from managing the business of ILECs.

36. Without question, the *Pricing Flexibility Order* adopted a self-adapting framework that decreased regulation commensurate with competition in the marketplace. Having determined that sufficient competition exists in the MSAs to grant pricing flexibility, it is incongruous to superimpose a regulatory scheme that is more restrictive and intrusive than that which existed prior to the *Pricing Flexibility Order*. Yet, Commission-imposed performance measures represent such a regulatory scheme. At a minimum, to preserve the pricing flexibility regime and its attendant competitive benefits, if the Commission were to adopt performance measures, such measures should not apply to MSAs that have qualified for pricing flexibility.

37. Pricing flexibility aside, there is no reason for the Commission to introduce a level of regulation that has never been imposed since interstate access charges were first implemented after the break-up of the Bell System. The few proponents of special access performance measures have not provided credible facts that would support such extraordinary regulatory action.

38. For example, AT&T contends that such performance measures are necessary to detect ILEC discrimination between carrier-customers of special access and end user-customers of special access. In making this argument, AT&T attempts to cobble an argument that is similar to

the one that is made in support of performance measures for unbundled network elements (“UNEs”). Performance measures for UNEs have been implemented to assure that competitors obtaining UNEs receive a comparable level of service from the ILEC to that which the ILEC employs in providing retail local services.

39. In the case of special access, all special access customers subscribe to exactly the same service, regardless of their status as a carrier or an end user. It is specious to suggest that ILECs can or do engage in conduct that favors end user special access customers. Such a discriminatory plan would not make any sense. The largest special access customers are carriers. It would be contrary to the financial interest of the ILEC to favor its end user customers over its carrier customers. Apart from the fact that there is no economic incentive to engage in such discriminatory conduct, such conduct could not escape detection. Carriers would quickly discover any preferences that are extended to end user customers exclusively because these same end users are also customers of the carriers. Moreover, the mere suspicion of inappropriate conduct has always been sufficient for carriers to pursue enforcement actions. There is absolutely no reason to believe that carriers would not be quick to file complaints if they believed ILECs were discriminating against them.¹⁰ In summary, phantom allegations of discrimination do not establish a need for performance measures for special access.

¹⁰ The absence of any such complaints strongly underscores the lack of substance to the allegation that ILECs are engaging in discriminatory conduct.

40. Other proponents of special access performance measures argue that such measures are necessary in order for CLECs to compete with ILECs for local services. This argument attempts to equate special access services with UNEs. Special access services are not UNEs and they are not necessary for CLECs to compete with ILECs. As an initial matter, BellSouth offers a complete array of high capacity UNEs. Table 1 shows the high capacity UNEs that CLECs can obtain.

TABLE 1

Hi-Capacity Offerings

Stand Alone UNEs

<u>Loops</u>	<u>Interoffice Transport</u>	<u>Local Channel</u>
4 Wire DS1 Digital Loop	DS1	DS1
DS3 Loop	DS3	DS3
STS-1 Loop	STS-1	STS-1
OC3 Loop		
OC12 Loop		
OC48 Loop		

Combinations with Hi-Capacity Services

EELs

- DS1 Interoffice Channel + DS1 Channelization + 2-wire VG Local Loop
- DS1 Interoffice Channel + DS1 Channelization + 4-wire VG Local Loop
- DS1 Interoffice Channel + DS1 Channelization + 2-wire ISDN Local Loop
- DS1 Interoffice Channel + DS1 Channelization + 4-wire 56 kbps Local Loop
- DS1 Interoffice Channel + DS1 Channelization + 4-wire 64 kbps Local Loop
- DS1 Interoffice Channel + DS1 Local Loop
- DS3 Interoffice Channel + DS3 Local Loop
- STS-1 Interoffice Channel + STS-1 Local Loop
- DS3 Interoffice Channel + DS3 Channelization + DS1 Local Loop
- STS-1 Interoffice Channel + DS3 Channelization + DS1 Local Loop

Loop/Port

4-wire ISDN Primary Rate Interface, DS1 loop, unbundled end office switching, unbundled end office trunk port, common transport per mile per MOU, common transport facilities termination, tandem switching, and tandem trunk port.

4-wire DS1 Trunk port, DS1 Loop, unbundled end office switching, unbundled end office trunk port, common transport per mile per MOU, common transport facilities termination, tandem switching, and tandem trunk port.

4-wire DS1 Loop with normal serving wire center channelization interface, 2-wire voice grade ports (PBX), 2-wire DID ports, unbundled end office switching, unbundled end office trunk port, common transport per mile per MOU, common transport facilities termination, tandem switching, and tandem trunk port.

41. Because a CLEC may elect to use special access services instead of UNEs does not nor should it mean that special access services should be treated like UNEs. CLECs are free to use any combination of services and facilities to offer competitive local services. By choosing special access services, which are premium services, the CLEC may be attempting to differentiate its offerings from that of the ILEC.

42. Whatever the motivation of a CLEC may be, it is incontrovertible that ILEC special access is not necessary for CLECs to compete with ILECs. Attached to these comments is a Special Access Competition Report prepared by the Eastern Management Group.¹¹ The Report reaches two fundamental conclusions. The first is that during the last fifteen years the number of special access competitors nationwide has grown steadily and substantially.¹² Next and more significantly, the Report concludes that “both wholesale and retail buyers of Special Access services in BellSouth’s territory are highly likely to have multiple choices of competitive alternatives to that company’s Special Access services, to the point where the marketplace is able to provide any level of service performance for which there is sufficient demand.”¹³

43. The Report shows that between 1993 and 2000, over 500 CAPs /CLECs and 200 IXC came into existence. The growth in competitive providers over the period indicates that there is a substantial pool of facilities that is available as an alternative to ILEC special access services.¹⁴

¹¹ “Special Access Competition,” The Eastern Management Group (Jan. 22, 2002) (“Report” or “Special Access Report”).

¹² Special Access Report at 2.

¹³ *Id.*

¹⁴ *Id.* at 5.

44. The Report also contains an analysis that determines the likelihood that special access-type facilities will be available in BellSouth's operating territory. Because all carriers want to maximize the use of their facilities, the presence of such facilities in a wire center indicates an alternative to BellSouth special access. The Report estimates the likelihood that wholesale and retail alternatives to BellSouth special access services are present. With respect to wholesale, the Report concludes:

When an IXC or CLEC is collocated with other CLECs in an ILEC wire center, the opportunity exists for special access wholesaling among these entities as an alternative to the purchasing of ILEC special access. A conservative view of the likelihood (or probability) of finding a non-ILEC special access source within BellSouth territory is 0.759.¹⁵

45. Opportunities for alternative special access also exist on the retail side:

Additionally, there is an opportunity afforded to commercial enterprises to purchase retail special access from non-ILEC sources. We conservatively estimate the likelihood of CLEC retail special access availability to be 0.673.¹⁶

46. The information provided in the Report establishes two important premises. The first is that there are substantial alternatives to BellSouth provided special access. The second point is that, if there is a real market demand for particular service performance levels, providers other than BellSouth can satisfy the demand. In these circumstances, it would be poor public policy for the Commission to interfere with the operation of economic forces in the determination of price/quality attributes of special access. The Commission cannot legislate an outcome that is inconsistent with the market outcome without injuring competition and competitors. Mandated performance measures for special access epitomize regulation at its worst.

¹⁵ *Id.* at 7.

¹⁶ *Id.*

III. THE COMMISSION’S JURISDICTION AND ENFORCEMENT AUTHORITY IS CIRCUMSCRIBED BY THE COMMUNICATIONS ACT.

A. Jurisdiction And Authority

47. At the outset, the scope of the Commission’s jurisdiction must be understood.

Section 152(b) of the Communications Act states that “nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier”¹⁷ Thus, to the extent the Commission were to adopt performance measures for special access, such performance measures would only be applicable to jurisdictionally interstate special access services. The statute specifically limits Commission jurisdiction and denies the Commission any authority over intrastate special access services.

48. Interstate special access services are provided by LECs pursuant to Title II of the Communications Act. As a general matter, Title II confers upon the Commission a variety of mechanisms to regulate charges, practices, classifications or regulations as they pertain to such interstate services. Nevertheless, the Commission’s powers are not unlimited or boundless. Instead, Section 201 of the Communications Act establishes the legal standard – just and reasonable – that the Commission must apply in its regulation of the charges, practices, classifications and regulations pertaining to interstate services.¹⁸

¹⁷ 47 U.S.C. § 152(b).

¹⁸ Section 201 states in pertinent part:

All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful[.]

47 U.S.C. §201(b)

49. With regard to special access performance measures, the actions that the Commission can take consistent with its statutory authority vary. For example, Section 201 confers upon the Commission general rulemaking authority. If the Commission were to exercise such authority for the purpose of enacting special access measures, such rules would be rules of general applicability, not specific metrics because the specific metrics would be regulations that pertain to offer of service and would have to be set forth in a LEC's interstate tariff. As discussed below, for the Commission to adopt specific metrics, the Commission would have to employ the process and procedures set forth in Section 205 of the Act.

50. Under its rulemaking authority, the Commission has the authority to adopt rules that would require LECs to incorporate special access performance measures into their interstate access tariff. The rules could identify the aspects of providing special access service (*e.g.*, installation) that LECs would be responsible for establishing and filing in their interstate tariffs. Obviously, however, to adopt such rules, the Commission must have a proper record and engage in reasoned decision-making. In the instant case, reasoned decision-making requires that the Commission address the competitive marketplace for special access and how adoption of special access performance measure rules would not be inconsistent with, and a reversal of, the Commission's pro-competitive, deregulatory policies and practices.

51. To the extent that the Commission is anticipating that it could adopt specific metrics associated with special access performance measures, the Commission would have to follow the process set forth in Title II. Such metrics would be practices and regulations in connection with the provision of special access service and, pursuant to Section 203 of the Communications

Act,¹⁹ would have to be set forth in the LEC’s interstate access tariff. In order for the Commission to prescribe specific regulations in a tariff, the Commission must act pursuant to Section 205.²⁰ Section 205 provides that after a full opportunity for hearing and the Commission “shall be of the opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe . . . what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed”²¹

52. The authority to prescribe tariff practices does not axiomatically lead to the conclusion that the facts and circumstances support a prescription of special access performance measures. Under Section 205, the Commission must first find that the existing tariff provisions that address provisioning aspects of special access are unjust and unreasonable. Such a finding cannot be based on generalizations or speculative assertions. Indeed, because LEC tariffs differ in these respects, the Commission must, under the statute, engage in a LEC-specific analysis. Even if the Commission finds a specific tariff provision unlawful, such a finding, alone, is not sufficient for the Commission to prescribe special access performance metrics. The statute requires that the Commission issue an order finding that the prescribed regulation is fair and reasonable. In order for the Commission to fulfill this requirement the decision must be based on a record and reflect reasoned decision-making. In this context, the Commission would have to address why the prescribed regulations are reasonable in light of the competitive environment and the fact that the Commission in the past in a far less competitive environment never required

¹⁹ 47 U.S.C. § 203(a).

²⁰ 47 U.S.C. § 205.

²¹ 47 U.S.C. § 205(a).

such regulations. Essentially, the Commission will have to find that competition in the special access market creates the need for intrusive regulation and then rationalize that finding with its prior policy decisions that provide for reduced regulation with the development of competition.

53. The *Notice* suggests two other statutory provisions for its authority to establish performance measures: Sections 202(a) and 272(e)(1). Neither section provides authority to establish performance measures. Section 202(a) of the Communications Act declares as unlawful unreasonable discrimination “in charges, practices, classifications, regulations, facilities or services for or in connection with like communication service”²² Thus, not every difference in service constitutes an unlawful discrimination under this Section. This Section only prohibits unjust and unreasonable discrimination. Whether or not a particular conduct constitutes an unjust and unreasonable discrimination is a question of fact. The Commission can address the question of fact through a complaint pursuant to Section 208 of Communications Act or through a Section 205 hearing. In any event, for the Commission to prescribe specific metrics, the Commission must proceed pursuant to Section 205. Section 202(a) does not afford the Commission any greater latitude or a different process by which to adopt performance measures, nor does it relieve it of its statutory requirements under Sections 201 and 205.

54. Likewise, Section 272(e)(1) does not broaden the Commission’s Title II authority. All that Section 272(e)(1) does is establish a nondiscriminatory requirement that is applicable to an ILEC when it fulfills a request for service for a Section 272 affiliate. Section 272(e)(1) requires that requests for service from non-affiliates be fulfilled within the same period of time that an affiliate’s requests are fulfilled. This Section does not provide the Commission with any authority to establish rules or provide for any other mechanism to create performance metrics.

²² 47 U.S.C. § 202(a).

Again, the Commission is limited to Sections 201 and 205 for such purposes and must meet the statutory requirements as set forth in those sections of the Communications Act.

A. Enforcement

55. The statute provides the Commission specific enforcement powers to ensure just and reasonable conduct on the part of common carriers and prescribes specific remedies for violations of Commission rules or orders. In using its enforcement powers, the Commission cannot act arbitrarily nor can it deviate from the Act's express provisions.

56. Assuming the Commission could justify establishing special access performance measures, the *Notice* questions what forfeiture or penalties would be applicable. The correct starting point of the analysis is Section 503 of Act. Section 503(b)(1)(B) makes a carrier liable for a forfeiture penalty if it is determined that the carrier has “willfully or repeatedly failed to comply with any provisions of this chapter or of any rule, regulation, or order issued by the Commission under this chapter”²³ This same provision states that this subsection does not apply “to any conduct which is subject to forfeiture under subchapter II of this chapter”²⁴ Thus, as an initial matter, to determine whether Section 503 applies, it must be known how the Commission proceeded, and under what authority were the performance measures adopted.

57. If the Commission uses its Section 205 authority to prescribe specific metrics and such metrics are incorporated as regulations within each LEC's access tariff, then Section 203 governs. Section 203 provides that a carrier shall not “extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or

²³ 47 U.S.C. § 503(b)(1)(B).

²⁴ 47 U.S.C. § 503(b)(1).

practices affecting such charges, except as specified in such schedule.”²⁵ Section 203(e) provides for a forfeiture for noncompliance with Section 203 of \$6,000 for each offense and \$300 for each day that the violation continues. Since Section 203 provides for a specific forfeiture, Section 503(b) and the forfeitures set forth therein would not apply.

58. Even assuming Section 503(b) applies, this section circumscribes the manner in which the Commission may determine the amount of a forfeiture. The Commission must “take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”²⁶ The language of this statutory provision is mandatory, not discretionary. Accordingly, the Commission, in order to meet its obligations under Section 503, must evaluate each and every violation using the statutory criteria before it may determine a forfeiture amount. A predetermination of forfeiture penalties flies in the face of the statute’s express requirements and could not withstand judicial scrutiny.

59. In the same way that the statute bounds the manner in which forfeitures may be assessed, the statute also establishes the parameters by which a person may seek damages from a carrier. If failure to meet a performance measure constituted an unlawful act, an access customer may bring a complaint for damages against the carrier pursuant to Section 207 of the Act.²⁷ Under Section 206, a carrier’s liability for damages is limited to damages actually sustained as a consequence of its unlawful conduct.²⁸ Thus, damages are limited to actual damages that the

²⁵ 47 U.S.C. § 203(c).

²⁶ 47 U.S.C. § 503(b)(2)(D).

²⁷ 47 U.S.C. §208.

²⁸ 47 U.S.C. §206.

complainant can prove. There is absolutely no authority under the Act for the Commission to establish a system of self-effectuating liquidated damages absent the consent of the carrier.

60. Contrary to the Commission's belief, the automatic enforcement mechanisms would not be pro-competitive. Such mechanisms just distort the competitiveness of special access. Automatic penalties and damages associated with special access performance measures are just an invitation to join a regulatory game – a very one-sided game. It unfairly targets the ILEC to the exclusion of every other competitor and provides a financial and competitive advantage to the ILEC's competitors. Fortunately, the statute precludes such a biased result.

IV. CONCLUSION

61. Looking at the Commission's evolutionary approach to regulation, its first priority was to establish competition in each and every facet of interstate communications. Special access has been no exception. Some form of competitive alternative has always been present since the first day that special access tariffs came into existence in 1985. Each year thereafter the number and type of alternatives have increased. Likewise, the Commission, through actions such as its expanded interconnection initiative, altered its regulations to encourage the growth of competitors and alternative networks. Although competition grew rapidly, the Commission continued to regulate comprehensively LEC special access offerings. It was not until 1999 that the Commission established a regulatory framework in the *Pricing Flexibility Order* that reduced the regulation of LECs as competition continued to evolve.

62. Less than three years after the adoption of the progressive policies set forth in the *Pricing Flexibility Order*, the Commission, in this proceeding, is considering embarking on a regulatory course that would increase regulation to a level that is greater than that which existed in 1985. The Commission never imposed special access performance measures on LECs. Given

the variety of operational and market considerations associated with such measures, it relied on Section 208 complaints to identify unreasonable conduct. It followed this approach in 1985 when the alternatives to LEC special access were limited. In 2002, where there are numerous alternatives to LEC-provided special access and where demand for special access can be satisfied by non-LEC providers, it is impossible to rationalize the introduction of a one-sided, intrusive regulatory scheme that special access performance measures represent with the Commission's commitment to competition.

63. The Commission, time and again, has made clear that its policies have always been to promote competition, not individual competitors. Special access performance measures would abandon this policy. The focus on ILECs is not competitively neutral and enactment of such measures provides a huge market and regulatory advantage to the ILECs' competitors without any benefit to competition. Special access performance measures are a poor concept that should not be enacted.

Respectfully submitted,

BELLSOUTH CORPORTION

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Date: January 21, 2002

Special Access Competition

Prepared for BellSouth

January 22, 2002

Special Access Competition

This paper investigates two aspects of the current Special Access market:

1. The historic growth of competition in the Special Access market over the past 15 years
2. The current availability of competitive alternatives to BellSouth's Special Access services in that company's territory

We conclude in the first instance that nationwide, the number of competitors offering Special Access has grown steadily and often dramatically during the period.

In the second case, we conclude that in the vast majority of cases, both wholesale and retail buyers of Special Access services in BellSouth's territory are highly likely to have multiple choices of competitive alternatives to that company's Special Access services, to the point where the marketplace is able to provide any level of service performance for which there is sufficient demand.

History of the Growth of Competition in Special Access

Beginning in the mid-1980s, demand for high-capacity access services based on fiber technologies created a new sector within the telecommunications industry. Starting with the largest business users and working their way down to small businesses today, competitive providers grew from a few firms to well over 500 by 2000. In addition, as IXCs grew during the period, they began establishing their own access facilities to connect to their customers directly. Today, these form another source of both wholesale and retail alternatives to ILEC Special Access.

Teleport Communications Group (TCG), formed in 1984, was the first Competitive Access Provider (CAP). TCG initially deployed a significant amount of fiber in Manhattan, both for access to satellite earth terminals outside the city and for digital services within New York City. Key targets of CAPs were large downtown office buildings in cities where the deployment cost and regulatory constraints of new fiber systems were not excessive. Other CAPs entered the market beginning in 1986 with Institutional Communications Company (ICC) formed in 1986. According to FCC

documents covering this period, there were a total of 24 such facilities-based CAPs deploying backbone fiber systems at the end of 1991^{1,2}.

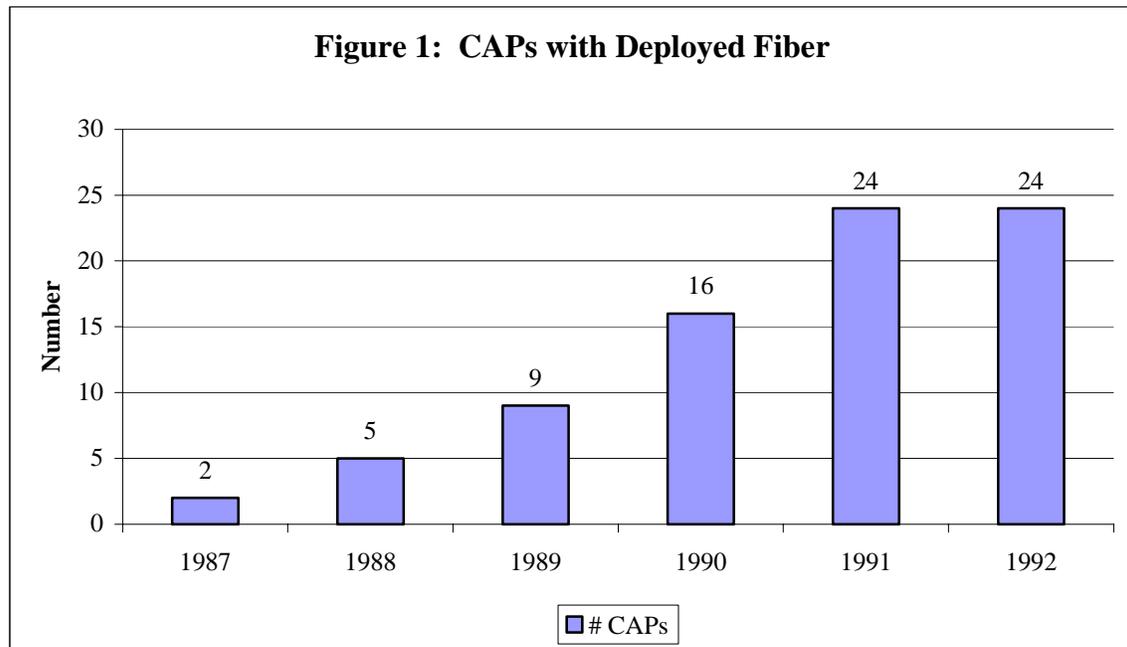
CAPs with Deployed Fiber					
CAP Name	1987	1988	1989	1990	1991
Bay Area Teleport					
City Signal					
DFW/MetroLink, Inc.					
Dignet					
Digital Direct					
Eastern Telelogic					
Electric Lightwave					
Fibernet Inc.					
ICC					
Indiana Digital Access, Inc.					
Intermedia Communications					
IOR Telecom					
Jones Lightwave					
Kansas City Fiber Net					
Metrex Corporation					
Metro Com					
Metropolitan Fiber System					
New England Digital Distrib.					
Ohio Linx					
Penn Access Corp.					
Phoenix Fiberlink					
Public Service of Oklahoma					
TCG (from 1984)					
Teleport Denver					
CUMULATIVE TOTAL	2	5	9	16	24
Total Route Miles	133	201	793	1326	2098

The level and year-over-year (YoY) growth in facilities-based CAPs is depicted in Figure 1, below. In 1992 the Commission declared that CAPs “now offer access services to large business customers in central business districts of major cities” and that many customers “do not use LEC facilities at all to connect their customer location directly with their long-distance carrier.”³

¹ FCC, Fiber Deployment End of Year 1990, Table 12 – Urban Fiber Systems, March 27, 1991. See also Fiber Deployment End Of Year 1992, Table 14 – Urban Fiber Systems, March, 1993.

² Kessler Marketing Intelligence, *Alternative Local Carriers with Fiberoptic Metropolitan Area Networks* at 24 (Aug. 1989).

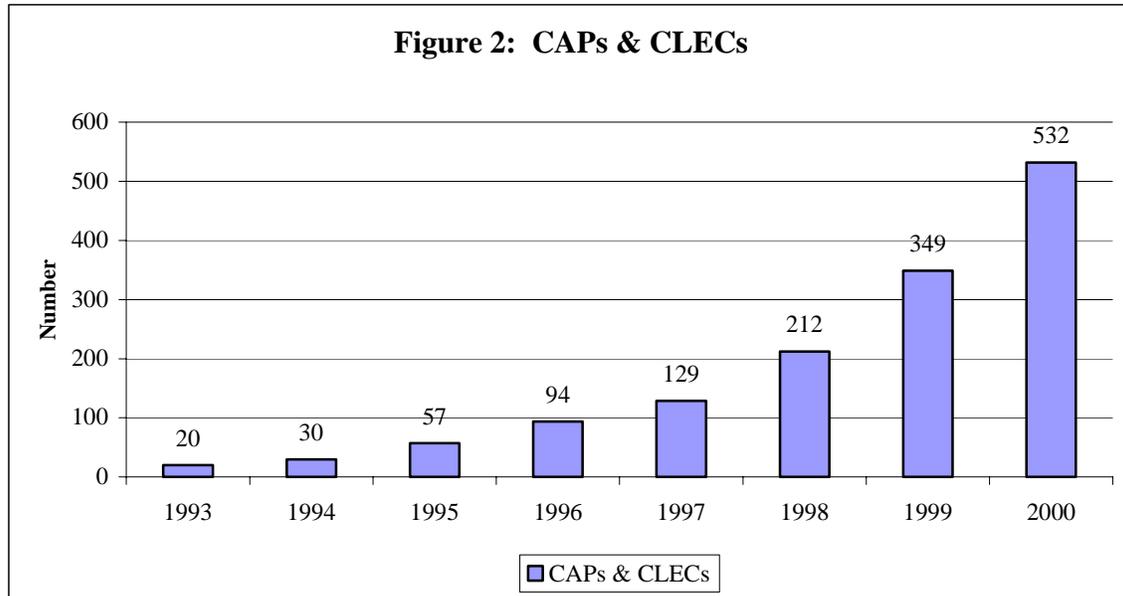
³ *Expanded Interconnection with Local Telephone Company Facilities*, Notice of Proposed Rulemaking and Notice of Inquiry, 6 FCC Rcd 3259, 3260 (1991); Remarks by Richard M. Firestone, Chief, Common Carrier Bureau, FCC, Ninth Annual FCBA/PLI Conference, “Telecommunications Policy and Regulation,” FCC, Dec. 2, 1991.



Growth in the CAP/CLEC sector over the last decade has continued unabated. In its news release on the state of local competition at the end of 2000, the Commission noted “CLEC market share grew 93% over the one-year period of January to December 2000.”⁴ In fact, according to another set of FCC documents, CAP and CLEC numbers have grown from 20 in 1993 to 532 at the end of 2000, approximately a 60% compound annual growth rate over the 7-year period.⁵ The significant growth trend is depicted below in Figure 2.

⁴ FCC releases latest data on local competition, May 21, 2000.

⁵ Data filed on FCC Forms 431, 457, and 499-A worksheets. See Trends In Telephone Service, Table 9.6, August 2001 for data through 1999 and The Telecommunications Provider Locator, Table 1, November 2001 for 2000 data. These data are filed by virtually every telecommunications provider *legal entity*. Therefore they cannot be merged with the facility-based CAP listing which is tabulated by holding company.



IXCs are major customers and providers of special access through their subsidiaries. We rely on Carrier Identification Codes (CICs) for the 1980s, which in the Commission’s words “provides the best information available on the entry of new firms into the long distance market prior to 1986.”⁶ Beginning in 1986, a number of corporations, government agencies and other organizations began to acquire CICs for their own use, rather than for the purpose of providing telecommunications services to others. After that time, the use of such codes to estimate the number of long distance carriers became less reliable. (Because of these changes, the data from the earlier period, 1987 to 1992, cannot be merged with post-1993 data.) From 1993 onwards we rely on data filed on FCC Forms 431, 457, and 499-A worksheets.⁷ Figures 3-4 show both views of IXC growth. The compound annual growth rate is almost 16% over the most recent 7-year period.

Over the period, well over 500 CAPS/CLECs came into existence, along with well over 200 IXCs. Although the structure and ownership of the competitive-access assets built by these firms continues to fluctuate, the steady growth in the number of competitive access providers of all types over the period indicates that there is a significant pool of facilities available to provide alternatives to ILEC Special Access.

⁶ FCC, Trends in Telephone Service, p. 10-2, August 2001.

⁷ See Table 10.4 (Number of Toll Carriers) in Trends in Telephone Service, August 2001 and The Telecommunications Provider Locator, Table 1, November 2001 for 2000 data.

Figure 3: IXC's Based on CIC Counts

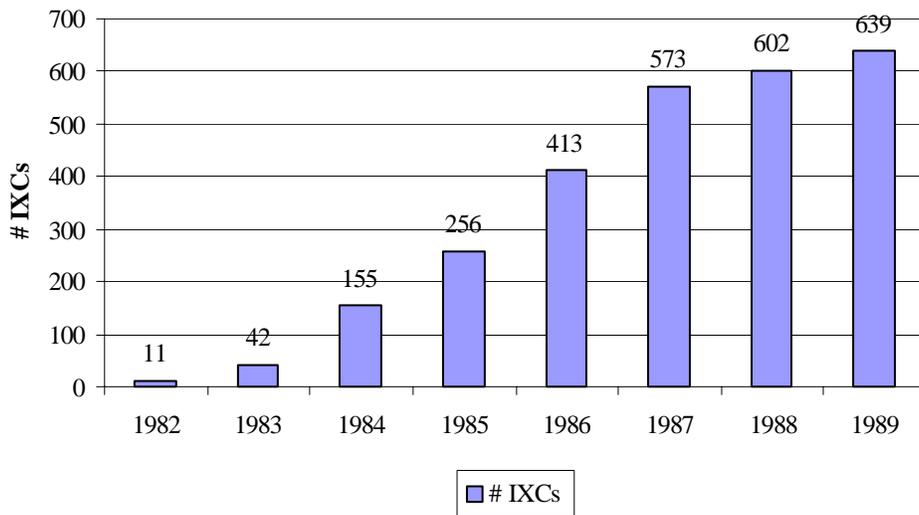
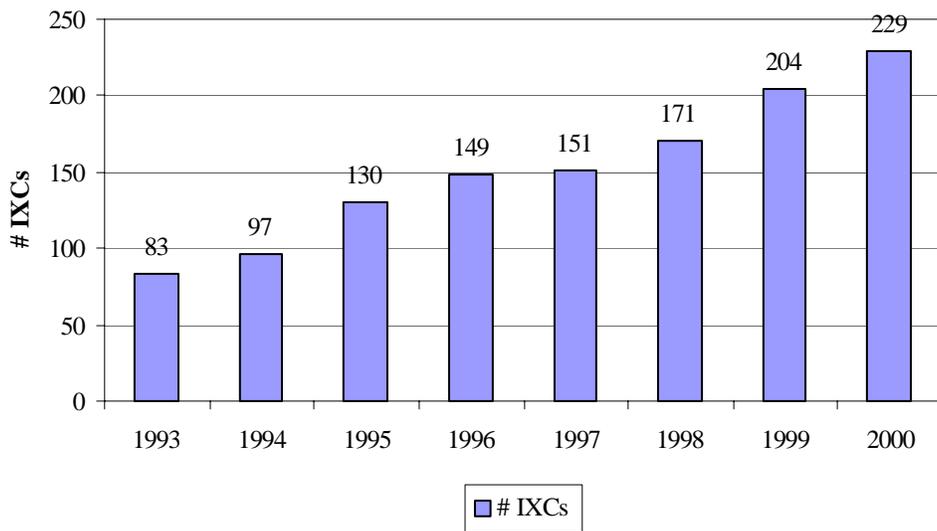


Figure 4: # IXCs Reporting to FCC



ILEC Special Access Is Not Required by IXC and CLECs

In this section, we derive the likelihood that Special-Access type facilities will be available in BellSouth's territory. Since all carriers want to maximize the usage of their facilities, the likelihood of the presence of such facilities in a wire center indicates the availability of alternatives to BellSouth Special Access.

When an IXC or CLEC is collocated with other CLECs in an ILEC wire center, the opportunity exists for special access wholesaling among these entities as an alternative to the purchasing of ILEC special access. A conservative view of the likelihood (or probability) of finding a non-ILEC special access source within BellSouth's territory is 0.759.

	IXC	CLEC	Pooled View
Likelihood	0.626	0.925 ⁸	0.759 ⁹

Additionally, there is an opportunity afforded to commercial enterprises to purchase retail special access from non-ILEC sources. We conservatively estimate the likelihood of CLEC retail special access availability to be 0.673. This estimate is conservative on the following grounds:

1. The estimate assumes that IXCs do not sell special access to businesses, when in fact they do.
2. Given that a business is in a CLEC serving area, the likelihood that the CLEC will offer special access is estimated state-by-state using an average (over CLECs within the state) of their percentage of on-net buildings to total connected buildings. Across BellSouth's territory we estimate this ratio at 30.9%, whereas the Commission reports that the December 30, 2000 ratio of CLEC owned lines to total CLEC lines at a higher number -- 35.1%.¹⁰
3. The analysis excludes consideration of CLECs acting as UNE connectors for other non-collocated CLECs.¹¹

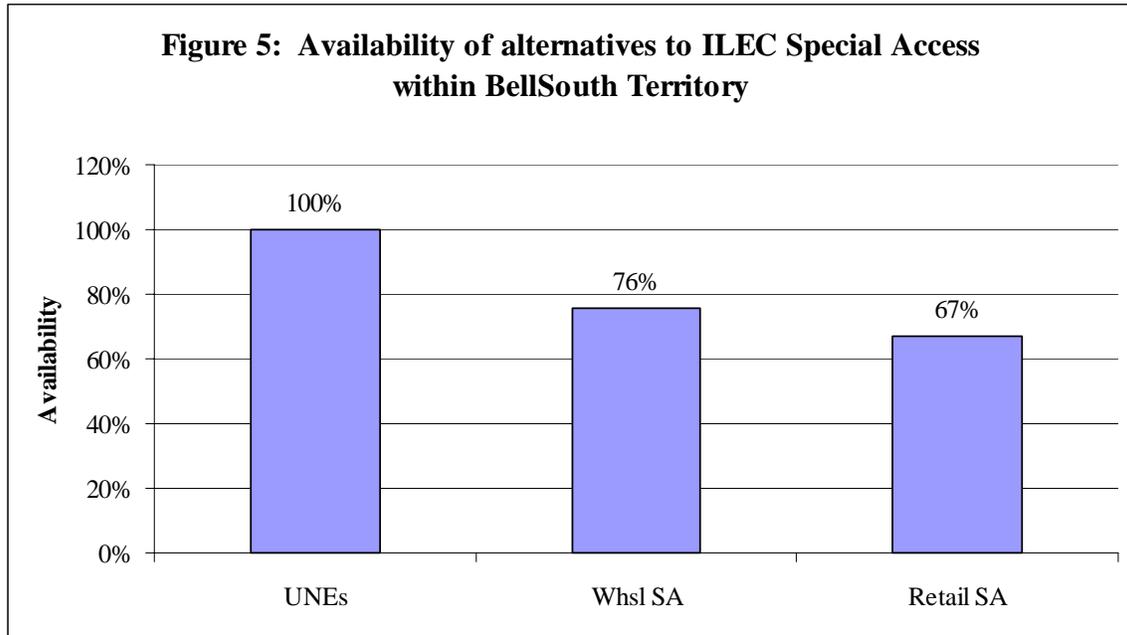
⁸ If there are 8 CLECs, on average, collocated in BellSouth wire centers with collocation, the probability that any one chosen at random will be served by at least one of the other 7 is $1 - (1-0.309)^7 = 0.925$, where 1-0.309 is the probability of not being served.

⁹ Of the IXC and CLEC population operating within BellSouth's territory, IXCs make up approximately 55%. See FCC Form 499-A interactive website <http://gullfoss2.fcc.gov/cib/form499/499results.cfm>.

¹⁰ FCC, Local Telephone Competition: Status as of December 31, 2000, Table 3, May, 2001.

¹¹ See New Paradigm Resources Group, Inc., CLEC Report 2001, 14th Edition, p.76, 2001.

Our overall view of the availability of ILEC special access alternatives, inclusive of ubiquitous availability of UNEs for local service appears in Figure 5, below. (The derivation of these availabilities is detailed in the section following the figure.)



Estimation Methodology

1. Estimation of CLEC Wholesale Special Access to IXCs

The foundation for this assessment rests on Table 6 of the Special Access Fact Report¹² rewritten here as

	Number of CLECs			
	0	1	2	≥3
Probability	0.22	0.12	0.13	0.53

¹² Huber, P. W. and Leo, E. T., Special Access Fact Report, Submitted by the United States Telecom Association in CC Docket No. 96-98, January 19, 2000.

Additionally, in BellSouth wire centers with collocation, there are approximately 8 collocated CLECs.¹³ This, in conjunction with Table 2, allows us to estimate the number of CLECs in the “≥3” cell to be 11, which in turn lets us calculate the probability that an IXC needing Special Access alternatives will be able to find them.¹⁴

The probability of an IXC being able to purchase special access from a collocated CLEC is simply (1 – probability that no collocated CLEC is willing to participate in the sale). The likelihood that a CLEC is willing to participate in a special access sale is estimated by the fraction of its connected buildings that are on-net as opposed to being on-switch or total service resale. (We assume normal business behavior, that is, that the CLECs will want to maximize the use of their network facilities.) We estimate this likelihood to be 30.9% across BellSouth’s territory.¹⁵ Therefore if there are 2 collocated CLECs, the probability of the special access sale is $1 - (1-0.309)^2 = 0.52$.¹⁶ The final result appears in Table 3, below, with the BellSouth average being the weighted average over the four cells in Table 3 using the probabilities in Table 2.

Table 3: Probability of CLEC availability for wholesale SA to IXC					
	Number of CLECs				
	0	1	2	>3 (11)	BST Avg
Probability	0	0.309	0.522	0.983	0.626

2. Estimating the Likelihood of CLEC Special Access Sales To Other CLECs and to Business Enterprises

The primary data at the BellSouth regional level for estimating the availability of CLEC wholesale special access to other CLECs and the availability of retail CLEC special access to business enterprises appears in Table 4.

¹³ From data provided by BellSouth, the average number of collocated CLECs is derived by dividing the number of collocation arrangements by the number of wire centers with collocation within the BellSouth region.

¹⁴ BellSouth average number of Collo Arrangements in Wire Centers with Collos $\geq 3 =$

$$\frac{\sum_{i=3}^n ip_i}{1 - p_0 - p_1 - p_2} = \frac{\bar{x}(1 - p_0) - p_1 - 2p_2}{1 - p_0 - p_1 - p_2}, \text{ where } \bar{x} = 8 \text{ and } p_i = \text{probability of } i \text{ collos.}$$

¹⁵ NPRG’s CLEC Reports 14th & 15th editions were the first sources for on-net and off-net buildings. When not available, the percent of on-net lines provided in Banc Of America Securities, Competitive Local Exchange Carriers Industry Outlook, p.10, February 2001, was used. Bear Stearns, CLEC Sector Initial Coverage, p.109, October 2001, was used for McLeod USA.

¹⁶ The general formula is $1 - (1-0.309)^n$, where n = the number of collocated CLECs.

Table 4: BellSouth Regional Statistics			
Avg/CLECs per WC with collos¹⁷	Fraction of On-Net Bldgs	CLEC Share State Lines¹⁸	% ILEC Biz Lines in WC w/ Collos¹⁹
8	30.9%	7.8%	68.5%

Following the train of thought outlined above, the availability of CLEC special access to collocated CLECs, on average across BellSouth's territory is $1 - (1-0.309)^7 = 0.925$, as shown in Table 1, above. Furthermore, the availability of CLEC special access to business enterprises is

$$(1 - 0.078) \times (0.685 \times 0.948) + 0.078 \times 0.948 = 0.673.$$

This states that businesses can only buy special access from CLECs willing to sell it and are collocated in the same wire centers as the business customers. The first term tells us that ILECs have as customers 92.2% of residence and small business lines. The second term tells us that within the ILEC market, 68.5% of its business lines are in wire centers with collocated CLECs; and these CLECs are 94.8% ($= 1 - (1-0.309)^8$) likely to sell special access to those business customers. Finally, the third term tells us that within the CLEC market (7.8% of residence and small business lines), again the likelihood of selling retail special access is 94.8%.

In summary, it is highly likely that IXCs, CLECs and enterprise customers looking for alternatives to BellSouth Special Access will find them.

¹⁷ See note 13 above.

¹⁸ FCC, Local Telephone Competition: Status as of December 31, 2000, Table 6, May, 2001.

¹⁹ FCC, Trends in Telephone Service, Table 9.6, p. 9-20, March 2000.

CERTIFICATE OF SERVICE

I do hereby certify that I have this 22nd day of January 2002 served the following parties to this action with a copy of the foregoing **COMMENTS OF BELLSOUTH CORPORATION** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed below.

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/s/ Juanita H. Lee
Juanita H. Lee

+ VIA ELECTRONIC FILING