

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
)
Application by BellSouth Corporation,)
for Authorization To Provide In-Region,)
InterLATA Services)
in the States of Florida and Tennessee)

WC Docket No. 02-307

REPLY COMMENTS OF AT&T CORP.

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FCC ORDERS CITED

SHORT CITE	FULL CITE
<i>Access Charge Reform NPRM</i>	<i>Access Charge Reform, Fifth Report And Order And Further Notice Of Proposed Rulemaking, 14 FCC Rcd. 14221 (rel. August 27, 1999).</i>
<i>BellSouth Louisiana II Order</i>	<i>Memorandum Opinion and Order, Application of BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Louisiana, 13 FCC Rcd. 20599 (1998)</i>
<i>Five- State 271 Order</i>	<i>Memorandum Opinion and Order, Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, WC Docket No. 02-150 (rel. Sept. 18, 2002)</i>
<i>Georgia/Louisiana 271 Order</i>	<i>Memorandum Opinion and Order, Joint Application of BellSouth Corporation et al. for Provision of In-Region InterLATA Services in Georgia and Louisiana, CC Docket No. 02-35 (rel. May 15, 2002)</i>
<i>KS/OK 271 Order</i>	<i>Memorandum Opinion and Order, Joint Application of SBC Communications, Inc., et al, for Provision of In-Region InterLATA Services in Kansas and Oklahoma, 16 FCC Rcd. 6237 (2001)</i>
<i>Local Competition Order</i>	<i>First Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd. 15499 (1996), aff'd in part and vacated in part by Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), aff'd in part and rev'd in part by AT&T Corp. v. Iowa Utils. Bd., 119 S. Ct. 721 (1999)</i>
<i>Massachusetts 271 Order</i>	<i>Memorandum Opinion and Order, Application of Verizon New England Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in Massachusetts, 16 FCC Rcd. 8988 (2001)</i>
<i>Michigan 271 Order</i>	<i>Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 to Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd. 20543 (1997)</i>

SHORT CITE	FULL CITE
<i>New Jersey 271 Order</i>	Memorandum Opinion and Order, <i>Application of Verizon New Jersey Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in New Jersey</i> , WC Docket No. 02-67 (rel. June 24, 2002)
<i>NY 271 Order</i>	Memorandum Opinion and Order, <i>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</i> , 15 FCC Rcd. 3953 (1999)
<i>Non-Accounting Safeguards</i>	First Report and Order and Further Notice of Proposed Rulemaking, <i>Implementation of the Non-Accounting Safeguards of Section 271 and 271 of the Communications Act of 1934 as amended</i> , 11 FCC Rcd. 21905 (1996)
<i>Pennsylvania 271 Order</i>	Memorandum Opinion and Order, <i>Application of Verizon Pennsylvania Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania</i> , 16 FCC Rcd. 17419 (2001)
<i>Texas 271 Order</i>	Memorandum Opinion and Order, <i>Application by SBC Communications Inc., et al Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas</i> , 15 FCC Rcd. 18354 (2000)
<i>Vermont 271 Order</i>	<i>Application of Verizon New England Inc. (d/b/a Verizon Long Distance) et al For Authorization to Provide In-Region InterLATA Services in Vermont</i> , CC Docket No. 02-7 (rel. April 17, 2002)

**DECLARATIONS IN SUPPORT OF AT&T's OPPOSITION TO
BELLSOUTH'S SECTION 271 APPLICATION FOR
FLORIDA AND TENNESSEE**

WC Docket No. 02-307

EX.	DECLARANT
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E	Brian Pitkin

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REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these reply comments in opposition to BellSouth's joint application for authorization to provide in-region, interLATA services in Florida and Tennessee.

INTRODUCTION AND SUMMARY

The comments in this proceeding confirm that in its rush to judgment in seeking Section 271 authorization for Florida and Tennessee, BellSouth has failed and continues to fail to correct numerous evident shortcomings in its Application. The Evaluation of the Department of Justice ("DOJ Eval.") makes clear that BellSouth has failed to correct or even to significantly improve the shortcomings in change control and data integrity that have been identified and emphasized again and again by AT&T and other commenters. Several of these concerns were noted by the Commission in the *Five-State 271 Order* as well, but rather than addressing those problems, BellSouth grasps at the ring, seeking the distinction of being the first RBOC to receive Section 271 authorization for all states in its region. BellSouth has not earned that right, however, and before it can proceed, BellSouth must be required to address and correct the serious problems raised by the Commission, the Department of Justice, and the commenters in this proceeding.

These concerns are particularly important given the current lack of competition in Florida and Tennessee. The FCC's most recent report on Local Telephone Competition touts a growth of 14% in switched access lines for CLECs nationwide for the six months ending December 31, 2001. Yet the CLEC share of access lines in Tennessee actually *declined* during that six month period, and in Florida, the CLEC share increased by less than one quarter of one percent. This certainly is not evidence of the significant competition that BellSouth claims and which the Commission requires prior to the issuance of Section 271 approval.

Part I of these Reply Comments discusses BellSouth's continuing failure to satisfy its obligations with respect to the change control process. Contrary to its promises, BellSouth substantially deviates from the prioritization of change requests assigned by the CLECs. The fundamental, and yet unresolved, problem here is that BellSouth simply refuses to devote sufficient resources to implement CLEC change control requests. The backlog of CLEC change control requests remains substantial, with no meaningful relief in sight until well into the year 2004. In addition, BellSouth software releases continue to contain numerous flaws that hinder CLECs' ability to compete and increase CLEC costs. These software releases demonstrate BellSouth's failure to test its releases adequately, and its unacceptable failure to correct in a timely manner the many errors that continue to occur.

Part II discusses BellSouth's ongoing data integrity problems. BellSouth's unilateral reposting policy inappropriately shields from disclosure significant errors in BellSouth's performance data and cloaks in secrecy BellSouth's actual performance. BellSouth's performance results under the Florida permanent performance metrics that took affect in May 2002 demonstrate its failure to meet the specified performance levels. And despite the

admonitions of the Commission, the Department of Justice and the commenters in these proceedings, BellSouth's performance results continue to be unreliable.

Part III discusses BellSouth's continuing anticompetitive conduct with respect to local number portability. BellSouth continues to require that AT&T become involved in the disposition of *BellSouth* property in connection with the porting of numbers for large business customers. AT&T has escalated this issue with BellSouth to the officer level, but BellSouth has refused to resolve this matter.

Part IV discusses BellSouth's failure to satisfy the pricing requirements of Section 271. First, in UNE pricing proceedings in North Carolina, BellSouth has recently identified a significant error in loading factors that could result in a substantial overstatement of UNE rates in other states such as Florida that have relied upon BellSouth's cost studies in implementing UNE rates. Acknowledged errors in BellSouth's North Carolina cost studies reduced the UNE rates for two-wire SL2 loops by \$1.04 and the cost of a DS-1 loops by \$14.63. AT&T has asked BellSouth whether a similar error affected the Florida UNE cost study, but BellSouth has so far refused to answer. Given the regional nature of BellSouth's cost studies, CLECs can only assume that the error identified in North Carolina results in a vast overstatement of Florida rates.

Second, the Florida Commission committed a clear error in establishing BellSouth's UNE rates. It is well established that inflation may be accounted for in cost studies through one of two methods - - inclusion of inflation in the cost of capital OR in the current asset base - -but not through the use of both methods. The Florida Commission nevertheless approved BellSouth's inclusion of inflation in the cost of capital AND the current asset base, resulting in

an unmistakable double counting of inflation. The double-counting of cost is wrong as a matter of law and must be rejected by this Commission.

Third, BellSouth hot cut rate of \$160 for SL-2 loops is vastly overstated and precludes AT&T from offering its UNE-loop service to small and medium-sized business customers. BellSouth's claim that it offers a cost-effective alternative is disingenuous and unavailing. AT&T purchases SL-2 loops (to which the \$160 hot cut charge applies) because they allow for testing of the line and a set cut over time required by its small and medium size business customers. For these customers, the telephone is an economic lifeline, and AT&T cannot allow any interruption in its business customers' service. SL-1 loops, by contrast, do not offer the testing and do not as a regular option allow for time-specific cut overs. Moreover, AT&T has proposed a bulk transfer process that allows for testing and real time correction of problems at negotiated rates instead of the massively overstated \$160 rate, but BellSouth has not yet responded to this AT&T proposal.

Finally, with respect to BellSouth's \$200 per day per line charge for expediting CLEC orders, BellSouth claims that the service of expediting a UNE order is not a UNE itself and is therefore not subject to the nondiscrimination and cost-based rate requirements of Sections 251(c)(3) and 252(d)(1). This argument is misplaced. Both the *Local Competition Order* and the *UNE Remand Order* make clear that OSS and associated ordering and provisioning activities are network elements subject to Sections 251(c)(3) and 252(d)(1). Expediting an order involves selection of a service date, which is a core provisioning activity, and as such expedite charges are subject to the nondiscrimination and cost-based ratemaking requirements. This arbitrary and discriminatory expedite charge violates Section 271.

In Part V AT&T demonstrates that BellSouth's inaccurate and internally inconsistent statements on the subject of its growth tariffs now confirm that this tariff is unlawful. In a Tennessee filing, BellSouth has conceded that the minimum usage levels that serve as the basis for the discount in the SWA Contract Tariff were designed to be negotiated individually with each carrier based on that carrier's specific volumes. This concession contradicts BellSouth's statements to this Commission that BellSouth Long Distance, Inc. ("BSLD") cannot take advantage of the SWA Contract Tariff because BSLD does not meet the minimum levels established for Sprint under the SWA Contract Tariff. As the Tennessee filing makes clear, however, BellSouth can always negotiate the same SWA Contract Tariff with minimum usage levels based on BSLD's much lower access volumes.

Part VI discusses BellSouth's latest violation of Section 271. On October 29, 2002, BellSouth filed an ex parte letter admitting that it has provided interLATA service to customers in Florida, Tennessee, and other states in its region prior to receipt of Section 271 authorization. After so many attempts to foreclose competition, by failing adequately to test and correct fundamental deficiencies in its underlying software systems or by brushing aside Commission concerns and tinkering at the margins, BellSouth's claim that this latest episode of unlawful provisioning is the result of a software glitch rings hollow. This flat violation of the statute, and the damaging implication that BellSouth has failed to test its software adequately as required, calls for nothing less than denial of this Application.

I. THE COMMENTS DEMONSTRATE THAT BELL SOUTH IS NOT PROVIDING NONDISCRIMINATORY ACCESS TO ITS OPERATIONS SUPPORT SYSTEMS.

The comments demonstrate that BellSouth still fails to provide the nondiscriminatory access to its operations support systems ("OSS") that is required by the 1996 Act and the

competitive checklist of Section 271.¹ Most notably, the comments show that BellSouth's current change control process ("CCP") still suffers from serious flaws that deny CLECs a meaningful opportunity to compete.²

The DOJ Evaluation expresses similar concerns regarding the adequacy of the CCP. Although it finds that BellSouth has made progress in addressing the concerns of CLECs and the state commissions, the DOJ nonetheless urges this Commission to monitor BellSouth's performance closely "to assure nondiscriminatory access by competitors." DOJ Eval. at 6, 9. In particular, the DOJ urges the Commission to monitor: "(1) BellSouth's adherence to the CLEC prioritization of [the CLECs'] change requests; (2) its provision of sufficient change capacity to implement CLEC-requested OSS changes; (3) its provision for adequate pre-release testing of OSS changes; and (4) review of OSS changes implemented for BellSouth's retail operations to assure that they do not result in discriminatory access." *Id.* at 7.

The comments confirm the DOJ's concerns. Despite paper improvements to the CCP, BellSouth still "fixes problems that it considers important, but refuses to fix the same problems in the systems that affect CLECs until pressure is applied from some outside source," usually from regulatory authorities responding to complaints by CLECs.³ Recently, rather than improve its performance under the CCP, BellSouth has attempted to mask its performance by submitting performance data that are flatly contrary to reality.

¹ AT&T at 6-14; Covad at 2-24; Mpower at 1-15; Network Telephone at 2-5, 9,11-12; Supra at 1-32; WorldCom at 1-7.

² AT&T at 6-14; Covad at 14-17; Network Telephone at 9; WorldCom at 1-7.

³ Covad at 15. *See also* AT&T at 14; WorldCom at 1.

A. BellSouth Disregards the Priorities Assigned To Change Requests by the CLECs.

As the DOJ recognizes, although BellSouth has promised to allocate half of available release capacity to change requests prioritized by CLECs – and to follow the priorities assigned by the CLECs in implementing those requests – BellSouth has not done so. As before, BellSouth still determines what change requests shall be implemented (and when) without providing CLECs with an adequate explanation when it decides not to follow the CLECs’ priorities. As the DOJ explained:

Unfortunately, while a substantial improvement to the earlier process, [BellSouth’s] “50/50 plan” does not appear to have completely resolved concerns that BellSouth is not following the priorities of the CLECs when scheduling implementation of their change requests. Although there may be good operational reasons for BellSouth to depart somewhat from the CLECs’ priorities, to the extent practical the CLECs should be regarded as the best judges of which their requested changes should be implemented first, and BellSouth should discuss its releases openly with CLECs when it believes constrains prevent it from following CLEC priorities.⁴

Although the clear intent of the prioritization procedures is “for BellSouth to follow that prioritization in creating a release package and only deviate from it based on group consensus,” BellSouth has “deviated substantially from CLEC priorities.” WorldCom at 2 & n.1. As WorldCom describes, the 2003 implementation schedule that BellSouth originally presented fell woefully short of reflecting the priorities that CLECs had assigned to change requests. Even the revised schedule that BellSouth proposed in October 2002 (after CLECs complained about the original schedule) still failed to include many higher-prioritized change requests. Yet

⁴DOJ Eval. at 7.

BellSouth's schedule called for implementation of several lower-prioritized CRs – including CRs which were initiated by BellSouth, not by the CLECs.⁵

By itself, BellSouth's unilateral inclusion of its own change requests in a release that was supposed to be a CLEC production release under the "50/50 Plan" shows a total disregard for the prioritization procedure. Even more flagrantly, however, BellSouth decided to implement two change requests prioritized as 13th and 14th, respectively, by the CLECs ahead of other, higher-prioritized CRs and did not even advise CLECs of its decision until *after the two change requests had already been implemented*. WorldCom at 3; Bradbury Reply Dec. ¶ 7.

BellSouth has compounded its disregard of the prioritization procedure by refusing even to provide CLECs with an adequate explanation for its deviations from CLEC prioritization decisions. When BellSouth finally deigned to advise the CLECs that it had already implemented the change requests that CLECs had ranked as 13th and 14th in a prioritization meeting held only two weeks earlier, BellSouth provided only a superficial explanation for why it could not implement other CRs requested by the CLECs (including two CRs that had been given a higher priority by the CLECs than the two CRs recently implemented). And BellSouth provided that explanation, as inadequate as it was, only after CLECs had protested BellSouth's failure to follow the prioritization procedure.⁶ BellSouth's attitude simply provides further confirmation

⁵WorldCom at 2; AT&T Bradbury Dec. ¶ 36 & n.10 (noting that BellSouth had included three BellSouth-initiated change requests in Release 13.0, which is supposed to be a CLEC Production Release); Bradbury Reply Dec. ¶ 6.

⁶Bradbury Reply Dec. ¶ 8. When BellSouth engaged in the charade of proposing a balloting procedure in early October to determine whether a high-priority CR should be implemented in place of a lower-priority CR, the CLECs returned the ballot without voting to protest BellSouth's refusal to implement CRs in the priorities assigned by CLECs. *See id.*; WorldCom at 3. Only at that point did BellSouth provide any explanation for its refusal. *Id.* As WorldCom states, "[I]t should not have taken CLEC protest to get BellSouth to provide an explanation of the reasons it did not schedule some changes for implementation. Moreover, BellSouth's explanations remain incomplete." *WorldCom* at 4.

that, although the CCP document itself may have been improved, those paper improvements have not been observed by BellSouth in practice.

B. BellSouth Fails To Devote Sufficient Resources To Implementing CLEC Change Requests.

The DOJ's continuing concern "regarding the sufficiency of the resources that BellSouth is devoting to CLEC change requests" is well-founded. As AT&T has previously shown, BellSouth still fails to devote sufficient capacity to such implementation, resulting in a substantial backlog in change requests and patently unreasonable delays in their implementation. AT&T at 8-9.

The continuing large backlog of change requests demonstrates BellSouth's failure to devote sufficient capacity to the change control process. According to BellSouth's own posted data, as of September 30, 2002, BellSouth had not implemented a total of 45 feature change requests that the CLECs had prioritized – and had not even scheduled 15 of those CRs for implementation, even though some of them were submitted as long ago as *August 1999* and *mid-2000*. See Bradbury Rep. Dec. ¶ 10 & Att. 3.⁷ Moreover, the time that BellSouth takes to implement change requests is unreasonable under any standard. Even if BellSouth adheres to the implementation dates that it has scheduled for 30 pending prioritized feature change requests, the majority of those requests will not have been implemented until two to three years – or more – after they were submitted. For one of those change requests, the scheduled implementation date

⁷To compute the total number of pending prioritized feature change requests as of September 30, AT&T relied on two logs posted to BellSouth's CCP website: the Current Log as posted October 16, 2002; and the Archived Log as posted on October 17, 2002. The 45 pending prioritized change requests do not take into account an additional 8 "pending" status CLEC change requests that have not yet been prioritized, any change requests currently in "new" status, or others that will be submitted in the future. Bradbury Reply Dec. ¶ 10 n. 8.

is 45 months after the submission date, and 32 months after the date on which the request was prioritized. *Id.* ¶ 11 & Att. 3.

BellSouth's own feature change requests, by contrast, experience no such backlogs or delays. Only four BellSouth-initiated change requests are pending at this time. Moreover, although it has not scheduled one-third of pending CLEC-prioritized requests for implementation, BellSouth has scheduled *all* of its own CRs for implementation for June 2003 – in a release that it supposedly created as a CLEC production release. *Id.* ¶ 12.

In addition to allowing a substantial backlog of prioritized feature change requests to accumulate, BellSouth has failed to implement an enormous number of defect change requests. According to BellSouth's Daily Change Request Activity Report and Change Control Process Log, as September 30, 2002 BellSouth had not implemented 44 defect change requests that it had recognized as valid. *See id.*, ¶ 13 & Att. 4.⁸ Under BellSouth's proposed implementation schedule, many of these defects will be corrected at intervals up to four times the maximum intervals permitted by the Florida PSC (10 business days for high-impact defects, 30 business days for medium-impact defects, and 45 business days for low-impact defects).⁹

In short, as was the case when the Commission issued its *Five-State 271 Order*, a substantial number of change requests prioritized by the CLECs have been awaiting implementation for two or three years, while few BellSouth-initiated change requests are pending. The Commission stated in the *Order* that this is not “a trend we wish to see continue,”

⁸Some of these 44 defect change requests are simply “validated” (*i.e.*, requests that BellSouth has analyzed and determined to be a valid defect), while the remainder are validated requests for which BellSouth has scheduled implementation dates.

⁹*See* Bradbury Rep. Dec. ¶ 13 & Att. 4; AT&T at 13 & Bradbury Dec. ¶¶ 46-50.

and urged BellSouth to “use some of its half of the release capacity to implement some of the more highly prioritized or older competitive LEC requests during the course of the next year.” *Five-State 271 Order* ¶ 196. BellSouth, in fact, has ample ability to comply with the Commission’s request, since it has scheduled no “BellSouth production releases” under its 50/50 plan. Bradbury Reply Dec. ¶ 15.

Remarkably, however, BellSouth has failed to do so. Instead, flouting both the Commission’s request and its own “50/50 plan,” BellSouth has scheduled its own four change requests for implementation in the *CLEC* production releases, while making no offer to dedicate to CLEC-prioritized requests any of the capacity assigned to “its” production releases. *Id.* ¶ 16. As always, BellSouth talks the CCP talk, but fails to walk the CCP walk.

Rather than devote more capacity to the implementation of CLEC-prioritized change requests, BellSouth offers excuses that simply confirm both its failure to devote sufficient resources to, and its lack of cooperation in, the CCP. For example, on October 8, BellSouth advised the CLECs that it could not implement CR0127 (which the CLECs had prioritized 6th in their prioritization meeting in September) in lieu of certain other change requests which it had previously scheduled for its forthcoming Release 13.0, because those other CRs “did not make available the necessary SGG capacity required to implement CR0127.”¹⁰ “SGG,” or ServiceGateGateway, is BellSouth’s Integrated Data Network (“IDN”) – which, BellSouth has claimed, will provide significant improvements to its OSS when it replaces ENCORE as the OSS platform.¹¹ Stated otherwise, BellSouth is now citing as a constraint on its ability to implement

¹⁰See Bradbury Rep. Dec. ¶ 17 & Att. 5.

¹¹AT&T at 10-11 & Bradbury Dec. ¶ 30.

change requests the very IDN platform that it has touted as a benefit to its OSS. This explanation is illogical.¹²

BellSouth has also asserted that its ability to implement prioritized change requests (including its ability to implement such requests within 60 weeks of prioritization) will be limited because of the CLECs' recent vote to implement the LSOG6/ELMS6 industry standard release. Stacy Dec. ¶ 232. This rationalization is disingenuous. In contrast to other RBOCs, BellSouth unilaterally decided in November 2001 that it would not implement the industry standard LSOG5/ELMS5 release (as it had originally scheduled) but instead would "leapfrog" to LSOG6/ELMS6, which it targeted for implementation for March 2003.¹³ Given its decision to "skip" one industry standard release – a decision that "freed up" capacity that otherwise would have been used for that release – BellSouth cannot seriously contend at this stage that the implementation of LSOG6/ELMS6 limits its ability to implement change requests in a timely manner. As BellSouth knows full well, the simple reality is that BellSouth has not devoted sufficient resources to implementing change requests, and has deliberately chosen not to make additional capacity available. Bradbury Rep. Dec. ¶ 19.

Given these facts, it is clear that – contrary to the DOJ's assumption – BellSouth will not even come close to implementing "nearly all of the outstanding CLEC change requests" by the

¹² See Bradbury Rep. Dec. ¶ 17. BellSouth has still not provided CLECs with adequate information regarding the implementation of the IDN platform. At a CCP meeting on October 23, 2002, BellSouth stated that the migration to the IDN platform is "planned" for December 2003, but did not commit to a specific implementation date. BellSouth provided few details about the migration, provisioning only that "more specifics should be available" by the next CCP meeting in November. See *id.* ¶ 17 n.13 & Att. 6.

¹³ WorldCom at 4; Bradbury Rep. Dec. ¶ 18 & Att. 7. BellSouth had originally scheduled LSOG5/ELMS5 for implementation in May 2002. CLECs had already devoted a substantial amount of time and resources in preparing for that release before BellSouth announced its decision in November 2001 that it would "skip" to LSOG6/ELMS6 instead. *Id.*

end of 2003. See DOJ Eval. at 7-8. As previously indicated, BellSouth's 2003 implementation schedule calls for implementation of only 30 of the 45 outstanding CLEC-prioritized change requests at various dates through December 2003. The remaining 15 change requests, or one-third of the total, still have not even been scheduled, and thus will likely not be implemented until sometime in 2004.¹⁴ Even if BellSouth ultimately implements these 15 change requests in January 2004 (*i.e.*, the earliest possible month in that year), their implementation will occur at least 16 months, and as long as 33 months, after prioritization – intervals that far exceed the 60-week intervals to which BellSouth has purportedly committed itself. See Bradbury Rep. Dec. ¶ 20 & Att. 3.

The fact that one-third of pending prioritized change requests will not have been implemented by the end of 2003 is sufficient to refute BellSouth's attempt to recast itself as a champion of change control. The full picture, however, is even more stark. Currently there are 20 pending CLEC change requests that have not even been prioritized.¹⁵ Because BellSouth's 2003 schedule already appears to be "filled," these requests will not be implemented until 2004 or later. Moreover, CLECs will undoubtedly file numerous additional feature change requests between now and the end of 2003 – making it questionable whether BellSouth will even be able to meet its schedule of implementing the 30 scheduled prioritized change requests by the end of next year. *Id.* ¶ 21.

¹⁴See Bradbury Rep. Dec. ¶ 20 & Att. 3. Even if the change requests approved by the Flow-Through Task Force and designated as regulatory (Type 2) change requests are excluded, at least 7 of the 15 unscheduled prioritized requests are CLEC-initiated (Type 5). *Id.*

¹⁵Of these 20 change requests, 12 are "new" (*i.e.*, the requests have been received by the BellSouth Change Control Manager, but have not yet been validated), and the remaining 8 are "pending" (*i.e.*, the requests have been accepted by the Change Control Manager and scheduled for change review and prioritization). Bradbury Rep. Dec. ¶ 21 & n. 16.

C. BellSouth's Software Releases Have Serious Flaws.

The evidence shows that BellSouth's software releases continue to contain a high level of errors, due to BellSouth's failure to conduct adequate internal testing prior to implementation. AT&T at 12-14. For example, according to BellSouth's own Daily Change Request Activity Reports, a total of 22 additional defect change requests were filed between August 26, 2002 (when BellSouth implemented Release 10.6) and September 30, 2002 – an average of nearly one defect change request per business day. Bradbury Rep. Dec. ¶ 22. Such poor performance cannot reasonably be regarded as sufficient. The obvious problems (including order rejections) that these defects create for CLECs are made even worse by the inordinately long times that BellSouth takes to correct them. *Id.* ¶ 23; AT&T at 12-13. BellSouth's lame attempt to blame the CLECs for these defects, and the methodologically flawed third-party study on which it has relied, cannot conceal the extent of defects in BellSouth's releases – a matter about which not only the DOJ, but this Commission, has expressed concern. *See Five-State 271 Order* ¶ 200; Bradbury Rep. Dec. ¶ 23.

An *ex parte* letter submitted by BellSouth this week provides further confirmation of BellSouth's failure to conduct adequate internal testing before implementing changes in its systems. In that letter, BellSouth acknowledged that some customers in States where it has not yet been granted Section 271 authority were nonetheless "initially allowed" to select BellSouth Long Distance ("BSLD") as their long-distance carrier.¹⁶ BellSouth explained that although certain Service Order Edit Routine ("SOER") edits, should have prevented these customers' orders from completing, the edits "were unintentionally rendered ineffective" when BellSouth

¹⁶*Ex parte* letter from Jonathan Banks (BellSouth) to Marlene H. Dortch, dated October 29, 2002.

instituted changes to other SOER edits to permit “cross-boundary” orders to flow through.¹⁷ Even after implementing a “fix” on October 9 to prevent orders from Florida and Tennessee for BSLD services from passing through its systems, BellSouth “subsequently determined that the SOER edit fix did not correct the problem in one cross boundary area” – requiring BellSouth to implement yet another “fix.”¹⁸

BellSouth attempts to explain this violation of law away by using its long-employed rationalization that only a *de minimis* number of orders were accepted in error after the SOER edits were rendered “ineffective.”¹⁹ As usual, BellSouth misses the point. The evidence shows that BellSouth has repeatedly, and frequently, implemented changes to its systems that are riddled with defects – reflecting a clear failure to perform adequate internal testing before it implements the changes. Clearly, in this latest incident, BellSouth performed shoddy internal testing (or no internal testing at all) before it made the changes to the SOER edits – or even before it implemented its original “fix.” Until BellSouth changes its procedures and practices to ensure that its proposed changes are fully and sufficiently tested before implementation, it cannot be found to be in compliance with Section 271. Bradbury Rep. Dec. ¶ 25.

¹⁷*Id.* at 2-3. Although BellSouth suggests that the SOER edits involve only orders placed by its retail operations (*id.* at 1), SOER edits are applied by its Service Order Communications System (“SOCS”) to both retail orders and to LSRs submitted by CLECs. As BellSouth states, “The SOER edit routine is a critical processing component in the creation of a service order to enable the request to be accepted by BellSouth’s legacy systems for provisioning.” *Id.* See also Bradbury Rep. Dec. ¶ 24 n. 18.

¹⁸*Id.* at 2.

¹⁹*Id.* at 3.

D. BellSouth Attempts To Use Its Reported Performance Data To Mask Its Inadequate Performance Under the CCP.

The various problems with the CCP demonstrated by AT&T and the other commenters show that, regardless of how the CCP might read on paper, the CCP as implemented by BellSouth is not providing CLECs with a meaningful opportunity to compete. Far from adhering to the CCP, BellSouth has not only disregarded it, but has manipulated its reported performance data to mask its lack of serious commitment to change management. Bradbury Rep. Dec. ¶¶ 26-29.

For example, BellSouth's application repeatedly cites the new performance measurements for change management recently adopted by the Florida and Georgia PSCs as improvements to the CCP, and as additional assurance that preexisting deficiencies in the CCP (such as BellSouth's failure to implement releases without conducting adequate internal testing) will not reappear in the future. *See, e.g.*, Stacy Aff. ¶¶ 147, 196, 224, 270. The data that BellSouth has reported for two of the new metrics, however, are so patently unreliable that they reflect a clear attempt by BellSouth to subvert them. These metrics are CM-6 (Percent of Software Errors Corrected in X (10, 30, or 45) Business Days) and CM-11 (Percent of Change Requests Implemented Within 60 Weeks of Prioritization). *Id.*; Bradbury Rep. Dec. ¶ 27.

BellSouth began reporting data for these two metrics in August, as required by the Florida PSC. Bradbury Rep. Dec. ¶ 28. On their face, however, the data that BellSouth has reported are flatly wrong. For CM-6, BellSouth reported that in both August and September, it implemented only 4 defect change requests during each month – and that all of these change requests were implemented within the required interval, resulting in a 100% on-time performance. BellSouth's reported data, however, are flatly contradicted by its own Daily

Change Activity Reports, which state that BellSouth implemented 22 – not four – defect change requests in August. Moreover, the Daily Change Activity Reports indicate that in both August and September, more than 20 other defect change requests had not been implemented within the prescribed time intervals (and had not been implemented at all). *See id.* ¶ 28 & Atts. 4, 8.

The information that BellSouth has reported for CM-11 (percentage of change requests implemented within 60 weeks of prioritization) is equally absurd on its face. *Id.* ¶ 29. For both August and September, BellSouth reported that there was “No Activity This Period” for this measurement. This statement flies in the face of reality. *Id.* For example, BellSouth implemented Release 10.6 – which contained 9 feature change requests – on August 25, 2002. *Id.* ¶ 29 & Att. 9. To assert that there was “no activity” despite this fact – and despite the fact that BellSouth is required to report data for this measurement in accordance with the business rules prescribed by the Florida PSC – demonstrates that BellSouth is willing to go to any lengths to avoid true compliance with the CCP. *Id.*²⁰

Promises and paper commitments do not translate into a CCP that satisfies BellSouth’s obligations under the competitive checklist. BellSouth has yet to demonstrate that it will do in fact what it has agreed to do on paper. When the Commission approved BellSouth’s previous application, it did so in part on the basis of its expectations that BellSouth would comply with, and continue to improve, the CCP. At the same time, the Commission recognized that “what is sufficient for checklist compliance today may not be sufficient over time.” *Five-State Order* ¶ 179. Time has proven that BellSouth does not implement the CCP in a way that provides CLECs

²⁰ AT&T and other CLECs have provided the Florida PSC staff with information showing that BellSouth’s method of calculating its reported data for the change management performance measurements is contrary to the business rules that the Florida PSC has prescribed for these measurements. Bradbury Reply Dec. ¶ 29 n. 21.

with a meaningful opportunity to compete. For these reasons, the CCP is clearly inadequate under Section 271.

II. BELLSOUTH'S PERFORMANCE DATA DO NOT SHOW CHECKLIST COMPLIANCE.

The comments confirm that BellSouth has failed to demonstrate that its performance data are accurate and show statutory compliance. Indeed, the comments show that BellSouth's own reported data are untrustworthy, and that even its inadequate performance results show that it has fallen far short of its statutory requirements. Norris Dec. ¶¶ 3-72; KMC at 10-17; Covad at 24-29.

A. BellSouth's Reposting Policy Demonstrates That Its Data Are Untrustworthy.

In its opening comments, AT&T explained that BellSouth's reposting policy inappropriately shields from disclosure errors in its performance data. Norris Dec. ¶¶ 3-10. BellSouth's policy "establishes exclusions for errors not involving one of the listed Key Performance Measures, not involving a metric with at least 100 CLEC transactions, or not changing the reported results at least 0.5 or 2% as applicable." DOJ Eval. at 9-10. Significantly, the DOJ concurs that BellSouth's reposting policy is cause for concern and warrants further scrutiny. *Id.* at 9.

In this regard, although "BellSouth's performance reporting obligations have been established by state regulations," BellSouth has failed to reference any "regulatory authority for this policy." *Id.* at 10. BellSouth's unilateral reposting policy makes a mockery of the Service Quality Measurement Plan ("SQM") that has been approved by the state regulatory bodies. The DOJ correctly points out that, "the scope of the obligation to correct erroneously reported

performance data should not be set by the carrier whose performance is being monitored.” DOJ Eval. at 10. n. 37.

Additionally, as the DOJ explains, the reposting policy is ill-defined and fails to elucidate with sufficient clarity and specificity the precise measures and types of errors which are subject to restatement. *Id.* at 10. Thus, for example, although BellSouth’s policy states that it “will make available reposted performance data...to the extent technically feasible,” the policy fails to explain the circumstances under which it would be technically infeasible for BellSouth to correct errors in its performance results.²¹

Critically, because BellSouth’s reposting policy permits it to conceal errors in its performance data, BellSouth’s actual performance remains cloaked in secrecy. Norris Dec. ¶¶ 3-10. As the DOJ explains, “[c]arriers and regulators alike have an interest in the reliability of reported data as inaccurate data undercut the purposes of performance measurement.” DOJ Eval. at 10. Moreover, this Commission has held that when a BOC, such as BellSouth here, relies on performance data, the reported results must be “above suspicion.” *Texas 271 Order* ¶ 429. On its face, BellSouth’s reposting policy – which permits it to conceal errors on its performance data – demonstrates that BellSouth’s reported results in its Application are inherently suspect.

Furthermore, BellSouth’s reposting policy belies its assertion that the SEEMs on which it relies “compensate individual CLECs for performance that does not meet the standards and...penalize more generalized problems of an industry-wide nature.” Varner Aff. ¶ 187. Under BellSouth’s reposting policy, only data for so-called “key measures” that otherwise meet certain temporal, volume, and performance severity thresholds will be restated. Norris Dec. ¶¶

²¹ See *ex parte* letter from Jonathan Banks to Marlene H. Dortch dated October 17, 2002, Att. (“BellSouth’s Policy on Reposting of Performance Data”) (“October 17 data reposting *ex parte*”) at 1. See also DOJ Eval. at 10 n. 37.

6-7. By BellSouth's own admission, numerous measures that are included in the SEEM are not subject to reposting, including measures on change management notices, acknowledgement completeness, and CLEC specific trunk group performance.²² Thus, if BellSouth performance data on non-"key" measures in the SEEM contain errors which, when corrected, would result in remedy payments, BellSouth's reposting policy effectively permits it to conceal such errors and avoid experiencing any financial consequences for plainly discriminatory or subpar performance. BellSouth's reposting policy plainly eviscerates the purported self-executing remedial mechanisms in the SEEMs which BellSouth touts in its Application.²³

BellSouth cannot have it both ways. BellSouth cannot contend that its data are accurate, show statutory compliance and are subject to self-executing remedial mechanisms, while simultaneously shielding errors in its performance results and avoiding making any remedy payments for plainly discriminatory conduct affecting measures that do not fall within the ambit of its unilateral, ill-conceived reposting policy.

Undoubtedly mindful of the fundamental infirmities in its reposting policy, BellSouth, in its October 21 *ex parte*, resorts to rationalizations and excuses in an attempt to justify its misguided approach. Thus, for example, in attempting to rationalize its unilateral decision to implement its seriously-flawed reposting policy, BellSouth contends that it was not

²² BellSouth admits that the following measures which are in the SEEM are not subject to reposting: "Timeliness of Change Management Notices; Timeliness of Documents Associated with Change; Recently Adopted Change Management Measures; Firm Order Confirmation and Reject Response Completeness; Acknowledgement Completeness; LNP Average-Disconnect Timeliness Interval; Cooperative Acceptance Testing - % of xDSL Loops Tested; Trunk Group Performance - CLEC Specific." *Ex parte* letter from Jonathan Banks to Marlene H. Dortch dated October 21, 2002, Att. "BellSouth's Reposting Policy" at 7 ("October 21 *ex parte*").

²³ The DOJ also correctly observes that, "[w]hen performance and penalty data are restated, moreover, the reasons for the restatements need to be explained," and that it "views with concern, therefore, allegations that BellSouth has failed to discuss and explain its multiple restatements of penalty payments due." DOJ Eval. at 10 n. 38.

required to seek State approval before implementing the policy because it is already required to issue accurate performance data.²⁴ BellSouth's analysis is demonstrably unsound.

During hearings, the Florida PSC examined whether BellSouth should incur penalties for issuing incomplete or inaccurate performance results.²⁵ The Florida PSC ordered BellSouth to provide complete and accurate performance reports and found that penalties should be assessed whenever BellSouth fails to do so. Critically, the Florida PSC did not find that BellSouth has discretionary authority to hide from public scrutiny particular types of errors in its reported results. Notably, BellSouth argued "that the definitions of 'incomplete' and/or 'inaccurate' are so imprecise that there would be an ongoing administrative burden each month to determine what is incomplete or inaccurate."²⁶ Although BellSouth expressed confusion regarding the kinds of defects which might render its results "incomplete" or "inaccurate" and opposed the imposition of penalties for inaccuracies in its reported results, the Florida PSC rejected BellSouth's arguments and stated unequivocally that, if BellSouth fails to calculate "any" performance results in accordance with the business rules in the SQM, BellSouth will incur a penalty.²⁷

We disagree with BellSouth witness Coon that the terms incomplete and inaccurate are sufficiently ambiguous to preclude taking any action to prevent improper reporting of the data. For purposes of determining the applicability of penalties, reports shall be deemed to be incomplete if they do not present all of the required data as specified above. Similarly, reports shall be

²⁴ October 21 *ex parte*, Att. at 2.

²⁵ *See In re: Investigation into the establishment of operations support system permanent performance measures for incumbent local exchange telecommunications companies*, Docket No. 000121-TP, Order No. PSC-01-1819-FOF-TP, issued September 10, 2001.

²⁶ *Id.* at 132.

²⁷ *Id.* at 134.

deemed inaccurate if *any* of the required data is not calculated as specified in the SQM plan.

* * *

Complete and accurate performance reports are necessary for the ALECs and this Commission. A penalty will establish an incentive for BellSouth to post the reports in a complete and accurate fashion.²⁸

In view of the Florida PSC's Order, it is patently absurd for BellSouth to contend that its reposting policy did not require State approval, particularly when the effect of this policy is to conceal from CLECs and regulators errors and omissions in its reported results and to ensure that BellSouth does not incur the penalties ordered by the Florida PSC for issuing inaccurate or incomplete performance results.

Similarly, in its October 21 *ex parte*, although BellSouth acknowledges that numerous measures in the SEEM are not subject to restatement, it contends, nonetheless, that its “[p]olicy reflects careful and necessary balance between restating potentially meaningful errors in the data and keeping the data stable to be of use to CLECs and regulators.”²⁹ Implicit in BellSouth's analysis is the notion that non-“key” measures which are included in the SEEM are not worthy of restatement because such measures have no “meaningful” impact on competitive entry. The fundamental and fatal flaws in BellSouth's analysis are illustrated by BellSouth's admission in the Application that the “SEEM encompasses measurements of key outcomes where a failure to produce that outcome would have a direct, significant effect on competition.” Varner Aff. ¶ 184.

Conceding that its reposting policy does not disclose all errors in its performance data, BellSouth contends that CLECs, nonetheless, are notified of all such errors by virtue of its

²⁸ *Id.* (emphasis added).

²⁹ October 21 *ex parte*, Att. at 10.

Data Notification Policy which purportedly works “in tandem with” its reposting policy.³⁰ In an effort to lend color to its arguments regarding the purported effectiveness of the Data Notification Policy, BellSouth contends that “no CLEC has filed formal challenge to any of BellSouth’s proposed changes” in its data notifications.³¹ BellSouth is wrong on both counts.

BellSouth’s Data Notification policy operates *prospectively* and is designed to give CLECs advance notice of the proposed changes that BellSouth intends to make to the methodologies for calculating performance results. Even BellSouth’s data notifications in the Application state explicitly that the data notifications “must be provided on the first business day of the month *before* the data month in which the change will be made,” and that “BellSouth must also provide notification if it is considering making changes to the method of calculating data for the following month.”³²

For example, on August 1, 2002, BellSouth filed a data notification report regarding proposed changes to the metrics that BellSouth planned to implement in its performance results for the September and October 2002 data months.³³ Similarly, on September 3, 2002, BellSouth filed a data notification report which discusses proposed metrics changes that BellSouth intends to implement to calculate performance results for the October and November 2002 data months.³⁴ Thus, notwithstanding BellSouth’s misguided suggestions to the contrary, the Data Notification Policy is not designed to serve and does not serve as a vehicle for

³⁰ October 21 *ex parte* at 10.

³¹ *Id.*, Att. at 4.

³² Letter from Bennett Ross to Reece McAlister dated September 3, 2002, Att., “Proposed October 2002 Data Notification” at 1, Varner Aff. Ex. 14A (“September 3 Data Notification”) (emphasis added).

³³ Letter from Bennett Ross to Reece McAlister, dated August 1, 2002, Att., “September 2002 Data Notification”. Varner Aff., Ex. 14.

³⁴ September 3 Data Notification, Varner Ex. 14A.

correcting errors in and restating *current* and *historical* performance results. Moreover, BellSouth's analysis blithely ignores that its much-heralded data notifications do not contain the penalty payments to which CLECs are entitled and never receive because BellSouth has unilaterally determined that error-ridden data for non-"key" measures in the SEEM are not subject to restatement.

Equally infirm is BellSouth's argument that CLECs have never challenged proposed changes to the metrics that are contained in its data notifications. On October 21, 2002, AT&T, Birch Telecom, Inc., and MCI jointly filed before the Georgia Public Service Commission ("Georgia PSC") comments on BellSouth's proposed metric changes to be implemented in its November 2002 data.³⁵ In these comments, the CLECs explained that, in its July 19, 2002 Order, the Georgia PSC found that any proposed metrics change that BellSouth intends to implement in response to observations and exceptions during KPMG's audit will be deemed approved automatically, but that other proposed metrics changes are subject to the 60 day review cycle and approval process. However, the CLECs noted that BellSouth has manipulated this Order and attempted to circumvent the review and approval process by improperly classifying proposed changes in its data notifications as modifications that are somehow required to respond to the KPMG audit. The CLECs have not only challenged BellSouth's proposed changes in its data notification, but they have also requested that the Georgia PSC require BellSouth to provide evidentiary support for any changes that allegedly are required to address specific KPMG exceptions or observations.³⁶

³⁵ *In Re: Performance Measurements for Telecommunications Interconnection, Unbundling and Resale*, Docket No. 7892U, Georgia Public Service Commission, CLEC Comments on BellSouth's Proposed November PMAP Changes, October 21, 2002.

³⁶ *Id.*

Against this backdrop, BellSouth cannot legitimately contend that the data in its Application are complete, accurate and “above suspicion” or, for that matter, that its SEEMs contain self-executing mechanisms which provide sufficient assurance that BellSouth will satisfy its statutory obligations in the wake of Section 271 relief. On its face, BellSouth’s reposting policy – which operates to hide from public scrutiny inaccuracies in its performance results – precludes such a finding.³⁷

B. BellSouth’s Performance Data Do Not Show Statutory Compliance.

In its Application, BellSouth relies upon its reported data results in Tennessee, as well as its reported results using the Florida interim performance metrics that were in effect until May 2002. BellSouth contends that these data prove that it has fully complied with the checklist. However, the comments confirm that even BellSouth’s inadequate performance results in its Application show that BellSouth has fallen far short of statutory requirements.

Thus, the Commission has found that it is absolutely essential that CLECs receive timely status notices. *New Jersey 271 Order* ¶ 93. The Commission has repeatedly found that the timely return of status notices “is an important aspect of a competing carrier’s ability to serve

³⁷ BellSouth’s performance data are unreliable in other respects. As noted herein, on their face, BellSouth’s reported data for change management metrics CM-6 (Percent of Software Errors Corrected in X (10, 30, or 45) Business Days) and CM-11 (Percent of Change Requests Implemented within 60 weeks of Prioritization) are inherently unreliable. Additionally, BellSouth’s reported results are otherwise suspect. In its October 7 *ex parte*, BellSouth submitted its performance results for the months of May through August 2002 under the permanent Florida SQM. *Ex parte* letter from Kathleen Levitz to Marlene Dortch, dated October 7, 2002, attaching spreadsheet (“October 7 *ex parte*”). BellSouth’s reported results include data regarding its performance in completing xDSL orders under measures P-4 (Order Completion Interval Within X Days) and P-4A (Average Order and Completion Notice Interval) for both mechanized and non-mechanized orders. *See, id.*, B.2.4.2, B.2.5.2 and B.2.6.2. According to the business rules governing P-4 and P-4A, the total order volumes reported in the denominator of the calculation are the “Total Service Orders Completed in Reporting Period.” BellSouth Service Quality Measurement Plan (SQM), Version 2.00, January 23, 2002 at 3-13, 3-16, Varner Aff., Ex. PM-19. Similarly, both measures contain the same exclusions. *Id.* Thus, the total order volumes reported for both measures should be identical. However, in August, BellSouth reports a total volume of 144 xDSL orders for measure P-4 (B.2.4.2), but reports a total volume of 80 (mechanized and non-mechanized) DSL orders under P-4A (B.2.5.2, B.2.5.2). On their face, BellSouth’s reported results are inaccurate.

its customers at the same level of quality as a BOC.” *Id.* However, BellSouth’s own data show that it has failed to return timely rejection notices, FOCs, and completion notices. Norris Dec. ¶¶ 12-18, 24-25, 38-55.

The comments also confirm that BellSouth has failed to perform at parity during the provisioning process. *See id.* ¶¶ 26-29, 60-66. Thus, the comments show that BellSouth “assigns loop facilities in a discriminatory fashion” by placing a greater percentage of CLEC loop orders in jeopardy status than orders for its own retail customers.³⁸ In addition, BellSouth’s own performance results on the measure of provisioning troubles within 30 days show that BellSouth “has not met the benchmarks in Florida, and provided even worse performance in Tennessee.” KMC at 15. *See also* Norris Dec. ¶¶ 60-63. BellSouth’s own data also demonstrate that BellSouth takes longer to provision CLEC orders than orders for its own retail customers. Norris Dec. ¶¶ 26-29.

BellSouth’s performance failures are not confined to the ordering and provisioning processes. BellSouth also has failed to perform at parity during the maintenance and repair process. As KMC aptly observes:

Once BellSouth actually assigns facilities, it assigns second or third grade trouble phone circuits. Once assigned, these circuits fail immediately after installation due to inherent weaknesses, inadequate testing, or faulty technician performance. These loops then continue to suffer troubles with greater frequency, month after month. When repairs are finally made, the repair is either not completed properly or the trouble reoccurs due to the poor quality of the circuit. There is simply no way that BellSouth, based on its

³⁸ KMC at 12-13. *See also* Norris Dec. ¶¶ 19-23. As KMC also points out, BellSouth has admitted that “[w]hen a jeopardy is issued, some of the time that would otherwise be allocated for testing and turn up of the circuit may be lost in trying to resolve the jeopardy.” KMC at 13-14. KMC also notes that “the greater the incidence of jeopardies, the more likely the circuit will fail – a fact confirmed by the significantly higher trouble rates for CLEC loop installs....” *Id.* at 14 (footnotes omitted).

own performance data, can credibly claim to be in compliance with the checklist standards for loops.³⁹

The deficiencies in BellSouth's maintenance and repair performance are confirmed by its own data which show that "CLEC loops that are installed encounter trouble with much greater frequency than do BellSouth retail circuits." KMC at 15. As KMC points out, "the CLEC Customer Trouble Report Rate exceeded BellSouth's retail in every month this year for Digital Loops." *Id.* at 16. BellSouth's failure to resolve troubles properly "results in a large quantity of repeat troubles ranging from 14% to 24% repeat troubles in Florida and up to 29% repeat troubles for Tennessee." *Id.* at 17. Significantly, BellSouth's performance in this area "can translate to lost customers because repeat troubles can destroy customer confidence." Covad at 28.

As noted above, the Florida performance results on which BellSouth relies in its Application are based upon the interim performance standards, rather than the Florida Permanent SQM that went into effect in May 2002. Importantly, there are stark differences between Florida's interim and permanent SQMs. For any number of measures, the performance standards in the Florida Permanent SQM are more stringent than those under the interim performance measurement plan.⁴⁰ Additionally, as BellSouth acknowledges, the Florida Permanent SQM includes additional levels of disaggregation and measures which are not included in the interim plan.⁴¹ In its October 7 *ex parte*, BellSouth filed its reported results for the measurements in the

³⁹ KMC at 17 (footnote omitted).

⁴⁰ The benchmark standards for FOC and rejection notice timeliness for partially-mechanized orders were increased in the permanent plan from 85% to 95%. *See ex parte* letter from Kathleen Levitz to Marlene Dortch dated October 17, 2002, Att. "Comparison of Florida PSC 271 Measures with Florida Permanent Measures" at 1-2. ("October 17 *ex parte*").

⁴¹ *Id.* at 1-4.

Florida Permanent SQM – performance results which further confirm that BellSouth’s performance is sorely deficient.

Thus, for example, in the Florida Performance SQM the benchmark standard for FOC and reject notice timeliness for partially-mechanized orders increased from 85 percent to 95 percent. However, BellSouth’s Application relies upon the less stringent 85 percent standard that was in effect prior to May 2002. When BellSouth’s performance is examined under the 95 percent benchmark standard in the permanent metrics, it is plainly evident that BellSouth’s performance is woefully inadequate.

BellSouth’s own performance results show that, in returning timely FOCs for partially-mechanized orders: BellSouth failed all of the resale metrics for which data were reported in May;⁴² BellSouth failed all of the resale submetrics for which data were reported in June;⁴³ BellSouth missed 11 of 13 submetrics for UNE orders in May;⁴⁴ BellSouth missed 12 of 13 submetrics for UNE orders in June;⁴⁵ BellSouth missed 11 of 13 submetrics for UNE orders in July;⁴⁶ and BellSouth missed nine of 13 submetrics for UNE orders in August.⁴⁷

⁴² In May, BellSouth failed the 95% benchmark standard for the following FOC timeliness submetrics for partially mechanized resale orders: A.1.12.1 (84.84%) (Resale Residence); A.1.12.2 (86.58%) (Resale Business); and A.1.12.4 (50%) (Resale PBX).

⁴³ In June, BellSouth failed the 95% benchmark standard for the following FOC timeliness metrics for partially-mechanized resale orders: A.12.1 (86.84%) (Resale Residence); A.1.12.2 (87.85%) (Resale Business); A.1.12.4 (0.00%) (Resale PBX); A.1.12.6 (0.00%) (Resale ISDN).

⁴⁴ In May, BellSouth failed the 95% benchmark standard the following FOC timeliness submetrics for partially-mechanized UNE orders: B.1.12.3 (80.73%) (Loop & Port Combinations); B.1.12.6 (94.01%) (ISDN); B.1.12.7 (87.50%) (Line Sharing); B.1.12.8 (83.64%) (2W Analog Loop Design); B.1.12.9 (93.01%) (2W Analog Loop Non-Design); B.1.12.12 (77.96%) (2W Analog Loop w/LNP Design); B.1.12.13 (92.92%) (2W Analog Loop w/LNP–Non-Design); B.1.12.14 (84.34%) (Other Design); B.1.12.17 (93.08%) (LNP Standalone); B.12.18 (94.01%) (Digital Loop < DS1); and B.1.12.19 (84.26%) (Digital Loop > = DS1).

⁴⁵ In June, BellSouth failed the 95% benchmark standard for the following FOC timeliness submetrics for partially-mechanized UNE orders: B.1.12.3 (92.68%) (Loop & Port Combinations); B.1.12.5 (88.89%) (xDSL); B.1.12.6 (82.05%) (ISDN Loop); B.1.12.7 (88.89%) (Line Sharing); B.1.12.8 (91.67%) (2W Analog Loop Design); B.1.12.9 (91.53%) (2W Analog Loop Non-Design); B.1.12.12 (65.57%) (2W

Similarly, BellSouth's own performance results for those measures assessing the timeliness of BellSouth's return of rejection notices for partially mechanized orders show that: in May, BellSouth missed 12 of 13 submetrics for UNE orders;⁴⁸ in June, BellSouth missed nine of 14 submetrics for UNE orders;⁴⁹ in July, BellSouth missed six of 13 submetrics for UNE orders;⁵⁰ and in August, BellSouth missed nine of 13 submetrics for UNE orders.⁵¹

Analog Loop w/LNP Design); B.1.12.13 (80.58%); (2W Analog Loop w/LNP Non-Design); B.1.12.17 (94.08%) (LNP Standalone); B.1.12.18 (84.31%) (Digital Loop < DS1); B.1.12.19 (84.84%) (Digital Loop > = DS1); B.1.12.20 (0.00%) (EELs).

⁴⁶ In July, BellSouth failed the 95% benchmark standard for the following FOC timeliness submetrics for partially-mechanized UNE orders: B.1.12.3 (94.67%) (Loop & Port Combinations); B.1.12.5 (89.19%) (xDSL); B.1.12.6 (70.83%) (ISDN Loop); B.1.12.8 (91.70%) (2W Analog Loop Design); B.1.12.9 (94.11%) (2W Analog Loop Non-Design); B.1.12.12 (74.04%) (2W Analog Loop w/LNP Design); B.1.12.13 (85.43%) (2W Analog Loop w/LNP Non-Design); B.1.12.17 (92.63%) (LNP Standalone); B.1.12.18 (84.48%) (Digital Loop < DS1); B.1.12.19 (83.78%) (Digital Loop > = DS1); and B.1.12.20 (58.82%) (EELs).

⁴⁷ In August, BellSouth failed the 95% benchmark standard for the following FOC timeliness submetrics for partially-mechanized UNE orders: B.1.12.3 (91.83%) (Loop & Port Combinations); B.1.12.5 (81.82%) (xDSL); B.1.12.6 (80.95%) (ISDN Loop); B.1.12.8 (91.33%) (2W Analog Loop Design); B.1.12.12 (69.80%) (2W Analog Loop w/LNP Design); B.1.12.13 (84.03%) (2W Analog Loop w/LNP Non-Design); B.1.12.18 (81.40%) (Digital Loop < DS1); B.1.12.19 (91.07%) (Digital Loop > = DS1); B.1.12.20 (71.43%) (EELs).

⁴⁸ In May, BellSouth failed the benchmark standard for the following Reject Interval submetrics for partially-mechanized UNE orders: B.1.7.3 (86.71%) (Loop & Port Combinations); B.1.7.5 (83.33%) (xDSL); B.1.7.6 (60%) (ISDN Loop); B.1.7.7 (75.28%) (Line Sharing); B.1.7.8 (84.52%) (2W Analog Loop Design); B.1.7.9 (64.71%) (2W Analog Loop Non-Design); B.1.7.12 (74.23%) (2W Analog Loop w/LNP Design); B.1.7.13 (84.13%) (2W Analog Loop w/LNP Non-Design); B.1.7.14 (86.36%) (Other Design); B.1.7.17 (91%) (LNP Standalone); B.1.7.18 (60%) (Digital Loop < DS1); B.1.7.19 (86.36%) (Digital Loop > = DS1).

⁴⁹ In June, BellSouth failed the benchmark standard for the following Reject Interval submetrics for partially-mechanized UNE orders: B.1.7.6 (46.67%) (ISDN Loop); B.1.7.7 (84.85%) (Line Sharing); B.1.7.8 (87.96%) (2W Analog Loop Design); B.1.7.9 (78.24%) (2W Analog Loop Non-Design); B.1.7.12 (75.18%) (2W Analog Loop w/LNP Design); B.1.7.13 (85.30%) (2W Analog Loop w/LNP Non-Design); B.1.7.17 (91.38%) (LNP Standalone); B.1.7.18 (52.94%) (Digital Loop < DS1); B.1.7.19 (87.76%) (Digital Loop > = DS1).

⁵⁰ In July, BellSouth failed the benchmark standard for the following Reject Interval submetrics for partially-mechanized UNE orders: B.1.7.8 (90.24%) (2W Analog Loop Design); B.1.7.9 (76.78%) (2W Analog Loop Non-Design); B.1.7.12 (72.80%) (2W Analog Loop w/LNP Design); B.1.7.13 (72.66%) (2W Analog Loop w/LNP Non-Design); B.1.7.17 (89.06%) (LNP Standalone); B.1.7.19 (89.25%) (Digital Loop > = DS1).

The Florida Permanent SQM also includes a new measure, P-6 (% Completion/Attempts without Notice or Less than 24 Hours Notice) which is designed to assess “if BellSouth is returning a FOC to the CLEC in time for the CLEC to notify their customer of the scheduled date.”⁵² The Florida PSC has adopted a benchmark standard of less than 5% for this measure. *Id.* BellSouth’s performance data reveal that BellSouth’s performance on this measure has been subpar. In this regard, in May 2002, BellSouth missed the five percent benchmark standard for 14 of the 23 submetrics with reported data.⁵³ During May, BellSouth completed or attempted to complete without the requisite notice 35.76% of BellSouth’s UNE loop with LNP non-design dispatch orders. *Id.* Similarly, in June 2002, BellSouth failed 13 of the 22 submetrics with reported data. During June, BellSouth failed to provide the requisite notice for 55.26% of UNE 2W Loop with LNP design orders requiring a dispatch. *Id.* Additionally, in July, BellSouth failed 13 of the 25 submetrics with reported data; and in August, BellSouth failed 11 of the 22 submetrics with reported data. *Id.* at 65, 67. Based upon its own performance data, BellSouth cannot seriously contend that its performance in returning timely FOC and rejection notices is exemplary.

In addition, BellSouth’s reported data under the Florida Permanent SQM show that it fails to provision xDSL Loops at parity. In its October 17 *ex parte*, BellSouth correctly points out that, under measure P-4A: Average Order Completion & Completion Notice Interval

⁵¹ In August, BellSouth failed the benchmark standard for the following Reject Interval submetrics for partially-mechanized UNE orders: B.1.7.5 (50%) (xDSL); B.1.7.7 (88.89%) (Line Sharing); B.1.7.8 (88.89%) (2W Analog Loop Design); B.1.7.9 (78.61%) (2W Analog Loop Non-Design); B.1.7.12 (92.31%) (2W Analog Loop w/LNP Design); B.1.7.13 (88.14%) (2W Analog Loop w/LNP Non-Design); B.1.7.18 (50%) (Digital Loop < DS1); B.1.7.19 (88.66%) (Digital Loop > = DS1); B.1.7.20 (90%) (EELs).

⁵² BellSouth Service Quality Measurement Plan (SQM), Version 2.00, January 23, 2002, Measure P-6 at 3-23. Varner Aff., Ex. PM-19.

for xDSL Loops, the benchmark is 5 days for xDSL loops without conditioning and 12 days for xDSL loops with conditioning.⁵⁴ However, in its October 7 *ex parte* in which it reported data under the Florida Permanent SQM, BellSouth reported that the benchmark standards are 5 days for xDSL Loops with conditioning and 20 days for xDSL loops without conditioning. Assuming that BellSouth's data on P-4A for xDSL loops (without conditioning) are accurate and using the appropriate five day benchmark standard, BellSouth's reported results show that it failed this metric in May, June, July and August.⁵⁵

BellSouth's reported results under the Florida Permanent SQM reveal other provisioning failures. For example, under the Florida Permanent SQM, BellSouth is now required to provide disaggregated EEL results for the measure of % Provisioning Troubles in 30 Days.⁵⁶ However, BellSouth's reports show that, in July and August 2002, it failed to perform at parity on this measure when completing EEL orders consisting of fewer than 10 circuits and requiring a dispatch. Indeed, those results show that CLECs experienced twice as many provisioning troubles as those reported by BellSouth's retail customers.⁵⁷

BellSouth's data reported under the Florida Permanent SQM also demonstrate that BellSouth's performance during the billing process is demonstrably poor. The Florida Permanent SQM includes a new measure, B-10 (Percent Billing Errors Corrected in 45 Days)

⁵³ October 7 *ex parte* (P-6) at 66, 68.

⁵⁴ October 17 *ex parte*, Att. at 3.

⁵⁵ October 7 *ex parte*, measure P-4A (B.2.5.2, B.2.6.2).

⁵⁶ *See* October 17 *ex parte*, Att. at 3.

⁵⁷ October 7 *ex parte* (B.2.26.21.1.1) (showing that in July, BellSouth's retail orders experienced 6.25% provisioning troubles, while CLECs experienced 15.89% provisioning troubles; and that, in August, BellSouth's retail orders experienced 8.37% provisioning troubles, while CLECs experienced 19.57% provisioning troubles).

which assesses the timeliness with which BellSouth responds to CLEC requests for adjustments and corrects errors in its bills. Any billing adjustment requests that are initiated, rejected, or disputed by BellSouth are excluded from performance results. Although measure B-10 is currently diagnostic and the CLECs have proposed a 95% benchmark standard, BellSouth's own performance results reveal that BellSouth's performance is commercially unreasonable by any standard.

Thus, BellSouth's reported May results for measure B-10 show that BellSouth made timely carrier bill adjustments for only 11.05 percent of the undisputed CLEC billing adjustment requests. BellSouth's June results show that BellSouth made timely carrier bill adjustments for 43.97 percent of the undisputed CLEC billing adjustment requests. Remarkably, BellSouth's wholly inadequate performance deteriorated even further in July and August when BellSouth provided timely bill adjustments for only 16.92 percent and 10.77 percent of the billing adjustments that CLECs requested.⁵⁸

BellSouth's failure to correct billing errors in the required time interval has devastating consequences. Currently, CLECs are paying their wholesale bills upfront and submitting claims for adjustments to BellSouth. a Since measure B-10 captures BellSouth's performance in making adjustments to correct undisputed billing errors, BellSouth's own results demonstrate that CLECs are deprived of monies to which they are entitled because of BellSouth's unreasonable delays in the billing process.

The weight of the evidence shows that BellSouth has utterly failed to meet its burden of demonstrating that its performance data are accurate, reliable, and that those data show that it has fully satisfied its statutory obligations. The pool of evidence shows that BellSouth's

⁵⁸ October 7 *ex parte* (B-10).

performance data are wholly unreliable and should be eyed with suspicion, and that its own inadequate results demonstrate that it has not fulfilled its Section 271 obligations.

III. BELLSOUTH'S ANTICOMPETITIVE CONDUCT IMPOSES COSTS AND COMPETITIVE BARRIERS ON AT&T.

In its comments, AT&T demonstrated that BellSouth's policy of requiring clarification on orders porting the numbers of large business customers to AT&T service violated checklist item 11. AT&T 17-19; Berger Dec. ¶¶ 4-7. As described in more detail in the Berger Reply Declaration, BellSouth's policy unlawfully discriminates against AT&T in two ways. First, AT&T is not ordering BellSouth facilities when it is porting only a customer's numbers, and the porting of the numbers has nothing to do with BellSouth's facilities. As a result, AT&T should not have to take any action with respect to BellSouth's facilities.

In addition, by seeking to require AT&T to tell BellSouth what to do with BellSouth facilities, BellSouth is forcing AT&T to deal with the BellSouth customer about disposition of BellSouth facilities. BellSouth has no basis for requiring AT&T to become involved in the disposition of *BellSouth* property. That is a matter for resolution between BellSouth's retail services and the customer.

BellSouth manipulated the change control process to introduce an OSS change requiring clarification of number porting orders to address the treatment of BellSouth property. BellSouth never made clear to the CLEC community the type of change being made and imposed this change without making full disclosure about its impact. Berger Reply Dec. ¶¶ 18-19.

AT&T has sought to resolve this matter by escalation with BellSouth, but such escalation to the BellSouth officer level has so far been fruitless. Having manipulated the change control process to establish this clarification process, BellSouth is now telling AT&T that it must

address this issue through the change control process. Given the many problems discussed above with the change control process, this is a recipe for inaction. BellSouth cannot meet its obligations under checklist item 11 until it resolves this issue.⁵⁹

IV. BELLSOUTH'S RECURRING AND NON-RECURRING RATES FAIL TO SATISFY CHECKLIST ITEM TWO.

As a preliminary matter, Florida's UNE rates may be significantly overstated due to an error in BellSouth's cost study. In addition, as demonstrated in the comments, BellSouth's double count of inflation, its \$160 hot cut charge, and its \$200 per day per line expedite charge all fail to comply with TELRIC principles.

A. BellSouth's Florida UNE Rates May Be Overstated as a Result of an Error in its Cost Study.

It appears that Florida's UNE rates may be significantly overstated as a result of an error in BellSouth's underlying loading factors used to determine investments. Pitkin Rep. Dec. ¶¶ 2-11.

On October 1, 2002, BellSouth announced in the North Carolina UNE proceeding that it had made an error in the calculation of hardwire and plug-in loading factors. *Id.* ¶ 3. This error affected the determination of costs associated with the installation of DLC equipment, a significant investment item in BellSouth's cost model. The result was a significant overstatement of costs, and once corrected, the UNE cost of a two-wire loop decreased by \$1.04 and the cost of a DS-1 loop declined by \$14.63. *Id.* ¶¶ 3-4.

BellSouth uses the same cost study methodology in UNE rate proceedings throughout its region. Pitkin Rep. Dec. ¶ 7. Three days after the BellSouth announcement, on October 4, 2002,

⁵⁹ On the issue of loop maintenance discussed in AT&T's comments (AT&T at 20-21), BellSouth has told AT&T that it is reviewing the issue, but to date there has been no resolution and no assurance that the matter will be resolved. Berger Rep. Dec. ¶ 2.

AT&T submitted an interrogatory to BellSouth asking whether similar errors had been made in any other state UNE cost proceeding. *Id.* ¶ 5. On October 15, 2002, BellSouth responded by objecting and refusing to answer the question. *Id.* Thus, to date, BellSouth has not stated whether the same error made in North Carolina was also made in Florida.

On its own, AT&T cannot determine whether the same error has been made, but the underlying data used to develop Florida UNE rates is similar to the erroneous data used in North Carolina. Pitkin Rep. Dec. ¶ 6. In North Carolina, BellSouth's hardware equipment loading factor was erroneously stated as 2.7240 and later revised to be 1.6208. The equivalent hardware equipment loading factor used in the Florida cost study was 2.5184, which is much closer to the erroneous North Carolina factor than the factor after it was corrected. *Id.* ¶¶ 7-8.

BellSouth has an obligation to state whether the same error that overstated North Carolina UNE costs similarly inflated the Florida UNE rates. It is not difficult to make this determination as it involves a discrete loading factor, and BellSouth can quickly determine if the same mistakes that contributed to the North Carolina error also occurred in Florida. Given the uncertainty that now exists, BellSouth must disclose whether an error occurred in its Florida cost study and, if it did, then correct that error before this Commission can act on BellSouth's Section 271 application for Florida. Pitkin Rep. Dec. ¶¶ 9-11.

B. BellSouth's Florida Rates Violate TELRIC Principles as a Result of the Double- and Triple-Counting of Inflation.

As AT&T demonstrated in its Comments, Florida's UNE rates are overstated as a result of the double counting of inflation. AT&T at 22-23; Klick/Pitkin Dec. ¶¶ 4-14. Although the Commission considered a similar issue in the *Georgia/Louisiana 271 Order*, the Florida Commission's double counting of inflation is a clear error that is subject to Commission review. *Pennsylvania 271 Order*, 16 FCC Rcd. at 17453, ¶ 55.

AT&T recognizes that state commissions may reach different conclusions on TELRIC issues involving issues of judgment and degree. That is not the case, here, however, as the double counting inflation is a question of mathematics, not judgment. Klick/Pitkin Rep. Dec. ¶¶ 3-4. It is an elementary principle of ratemaking that applying a nominal rate of return to a rate based that is increased over the study period to account for anticipated inflation produces a double recovery of inflation. “If the rate base has been adjusted for inflation, no further adjustment of the rate of return (or cost of capital) is warranted. An adjustment of rate of return in such circumstances would allow the [rate of return/rate base] method to include an excessive allowance for inflation.”⁶⁰

The landmark rulemaking of the Federal Energy Regulatory Commission establishing maximum rate standards for oil pipelines exemplifies the hornbook law on this issue. Rejecting carrier arguments similar to those advanced by BellSouth (and accepted by the Florida and Louisiana commissions), the FERC held that recovering inflation through both an a cost-adjusted rate base and a nominal rate of return would give the carriers a “bonanza.”⁶¹ Arguments for an “inflation-sensitive rate of return on an inflation-sensitive rate base,” or “what some might call a blow up on a blow up,” are “fancy sophistries,” which have already been “found fallacious by the Court of Appeals and by us.”⁶² If labor unions made similar demands in collective bargaining over wages, the FERC colorfully added, “management would in all probability laugh at the demand for a cost of living allowance double the actual rise in the cost of

⁶⁰ 1 Leonard S. Goodman, *The Process of Ratemaking* 599 (1998).

⁶¹ *Williams Pipe Line Company*, 21 FERC ¶ 61,260 (1982) at 61,643.

⁶² *Id.* at 62,642.

living as a humorous bargaining ploy that the union's negotiating committee concocted in a really lighthearted moment at a bar"⁶³

On review, the D.C. Circuit agreed. When the "valuation base is . . . already 'inflation-sensitive,'" the court held, the regulator "should deduct from the nominal rate of return the percentage by which the valuation rate base has been 'written up' during the relevant period."⁶⁴ Stated otherwise, when "expected inflation is *already* reflected in the level of rates of return," an "increase in the rate base" for inflation is unjustifiable.⁶⁵

AT&T's evidence in this proceeding fully demonstrates that the Florida Commission double-counted (and in places triple-counted) inflation. The Klick/Pitkin Declaration and Klick/Pitkin Reply Declaration both illustrate the double counting of inflation that occurs when the nominal cost of capital (which includes inflation) is applied to an asset that has been inflated to take into account inflation in the future. These two declaration discuss the several cost recovery patterns that can be used to calculate the cost of investments in a manner that takes into account inflation. As shown in Exhibit 1 to the Klick/Pitkin Reply Declaration, the four methods set forth in the Klick/Pitkin Reply Declaration (immediate recovery, utility method, real annuity, and nominal annuity) all take into account the effects of inflation, present value, return, and depreciation in the cost recovery of an asset, and all produce the same result. Klick/Pitkin Rep. Dec. ¶¶ 5-13. All four of the cost recovery patterns fully compensate BellSouth for its capital costs, *including* the effects of inflation on the costs it incurs to periodically replace the asset. Moreover, this approach shows that the inflation included in the

⁶³ *Id.* at 61,711 n. 487.

⁶⁴ *Farmers Union Central Exchange, Inc. v. FERC*, 734 F.2d 1486, 1525 (D.C. Cir. 1984).

⁶⁵ *Id.* (emphasis in original). The D.C. Circuit ultimately overturned the FERC decision on the ground that it did not go far enough to eliminate the possibility of double-recovery of inflation. *Id.* at 1521-25.

nominal cost of capital is the exact same inflation that increases the cost of the asset over time. There is simply no way around this mathematical fact. *Id.*

By contrast, BellSouth's methodology uses a nominal cost of capital (which includes inflation) and applies it against an asset that has been inflated into the future. Not only does using this approach overstate the cost recovery, it consistently overstates investments in each subsequent replacement of the asset. Over the fifty-year period set forth in Exhibit 1 to the Klick/Pitkin Reply Declaration, BellSouth's method results in a present value of \$2,366,917, an 8.2% overstatement. Klick/Pitkin Rep. Dec. ¶ 13.

In addition, BellSouth asserts that cost overrecovery occurs only if the rates are recalculated each year. In fact, as demonstrated in the Klick/Pitkin Reply Declaration, if BellSouth builds into its initial UNE cost calculations the average effect of three year's worth of inflation, and contemplates that UNE rates will be re-established every third year, the UNE rates will be overstated by 21.4%. Klick/Pitkin Rep. Dec. ¶¶ 14-15.

Clearly, as a matter of plain economics and mathematics, the Florida Commission committed clear error in allowing BellSouth to recover inflation both through the nominal cost of capital and through investments whose value was inflated into the future.

C. BellSouth's \$160 Hot Cut Rate is Massively Overstated and Fails to Allow AT&T to Offer Competitive UNE-Loop Service to Small and Medium Sized Businesses.

As AT&T previously demonstrated, BellSouth's nonrecurring charges for hot cuts in Florida – \$160 for the first hot cut, and \$82.47 for each additional hot cut in the same order – are patently unlawful and anticompetitive. AT&T at 23-25, King Dec. ¶¶ 5-13. As AT&T explained, AT&T is currently serving the small and medium sized business market using UNE-P service, but it is important to AT&T's business plan to be able to switch these customers to

UNE-L service, and such conversions require a hot cut.⁶⁶ As AT&T showed, however, BellSouth's hot cut rates do not comply with TELRIC principles, and indeed, its rates are higher than those of other BOCs in comparably large states.⁶⁷ As a result, the conversion process is entirely uneconomical.⁶⁸ Indeed, BellSouth's rates are deterring facilities-based competition, because they effectively preclude AT&T from using its own switches to serve such customers.⁶⁹

Although some have suggested that AT&T could convert such lines to "SL-1" (Service Level 1) loops, for which hot cuts are less expensive, instead of the "SL-2" loops at issue, SL-1 loops are no substitute for SL-2 loops for several reasons. First, conversion to an SL-2 loop includes order coordination and can be ordered as a *time-specific* hot cut, in which BellSouth guarantees that the disconnection and re-installation of each loop will occur at a specific time with a minimum of disruption to the customer. The ability to select a specific time for the cutover is important to many small and medium-sized businesses, who depend on uninterrupted telephone service and who typically do not want to lose telephone service at certain busy times of the day. Time-specific coordination is thus critical to AT&T's ability to convert these lines to UNE-L without disrupting service to these small and medium-sized businesses. *See* Berger Rep. Dec. ¶ 5. BellSouth also provides AT&T with loop testing and a design layout record in conjunction with SL-2 loops, which allows AT&T to ensure the quality of the loop prior to the cutover. *Id.* ¶ 6.

⁶⁶ AT&T at 23-24; King Dec. ¶¶ 5-6.

⁶⁷ *See* AT&T at 24; King Rep. Dec. ¶¶ 3-4.

⁶⁸ *See* King Dec. ¶ 13.

⁶⁹ AT&T has approximately [BEGIN AT&T PROPRIETARY] ***** [END AT&T PROPRIETARY] UNE-P lines in Florida, and approximately [BEGIN AT&T PROPRIETARY] ***** [END AT&T PROPRIETARY] UNE-L lines. All of these loops are SL-2 loops, and all of the UNE-L loops were ordered as new loops. *See* Berger Rep. Dec. ¶ 3.

BellSouth's own recent *ex parte* submission demonstrates that trouble outage durations for SL-1 loops are almost three times as long on average as trouble outage durations on SL-2 loops. For the period April through August of this year, the average trouble outage duration for SL-2 loops was 4.68 hours, whereas the average trouble outage duration for SL-1 loops was 12.01 hours (and over 13 hours in July). *See* Letter from Glenn T. Reynolds (BellSouth) to Marlene H. Dortch (FCC), dated October 25, 2002.

To address the shortcomings of BellSouth's current system of hot cuts, AT&T recently proposed a new coordinated bulk conversion process to convert UNE-P customers to UNE-L.⁷⁰ Under AT&T's proposal, BellSouth would convert between 100 and 500 lines at a time during the evening hours. AT&T's proposal provides for extensive coordination between BellSouth and AT&T during the hot cut process, including a telephone bridge during the conversion process itself, to ensure that conversions can be accomplished by keeping loss of service to a minimum. Performing a large number of hot cuts in a single bulk conversion would result in economies of scale that would lower the cost of each hot cut to less than \$5.⁷¹ BellSouth has acknowledged receipt of AT&T's request but has not yet provided a detailed response to AT&T's proposal.⁷²

For all of these reasons, BellSouth's current hot cut rates and processes are not in compliance with the competitive checklist. SL-2 loops are critical to AT&T's ability to convert

⁷⁰ *See* Berger Rep. Dec. ¶ 7; Letter from Denise Berger (AT&T) to Jim Schenk (BellSouth), dated October 16, 2002 (attached to Berger Rep. Dec.).

⁷¹ Berger Rep. Dec. ¶ 7.

⁷² If BellSouth were to guarantee that it would use the same loop in any conversion from UNE-P to UNE-L, such a guarantee might obviate the need for loop testing. With such a guarantee, AT&T could use SL-1 loops in certain circumstances, if a time-specific cutover was not important to the customer. In AT&T's experience, however, most small and medium-sized businesses view a time-specific cutover as important. For these reasons, AT&T has not formally proposed such a guarantee to BellSouth; to address all of AT&T's concerns, AT&T has proposed the bulk conversion process described above. *See* Berger Rep. Dec. ¶¶ 8-9.

UNE-P customers to UNE-L in a commercially reasonable manner, because (unlike SL-1 loops) SL-2 loops provide order coordination, loop testing, and design layout record, with the option for time-specific coordination. BellSouth's high hot cut rates are thwarting the conversion of UNE-P customers to UNE-L (and thus thwarting facilities-based competition), and BellSouth should not be permitted to use its high rates to force CLECs such as AT&T into using inferior SL-1 loop conversions. In short, BellSouth must fix the rates and the process for SL-2 loop conversions, in order to comply with the checklist.

D. BellSouth's \$200 Per Day Per Line Charge Is a Network Element Subject to Section 251(c)(3) and in no Way Complies with TELRIC Principles.

In its comments, AT&T demonstrated that BellSouth's charge of \$200 per day per line or circuit to expedite orders has no possible cost basis and unduly discriminates against AT&T and other CLECs. *See* AT&T at 25-26; King Dec. ¶¶ 14-16.⁷³ This charge relates solely to expediting an order, not the performance of work order itself. Moreover, it has not been supported by any cost study by BellSouth, and indeed cannot be, for no cost justification can exist for a separate \$200 charge for each expedited day or for each expedited line. AT&T's comments also demonstrated that BellSouth's expedite charges also are highly discriminatory, as BellSouth clearly does not incur anything close to \$200 per day or per line to expedite orders for its own customers and does not charge its customers that amount when it does expedite their order.

BellSouth apparently concedes that its expedition charge is not cost-based but claims that "expediting an order" is not an unbundled network element and thus may be charged on a "market" basis. Such a claim flunks the straight face test.

⁷³ BellSouth's charge to expedite a customer's 10-line order by 4 days to meet that customer's business requirements incurs an \$8,000 expedition charge in addition to the standard non-recurring charge to provision the order.

Expediting an order is one of the core aspects of provisioning, as it involves the determination of the service date for the order, an issue that is very important to customers and to the efficient handling of the customer's order. Customer requirements change, and as a result, customers sometimes need to obtain service more quickly than originally envisioned. Such changes are clearly part of the provisioning process and reflect the daily reality faced by all service providers -- BellSouth, other ILECs, AT&T, and CLECs, and indeed, any entity in a service industry. Service providers must seek to satisfy their customer's needs, and changes in service dates, including expediting those service dates, are part and parcel of provisioning and serving the customer. Any CLEC that cannot expedite an order risks losing that customer to another service provider that can meet the customer's needs. King Rep. Dec. ¶¶ 6-7.

Recognizing the importance of provisioning to the competitive process, the Commission has specifically determined that provisioning of orders is itself a network element subject to the requirements of Sections 251(c)(3). *Local Competition Order* ¶¶ 516-17. The expedition of an order specifically relates to the determination of the due date for that order and thus is an integral part of the provisioning process. It thus qualifies as part of the OSS process and as a "network element" subject to the unbundling obligations of section 251(c)(3). This finding that OSS are network elements -- and that provisioning is similarly a network element -- was reaffirmed in the *UNE Remand Order* in which the Commission stated that "lack of access to OSS as an unbundled network element materially diminishes a requesting carrier's ability to provide the services it seeks to offer." *UNE Remand Order* ¶ 424.

As a network element, provisioning must be provided on a nondiscriminatory basis. In the *Local Competition Order*, the Commission clearly stated that provisioning was one aspect of the OSS network elements that had to be provided on a nondiscriminatory basis: "[w]e

conclude that an incumbent LEC must provide nondiscriminatory access to their operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing available to the LEC itself.” *Local Competition Order* ¶ 523.⁷⁴ Thus, provisioning and the associated function of determining a service date by expediting an order must be provided on a nondiscriminatory basis.

The Commission has also made clear that the obligations of Section 251(c)(3) relate not only to an unbundled element itself but also to “physical or logical connection to the element.” *Local Competition Order* ¶ 312. The Commission specifically rejected the argument -- similar to the argument raised by BellSouth here -- that the incumbent LECs obligation to provide “nondiscriminatory access” is limited to the UNE itself and does not include access to the element. The Commission concluded that the Section 251(c)(3) obligation extends to the following:

first, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element, must be equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself.⁷⁵

The ability to expedite an order is precisely the type of provisioning activity that is encompassed in the nondiscrimination requirement of Section 251(c)(3) and must be provided on the same basis to CLECs that the ILEC provides to itself:

[I]ncumbent LECs must provide carriers purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the

⁷⁴ A footnote to this statement indicates that nondiscriminatory access must be provided to the “full range of functions within pre-ordering, ordering, provisioning, maintenance and repair, and billing enjoyed by the incumbent LEC.” *Local Competition Order* § 522 n.1273.

⁷⁵ *Local Competition Order* ¶ 312.

incumbent LECs operations support systems. Moreover, the incumbent must provide access to these functions under the same terms and conditions that they provide these services to themselves or their customers.⁷⁶

Given this clear evidence that the OSS are a network element, that provisioning must be offered on a nondiscriminatory basis, and the commercial reality that expediting orders is a daily occurrence for all telecommunications service providers, BellSouth cannot argue with a straight face that its expedition charge is not subject to the nondiscrimination and cost-based rate requirements of Sections 251(c)(3) and 252(d). King Rep. Dec. ¶¶ 7-8.

BellSouth has sought to introduce this expedite charge unilaterally in an exercise of its monopoly power. King Rep. Dec. ¶¶ 9-11. BellSouth issued a Carrier Notification in July stating that it would charge for expediting orders beginning August 15, 2002 and would reject an order if a CLEC did not reach agreement with BellSouth on an expedite charge. BellSouth proposed the \$200 per day per line charge in August 2002 as an amendment to the AT&T/BellSouth Interconnection Agreement to update various rates. AT&T did not agree to the \$200 per day per line charge and suggested that the expedite charge be made interim pending negotiation by the parties. BellSouth denied AT&T's request and stated that AT&T orders would be rejected if AT&T did not pay the expedite charge. AT&T has sought to escalate the issue with BellSouth, but to no avail, and is now deciding how to proceed. *Id.*

As the \$200 per day per line charge clearly discriminates against AT&T and has no cost justification, until BellSouth negotiates a cost-based rate for expediting orders, BellSouth cannot satisfy its obligations under checklist item two of Section 271.

⁷⁶ *Id.* ¶ 316.

V. BELLSOUTH HAS FAILED TO DEMONSTRATE THAT IT AND ITS SECTION 272 AFFILIATE WILL OPERATE IN ACCORDANCE WITH SECTION 272 IF GRANTED INTERLATA AUTHORITY.

As AT&T showed in its comments, BellSouth is in violation of section 272(c)(1)'s unqualified prohibition against discrimination by a BOC in favor of its affiliate through a switched access tariff designed to establish impermissible growth discounts which would discriminate in favor of BSLD. AT&T at 26-37.

BellSouth has claimed that BSLD does not qualify to take service under the FCC growth tariff, and the Commission accepted this rationale in ruling in the *Five-State 271 Order* that BellSouth does not violate Section 272. *Five-State 271 Order* ¶ 274.

In its state filings, however, BellSouth has been more candid about its intent. King Rep. Dec. ¶¶ 13-14. In opposition to a CLEC Coalition filing in Tennessee seeking suspension of BellSouth's Tennessee growth tariff filing, BellSouth filed an answer that discussed its intended practice under both the federal and state SWA Contract Tariffs.⁷⁷ BellSouth noted that its agreement with Sprint on the Contract Tariff served as the basis for the federal and state filings but then acknowledged that BellSouth would enter into arrangements with other carriers based on each carrier's specific volumes:

Although the original contract tariffs (both federal and state) were based on Sprint's usage levels, BellSouth has always been willing to enter into comparable contracts with other carriers that have sufficient volume to qualify, based on that carrier's specific volume levels.⁷⁸

As this quotation makes clear, the minimum discount level set forth in the SWA Contract Tariff filed with the FCC represents Sprint's minimum usage levels but was never intended to set

⁷⁷ BellSouth's Answer to CLEC Coalition Petition to Suspend Tariff and to Convene a Contested Case Proceeding, *In re Petition to Suspend BellSouth Tariff No. TN 2002-256 and to Convene a Contested Case Proceeding*, Tenn Reg. Auth Docket No. 02-01073 (filed October 14, 2002) (Attachment 4 to King Reply Dec.).

⁷⁸ *Id.* at 2; see King Rep. Dec., Att. 4.

the minimum level for all carriers. Indeed, BellSouth clearly intended to negotiate and enter into separate contracts with other carriers – including BSLD – with minimum usage levels based on “that carrier’s specific volume levels.” Thus, as AT&T has consistently argued, BellSouth’s contract tariff was designed to be individually tailored to provide discounts based on each carrier’s usage level, and as a result BellSouth can enter into a Contract Tariff with BSLD based on BSLD’s usage levels at any time. King Rep. Dec. ¶¶ 13-14.

VI. BELLSOUTH’S VIOLATION OF SECTION 271(a) WARRANTS DENIAL OF THE APPLICATION.

BellSouth is currently seeking to “provide” interLATA services in Florida and Tennessee. It is therefore flatly unlawful for BellSouth to provide long distance services in those states now or, indeed, to have *any* long distance involvement that enables it to obtain a competitive advantage. *See, e.g.*, 47 U.S.C. §§ 271(a), (b)(1); *Qwest Teaming Order*, 13 FCC Rcd. 21438, ¶ 37 (1998) (“[I]n order to determine whether a BOC is providing interLATA service within the meaning of section 271, we must assess whether a BOC’s involvement in long distance markets enables it to obtain competitive advantages.”).

Notwithstanding this clear rule, in what is becoming a hauntingly familiar occurrence, BellSouth disclosed in October 29 and October 30 ex parte letters that it provided long distance services to customers located in Florida and Tennessee prior to receipt of Section 271 authority for those states. BellSouth provides little information in its ex parte filings, but it is clear that customers in Florida and Tennessee were able to select BSLD as their interLATA service provider and made interLATA calls. October 30 ex parte at 1.

Two points are in order. First, this latest violation of Section 271 is clear evidence of BellSouth’s failure to test adequately its software. As discussed more fully in Part I *supra* and in the Bradbury Reply Declaration, BellSouth has a history of not testing its software to remove

errors, and this Section 271 violation is just the latest example of a continuing problem. CLECs experience these software problems all the time and must incur the time and expense dealing with them. The principal difference between this software problem and similar software problems that directly affect CLECs is that BellSouth undoubtedly devoted the resources to correct this software error much more quickly than it corrects software errors affecting CLECs.

With a brave face, BellSouth lauds the controls that discovered the errors while ignoring the glaring problem of the inadequate software testing that gave rise to the problem in the first place. Indeed, only a monopolist could make the Kafkaesque claim that this incident “demonstrates that BellSouth has instituted adequate controls to prevent the provision of interLATA services prior to authorization.” October 29 ex parte at 3. Clearly, more controls are required.

Second, the premature marketing and providing of interLATA services will continue until the Commission sends a message that such conduct will not be tolerated. This is not the first time BellSouth has violated Section 271 by prematurely offering interLATA services in states in which it had not obtained Section 271 authority. During the pendency of the Five State application, BellSouth mailed long distance information to 130,000 customers in various states, including Florida and Tennessee, for which it had not received Section 271 authorization. *Five-State 271 Order* ¶ 299. The Commission directed BellSouth to “exercise caution” to ensure it did not market long distance services in jurisdictions in which it had not received Section 271 authorization. *Id.* ¶ 301. Evidently, BellSouth was unable to do so. As an appropriate remedy for a repeat offender, the Commission should deny BellSouth’s application. If the Commission is not willing to enforce the rules, and there are no consequences for violation of those rules, then respect for the process (and the Commission) will be lost, and the public not well served.

CONCLUSION

For the foregoing reasons, BellSouth's joint application for authorization to provide in-region, interLATA services in Florida and Tennessee should be denied.

Respectfully submitted,

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