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

In the Matter of	
Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements	WC Docket No. 02-112
2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1902 of the Commission's Rules	CC Docket No. 00-175

REPLY COMMENTS OF BELLSOUTH

BELLSOUTH CORPORATION

Richard M. Sbaratta
Alan L. Silverstein
Angela N. Brown

Its Attorneys

Suite 4300
675 West Peachtree Street, N. E.
Atlanta, Georgia 30375
(404) 335-0724

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BellSouth Corporation, by counsel and on behalf of itself and its wholly owned subsidiaries ("BellSouth"), respectfully submits its replies to the comments filed in the above-captioned proceeding. [1]

I. INTRODUCTION AND SUMMARY

Although the record in this proceeding is voluminous, it is filled with an inordinate number of unsubstantiated allegations and speculative claims designed to obscure the central issue – whether a Bell Operating Company's ("BOC") provision of in-region, interstate and international, interexchange services (*i.e.,* long distance services) on an integrated basis should be subject to dominant carrier regulation after the expiration of the Section 272 structural and related safeguards.[2] Rather than respond with credible

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[1] *See Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112; *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, CC Docket No. 00-175, *Further Notice of Proposed Rulemaking*, FCC 03-111 (rel. May 19, 2003) ("*FNPRM*").

[2] *See FNPRM*, ¶ 2.

and factual evidence, the interexchange carriers ("IXCs") and competitive local exchange carriers ("CLECs") have adopted a strategy of throwing baseless allegations and misleading arguments against the wall to see what sticks.

Since the Commission is considering the "incentives" of BOCs to engage in anticompetitive conduct as part of this proceeding, BellSouth encourages the Commission also to consider the incentives of the IXCs and CLECs. Are these parties' requests for more limitations, more prohibitions, and more restrictions on BOCs designed to enhance competition or improve their own position in the marketplace? BellSouth submits that commenters such as AT&T, the Ad Hoc Telecommunications Users Committee ("Ad Hoc"), Sprint, and MCI WorldCom are only seeking to gain a competitive advantage at the expense of BOCs and consumers.

It is not surprising therefore that these parties are continuing their crusade to retain the Section 272 requirements, as well as impose additional regulation on BOCs. The list of regulations purportedly necessary to curtail possible anticompetitive behavior by BOCs is predictable – *e.g.*, performance measures for unbundled network elements ("UNEs") and special access services; the elimination of pricing flexibility for special access. Some commenters have even expanded this worn wish list to include the establishment of a third party to administer Presubscribed Interexchange Carrier ("PIC") changes,[3] the re-regulation of billing and collection,[4] and requiring non-BOC ownership of Section 272 affiliates. The Commission should reject these efforts to saddle the BOCs

[3] *See, e.g.,* AT&T Comments at 7, 71-72; Working Assets Funding Service, Inc. dba Working Assets Long Distance ("Working Assets") Comments at 5-6.

[4] *See, e.g.,* Americatel Comments at 5; WorldCom, Inc. d/b/a MCI ("MCI WorldCom") Comments at 23-25.

with overly burdensome and costly regulation. The Commission's obligation is to promote competition, not favor specific segments of the industry. BOCs are no less important to that competitive equation than their competitors.

Accordingly, the Commission must look beyond the rhetoric and remain focused on its stated objective – determining whether to treat BOCs providing in-region, long distance services on an integrated basis as dominant carriers post sunset. In the instant case, the test for dominant carrier regulation is whether a BOC has market power. The Commission has defined market power as the ability to raise and sustain prices by restricting output or controlling an essential input.[5] Since dominant carrier regulation is only imposed on carriers with market power,[6] the central question before the Commission can be restated as follows: whether the BOCs will be likely to acquire market power in the provision of long distance services after sunset of the separate affiliate requirements.[7] As shown by the comments filed by BellSouth and others, the unequivocal answer to this question is no.[8]

The fact of the matter is that competitive market forces combined with on-going regulation (*e.g.,* Section 251; Section 272(e)(1) and (3); Sections 201 and 202; Section 208; price cap regulation) are more than sufficient to curtail any anticompetitive behavior in the absence of structural safeguards. Based on the evidence in the record, no party has provided sufficient justification to warrant: (1) extending the structural and

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[5] *FNPRM*, ¶ 5.

[6] *See id.*, ¶ 5.

[7] *See id.*, ¶ 29.

[8] *See, e.g.,* Comments of BellSouth at 5-8; Comments of Verizon at 4-10, and attached Declaration of Dennis W. Carlton, Hal Sider, and Allan Shampine, ¶¶ 18-44 (declaration hereinafter cited as "Carlton/Sider/Shampine Declaration"); Comments of SBC at 15-37.

nondiscrimination requirements of Section 272 beyond the statutory three-year period; (2) imposing alternative regulatory requirements such as UNE or special access performance measures in lieu of, or in conjunction with, the separate affiliate requirements; or (3) subjecting a BOC's provision of long distance services on an integrated basis to dominant carrier regulation. Accordingly, the Commission should refuse to impose any new or modified regulations on a BOC post sunset and conclude that a BOC's provision of in-region, long distance telecommunications services outside of a separate affiliate should be treated as non-dominant.

II. MARKET STRUCTURE AND PERFORMANCE DEMONSTRATE THE IMPROBABILITY OF THE BOCS, OR ANY OTHER CARRIER, ACQUIRING MARKET POWER IN THE LONG DISTANCE MARKET.

The structure and performance of the long distance market demonstrate that the BOCs will not be able to acquire long distance market power in the future, regardless of whether they provide long distance services through a separate affiliate or on an integrated basis.[9] As recognized by a number of the comments, the existence of wireless and other technological substitutes for traditional wireline long distance service renders the acquisition of BOC market power in long distance implausible or highly unlikely.[10] Wireless long distance service has already become a strong competitive alternative to

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[9] Although the Commission's inquiry is prospective, the current performance of the long distance market should be viewed as highly probative evidence of where the market is heading. That data overwhelmingly shows an extremely competitive marketplace. Indeed, the Commission's recently released Reference Book reports that the consumer price index for interstate toll service dropped 5.9 percent in 2002 alone, while overall consumer prices increased. Paul R. Zimmerman, Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service, Industry Analysis & Technology Division, Wireline Competition Bureau, at iii and Table 3.1 (rel. July 15, 2003).

[10] *See, e.g.,* Verizon Comments at 4-7; SBC Comments at 16, 18-20.

wireline long distance service. Even Sprint acknowledges that, "[o]bviously, using wireless for long distance calling is becoming very commonplace."[11]

One of the few dissenters on the issue of the effect of wireless service on the long distance market is AT&T, but its arguments are entirely without merit. AT&T notes only that, "with very limited and marginal exceptions, consumers are not replacing their wireline phones with wireless phones. Most consumer and business end-users who subscribe to wireless service also subscribe to wireline service."[12]

This sidesteps the point completely. Wireless long distance service provides a direct competitive alternative to wireline long distance for customers who have both wireline and wireless service. The amount consumers pay for wireline long distance services is a function of their usage of those services, either directly (in the case of per-minute plans) or indirectly (*e.g.*, consumers with low wireline long distance usage will tend to avoid or migrate away from more expensive plans that offer larger monthly allotments of wireline long distance minutes). Accordingly, *usage* of long distance services is a much more significant indicator of consumer demand than mere subscription data, as AT&T has itself explained on numerous occasions.[13] From this perspective, it is

[11] Sprint Comments at 4. Sprint clearly recognizes the significant implications of this by adding that, "Sprint is not arguing in this proceeding that any carrier be treated as dominant in its provision of long distance services." *Id.*

[12] AT&T Comments at 16.

[13] *See, e.g.*, AT&T, Earnings Commentary, Quarterly Update – Fourth Quarter 2002 at 5 (Jan. 23, 2003), *available at* www.att.com/ir/efr (attributing decline in AT&T Consumer revenue to "the ongoing impacts of wireless and Internet substitution" and explaining that such substitution is "particularly meaningful" to AT&T margins because "[c]ustomers who substitute long distance calling with a wireless or Internet product and remain AT&T customers generate less revenue for AT&T Consumer Services, but certain costs remain, such as billing and customer care").

clear that the increasing usage of wireless and other alternative modes of long distance communications would prevent a BOC or any other carrier from acquiring market power in the long distance market.

As shown in a number of the comments, consumers are substituting wireless long distance usage for wireline long distance usage to a substantial degree.[14] In addition, the Commission's recent report on CMRS competition recognizes that, "[t]he long distance, local, and the payphone segments of wireline telecommunications have all been losing business to wireless substitution. Long distance volumes and revenues are down at AT&T, MCI, and Sprint as customers shift to wireless services to make their calls."[15] The explosive growth in wireless long distance usage is a natural outgrowth of the nature of the plans offered by the major CMRS carriers – because most wireless plans now make no distinction between local and long distance usage, consumers typically regard wireless long distance as essentially free.

As wireless penetration rates continue to rise, the ability of consumers to substitute wireless long distance for wireline long distance services will serve as an

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[14] *See, e.g.,* Carlton/Sider/Shampine Declaration, ¶¶ 28-34. The Declaration states that, as of the end of 2002, wireless service accounted for approximately 29 percent of total originating interstate long distance traffic (*id.,* ¶ 31), and notes that from 1995 to 2002, average wireline interstate interexchange usage declined 42 percent (*id.,* ¶ 33).

[15] *Implementation of Section 60002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 02-379, *Eighth Report*, FCC 03-150, ¶ 103 (rel. July 14, 2003) ("*Eighth Wireless Report*"). Similarly, in recognition of "the increased substitution of wireless for traditional wireline service," in December 2002, the Commission decided to increase the CMRS safe harbor payment level for universal service contributions. *Federal-State Joint Board on Universal Service, et al.,* CC Docket No. 96-45, *et al., Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd 24952, 24965, ¶ 21 (2002).

increasingly powerful check on the marketplace behavior of providers of long distance services. Forty-nine percent of the United States population now subscribes to wireless services, with wireless penetration continuing to grow.[16] Because many consumers live in households where family members share access to a wireless phone, the number of consumers who can switch to wireless long distance for incremental long distance calls is even higher than the penetration figure.

Long distance competition has been intensified further by the emergence of long distance services offered via cable and/or Internet access. Even AT&T acknowledges that cable telephone service "holds promise," but argues that it should be discounted because it is not universally available today.[17] This myopic position ignores the largely prospective nature of the Commission's inquiry in this proceeding. Furthermore, AT&T's argument overlooks the fact that cable and Internet telephony are becoming more widely available all the time. Cable MSOs have been increasingly active in recent months in deploying telephone services, typically featuring unlimited long distance calling.[18] Providers of Internet-based telephony provided via existing broadband connections are offering an additional fast-growing option for inexpensive long distance

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[16] *Eighth Wireless Report*, ¶ 59.

[17] AT&T Comments at 16.

[18] *See* Anthony Crupi, *The Rabbit in the Hat Looks Like VoIP*, Cable World, July 7, 2003, (discussing VoIP telephony rollouts by Cablevision, Cox and Time Warner). Cablevision announced that its VoIP offering will be available throughout its footprint by the end of this summer. *See id.* Cablevision Systems Corporation is currently promoting its Optimum Voice service, which offers unlimited local and long distance calling for $34.95 per month. *See* www.optimumvoice.com.

calling.[19] Clearly, the competitive nature of the interexchange market eliminates any opportunities for BOCs (or any other carrier) to obtain long distance market power either in the presence or absence of a separate affiliate.

III. THE INTEGRATED BOCS WOULD HAVE NEITHER THE INCENTIVE NOR THE ABILITY TO ENGAGE IN PREDATORY PRICE SQUEEZES OR OTHER ANTICOMPETITIVE CONDUCT.

The above discussion demonstrates that as a result of competition from wireless and other technological substitutes for traditional wireline service, the BOCs will be unable to acquire market power in the provision of long distance services, even if we assume for purposes of this discussion that the BOCs were able to engage in the anticompetitive activities (such as predatory price squeezes) alleged by AT&T and the other IXCs and were thereby able to eliminate the existing IXCs as long distance competitors. Moreover, the BOCs' inability to acquire long distance market power also means that the BOCs do not have the incentive or the ability to engage in such anticompetitive activity in the first place, regardless of whether they provide long distance service on an integrated basis or through a separate affiliate.

The principal anticompetitive concern alleged by AT&T and the other major IXCs is a predatory price squeeze,[20] which focuses on the relationship between access prices and retail long distance prices. A BOC could allegedly engage in a predatory price squeeze either by (1) raising access prices to competitors while pricing its own retail long

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[19] *See, e.g.*, Paul Davidson, *Calling via Internet has suddenly arrived*, USA Today, July 7, 2003, *available at* www.usatoday.com/tech/news/2003-07-07-net-calling_x.htm (discussing Vonage Internet telephony service).

[20] *See, e.g.,* AT&T Comments at 26-32.

distance services on the basis of the presumably lower incremental cost the BOC incurs in providing access, or (2) maintaining existing access prices while pricing retail long distance services below the level of access prices.[21] A predatory price squeeze, as with other forms of predatory pricing, involves sacrificing revenues in the short run, in the hopes of eliminating rivals and recouping these revenues later by raising retail rates in the absence of competition.[22]

The ability of a BOC to recoup the lost revenues, however, depends on whether the BOC has market power in the provision of long distance services. That is, without long distance market power, the BOC would be unable to profitably raise retail long distance rates, because any attempt to do so would be undercut by existing competitors or new entrants and would therefore be unsuccessful.[23]

As discussed in Section II above, wireless and other technological substitutes for traditional wireline long distance services will prevent the BOCs (or any other carrier) from acquiring long distance market power. Thus, the BOCs would be unable to succeed in any predatory price squeeze scheme, and therefore would have no reason to attempt such a scheme at the outset.

In addition, even if a BOC were somehow able to eliminate its current IXC long distance rivals, the fixed assets (*e.g.*, copper, fiber, and switches) owned by these IXCs would almost certainly remain in the marketplace and be used by new entrants to provide

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[21] *See FNPRM*, ¶ 29.

[22] *See* Carlton/Sider/Shampine Declaration, ¶ 53.

[23] This conclusion is simply another way of saying that, as recognized by the Commission, the hallmark of market power is the unilateral ability to profitably raise prices above the competitive level. *See FNPRM*, ¶ 22.

long distance service. The prospective ability of such firms to undercut the future retail price increases by the BOCs that would be necessary to justify a price squeeze strategy again makes it senseless to initiate such a strategy.[24]

Finally, as a number of parties including BellSouth point out, various statutory and regulatory safeguards will continue to exist after sunset of the separate affiliate requirements.[25] The existence of these safeguards will prevent the BOCs from implementing any of the alleged predatory price squeeze scenarios or any other form of anticompetitive conduct that is based on the BOCs' misuse of their alleged market power in local exchange and access services.

IV. THE IMPOSITION OF DOMINANT CARRIER REGULATION ON A BOC'S PROVISION OF IN-REGION, INTEREXCHANGE SERVICES ON AN INTEGRATED BASIS IS UNNECESSARY AND WOULD BE COSTLY AND HARMFUL TO COMPETITION AND CONSUMERS.

The record is clear – the application of dominant carrier regulation to a BOC's provision of long distance services in the absence of an affiliate is entirely unwarranted. A number of carriers aptly demonstrate that the costs associated with dominant carrier regulation far outweigh any purported benefits in the context of BOC provision of interexchange services.[26] As Carlton, Sider, and Shampine state: "Given the current

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[24] *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-149 and CC Docket No. 96-61, *Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61*, 12 FCC Rcd 15756, 15818-19, ¶ 107 ("*LEC Classification Order*"); Carlton/Sider/Shampine Declaration, ¶ 55.

[25] *See, e.g.*, BellSouth Comments at 9-18, 20-21; SBC Comments at 41-48; Verizon Comments at 18-21.

[26] *See, e.g.*, BellSouth Comments at 22-29; SBC Comments at 4-8; Qwest Comments at 21-23; Verizon Comments at 28-30.

status of the long distance industry and existing safeguards, the imposition of dominant carrier regulation would not only be inappropriate, but would impose unwarranted costs and distortions on the industry."[27]

In their initial comments, BellSouth and others explained that the purpose behind dominant carrier regulation is to preclude a carrier from raising the prices of its long distance services by restricting output.[28] Because BOCs lack market power in the interexchange market, regardless of whether a Section 272 affiliate exists, they cannot raise long distance prices by restricting output.[29] Moreover, as the Commission previously found, dominant carrier regulation is not an effective or appropriate tool to address potential anticompetitive conduct by BOCs in the interexchange market, regardless of the existence of a separate affiliate. Specifically, the Commission concluded that "regulat[ing] BOC in-region interLATA affiliates as dominant carriers generally would not help to prevent improper allocations of costs, discrimination by the BOCs against rivals of their interLATA affiliates, or price squeezes by the BOCs or the BOC interLATA affiliates."[30] It further found that "application of these regulations to a carrier that does not have the ability to leverage its market power by restricting its own output could lead to incongruous results."[31]

BellSouth urges the Commission to reach a similar conclusion in the instant proceeding. As demonstrated above, BOCs do not possess market power in the

[27] Carlton/Sider/Shampine Declaration, ¶ 73.

[28] *See LEC Classification Order*, 12 FCC Rcd at 15804, ¶ 85; *see also* BellSouth Comments at 22-23; SBC Comments at 4.

[29] *LEC Classification Order*. 12 FCC Rcd at 15763, ¶ 6.

[30] *Id.*

[31] *FNPRM*, ¶ 38.

interexchange market, regardless of whether or not they operate through Section 272 affiliates. In the absence of market power, a BOC lacks the ability to raise long distance prices by restricting output – conduct that dominant carrier regulation is supposed to constrain. Moreover, as the record shows, tariffs, price caps, and other dominant carrier regulations are ill-suited to address concerns about non-price discrimination or predation.[32] Finally, the application of dominant carrier regulation to a BOC's provision of long distance services would stifle competition by imposing onerous and unnecessary constraints on BOCs without any countervailing benefits. In light of the foregoing, the Commission should find that BOCs providing in-region, long distance services on an integrated basis post sunset are non-dominant carriers and therefore not subject to dominant carrier regulation.

V. THE COMMISSION SHOULD NOT CONDITION NON-DOMINANT TREATMENT ON COMPLIANCE WITH ANY SEPARATE AFFILIATE REQUIREMENTS.

BellSouth urges the Commission not to require compliance with any separate affiliate requirements as a condition for non-dominant treatment after the Section 272 obligations expire. No party has provided sufficient justification for either retaining the complete set of separate affiliate requirements or adopting a streamlined set.

As BellSouth pointed out in its initial comments, the Commission has a statutory obligation to allow the Section 272 requirements to expire three years after a BOC obtains long distance relief in the absence of substantial and compelling evidence to

[32] *See, e.g.*, Carlton/Sider/Shampine Declaration, ¶¶ 74-78; Qwest Comments at 6; SBC Comments at 7-8.

justify the retention of these requirements.[33] As the Commission has recognized, "Congress made the judgment that the BOCs should be subject to the structural and nondiscrimination safeguards in section 272 only temporarily after entry into the long distance market."[34] Thus, the complete sunset of the relevant provisions is the default.

To support the continued application of the separate affiliate requirements as a condition of non-dominant status, there must be substantial and specific evidence establishing that, in the absence of the separate affiliate requirements, the public interest and competition would be adversely affected. This evidentiary burden is extremely difficult to overcome, especially in light of the fact that: (1) there is no consumer or public interest benefit associated with the separate affiliate requirements, and (2) existing, less burdensome safeguards are more than sufficient to protect against any potential threat to competition. Accordingly, BellSouth urges the Commission to reject proposals seeking to extend the structural and nondiscrimination provisions of Section 272 for any length of time beyond the statutory three-year period (*e.g.*, one year,[35] indefinitely[36]). Continuing these requirements, in whole or in part, as a condition for non-dominant treatment would advance no legitimate interest, would impose unnecessary and burdensome costs on BOCs, and would deprive consumers of innovative and competitive service offerings.

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[33] BellSouth Comments at 29-31.

[34] *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, *Notice of Proposed Rulemaking*, 17 FCC Rcd 9916, 9920, ¶ 8 (2002) (emphasis added) ("*NPRM*").

[35] *See* Missouri Public Service Commission ("MPSC") Comments at 8.

[36] *See* Public Utility Commission of Texas ("Texas PUC") Comments at 3, 7.

The Commission also should reject Americatel's proposal to require BOC interLATA affiliates to have at least a minority of non-BOC stock ownership.[37] This suggestion not only grossly exceeds the scope of the Act but also is more stringent than existing requirements. The plain language of Section 272 sets forth the requirements for structural separation. Section 272(b) requires a BOC's Section 272 affiliate to: (1) operate independently from the BOC; (2) maintain separate books, records, and accounts from the BOC; (3) have separate officers, directors, and employees from the BOC; (4) not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the BOC; and (5) conduct all transactions with the BOC on an arm's length basis, with any transactions reduced to writing and available for public inspection.[38]

Established rules of statutory construction mandate that the Commission follow the express language of Section 272. The statute does not say that the Section 272 separate affiliate must be owned by independent shareholders. Had Congress intended to prescribe additional ownership requirements, it would have included explicit language to that effect. In the absence of express statutory language mandating a particular ownership structure, the Commission may not require non-BOC ownership.

Moreover, as the record shows, other statutory and regulatory requirements (*e.g.*, Sections 272(e)(1) and (3), Sections 201 and 202, access charge rules, imputation requirements, cost allocation rules, price cap regulation) prevent anticompetitive conduct by BOCs regardless of whether they provide in-region, interexchange services through a

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[37] *See* Americatel Comments at 29 n. 59, 35.

[38] 47 U.S.C. § 272(b).

separate affiliate or on an integrated basis. The application of even a modified set of separate affiliate requirements would result in inefficiencies, restrictions, and costs that would adversely affect the BOCs' ability to compete in the interexchange marketplace. Accordingly, the Commission should allow the expiration of the relevant separate affiliate requirements as contemplated by the Act and refrain from imposing any modified obligations upon the BOCs post sunset as a condition for non-dominant treatment.

VI. THE COMMISSION NEED NOT CONDUCT AN EXTENSIVE ANALYSIS OF COMPETITIVE MARKET CONDITIONS PRIOR TO ALLOWING THE SEPARATE AFFILIATE REQUIREMENTS TO EXPIRE.

Sage Telecom, Inc. ("Sage") suggests that the Commission retain the separate affiliate requirements until it has been demonstrated that competition in the local exchange and exchange access markets has reached a level where the BOC can no longer leverage its power.[39] Sage explains that the Commission can use the same analysis relied upon to determine a BOC's eligibility to provide in-region, interexchange services pursuant to Section 271 and/or consider the timely provisioning of interconnection, UNEs, collocation, and resale services. The Commission should reject this proposal.

Clearly, there is neither a statutory basis nor a need for the Commission to examine the competitive landscape in order to determine whether or not to apply the Section 272 requirements. Section 272 allows the separate affiliate obligations and related safeguards to sunset three years after a BOC receives Section 271 relief. Nowhere in Section 272 is there a requirement that the BOC prove that competition is

[39] Sage Comments at 30.

continuing to grow or has reached a certain level before it can be relieved of the separate affiliate requirements. The Act does not state that when a BOC loses market share or is declared non-dominant in the provision of local exchange services, the Section 272 restrictions should sunset. Congress never expressed this view, either in the Act or the legislative history. Accordingly, the Commission may not condition the expiration of the Section 272 requirements on the state of the marketplace.

In addition, Sage's suggestion that the Commission consider the timely provisioning of interconnection, UNEs, collocation, and resale services in evaluating whether to retain the separate affiliate requirements is wholly unjustified and would be redundant with existing obligations. The Commission is actively involved in monitoring BOC compliance with the Act's market-opening mandates after receipt of Section 271 relief to provide in-region, interLATA services. To that end, BellSouth and the other BOCs that have obtained long distance authority are subject to extensive Section 271 compliance programs.

As part of its compliance with Section 271, BellSouth is required to provide performance measurement reports on a monthly basis to each of its states.[40] BellSouth reports in excess of 2,000 measurements each month in each of its nine states. Included

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[40] *See, e.g., Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, CC Docket No. 02-35, *Memorandum Opinion and Order*, 17 FCC Rcd 9018, 9189, ¶ 308 (2002); *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, *Memorandum Opinion and Order*, 17 FCC Rcd 17595, 17765, ¶ 304 (2002); *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, WC Docket No. 02-307, *Memorandum Opinion and Order*, 17 FCC Rcd 25828, 25923-24, ¶ 183 (2002).

in these reports are performance measures for ordering, provisioning, maintenance and repair, and billing functions, including processing for UNE-P conversion orders and loop provisioning. BellSouth also reports data on its change management process. Besides lacking a statutory basis, the proposal suggested by Sage would be unnecessary, costly, and redundant with existing obligations and therefore should be rejected.

VII. THE COMMISSION SHOULD NOT ADOPT PERFORMANCE MEASURES FOR SPECIAL ACCESS OR UNES AS AN ALTERNATIVE TO THE SECTION 272 REQUIREMENTS.

Several parties urge the Commission to adopt performance measures and standards for special access services[41] and UNEs[42] either in lieu of, or in addition to, the separate affiliate requirements. These proponents of performance measures argue that such tools are necessary to prevent discrimination by BOCs. These commenters grossly exaggerate the incentive and ability of BOCs to discriminate in the provision of these interstate access services. For example, AT&T and MCI WorldCom contend that performance measures are necessary to address a pattern of ILEC discrimination in the provisioning and maintenance of special access services.[43]

As an initial matter, the propriety of performance measures for both special access services and UNEs is being decided in two separate proceedings.[44] BellSouth urges the

[41] *See, e.g.,* AT&T Comments at 70; AT&T Wireless Comments at 2, 15; MCI WorldCom Comments at 22-23; New Jersey Division of the Ratepayer Advocate Comments at 7-8.

[42] *See, e.g.,* Sprint Comments at 2-3, 5.

[43] AT&T Comments at 33; MCI WorldCom Comments at 23.

[44] *See Performance Measurements and Standards for Interstate Special Access Services, et al.,* CC Docket No. 01-321, *et al., Notice of Proposed Rulemaking,* 16 FCC Rcd 20896 (2001); *Performance Measurements and Standards for Unbundled Network Elements and*

Commission to engage in independent decisionmaking in the instant rulemaking. The decision whether to adopt performance measures for special access or UNEs has absolutely no bearing on whether to apply dominant carrier regulation on a BOC's provision of long distance services post sunset.

A. Special Access

Performance measures for special access service are completely unwarranted for a number of reasons. First, as the record demonstrates, the market for special access is highly competitive.[45] A report submitted as part of BellSouth's comments in the pending special access performance measures proceeding[46] indicates that, during the last fifteen years, the number of special access competitors nationwide has grown steadily and substantially.[47] In addition, this report concludes that "both wholesale and retail buyers of Special Access services in BellSouth's territory are likely to have multiple choices of competitive alternatives to that company's Special Access services."[48] Clearly, competition in this market is widespread thereby rendering performance measures unwarranted. Moreover, as Verizon notes, the vigorous competition in the special access market "assures that no ILEC could price access at uneconomic levels or discriminate in

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Interconnection, et al., CC Docket No. 01-318, *et al., Notice of Proposed Rulemaking*, 16 FCC Rcd 20641 (2001).

[45] *See., e.g.,* BellSouth Comments at 13-14; Verizon Comments at 17-18;

[46] *Performance Measurements and Standards for Interstate Special Access Services, et al.*, CC Docket No. 01-321, *et al., Notice of Proposed Rulemaking*, 16 FCC Rcd 20896 (2001).

[47] "Special Access Competition," The Eastern Management Group, at 2 (Jan. 22, 2002) ("Special Access Report").

[48] *Id.*

the provision of access services."[49] Thus, the Commission should not distort the marketplace by establishing detailed performance measures and standards for special access.

Second, as BellSouth's initial comments point out, BOCs are already subject to reporting requirements for access services.[50] Therefore, complaints about inadequate data are without merit.[51] Under the Commission's current rules, BOCs must report average installation intervals, mean time to repair, and percent of commitments met (*i.e.*, commit to a due date and meet that committed due date) (ARMIS (Automated Reporting Management Information System) Report 43-05).[52] These data are reported annually and are readily available to carriers. All of these data can easily be used to assess BellSouth's performance. Therefore, no additional reporting requirements for special access services are necessary due to the absence of a Section 272 affiliate.

Further, BOCs do not have any incentive to engage in conduct that favors their end user special access customers over their carrier customers. Such a discriminatory plan would have significant financial implications because the largest special access customers are carriers. Given the large revenue stream generated from the provision of special access services to these carriers, it would be contrary to the financial interest of a BOC to favor its end user customers over its carrier customers.

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[49] Verizon Comments at 18.

[50] BellSouth Comments at 14.

[51] *See* AT&T Comments at 36.

[52] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, *Memorandum Opinion and Order*, 6 FCC Rcd 2974 (1991) (*"Service Quality Order"*).

Apart from the fact that there is no economic incentive to engage in discriminatory conduct in the special access arena, such conduct could not escape detection. Carriers vigilantly monitor the quality of the access services provided to them and insist on immediate corrective action if there is a service disruption. As the Commission has found,

> IXCs often have good bargaining positions when purchasing services from incumbent LECs because they purchase large volumes of telecommunications services on an individual basis. IXCs are also more likely to possess the analytical expertise and resources needed to protect themselves against service quality degradation.[53]

Thus, carriers would quickly discover any preferences extended to end user customers exclusively, because these same end users are also customers of the carriers. Dissatisfied end users would most certainly complain to their service providers. Moreover, the mere suspicion of inappropriate conduct has always been sufficient for carriers to pursue enforcement actions. There is absolutely no reason to believe that carriers would hesitate to file complaints if they believed BOCs were discriminating against them. Consequently, there is no justification for applying performance measures and standards for special access to BOCs that have elected to integrate their long distance operations post sunset.

B. Unbundled Network Elements ("UNEs")

The Commission should reject requests to impose upon BOCs a set of metrics for UNEs when the separate affiliate requirements expire. As with special access, the

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[53] *2000 Biennial Regulatory Review – Telecommunications Service Quality Reporting Requirements*, CC Docket No. 00-229, *Notice of Proposed Rulemaking*, 15 FCC Rcd 22113, 22125, ¶ 39 (2000).

Commission is deciding in a separate proceeding whether to adopt a national set of performance measures for UNEs.[54] Not only have state commissions already established extensive metrics for UNEs, but also such metrics are completely unrelated to the fulfillment of the Section 272(e)(1) nondiscrimination obligation.

In addition, there is absolutely no nexus between UNE performance measures and a BOC's conduct in the provision of interexchange services either through an affiliate or an integrated business. As the Commission has previously concluded, performance measures for UNEs "were intended to assist incumbents, new entrants, and regulators in evaluating an incumbent's performance in meeting its statutory obligations."[55] These performance measures have been used as tools for assessing a BOC's compliance with the Section 271 checklist by ensuring that competitors obtaining UNEs receive a comparable level of service from the BOC to that which the BOC employs in providing its retail local services. Although these standards may provide value in assessing a BOC's conduct in the local exchange market, they bear no relation to a BOC's conduct in the interexchange market. Accordingly, the Commission should not link a BOC's provision of long distance service on an integrated basis to the satisfaction of certain UNE performance measures.

Moreover, existing reports provided by BOCs today allow competitors, the Commission, and state commissions to monitor a BOC's performance. As indicated

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[54] *Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al.*, CC Docket No. 01-318, *et al.*, *Notice of Proposed Rulemaking*, 16 FCC Rcd 20641 (2001).

[55] *Id.* at 20646-47, ¶ 9; *see also Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56; RM-9101, *Notice of Proposed Rulemaking*, 13 FCC Rcd 12817, 12820, ¶ 3 (1998).

above, as part of its compliance with Section 271, BellSouth is required to provide performance measurement reports on a monthly basis to each of its states.[56] BellSouth reports in excess of 2,000 measurements each month in each of its nine states. Included in these reports are performance measures for ordering, provisioning, maintenance and repair, and billing functions, including processing for UNE-P conversion orders and loop provisioning. BellSouth also reports data on its change management process. While BellSouth contends that the breadth of the current measurement set is unnecessary, certainly additional UNE performance measures and standards would be redundant.

VIII. NO BASIS EXISTS FOR ALTERING THE REGULATORY PARADIGM FOR INTERSTATE ACCESS SERVICES.

AT&T, Ad Hoc, Americatel, and MCI WorldCom all request that the Commission require BOCs to retarget their access rates to cost.[57] These parties want the Commission to eliminate pricing flexibility and reinstate price cap regulation for all access. This battle cry is far from new. AT&T filed a petition for rulemaking to reform

[56] *See, e.g., Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., And BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, CC Docket No. 02-35, *Memorandum Opinion and Order*, 17 FCC Rcd 9018, 9189, ¶ 308 (2002); *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, *Memorandum Opinion and Order*, 17 FCC Rcd 17595, 17765, ¶ 304 (2002); *Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, WC Docket No. 02-307, *Memorandum Opinion and Order*, 17 FCC Rcd 25828, 25923-24, ¶ 183 (2002).

[57] AT&T Comments at 68-69; Ad Hoc Telecommunications Users Committee ("Ad Hoc") Comments at 18-20; Americatel Comments at 30-31; MCI WorldCom Comments at 19.

special access rates in October 2002.[58] In that petition, AT&T raised the same claims that pricing flexibility has failed and therefore BOCs should be subject to additional regulation. These arguments amount to nothing more than an attempt to reprise the fruitless arguments made over the last decade in an effort to block any type of regulatory reform. Moreover, none of the arguments support the claim that BOCs retain market power in special access markets; that competition is inadequate to discipline prices; or that dominant carrier regulation of a BOC's integrated long distance service is warranted. Therefore, the Commission need not modify its rules for access services as requested by AT&T and others.

These parties are simply wrong in their claim that special access earnings are excessive and that they demonstrate LEC market power. Regulatory earnings have no significance in assessing market power. In essence, AT&T is challenging price cap regulation; but, the challenge must fail. Price cap regulation never was intended to constrain earnings. Instead, price cap regulation constrains prices and invites carriers to become more efficient and to increase earnings subject to the price cap limits. All that earnings can show is how successful a price cap carrier has been in light of the price limitations. Earnings under price caps have nothing to do with whether rates are just and reasonable.

Moreover, the margin between prices and incremental costs has nothing to do with market power. The telecommunications industry is characterized by substantial fixed costs that require that rates be set in excess of incremental costs. Permitting market

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[58] *See AT&T Corp. Petition for Rulemaking To Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593 (filed Oct. 15, 2002).

forces to determine the manner in which shared and common costs are recovered results in a set of more efficient prices than would occur by the Commission arbitrarily dictating the allocation of such costs through a cost methodology.

An equally doomed argument is AT&T's claim that the special access market is not competitive.[59] As shown above in Section III.A, AT&T's claim simply cannot measure up to the facts. Competition has been firmly established in the market for some time and it continues to thrive. The competitive conditions of the marketplace support the pricing flexibility that the Commission has afforded special access. The optional pricing plans that pricing flexibility has enabled are procompetitive and should be encouraged by the Commission. AT&T's desire to undo pricing flexibility has nothing to do with promoting competition. To the contrary, AT&T's request for the Commission to take a giant regulatory step backward is intended to achieve one purpose and one purpose only – to prevent BOCs from competing in the marketplace.

Moreover, AT&T and Ad Hoc are simply wrong when they assert that recent price increases for certain special access services demonstrate that pricing flexibility is not working or that such increases are evidence of market power.[60] In the first instance, the only rates that BellSouth has increased are month-to-month rates for DS1 and DS3 services. Services that BellSouth must provide on a month-to-month basis represent the services that have the highest transaction costs. Under price cap regulation alone, there is not sufficient flexibility to align rates properly to reflect such transactional differences between term and volume discount plans and month-to-month rates. Pricing flexibility

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[59] *See* AT&T Comments at 19-21.

[60] *See id.* at 31-32; Ad Hoc Comments at 10-11.

has enabled BellSouth to reflect more properly transactional differences by adjusting its month-to-month rates.

Despite the rate adjustment, substantial discounts off month-to-month rates remain available for DS1 and DS3 services through term plans such as BellSouth's Area Commitment Plan, Transport Payment Plan, and Channel Services Payment Plan. For DS1 services, 97 percent of DS1 revenues are associated with these plans. Similarly, for DS3 services, 98 percent of DS3 revenues are likewise associated with such discounted rates.[61]

In addition to the discounts available under the term plans, BellSouth has negotiated numerous contract tariffs that offer customers volume-based discounts. These contract tariffs offer discounts over and above the term plans for a wide range of volumes, from as little as $2 million annually to over $80 million annually. BellSouth estimates that by the end of 2002, it provided contract tariff customers discounts amounting to $8.5 million.

While AT&T seeks to create the impression that the only result of pricing flexibility has been rate increases, the facts demonstrate otherwise. Pricing flexibility has enabled more rational prices to be established, and, as fully anticipated by the Commission, in limited instances the price adjustments included increases. More importantly, pricing flexibility has led to a wide range of negotiated offerings, which have introduced not only volume discounts but also service level agreements that guarantee service performance. Thus, pricing flexibility has enabled the marketplace and customers to replace regulators as the determinants of the terms and conditions of

[61] The percentages are based on year-to-date revenues as of October 2002.

transport offerings, and the Commission should reject attempts to derail this procompetitive advancement.

The Commission also should not be persuaded by AT&T's complaints of excessive switched access rates.[62] This claim is disingenuous given that AT&T has been the direct recipient of sharply reduced switched access rates as a result of the CALLS plan.[63] Again, AT&T is doing nothing more than offering baseless allegations without the submission of any evidence. The Commission should accord no weight to such unsupported assertions.

IX. SECTIONS 272(e)(2) AND (4) DO NOT APPLY POST SUNSET REGARDLESS OF THE EXISTENCE OF A SEPARATE AFFILIATE.

The Commission should deny Z-Tel Communications, Inc.'s ("Z-Tel") request to retain Sections 272(e)(2) and (4) post sunset.[64] According to Z-Tel, Section 272(e)(4) is necessary to help competition develop in the provision of bundled packages of services by preventing BOCs from discriminating.[65] However, the Commission has already found that Sections 272(e)(2) and (4) do not apply post sunset in the absence of an affiliate.[66] Moreover, as Verizon points out:

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[62] *See* AT&T Comments at 4.

[63] *See Access Charge Reform Price Cap Performance Review for Local Exchange Carriers Low-Volume Long Distance Users; Federal-State Joint board on Universal Service*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, *Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45*, 15 FCC Rcd 12962 (2000).

[64] *See* Z-Tel Comments at 2, 8-9.

[65] *Id.* at 2.

[66] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended,* CC Docket No. 96-149, *First Report and*

> The plain language of the statute has not changed and there is no basis for the Commission to reconsider its earlier conclusion. And, in any event, other, less intrusive safeguards sufficiently address the alleged harms these provisions seek to prevent, and these additional constraints would uniquely and unduly constrain the BOCs' competitive flexibility.[67]

Z-Tel itself admits that other safeguards exist, and that 272(e) "is one of a number of nondiscrimination requirements."[68] Indeed, Section 272(e)(3), which the Commission has concluded remains post sunset, "serves to constrain a BOC's ability to engage in discriminatory pricing of its exchange and exchange access service."[69] In addition, Z-Tel correctly acknowledges that "the Commission could use its long-standing authority under sections 201 and 202 to require BOCs (and other ILECs) to provide nondiscriminatory access to their facilities."[70] In sum, Z-Tel has failed to justify the necessity of retaining Sections 272(e)(2) and (4) post sunset. The full suite of statutory and regulatory requirements that exist today and will continue to apply post sunset make the continued application of these provisions unnecessary.

BellSouth also disagrees with Qwest's assertion that Sections 272(e)(2)and (4) will continue to apply post sunset as long as a BOC chooses to provide interLATA long distance services through a separate affiliate.[71] As BellSouth's initial comments state, it would be illogical to retain these requirements in the presence of an affiliate after the sunset, given that the theoretical harms associated with integration are minimized when there is a

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Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22035, ¶ 270 (1997) ("*Non-Accounting Safeguards Order*").

[67] Verizon Comments at 30.

[68] Z-Tel Comments at 7.

[69] *LEC Classification Order*, 12 FCC Rcd at 15823, ¶ 115.

[70] Z-Tel Comments at 9.

[71] *See* Qwest Comments at 18.

structurally separate affiliate.[72] Following this logic, there should be less concern about possible anticompetitive conduct when an affiliate exists, thereby reducing the need for these additional requirements in a post-sunset environment. Once the structural separation period expires, Sections 272(e)(2) and (4) no longer apply, regardless of whether a separate affiliate exists. Any other outcome would be inconsistent with the letter and spirit of the Act.

X. THE COMMISSION SHOULD REJECT REQUESTS TO REVISIT LONG-SETTLED ISSUES.

A. There Is No Justification For Establishing A Third-Party PIC Administrator Or Adopting Additional PIC Freeze Rules.

A few parties call upon the Commission to establish a neutral, third party PIC administrator and/or modify the Commission's existing rules regarding PIC freezes.[73] Not only have the parties failed to demonstrate the need for the above changes, but the Commission has already considered these same requests and rejected them; therefore, there is no need to revisit the issue.

In addition, the creation of a neutral third party PIC administrator is unnecessary and would be costly to establish and manage. As the Commission pointed out in the SBC California Section 271 proceeding, its "slamming rules do not prohibit a BOC from retaining the role of PIC administrator."[74] In that proceeding, the Commission refused to

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[72] BellSouth Comments at 19-20.

[73] *See, e.g.,* AT&T Comments at 7, 71-72; Working Assets Comments at 5-6.

[74] *Application by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services Inc., for Authorization To Provide In-Region, InterLATA Services in California*, WC Docket No. 02-306, *Memorandum*

find that the absence of a third-party PIC administrator would harm the public interest.[75] The Commission also appropriately noted that a BOC's conduct in the long distance market, including its actions as the PIC administrator, are governed by Section 64.1100 *et seq.*[76] of the Commission's rules.[77] Given that there are existing rules to govern a BOC's behavior in its role as PIC administrator, there is no basis for the creation of a third-party PIC administrator.

The Commission also should reject MCI WorldCom's request to: (1) require BOCs to resume providing competing interLATA carriers with a list showing PIC freeze status and (2) establish an electronic authorization process that allows an independent third-party to make available to the BOC a customer's recorded voice authorization to lift the PIC freeze and process a PIC-change order.[78] The Commission has considered and rejected both of these proposals before and should do the same here. Specifically, the Commission refused to require LECs administering preferred carrier freeze programs to make subscriber freeze information available to other carriers.[79] In addition, the

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Opinion and Order, 17 FCC Rcd 25650, 25746, ¶ 175 (2002) ("*SBC California Section 271 Order*").

[75] *Id.* at 25746-47, ¶ 175.

[76] 47 C.F.R. § 64.1100 *et seq.*

[77] *SBC California Section 271 Order*, 17 FCC Rcd at 25747, ¶175.

[78] MCI WorldCom Comments at 30-31.

[79] *Implementation of the Subscriber Carrier Selection Change Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Docket No. 94-129, *Third Report and Order and Second Order on Reconsideration*, 15 FCC Rcd 15996, 16031, ¶ 76 (2000).

Commission explicitly "declined to enumerate all acceptable procedures for lifting preferred carrier freezes."[80]

PIC freezes are intended to protect end users. As the Commission has stated, "'the essence of a preferred carrier freeze is that a subscriber must specifically communicate his or her intent to request or lift a freeze [and it is this] limitation on lifting preferred carrier freeze that gives the freeze mechanism its protective effect.'"[81] The same advice the Commission previously provided when it denied MCI WorldCom's requests is equally applicable today. Indeed, "[i]f MCI is concerned about the delay that may result from some LECs refusing to accept properly verified carrier change orders during the same three-way call initiated for the purpose of lifting a freeze, it may file a complaint."[82] Given that MCI WorldCom has not presented any new arguments or evidence to justify revisiting this issue, the Commission should deny its request to modify the existing slamming rules.

B. The Commission Should Reject Attempts To Re-Regulate Billing And Collection.

BellSouth opposes any attempts to re-regulate billing and collection. [83] As an initial matter, billing and collection services are not common carrier services and have

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[80] *Id.*, ¶ 75.

[81] *Id.* at 16028-29, ¶ 70.

[82] *Id.* at 16031, ¶ 74.

[83] *See, e.g.,* Americatel Comments at 5.

not been regulated by the Commission for nearly twenty years.[84] When the Commission removed billing and collection from common carrier regulation in 1987, it found that:

> Deregulating billing and collection will serve the interests of LECs by giving them greater flexibility in structuring and pricing this service, thereby enhancing their ability to retain and attract customers. It will serve the interests of their customers, the [IXCs], by enabling them to get billing and collection packages tailored to their specific needs at rates that are more directly based on the LECs' costs. Finally, deregulation will serve the interests of subscribers by holding down the carriers' administrative costs of providing telephone service.[85]

Moreover, the industry is long past the point where regulation can be justified. Competitive alternatives to BOC billing and collection services exist. In addition, IXCs are capable of directly billing their customers. Therefore, there is no basis for the Commission to interfere. Commenters such as MCI WorldCom simply do not want to bear the costs of billing non-presubscribed services. Rather, MCI WorldCom merely wants the BOCs to underwrite its non-presubscribed business. This desire hardly justifies overturning twenty years of deregulation. Thus, the Commission should not seek to re-regulate BOC billing and collection.

XI. COMMENTERS' CLAIMS OF ALLEGED BOC MISCONDUCT AND DISCRIMINATION BY BELLSOUTH ARE WITHOUT MERIT.

The number of unsubstantiated allegations and theoretical abuses claimed by IXCs and CLECs is not surprising given their propensity for hyperbole and exaggeration. For example, Americatel offers a laundry list of allegations against BellSouth that are all without merit. Americatel claims that BellSouth "could" cross-subsidize and "could" engage in cost

[84] *Detariffing of Billing and Collection Services*, CC Docket No. 85-88, *Report and Order*, 102 FCC 2d 1150 (1986) ("*Billing and Collection Detariffing Order*").

[85] *Id.* at 1177-78, ¶ 53.

misallocation. However, it never offers any evidence of such misconduct, which is not surprising, because there is none. This is not the first time that Americatel has brought baseless charges against BellSouth. Most recently, the Enforcement Bureau refused to pursue an informal complaint filed by Americatel against BellSouth in which Americatel raised the very same issues set forth in its comments. These allegations are equally as unpersuasive here as they were in the informal complaint proceeding and therefore should not be afforded any weight.

A. The Bundling of Local and Long Distance Services by BOCs, Including BellSouth, Is Lawful and Permissible.

Americatel raises a number of objections to the bundling of services by BOCs. Specifically, Americatel asks the Commission to: (1) prohibit carriers with significant power from bundling their services into single-price packages;[86] (2) condition a BOC's provision of integrated long distance on the use of rate-of-return regulation based on a fully distributed cost allocation plan for all BOC services that could be bundled together;[87] and (3) impose reporting rules for bundling by BOCs and declare that state commissions are authorized to investigate any bundled service package offered by a BOC to residential customers.[88] The Commission should reject these requests as unwarranted.

Bundling is completely lawful, permissible, and consistent with the public interest. Customers want bundled local and long distance offerings. Moreover, such offerings were contemplated by the Act. As the Commission recently concluded in the

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[86] Americatel Comments at 23.

[87] *Id.* at 31.

[88] *Id.* at 32-33.

BellSouth Section 271 proceeding for Alabama, Kentucky, *et al.*, "[w]e believe that the bundling of both local and long distance services is one of the goals of section 271."[89]

Americatel itself acknowledges the value to the end user of bundled offerings. Americatel states that the "[b]undling of telecommunications service and products can be in the public interest. A carrier may be able to assemble a combination of services and products that meets customers' needs and desires at prices that are lower than the customers would pay if they were to purchase those services and products separately."[90] Thus, a prohibition on bundling would be antithetical to competition and would deprive customers of desired service offerings.

Indeed, as the Commission has concluded:

> allowing all carriers to bundle products and services is generally procompetitive and beneficial to consumers. Bundling encourages competition by giving carriers flexibility both to differentiate themselves from their competitors and to target segments of the consumer market with product offerings designed to meet the needs of individual customers.[91]

The Commission has further recognized that "offering consumers the choice of purchasing packages of products and services at a single low-rate will encourage them to subscribe to new, advanced, or specialized services by reducing the costs that they have to pay up-front

89 *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, *Memorandum Opinion and Order*, 17 FCC Rcd 17595, 17751-52, ¶ 278 (2002).

90 Americatel Comments at 18.

91 *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended; 1998 Biennial Regulatory Review -- Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access And Local Exchange Markets*, CC Docket No. 96-61; CC Docket No. 98-183, *Report and Order*, 16 FCC Rcd 7418, 7426, ¶ 14 (2001).

to purchase equipment, or by giving them a choice of relying on one provider instead of having to assemble the desired combinations on their own."[92]

When the Commission allowed incumbent LECs to bundle customer premises equipment with local exchange service, it balanced the costs and benefits of bundling.[93] As part of its analysis the Commission acknowledged that the local exchange market was not substantially competitive and that incumbent LECs had market power. Nonetheless, the Commission found that it "must balance the risk that the incumbents can act anticompetitively with the public interest benefits associated with bundling."[94] The Commission reached the conclusion that the risk of anticompetitive behavior by the incumbent LECs was low, "not only because of the economic difficulty that even dominant carriers face in attempting to link forcibly the purchase of one component to another, but also because of the safeguards that currently exist to protect against this behavior. In particular, incumbent LECs will, under state law, offer local exchange service separately on an unbundled tariff basis if they bundle such service with CPE."[95]

The same holds true for the bundling of local and long distance service by BOCs. The number of competitors providing bundled offerings is steadily growing, and BellSouth's combined local and long distance offers are no different than the packages currently being offered by AT&T and MCI (MCI Neighborhood). The BOCs are merely responding to the marketplace by giving consumers want they want. Imposing limitations on a BOC's ability to bundle local and long distance is nothing more than an

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[92] *Id.* at 7424, ¶ 10.

[93] *See id.* at 7425, ¶ 12.

[94] *Id.*

[95] *Id.*

attempt to foreclose BOCs from competition on a fair and equitable basis. Such an outcome is contrary to the whole goal of the Act – namely to increase competition in the local and long distance markets, and to give end users the benefit of the efficiencies created by companies that provide both services.

B. BellSouth Is Not Engaging in Anticompetitive Conduct.

Americatel also complains that it cannot resell BellSouth Long Distance's ("BSLD") most inexpensive international long distance services because it does not want to buy BellSouth's local service.[96] While Americatel may have good reasons for not wanting to become a CLEC, those reasons say nothing about whether competition is affected by BellSouth's pricing package. Simply put, Americatel does not need to be able to resell BSLD's long distance service in order to compete in the international long distance service market. There are numerous other providers of such services with whom Americatel could enter into a resale agreement. Further, Americatel could enter into an agreement with another local provider to offer a package comparable to BellSouth's combined offer. Competition is not hindered in any way by the perceived limitation on Americatel's ability to resell certain services.

XII. CONCLUSION

For all the foregoing reasons, BellSouth urges the Commission to find that a BOC providing in-region, interexchange telecommunications services in the absence of a separate affiliate does not possess market power and therefore should not be subject to dominant

[96] Americatel Comments at 20.

carrier regulation after the sunset of the Section 272 separate affiliate requirements. In addition, the Commission should not adopt any additional or modified safeguards to govern BOC conduct. There are more than adequate statutory and regulatory protections in place to preclude any potential anticompetitive conduct in both the local and long distance markets.

Respectfully submitted,

BELLSOUTH CORPORATION

Its Attorneys

By: /s/ Angela N. Brown
Richard M. Sbaratta
Alan L. Silverstein
Angela N. Brown
Suite 4300
675 West Peachtree Street, N. E.
Atlanta, GA 30375
(404) 335-0724

Date: July 28, 2003

CERTIFICATE OF SERVICE

I do hereby certify that I have this 28th day of July served the following parties to this action with a copy of the foregoing **REPLY COMMENTS OF BELLSOUTH** by electronic filing, electronic mail and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

/s/ Juanita H. Lee
Juanita H. Lee

Service List WC Docket No. 02-112 and CC Docket No. 00-175

Marc D. Poston
Natelle Dietrich
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

Susan L. Gately
Scott C. Lundquist
Ad Hoc Telecommunications
Users Committee
Economics and Technology, Inc.
Two Center Plaza, Suite 400
Boston, MA 02108-1906

Colleen Boothby
Ad Hoc Telecommunications
Users Committee
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, NW, Suite 900
Washington, D.C. 20036

Judith L. Harris
Robert H. Jackson
Americatel Corporation
Reed Smith LLP
1301 K Street, N. W., Suite 1100 – East Tower
Washington, D. C. 20005

Leonard J. Cali
Lawrence J. Lafaro
Stephen C. Garavito
James J. R. Talbot
Aryeh S. Friedman
AT&T Corporation
One AT&T Way
Bedminster, N. J. 07921

Michael H. Pryor
Catherine Carroll
AT&T Wireless Services, Inc.
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
Suite 900
701 Pennsylvania Avenue, N. W.
Washington, D. C. 20004

Douglas I. Brandon
Vice President – External Affairs
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, N.W.
Suite 400
Washington, D. C. 20036

Donald J. Elardo
Coalition of Incumbent Independent
Local Exchange Carriers
Kraskin, Lesse & Cosson, LLC
2120 L Street, NW, Suite 520
Washington, DC 20037

David Clark
GVNW Consulting, Inc.
8050 SW Warm Springs Street
Suite 200
Tualatin, Oregon 97062

David W. Zesiger
Executive Director
The Independent Telephone &
Telecommunicaitons Alliance
1300 Connecticut Avenue, N.W.
Suite 600
Washington, D. C. 20036

Richard R. Cameron
Tonya Rutherford
The Independent Telephone &
Telecommunications Alliance
Latham & Watkins LLP
555 Eleventh Street, N. W.
Suite 1000
Washington, D.C. 20004

Alan Buzacott
Lori E. Wright
WorldCom, Inc. d/b/a MCI
1133 19th Street, N. W.
Washington, D.C. 20036

L. Marie Guillory
Jill Canfield
National Telecommunications
Cooperative Association
4121 Wilson Boulevard
10th Floor
Arlington, VA 22203

Sharon J. Devine
James T. Hannon
Qwest Services Corporation
Suite 950
607 14th Street, N.W.
Washington, DC 20005

Jonathan E. Canis
Enrico C. Soriano
Sage Telecom, Inc.
Kelly Drye & Warren LLP
1200 19th Street, N. W. Fifth Floor
Washington, D.C. 20036

Robert W. McCausland
Vice President, Regulatory Affairs
Sage Telecom, Inc.
805 Central Expressway South
Suite 100
Allen, TX 75013-2789

William Randolph Smith
Robert M. Halperin
SBC Communications, Inc.
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004

Paul K. Mancini
Gary L. Phillips
Anu Seam
SBC Communications, Inc.
Suite 400
1401 Eye Street, N. W.
Washington, D. C. 20005

Roger B. Borgelt
Office of The Attorney General
Of the State of Texas
P. O. Box 12548
Austin, Texas 78711-2548

Rebecca Klein
Brett A. Perlman
Julie Parsley
Public Utility Commission of Texas
1701 N. Congress Avenue
Austin, Texas 78711-3326

Robin E. Tuttle
Lawrence E. Sarjeant
Indra Shedev Chalk
Michael T. McMenamin
United States Telcom Association
1401 H Street, N. W, Suite 600
Washington, D. C. 20005

Michael G. Hoffman
Chief Legal Officer
VarTec Telecom, Inc.
1600 Viceroy Drive
Dallas, Texas 75235

James P. Tobin
Mary E. Wand
Working Assets Long Distance
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105-2482

Theresa L. Cabral
Working Assets Long Distance
Morrison & Foerster LLP
101 Ygnacio Valley Road, Suite 450
Walnut Creek, CA 94596

Thomas M. Koutsky
Z-Tel Communications, Inc.
1200 19th Street, N. W.
Suite 500
Washington, D. C. 20036

Christopher J. Wright
Timothy J. Simeone
Harris, Wiltshire & Grannis LLP
Z-Tel Communications, Inc. LLP
1200 Eighteenth Street, N. W.
Washington, D. C. 20036

Seema M. Singh
Ava-Marie Madeam
Division of the Ratepayer Advocate
31Clinton Street, 11th Floor
P. O. Box 46005
Newark, New Jersey 07101

+Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
The Portals, 445 12th Street, S. W.
Room TW-A35
Washington, D. C. 20554

+Qualex International
The Portals, 445 12th Street, S. W.
Room CY-B402
Washington, D, C. 20554

Michele C. Farguhar
David L. Sieradzki
Ronnie London
Competitive Universal
Service Coalition
Hogan & Hartson, LLP
555 – 13th Street, N. W.
Washington, D. C. 20554

Jeffrey S. Linder
Verizon
Wiley Rein & Fielding LLP
1776 K Street, N. W.
Washington, D. C. 20006

Craig T. Smith
Sprint Corporation
6450 Sprint Parkway
Overland, KS 66251

Tonya Rutherford
Independent Telephone &
Telecommunications Alliance
Suite 1000
555 11th Street, N. W.
Washington, D. C. 20004-1304

Gil M. Strobel
WorldCom, Inc. d/b/a MCI
Lawler, Metzger and Milkman, LLC
Suite 802
2001 K Street, N. W.
Washington, D.C. 20006

H. Richard Juhnke
Sprint Corporation
401 9th Street, N. W.
Suite 400
Washington, D. C. 20004

Western Wireless
401 9th Street, N.W., #550
Washington, D. C. 20037

VarTec Telecom, Inc.
Excel Telecommunications, Inc. &
eMertus Communications
1600 Viceroy Drive
Dallas, TX 75235

*Janice M. Myles
Federal Communications Commission
Wireline Competition Bureau
Competition Policy Division
The Portals, 445 13th Street, S. W
Suite 5-C327
Washington, D. C. 20554
jmyles@fcc.gov

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