

SIDLEY AUSTIN BROWN & WOOD LLP

BEIJING  
BRUSSELS  
CHICAGO  
DALLAS  
GENEVA  
HONG KONG  
LONDON

1501 K STREET, N.W.  
WASHINGTON, D.C. 20005  
TELEPHONE 202 736 8000  
FACSIMILE 202 736 8711  
www.sidley.com  
FOUNDED 1866

LOS ANGELES  
NEW YORK  
SAN FRANCISCO  
SHANGHAI  
SINGAPORE  
TOKYO  
WASHINGTON, D.C.

WRITER'S DIRECT NUMBER  
(202) 736-8088

WRITER'S E-MAIL ADDRESS  
dlawson@sidley.com

November 9, 2004

**REDACTED – FOR PUBLIC INSPECTION**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

Re: Unbundled Access to Network Elements  
WC Docket No. 04-313 & CC Docket No. 01-338

Dear Ms. Dortch:

Attached for filing is "Impairment Tests Based on a 'Proxy' of the Number of Business Lines in a Wire Center Are Irrational and Unlawful" in connection with the above referenced matter. Please contact me if you have any questions.

Very truly yours,

/s/ David L. Lawson

David L. Lawson  
*Counsel for AT&T Corp.*

**Impairment Tests Based on a “Proxy” of the Number of Business Lines in a Wire Center Are Irrational and Unlawful**

Several Bell companies have proposed impairment tests in which enterprise loops and dedicated transport would be de-listed in any ILEC wire center with a certain number of “business lines.” See Verizon at 82-83; BellSouth at 39-50; SBC at 78-79, 89. Both BellSouth and Verizon would set the threshold for delisting at 5,000 business lines.<sup>1</sup> BellSouth at 39, 44; Verizon at 82-83. These and similar proposed tests are fatally flawed and must be rejected.

Most fundamentally, there is no reliable relationship between the number of business lines in a wire center and the absence of impairment. Thus, it is predictable that the “evidence” in BellSouth’s reply comments that purports to show a relationship between a specific number of business lines in a wire center and competitive facilities deployment is misleading and fails to support the Bells’ proposed conclusions. And critically, the Bells do not even purport to show (as they cannot) that a line-based proxy is a better predictor of non-impairment than the capacity limits adopted in the *TRO*. Therefore, *USTA II* requires that the Commission reject the Bells’ line-based proxies. Moreover, none of the Bells has ever adequately explained how the number of “business lines” in a wire center would be determined, monitored, or audited. Thus, their proposals are fraught with potential for disputes over the standard itself. Nor is a line-based test more easily administered than other proposed impairment tests.

**I. The Number of Business Lines in a Wire Center Lacks Any Significant Relationship to Competitive Facilities Deployment and is a Poor Predictor of Non-Impairment**

The number of business lines in a wire center is not a factor at all in determining the cost of facilities construction, and it is at best only weakly correlated with the revenue opportunities arising from the deployment of new competitive loops or transport.

Thus, in sharp contrast to the capacity limits established in the *TRO*, the number of lines in a wire center has *no* direct relationship to the key factors in establishing impairment.

- The most important cost factor is the cost of placing fiber, which is directly related to the distance between a new location and the competitor’s network. A competitor’s outside plant mileage – the main driver of its deployment cost – is thus completely unrelated to the number of business lines in an ILEC wire center. See Fea-Giovannucci Dec. ¶¶ 15 & n.4.
- The number of lines in a wire center has no relationship at all to *either* the costs *or* the revenues associated with extending a “lateral” from a competitor’s existing network to a new building. In fact, competitive loops rarely (if ever) connect a customer location to that building’s serving ILEC wire center. Thus, there is *no* valid relationship between loops and the number of lines served by specific ILEC wire centers.

---

<sup>1</sup> ALTS and certain small facilities-based carriers have suggested a threshold of 40,000 switched business lines, based upon data from PNR Associates, limited to wire centers in the top 50 MSAs. ALTS at 81-83.

## REDACTED – FOR PUBLIC INSPECTION

- The unit cost of using terminal gear also is not a function of the total number of lines in an ILEC wire center. Rather, it is related to the number of lines that a competitor serves using such equipment. Fea-Giovanucci Dec. ¶ 72.
- Collocation is necessary to provide alternative transport. Collocation-specific costs are primarily a function of the ILEC's non-recurring charges to establish such an arrangement and its recurring fees for power consumption and floor space. Thus, collocation-specific costs have little correlation to the number of business lines at an individual wire center. Fea-Giovanucci Dec. ¶ 73.
- Efficient design of competitive networks (and the efficient selection of ILEC offices a competitor places "on-net") is not based on the number of lines in any specific ILEC wire center. Rather, it is based on the total transport costs a competitor expects to incur in serving a wider area, using its fiber-based collocation as a "hub." Fea-Giovanucci Dec. ¶ 69.
- Other cost factors relevant to efficient network construction, *e.g.*, costs related to terrain (rural vs. urban, the existence of pavement, etc.); the availability, permit costs, and delays involved with rights of way; and other input costs, such as labor costs, also have minimal relationship to the number of business lines served by an individual ILEC wire center.
- There is also no significant correlation between any competitive carrier's revenues and the total number of business lines in an individual ILEC wire center. Moreover, other related factors, such as the character of business lines in the wire center (*e.g.*, voice, data, inbound, outbound) and the ILEC's tariffed rates for the various retail services in that wire center have no necessary correlation with the size of the wire center at all.
- In short, the total number of business lines in a wire center correlates very poorly with the factors that determine impairment.

## II. BellSouth Fails to Show a Meaningful Relationship Between Business Lines in a Wire Center And Competitive Transport Deployment

BellSouth's reply comments present two tables to support its claim that a threshold of 5,000 business lines per wire center would be a reliable indicator that competitors are not impaired in deploying their own transport in offices of that size. These tables suffer from several fatal flaws and do not support BellSouth's claim.

- **BellSouth's tables have nothing to do with the provision of competitive dedicated transport.** BellSouth's first table (Padgett Reply Dec. ¶ 61, Table 3) plots wire center size against the number of fiber-based collocators in those wire centers. But virtually all parties concede (*see, e.g.*, SBC at 76-77) that competitors deploy transport facilities primarily (if not solely) to connect an ILEC wire center to their own networks – *i.e.*, as an *entrance facility*. Thus, the presence of a fiber-based collocation says *nothing at all* about whether a carrier can provide "dedicated transport" between the ILEC office where it is collocated and any other

ILEC office in the same LATA. Indeed, even the Bells recognize that a competitive carrier cannot even *theoretically* provide dedicated transport between two ILEC wire centers in a LATA unless it has a fiber-based collocation in *both* offices. See Bell Report, p. III-29 (“when a single CLEC collocates in *two or more* wire centers, it is reasonable to assume that competitive transport is available between or among *those specific locations*” (emphasis added)). Therefore, BellSouth’s analysis – which is based entirely on collocations in *individual* ILEC wire centers – cannot possibly have any validity as an indicator of non-impairment for dedicated transport.

- **BellSouth’s tables misleadingly assume that wire center size is homogeneously dispersed throughout its entire serving territory.** BellSouth’s tables lump together all of its wire centers across its nine-state region, creating the misimpression that the tables present an accurate representation of wire centers throughout its entire territory. But that is incorrect. A disproportionate number of the largest wire centers in BellSouth’s territory are located in the handful of its largest cities. BellSouth provides service in 39 LATAs. Based on the best data available to AT&T regarding the number of switched business lines in BellSouth wire centers:
  - About *one-third* of all BellSouth’s offices with over 5,000 switched business lines are in its *three* largest MSAs, and *more than half* are in its *nine* largest MSAs.<sup>2</sup> See Attachment 1.
  - Business lines are even more concentrated -- 38% of all BellSouth’s switched business lines are in its three largest MSAs and nearly 60% are in the largest nine MSAs. *Id.*

Thus, by lumping together all the data on all of its states into a single set of data, the BellSouth tables use the unique conditions in *less than one-fourth* of its MSAs to create the misimpression that the levels of competitive deployment that have been achieved in the largest cities could be replicated elsewhere. There is no basis for any such assumption.

- **BellSouth fails to demonstrate that the 5,000-line threshold is a meaningful proxy for non-impairment for dedicated transport.** BellSouth defends its proposed 5,000-line threshold on the ground that there is more likely to be a fiber-based collocator in wire centers with more than 5,000 lines compared to wire centers with fewer than 5,000 lines. Padgett Reply Dec. ¶ 61. BellSouth’s own data, however, show that a 5,000-line threshold is a wildly *inaccurate* predictor – indeed, only about *half* of the wire centers in the 5,000 to 10,000-line range have even *one* fiber-based collocator – and BellSouth’s proposal provides no assurance that even those single collocators (who, as noted above, typically deploy their own transport to serve as entrance facilities) can connect to even one *other* ILEC wire center in the LATA. See *id.*, Table 3. This utterly fails to demonstrate that *any* carrier has actually

---

<sup>2</sup> Three MSAs in BellSouth’s region (Atlanta, Miami and Tampa) are within the Top 25 MSAs in the country. Six other disparate MSAs (Charlotte, Greensboro, Orlando, Nashville, New Orleans and Baton Rouge) are in the Top 50 MSAs.

connected -- or even theoretically *could* connect -- two offices to create a dedicated transport route. Thus the Bells' proposed proxy would obviously lead to huge numbers of cases in which there would be a finding of non-impairment *even though there is not even a theoretical possibility that any carrier could provide competitive dedicated transport.*

- **BellSouth's plotting of wire center size against special access revenues provides no insight into non-impairment.** Table 4 to the BellSouth Padgett Reply Dec. ¶ 63 merely reflects the unremarkable fact that ILEC special access revenues generally increase as the number of business access lines increases. This provides no insight at all as into the costs of self-deploying transport, nor does it identify the actual amount of revenues a competitor could potentially earn on a specific route. Moreover, competitors are not in a position to compete for most of those revenues, because potential customers have often executed long-term contracts with the ILECs that contain punitive "lock-up" provisions. *See AT&T at 47. 156.*<sup>3</sup>

### III. BellSouth Demonstrates *No Relationship Between Business Lines in a Wire Center And Competitive Loop Deployment*

BellSouth's claim that the number of business lines in a wire center would be a suitable test for loop impairment is preposterous, and its "evidence" completely fails to support its claims.

- **BellSouth's showings depend on the flagrantly erroneous assumption that a *single* CLEC "lit" building in a wire center -- at any capacity -- demonstrates there is no impairment for *any* loops *anywhere* throughout the wire center.** The evidence overwhelmingly demonstrates that loop impairment can only be assessed on a location-by-location basis. D'Apollito/Stamley Dec. ¶¶ 12-24. It also shows that the mere fact one competitor may have deployed a loop to one location does not mean that even efficient competitors could economically deploy loops to that or a nearby location. *Id.*; Selwyn Dec. ¶¶ 47-49. Thus, there is no basis for BellSouth's implicit assertion that the provision of a *single* competitive loop -- of *any* capacity -- to a *single* building in a wire center means that competitors are not impaired in deploying loops to any *other* building served by that wire center. BellSouth also completely ignores the capacity limits identified in the *TRO* and makes no attempt to show that the "lit" buildings it identifies are served by carriers that provide only 2 or fewer DS3s of traffic. Thus, its proposed proxy would eliminate access to UNE loops in circumstances the Commission identified as generally "impaired" (*i.e.*, for carriers that need only DS1s or 2 or fewer DS3s) *solely* on the basis of self-deployment by carriers the Commission found are *not* impaired (*i.e.*, carriers that have deployed loops serving at least 3 DS3s of demand). Moreover, the evidence shows that carriers that have

---

<sup>3</sup> The Commission must also reject BellSouth's bald assertion that the capacity thresholds for transport would be subject to "arbitrage," because competitors would allegedly route transport traffic through "impaired" routes (at TELRIC rates) to avoid "competitive" routes. BellSouth Padgett Reply Dec. ¶ 52. BellSouth offers no evidence that it would be economic for competitors to deliberately route traffic inefficiently around allegedly "competitive" routes when they must pay *distance-sensitive* rates to do so.

deployed loops at the OCn level do *not* offer “channelized” wholesale options to competitors. Even the Bells’ own highly inflated – and erroneous – claims assert only that there is competitive wholesaling at fewer than 1% of commercial office buildings. Bell Report, p. III-5. BellSouth’s proposed test thus rests on a completely irrational premise and would be a wildly inaccurate predictor of loop impairment.

- **BellSouth’s Table 5 regarding “lit” buildings by wire center size is meaningless.** *See* BellSouth Padgett Reply Dec. ¶ 78, Table 5. All this table does is to count the percentage of “known CLEC lit buildings” and display them across wire centers of various sizes, in an effort to show that there is some “meaningful” difference between offices with more and fewer than 5,000 business lines. BellSouth concludes that “almost half” (actually, only 36.7%) “of all central offices with known CLEC lit buildings have between 5,000 and 15,000 business lines.” BellSouth Padgett Dec. ¶ 78. But this is a completely meaningless statistic. It fails to identify the capacity levels served at any of the identified buildings and says absolutely nothing about *either* the cost *or* the revenue factors that must underlie any impairment determination. In particular, it ignores the fact that there is *nothing at all* about the *size* of an ILEC wire center that relates to a competitor’s costs in constructing a lateral from a customer building *to its own metro fiber* – not to *any* ILEC wire center. Thus, this table (and BellSouth’s other tables) actually have nothing at all to do with any key factor necessary to determine impairment. And because BellSouth’s analysis ignores all of those factors, the fact that the “biggest difference” in an irrelevant statistic occurs between wire centers of specific sizes is not probative in determining when competitors are “not impaired.”
- **BellSouth’s Table 6 regarding use of special access is not probative and is contrary to fact.** *See* BellSouth Padgett Reply Dec. ¶ 79, Table 6. This table plots wire center size against the number of buildings where CLECs purchase DS1 special access from BellSouth. AT&T and other carriers have already explained at length why the availability of special access does not eliminate impairment. AT&T at 80-134; ALTS at 8-34; Loop-Transport Coalition at 37-69; MCI at 154-72; NuVox at 28-50. BellSouth’s table, however, is both entirely predictable and unremarkable insofar as it shows that the amount of DS1 purchases increases with wire center size, up to 40,000 lines. But above 40,000 lines, BellSouth suddenly places “NA” for each entry, and cryptically states “in central offices with at least 40,000 [lines], CLECs no longer appear to use special access in this way.” BellSouth Padgett Dec. ¶ 79. The implicit contention that competitors purchase no DS1s in wire centers with more than 40,000 lines is not only incredible and unexplained – it is bizarre and contrary to fact. Indeed, a partial review of AT&T’s purchasing records shows that AT&T itself purchases a total of [proprietary begin] [proprietary end] DS1 special access channel terminations (loop equivalents) from BellSouth in BellSouth wire centers with over 40,000 business lines. Thus, BellSouth’s chart is incoherent and erroneous and should be given no weight.
- **BellSouth’s Tables 4 and 7 actually confirm the *lack* of widespread competitive loop deployment.** *See* BellSouth Padgett Reply Dec. ¶¶ 63 (Table 4), 80 (Table 7). These tables show that as wire centers grow larger, the mean special access spending grows larger as well. But if competitors were *unimpaired* in larger offices, as the Bells assert, one would expect to see the rate of growth in competitive special access purchases *decline* as the wire center size

increases, because competitors would be better able to use their own (or other competitors') facilities to provide service. Notably, BellSouth's data do not reflect this phenomenon. Instead, contrary to BellSouth's apparent intent, these data actually confirm that competitive loop deployment is minimal, even in larger wire centers. Thus, these tables offer no support for a rational test based on wire center size.

#### IV. The Commission May Not Lawfully Adopt the Bells' Proposed Tests

As is evident from the above, the Bells' proposed impairment proxies would generate huge errors in impairment determinations and cannot be lawfully adopted.

- **USTA II requires a comparison of the errors that would likely result from various impairment proxies** - *USTA II* requires the Commission to balance the likely errors that would result from the use of proposed regulatory rules. *USTA II*, 359 F.3d at 574-75 (Commission must minimize "error costs" in terms of "false positives" and "false negatives"). The Commission cannot rationally adopt the Bells' poorly correlated line-based proxy unless it can demonstrate that it would produce *fewer* errors (*i.e.*, "false positives" and "false negatives") than other proposed tests. *Id.* However, the Bells do not even *attempt* to show that their proposed tests will produce reasonably accurate results – much less more accurate results than other proposed tests.
- **The capacity limits are a highly superior test for non-impairment.** In contrast to the poor correlation between business lines in a wire center and the economic and operational factors defining impairment, the data in the record shows an extremely close "fit" between economic non-impairment and the capacity limits established in the *TRO*. AT&T at 30-50; D'Apolito-Stanley Dec. ¶¶ 12-24; Fea-Giovannucci Dec. ¶¶ 55-76; *QSI Analysis*. Indeed, the capacity limits alone are very restrictive and preclude competitors from obtaining access to UNEs in many situations where they are still impaired. *E.g.*, AT&T at 57-61. Therefore, it would be irrational – and thus unlawful – to adopt the Bells' error-prone line count proxy in lieu of the capacity limits.

#### V. In All Events, The Bells Have Not Adequately Defined Their Proposed Tests, Which In Turn Could Lead to Significant and Unnecessary Disputes

- **The Bells' proposals are inadequately described.** The Bells make no effort to explain how "business lines" would be identified and "counted" in their proposed tests. Importantly, the Bells' proposals also fail to identify the specific offices that would be affected by their proposals or describe the data sources they rely upon to identify such offices.
- **There is no undisputed source for "business line" data.** Even assuming that the Bells' proposals mean a simple count of "switched business lines," the Commission does not currently gather data on switched business lines by wire center, nor does it use such data for any other purpose. For example, such data are not reported in ARMIS, nor is there any process in place for conducting regular audits of the accuracy of such data.

**REDACTED – FOR PUBLIC INSPECTION**

- **The data underlying these proposals are solely within the hands of the ILECs.** Because neither the Commission nor the parties has ever had the opportunity to review the ILECs' data, see ALTS at 80-81, 83 n.128, the Commission would have to establish an entirely new set of data-gathering, monitoring and dispute resolution procedures before it could reasonably rely on those data to de-list UNEs.
- **The capacity thresholds for identifying non-impairment are less likely to fluctuate than number of business lines in a wire center.** Contrary to Bell claims (BellSouth Padgett Reply Dec. ¶¶ 50-54), the Commission's 2-DS3 and 12-DS3 capacity thresholds are easier to administer than the wire center test, because they do not fluctuate at all and can be identified from existing carrier service records.

