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

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In the Matter of	)	
	)	
BellSouth Corporation's Petition	)	WC Docket No. ____________
For Waiver	)	
	)	

PETITION FOR WAIVER

BELLSOUTH CORPORATION

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BELLSOUTH CORPORATION'S PETITION FOR WAIVER

I. INTRODUCTION AND SUMMARY

The Telecommunications Act of 1996 ("1996 Act") laid out a statutory path for Bell Operating Companies ("BOCs") to obtain authority to provide in-region, interexchange services. Millions of pages of filings and thousands of pages of Commission orders demonstrate the searching review conducted under section 271 of the 1996 Act that preceded each decision to authorize BOC entry into the long distance market based on the Commission's determination that local markets were open and that such entry was in the public interest. With such authorization, section 272 imposed an additional set of safeguards beyond continued compliance with section 271, requiring that the BOCs provide long distance services through a fully separate affiliate for three years. Certain section 272 safeguards continue beyond this three-year period of mandated separation.[1]

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[1] The 1996 Act provides that the provisions of section 272, except for section 272(e), expire three years after a BOC or any BOC affiliate is authorized under section 271 to provide in-region, interLATA services, "unless the Commission extends such 3-year period by rule or order." 47 U.S.C. § 272(f)(1). To date, the Commission has expressly declined to extend this three-year period. *See, e.g.*, *Section 272 Sunsets for Verizon in New York State by Operation of Law on December 23, 2002 Pursuant to Section 272(f)(1)*, WC Docket No. 02-112, *Public Notice*, 17 FCC Rcd 26864 (2002); *Section 272 Sunsets for BellSouth Communications Inc. in the States of Georgia and Louisiana by Operation of Law on May 15, 2005 Pursuant to Section 272(f)(1)*, WC Docket No. 02-112, *Public Notice*, 20 FCC Rcd 8998 (2005).

More than three years ago, this Commission initiated an inquiry regarding the sunset of the statutory requirements under section 272.[2] The Commission subsequently indicated that it intended to consider the appropriate approach if and when BOCs "may provide in-region, interexchange services outside of a separate affiliate" and has sought comment on "the continued need for dominant carrier regulation of BOCs' in-region, interstate and international interexchange telecommunications services after sunset of the Commission's section 272 structural and related requirements in a state."[3]

While issues concerning the interexchange market may be complex and intertwined with the pending mergers, section 272's structural and related requirements will sunset for BellSouth in all nine states in its region on December 19, 2005.[4] Thus, BellSouth will become the first BOC for which section 272 will sunset throughout its region, and it is currently making plans for organizing its local and long distance operations in the most efficient manner that best serves consumers in a post-sunset environment.

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[2] *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 (2002) ("*272 Sunset NPRM*").

[3] *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules,* WC Docket No. 02-112, CC Docket No. 00-175, *Further Notice of Proposed Rulemaking*, 18 FCC Rcd 10914, 10914-15 ¶¶ 1 & 2 (2003) ("*272 Sunset FNPRM*").

[4] *See BellSouth Corporation*, File Nos. EB-02-IH-0683, EB-02-IH-0805; Acct. No. 200332080018; FRN No. 0004942-2447, *Consent Decree*, 18 FCC Rcd 15137, 15143, ¶ 11, *adopted by Order,* 18 FCC Rcd 15135 (2003) (consent decree by which BellSouth agreed to comply with all pertinent aspects of 272 "until such time as each of the nine states in BellSouth's region is released from the requirements" of section 272). The last two of the nine states in BellSouth's region to obtain section 271 authorization were Florida and Tennessee, which obtained such authorization on December 19, 2002.

Unfortunately, those plans are seriously complicated by the current regulatory paradigm confronting BellSouth. If BellSouth were to decide to offer in-region interexchange services on a more integrated basis or choose to offer such services pursuant to an affiliate that does not comply with all the requirements of section 272, it appears based upon the Commission's pronouncements to date that BellSouth could only do so subject to dominant carrier regulation. Alternatively, if BellSouth were to elect nondominant regulation by continuing to offer long distance service through its affiliate – BellSouth Long Distance, Inc. ("BSLD") – it could only do so if it continued to comply with all the provisions of section 272, even after those requirements have sunset. This Hobson's choice presents BellSouth with two sets of burdensome regulatory requirements, neither of which is warranted in today's market and about which the Commission has previously expressed concerns.

Nevertheless, and while no decision has been made about whether to integrate fully BSLD, the costs and inefficiencies associated with section 272 structural separation are so severe that BellSouth intends to operate a more streamlined and cost-effective long distance operation after the requirements of section 272 have sunset.[5] But in order to do so, BellSouth, on behalf of

[5] Consistent with section 272, BSLD maintains a separate workforce, separate operational systems, and separate network equipment from that of BellSouth Telecommunications, Inc. ("BST"). The artificial separation between local and long distance operations mandated by section 272 – to which no carrier other than the BOCs must adhere – results in additional costs and creates many inefficiencies. On a purely day-to-day operational level, for example, the circuits used to provide service to a BellSouth customer of local and long distance service must be inventoried under two separate circuit identifiers – one for BSLD circuits and one for BST circuits. Trouble-shooting and maintenance and repair are complicated by this arrangement, and customers do not receive the most seamless service they expect and require. In addition, the section 272 separate affiliate requirements make it more costly and difficult to develop integrated systems to efficiently order, provision, maintain and repair the underlying network needed to offer IP-based services and needlessly complicates efforts to design and implement services that integrate wireless and wireline services. The Commission has recognized the added costs and inefficiencies created by mandated separate affiliate requirements. *See In re: Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and*

itself and its affiliates, hereby requests that the Commission waive certain aspects of dominant carrier regulation that would otherwise apply to BellSouth's provision of in-region interexchange services after December 19, 2005.[6] In particular, BellSouth seeks limited waiver of those Commission rules that: (1) set forth the tariffing requirements applicable to dominant carriers for non-access interLATA services (47 C.F.R. §§ 61.32, 61.33, 61.38, 61.58 and 61.59) or could be read to impose a tariff filing obligation; and (2) impose price cap regulation on the retail offerings of a BOC as they may relate to BellSouth's long distance offerings (47 C.F.R. § 61.41-61.49). BellSouth also seeks a waiver of the Commission's accounting requirements, to the extent they could be read to require the nonregulated treatment of in-region, interexchange services provided by BellSouth on a more integrated basis after the sunset of section 272.[7]

Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof; Communications Protocols under Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, *Report and Order*, 104 F.C.C.2d 958, 1004, ¶ 81 (1986) (eliminating the structural separation requirements associated with the provision of enhanced services, noting the "costs of foregone opportunities for new services and scope economies" and the "direct costs of duplicating personnel and facilities").

[6] *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, *Memorandum Opinion and Order*, 17 FCC Rcd 26869, 26871, n.8 (2002) (noting that "Verizon will be deemed nondominant in the provision of in-region interLATA, domestic interstate service only insofar as that service is provided through an affiliate that complies with section 272 and our implementing rules"); *272 Sunset FNPRM,* 18 FCC Rcd at 10917, ¶ 5 (noting the Commission's "decision to accord nondominant treatment to the BOC interLATA affiliates' provision of interexchange services was predicated on the presence of a section 272 separate affiliate and full compliance with the structural, transactional, and nondiscrimination requirements of section 272 and the Commission's implementing rules"). This is not to suggest that BellSouth agrees that dominant carrier regulation post-272 sunset is appropriate, which is not the case as evidenced by its written filings in WC Docket No. 02-112.

[7] BellSouth's request to waive the tariffing and price regulation rules extends only to the provision and offering of long distance services and does not include access services. However, the requested waiver of the Commission's accounting rules would apply to all interLATA services provided by BST, both access services provided pursuant to dominant tariffing requirements and non-access services provided pursuant to non-dominant tariffing requirements in the event the Commission were to grant BellSouth's petition.

Generally, the Commission may waive its rules for good cause shown.[8] The Commission may exercise its discretion to waive a rule when the particular facts make strict compliance inconsistent with the public interest. In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.[9] In short, a waiver is justified when special circumstances warrant a deviation from general rules and such deviation will serve the public interest.[10]

In this case, there are special circumstances warranting waiver of the rules in question, and, as demonstrated in greater detail below, such waiver is in the public interest. In the absence of a grant of this waiver, regulatory inertia may result in the application of dominant carrier regulation if BellSouth were to take advantage of the sunset of section 272 by providing long distance service in a more efficient manner. These regulatory requirements were adopted in a different age to govern the conduct of standalone long distance carriers and to address concerns that are no longer valid. Aggravating the threat to the public interest is the additional fact that the Commission has previously recognized that these rules – in particular, the tariffing requirements applicable to dominant carriers – may independently harm the public interest.

Furthermore, other competitors do not labor under the requirement to either separate its local and long distance operations or operate as a dominant long distance carrier. Wireless carriers, cable companies, providers of Voice over the Internet Protocol ("VoIP") services, and Competing Local Exchange Carriers ("CLECs") are all free to choose the corporate structure that

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[8] 47 C.F.R. § 1.3.

[9] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied,* 409 U.S. 1027 (1972); *Northeast Cellular Telephone Co. v. FCC,* 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[10] *Northeast Cellular*, 897 F.2d at 1166; *see also Allband Communications Cooperative, Petition for Waiver of Sections 69.2(hh) and 69.601 of the Commission's Rules*, WC Docket No. 05-174, *Order*, 2005 FCC LEXIS 4527 (Aug. 11, 2005).

enables them to compete most effectively. Handicapping one set of providers simply reduces effective competition and harms consumers. By granting this waiver petition, the Commission can ensure that the public interest is served during the interim period before it concludes the *272 Sunset NPRM* and *272 Sunset FNPRM.*

To be sure, the issues raised in BellSouth's Petition parallel to some extent those pending before the Commission in other proceedings. However, BellSouth's request for a waiver of certain rules is based on circumstances unique to BellSouth. The *272 Sunset FNPRM* addressees the issue of BOC classification by way of an analytical framework that applies to all BOCs, which necessarily would require an examination of the effect of the pending SBC/AT&T and Verizon/MCI mergers on the long distance market. However, BellSouth is in a markedly different position than either SBC or Verizon, and the granting of this waiver petition will not prejudice the Commission's ability to resolve the broader issues in the *272 Sunset NPRM* and *272 Sunset FNPRM* for the industry as a whole.

BellSouth's waiver petition also should be granted because adequate safeguards will remain in place to prevent any possible discriminatory or anticompetitive behavior by BellSouth. These include the nondiscrimination safeguards set forth in section 272(e). Any carrier that believes it has been the subject of unlawful discrimination also would have the protections of sections 201 and 202 (which prohibit discriminatory conduct and unlawful pricing) and would have the ability to request that the Commission investigate compliance with these sections by filing a complaint pursuant to section 208. Furthermore, even with the sunset of the structural separation requirements of section 272(b), Rule 32.27 and Rule 64.902 affiliate transaction requirements would continue to apply. Accordingly, the Commission should grant this waiver petition and do so before December 19, 2005.[11]

II. DISCUSSION

A. Overview Of Current Regulatory Regime

Section 271 requires that before entry into long distance, BOCs must fully open their local markets to competition. Performance measures and remedy plans provide on-going assurance that compliance with section 271 has continued through the present and will continue on into the future.[12] Section 272, which governs BOC provision of long distance service for the first three years after receipt of authorization to provide service under section 271, requires that long distance service be provided by an affiliate separate from the BOC local exchange company. That affiliate must have separate employees and officers, separate books, and conduct all transactions with the local exchange company on an arm's length basis, with all transactions reduced to writing and available for public inspection.[13] Section 272 also imposes general nondiscrimination requirements and requires regular audits to ensure that these requirements have been met.[14] No doubt recognizing the long-term costs of mandated separate affiliate requirements, Congress prescribed a three-year sunset of these requirements.

[11] BellSouth has not included Rules 53.101 through 53.213 in its Petition under the belief that these rules would no longer apply after sunset. These rules implement sections 272(b)(c)(d) and (g) of the 1996 Act, and, as previously discussed, section 272(f) provides for the automatic sunset of these provisions of section 272. Although the implementing rules do not themselves contain a sunset provision, there would be no legal basis for continuing to enforce such rules after the statutory provisions they implement no longer have legal effect.

[12] *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 (2002).

[13] 47 U.S.C. § 272(b).

[14] 47 U.S.C. § 272(c) & (d).

In addition to the section 272 requirements governing the structure of BOC long distance offerings, an additional set of regulations governs the provision of long distance services more generally. The particular regulations depend upon whether a carrier is classified as dominant or nondominant in the provision of long distance services. Carriers classified as dominant must file detailed tariffs setting out the prices and terms of each long distance offering, accompanied by detailed supporting documentation.[15] The very notion of tariffing long distance services is difficult to apply to today's long distance calling services. Flat-rated long distance calling plans and bundled any distance services do not lend themselves to the application of tariff rules and requirements developed in an era of separate, stand-alone long distance service offerings. Furthermore, BSLD currently has more than one hundred calling plans, and BSLD continually evaluates and modifies its long distance offerings as competitive conditions dictate.

For almost a decade, all long distance providers have been classified as nondominant, including the section 272 long distance affiliates through which BOCs offer long distance services.[16] Nondominant carriers are prohibited from filing tariffs except in limited circumstances and are exempt from price cap regulation and detailed accounting requirements. Within this streamlined regime of regulation, long distance competition has continued to increase, and prices have continued to fall.

Although all long distance providers are today classified as nondominant, the Commission has not yet accorded non-dominant status to a BOC for the provision of long distance service outside of a section 272 affiliate. While the Commission's *272 Sunset NPRM*

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[15] *See, e.g.,* 47 C.F.R. § 61.38.

[16] *See generally Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order*, 11 FCC Rcd 3271 (1995); *Motion of AT&T Corp. to be Declared Non-Dominant for International Service, Order*, 11 FCC Rcd 17963 (1996); *see also MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000).

and *272 Sunset FNPRM* remain pending, it appears that the long dormant set of dominant carrier regulations may apply should BellSouth begin to restructure its long distance operations to avoid the costs and inefficiencies of the separate affiliate structure mandated by section 272. Dominant carrier regulation of long distance operations would raise a substantial barrier to such restructuring and would stand in the way of the public interest benefits to be gained from a more efficient delivery of long distance services. Accordingly, as explained in greater detail below, BellSouth seeks a limited waiver from certain dominant carrier regulations so that it can move forward to implement the most efficient and competitive structure for delivering long distance services to its customers.

B. <u>The Commission Should Waive Its Tariffing Rules Applicable To Dominant Carriers For Non-Access InterLATA Services Provided By BellSouth And Its Affiliates.</u>

BellSouth seeks a limited waiver of Commission Rules 61.32, 61.33, 61.38, 61.58 and 61.59, which set forth the tariffing requirements for dominant carriers.[17] This waiver would extend only to the provision and offering of long distance services by either BST or BSLD and would not include access services offered by BST, even though such services may include an interLATA component. At the same time, BST and BSLD would agree to be subject to Rules 61.19-61.25, which set forth the tariffing requirements for nondominant carriers. Compliance with these nondominant carrier rules (and, in the case of BSLD, continued compliance with such rules) should be made a condition of the granting of this waiver.

The Commission's dominant carrier rules include extensive and detailed tariff filing requirements. For example, Rule 61.38 requires a dominant carrier to include as part of any tariff change: (1) a cost of service study for elements for the most recent 12 month period; (2) a

[17] This waiver request also encompasses any ancillary Commission rules to the extent they could be read to impose a tariff filing obligation. *See, e.g.*, 47 C.F.R. §§ 61.13-61.17.

study containing a projection of costs for a representative 12 month period; and (3) estimates of the effect of the changed matter on the traffic and revenues from the service to which the tariff change applies, the carrier's other service classifications, and the carrier's overall traffic and revenue.[18] Similar information must be filed for any new service that a dominant carrier seeks to introduce.[19] Tariff filings by dominant carriers, whether seeking to change an existing rate or introduce a new service, must be accompanied by two sets of working papers containing the cost and revenue information required,[20] and certain proposed rate increases must include "all additional cost, marketing, and other data underlying the working papers to justify a proposed rate increase."[21] Tariff filings by dominant carriers also are subject to specified notice requirements.[22]

The administrative time and effort required to satisfy dominant carrier tariff requirements is not only unnecessary but is counterproductive and not in the public interest. The Commission has recognized as much, noting in the *LEC Classification Order* that "the regulations associated with dominant carrier classification can dampen competition. For example, advance notice periods for tariff filings can stifle price competition and marketing innovation when applied to a competitive industry."[23] As the Commission explained, dominant carrier tariff filing

[18] 47 C.F.R. § 61.38(b)(1).

[19] 47 C.F.R. § 61.38(b)(2).

[20] 47 C.F.R. § 61.38(c).

[21] 47 C.F.R. § 61.38(d).

[22] 47 C.F.R. § 61.58.

[23] *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area; Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149 & 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, 15806, ¶ 88

requirements "would reduce incentives for competitive price discounting, constrain carriers' ability to make rapid, efficient responses to changes in demand and cost, impose costs on carriers that attempt to make new offerings, and prevent customers from seeking out or obtaining service arrangements specifically tailored to their needs."[24] The Commission also concluded that if it "were to require BOC interLATA affiliates to file tariffs for interstate, domestic, interexchange services, the ready availability of that information might facilitate tacit coordination of prices."[25] Finally, according to the Commission, "[t]he required cost support data also can discourage the introduction of innovative new service offerings, because it requires a carrier to reveal its financial information to its competitors."[26]

The Commission also declined to apply dominant carrier regulation because there was simply no need. In the *LEC Classification Order* the Commission concluded that the highly competitive long distance market would function to effectively prevent predatory or other anticompetitive behavior:

(1997) ("*LEC Classification Order*"). The Commission previously had eliminated tariffing requirements for nondominant carriers and ordered them to cancel their tariffs for interstate, domestic, interexchange services. *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, *Second Report and Order*, 11 FCC Rcd 20730 (1996) ("*Tariff Forbearance Order*"). The Commission did so because it concluded "that a regime without non-dominant interexchange carrier tariffs for interstate, domestic, interexchange services will be the most pro-competitive, deregulatory system." *LEC Classification Order*, 12 FCC Rcd at 15806-07, ¶ 88. The Commission also "found that not permitting nondominant interexchange carriers to file tariffs with respect to interstate, domestic, interexchange services will enhance competition among providers of such services, promote competitive market conditions, and achieve other objectives that are in the public interest." *Id.* at 15807.

[24] *Id.* at 15807, ¶ 88.

[25] *Id.* ¶ 89.

[26] *Id.* at 15808, ¶ 90.

> As we discussed in the Notice, the Commission also recently found that the purchasing decisions of most customers of domestic interexchange services are sensitive to changes in price, and customers would be willing to shift their traffic to an interexchange carrier's rival if the carrier raises its prices. The existence of such demand substitutability supports the conclusion that the BOC interLATA affiliates will not have the ability to raise prices by restricting their output. Finally, given the presence of existing interexchange carriers, including such large well established carriers as AT&T, MCI, Sprint, and LDDS, we find that the cost structure, size, and resources of the BOC interLATA affiliates are not likely to enable them to raise prices above the competitive level for their domestic interLATA services.[27]

Furthermore, according to the Commission, it would be unlikely

> that a BOC interLATA affiliate, whose customers are likely to be concentrated in the BOC's local service region, could drive one or more of these national companies from the market. Even if it could do so, it is doubtful that the BOC interLATA affiliate would later be able to raise prices in order to recoup lost revenues.[28]

In the years since the issuance of the *LEC Classification Order*, the long distance market has not changed in any way that would invalidate the Commission's prior conclusions. There are still multiple national networks that provide competitive long distance service. Regardless of who may ultimately own these networks (e.g., AT&T or SBC, Verizon or MCI), these networks *will* be utilized to compete against BellSouth in the provision of long distance services in BellSouth's region. Thus, the competitive market conditions that mitigated in favor of rejecting restrictive tariffing and other requirements eight years ago apply with equal force today.

In fact, since the issuance of the *LEC Classification Order* in 1997, the market has become even more competitive, with long distance services being offered by a host of providers other than traditional wireline carriers. For example, wireless service has continued to proliferate, with the number of wireless subscribers growing from approximately 55 million in

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[27] *Id.* at 15811, ¶ 97.

[28] *Id.* at 15818-19, ¶ 107.

1997 to more than 182 million by year end 2004, with more than 23 million new wireless subscribers being added last year.[29] By contrast there are approximately 183 million wireline access lines, a number declining each year,[30] and it is expected that this year the number of cell phone users will exceed the number of wireline access lines.[31]

In addition, wireless carriers are competing aggressively to displace long distance telephone calls that previously were made on wireline networks. Wireless service packages include unlimited long distance calling, which has contributed to wireline traffic substitution and increasing average minutes of use among wireless carriers. As one analyst explained, "[t]hanks

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[29] *CTIA's Semi-Annual Wireless Industry Survey Results, available at* http://files.ctia.org/pdf/CTIAYearEnd2004Survey.pdf.

[30] *See, e.g.*, Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *Trends in Telephone Service,* at Table 7.1 (June 2005) (end-user switched access lines have declined steadily since their peak in 2000).

[31] Adam Quinton, Managing Director & First Vice President, Co-Head of Global Telecom Services Research, Merrill Lynch, prepared witness testimony before the Subcommittee on Telecommunications and the Internet of the House Energy and Commerce Committee, Washington, DC (Feb. 4, 2004). Growing numbers of wireless subscribers are abandoning their wireline service altogether. During the last few years, the percentage of wireless users that have given up wireline service has grown to 7-8 percent. *Id; see also* Michael Balhoff, Managing Director, Telecommunications Group, Legg Mason, prepared witness testimony before the Subcommittee on Telecommunications and the Internet of the House Energy and Commerce Committee, Washington, DC (Feb. 4, 2004). Approximately 3 million additional wireless subscribers are now giving up their wireline phones each year. B. Bath, Lehman Brothers, *Final UNE-P Rules Positive for RBOCs* at Figure 2 (Dec. 10, 2004). And even larger percentages of young consumers – which will make up the next generation of homeowners – are disconnecting their wireline service altogether, which make it likely that the rate of substitution will increase even further in the future. A. Quinton, *et al.*, Merrill Lynch, *Telecom Services: Unraveling Revenues* at 5 (Nov. 20, 2003) ("[W]e believe that demographic trends favor wireless. . . . So, as the US population ages, more young people are likely to become wireless subscribers – and either displace the purchase of a wireline service with wireless or cut the cord on an existing line."); S. Ellison, IDC, *U.S. Wireline Displacement of Wireline Access Lines Forecast and Analysis, 2003-2007* at 7 (Aug. 2003) ("The first communications services purchased by youth and young adults are now often wireless services. Adoption of wireless by teenagers is increasingly being translated into forgoing traditional primary access lines when such wireless users go to college or otherwise establish their own households.").

to unlimited night and weekend minutes ... cellphone plans are the method of choice when it comes to long-distance calling from home."[32]

With the increase in wireless subscribers and the variety of competitive packages being offered by wireless carriers, greater amounts of traffic are migrating from wireline to wireless networks. According to industry reports, wireless minutes of use exceeded one trillion in 2004,[33] and analysts estimate that in 2004 "wireless could make up approximately 29% of voice minutes in the US."[34] Wireless voice minutes are rising at 36 percent per year,[35] while minutes on landline networks have declined.[36] The increase in wireless long-distance calls is even greater as estimates are that wireless subscribers make 60 percent of their long-distance calls on their wireless phones.[37]

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[32] W. Mossberg, *The Mossberg Solution: Turning Your Home Phone into a Cellphone – Call-Forwarding Devices Let You Use Cellular Service on a Traditional Phone*, Wall St. J. at D6 (Dec. 3, 2003).

[33] *CTIA's Semi-Annual Wireless Industry Survey Results, available at* http://files.ctia.org/pdf/CTIAYearEnd2004Survey.pdf.

[34] D. Janazzo, *et al.*, Merrill Lynch, *The Next Generation VIII: The Final Frontier?* at 5 (Mar. 15, 2004); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, WT Docket No. 02-379, *Eighth Report*, 18 FCC Rcd 14783, 14929, ¶ 102 (2003) ("One analyst estimates that wireless has now displaced about 30 percent of total wireline minutes.").

[35] Adam Quinton, Managing Director & First Vice President, Co-Head of Global Telecom Services Research, Merrill Lynch, prepared witness testimony before the Subcommittee on Telecommunications and the Internet of the House Energy and Commerce Committee, Washington, D.C. (Feb. 4, 2004).

[36] *See, e.g.*, Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *Trends in Telephone Service* at Table 10.1 (Aug. 2003); S. Flannery, *et al.*, Morgan Stanley, *Telecom Services: Trend Tracker: Spring Break! Some Temporary Telecom Relief* at 23 (Mar. 18, 2004).

[37] P. Marshall, *et al.*, The Yankee Group, *Divergent Approach to Fixed/Mobile Convergence* at 7 & Exh. 4 (Nov. 2004).

The long distance carriers themselves have acknowledged that wireless service is displacing long distance traffic and constraining prices. For example, AT&T has said that "[c]onsumer long distance voice usage is declining as a result of substitution to wireless services, internet access and e-mail/instant messaging services, particularly in the 'dial one' long distance, card and operator services segments."[38] MCI has made the same observation: "[W]ireless telephone companies, such as Verizon Wireless, Cingular, Sprint PCS, AT&T Wireless, Nextel and T-Mobile ... have increased their network coverage, improved service quality, started to provide bundled wireless products and lowered prices to end users. As a result, customers are beginning to substitute wireless services for basic wireline service causing these companies to gain market share from providers of wireline voice communications."[39]

In addition to wireless substitution, there also is increased competition in the long distance market from cable operators and VoIP providers. According to analysts, "Cable telephony, circuit and packet, represent about 3.4 million households today or 3%, but we see this rising steadily to about 17.2 million or 15% by 2010."[40] The number of consumers subscribing to VoIP has been forecast to grow from 1.1 million in 2004 to 28.5 million by 2009.[41] The Commission has acknowledged that consumers of VoIP service expect it to function

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[38] AT&T Corp., Form 10-K (SEC filed Mar. 15, 2004). According to recent analyst reports, in the first quarter of 2005, AT&T's long distance revenues in the consumer services segment fell by 20%, year over year. CIBC Equity Research Earnings Update, *AT&T Corp. – Reports Weak Revenue; Continues to Slash Expenses* (April 21, 2005). This revenue decline was driven, in part, by lower standalone long distance voice revenue as a result of "wireless and Internet substitution." *Id.*

[39] MCI, Inc., Form 10-K (SEC filed Apr. 29, 2004).

[40] Banc of America Securities Research Brief, *Setting the Bar: Establishing a Baseline for Bell Consumer Market Share* (June 14, 2005).

[41] Yankee Group, *Consumer Market for US Residential VoIP Services Accelerates* (June 28, 2005).

as a "regular telephone" service,[42] which means that it increasingly competes with traditional telephone services, including long distance.

As competitive alternatives continue to expand, a constant factor has been the willingness of the Commission to allow competition to develop without the hindrance of unnecessary regulation. The commitment to this approach was an obvious underpinning of the Commission's decision in the *LEC Classification Order* not to impose unneeded dominant carrier regulation. The Commission's approach proved to be the correct one, as competition in the long distance market has flourished and has functioned to control the behavior of competitors just as the Commission predicted that it would. The Commission extended this same approach to intermodal competitors as wireless, cable-based and VOIP providers of long distance service have entered the market with minimal regulation. The public interest would be best served by extending this same competitive freedom to BellSouth, since doing so would allow BellSouth to operate more efficiently and offer additional (and more innovative) competitive offerings.

Furthermore, in the case of BSLD, there is an additional specific negative consequence of applying dominant carrier requirements that is contrary to the public interest. BSLD has, of course, been subject to nondominant carrier regulation for a number of years. Accordingly, BSLD has contracts with customers for service offerings that it could not have entered into if it were a dominant carrier. If BSLD were required after sunset to comply with dominant carrier tariffing requirements, each of the current contracts would have to be terminated, and BSLD's customers would have to go through the process of obtaining the same service they now have via tariffs that would be filed by BSLD to satisfy the dominant carrier tariffing requirements. Thus,

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[42] *See generally IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers,* WC Docket Nos. 04-36 & 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005).

the imposition of dominant carrier tariffing requirements would not only have the full range of negative effects identified by the Commission in the *LEC Classification Order*, it also would have a specific, negative impact on customers currently purchasing long distance services from BSLD, which would hardly be in the public interest.

C. <u>The Commission Should Waive Its Price Cap Rules To The Extent They Apply To Non-Access InterLATA Services Provided By BellSouth And Its Affiliates.</u>

BellSouth also seeks a limited waiver of Commission Rules 61.41-61.49, which set forth the price cap regulations applicable to the retail offerings of a BOC. Under a strict reading of these rules, if BellSouth offered long distance services on a more integrated and efficient basis, such offerings would become subject to price cap regulation – a form of regulation that does not apply to BSLD or to any other competitor in the long distance market. Accordingly, these rules should be waived. The requested waiver would extend only to the provision and offering of long distance services and would not include access services offered by BST, even though such services may include an interLATA component.

Implementation of price cap regulation would require systems and process changes for which there would be no corresponding public benefit. At a minimum, for BST, its systems would have to be modified to track all interLATA service elements so that actual price indices could be maintained and, yearly base period demand could be quantified. For BSLD, an entire system would have to be designed and implemented. To require such efforts would defy reason. There is not a single interexchange toll service that is subject to price cap regulation today. In 1999, the last vestige of price cap regulation of toll services was removed by the Commission, and price cap incumbent local exchange carriers were permitted to remove their interstate intraLATA toll and interLATA corridor services from price cap regulation once toll dialing parity was implemented.[43] To impose price cap regulation after the sunset of section 272 would constitute a giant regulatory step backwards.

Equally significant is that applying price cap regulation to interLATA toll services would be contrary to the public interest. Such regulation would interfere with the robust competition that currently characterizes the interLATA toll market. It imposes artificial constraints on pricing that are neither consistent with the competitive model nor the consumer's interest that all market participants engage in free market, unconstrained price rivalry.

D. <u>The Commission Should Waive Its Accounting Requirements To The Extent They Could Be Read To Require That In-Region, Interexchange Services Provided By BellSouth On A Post-272 Sunset Basis Be Treated As Nonregulated.</u>

BellSouth also seeks a waiver of the Commission's accounting requirements, to the extent those requirements could be read to mandate that in-region, interexchange services provided by BellSouth on a more integrated basis be treated as nonregulated. This waiver would apply to all interLATA services provided by BST, both access services provided pursuant to dominant tariffing requirements and non-access services that would be provided pursuant to nondominant tariffing requirements in the event the Commission were to grant BellSouth's petition.

The Commission has not expressly addressed the accounting treatment of integrated interLATA services provided after the sunset of section 272. In the absence of a statement to the contrary, BellSouth believes that such integrated interLATA services would be treated consistent

[43] *Access Charge Reform*; *Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262; 94-1 & 98-157; CCB/CPD File No. 98-63, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221, 14243-44, ¶ 45 (1999).

with the Commission's *Joint Cost Order,* wherein the Commission observed that "[a]ll activities that are classified as common carrier communications for Title II purposes will be classified as regulated activities for purposes of our accounting rules."[44] Since any integrated interLATA services offered by BellSouth would be regulated under Title II regardless of the outcome of this waiver request, these services should be treated as regulated for accounting purposes consistent with the *Joint Cost Order*. If the Commission agrees that all interLATA services offered after the sunset of section 272 should be treated as regulated under its current rules, then no Commission action is necessary.

However, there is some ambiguity concerning the Commission's intent regarding the appropriate accounting treatment of interLATA services provided after the sunset of section 272. In its *Accounting Safeguards Order* the Commission considered the accounting treatment of out-of-region and section 271(g) incidental interLATA services.[45] While acknowledging that some of these services were common carrier services, the Commission decided that integrated incidental interLATA services should be treated as nonregulated solely for federal accounting purposes.[46] Nothing in the language of the *Accounting Safeguards Order* or subsequent orders suggests that the Commission was addressing interLATA services provided on a post-272 sunset basis (incidental or otherwise). However, should the Commission determine that it intended to treat

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[44] *In re: Separation of costs of regulated telephone service from costs of nonregulated activities; Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to provide for nonregulated activities and to provide for transactions between telephone companies and their affiliates*, CC Docket No. 86-111, *Report and Order*, 2 FCC Rcd 1298, 1307, ¶ 70 (1987) ("*Joint Cost Order*").

[45] *In re: Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996,* CC Docket No. 96-150, *Report and Order*, 11 FCC Rcd 17539 (1996) ("*Accounting Safeguards Order*").

[46] *Id.* at 17572, ¶ 75.

integrated interLATA services as nonregulated for accounting purposes, BellSouth respectfully requests a waiver so that integrated interLATA services provided after the sunset of section 272 would be treated as regulated for accounting purposes.[47]

The rationale for such a waiver is threefold. First, the Commission's purpose in treating incidental interLATA services as nonregulated – to satisfy sections 254(k) and 271(h) and to "achieve greater accuracy" in cost allocation – is no longer valid. Section 254(k) requires the Commission to establish "any *necessary* cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." The Commission can satisfy this requirement by classifying integrated interLATA services as regulated for accounting purposes.[48]

With respect to section 271(h), which requires the Commission to ensure that services provided under section 271(g) do not "adversely affect telephone exchange service ratepayers or competition in any telecommunications market," none of the interLATA services provided after

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[47] BellSouth is seeking a waiver of the applicability of the *Accounting Safeguards Order* to the extent this order requires an accounting treatment that deviates from that stipulated by the *Joint Cost Order* and currently codified in the Commission's rules. For example, Rule 32.5280 specifies the recording of revenue "for regulated services classified pursuant to Commission order as non-regulated for Federal accounting purposes." In the alternative, the Commission could achieve a similar result, although less directly, by waiving the applicability of Rules 64.901(a)-(d) and Rules 32.23(a) and (c) to integrated interLATA services.

[48] Part 64 allocation of integrated interLATA services is not *necessary* for universal service purposes because: (i) under price cap regulation, prices are no longer determined based on cost, and thus Part 64 cost allocation has no impact on contributions; (ii) the distributions of universal service funds are based on a hypothetical cost model, and thus Part 64 cost allocation has no impact on distributions; and (iii) prices charged for services included in the definition of universal service are not tied to changes in accounting costs and thus the concept of bearing a share of costs is irrelevant.

sunset would be provided under the authority of section 271(g). Thus, section 271(h) would no longer apply.

With respect to the Commission's desire to "achieve greater accuracy" in allocating costs for incidental interLATA services than that afforded by Part 36 and Part 69 applicable to exchange or exchange access, the Commission noted that "changes in the competitive conditions of local telecommunications markets in the future may cause us to re-examine the continued need for our Part 64 cost allocation rules."[49] Such a reexamination is appropriate here.

Since 1996, the local telecommunications market has become increasingly competitive, and the Commission has responded with fundamental changes in interstate regulation and the role that costs play. These include: (1) price cap regulation combined with pricing flexibility, which has completely eliminated the direct link between an incumbent's recorded costs and the prices they charge for services; (2) elimination of the sharing and lower formula adjustment mechanism which could have created potential incentives for incumbents subject to price cap regulation to shift costs; and (3) adoption of the CALLS plan under which rates are not based on the development and reporting of costs under any of the Commission's accounting and reporting rules. Accordingly, the minimal role that a carrier's costs play in today's regulatory environment means "greater accuracy" of cost allocation is no longer necessary.

Second, BellSouth's request for a waiver of the Commission's accounting requirements is appropriate because there would be no useful purpose for the data produced by treating integrated interLATA services as nonregulated for accounting purposes. Results of treating integrated interLATA services as nonregulated (and, as such, allocating costs pursuant to Part 64) would be reflected in a number of accounts in regulated books, specifically revenue accounts

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[49] *Accounting Safeguards Order*, 11 FCC Rcd at 17661, ¶ 271.

5080 and 5280 or 5100 and almost all expense accounts. However, the data in these accounts are not used in federal or state ratemaking under price cap regulation (although such data is used to populate Table 1 of the ARMIS 43-03 report). Since the results of such cost allocation would have no relevance for ratemaking purposes or for preventing cross subsidies, the Commission should treat integrated interLATA services offered on a post-272 sunset basis as regulated.

Third, a waiver is appropriate because the steps that would be required to allocate integrated interLATA services are difficult, burdensome, and not borne by any other competitor. Most burdensome would be Part 64.901(b)(4), which requires allocation of network equipment based on the relative regulated or non-regulated usage of such network. This rule was written with old, circuit switched, network technologies in mind and did not contemplate the difficulty of allocating investment shared in the delivery of services over a modern broadband network. Accordingly, a waiver is appropriate.

E. The Limited Waiver Sought By BellSouth Is Particularly Appropriate Given The Unique Position Occupied By BellSouth.

Two additional reasons strongly support the grant of this Petition. First, as the Commission recognized in the *LEC Classification Order,* there are substantial public interest concerns with applying current dominant carrier regulation to long distance services delivered by a BOC.[50] As noted previously, section 272 sunsets across BellSouth's region on December 19, 2005, well before the comparable sunsets for the other BOCs. BellSouth intends to reorganize its local and long distance operations to better serve its customers, but, as discussed above, in doing so may become subject to dominant carrier regulation, which would reduce competition and innovation, harm the public interest, and result in a significant competitive disadvantage to BellSouth. Thus, the Commission should grant the requested waiver while it completes its

[50] *LEC Classification Order*, 12 FCC Rcd at 15818-19, ¶ 107.

thorough assessment of the need for imposing any regulatory burdens on BOCs' provision of long distance service.

Second, the Commission has already concluded that a local carrier the size of BellSouth is unlikely to possess the ability to drive long distance competitors out of the market or raise prices, highlighting that the grant of BellSouth's waiver request poses no threat to competition or consumers.[51] In the 1997 *LEC Classification Order*, the Commission observed:

> At least four interexchange carriers – AT&T, MCI, Sprint and LDDS WorldCom – have nationwide, or near-nationwide, network facilities that cover every BOC region. These are large well-established companies with millions of customers throughout the nation. It is unlikely, therefore, that a BOC interLATA affiliate, whose customers are likely to be concentrated in the BOC's local service region, could drive one or more of these national companies from the market. Even if it could do so, it is doubtful that the BOC interLATA affiliate would later be able to raise prices in order to recoup lost revenues. As Professor Spulber has observed, '[e]ven in the unlikely even that [a BOC interLATA affiliate] could drive one of the three large interexchange carriers into bankruptcy, the fiber-optic transmission capacity of that carrier would remain intact, ready for another firm to buy the capacity at distress sale and immediately undercut the [affiliate's] noncompetitive prices.'[52]

BellSouth's wireline local region is the same size today as it was in 1997. Although other companies have substantially increased the geographic scope of their wireline businesses, BellSouth has not. In addition, the major long distance carriers singled out by the Commission – AT&T, MCI, and Sprint – continue to remain unaffiliated competitors in BellSouth's region, regardless of the outcome of the pending mergers. This market structure renders restrictive regulation of BellSouth completely unnecessary, and the Commission's conclusions in 1997 remain equally applicable to BellSouth today.

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[51] As discussed below, there are additional guarantees that the public interest will be protected, including the current rules associated with BST's provision of access services, the continued application of section 272(e), and the Commission's affiliate transaction rules.

[52] *LEC Classification Order* , 12 FCC Rcd at 15818-19, ¶ 107, citing Daniel F. Spulber, *Deregulating Telecommunications*, 12 Yale J on Reg 25, 60 (1995) (other citations omitted).

Indeed, the Commission's conclusions are buttressed by the fact that other local exchange providers now are significantly larger. For example, Verizon and SBC each have pre-merger regulated revenues that are approximately twice that of BellSouth. Based on the most recent ARMIS data, Verizon's pre-merger regulated revenue was $34.5 billion and SBC's was $31.2 billion, as compared to $15.9 billion for BellSouth.[53] In fact, BellSouth's regulated revenue is closer to the ceiling for mid-sized carrier classification than it is to the pre-merger regulated revenue of SBC or Verizon.[54] Also, BellSouth has fewer than 45% of the total access lines of either SBC or Verizon on a pre-merger basis, with Verizon having 45.2 million end user switched access lines, SBC having 44.4 million, and BellSouth having 19.1 million.[55] After the mergers, BellSouth estimates that it will have approximately 11% of total access lines nationally, while SBC will have approximately 30% and Verizon will have approximately 28%.[56]

[53] From FCC Electronic ARMIS Filing System – PreSet Report for Regulated/Nonregulated Revenues and Costs, *at* http://svartifoss2.fcc.gov/eafs; select Regulated/Nonregulated Revenues and Costs; Year: 2004; Report Format: In Current Corporate Structures.

[54] Today carriers are divided into Class A and Class B companies; mid-sized status is a subset of Class A. Within Class A, midsized carriers are those whose total operating revenue, when added to the operating revenue of their local exchange affiliates, is less than $7.403 billion. 47 C.F.R. § 32.9000; *Annual Adjustment of Revenue Thresholds, Public Notice*, DA 05-1263 (Apr. 28, 2005).

[55] Local Telephone Competition and Broadband Deployment, Selected RBOC Local Telephone Data, as of 12/31/04, posted July 2005, *at* http://www.fcc.gov/wcb/iatd/comp.html.

[56] These estimates are based on data from AT&T Annual Report to Shareholders, *at* http://www.att.com/ar/docs/annualreport_2003.pdf; UBS Investment Research, *Wireline Postgame Analysis 12.0: Recap of Second Quarter 2005 Results*, Table 10, at 23 (Aug. 22, 2005) and Selected RBOC Local Telephone Data, *supra*, note 55. BellSouth derived these estimates by using reported end user switched access lines in the case of Verizon, and SBC and total access lines reported by AT&T and by estimating MCI's access lines as a percentage of AT&T's local business and residence access lines as reported by AT&T.

Furthermore, BellSouth has a relatively small share of the national long distance market. For example, according to one analyst, BellSouth's revenues for wireline long distance voice services in the second quarter of 2005 were $580 million. This compares to revenues of $3.32 billion for AT&T, $2.36 billion for MCI, $1.09 billion for Sprint, $1.09 billion for Verizon, and $922 million for SBC.[57] On a revenue basis, BellSouth's share of the purely wireline long distance market is less than 6%.[58] Of course, these calculations are not reflective of the entire long distance market, since they do not include long distance revenues of wireless carriers, cable operators, or VoIP providers; if these figures were included, BellSouth's market share would be even smaller.

In short, BellSouth remains a regional telephone company, which is competing against established long distance competitors, wireless carriers, and new entrants offering new and innovative technologies. Under the circumstances, dominant carrier regulation of BellSouth is wholly unnecessary.

F. Adequate Safeguards Exist To Protect The Public Interest In The Event The Commission Grants BellSouth's Petition.

The Commission has long embraced the principle that the development of competition is in the public interest. The existence of competition ensures price rivalry among competitors, which, in turn, results in lower prices to consumers. Competition also spurs competitors to tailor offerings to the specific needs of customers. In a competitive environment consumer demand

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[57] UBS Investment Research, *Wireline Postgame Analysis 12.0: Recap of Second Quarter 2005 Results,* Table 10, at 23 (Aug. 22, 2005).

[58] *Id.*

drives the development of new and innovative services, and incents competitors to increase investment.[59]

[59] *See, e.g.*, *Rochester Telephone Corporation Petition for Waivers to Implement Its Open Market Plan, Order*, 10 FCC Rcd 6776, 6782, ¶ 13 (1995) ("[W]e are firmly committed to the rapid introduction of competition in local exchange markets. Competition should produce lower prices, improve services, and yield an innovative and broadly accessible communications network."); *BT North America, Inc. Application for Authority Under Section 214 of the Communications Act to Provide International Resale Services as a Nondominant Common Carrier*, File No. I-T-C-93-126, *Memorandum Opinion, Order and Authorization*, 10 FCC Rcd 3204, 3206, ¶ 11 (1995) ("We conclude that the public interest will be served by the grant of this application in that it introduces additional competition in the resale of international communications services. Competition fosters lower prices, innovative services and increased responsiveness to consumer needs, all of which in turn should help to stimulate U.S. economic growth."); *Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands*, CC Docket No. 83-1376; RM 4436, *Memorandum Opinion and Order*, 9 FCC Rcd 3023, 3024, ¶ 11 (1994) ("Competitive markets encourage carriers to adopt new technologies, develop new and innovative services, reduce costs by eliminating waste, provide service more efficiently, and improve customer service."); *Western Union Telegraph Company; Application for a Waiver of the International Settlements Policy for Accounting Rates and the Division of Tolls for Telegram Service with South Korea*, File No. USP-86-009-(W), *Memorandum Opinion and Order*, 2 FCC Rcd 118, 119, ¶ 8 (1986) ("The Commission's primary goal with regard to the international settlements policy is the achievement of true competition resulting in lower prices and better services for U.S. users."); *Applications of Nextel Communications, Inc. for Transfer of Control of OneComm Corporation, N.A. and C-Call Corp., Order*, 10 FCC Rcd 3361, 3364, ¶ 25 (1995) ("Increased competition throughout the broader CMRS market serves the public interest because it promotes technological innovation and acts as a check on price increases."); *MCI Telecommunications Corporation, et al.; Applications for Authority Pursuant to Section 214 of the Communications Act to Establish, Acquire, and Operate Facilities for the Provision of International Switched Voice Service (IMTS) Between Points in the Contiguous United States and Points in Canada*, File No. I-P-C-83-052, *Order Authorization and Certificate*, 1985 FCC LEXIS 3499, at *6, ¶ 8 (1985) ("The Commission has consistently found that the growing volume of international traffic supports increased competition and has established a policy favoring the entry of new carriers under these circumstances. We conclude here that competition for switched voice service in the United States and Canada is . . . in the public interest."); *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141; Transport Phase II, *Third Report and Order*, 9 FCC Rcd 2718, 2724, ¶ 25 (1994) ("[B]roader access competition should exert downward pressure on tandem-switched rates, while fostering more efficient provisioning of these services by new competitors and LECs. Competition also should encourage innovation and investment in new technologies and could offer increased network reliability through route diversity and redundancy.").

The Commission also has recognized that regulation is a surrogate for competition, and that regulation should remain in place no longer than needed. Congress obviously recognized this principle as well and made it part of the structure of section 272. The safeguards of section 272 are not envisioned to apply perpetually, but rather are intended to sunset automatically three years after the BOC is authorized to provide interLATA services pursuant to 271(d).[60] Implicit in this structure is Congress's recognition that three years was a sufficient period of time to impose this extraordinary safeguard.

Congress's predictive judgment was correct, as the long distance market is fully competitive, as discussed more fully above. With wireless, cable operators, and VoIP providers competing against traditional wireline long distance services, long distance prices continue to fall – a hallmark of a competitive marketplace. In short, today's long distance market does not even mildly resemble the market that existed when the Commission first adopted its dominant carrier regulations.

Granting BellSouth's request for a limited waiver will not have any adverse impact on the competitiveness of the long distance market or in the ability of interexchange carriers to compete successfully with BellSouth. Significantly, the limited waiver sought by BellSouth would not affect BST's obligations with respect to offering exchange access services, even if such exchange access services were to include an interLATA interoffice element after the sunset of section 272. Such offerings would continue to be subject to the Commission's Part 61 and Part 69 rules and would continue to be subject to dominant carrier regulation. Accordingly, all exchange access services will be available pursuant to tariff to all interexchange carriers at the prices set forth in those tariffs.

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[60] 47 U.S.C. § 272 (f)(1). Under this section, the Commission may extend this period by rule or order, but it has not elected to do so.

Furthermore, the existing Commission rules governing transactions between the incumbent local exchange carrier and its affiliates would remain in effect. Section 32.27 of the Commission's rules sets forth detailed rules that govern the transactions between affiliates. Accordingly, to the extent that BST provides services to or for BSLD, those transactions would have to be accounted for consistent with the Commission's affiliate transaction rules.

Likewise, effective protections against discrimination remain in place by virtue of section 272(e), which will continue in effect after sunset (absent forbearance by the Commission). There are four specific protections set forth in section 272(e). Section 272(e)(1) requires BST to fill a request for exchange access from an unaffiliated entity "within a period no longer than the period in which it provides such telephone exchange or exchange access to itself or to its affiliates."[61] Thus, BST may not provision exchange access service to itself or its affiliates faster than it provides the same service to a competitor.

Section 272(e)(2) prohibits BST from providing to its section 272 affiliate any facilities, services, or information concerning exchange access unless the same facilities, services, or information is made available on the same terms and conditions to other providers of interLATA services.[62] This provision of the statute ensures that BSLD can obtain no advantage over its interLATA competitors by virtue of its affiliation with BST. If BST provides to BSLD information regarding new developments or changes in exchange access, BST must make the same information available to all other interLATA competitors. Likewise, any exchange access services that BST provides to BSLD must be made available to all other interLATA competitors

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[61] 47 U.S.C. § 272(e)(1).

[62] 47 U.S.C. § 272(e)(2).

on the same terms and conditions. In short, BST's general obligation to provide exchange access in a nondiscriminatory manner is preserved under section 272(e)(2).

Section 272(e)(3), in conjunction with 272(e)(1), ensures a level playing field between interLATA competitors and BST if BST provides retail interLATA long distance services. Not only must BST provide exchange access to its interLATA competitors within the same time period it provides service to itself,[63] but, in addition, BST must impute to itself the same charge that it assesses to its interLATA competitors for exchange access.[64]

As a final nondiscriminatory safeguard, section 272(e)(4) conditions the provision of interLATA or intraLATA facilities or services by BST to its interLATA affiliate upon the proviso that the same services and facilities are made available to all carriers at the same rates and on the same terms and conditions and so long as the costs are appropriately allocated.[65] Thus, under section 272(e)(4), even if facilities or services are not telephone exchange or exchange access services, the statute ensures such facilities and services can only be provided to an interLATA affiliate on a nondiscriminatory basis.

It is readily evident that the limited waivers that BellSouth requests will not adversely impact the competitiveness of the interLATA market. The Commission's rules and the 1996 Act ensure that BellSouth will deal with its interLATA competitors on a nondiscriminatory basis.

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[63] 47 U.S.C. § 272(e)(1).

[64] 47 U.S.C. § 272(e)(3). Likewise, section 272(e)(3) requires that BellSouth Telecommunications assess its section 272 affiliate the same charge for exchange access that it assesses unaffiliated interLATA competitors.

[65] 47 U.S.C. § 272(e)(4).

III. CONCLUSION

The Commission should grant BellSouth's waiver request and should do so before December 19, 2005, when section 272 sunsets for BellSouth. The Commission has long recognized that competition serves the public interest, and that excessive regulation can hinder competition. Consistent with this approach, the Commission should allow BellSouth (both BST and BSLD) to offer long distance services without being subject to the rules for which waiver is being sought. Waiving these rules is in the public interest and would allow BellSouth to operate more efficiently so that it can provide to consumers the benefits of increased competition. Also, the continuing application of other statutory provisions and Commission rules described above will be more than adequate to protect consumers. For these reasons, the Commission should grant the requested waiver.

Respectfully submitted,

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