

AFFIDAVIT

STATE OF GEORGIA

COUNTY OF FULTON

BEFORE ME, the undersigned authority, duly commissioned and qualified in and for the State and County aforesaid, personally came and appeared Kathy K. Blake, who, being by me first duly sworn deposed and said that:

She is appearing as a witness before the Kentucky Public Service Commission in Case No. 2003-00379, Review of Federal Communications Commission's Triennial Review Order Regarding Unbundling Requirements for Individual Network Elements, and if present before the Commission and duly sworn, her rebuttal testimony would be set forth in the annexed testimony consisting of 28 pages and 0 exhibits.

Kathy K. Blake

Kathy K. Blake

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 29th DAY OF MARCH, 2004

Evelyn Parks Peters Notary Public

Evelyn Parks Peters
Notary Public, Newton County, Georgia
My Commission Expires May 12, 2007

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BELLSOUTH TELECOMMUNICATIONS, INC.
REBUTTAL TESTIMONY OF KATHY K. BLAKE
BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION
DOCKET NO. 2003-00379
MARCH 31, 2004

Q. PLEASE STATE YOUR NAME, YOUR POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. (“BELLSOUTH”) AND YOUR BUSINESS ADDRESS.

A. My name is Kathy K. Blake. I am employed by BellSouth as Director – Policy Implementation for the nine-state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375.

Q. HAVE YOU PREVIOUSLY FILED TESTIMONY IN THIS PROCEEDING?

A. Yes, I filed direct testimony and four exhibits on February 11, 2004.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. My rebuttal testimony addresses numerous comments contained in the direct testimony filed by other witnesses in this proceeding on February 11, 2004. Specifically, I address portions of the testimony of Mr. Joseph Gillan representing CompSouth, Dr. Mark T. Bryant, Mr. James Webber, and Ms. Sherry Lichtenberg representing MCIMetro Access Transmission Services, LLC and MCI WorldCom

1 Communications, Inc. (“MCI”) and Mr. Steven E. Turner and Mr. Mark D. Van
2 de Water representing AT&T Communications of the South Central States, LLC
3 (“AT&T”).

4
5 Q. ALL PARTIES HAVE DIRECTED THIS COMMISSION TO VARIOUS
6 PORTIONS OF THE TRIENNIAL REVIEW ORDER (“TRO”) AND THE
7 RULES IN SUPPORT OF THEIR POSITIONS IN THEIR DIRECT
8 TESTIMONY. WHAT IS THE IMPACT OF THE D.C. CIRCUIT COURT OF
9 APPEALS ORDER ON THE TRO IN THIS PROCEEDING?

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11 A. Currently the impact of the D.C. Circuit Court's opinion is unclear. At the time of
12 filing this testimony, the D.C. Court had vacated large portions of the rules
13 promulgated as a result of the *TRO*, but stayed the effective date of the opinion
14 for at least sixty days. Therefore my understanding is that the *TRO* remains intact
15 for now, but its content, and the rules adopted thereto, must be suspect in light of
16 the court's harsh condemnation of large portions of the order. Accordingly, I will
17 reserve judgment, and the right to supplement my testimony as circumstances
18 dictate, with regard to the ultimate impact of the D.C. Court’s order on this case.

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20 **THE ROLE OF THE KENTUCKY PUBLIC SERVICE COMMISSION**

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22 Q. AT PAGES 13-14, IN DISCUSSING THE TASKS ASSIGNED TO STATE
23 COMMISSIONS BY THE FCC, MR. GILLAN SUGGESTS THAT THIS
24 COMMISSION’S ROLE IS TO SIMPLY “CONFIRM THERE ARE NO

1 EXCEPTIONS TO” THE FCC’S NATIONAL FINDING OF IMPAIRMENT
2 WITH RESPECT TO MASS MARKET SWITCHING. PLEASE COMMENT.

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4 A. Mr. Gillan’s suggestion is misguided. While the FCC did make a national finding
5 that competitive local providers (“CLECs”) are impaired without access to mass
6 market switching on an unbundled basis, the FCC did not simply ask the states to
7 confirm that there are no exceptions. To the contrary, in footnote 1404 of the
8 Triennial Review Order (“TRO”),¹ the FCC specifically stated that their intent
9 was to “make a national finding based on a more granular inquiry”. In the TRO,
10 the FCC determined that this granular inquiry would be most appropriately
11 conducted by the state commissions. Further, in paragraph 461 of the TRO, the
12 FCC stated,

13 We also recognize that a more granular analysis may reveal that a
14 particular market is not subject to impairment in the absence of
15 unbundled local circuit switching. We therefore set forth two
16 triggers that state commissions *must* apply in determining whether
17 requesting carriers are impaired in a given market. Our triggers
18 are based on our conclusion that actual deployment is the best
19 indicator of whether there is impairment, and accordingly
20 evidence of actual deployment is given substantial weight in our
21 impairment analysis. (Emphasis added.)

¹ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, et al., *Report and Order and Order on Remand an Further Notice of Proposed Rulemaking*, FCC 03-36, released August 21, 2003.

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The FCC's intent that the states conduct a granular analysis of markets within the state is a far cry from Mr. Gillan's interpretation, which is much akin to simply "seconding a motion from the chair".

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Q. AT PAGES 70-71, MR. GILLAN RECOMMENDS THE COMMISSION OPEN YET ANOTHER PROCEEDING TO ESTABLISH A MARKET RATE FOR NETWORK ELEMENTS NO LONGER SUBJECT TO SECTION 251 PRICING STANDARDS. IS THIS APPROPRIATE?

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A. No. Mr. Gillan's recommendation misses the mark. When an ILEC has been relieved of its obligation to offer a network element under Section 251 of the Act, such as local circuit switching, it means that CLECs are no longer impaired without access to that network element. Under a finding of no impairment, there are sufficient alternatives in the market such that CLECs do not need to rely on ILEC services at regulated prices. Because CLECs have alternatives, competition will drive the market price of the network element. As such, it is appropriate for BellSouth to set its rate according to those market conditions through negotiations with the CLEC. It is neither necessary nor appropriate for this market rate to be set by this Commission, and it has no authority to do so. Mr. Gillan's suggestion should therefore be rejected.

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Q. MR. GILLAN RECOMMENDS A TWO-YEAR QUIET PERIOD

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FOLLOWING THIS PROCEEDING, IN WHICH THE ILECS MAY NOT

1 SEEK FURTHER UNBUNDLING RELIEF (PAGE 72). IS THIS
2 APPROPRIATE?

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4 A. Absolutely not. Under the guise of “provide needed certainty to the industry”,
5 Mr. Gillan is merely attempting another strategy designed to extend the
6 unbundled network element platform (“UNE-P”) as long as possible. Although it
7 may be appropriate to set some basic guidelines for subsequent proceedings, it
8 should be for the purpose of acknowledging and furthering competition rather
9 than in protecting UNE-P. Two years in this business is a very long time and
10 much can happen. Delaying an ILEC’s ability to obtain further relief from its
11 unbundling obligations due to an arbitrary “quiet period” is unfair to the ILEC
12 and does not recognize the dynamics of the marketplace.

13

14 Further, with respect to those markets where CLECs continue to be impaired
15 without access to unbundled switching, Dr. Bryant states, “If CLECs are not
16 impaired without access to UNE switching, I would expect more CLECs to self-
17 provision switching in the relatively near future.” (Bryant, p. 21) Dr. Bryant’s
18 statement will not always be right for the simple reason that TELRIC priced
19 switching by the incumbent will often keep CLECs from deploying their own
20 switches, even where the CLEC would not be impaired without unbundled
21 switching. However, in some cases CLECs will deploy their own switches in the
22 future. When that activity occurs or other evidence of no impairment surfaces,
23 BellSouth should have the option to immediately petition for relief in that market.

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COMPETITION AND UNE-P

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Q. MR. GILLAN DISCUSSES WHAT HE CALLS THE “COMPETITIVE PROFILE” IN KENTUCKY (PAGES 28-33) CONCLUDING THAT UNE-P PRODUCES STATEWIDE COMPETITION. FROM HIS ASSESSMENT, MR. GILLAN STATES THAT THE COMMISSION “SHOULD NOT RESTRICT THE AVAILABILITY OF UNBUNDLED LOCAL SWITCHING AND UNE-P UNLESS IT CAN CONCLUDE THAT AN ALTERNATIVE WILL PRODUCE A SIMILAR COMPETITIVE PROFILE.” DO YOU AGREE?

A. No, I do not. First, Mr. Gillan appears to suggest that the entire state of Kentucky should be the market area, because he says the UNE-P produces statewide competition and any alternative should do the same. As the FCC was specific in pointing out, “State commissions have discretion to determine the contours of each market, but they may not define the market as encompassing the entire state.” (*TRO* ¶ 495).

Second, there is no reference in the *TRO* that places a requirement upon this Commission to ensure that a statewide alternative to UNE-P is in place before the Commission can find no impairment in a particular market. Indeed, such a requirement would make no sense given the fact UNE-P itself will remain in place in those markets where relief is not granted.

However, there most definitely is a requirement that this Commission determine that CLECs are not impaired in a market when either the self-provisioning or

1 wholesale triggers are met or the market is found to be conducive to competitive
2 entry. This analysis is done on a market-by-market basis, as BellSouth has done
3 in establishing the 20 distinct geographic markets in its territory in Kentucky.

4
5 Finally, it is not surprising at all that UNE-P produces some level of competition
6 in most wire centers in the state of Kentucky. After all, UNE-P is nothing more
7 than the incumbent LEC's local service offering at below-cost prices. BellSouth
8 will only receive switching relief where competitive alternatives exist or could
9 exist. Thus, competition will continue after BellSouth gets switching relief. The
10 difference will be that the competition that flourishes after relief is granted will be
11 healthy facility-based competition rather than pseudo resale competition.

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13 Q. TWO PARTIES ALLEGE THAT COMPETITION IN KENTUCKY DEPENDS
14 ON THE AVAILABILITY OF THE UNBUNDLED NETWORK ELEMENT
15 PLATFORM OR UNE-P. DO YOU AGREE?

16
17 A. No. There seems to be a theme that runs through the testimony of witnesses
18 Gillan (pp. 60-62) and Bryant (pp. 13-15), which is based on the mistaken notion
19 that CLECs cannot compete in Kentucky without UNE-P.

20
21 These witnesses are incorrect. First, the *TRO* requires that either a provisioning
22 trigger be met or potential competition be shown before a state commission can
23 find that no impairment exists for local switching. Second, the Act envisioned
24 provisioning of local exchange competition by three means; resale of the
25 incumbent's retail services, purchase of unbundled network elements ("UNEs"),

1 and interconnection via a CLEC's own facilities. All three options, or
2 combination of options, are available to CLECs. CLECs are certainly not limited
3 to UNE-P as an entry method.

4
5 In the markets where the state commission finds CLECs are not impaired without
6 unbundled switching, the CLEC has the means to supply its own switching or can
7 use BellSouth's local circuit switching at market prices. BellSouth must continue
8 to provide local switching to CLECs under Section 271(c)(2)(B) of the Act.
9 Therefore, and as I discussed above, BellSouth will offer local switching at a
10 competitive market rate in those markets where the Commission determines that
11 CLECs are not impaired. In addition, there will be a transitional period sufficient
12 to allow CLECs to implement their chosen options (e.g., *TRO* ¶ 532 describes
13 how, even after a finding of no-impairment in a particular market, UNE-P will not
14 be phased out for a subsequent 27 months). Therefore, contrary to Dr. Bryant's
15 statement, all consumers currently served by UNE-P CLECs will not be forced to
16 make a change in their telephone service. Indeed, any switching relief provided
17 to BellSouth should be transparent to the end user consumer.

18
19 Finally, although at this time BellSouth has not attempted to demonstrate the
20 presence of wholesale switch providers in this case, it is reasonable to expect that
21 in markets where no impairment is found, wholesale switching will become more
22 prevalent as an option for CLECs. Once the subsidized switching that BellSouth
23 is currently required to offer is eliminated and BellSouth provides switching at
24 market-based rates, switch providers will likely find that wholesale switching
25 offers a viable and long-term market where they can compete effectively.

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In summary, the parties that attempt to minimize CLEC opportunity in the absence of unbundled local switching are doing so only to preserve the below-cost prices they currently pay for the UNE-P. They give little credence to the options available to them including the multiple sources of switching, and BellSouth's local switching at market rates.

Q. ON PAGES 62-64 MR. GILLAN SUGGESTS THAT UNE-P ENCOURAGES INVESTMENT. DO YOU AGREE?

A. Absolutely not. The use of UNE-P, if anything, discourages investment in facilities for both CLECs and ILECs. UNE-P is basically the resale of an ILEC's services. While Mr. Gillan claims that CLECs invest in "billing systems, computer systems, offices and, perhaps most importantly, human capital", such investment is minimal compared to the investment associated with true facilities-based competition. Furthermore, the investment claimed by Mr. Gillan can be easily terminated if business plans change. The FCC has recognized that a CLEC who invests in facilities, i.e. collocation space, transport facilities, etc., has made a commitment to provide service in a particular market by investing in network infrastructure. In its *Pricing Flexibility Order*,² in discussing the necessary competitive showing test for common line and traffic-sensitive services, the FCC

² *In the Matter of Access Charge Reform* (CC Docket No. 96-262), *Price Cap Performance Review for Local Exchange Carriers* (CC Docket No. 94-1), *Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers* (CCB/CPD File No. 98-63), and *Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA* (CC Docket No. 98-157), Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206, Rel. August 27, 1999.

1 states,
2 resold services employ only incumbent LEC facilities and thus
3 do not indicate irreversible investment by competitors
4 whatsoever. Similarly, a competitor providing service solely
5 over unbundled network elements leased from the incumbent
6 (the so-called “UNE-platform”) has little, if any, sunk
7 investment in facilities used to compete with the incumbent
8 LEC. (*Pricing Flexibility Order* ¶ 111)

9
10 Thus, the lack of sunk investment affords a CLEC greater opportunity to exit a
11 market rather than a commitment to provide service to its customers.

12
13 Mr. Gillan also suggests that UNE-P provides the capability for data LECs to
14 continue to have access to end users. His argument for encouraging investment
15 with this example is not clear. He states that with the elimination of the line
16 sharing requirement, a data LEC will be required to either purchase the entire
17 loop to provide service to its customer or to enter into a line splitting arrangement
18 with a “voice partner”. (Gillan, p. 63) Neither of these situations encourages
19 investment. In both situations, the data LEC is still purchasing a stand-alone
20 UNE loop that uses BellSouth’s existing network facilities. In markets where
21 there is no switching impairment, the only change is that switching is no longer
22 available at TELRIC-based rates and the data LEC or its “voice partner”
23 purchases an unbundled network element-loop (“UNE-L”). There is no new
24 investment by a data LEC.

25

1 Q. IS MR. GILLAN CONSISTENT WITH HIS ARGUMENTS ABOUT UNE-P
2 ENCOURAGING INVESTMENT?

3

4 A. No. Mr. Gillan's testimony appears to be inconsistent with his claim that UNE-P
5 encourages investment. On page 64, Mr. Gillan states "The POTS market is
6 shrinking as customers choose (for themselves, and not under regulatory
7 direction) to move to more advanced services. There is no valid policy reason to
8 encourage additional investment in the generic local exchange facilities that
9 underlie UNE-P." By Mr. Gillan's own admission, UNE-P has not encouraged
10 investment, at least in the POTS market.

11

12 Furthermore, contrary to Mr. Gillan's position, UNE-P does nothing to advance
13 the development of new technologies. It is not UNE-P providers who introduce
14 new technologies, but rather that carriers with control over their own switch that
15 decide what software and hardware to install in order to customize their various
16 offerings. This is demonstrated by the testimony of Jake E. Jennings of
17 NewSouth, filed in the loop transport proceedings currently taking place in
18 BellSouth's region:

19 NewSouth [a facilities-based carrier with voice and data
20 switches in several southern states] is able to attract customers
21 because, through the facilities it has deployed, it can offer
22 customers a value proposition that exceeds what they currently
23 receive from the incumbent. This value proposition involves

1 not only better prices, but also more and varied services,
2 including advanced services.³

3

4 In such cases, CLECs may find new technologies that offer services ILECs are
5 not offering. Such enhancements to their switches will drive competition and
6 innovation among competitors and will lead to a market driven by new offerings
7 based on new technologies. That is not the case with UNE-P.

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9 **GEOGRAPHICAL MARKET DEFINITION**

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11 Q. PLEASE DISCUSS MCI'S DEFINITION REGARDING THE APPROPRIATE
12 GEOGRAPHIC MARKETS FOR MASS MARKET SWITCHING.

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14 A. The problems with the market definition proposed by MCI are discussed further
15 in the rebuttal testimony of Dr. Pleatsikas. Let me note, however, that what at first
16 blush appears to be a definition of geographic markets is, in reality, a design by
17 MCI to secure the continuation of UNE-P indefinitely. MCI recommends that
18 markets be defined as wire centers. (Bryant, pp. 44-49) Under this approach,
19 MCI simply hopes to limit the loss of UNE-P to the greatest extent possible. MCI
20 expects that BellSouth may be relieved of its UNE switching obligation in some
21 wire centers, but hopes to confine the "damage to UNE-P" to relatively small

³ Florida Docket No. 030852, TRO Loop/Transport, Revised Direct Testimony of Jake E. Jennings, p. 9, lines 14-18; Georgia Docket No. 17741-U, filed January 30, 2004, p. 10, lines 15-19, North Carolina Docket No. P-100, Sub 133s, filed February 11, 2004, p. 10, lines 18-22; Tennessee Docket No. 03-00527, filed March 1, 2004, p. 10, lines 17-21; Kentucky Case No. 2003-00379, filed March 10, 2004; and South Carolina Docket No. 2003-327-C, filed March 12, 2004, p. 10, lines 18-22.

1 pockets. MCI's approach to defining the geographic market is consistent with its
2 strategy to limit the amount of switching relief granted to BellSouth so MCI can
3 continue using UNE-P to the maximum extent possible. However, MCI's
4 approach is not consistent with the *TRO*.

5

6 Q. PLEASE FURTHER ADDRESS MCI'S CHOICE OF THE WIRE CENTER AS
7 THE CORRECT DEFINITION OF GEOGRAPHIC MARKET IN THIS
8 PROCEEDING.

9

10 A. MCI's position is inconsistent with testimony filed by its own witnesses in
11 previous proceedings. Here, Dr. Bryant touts the wire center as the appropriate
12 market definition, stating on pp. 29-30, "ILEC wire center boundaries are the
13 most natural geographic boundaries for purposes of defining markets for several
14 reasons." In contrast, in testimony filed in previous arbitration cases, MCI
15 discounts the geographic area of an ILEC's wire center when compared to the
16 more updated CLEC networks. Specifically, in Georgia Docket No. 11901-U,
17 Mr. Ron Martinez compared BellSouth's network to MCI's network:

18 ILEC networks, developed over many decades, employ an
19 architecture characterized by a large number of switches within a
20 hierarchical system, with relatively short copper based subscriber
21 loops. By contrast, WorldCom's local network employs state-of-
22 the-art equipment and design principles based on the technology
23 available today, particularly optical fiber rings utilizing SONET
24 transmission. In general, using this transmission based
25 architecture, it is possible for WorldCom to access a much larger

1 geographic area from a single switch than does the ILEC switch
2 in the traditional copper based architecture. This is why, in any
3 given service territory, WorldCom has deployed fewer switches
4 than the ILEC. Any CLEC will begin serving a metropolitan area
5 with a single switch and grow to multiple switches as its customer
6 base grows.

7
8 In general, at least for now, WorldCom's switches serve rate
9 centers at least equal in size to the serving area of the ILEC
10 tandem. WorldCom is able to serve such large geographic areas
11 via fiber network and bears the cost of transport of that owned
12 network. (Emphasis added.) (Direct Testimony, pp. 35-36)

13
14 MCI's own testimony establishes that a geographic market as defined by the
15 boundaries of a decades old ILEC wire center is meaningless because MCI
16 reaches well beyond the wire center to serve its market. By its own admission
17 MCI does not use the wire center to identify the customers it targets. Rather, it
18 uses a number of other factors and appears to be limited in its market reach only
19 as a function of its fiber network.

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21 Q. WHAT GUIDANCE DID THE FCC PROVIDE IN DETERMINING
22 GEOGRAPHIC MARKETS?

23
24 A. Paragraph 495 of the *TRO* gives guidance to state commissions in designing
25 geographic markets. State commissions must consider locations of customers

1 actually being served, variation in factors affecting the competitors' ability to
2 serve groups of customers, and the ability to target and serve specific markets
3 economically and efficiently using currently available technology. However, the
4 FCC was also specific in pointing out:

5 While a more granular analysis is generally preferable, states
6 should not define the market so narrowly that a competitor
7 serving that market alone would not be able to take advantage of
8 available scale and scope economies from serving a wider market.
9 State commissions should consider how competitors' ability to
10 use self-provisioned switches or switches provided by a third-
11 party wholesaler to serve various groups of customers varies
12 geographically and should attempt to distinguish among markets
13 where different findings of impairment are likely. The state
14 commission must use the same market definitions for all of its
15 analysis. (Footnotes omitted)

16
17 The fact that the FCC was concerned that the geographic area not be defined as
18 the entire state indicates its belief that market areas would be something
19 substantially larger than the ILECs' wire centers. BellSouth's proposal to use the
20 individual UNE rate zones adopted by this Commission, subdivided into smaller
21 areas using the Component Economic Areas ("CEAs") as developed by the
22 Bureau of Economic Analysis of the United States Department of Commerce
23 represents a more appropriate definition of geographic markets. UNE rate zones
24 are an appropriate starting point for the market definition because, by design, they
25 reflect the locations of customers currently being served by CLECs. CEAs are

1 defined by natural geographic aggregations of economic activity and cover the
2 entire state of Kentucky. BellSouth recommends the Commission adopt its
3 definition of geographic markets and reject MCI's proposed definition of
4 geographic markets.

5

6

SWITCHING TRIGGERS

7

8 Q. IN DISCUSSING WHAT CRITERIA HE RECOMMENDS THE
9 COMMISSION APPLY WHEN IDENTIFYING SELF-PROVISIONING
10 TRIGGER CANDIDATES, MR. GILLAN STATES THAT THE COMMISSION
11 SHOULD EXCLUDE CANDIDATES THAT DO NOT RELY ON ILEC
12 ANALOG LOOPS (PAGES 36 & 47-49). PLEASE ADDRESS THIS
13 COMMENT.

14

15 A. Mr. Gillan states that "Self-Providers Must Be Relying on ILEC Loops or
16 Offering Service of Comparable Cost, Quality and Maturity" (page 47) in order
17 for them to be included as candidates that meet the self-provisioning trigger. This
18 is clearly inconsistent with the *TRO* – as footnote 1560 explains:

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We recognize that when one or more of the three competitive providers is also self-deploying its own local loops, this evidence may bear less heavily on the ability to use a self-deployed switch as a means of accessing the incumbent's loops. Nevertheless, the presence of three competitors in a market using self-provisioned switching and loops, shows the feasibility of an entrant serving the mass market with its own facilities.

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Although Mr. Gillan would have this Commission exclude carriers that do not rely upon BellSouth’s local loop facilities to provide service to their customers, the *TRO* clearly states otherwise. Accordingly, the Commission can, and should consider a carrier that provides its own switching as a trigger candidate, even if the carrier self-provisions its own loops as well.

Q. MR. GILLAN RECOMMENDS THAT A “*DE MINIMUS*” [SIC] CRITERION BE ADDED BY THE STATE COMMISSIONS TO THE TRIGGERS TEST (PAGES 52-54). IS THIS RECOMMENDATION CONSISTENT WITH THE REQUIREMENTS OF THE *TRO*?

A. No. The *TRO* does not establish any size requirements or specific quantitative standard regarding the number of customers in a market that must be served before a self-provisioning carrier can be “counted” for purposes of the triggers test. Any imposition of a *de minimis* requirement regarding the number of customers served would be completely outside the explicit dictates of the *TRO*.

Q. WHY DO THE PARAGRAPHS CITED BY MR. GILLAN NOT SUPPORT A REQUIREMENT THAT A TRIGGER CANDIDATE PASS A *DE MINIMIS* TEST?

A. The only support that Mr. Gillan provides for his assertion that there should be a quantitative analysis is language in a section of the *TRO* (§ 438) that appears well before the section that establishes the triggers test (§§ 498 – 505). Paragraph 438

1 of the *TRO* addresses the finding of *national* impairment and merely indicates
2 that the FCC found *in aggregate* that the evidence in the record regarding the
3 *overall* level of switch deployment was insufficient to warrant a finding in the
4 *TRO* that CLECs are not impaired on a national basis. By contrast, the triggers
5 tests, which are described some forty pages later in the *TRO*, posit a set of bright-
6 line rules that, if met, overcome this presumption of national impairment. The
7 discussion in paragraph 438 of the *TRO* is neither a part of the triggers tests nor is
8 it logically linked to the tests.

9
10 Q. ARE THERE REASONS TO BELIEVE THAT THE FCC INTENDED TO
11 ESTABLISH A *DE MINIMIS* STANDARD AS A PART OF ITS TRIGGERS
12 TESTS?

13
14 A. No. At one point in his testimony, Mr. Gillan argues that the *TRO* requires state
15 commissions to apply “judgment, experience, and knowledge of local competitive
16 conditions” to implement the triggers test, but he is simply grasping at straws.
17 (Gillan, p. 54) In fact, the *TRO* is clear that it wishes to *remove* as many
18 subjective elements as possible from the triggers test, and that is why the test is
19 defined so objectively. (*TRO* ¶ 428, ¶ 498) The FCC was clear to spell out a
20 number of criteria that it *did* intend for the state commissions to apply (e.g., the
21 number of carriers required to demonstrate “multiple, competitive supply”, *TRO* ¶
22 501). If the FCC had intended state commissions to assess the “size” of carriers
23 or their operations, it surely would have explicitly said so – just as it has done in
24 countless other instances where it has established such bright line tests. Indeed,
25 after describing in paragraph 499 the factors that are to be considered by the state

1 commissions, the *TRO* explicitly indicates that “[f]or purposes of these triggers,
2 we find that states shall not evaluate any *other* factors...” (*TRO* ¶500, emphasis
3 added)

4
5 Q. ARE THERE ADDITIONAL REASONS THAT MR. GILLAN’S PROPOSED
6 *DE MINIMIS* SIZE REQUIREMENT IS INCONSISTENT WITH THE FCC’S
7 TRIGGERS TEST?

8
9 A. Yes. Apart from the FCC’s desire for administrative simplicity and to avoid
10 interpretive ambiguity, the triggers test is designed to reflect the presence of
11 facilities-based competition. However, as Chairman Powell notes in his separate
12 statement, there is significant evidence that the availability of TELRIC-priced,
13 wholesale switching deters facilities-based competitors. (Separate Statement of
14 Chairman Michael Powell at p. 6). Consequently, creating a minimum
15 penetration standard would virtually ensure that the non-impairment tests would
16 never be met, because the availability of UNE-P would itself deter the level of
17 penetration required for a finding of non-impairment. This may explain why Mr.
18 Gillan proposes the addition of a *de minimis* size requirement in the first place.

19
20 Q. DOES DR. BRYANT PROPOSE A “*DE MINIMIS*” TEST?

21
22
23 A. Yes. In response to BellSouth’s Florida interrogatory 3-119 (Docket 030851-TP)
24 on this topic, Dr. Bryant admits that he proposes such a test and cites to paragraph
25 499 of the *TRO*. In that response, Dr. Bryant specifically points to the FCC’s

1 statement that “. . . the identified competitive switch providers should be actively
2 providing voice service to mass market customers in the market” as implying
3 “that some determination be made regarding the number of customers being
4 served.”

5

6 Q. PLEASE COMMENT ON DR. BRYANT’S INTERPRETATION OF THE *TRO*.

7

8 A. Dr. Bryant’s proposal simply is not supported by the FCC’s statement. There is
9 no mention in that statement of customer counts, hurdles, market shares or any
10 other quantitative indicator of “active” provision of service. The FCC is perfectly
11 capable of imposing such quantitative requirements, but it did not. Indeed, a
12 further reading of that general section of the *TRO* shows that the FCC proposes a
13 *qualitative* indicator of “active” provision of service rather than the quantitative
14 approach advocated by Dr. Bryant. In footnote 1556, the FCC notes that
15 “actively providing” can be determined by reviewing whether the competitive
16 switching provider has filed a notice to terminate service in the market. Such an
17 investigation should satisfy the Commission that there is “active” provisioning of
18 service, since in paragraph 500 of the *TRO*, the FCC obliges states *not* to evaluate
19 any other factors regarding CLEC provisioning because, as the FCC notes, even
20 carriers in Chapter 11 bankruptcy protection “are often still providing service.”
21 The FCC’s proscriptions would rule out open-ended requirements such as Dr.
22 Bryant’s proposal. Dr. Bryant’s attempt to bootstrap an additional rule is
23 undermined, not supported, by the section of the *TRO* that he identifies, and
24 CLEC proposals to impose a *de minimis* requirement should be rejected as being

1 inconsistent with the FCC’s desire for a bright-line test that is designed to reduce
2 administrative delay.

3

4 Q. SHOULD THIS COMMISSION CONSIDER ANY OF THESE ARGUMENTS?

5

6 A. No. These arguments do not represent genuine proposals. Rather, they are
7 assertions of vague and unspecified steps that would compromise the bright-line
8 test that the FCC requires. In creating the triggers tests, the FCC concluded that
9 the thresholds that it created are “based on our agency expertise, our
10 interpretation of the record, and our desire to provide bright-line rules to guide the
11 state commission in implementing section 251.” (*TRO* ¶ 498) The FCC declined
12 to create ambiguous thresholds that would result in implementation issues and
13 administrative delay.

14

15 Q. MR. GILLAN CONTENDS THAT, IN CONDUCTING A TRIGGERS
16 ANALYSIS, THERE IS A DIFFERENCE BETWEEN AN “ENTERPRISE
17 SWITCH” AND A “MASS MARKET SWITCH”. (GILLAN DIRECT PP. 37-
18 40) HOW DO YOU RESPOND?

19

20 A. This contention is simply a distraction that the Commission should reject. The
21 actual rules refer only to “local switches” (for the self-provisioning trigger) and
22 “switches” (for the wholesale trigger). There is no distinction between a so-called
23 “enterprise” and “mass market” switch, despite Mr. Gillan’s suggestions to the
24 contrary.

25

1 The text of the *TRO* is consistent with the rules – in the triggers analysis portion
2 of the text, the FCC does not make any distinction between or require that a
3 particular switch be dedicated solely to providing enterprise or mass market
4 switching. Contrary to these witnesses’ contentions, the language of the *TRO*
5 clearly contemplates that carriers will use a single switch or switches to serve
6 *both* enterprise *markets* and mass *markets*. This language is reflected in the
7 paragraphs Mr. Gillan relies upon in his testimony; specifically, at ¶ 441 the FCC
8 states:

9
10 For example, in order to enable a switch serving large enterprise
11 customers to serve mass market customers, competitive LECs
12 *may* need to purchase additional analog equipment, acquire
13 additional collocation space, and purchase additional cabling and
14 power. (Emphasis added).

15
16 Likewise, at ¶ 508:

17
18 We determine that to the extent that there are two wholesale
19 providers or three self-provisioners of switching serving the voice
20 *enterprise* market, and the state commission determines that these
21 providers are operationally and economically capable of serving
22 the *mass* market, this evidence must be given substantial weight
23 by the state commissions in evaluating impairment in the mass
24 market. We find that the existence of serving customers in the
25 *enterprise* market to be a significant indicator of the possibility of

1 serving the mass market because of the demonstrated scale and
2 scope economies of serving numerous customers in a wire center
3 using a single switch. (Emphasis in original)

4
5 Clearly, the FCC expects carriers to use a single switch to serve customers in both
6 the enterprise and mass markets. While the FCC has precluded the use of
7 switches that serve *only* the enterprise market from qualifying for the triggers
8 analysis, it is ludicrous to exclude as a triggers candidate a carrier's switch that
9 serves *both* markets, which is the ultimate outcome of a competitive market. It
10 would be equally absurd to engage in some type of capacity counting exercise and
11 try to allocate switch capacity between various markets. The rules require only
12 that the switches used to meet the triggers analysis are serving either mass market
13 customers or DS0 capacity loops and any attempt to create additional
14 requirements where none exist should be rejected by this Commission.

15

16 **BELLSOUTH'S BATCH HOT CUT PROCESS**

17

18 Q. THE CLECS CITE TO THE FCC'S PROVISIONAL FINDING ON THE HOT
19 CUT PROCESS AS EVIDENCE THAT BELLSOUTH'S HOT CUT PROCESS
20 IS FLAWED. IS THIS VALID?

21

22 A. No. The FCC made a provisional national finding regarding hot cuts, but, at the
23 same time, requested the state commissions to examine the issue more closely.
24 The FCC held that the state commissions must adopt and implement a batch hot
25 cut process within 9 months of the effective date of the Order. *See* ¶423

1 (“specifically, we ask the state commissions, within nine months of the effective
2 date of this Order, to approve and implement a batch cut migration process – a
3 seamless, low-cost process for transferring large volumes of mass market
4 customers – or to issue detailed findings that a batch cut process is unnecessary in
5 a particular market because incumbent LEC hot cut processes do not give rise to
6 impairment in that market”); 47 C.F.R. 51.319(d)(2)(ii) (“the state commission
7 shall...establish an incumbent LEC batch cut process...”). Thus, at the
8 conclusion of this proceeding, this Commission must order a batch hot cut
9 process.

10

11 Moreover, the FCC’s reasoning on hot cuts in the *TRO* is flawed. The FCC
12 ignored specific data, the same data upon which it relied in its 271 decisions, in
13 favor of vague, unreliable and out-of-date information. For example, the *TRO*
14 credited an AT&T assertion that, several years ago, it lost customers in several
15 states, including Texas and New York, because of hot cut difficulties.

16 Conversely, the FCC rejected nearly identical claims made by AT&T when it
17 granted long-distance authority to Verizon and SBC in each of these states. Since
18 that time, the FCC has considered hot cut issues in all other 271 proceedings and
19 has reached the same conclusion - that RBOCs are meeting their 271 obligations.
20 Thus, the FCC has granted their applications. However, the FCC’s analysis of the
21 hot cut issue on a national basis in the *TRO*, while inadequate for what it was,
22 says nothing about BellSouth’s hot cut process, despite CLEC claims to the
23 contrary.

24

1 Q. AT&T WITNESS VAN DE WATER, AT PAGE 57-58, AND MCI WITNESS
2 LICHTENBERG, AT PAGES 19-21, SUGGEST THAT THE HOT CUT
3 PROCESS SHOULD MIRROR THE SEAMLESS NATURE OF UNE-P
4 MIGRATIONS AND PIC CHANGES. DO YOU AGREE?

5
6 A. Absolutely not. To implement the scenario the CLECs advocate would require
7 substantial investment on BellSouth's part to upgrade its existing network
8 because neither BellSouth nor any other RBOC can accomplish electronic loop
9 provisioning ("ELP") today with existing network architectures. Rather than
10 discussing the hot cut process applicable to the network that exists today, the
11 CLECs talk about a process that might only be possible in an entirely new
12 network at some point in the future. BellSouth witness Gary Tennyson discusses
13 this issue in greater detail in his rebuttal testimony.

14

15 Moreover, the CLECs' argument that they are impaired without unbundled
16 switching until such time as the UNE-L is equal to the UNE-P is based on the
17 wrong test. The question for the Commission is not whether UNE-P is the same
18 as UNE-L, but rather whether an efficient CLEC can economically enter the
19 market without access to unbundled switching. Because the answer to that
20 question is unequivocally "yes," it is understandable that those CLECs relying
21 upon UNE-P seek to change the question.

22

23 Q. MS. LICHTENBERG ALLEGES (PAGE 15) THAT THE FCC
24 "RECOGNIZED" THAT HOT CUTS MUST BE "AS SEAMLESS AND

1 TROUBLE FREE AS THEY ARE WITH LONG-DISTANCE AND UNE-P.” IS
2 SHE RIGHT?

3

4 A. No. In fact, the FCC found exactly the opposite when it flatly rejected AT&T’s
5 ELP proposal. The FCC declared that to make the necessary system changes
6 called for by AT&T’s ELP proposal “would require significant and costly
7 upgrades to the existing local network at both the remote terminal and central
8 office. AT&T’s ELP proposal proposes to ‘packetize’ the entire public switched
9 telephone network for both voice and data traffic, at a cost one party estimates to
10 be more than \$100 billion. Incumbent LECs state that AT&T’s proposal would
11 entail a fundamental change in the manner in which local switches are provided
12 and would require dramatic and extensive alterations to the overall architecture of
13 every incumbent LEC local telephone network. Given our conclusion above, we
14 decline to require ELP at this time...” (TRO ¶ 491) This Commission should give
15 ELP no more consideration than did the FCC.

16

17 Q. MR. VAN DE WATER CONTENDS (AT PAGE 18) THAT THE RATE FOR
18 HOT CUTS SHOULD BE BASED ON ELECTRONIC LOOP PROVISIONING.
19 DO YOU AGREE?

20

21 A. No, I do not agree, and neither did the FCC. As stated above, the FCC flatly
22 rejected AT&T’s ELP proposal. The FCC directed state commissions to approve
23 a batch cut process which it expects will be lower in cost than single hot cut rates.
24 BellSouth has developed such an offering. Mr. Van de Water compares the rate
25 BellSouth charges for PIC changes and UNE-P changes to the rate for hot cuts.

1 As noted above, such a comparison is inappropriate. The cost incurred for PIC
2 changes and UNE-P migrations are different than the cost incurred to perform a
3 hot cut of a UNE-L because the UNE-L hot cut requires physical work. The
4 Commission already has considered these facts and established TELRIC hot cut
5 rates.

6

7 Q. MR. WEBBER STATES (PAGE 21) THAT ONE OF THE REASONS ILECS
8 ARGUE AGAINST THE IMPLEMENTATION OF AN AUTOMATED
9 MIGRATION SYSTEM IS TO PRECLUDE THE GROWTH OF UNE-L. DO
10 YOU AGREE WITH HIS ASSESSMENT?

11

12 A. No, I do not agree. The creation of an automated UNE-L migration system would
13 be cost prohibitive for all carriers involved in interconnecting to the network.
14 Such a change would be a fundamental change in how the telephone network
15 processes information. The FCC recognized this when they rejected AT&T's
16 ELP proposal. As BellSouth witness Gary Tennyson describes, moving to an
17 automated system, one that is not in place today, would cost billions of dollars to
18 develop and would require deployment of equipment that in many cases does not
19 even exist at commercially viable levels.

20

21 Q. ON PAGES 39-40, MR. TURNER ALLEGES THAT BELLSOUTH'S
22 KENTUCKY HOT CUT CHARGES CONSTITUTE AN ECONOMIC
23 IMPAIRMENT TO UNE-L. HOW DO YOU RESPOND?

24

1 A. The charges about which Mr. Turner complains were previously approved by this
2 Commission.⁴ This Commission approved the non-recurring rates for the
3 elements necessary for hot cuts in its UNE Cost Docket (Case No. 382). When
4 the Commission released its order approving BellSouth's UNE rates, AT&T had
5 the opportunity to raise its concern that such non-recurring rates constituted an
6 economic impairment. It, however, did not do so. Raising cost issues in this
7 proceeding rather than in Case No. 382 should be seen for what it is – a ploy to
8 perpetuate UNE-P rather than a serious complaint about the Commission's rates
9 for hot cuts.

10

11 Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

12

13 A. Yes.

14

15 # 532539

⁴ The elements included in a hot cut are the type of loop (i.e., SL1, SL2, UCLND), order coordination (optional), electronic service order, and cross connects.