

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

In the Matter of)
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BellSouth Petition for Phase I Pricing Flexibility) CCB/CPD No. 00-21
for Switched Access Services)
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MEMORANDUM OPINION AND ORDER

Adopted: February 22, 2001

Released: February 27, 2001

By the Commission:

I. INTRODUCTION

1. In this order, we grant in part and deny in part a petition of BellSouth seeking pricing flexibility for various switched access services in ten metropolitan statistical areas (MSAs) within its region.¹ As detailed below, the Commission established the parameters for granting pricing flexibility in the *Access Reform Fifth Report and Order* and codified those parameters at section 1.774 of its rules.²

¹ BellSouth Petition for Phase I Pricing Flexibility For Switched Access Services, CCB/CPD File No. 00-21 filed on August 28, 2000. (BellSouth Switched Access Petition). See Public Notice, Pleading Cycle Established, CCB/CPD File No. 00-21, DA 00-1978, (rel. Aug. 30, 2000) and BellSouth Telecommunications, Inc.’s Petition for Pricing Flexibility for Special Access and Dedicated Transport Services, BellSouth Telecommunications, Inc.’s Petition for Pricing Flexibility for Switched Access Services CCB/CPD File Nos. 00-20 and 00-21, Protective Order, DA 00-2006 (Com. Car. Bur. Rel. August 31, 2000) (*Protective Order*) (granting BellSouth’s request for confidential treatment of BellSouth’s disaggregated revenue data shown on an MSA basis). Subsequently, on September 1, 2000, BellSouth filed an amended petition for pricing flexibility for switched services pursuant to Section 1.774 of the Commission’s rules, 47 C.F.R. § 1.774. This petition amended Attachment 3, Exhibit E, Parts 1 and 5 and Attachment 5, Exhibits A-E, Part 1 of BellSouth’s August 28, 2000 submission, which were corrupted when filed through the Commission’s Electronic Tariff Filing System (ETFS) and could not be viewed through ETFS. See Public Notice, Revised Pleading Cycle Established, CCB/CPD File No. 00-21, DA 00-2034, (rel. Sept. 5, 2000). AT&T and WorldCom filed comments opposing the petition on September 18, 2000. On September 28, 2000, BellSouth filed a reply to the comments filed by AT&T and WorldCom. BellSouth Telecommunications Inc., CCB/CPD File No. 00-21, Reply filed on September 28, 2000. (BellSouth Reply).

² Access Charge Reform, CC Docket No. 96-262, Fifth Report and Order, 14 FCC Rcd 14221 (1999), affirmed *MCI WorldCom, Inc. v. FCC*, Nos. 99-1395 *et al.* (D.C. Cir., Feb. 2, 2001) (*Access Reform Fifth Report and Order*); 47 C.F.R. § 1.774.

Applying the tests set forth in that order, we grant BellSouth's petition for eight of the requested MSAs and deny it with respect to two MSAs.

II. BACKGROUND

2. To recover the costs of providing interstate access services, price cap LECs charge interexchange carriers (IXCs) and end users for access services in accordance with our Part 69 access charge rules.³ The Commission has long recognized that it should allow price cap LECs progressively greater pricing flexibility as they face increasing competition.⁴ In the *Access Reform First Report and Order*, the Commission adopted a market-based approach to access charge reform, pursuant to which it would relax restrictions on price cap LEC pricing as competition emerges, thereby ensuring that "our own regulations do not unduly interfere with the development and operation of these markets as competition develops."⁵ At that time, the Commission deferred resolution of the specific timing and degree of pricing flexibility to a future order.⁶ Subsequently, in the *Access Reform Fifth Report and Order*, the Commission provided detailed rules for implementing the market-based approach, pursuant to which price cap LECs will receive pricing flexibility in the provision of interstate access services as competition for those services develops.⁷ Although these rules were challenged by various parties, the United States Court of Appeals for the District of Columbia Circuit has recently upheld these rules as a reasonable exercise of the Commission's policy making discretion under the Act.⁸

3. The pricing flexibility framework the Commission adopted in the *Access Reform Fifth Report and Order* is designed to grant greater flexibility to price cap LECs as competition develops, while ensuring that: (1) price cap LECs do not use pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior; and (2) price cap LECs do not increase rates to unreasonable levels for

³ Part 69 establishes two basic categories of access services: special access services and switched access services. Switched access services, such as those at issue in BellSouth's current petition, use local exchange switches to route originating and terminating toll calls. Part 69 establishes specific switched access elements and a mandatory rate structure for each element. 47 C.F.R. Part 69.

⁴ See Price Cap Performance Review for Local Exchange Carrier, CC Docket No.94-1, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858 (1995) (*Price Cap Second FNPRM*) (seeking comment on a framework for three gradations of increasingly less stringent price regulation); see also Access Charge Reform, CC Docket No. 96-262, Notice of Proposed Rulemaking, 12 FCC Rcd 21354, 21428-48 (1996) (*Access Reform NPRM*) (refining and seeking comments on the Commission's pricing flexibility proposals). The Commission instituted price cap regulation for the Regional Bell Operating Companies (BOCs) and GTE in 1991, and permitted other LECs to adopt price cap regulation voluntarily, subject to certain conditions. Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818-20 (1990) (*LEC Price Cap Order*). Price cap LECs are those LECs that are subject to price cap regulation.

⁵ Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, 16094 (1997) (*Access Reform First Report and Order*).

⁶ *Access Reform First Report and Order*, 12 FCC Rcd at 15989.

⁷ *Access Reform Fifth Report and Order*, 14 FCC Rcd 14221, 14225 (1999) citing *Access Reform First Report and Order*, 12 FCC Rcd at 15989, 16094-95.

⁸ *MCI WorldCom, Inc. v. FCC*, slip op. at 2.

customers that lack competitive alternatives.⁹ In addition, the reforms were designed to facilitate the removal of services from price cap regulation as competition develops in the marketplace, without imposing undue administrative burdens on the Commission or the industry.¹⁰

4. In keeping with these goals, the Commission established a framework for granting price cap LECs greater flexibility in the pricing of interstate access services once they make a competitive showing, or satisfy “triggers,” to demonstrate that market conditions in a particular area warrant the relief at issue. In general, the Commission contemplated that relief would be granted in two phases and on a Metropolitan Statistical Area (MSA) basis.¹¹ Currently, price cap LECs are eligible only for Phase I pricing flexibility for the provisioning of common line and traffic sensitive switched access services, and the traffic sensitive components of tandem switched transport service.¹²

5. To obtain Phase I relief for common line and traffic sensitive switched access services, a price cap LEC must meet a trigger designed to demonstrate that competitors have made irreversible, sunk investments in the facilities needed to provide the services at issue. In particular, to receive Phase I pricing flexibility for common line and traffic sensitive switched access services, and the traffic sensitive components of tandem switched transport service, a price cap LEC must provide convincing evidence that its unaffiliated competitors, in aggregate, offer service to at least 15 percent of the price cap LEC’s customer locations.¹³ For purposes of this showing, the price cap LEC may not rely on service the competitors provide solely by reselling the price cap LEC’s services, or provide through the purchase of the price cap LEC’s unbundled network elements (UNEs), except that the price cap LEC may rely on service the competitors provide through the use of the price cap LEC’s unbundled loops.¹⁴

6. A price cap LEC that obtains Phase I relief for these switched access services is allowed to

⁹ *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14225.

¹⁰ *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14225.

¹¹ See 47 C.F.R. § 22.909(a) of the Commission’s rules for a definition of MSA. Pricing flexibility also is available for the non-MSA sections of a study area -- rural study areas (RSAs) -- provided the price cap LEC satisfies the triggers adopted for MSAs. *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14234. RSAs are listed with MSAs in Common Carrier Public Mobile Services Information, Public Notice, 7 FCC Rcd 742 (1992).

¹² As part of its *Further Notice of Proposed Rulemaking*, the Commission sought comment on the appropriate triggers for Phase II pricing flexibility for common line and traffic-sensitive services, and the traffic-sensitive components of tandem-switched transport services offered by price cap LECs. *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14324-14326 (1999) (*Further Notice of Proposed Rulemaking*). Additional flexibility was also given in the *CALLS Order* which, *inter alia*, permits geographic deaveraging of subscriber line charges subject to limitations. *Access Charge Reform*, Sixth Report and Order in CC Docket No. 96-262, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) (*CALLS Order*). Price cap LECs are also eligible for Phase I and II pricing flexibility for special access and direct-trunked transport service. 47 C.F.R. §§ 69.709, 69.711.

¹³ 47 C.F.R. § 69.713(b)(1).

¹⁴ 47 C.F.R. § 69.713(b)(2). A local loop connects a customer’s premises to a LEC central office.

offer, on one day's notice, contract tariffs¹⁵ and volume and term discounts, so long as the services provided pursuant to a contract tariff are removed from price caps.¹⁶ To protect those customers that may lack competitive alternatives, a price cap LEC receiving Phase I flexibility must maintain its generally available price cap constrained tariffed rates for these services.¹⁷ Thus, no customer of a price cap LEC that has been granted this flexibility can be required to pay more than it would if the flexibility had not been granted.

III. DISCUSSION

7. BellSouth has filed a petition seeking Phase I pricing flexibility relief for those switched access services enumerated in section 69.713 of our rules¹⁸ in ten MSAs.¹⁹ AT&T and WorldCom challenge BellSouth's petition on five main grounds. In particular, the parties allege that: (1) BellSouth fails to provide convincing evidence that unaffiliated competitors actually offer service using competitive transport in conjunction with unbundled loops; (2) BellSouth improperly relies upon competitors that use special access circuits to connect their switches to customer locations instead of using unbundled loops; (3) BellSouth fails to demonstrate that competitors have deployed their own switches; (4) BellSouth improperly assumes that each competitor's collocation implies that the competitor is offering switched access services using unbundled loops; and (5) the underlying Commission standards for allowing pricing flexibility are inadequate to protect new entrants.

A. Standards For Granting A Petition For Switched Access Pricing Flexibility.

8. A price cap LEC bears the burden of proving that it has satisfied the applicable trigger for the pricing flexibility it seeks for each MSA.²⁰ To carry its burden of proof for a petition for pricing flexibility for common line, traffic sensitive switched access services, and traffic sensitive tandem transport services, the price cap LEC must demonstrate that competitors actually offer (not merely are capable of offering) common line and traffic-sensitive services to 15 percent of the price cap LEC's customer locations within an MSA.²¹ The Commission did not establish any specific rules pertaining to how a price cap LEC might demonstrate that competitors "offer service" over their own facilities. The Commission did

¹⁵ A contract tariff is a tariff based on an individually negotiated service contract. *See Interexchange Competition Order*, 6 FCC Rcd 5880, 5897 (1991); 47 C.F.R. § 61.3(o). *See also* 47 C.F.R. § 61.55 (describing the required composition of the contract-based tariffs).

¹⁶ *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14287; 47 C.F.R. § 69.727(a).

¹⁷ *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14234-35. 47 C.F.R. § 69.727(a)(2).

¹⁸ 47 C.F.R. § 69.713(a) (The relevant services are: (1) common line services, as described in Sections 69.152, 69.153, and 69.154 of the Commission's rules; (2) services in the traffic-sensitive basket, as described in Section 61.42(d)(2) of the Commission's rules; and (3) the traffic sensitive components of tandem switched transport services, as described in Sections 69.111(a)(2)(i) and (ii) of the Commission's rules).

¹⁹ The ten MSAs are: Atlanta, GA; Augusta, GA; Charleston-North Charleston, SC; Columbus, GA; Jacksonville, FL; Lafayette, LA; Miami-Fort Lauderdale-Hollywood, FL; Montgomery, AL; Orlando, FL; and Panama City, FL

²⁰ *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14309.

²¹ *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14287.

note, however, that advertisements may well be probative of the extent of competitive offerings, and that price cap LECs are aware of competitors' purchase of unbundled loops and may possess considerable intelligence regarding the extent and location of competitive facilities.²²

B. BellSouth Methodology.

9. *BellSouth Switched Access Petition*. To establish that it met the trigger, BellSouth first determined the total number of customer locations in each of the MSAs at issue. It identified three customer groups within its subscribership, *i.e.*, residential, small/medium business, and complex business.²³ BellSouth then identified the number of locations attributable to each category and summed the number of locations per category to determine the total number of locations in an MSA.²⁴

10. BellSouth next analyzed its internal records and records from an intelligence and research firm, Current Analysis, to identify competitors that offered service through their own facilities or through a collocation arrangement.²⁵ BellSouth used maps showing BellSouth's wire center and United States Postal Service ZIP code boundaries to relate competitive switch coverage to one or more BellSouth wire center service areas based on the geographic location of the switch and the areas served. BellSouth also obtained information regarding competitor marketing activities through numerous sources including unaffiliated research firms, Internet surveys, print ads, press releases, direct mail ads, and billboard ads.²⁶ BellSouth asserts that this compilation offers evidence of competitive market presence within specific wire center/MSA serving areas, as well as evidence of the specific customer segment(s) targeted by each competitor.

11. BellSouth then developed a competitive matrix for each MSA showing which competitors own facilities and actively market to the residential, small/medium business, and/or complex business segments. To develop the matrix, BellSouth used the facilities data regarding competitive switch coverage;

²² *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14287.

²³ BellSouth Switched Access Petition at 3; *see also* October 11, 2000 Letter from W.W. Jordan, Vice President, Federal Regulatory, BellSouth to Magalie Roman Salas, Secretary, Attachment at 5 (*BellSouth October 11, 2000 Ex Parte*).

²⁴ BellSouth classified locations that had only one primary residential subscriber line charge (SLC) as residential locations. BellSouth derived the number of business locations through the use of customer location account codes (CLACs) contained in their internal billing records. A CLAC is a code that uniquely defines a single customer location and ties together all telephone bills for that customer at the location. The CLAC code also allowed BellSouth to further subdivide business locations into small/medium and complex business locations. The small/medium and complex business segment designations correlate to BellSouth's customer segments and to the competitors' marketing strategies for these customer groups. BellSouth Switched Access Petition at 4; *BellSouth October 11, 2000 Ex Parte*, Attachment at 5.

²⁵ BellSouth obtained the collocation arrangements from its internal proprietary customer records. Collocation arrangements were included only if a competitor had taken possession of the collocation space. BellSouth obtained the facilities data from the database of Current Analysis. BellSouth Switched Access Petition at 6; *BellSouth October 11, 2000 Ex Parte*, Attachment at 6. Current Analysis' database is based on the Local Exchange Routing Guide (LERG) and data from the National Exchange Carriers Association (NECA). The database provides the address of each switch and point of interface as well as the geographic areas served by the switch.

²⁶ BellSouth Switched Access Petition, Exhibit E.

the collocation information obtained from proprietary BellSouth customer records; and information regarding the competitor's marketing efforts and targeted segments obtained from competitors' advertising in the MSA.²⁷ Using this information, BellSouth calculated the percentage of locations targeted by competitors by summing the number of locations associated with the market segment(s) indicated within the wire center coverage areas within the MSA and dividing this figure by the total locations in the MSA.²⁸ In accordance with Section 1.774(e),²⁹ BellSouth states that it notified each competitor upon which it is relying to meet its trigger.³⁰ In performing this analysis, BellSouth did not determine whether the competitors were relying on competitive transport to their customer locations. Based on this analysis, BellSouth's petition showed that competitors offered service to the following percentage of customer locations in the MSAs at issue:

<u>MSA</u>	<u>Percentage of Customer Locations</u>
Atlanta, GA	43.4%
Augusta, GA	27.7%
Charleston, SC	25.9%
Columbus, GA	34.2%
Jacksonville, FL	57.3%
Lafayette, LA	17.1%
Miami-Ft. Lauderdale, FL	18.7%
Montgomery, AL	73.0%
Orlando, FL	16.4%
Panama City, FL	45.8%

12. BellSouth October 31, 2000 Ex Parte. In response to comments filed in opposition to its petition, on October 31, 2000, BellSouth filed an ex parte letter that included analyses of whether the competitors that BellSouth relied upon to meet its trigger in the ten MSAs provided their own transport and/or switches.³¹ In particular, BellSouth conducted three additional analyses of the data pertaining to the ten MSAs. First, BellSouth reviewed the data and identified only those wire centers containing collocations with competitive transport. Based upon this analysis, using only those competitors that used competitive

²⁷ BellSouth Switched Access Petition at 3, 5-6; *BellSouth October 11, 2000 Ex Parte*, Attachment at 7.

²⁸ BellSouth Switched Access Petition at 5; *BellSouth October 11, 2000 Ex Parte*, Attachment at 4

²⁹ 47 C.F.R. § 1.774(e).

³⁰ BellSouth Switched Access Petition at 3, *citing* Attachment at 14.

³¹ See October 31, 2000 Letter from W.W. Jordan, Vice President, Federal Regulatory, BellSouth to Magalie Roman Salas, Secretary. (*BellSouth October 31, 2000 Ex Parte*). In response, WorldCom filed two ex parte presentations contending that BellSouth's pricing flexibility petition, even as amended by its *October 31, 2000 Ex Parte*, falls well short of the requirement that competitors actually offer switched access service over their own facilities to 15 percent of customer locations. See January 17, 2001 Letter from Alan Buzacott, Senior Manager Regulatory Affairs, WorldCom to Magalie Roman Salas, Secretary (*WorldCom January 17, 2001 Ex Parte*) and February 9, 2001 Letter from Alan Buzacott, Senior Manager Regulatory Affairs, WorldCom to Magalie Roman Salas, Secretary (*WorldCom February 9, 2001 Ex Parte*). We note that AT&T did not file a response to either ex parte presentations by BellSouth.

transport, BellSouth would qualify for pricing flexibility in six MSAs.³² Second, BellSouth reviewed the data and identified both those wire centers containing collocations with competitive transport as well as those wire centers with competitive switches mapped to them from the competitive switches matrix.³³ By adding wire centers where there was a competitive switch located within its service area, the percentages increased in the Miami/Fort Lauderdale, FL MSA to 17.7 percent and in the Lafayette, LA MSA to 15.5 percent. The Augusta, GA and Charleston/North Charleston, SC MSAs remained below the 15 percent trigger. In addition, BellSouth performed an additional analysis solely of the Miami-Fort Lauderdale, FL MSA because it determined that its original analysis did not fully capture the competitive inroads of MediaOne and AT&T.³⁴ This separate analysis for the Miami/Fort Lauderdale area included wire centers served by MediaOne and AT&T through total facilities bypass with switches outside the service area of that particular wire center. Based upon this third analysis that included facilities bypass by MediaOne and AT&T, BellSouth reported that competitors offered service to 25.2 percent of customer locations in the Miami-Fort Lauderdale, FL MSA. According to the *BellSouth October 31, 2000 Ex Parte*, BellSouth's final calculations, if collocators using BellSouth transport are not included, show that competitors offer service to the following percentage of customer locations:

<u>MSA</u>	<u>Percentage of Customer Locations</u>
Atlanta, GA	35.3%
Augusta, GA	10.1%
Charleston, SC	6.1%
Columbus, GA	33.5%

³² This analysis showed that competitors offered service to the following percentage of customer locations in the ten MSAs at issue:

<u>MSA</u>	<u>Percentage of Customer Locations</u>
Atlanta, GA	33.1%
Augusta, GA	10.1%
Charleston SC	6.1%
Columbus, GA	29.6%
Jacksonville, FL	48.9%
Lafayette, LA	10.3%
Miami-Ft. Lauderdale, FL	11.9%
Montgomery, AL	73.0%
Orlando, FL	15.4 %
Panama City, FL.	41.1%

See BellSouth October 31, 2000 Ex Parte, Attachment at 3.

³³ In making this latter showing, BellSouth assumes that the competitors that have switches that can serve customers in additional wire centers will provide their own transport or are relying upon transport provided by another BellSouth competitor.

³⁴ BellSouth's switched access petition showed MediaOne serving only one wire center. A more in depth review by BellSouth, however, revealed that MediaOne's serving area included four wire centers. *See BellSouth October 31, 2000 Ex Parte*, Attachment at 4. In addition, a more in depth review by BellSouth revealed that AT&T had fiber routes serving buildings located in eight BellSouth wire centers where collocation is not present. *See BellSouth October 31, 2000 Ex Parte*, Attachment at 5.

Jacksonville, FL	52.6%
Lafayette, LA	15.5%
Miami-Ft. Lauderdale, FL	25.2%
Montgomery, AL	73.0%
Orlando, FL	16.4%
Panama City, FL	41.7%

C. Competitive Transport.

13. WorldCom and AT&T argue that the *Access Reform Fifth Report and Order's* definition of own facilities requires that competitors offer service entirely over their own facilities or by combining unbundled loops with their own transport.³⁵ In response, BellSouth argues that competitors do not have to employ their own transport facilities in order to be considered as offering service over their own facilities. BellSouth contends that this requirement is absent from the Commission's standard that the price cap LEC must provide convincing evidence that competitors are actually offering service to at least 15 percent of customer locations over their own facilities.³⁶ Rather, BellSouth asserts that the Phase I trigger measures the extent to which competitors offer service exclusively or largely over their own facilities.³⁷

14. The Commission specifically addressed this issue in the *Access Reform Fifth Report and Order*. The Commission stated that "a competitor provides service over its own facilities if it leases unbundled loops but provides its own switching and transport."³⁸ This requirement was codified in our rules which state "the price cap LEC may not rely on services competitors provide solely by reselling the price cap LEC's services, or provide through unbundled network elements, except that the price cap LEC may rely on service the competitors provide through the use of the price cap LEC's unbundled loops."³⁹ Accordingly, in meeting its trigger, BellSouth may not rely on service offered by competitors that do not provide their own transport. Thus, in evaluating the evidence provided by BellSouth, we must ignore any competitor relied upon by BellSouth that does not provide its own transport. As described above, BellSouth filed supplemental information which showed that the Charleston-North Charleston, SC and Augusta, GA MSA fall below the 15 percent trigger when this standard is applied. Accordingly, based upon its own data, we find that BellSouth has failed to meet its burden for receiving relief in these two MSAs.

D. Special Access Circuits.

15. WorldCom alleges that BellSouth improperly relies upon competitors that use special

³⁵ WorldCom Comments at 2; AT&T Comments at 6. WorldCom asserts that competitors have built their own transport to only 86 of the 150 wire centers on which BellSouth relies. WorldCom Comments at 6.

³⁶ *BellSouth October 31, 2000 Ex Parte*, Attachment at 1.

³⁷ See *BellSouth October 31, 2000 Ex Parte*, Attachment at 1 (citing *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14284).

³⁸ *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14284; see also *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14283 (a competitor's offering of service using its own switching and transport indicates that the competitor has made an irreversible investment in facilities that warrant Phase I pricing flexibility).

³⁹ 47 C.F.R. § 69.713(b)(2).

access circuits to connect their switches to customer locations. WorldCom asserts that competitors rely heavily on tariffed special access circuits to offer local exchange and switched access services to locations that they cannot reach entirely over their own facilities.⁴⁰ AT&T further contends that it does not use total bypass in its AT&T Digital Link service and instead uses T1s purchased from BellSouth's special access tariff to connect its 4ESS switches to customer locations.⁴¹

16. The Commission adopted a Phase I trigger for switched services that measures the extent to which competitors offer their services either exclusively or largely over their own facilities.⁴² The Commission further concluded that collocation furnishes evidence of irreversible investment in facilities in part because it indicates competitive transmission facilities terminating at the collocation site.⁴³ The Commission found that a competitor's offering of service using its own transport, switching, and UNE loops is indicative that the competitor has made an irreversible investment in facilities that warrant Phase I pricing flexibility.⁴⁴ The Commission's rules provide that for purposes of showing that competitors offer service to at least 15 percent of its customer locations, "the price cap LEC may not rely on service the competitors provide solely by reselling the price cap LEC's services, or provide through unbundled network elements, ... except that the price cap LEC may rely on service the competitors provide through the use of the price cap's unbundled loops."⁴⁵ A competitor's use of special access circuits in combination with its own switching and transport is neither providing service solely through resale nor through the use of UNES. Therefore, reliance upon carriers that use special access circuits in order to satisfy the pricing flexibility triggers is not explicitly foreclosed by our rules.⁴⁶

17. In addition, use of special access circuits is consistent with the Commission's focus on the extent of competitive entry in a price cap LEC's market and whether the competitor has made an irreversible investment in facilities. Whether a competitor has purchased special access or unbundled loops to reach a collocation site, it has made the same level of irreversible investment in its collocation facilities, its switch and its own transport facilities. Because the level of irreversible investment is the same whether special access circuits or unbundled loops are used, BellSouth may properly include competitors that use special access circuits to reach collocation facilities in its competitive analysis. We note that our finding is limited to the context of pricing flexibility petitions, and the use of a special access circuit to connect an end user with a competitor's collocation facilities. A price cap LEC may not rely on competitors that use the price cap LEC's special access facilities for transport other than between their collocation facilities and an end user, because that reduces the level of investment required by the competitor. This decision in no

⁴⁰ WorldCom Comments at 7; *WorldCom February 9, 2001 Ex Parte* at 2. We note that WorldCom has not contended that BellSouth has misstated the reach of WorldCom's switches or WorldCom's use of special access circuits. Instead, WorldCom merely reiterated AT&T's claim that AT&T uses T1s purchased from BellSouth's special access tariff to connect to larger business locations. *WorldCom February 9, 2001 Ex Parte* at 2-3 citing AT&T Comments at 14.

⁴¹ AT&T Comments at 8. A T1 is a high speed, circuit switched service.

⁴² *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14284.

⁴³ *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14282.

⁴⁴ *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14283.

⁴⁵ 47 C.F.R. § 69.713(b)(2).

⁴⁶ 47 C.F.R. § 69.713(b)(2).

way prejudices the Commission's ongoing rulemaking regarding the provisioning of unbundled network elements.⁴⁷ We also note that this finding, made in the context of our access charge rules, has no bearing on any questions regarding BellSouth's compliance with the requirements of section 271 of the Communications Act.⁴⁸ We further note that this finding is based solely upon the record before us and that the Commission is not precluded from revisiting any competitive review in a separate 271 proceeding.

E. Competitive Switches.

18. AT&T argues that BellSouth inappropriately assumes that, where a competitor has a switch that serves a portion of the MSA, the competitor is using the switch to provide service throughout all wire centers in the MSA.⁴⁹ This allegation, however, overstates BellSouth's assumption regarding the reach of competitive switches. Rather than assuming a competitive switch serves all wire centers in an MSA, BellSouth generally assumes only that it serves all wire centers within the city limits where the switch is located. For example, a competitive switch in Roswell, Georgia, is assumed to serve only Roswell wire centers and not the entire Atlanta MSA.⁵⁰ Thus, we reject AT&T's argument that BellSouth has overstated the reach of competitive switches. Moreover, we accept BellSouth's approach. As we have previously stated, "once a competitor installs a switch in its network, it has every incentive to maximize the number of customers it serves with that switch, in order to spread the sunk investment over the broadest base possible."⁵¹ Accordingly, we find that BellSouth could reasonably assume that for purposes of this application, in the absence of any evidence to the contrary, a competitive switch serves all wire centers within the city limits where the switch is located.

19. In addition, with the exception of AT&T's generalized assertion, no competitor has come forward to dispute the characterization of the reach of its switches.⁵² AT&T has not provided any facts in

⁴⁷ See, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, 15 FCC Rcd 3696, 3756-57 (¶¶ 131-32) (*UNE Remand Order*); *MCI WorldCom, Inc. v. FCC*, Nos. 99-1395 *et al.* (D.C. Cir., Feb. 2, 2001) (affirming the use of different standards for determining the conditions upon which competitors are given access to unbundled network elements and whether deregulatory measures are warranted once competitive providers have gained a foothold in the market).

⁴⁸ 47 U.S.C. § 271. This finding does not control our analysis of whether, for purposes of section 271(c)(1)(A), competitors in BellSouth's service area are actually providing service to a sufficient number of business and residential customers. In the *Access Reform Fifth Report and Order*, the Commission explicitly rejected using the section 271 criteria to evaluate petitions for pricing flexibility. The Commission found that competition may have developed to such a degree as to warrant pricing flexibility to a price cap LEC in part of a state, even if the price cap LEC has not satisfied the section 271 checklist. The Commission further determined that granting pricing flexibility on a state-by-state basis, as is required by section 271, is not appropriate because competitors do not generally enter new markets on that basis. See *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14271.

⁴⁹ AT&T Comments at 6.

⁵⁰ BellSouth Petition at 6; BellSouth Reply Comments at 4.

⁵¹ *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14287.

⁵² AT&T Comments at 6. AT&T also argues that BellSouth has not presented evidence that the switches used by the competitors are used for wireline service and not wireless service. No competitor, however, has come forward to dispute BellSouth's characterization of its switch as providing wireline service. Similarly, WorldCom argues (continued....)

support of its argument that would warrant shifting the burden back to BellSouth to provide further proof that its assumptions were correct.⁵³ We note that BellSouth did assume a wider reach for AT&T and MediaOne switches in the separate analysis of the Miami-Fort Lauderdale, MSA based upon serving areas reported to the local exchange routing guide (LERG) and AT&T's fiber routes.⁵⁴ Neither AT&T nor MediaOne, however, asserts that it did not serve the areas attributed to it in this separate Miami-Fort Lauderdale analysis. Accordingly, we reject AT&T's argument with respect to BellSouth's assumptions regarding switch capacity and reach.

20. WorldCom also argues that BellSouth may not rely on competitors that use enhanced extended links (EELs) for transport to meet its trigger because the combination of competitive switching and EELs for transport does not meet the *Access Reform Fifth Report and Order's* definition of "own facilities."⁵⁵ BellSouth's switched access petition and its two October 2000 ex parte submissions, however, do not rely on competitors that use EELs as transport. In addition, no competitor notified by BellSouth has come forward to assert that its services are provided by using EELs as transport. Accordingly, we do not need to reach this argument by WorldCom.

E. Competitive Collocations.

21. AT&T alleges that BellSouth makes the unwarranted assumption that each competitive collocation implies that the competitor is offering switched access services using UNE loops.⁵⁶ AT&T argues that collocations may be used solely for provisioning of special access services or to terminate entrance facilities.⁵⁷ As noted earlier, BellSouth revised its analysis so that it included only those collocations where the competitor had its own transport to a competitive switch. This revised analysis complies with our rules and eliminates two of the MSAs from eligibility. As to the remaining eight MSAs,⁵⁸ BellSouth has notified each competitor that it is relying upon the presence of that competitor to meet its trigger.⁵⁹ The competitors had the opportunity to come forward and dispute BellSouth's claims

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that BellSouth has not presented evidence that a competitor, Knology, has deployed its own switches in four MSAs: Augusta, GA; Charleston-North Charleston, SC; Montgomery, AL; Panama City, FL. WorldCom Comments at 9-10. Knology, however, has not disputed BellSouth's assertions regarding its deployment of the switches.

⁵³ For example, AT&T's pleadings do not identify any AT&T switch that has been mischaracterized by BellSouth as to capacity or reach.

⁵⁴ *BellSouth October 31, 2000 Ex Parte*, Attachment at 5.

⁵⁵ WorldCom Comments at 9. An EEL consists of a combination of an unbundled loop, multiplexing/concentrating equipment, and dedicated transport. *UNE Remand Order*, 15 FCC Rcd at 3828.

⁵⁶ AT&T Comments at 7; *see also WorldCom February 9, 2001 Ex Parte* at 1 (alleging that BellSouth makes the unwarranted assumption that all CLECs that have deployed switches and transport are using their own loops or unbundled loops to offer switched access services to all business customer locations).

⁵⁷ AT&T Comments at 7.

⁵⁸ The remaining eight MSAs are: Atlanta, GA; Columbus, GA; Jacksonville, FL; Lafayette, LA; Miami-Fort Lauderdale, FL; Montgomery, AL; Orlando, FL; and Panama City, FL.

⁵⁹ 47 C.F.R. § 1.774(e)(1)(ii).

concerning the nature or scope of the services offered from each collocation facility. In the present case, with the exception of AT&T, none of the collocated competitors cited by BellSouth have come forward to dispute BellSouth's characterization of their competitive reach. AT&T argues that the number of digital loop carriers in its collocation site limits the number of lines it can serve through its collocation facilities.⁶⁰ Our trigger does not require BellSouth to show that competitors *provide* service to 15 percent of customer locations; there is no market share test. The test requires only that competitors *offer* service to that many locations. Once AT&T, or another competitor, has collocated in a particular wire center and has transport to a competitive switch, it can relatively easily change the equipment in that collocation site so that it can serve additional customers as they are obtained.⁶¹ We therefore reject this argument of AT&T. Furthermore, even if we were to remove AT&T's facilities from the evaluation, BellSouth would still meet its trigger in the eight MSAs remaining under consideration because of the presence of other competitors. For example in the Miami-Fort Lauderdale, FL MSA, if we were to remove AT&T facilities from the evaluation, competitors would still offer service to 21.9 percent of BellSouth's customer locations.⁶² Accordingly, we reject the AT&T's argument with respect to competitive collocations.

F. Other Issues.

22. *Marketing and Pricing of Services.* AT&T argues that the ads cited by BellSouth do not show that competitors are actually offering switched service in the MSAs in question.⁶³ AT&T notes that some of the ads noted by BellSouth make clear that the offerings are limited to a particular type of customer or geographic area.⁶⁴ For example, AT&T notes that its Digital Link service is limited to those customers that can access a T1 loop.⁶⁵ Moreover, AT&T argues that BellSouth has made no attempt to verify that the competitors in question actually offer the service that they have marketed.⁶⁶ BellSouth, however, has notified the competitors that it is relying upon their offerings to meet the trigger. With the exception of AT&T's generalized objection and its Digital Link argument, none of the competitors have stepped forward to dispute BellSouth's characterization, or use, of their offerings to meet the trigger for a particular customer segment. As noted above, even if we were to remove entirely AT&T's facilities from the evaluation, BellSouth would still meet its trigger in the eight MSAs remaining at issue.

⁶⁰ AT&T Comments at 7.

⁶¹ BellSouth Reply at 6.

⁶² In an ex parte letter filed shortly before the deadline for our determination of this petition, AT&T provided data that called into question the inclusion of a significant portion of the business customers to which it purportedly offers service and the inclusion of residential customers purportedly offered service by its affiliate, MediaOne. See February 15, 2001 Letter from Judy Sello, Senior Attorney, AT&T to Magalie Roman Salas, Secretary. Even if we were to exclude entirely AT&T from the evaluation in the Miami-Fort Lauderdale MSA, and we also excluded MediaOne in those wire centers where AT&T challenged BellSouth's inclusion of MediaOne, BellSouth would exceed the 15 percent trigger in this MSA by more than four percentage points.

⁶³ AT&T Comments at 12.

⁶⁴ AT&T Comments at 11 (noting that a number of CLECs (such as Teligent, USLEC, Florida Digital, and Knology) state on their web sites that they are offering only digital service).

⁶⁵ AT&T Comments at 14.

⁶⁶ AT&T Comments at 13.

23. AT&T also argues that the marketing materials supplied by BellSouth do not prove that the competitors are aggressively marketing their services as required by the *Access Reform Fifth Report and Order*. The Commission, however, never required price cap LECs to prove that competitors are aggressively marketing their services. Instead, the Commission noted that “advertisements may well be probative of the extent of competitive offerings.” Accordingly, we reject AT&T’s arguments with respect to the marketing materials supplied by BellSouth as evidence that competitors are in fact offering service. Finally, AT&T asserts that BellSouth has not introduced evidence, such as prices or a comparison of quality, regarding whether the services offered are competitive with its own. Neither the Commission’s rules nor the *Access Reform Fifth Report and Order* require BellSouth to produce such evidence.

24. Competitive Showings. Finally, in response to BellSouth’s pricing flexibility petition, AT&T contends that the competitive showings, or “triggers,” that a LEC must make in order to qualify for pricing flexibility do not provide a reliable indication of effective competition.⁶⁷ These rules were recently upheld on appeal by the United States Court of Appeals for the D.C. Circuit.⁶⁸ Accordingly, we reject this argument by AT&T.

IV. CONCLUSION

25. As discussed above, we find that BellSouth, in eight MSAs, has demonstrated that 15 percent of its customer locations are offered competitive local service either through total bypass or through the use of competitive transport and switches, as required by our rules and the *Access Reform Fifth Report and Order*. Accordingly, we grant BellSouth’s petition with respect to those eight MSAs: Atlanta, GA; Columbus, GA; Jacksonville, FL; Lafayette, LA; Miami-Fort Lauderdale-Hollywood, FL; Montgomery, AL; Orlando, FL; and Panama City, FL. As also discussed above, however, in two MSAs, BellSouth has failed to demonstrate that its competitors offer local service to 15 percent of its customer locations either through total bypass or through the use of competitive transport and switches, as required by our rules and the *Access Reform Fifth Report and Order*.⁶⁹ Accordingly, we deny BellSouth’s petition with respect to those two MSAs: Augusta, GA and Charleston-North Charleston, SC.

V. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED, pursuant to Section 1.774 of the Commission's Rules, 47 C.F.R. § 1.774 that the petition filed by BellSouth IS GRANTED to the extent detailed herein and IS DENIED to the extent detailed herein.

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⁶⁷ AT&T Comments at 18-32.

⁶⁸ On September 8, 2000, AT&T and WorldCom filed a motion for a moratorium on the pricing flexibility petitions pending judicial review. See *Access Charge Reform*, CC Docket No. 96-262, Motion Of AT&T Corp. And Worldcom Inc. For A Moratorium On Pricing Flexibility Petitions Pending Judicial Review filed on September 8, 2000. On November 21, 2000, AT&T filed a motion for a stay of the *Access Reform Fifth Report and Order* pending judicial review. See *Access Charge Reform*, CC Docket No. 96-262, Motion Of AT&T Corp. For Stay Of Pricing Flexibility Order Pending Judicial Review filed on November 21, 2000. See *MCI WorldCom, Inc. v. FCC*, Nos. 99-1395 *et al.* (D.C. Cir., Feb. 2, 2001). In light of the court’s decision, we hereby dismiss these motions as moot.

⁶⁹ *Access Reform Fifth Report and Order*, 14 FCC Rcd at 14283; 47 C.F.R. § 69.713(b).

Magalie Roman Salas
Secretary