

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Consideration of BellSouth)
 Telecommunications, Inc. Entry Into) DOCKET NO. 960786-TL
 InterLATA Services Pursuant to)
 Section 271 of the Federal) FILED: September 23, 1997
 Telecommunications Act of 1996)

INTERMEDIA COMMUNICATIONS INC.'S
POST-HEARING BRIEF

Patrick K. Wiggins
 Donna L. Canzano
WIGGINS & VILLACORTA, P.A.
 501 East Tennessee Street
 Suite B
 Post Office Drawer 1657
 Tallahassee, Florida 32302
 (850) 222-1534
 (850) 222-1689 (facsimile)

and

Jonathan E. Canis
 Enrico C. Soriano
KELLEY DRYE & WARREN LLP
 1200 19th Street, N.W.
 Suite 500
 Washington, D.C. 20036
 (202) 955-9600
 (202) 955-9792 (facsimile)

Its Attorneys

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INTERMEDIA COMMUNICATIONS INC. ("Intermedia") hereby files its post-hearing brief in this proceeding.

I. INTRODUCTION

In this Brief Intermedia argues that based on the record developed in this docket and the applicable provisions of the Federal Telecommunications Act of 1996, this Commission must recommend to the Federal Communications Commission ("FCC") that it deny the application of BellSouth Telecommunication Inc. for entry into IntraLATA services pursuant to Section 271 of the Act. Including this introduction, this Brief contains four major sections; the remaining three sections are entitled as follows: General Issues, Positions and Arguments; Specific Issues, Positions and Argument; and Conclusion.

II. GENERAL ISSUES, POSITIONS AND ARGUMENTS

A. BASIC POSITION

BellSouth has not met the requirements for Section 271 relief. It has not satisfied Track A, Track B, or the fourteen-point checklist, or provided non-discriminatory access to OSS for the checklist items. BellSouth does not allow an ALEC to enter the

local market through interconnection, UNEs, or resale based on the ALEC's business plan, because BellSouth has effectively limited the availability of these strategies. The local market is not yet open and BellSouth's application is premature.

B. OVERVIEW OF ARGUMENT

1. BellSouth's Application

On July 7, 1997, BellSouth filed with this Commission an application for authorization under Section 271 of the Telecommunications Act of 1996 (the "1996 Act") to provide in-region interLATA services within the State of Florida. The 1996 Act conditions Bell Operating Company ("BOC") entry into the provision in-region interLATA services market upon a demonstration that the BOC's local market is open to competition. In particular, the 1996 Act requires that, before a BOC may be authorized to provide in-region interLATA services, the Federal Communications Commission ("FCC") must first find that a BOC:

(1) has fully implemented approved access and interconnection agreements with one or more facilities-based competing carriers providing service to both business and residential subscribers, or, in very limited circumstances, has an approved or effective Statement of Generally Available Terms and Conditions ("SGAT");

(2) has fully implemented the fourteen-point competitive checklist contained in Section 272(c)(2)(B);

(3) satisfies the requirements of Section 272, including the establishment of a separate long distance subsidiary and the satisfaction of nondiscrimination conditions; and

(4) has demonstrated that in-region interLATA entry would be in the public interest.

2. The Ameritech Order

On August 19, 1997, the FCC adopted and released its Memorandum Opinion and Order in CC Docket No. 97-137 in response to the Section 271 application of Ameritech Michigan (hereafter "Ameritech"). In *Ameritech*, the FCC explicitly communicated to BOCs and state public utility commissions how it would exercise the legislative authority Congress delegated to it in Section 271. With *Ameritech* it is now much clearer as to what a BOC must demonstrate for the FCC to find that it is entitled to relief under Section 271.

Curiously, in its opening statement BellSouth urged the Commission to ignore the FCC's careful delineation of its own understanding of its responsibilities under Section 271. Certainly this Commission is free to follow BellSouth's counsel, but it does so at the risk of rendering useless its recommendation to the FCC. Indeed ignoring *Ameritech* could mean sacrificing a year's worth of work to ungrounded petulance.

Jurisdictional squabbles over other sections of the 1996 Act notwithstanding, the existential reality under Section 271 is that the Congress has told the states to make the recommendations and the FCC to make the findings. Thus, this Commission's responsibility is to make recommendations to the FCC in a form that is useful to the FCC. For this Commission to do otherwise would be for it to depart from its historic role of responsible participation in federal matters.

3. Burden of Proof

As a preliminary matter, BellSouth has the burden of proof in this proceeding. In a recent order addressing Ameritech-Michigan's petition for in-region interLATA authority, the FCC enunciated the burden of proof applicable in Section 271 proceedings:

Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied. Section 271(d)(3) provides that "(t)he Commission shall not approve the authorization requested in an application . . . unless it finds that (the petitioning BOC has satisfied all the requirements of section 271)". Because Congress required the Commission affirmatively to find that a BOC application has satisfied the statutory criteria, the ultimate burden of proof with respect to factual issues remain at all times with the BOC, even if no party opposes the BOC's application. (Ameritech ¶ 43 (emphasis added))

Thus, according to the FCC, a Bell Operating Company ("BOC") must present a *prima facie* case in its application that all of the requirements of Section 271 have been met. The FCC has concluded that the "preponderance of evidence" standard applicable in most administrative and civil proceedings is the appropriate standard for evaluating a BOC Section 271 application. (Ameritech ¶ 45) The FCC interprets the "preponderance of the evidence" standard to mean "the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it." (Ameritech ¶ 46) As Intermedia discusses in this brief, the record of this proceeding demonstrates that BellSouth has not met its burden of proof and, hence, the Commission cannot affirmatively find that BellSouth has satisfied the statutory criteria of Section 271.

4. BellSouth Does Not Satisfy Track A, Track B, or the Fourteen-Point Checklist

In this proceeding, the Florida Public Service Commission's (the "Commission") primary role is to advise the FCC on the first two items above. The first item concerns whether BellSouth has satisfied either "Track A" (Section 271(c)(1)(A)) or "Track B" (Section 271(c)(1)(B)) to relief; the second item concerns whether BellSouth has satisfied the fourteen point checklist. The record in this proceeding is clear that BellSouth has not satisfied either of the two tracks, nor the fourteen-point checklist.

BellSouth can qualify only for Track A consideration, not Track B, because BellSouth has received many requests for access and interconnection within the meaning of Section 271(c)(1)(B). BellSouth cannot satisfy Track A, however, because it has not demonstrated that operational facilities-based competing providers of telephone exchange now serve beyond a de minimis level residential and business customers in Florida.

Nor has BellSouth shown that it has satisfied the requirements of the fourteen-point competitive checklist, either through fully implemented interconnection agreements with unaffiliated competing providers or through an approved or effective SGAT, in a manner that would enable its competitors to fully and meaningfully compete, at parity, with BellSouth. An essential requirement for compliance with the fourteen-point competitive checklist is BellSouth's ability to provide nondiscriminatory access to its operations and support systems ("OSS") for both resale and access to UNEs. BellSouth has not

demonstrated that competing providers of telephone exchange service have nondiscriminatory access to OSS for the provision of resale services and UNEs.

5. The Three Entry Strategies

Track A and the Fourteen-Point Checklist dovetail to ensure that a CLEC can enter the local market through any one or combination of the following three entry strategies: interconnection, unbundled network elements, and resale of services. In a nutshell, a BOC cannot provide in-region, interLATA service until the local market is open, and the local market is not open until the BOC provides non-discriminatory access to each of the three entry strategies, and all components of each strategy. This means that for the entry strategy of interconnection, BellSouth's interconnection agreements must be fully implemented, not just partly; for the entry strategy of unbundled network elements, all network elements have to be provided, not just one or two; and for the entry strategy of resale of services, all services must be available for resale, not just simple voice service.

Thus, for BellSouth to be entitled to relief in this case each of the applicable operational support system functions and each of the applicable checklist items must support not just interconnection, and not just the use of unbundled network elements, and not just resale, but each of these either alone or in any combination that an ALEC would choose to use.

6. Access to Entry Strategies Includes OSS

Moreover, providing access to these three entry strategies means providing non-discriminatory access to OSS functions that support these techniques. For example, a CLEC has the right to use unbundled switching in combination with the resale of both simple and complex voice and data services. To be entitled to relief, BellSouth must provide the OSS functions for these items so that if the ALEC chooses not to use this combination, it is because of business considerations, not the availability or unavailability of OSS functions.

The FCC has provided two overarching performance standards for determining non-discriminatory access to OSS functions. The first applies to those OSS functions analogous to OSS functions that a BOC provides to itself: the BOC must provide access to the CLEC that is equal to the level that the BOC provides to itself in terms of quality, accuracy and timeliness. Included in these "analogous OSS functions" are pre-ordering, ordering and provisioning for resale services, and repair and maintenance for both resale and UNEs. The evidence in this proceeding shows that despite its efforts, BellSouth has not been able to provide this level of access to analogous OSS functions.

The second performance standard is for OSS functions that have no retail analogue, such as ordering and provisioning of UNEs. Here the BOC must demonstrate that it provides the efficient ALEC with an meaningful opportunity to compete. And if one thing is clear from the record in this proceeding, it is this: BellSouth's

current level of access to UNEs and the OSS that support them, does not give CLECs a meaningful opportunity to compete.

7. Conclusion

As reflected in this overview and as evident from the record in this proceeding, BellSouth has not met the requirements for entry into the provision in-region interLATA services. Indeed, the record in this proceeding is clear that BellSouth has failed:

to satisfy either Track A or Track B;

to satisfy the fourteen-point checklist;

to provided non-discriminatory access to OSS for the checklist item;

to provide non-discriminatory access to and support of the three entry strategies: interconnection, UNEs, and resale.

In an nutshell, BellSouth has not yet opened its local markets to meaningful competition and its application is thus premature.

C. THE COMMISSION MUST CLARIFY THAT BELLSOUTH HAS AN AFFIRMATIVE OBLIGATION TO PROVIDE UNBUNDLED DATA LOOPS AND OTHER NETWORK ELEMENTS AS A NECESSARY PRECONDITION TO RECOMMENDING SECTION 271 AUTHORITY.

Intermedia is unique among the participants in this proceeding in that its network design, service mix and customer base focus much more heavily on data services than on traditional voice services. While Intermedia is similar to the other ALECs in this proceeding in its efforts to have its interconnection agreement implemented, and in its need for fully functional systems for the ordering and processing of BellSouth interconnection, unbundled network elements and resale services, Intermedia is more aware than most ALECs of BellSouth's shortcomings in the provision of services

and network elements necessary to the offering of digital data services. This concern compels Intermedia to ask this Commission to take particular action to address BellSouth's obligation under the 1996 Act to provide effective and nondiscriminatory access to data services and elements.

The record of this proceeding has focused largely on the provision of "plain old telephone service" over standard analog loops. This is understandable because, today, the majority of circuits provided by BellSouth and new entrants consist of voice grade services over analog facilities. In the next few years, however, this will change -- increasingly complex services, from a combination of voice and data to full motion video, will be demanded by both business and residential customers. The digital network that Intermedia is building will be the backbone architecture over which these services -- as well as plain old telephone service -- will be provided. For this reason, the 1996 Act clearly contemplates that its interconnection provisions will be used to provide a whole spectrum of competitive local services, including voice, data and video.

While digital data services are the wave of the future, Intermedia has a critical need for unbundled data network elements for the services that it provides to its customers today. Currently, while Intermedia provides a large volume of voice circuits, the majority of circuits it provides are for data services. Every time a customer uses a credit card in a store, or a bank card in an ATM machine, the cash register or ATM uses a data

circuit to check whether the card is valid. All kinds of businesses, from large car dealerships to drug store chains, use data circuits to monitor changes in inventory every time a sale is made. The use of fax machines by both business and residential customers has been growing dramatically for years, and the use of the Internet for both business and residential applications is growing exponentially. All of these applications use data circuits, and these represent the majority of services that Intermedia is providing now.

It is these applications that Intermedia had in mind when it first requested data circuits as unbundled network elements. As Intermedia witness Julia Strow discusses in her testimony, despite extensive and continued discussions and correspondence with BellSouth personnel, Intermedia still has not been able to obtain unbundled digital loops critical to Intermedia's data services. (Strow, TR 2384, 2438) In fact, Intermedia first requested unbundled data circuits for the provision of its frame relay data service fourteen months ago. In a letter dated September 10, 1996, BellSouth stated that, "In regard to your letter of July 11, 1996, BellSouth can provide the unbundled frame relay loop and the unbundled ISDN loop as requested by Intermedia Communications." (EXH 28) Despite this commitment made fourteen months ago, to date, BellSouth still is not providing unbundled digital loops to Intermedia, but instead is reselling tariffed data services to Intermedia as a makeshift substitute for the unbundled network

elements that the 1996 Act requires BellSouth -- and that BellSouth has committed -- to provide.

In fact, while BellSouth has listed some digital unbundled loops in its Statement of Generally Available Terms and Conditions, it has left out the two types of unbundled data loops that Intermedia has requested and that BellSouth committed to provide in its letter of September 10, 1996. While BellSouth has included in its statement ADSL and HDSL loops, it has not included the 56 and 64 kbps data circuits that Intermedia requires for its frame relay service.¹ Similarly, while BellSouth has included a two-wire ISDN loop in its Statement, it has excluded the four-wire ISDN loop that Intermedia requested 14 months ago. Thus, not only has BellSouth failed to provide Intermedia with the unbundled data loops that it requested, to date, it still has not even developed a price for the loops.

Moreover, statements by BellSouth witnesses in this proceeding provide a disturbing indication that BellSouth may be reneging on its commitment to provide unbundled data loops altogether. During

¹ See BellSouth Statement of Generally Available Terms and Conditions, Attachment A, at 2. Currently, BellSouth is reselling to Intermedia 56 and 64 kbps data lines out of its retail Synchronet Services tariff as an interim substitute for the unbundled frame relay data loops that Intermedia requested 14 months ago. The fact that BellSouth is providing these services as an interim measure demonstrates that BellSouth has specific knowledge that Intermedia has requested unbundled 56 and 64 kbps digital data loops. Because BellSouth has tariffed services that are equivalent to the unbundled loops requested by Intermedia, it also is clear that BellSouth has the cost data necessary to establish rates for the unbundled data loops.

cross examination two weeks ago, BellSouth's witnesses stated that it was BellSouth's position that they were not obligated to provide any unbundled loops that were not specifically ordered by a state regulatory commission in an arbitration proceeding. (TR 322, 326) Because Intermedia entered into a voluntarily negotiated interconnection agreement with BellSouth -- and did not bring the agreement to arbitration -- this newly stated BellSouth position appears to mean that BellSouth will not provide the 56 and 64 kbps data loops, and the four-wire ISDN loops that Intermedia has specifically requested, and that BellSouth previously committed to provide. Moreover, BellSouth witness Varner stated in this proceeding that BellSouth is not obligated to provide a digital network interface device ("NID") as an unbundled element, but rather is only obligated to provide an unbundled NID for analog voice circuits. (Varner, TR 349-353) Intermedia considers these revelations at this late date to be a repudiation of BellSouth's earlier commitments, and a contradiction of the understanding that BellSouth and Intermedia have had for over a year.

Equally important, even if BellSouth was able to provide the digital loops that Intermedia requires, BellSouth has no processes or systems in place that allow for the efficient submission of orders for such circuits, or for their timely provisioning. Intermedia's recent experience in placing an order for a DS-1 loop is a case in point. Intermedia submitted an order for the DS-1 loop in late May, and it took BellSouth *six weeks* to complete the order. (Strow, TR 2430-2431, 2453) In contrast, when a BellSouth

customer orders a DS-1 service from BellSouth, BellSouth typically provides it in one or two weeks. (Strow, TR 2453) This inordinate delay stems from the fact that BellSouth has failed to provide reasonable access to the operations support systems necessary for the ordering and provisioning of such orders.

In light of BellSouth's documented inability to provide the unbundled data loops requested by Intermedia, despite over a year of discussions and correspondence, and in light of the disturbing indications that BellSouth may renege on its commitment to provide such loops altogether, Intermedia believes that it is critically important for this Commission to make clear that BellSouth has an affirmative obligation to provide unbundled network elements necessary for digital data services. Because these data services are an increasingly important part of the telecommunications infrastructure and economy of Florida, Intermedia urges the Commission to make clear that it will not recommend in favor of BellSouth's entry into the in-region interLATA market until BellSouth fully complies with the interconnection, unbundling, and resale provisions of the 1996 Act, for data as well as voice services.

III. SPECIFIC ISSUES

ISSUE 1.A: Has BellSouth met the requirements of section 271(c)(1)(A) of the Telecommunications Act of 1996?

INTERMEDIA'S POSITION: * No, BellSouth has not met the requirements of Section 271(c)(1)(A), although this is the only avenue available to it. The 1996 Act requires meaningful facilities-based competition for business and residential customers. BellSouth has not demonstrated that there currently

exist in Florida competing providers of telephone exchange service providing service to both residential and business customers either exclusively over their own facilities or predominantly over their own facilities in combination with resale. *

ARGUMENT:

BellSouth has not met the requirements of Section 271(c)(1)(A) of the 1996 Act because, as the record in this proceeding demonstrates, BellSouth is not providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service to residential and business subscribers, as contemplated by the 1996 Act. In the proceeding paragraphs, Intermedia shows that BellSouth has not met the requirements of Section 271(c)(1)(A) because, among other things, BellSouth does not provide nondiscriminatory access to unbundled network elements, does not provide interconnection as contemplated by the 1996 Act, and does not provide nondiscriminatory access to its operations and support systems to enable competing carriers to purchase unbundled network elements and/or resell BellSouth's retail services.

ISSUE 1.A.(a): Has BellSouth entered into one or more binding agreements approved under Section 251 with unaffiliated competing providers of telephone exchange service?

INTERMEDIA'S POSITION: * Yes, BellSouth has entered into one or more binding agreements approved under Section 251 with unaffiliated competing providers of telephone exchange service in Florida. *

ARGUMENT:

The record in this proceeding demonstrates that BellSouth has several binding Section 251 interconnection agreements.

ISSUE 1.A.(b): Is BellSouth providing access and interconnection to its network facilities for the network facilities of such competing providers?

INTERMEDIA'S POSITION: * BellSouth is providing some level of access and interconnection to its network facilities for the network facilities of such competing providers, but the level of access and interconnection being provided is not sufficient to satisfy the requirements of the 1996 Act. *

ARGUMENT:

As discussed above and elsewhere in this brief, while BellSouth is providing some level of access and interconnection to its network facilities for the network facilities of competing providers of telephone exchange service, BellSouth is not providing unbundled network elements, interconnection, and nondiscriminatory access to operations and support systems, in the manner contemplated by the 1996 Act.

ISSUE 1.A.(c): Are such competing providers providing telephone exchange service to residential and business customers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities?

INTERMEDIA'S POSITION: * No competing provider or providers of telephone exchange service are now providing such service to residential and business customers, either exclusively or predominantly over their own telephone exchange service facilities. The 1996 Act and the FCC's *Ameritech Order* require that business and residential customers be served by one or more qualifying facilities-based providers. The services being provided by the competing provider(s) must be, among other things, significant and geographically dispersed. *

ARGUMENT:

The 1996 Act and *Ameritech* state that when a BOC relies upon more than one competing provider to satisfy Section 271(c)(1)(A), each carrier need not provide service to both residential and business customers. Thus, this aspect of Section 271(c)(1)(A) is

met if multiple carriers collectively serve residential and business customers. Similarly, if the BOC is relying on a single provider to satisfy the requirements of Section 271(c)(1)(A), that competing provider must be providing service to both residential and business customers. In addition, while in *Ameritech* the FCC did not reach the question of whether a carrier that is serving a *de minimis* number of access lines is a "competing provider" under Section 271(c)(1)(A), the FCC did recognize that "there may be situations where a new entrant may have a commercial presence that is so small that the new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a "competing provider." (*Ameritech* ¶ 77) This suggests that something more than incidental service is required to satisfy the requirements of Section 271(c)(1)(A). As the evidence in this proceeding reflects, no competing provider or providers of telephone exchange service are now providing such service to residential and business customers, either exclusively or predominantly over their own telephone exchange service facilities.

ISSUE 1.B: Has BellSouth met the requirements of section 271(c)(1)(B) of the Telecommunications Act of 1996?

INTERMEDIA'S POSITION: * No, BellSouth has not met the requirements of Section 271(c)(1)(B) because several competing providers of telephone exchange service to residential and business customers have, at least three months prior to the date on which BellSouth may seek in-region inter LATA authority, requested the access and interconnection described in Section 271(c)(1)(A). Similarly, the Commission has not certified that any of the qualifying providers has delayed the negotiation or implementation process. *

ARGUMENT:

BellSouth has not met the requirements of Section 271(c)(1)(B) because, as the record in this proceeding reflects, several "qualifying requests" for access and interconnection have been submitted to BellSouth by competing providers of telephone exchange service in Florida.

ISSUE 1.B.(a): Has an unaffiliated competing provider of telephone exchange service requested access and interconnection with BellSouth?

INTERMEDIA'S POSITION: * Yes, several unaffiliated competing providers of telephone exchange service, including Intermedia, have requested access and interconnection with BellSouth. *

ARGUMENT:

BellSouth has not met the requirements of Section 271(c)(1)(B) because, as the record in this proceeding reflects, several "qualifying requests" for access and interconnection have been submitted to BellSouth by competing providers of telephone exchange service in Florida.

ISSUE 1.B.(b): Has a statement of terms and conditions that BellSouth generally offers to provide access and interconnection been approved or permitted to take effect under Section 252(f)?

INTERMEDIA'S POSITION: * No, BellSouth's SGAT has not been approved or permitted to take effect under Section 252(f). Moreover, BellSouth's untimely request that its SGAT be approved in this proceeding must be denied. *

ARGUMENT:

As discussed in this section, BellSouth's attempt to obtain approval of its SGAT in the context of the instant proceeding is procedurally defective. Moreover, consideration of the merits

compels rejection of the SGAT on the grounds that it fails to meet the pricing standards of the 1996 Act and *Ameritech*, and because most of the services it purports to offer are not currently available on a reasonable and nondiscriminatory basis.

The Request for Approval of the SGAT In the Instant Proceeding Is Procedurally Defective

Several BellSouth witnesses in this proceeding have testified that BellSouth is proceeding under Track A of the 1996 Act. BellSouth has explicitly stated in this proceeding that BellSouth relies upon its interconnection agreements to demonstrate compliance with checklist items actually purchased by competitors, but relies upon its SGAT to demonstrate compliance with those checklist items not yet purchased by competitors. As the FCC has recently determined in *Ameritech*, however, under Track A a BOC's ability to "provide" checklist elements must be based on its interconnection agreements, not on SGAT. The FCC determined that a BOC "provides" a checklist item under Track A in one of two ways, neither of which is an SGAT:

For the reasons discussed below, we conclude that a BOC "provides a checklist item if it actually furnishes the item at rates and on terms and conditions that comply with the Act or, where no competitor is actually using the item, if the BOC makes the checklist item available as both a legal and a practical matter. Like the Department of Justice, we emphasize that the mere fact that a BOC has "offered" to provide checklist items will not suffice for a BOC petitioning for entry under Track A to establish checklist compliance. To be "providing" a checklist item, a BOC must have a concrete and specific legal obligation to furnish the items upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item. Moreover, the petitioning BOC must demonstrate that it is presently ready to furnish each checklist item in the quantities that competitors may

reasonably demand and at an acceptable level of quality.
. . . (Ameritech ¶ 110 (footnotes omitted))

Similarly, the FCC elaborated on the distinction between the Track A requirement that BOC "provide" interconnection and access and the Track B requirement that it "generally offer" interconnection and access:

Reading the statute as whole, we think it is clear that Congress used the term "provide" [under Track A] as a means of referencing those instances in which a BOC furnishes or makes interconnection and access available pursuant to state-approved interconnection agreements and the phrase "generally offer" [under Track B] as a means of referencing those instances in which a BOC makes interconnection and access available pursuant to a statement of generally available terms and conditions. A statement of generally available terms and conditions on its face is merely a general offer to make access and interconnection available, reflecting the fact that no competing provider has made a qualifying request therefor. (Ameritech ¶ 114)

Thus, the FCC made it perfectly clear that an SGAT is irrelevant to a BOC's ability to meet the requirements of Track A. BellSouth's explicit admission that it is proceeding under Track A renders the SGAT irrelevant and immaterial for purposes of this proceeding.

Even if BellSouth had not admitted that it is proceeding under Track A, consideration of BellSouth's SGAT in this proceeding is inappropriate. Although BellSouth seeks approval of its SGAT in this proceeding, BellSouth has not complied with Section 252(f)(2). Specifically, Section 252(f)(2) requires BellSouth to comply with the pricing standards articulated in Section 252(d) and Section 251. With respect to the rates which BellSouth claims were the result of arbitration, the Commission specifically prohibited any

intervenor from participating in the arbitration proceedings. (See Order No. PSC-96-0933-PCO-TP, issued July 17, 1996). In fact, a number of parties in this proceeding have never been permitted for purposes of Section 271 to review the cost studies to determine whether BellSouth has met the pricing standards of 252(d). Nor has BellSouth filed the necessary cost information in this proceeding to determine whether it has complied with this standard. Thus, if the Commission relies on costs that were submitted in another docket where a number of parties, such as Intermedia, were prohibited from intervening, the Commission would violate Intermedia's and others' due process rights in this proceeding.

Finally, the Commission's consideration of the SGAT in this proceeding is improper because BellSouth has not complied with the Commission's procedural orders. On July 2, 1997, the Prehearing Officer issued Order No. PSC-97-0703-PCO-TL, Second Order Establishing Procedure, in this docket. Among other things, the Order directed BellSouth to file the following evidence on July 7, 1997:

2. Evidence to be relied upon demonstrating that each requirement of Section 271(c)(2)(B) has been met. BellSouth shall indicate with specificity which issue and checklist item it believes the evidence supports. (Order No. PSC-97-0703-PCO-TL, Second Order Establishing Procedure)

The Order contemplated that BellSouth would take steps to fulfill the requirements of Section 271(c)(2)(B) prior to filing its petition for Section 271 approval. Instead, BellSouth chose to evade the Commission's SGAT review under Section 251 and 252 by filing a draft SGAT and subsequently filing two more iterations of

the SGAT. BellSouth's failure to pursue SGAT approval prior to Section 271 filing demonstrates BellSouth's transparent attempt to circumvent the procedural requirements contemplated by the 1996 Act.

BellSouth's SGAT Fails to Meet the Pricing Standards of the 1996 Act.

Items (i) and (ii) of the Competitive Checklist require a BOC applying for in-region interLATA authority under Section 271 of the 1996 Act to provide interconnection and access to unbundled network elements, respectively. Section 252(d)(1) of the 1996 Act sets forth the pricing standards that apply to interconnection and unbundled network elements. In particular, Section 252(d)(1) provides:

(1) INTERCONNECTION AND NETWORK ELEMENTS CHARGES.--
Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--

(a) shall be--

(i) based on the cost (determined without reference to a rate of return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(b) may include a reasonable profit. (47 U.S.C. § 252(d)(1) (emphasis added))

BellSouth used several sources as the basis for the initial rates included in its SGAT. Where a rate was arbitrated, BellSouth incorporated the Commission's ordered rates into the SGAT. Where a rate was not arbitrated, BellSouth relied on a number of sources,

such as BellSouth's proposed price lists in the arbitration proceeding, voluntarily negotiated agreements, as well as existing tariffs. (Scheye, TR 395)

BellSouth's proposed rates are inconsistent with the pricing standards established in the 1996 Act. First, Section 251(d)(1) explicitly requires the involvement of the State commission in determining whether the rates are compliant with the pricing standards. In order for the rates to be in compliance with the pricing standards, the Commission must first determine the appropriate pricing methodology, and then determine the costs of the network elements by applying the pricing methodology found to be the consistent with the 1996 Act's requirements.

As to those rates which did not come from the Commission's arbitration proceedings, but rather were based on "proposed price lists" and tariffs, these, too, are inconsistent with the pricing standards of the 1996 Act. The Commission has not found these rates to be cost-based. Indeed, BellSouth has not provided cost data to support its assertion that the proposed rates are based on costs. Similarly, rates culled from existing tariffs are not necessarily based on the costing methodology contemplated by the 1996 Act.

Finally, with respect to those rates which came from negotiated interconnection agreements and which were never arbitrated, e.g., four-wire and two-wire POT Bay and cross-connect rates, (Scheye, TR 411) these rates were never subject to Commission review. The same is true of the rates for poles (TR

579) and daily usage file. (TR 580) Only during arbitration cases has the Commission examined costs pursuant to Section 252(d). Under Section 252(e)(2)(B), the Commission may reject arbitrated agreements if they do not meet the requirements of Section 251, including the FCC regulations promulgated thereunder, or the standards set forth in Section 252(d). In contrast, rates in negotiated interconnection agreements are exempt from 252(d) review. Section 252(e)(2)(A) only allows a Commission to reject a negotiated agreement if it discriminates against a telecommunications carrier not a party or is not consistent with the public interest, convenience or necessity. Moreover, Section 252(a)(1) permits an ILEC to enter into a binding agreement with a competing carrier without regard to the standards in Section 251(b) and (c). Section 251(c) specifically requires compliance with the pricing standards of Section 252(d). Therefore, the negotiated agreements are exempt from the Section 252(d) pricing standards. Indeed, Section 252(a)(1) permits an ILEC to negotiate rates which do not comply with the pricing standards of Section 252(d). Since BellSouth chooses to use rates in its SGAT that have been negotiated, BellSouth must prove that those negotiated rates comply with Section 252(d). BellSouth has not submitted any cost studies in this proceeding nor has the Commission evaluated those negotiated rates according to the pricing standards articulated in Section 252(d).

In addition to the fact that the rates proposed by BellSouth have not been found to be cost-based, some of the network elements

included in the SGAT do not even have rates associated with them. For example, the SGAT does not have a non-recurring rate for loop distribution.² Instead, the non-recurring rate for loop distribution is subject to a bona fide request ("BFR") process. (Scheye, TR 426) The BFR process is a merely a negotiating tool. Similarly, the SGAT does not include a rate for loop feeder. (TR 618) Section 252(d)(1) clearly requires that the rates for UNES must be based on costs. Because the SGAT does not contain, among other things, a nonrecurring rate for loop distribution, it is impossible to determine whether the rate ultimately arrived at in the BFR process will be cost-based. Similarly, the BFR process is an open invitation to price the loop distribution element well in excess of cost.

Moreover, during cross-examination by Intermedia's counsel, BellSouth witness Scheye testified that a competing carrier could negotiate with BellSouth to combine unbundled network elements, in which case a "glue" charge³ would apply. (Scheye, TR 744) Because this glue charge would be subject to negotiation, this is another

² "Loop distribution" is that part of the entire loop that begins at the customer's premise and generally runs to some cross-connect point where the smaller cable is met with larger cables that proceed from that point to the BellSouth central office. The loop itself is composed of at least two parts: the loop feeder, which is that part that connects directly to the central office; and loop distribution, which is the other half of that loop which connects to the customer's premises. (TR 881)

³ The term "glue charge" generally refers to the additional charge imposed to cover the costs associated with combining unbundled network elements. (See TR 345)

open invitation to charge well in excess of cost. As a result, the Commission cannot find that the SGAT meets the pricing standards set forth in the 1996 Act.

BellSouth does not Meet the "Availability Test" Enunciated in Ameritech.

In the *Ameritech*, the FCC concluded that a BOC "provides" a checklist item if it "actually furnishes the item at rates and on terms and conditions that comply with the Act, or, *where no competitor is actually using the item*, if the BOC makes the checklist item available as both a legal and a practical matter." (*Ameritech* ¶ 110 (emphasis added)) BellSouth suggests that it has fully implemented the items on the Competitive Checklist, and defines the phrase "fully implemented" to mean either that the items are actually in service or are in fact functionally available. For items that have not been requested, BellSouth makes the items available through the SGAT. (TR 146)

Outside of the fact that BellSouth may not utilize its SGAT to demonstrate compliance with the Competitive Checklist in a Track A proceeding, BellSouth clearly has not met its statutory obligations. Even assuming, *arguendo*, that BellSouth may rely upon its SGAT to demonstrate its ability to provide checklist items that have not been requested by competing carriers, BellSouth demonstrably fails because its SGAT lists several items that BellSouth is not presently capable of providing. For example, the SGAT lists the availability of unbundled subloops. However, BellSouth has not yet provided unbundled subloops to Intermedia despite repeated requests by Intermedia to obtain them. Similarly,

although the SGAT purports to offer DS-1 unbundled local loops, BellSouth has been unable to provision such loops within the same time frame it takes BellSouth to provision the same loops to its retail customers. (Strow, TR 2430)

ISSUE 1.C: Can BellSouth meet the requirements of section 271(c)(1) through a combination of both "track A" (Section 271(c)(1)(A)) and "track B" (Section 271(c)(1)(B))? If so, has BellSouth met all of the requirements of the section?

INTERMEDIA'S POSITION: * No, BellSouth cannot meet the requirements of section 271(c)(1) through a combination of both Track A and Track B. Congress envisioned two ways of authorizing BOC entry into the in-region interLATA market: (1) facilities-based competition via interconnection (i.e., Track A), or, (2) in the absence of qualifying requests, via an SGAT (i.e., Track B). These two tracks are mutually exclusive under the plain meaning of the statute. *

ARGUMENT:

Track A and Track B are mutually exclusive. The statutory framework of the 1996 Act clearly demonstrates that Congress intended the requirements of both tracks to be met independently of each other. Section 271(c)(1) states:

(1) AGREEMENT OR STATEMENT.--A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought. (47 U.S.C. § 271(c)(1) (emphasis added).

Section 271(c)(1) uses the coordinating conjunction "or," which suggests two separate alternatives. If Congress intended to allow a combination of Track A and Track B, Congress would have used the words "and" or "and/or" to evince such an intent. As discussed more fully below, BellSouth cannot meet the requirements of either Track A or Track B. Even assuming BellSouth may combine

Track A and Track B--which, as Intermedia points out, the 1996 Act does not contemplate--BellSouth has failed to demonstrate that it meets its obligations under Section 271(c)(1) through a combination of both Tracks.

The Track A/Track B Dichotomy

The 1996 Act provides two ways for BOC entry into the in-region interLATA market: entry through Section 271(c)(1)(A) or Track A, and entry through Section 271(c)(1)(B) or Track B. In order to meet the requirements of Track A, a BOC must demonstrate that "it is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers," and the telephone exchange service is being offered by the competing providers "either exclusively over their own . . . facilities or predominantly over their own . . . facilities in combination with . . . resale" (47 U.S.C. § 271(c)(1)(A)) Section 271(c)(1)(B), on the other hand, permits a BOC to seek entry under Track B if "no such provider" has requested the access and interconnection described in Section 271(c)(1)(A) three months prior to the date on which a BOC may apply to the FCC for in-region interLATA authority, and the BOC's SGAT has been approved or permitted to take effect by the relevant state regulatory commission. (47 U.S.C. § 271(c)(1)(B))

As discussed below, the plain language of the 1996 Act, and its interpretation by the FCC, makes clear that BellSouth is precluded from seeking 271 authorization via Track B.

BellSouth is Ineligible for 271 Authorization Under Track B.

The phrase "no such provider," as used in Section 271(c)(1)(B) refers to a potential competing provider of the telephone exchange service described in Section 271(c)(1)(A). This interpretation comports with the FCC's recent decision rejecting SBC Communications, Inc.'s Section 271 application. Specifically, the FCC found:

Congress intended to preclude a BOC from proceeding under Track B when the BOC receives a request for access and interconnection from a prospective competing provider of telephone exchange service, subject to the exception in section 271(c)(1)(B) Thus, we interpret the words "such provider" as used in section 271(c)(1)(B) to refer to a potential competing provider of the telephone exchange service described in section 271(c)(1)(A). We find it reasonable and consistent with the overall scheme of section 271 to interpret Congress' use of the words "such provider" in section 271(c)(1)(B) to include a potential competing provider. This interpretation is the more natural reading of the statute because . . . it retains the meaning of the term "request." . . . To give full effect to the term "request," we therefore interpret the words "such provider" to mean any such potential provider that has requested access and interconnection." *Application by SBC Communications, Inc. Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Oklahoma*, Memorandum Opinion and Order, CC Docket No. 97-121 (rel. June 26, 1997) ("SBC-Oklahoma Order" ¶ 34)

In light of this reading of the statute, potential providers of competitive local service have requested interconnection with BellSouth; as a result, BellSouth is precluded from obtaining in-region interLATA authority under Track B. The record in this proceeding demonstrates that BellSouth does not meet the requirements of Section 271(c)(1)(B) because several "qualifying requests" for access and interconnection have been submitted to BellSouth by competing providers of telephone exchange service in

Florida. In fact, Intermedia has such an interconnection agreement with BellSouth. Such interconnection agreements, if fully implemented, would result in the provision of telephone exchange service to residential and business subscribers in the manner described in Section 271(c)(1)(A). As long as these qualifying requests remain unsatisfied--and the record in this proceeding clearly demonstrates that these qualifying requests have not been fully satisfied by BellSouth--the requirements of Section 271(c)(1)(A) would remain unsatisfied, and BellSouth would remain foreclosed from obtaining in-region interLATA authority under Track B. (See SBC-Oklahoma Order ¶ 57) Indeed, BellSouth has acknowledged that the requirements of Track B are not met in this case. (TR 276-278)

BellSouth's argument that Track B automatically becomes available ten months subsequent to the enactment of the 1996 Act (Varner, TR 116) is in direct contravention of the overarching legislative objective of promoting facilities-based local exchange competition. As the FCC recently has reaffirmed:

Once a BOC has received a qualifying request for access and interconnection, Track B is available, by its terms, *only* "if the provider or providers making such a request have (i) failed to negotiate in good faith . . . , or (ii) violated the terms of an (approved) agreement . . . by failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement." (Ameritech ¶ 112 (emphasis added))

BellSouth is Ineligible for 271 Authorization Under Track A.

While BellSouth has entered into one or more binding agreements approved under Section 252 of the 1996 Act, the record in this proceeding indicates that BellSouth is not providing access

and interconnection to its network facilities as contemplated by Section 271(c)(1)(A). The 1996 Act requires meaningful facilities-based competition for business and residential customers as a condition-precedent to a BOC entry into the in-region interLATA market. At this time, none of BellSouth's competitors in Florida are providing telephone exchange service to both residential and business customers either exclusively over their own facilities or predominantly over their own facilities. Indeed, BellSouth has already conceded that it cannot seek in-region interLATA authority under Track A at this time. (Varner, TR 153) Moreover, BellSouth witness Alphonso Varner testified that BellSouth is not aware of competing providers of telephone exchange service providing service to residence and business customers predominantly over their own facilities in Florida. (Varner, TR 224)

A Threshold Determination Under Section 271(c)(1) is a Condition-Precedent to a Determination of Compliance with Section 271(c)(2)(B).

In this proceeding, BellSouth would have the Commission determine BellSouth's compliance with the Competitive Checklist without having first made a determination that BellSouth can, in fact, pursue in-region interLATA authority under either Track A or Track B. In effect, BellSouth would put the cart before the horse. BellSouth's assertion that the issue of which track BellSouth is permitted to follow is a "federal, not a state issue," (Varner, TR 110)⁴ is clearly inconsistent with the overall statutory framework

⁴ Mr. Varner also said "there has been no indication that [the] Commission will need to determine whether the correct track was followed" (TR 110)

of the 1996 Act. Section 271 clearly contemplates a threshold showing of satisfaction of either Track A or Track B before a determination as to whether a BOC's agreement or SGAT is compliant with the Competitive Checklist may proceed. Thus, a determination of eligibility under Track A or Track B under Section 271(c)(1) is a condition precedent to a determination of compliance with the Competitive Checklist under 271(c)(2)(B). In very simple terms, a Commission finding that BellSouth does not qualify under either track automatically precludes further consideration of whether BellSouth satisfies the Competitive Checklist. Indeed, in the *SBC-Oklahoma Order*, the FCC denied SBC Communications Inc.'s Section 271 application on the basis that SBC did not satisfy the requirements of Section 271(c)(1); the FCC found it "unnecessary to address SBC's compliance with the competitive checklist requirements set forth in section 271(c)(2)(B)." (*SBC-Oklahoma Order* ¶ 65)

Similarly, nothing in the 1996 Act suggests that the relevant State commission need not make a threshold determination of a BOC's eligibility under Track A or Track B. To the contrary, Section 271(d)(2)(B) states:

(B) CONSULTATION WITH STATE COMMISSIONS.--Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c). (47 U.S.C. § 271(d)(2)(B) (emphasis added))

Subsection (c) of Section 271 clearly encompasses the requirements of satisfying Track A or Track B and the Competitive

Checklist. Indeed, it would appear that a State commission would be remiss in its responsibility under the 1996 Act if it were not to make the threshold determination that the BOC applicant meets one of the two tracks for in-region interLATA entry. Because BellSouth has not satisfied the threshold showing under either Track A or Track B, BellSouth's application is premature.

ISSUE 2: Has BellSouth provided interconnection in accordance with the requirements of Section 251(c)(2) and 252(d)(1) of the Telecommunications Act of 1996, pursuant to 271(c)(2)(B)(i) and applicable rules promulgated by the FCC?

INTERMEDIA'S POSITION: * BellSouth has provided some level of interconnection to Intermedia, although to date some aspects of the BellSouth-Intermedia interconnection agreement remain unimplemented (unbundled frame relay loops and unbundled subloops not provided at technically feasible points of interconnection). In addition, at least one other carrier has complained of unacceptable trunk blockage rates and other deficiencies with interconnection. It appears that BellSouth has not produced sufficient evidence to support an affirmative answer to this issue. *

ARGUMENT

As reflected in the framing of the issue, checklist item (i) requires BellSouth to provide interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1). Section 251(c)(2) imposes upon incumbent LECs "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network ... for the transmission and routing of telephone exchange service and exchange access." To comply with this provision, BellSouth must provide interconnection,

at any technically feasible point within the carrier's network;

at least equal in quality to that provided by the local exchange carrier to itself or . . . (to) any other party to which the carrier provides interconnection; and

at "just, reasonable, and nondiscriminatory" rates, terms, and conditions in accordance with the requirements of Section 251(c) (2) and 252(d) (1) of the Telecommunications Act of 1996.

For BellSouth to satisfy the above "equal in quality" standard it must provide, *inter alia*, interconnection between its network and the network of the requesting ALEC that is at least indistinguishable from that which the BellSouth provides itself. (Local Interconnection Order at ¶ 224) For example, the FCC has stated that an incumbent LEC must design its "interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used within (its) . . . own network." (*Id.*)

Intermedia's experience with BellSouth with respect to this issue is that where interconnection has been provided, it has been satisfactory. Intermedia's problem with BellSouth, however, is that BellSouth has yet to implement some of the interconnection terms established in the negotiated agreement between Intermedia and BellSouth dated July 1, 1996. For example, as more fully developed in response to Issue 3, BellSouth has not provided unbundled frame relay loops and unbundled subloops at technically feasible points of interconnection despite repeated requests by Intermedia.

At least one other carrier specifically challenges BellSouth's compliance with 271(c) (2) (B) (i). Specifically, TCG contends that

BellSouth provides inferior interconnection. For example, TCG complains that BellSouth has not properly sized its network leading to unacceptable blockage of calls. In addition, TCG argues that BellSouth's refused to provide the following: direct end office trunking to TCG; meet-point billing records; interexchange carrier identification codes, and confirmation of SS7 point code translations. (Hoffman, TR 3423)

At the very least, TCG's complaint suggests that BellSouth has not met its affirmative obligation under the *Ameritech* decision to deploy the system, personnel, and assistance necessary for TCG to use this key entry strategy. (*Ameritech* ¶ 136) Moreover, in light of TCG's specific concerns about blockage, it would also appear, that BellSouth's blockage data is inadequate to establish by a preponderance of the evidence that interconnections actually furnished to ALECs are "at least equal in quality to that provided by . . ." BellSouth to itself.

ISSUE 3: Has BellSouth provided nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of the Telecommunications Act of 1996, pursuant to 271(c)(2)(B)(ii) and applicable rules promulgated by the FCC?

INTERMEDIA'S POSITION: * No, BellSouth has not provided Intermedia with access to unbundled network elements ("UNEs") (e.g., unbundled frame relay loops and unbundled subloops) at any technically feasible point consistent with the requirements of the 1996 Act. Similarly, because nondiscriminatory access to BellSouth's OSS is not completely available to Intermedia and other competing providers of telephone exchange services at parity with BellSouth, BellSouth is not providing nondiscriminatory access to network elements consistent with the 1996 Act. *

ARGUMENT:

In addition to the statutory requirements identified in the issue, the FCC has previously concluded that providing nondiscriminatory access to operations and support functions is a "term and condition" of unbundling network elements under Section 251(c)(3), or resale under Section 251(c)(4).

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98 (rel. Aug. 8, 1996) ("Local Competition Order"). Specifically, the FCC concluded:

(N)ondiscriminatory access to the functions of operations support systems, which would include access to the information they contain, could be viewed as a "term and condition" of unbundling other network elements under section 251(c)(3), or resale under section 251(c)(4). Thus, we conclude that, under any of these interpretations, operation support systems functions are subject to the nondiscriminatory access duty imposed by section 251(c)(3), and the duty imposed by section 251(c)(4) to provide resale services under just, reasonable, and nondiscriminatory terms and conditions. (*Local Competition Order* ¶ 517)

The FCC recently reaffirmed this requirement in *Ameritech*, and noted that in order for a BOC to demonstrate that it is providing the items enumerated in the Competitive Checklist (e.g., unbundled loops, unbundled local switching, resale services, etc.), it must demonstrate, *inter alia*, that it is providing nondiscriminatory access to the systems, information, and personnel that support those elements or services. (*Ameritech* ¶ 132)

Similarly, the FCC previously has found that OSS and the information they contain fall squarely within the definition of "network element" and must be unbundled upon request under Section 251(c)(3). (*Local Competition Order* ¶ 316) The obligation to

unbundled OSS upon request under the FCC's regulations has been left intact by the United States Court of Appeals for the Eighth Circuit. In rejecting the BOCs' assertion that the FCC's decision to require the ILECs to provide competitors with unbundled access to OSS unduly expands the ILECs' unbundling obligations beyond the statutory requirements, the Eighth Circuit concluded that OSS and other vertical switching features qualify as network elements that are subject to the unbundling requirements of the 1996 Act. The Eighth Circuit found that

the Act's definition of network elements is not limited to only the physical components of a network that are directly used to transmit a phone call from point A to point B. The Act specifically provides that "(t)he term 'network element' means a facility or equipment used in the provision of a telecommunications service." 47 U.S.C.A. § 153(29). Significantly, the Act defines "telecommunications service" as meaning "the offering of telecommunications for a fee directly to the public." *Id.* § 153(46). Given this definition, the offering of telecommunications services encompasses more than just the physical components directly involved in the transmission of a phone call and includes the technology and information used to facilitate ordering, billing, and maintenance of phone service--the functions of operational support systems. Such functions are necessary to provide telecommunications "for a fee directly to the public." *Id.* We believe that the FCC's determination that the term "network element" includes all the facilities and equipment that are used in the overall commercial offering of telecommunications is a reasonable conclusion and entitled to deference. *Iowa Utilities Board v. Federal Communications Commission*, Nos. 96-3321, 96-3406, et al. (8th Cir. 1997)

Sections 271(c)(2)(B)(ii) and 271(c)(2)(B)(xiv) expressly require a BOC to provide "nondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1) and to demonstrate that telecommunications services are available for resale in accordance with the requirements of

Sections 251(c)(4) and 252(d)(3). Because the duty to provide access to network elements under Section 251(c)(3) and the duty to provide resale services under Section 251(c)(4) include the duty to provide nondiscriminatory access to OSS functions, compliance with Sections 271(c)(2)(B)(ii) and 271(c)(2)(B)(xiv) necessarily requires compliance with applicable OSS requirements.

Compliance with OSS Requirements.

In its recent *Ameritech* decision, the FCC reaffirmed the importance of providing nondiscriminatory access to the BOCs' OSS. In rejecting the *Ameritech-Michigan's* Section 271 application, the FCC reaffirmed that new entrants must have equivalent access to the functions performed by the systems, databases, and personnel--i.e., OSS--that are used by the ILECs to support telecommunications services and network elements. The FCC further reaffirmed its finding in the *Local Competition Order* that, in order to meet the nondiscriminatory standard of OSS, an ILEC must provide to competing carriers access to OSS functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing that is equivalent to what it provides itself, its customers, or other carriers. (*Ameritech* ¶ 130)

The FCC also concluded that ILECs must generally provide network elements, including OSS functions, on terms and conditions that provide an efficient competitor with a meaningful opportunity to compete. Without equivalent access to the BOCs' OSS, the FCC found, many items required by the checklist, such as resale, unbundled loops, unbundled local switching, and unbundled local

transport, would not be practically available. Finally, the Commission reaffirmed its prior conclusion that ILECs must generally provide network elements, including OSS functions, on terms and conditions that "provide an efficient competitor with a meaningful opportunity to compete." (Ameritech ¶ 130)

Intermedia itemizes below some of the OSS requirements to which BellSouth must comply in order to satisfy its obligations under the 1996 Act:

- The BOC must provide to competing carriers access to OSS functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing that is equivalent to what it provides itself, its customers or other carriers. (Ameritech ¶ 130)
- The BOC must generally provide network elements, including OSS functions, on terms and conditions that provide an efficient competitor with a meaningful opportunity to compete. (Ameritech ¶ 130)
- The BOC must provide access to OSS functions provided by the BOC to competing carriers must sufficiently support each of the three modes of competitive entry strategies established by the 1996 Act: interconnection, unbundled network elements, and services offered for resale. (Ameritech ¶ 133)
- The BOC must provide access to all of the processes, including those existing legacy systems used by the BOC

to provide access to OSS functions to competing carriers.
(Ameritech ¶ 134)

- The BOC must deploy the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and provision of assistance to competing carriers to understand how to implement and use all of the OSS functions available to competing carriers.

(Ameritech ¶ 136)

- The BOC must develop sufficient electronic and manual interfaces to allow competing carriers to access all of the necessary OSS functions. For those functions that the BOC itself accesses electronically, the BOC must provide equivalent electronic access for competing carriers. (Ameritech ¶ 137)

- The BOC must provide competing carriers with the specifications necessary to instruct competing carriers on how to modify or design their systems in a manner that will enable them to communicate with the BOC's legacy systems and any interfaces utilized by the BOC for such access. (Ameritech ¶ 137)

- The BOC must provide competing carriers with all of the information necessary to format and process their electronic requests so that these requests flow through the interfaces, the transmission links, and into the legacy systems as quickly and efficiently as possible. (Ameritech ¶ 137)

- The BOC must disclose to competing carriers any internal "business rules," including information concerning the ordering codes that a BOC uses that competing carriers need to place orders through the system efficiently. (Ameritech ¶ 137)
- The BOC must ensure that its OSS are designed to accommodate both current demand and projected demand of competing carriers for access to OSS functions. (Ameritech ¶ 137)
- The BOC must ensure that the OSS functions it has deployed are operationally ready, as a practical matter (probative evidence that OSS functions are operationally ready is actual commercial usage). (Ameritech ¶ 136)
- The OSS functions provided by the BOC to competing carriers must actually be handling current demand and will be able to handle reasonably foreseeable demand volumes. (Ameritech ¶ 138)
- For OSS functions provided to competing carriers that are analogous to OSS functions that a BOC provides to itself in connection with retail services, the BOC must provide access to competing carriers that is equal to the level of access that the BOC provides to itself, its customers, or its affiliates, in terms of *quality, accuracy, and timeliness*. Equivalent access includes comparisons of analogous functions between competing carriers and the BOC, even if the actual mechanism used to perform the

function is different for competing carriers than for the BOC's retail operations. (Ameritech ¶ 139)

- For those OSS functions that have no retail analogue, such as the ordering and provisioning of unbundled network elements, the BOC must demonstrate that the access it provides to competing carriers satisfies its duty of nondiscrimination because it offers an efficient competitor a meaningful opportunity to compete. (Ameritech ¶ 141)

- There must exist specific performance standards for OSS functions (either adopted by a state commission in an arbitration decision or unilaterally adopted by the BOC outside of its interconnection agreement). (Ameritech ¶ 141)

As discussed below, BellSouth's provision of OSS does not satisfy the requirements the FCC has recently found to be critical in determining BOC compliance with the 1996 Act.

BellSouth has not Demonstrated that the OSS Access Provided to Competing Carriers is Equivalent to the OSS Access it Provides to Itself in Terms of Quality, Accuracy, and Timeliness.

BellSouth's uses an integrated pre-ordering and ordering system when it places its own orders. (TR 1420) In contrast, competing carriers are offered separate interfaces for pre-ordering and ordering. For example, to place an order for a loop, an ALEC would need to validate the customer address through the LENS system. Then, to place the actual order, the ALEC must use the EDI system. In contrast, BellSouth can obtain pre-ordering information

and place a residential order at the same time using RNS. (TR 1231) Moreover, unlike BellSouth's integrated system, LENS does not interact or communicate directly with the ALEC's own OSS. Although BellSouth asserts that the ALEC could choose to integrate the data from LENS with the ALEC's OSS by taking the information available through LENS and putting it into the ALEC system, the processes involved are onerous, cumbersome, time-consuming, and otherwise resource-intensive. For example, BellSouth suggests that information from the LENS system can be "migrated" to the ALEC OSS through cut-and-paste. (Calhoun, TR 1171) This process of moving from one system to another takes significant time and effort. The amount of time wasted and human resources consumed expands exponentially as the number of ALEC orders increases. Other solutions offered by BellSouth would require the ALECs to develop software to move information from LENS to the ALECs' OSS.

Moreover, the interfaces provided by BellSouth to itself generally are better, if not altogether superior, than those provided to ALECs. For example, through EDI, an ALEC cannot validate an address. In contrast, through DOE and RNS, BellSouth can validate addresses. An ALEC cannot obtain customer service record ("CSR") information from EDI. In contrast, BellSouth can obtain CSR information through RNS. An ALEC cannot calculate a due date via EDI. In contrast, RNS and DOE can calculate a due date. Similarly, there are services that a BellSouth representative can order electronically through RNS that an ALEC cannot order electronically through either EDI or LENS. (Calhoun, TR 1248) In

addition, despite the Commission's Order requiring that ALECs be allowed access to payment history, BellSouth has not yet implemented that capability. (TR 1272) The record in this proceeding clearly demonstrates that BellSouth does not provide access to OSS at parity.

Similarly, BellSouth has not demonstrated--nor can it--that the amount of time required of ALECs to process an order using LENS or EDI is comparable to the time it takes BellSouth to process a similar order using DOE or RNS:

Q: Okay. Could you show me where on this exhibit the data exists that supports your statement that the access times are, quote, substantially the same, end of quote?

A: Well, first, I don't think my statement was that the access times are the same. What I was talking about was not in the sense of performance measurements whether something is two tenths of a second or two seconds or that sort of thing. When I say in substantially the same time and manner, what I am saying is that both systems have real time interactive access to the same data bases so that when a BellSouth customer is on the phone with a BellSouth service representative or an ALEC customer is on the phone with an ALEC service representative that they both are able to get to information in the same data base during the course of that customer contact. (Calhoun, TR 1342)

BellSouth suggests--quite erroneously--that it meets its OSS obligations by giving "real time interactive access to the same data bases" (TR 1342) from which BellSouth obtains its ordering and pre-ordering information. That, however, is insufficient in and of itself. Without a demonstration that there is equivalent access to OSS in terms of quality, accuracy, and timeliness, BellSouth has not demonstrated nondiscriminatory access to OSS.

BellSouth has No Formal Processes in Place for Informing Competing Carriers of Changes in OSS Interfaces.

Of critical importance to competing carriers is the ability to receive up-to-date information on OSS functionalities as changes occur. BellSouth has, time and again, stated that its OSS functionalities and related processes are the same in the entire BellSouth territory. BellSouth relies on conferences and the account teams serving the ALECs to apprise them of changes in the interfaces. (Calhoun, TR 1334) These methods of information dissemination are unreliable and ineffective. The first method presumes that ALECs will always have representatives at conferences conducted by BellSouth. Considering the limited resources of smaller ALECs, it may not always be possible for them to send representatives to conferences. The second method presumes that BellSouth's account representatives will always have up-to-date information. Intermedia's experience proves that this is not always the case. For example, BellSouth witness Calhoun states that EDI interface was available in December of 1996. Nevertheless, Intermedia was not informed by BellSouth of EDI and LENS availability until a CLEC conference in April of 1997. (TR 3076) Thus, if management at BellSouth believed alternatives to manual processing were realistically available to CLECs in January 1997, that message did not get out to Intermedia's account team. Moreover, Intermedia has responded prudently and timely to the availability of the electronic interfaces. (TR 3076)

Based on the record, BellSouth has not demonstrated that it has a more formalized process for communicating interface changes

in the OSS interfaces to ALECs as needed on a going-forward basis. Competing carriers need up-to-date OSS information in order to compete meaningfully and at parity with BellSouth. Unless and until BellSouth has a process in place for disseminating information relevant to its OSS, BellSouth has not demonstrated nondiscriminatory access to OSS and associated processes.

BellSouth's Own Commissioned Study Demonstrates that BellSouth's Order Processing System Provides Inferior Service to Competitive Carriers.

In the direct testimony and cross-examination responses of two BellSouth witnesses, it has been determined that the Local Carrier Service Center ("LCSC") is a critical part of BellSouth's operations support systems, and that the functioning of this organization directly impacts the quality of unbundled network elements and resold services that BellSouth provides to competitive carriers. As Intermedia discusses below, however, reports commissioned by BellSouth on the performance of its LCSC demonstrate that BellSouth is currently incapable of processing ALEC orders for network elements and resale services in a reasonable and nondiscriminatory manner.

The function of the LCSC.

The LCSC is the organization within BellSouth that handles all ALEC orders for unbundled network elements and resold services that are processed manually. This includes the processing of orders for all complex unbundled network elements and services; and all types of orders that are rejected by BellSouth's automated interfaces. For example, orders submitted by ALECs through either EDI or LENS

are first checked for errors by BellSouth's Local Exchange Ordering ("LEO") database. If the order passes the edit check, LEO will pass the order to BellSouth's Local Exchange Service Order Generator ("LESOG") for mechanized order generation; orders that do not pass the edit check are passed on to the LCSC for further handling. For complex services, the LCSC's role is even more critical. For example, the ordering processes for unbundled DS-1 loops -- which Intermedia has requested from BellSouth -- or for unbundled data circuits such as HDLC and ADLC -- which BellSouth has included in its SGAT -- requires the LCSC, acting on behalf of the ALEC, to type the final service order into the ordering system. In short, as witness Scheye testified, the LCSC is the interface with the ALECs for orders. (Scheye, TR 676)

The LCSC processes only orders submitted by ALECs. Orders for retail services that BellSouth provides to its customers are processed by other organizations within BellSouth, such as BellSouth's Data Service Center, which processes orders for BellSouth's DS-1 service and other data-oriented retail services. See generally (Calhoun, TR 1392; Scheye, TR 677)

The LCSC is a Critical Determinant of the Quality of Service BellSouth Provides to ALECs.

Because the LCSC plays such a major role in BellSouth's ability to provide nondiscriminatory access to unbundled network elements and resale services, it is critical that the BellSouth employees comprising the LCSC have the necessary skill level and competence to fulfill their important function. Moreover, if BellSouth is to provide network elements and resold services to

ALECs in a manner that is at parity with the service BellSouth provides to itself and its own customers, the LCSC must function in a manner that is equivalent to the Data Service Center and other organizations that process retail service orders within BellSouth.

BellSouth witness Scheye acknowledged in this proceeding that the job performed by LCSC personnel can affect the effectiveness of BellSouth's OSS where an order requires manual intervention. (Scheye, TR 676)

As Intermedia discusses below, documents produced by BellSouth abundantly demonstrate that the LCSC is understaffed, undertrained, and otherwise lacks the requisite level of skills necessary to support the ALECs. These reports substantiate the complaints of Intermedia and other ALECs in this proceeding that BellSouth is providing them with service that is inferior to that which BellSouth provides to itself and to its retail customers, and compel the conclusion that BellSouth cannot meet the OSS standards established by the 1996 Act and by the FCC.

Reports Commissioned by BellSouth Demonstrate that the LCSC provides inferior and discriminatory service to ALECs.

During the course of discovery in this proceeding, BellSouth produced copies of a series of BellSouth-commissioned reports conducted by an outside consultant that examined the functioning of BellSouth's LCSC. The series consists of an initial evaluation of the LCSC conducted on March 13, 1997, and follow-up reports dated April 23, July 8 and August 15, 1997 (collectively EXHs 21 and 22). These reports paint a picture of an LCSC that is understaffed, whose personnel are inadequately trained and supervised, and whose

proficiency in processing orders from ALECs is astoundingly inadequate.

The March 13 report reflects a 10-day audit of LCSC activities conducted by the consultant between March 3 and March 13. The results of the audit compelled the consultant to report the following conclusions:

- * During the entire 10-day period, no supervisor was ever seen training a member of the LCSC staff. (EXH 21, March 13 Report at 002772, 002775)
- * Supervision is ineffective. (*Id.* at 002775 - 002777)
- * Employees are undertrained and deficient in skills. (*Id.* at 002773)
- * Excessive errors and rework are lowering the quality of your service due to missed dates and excessive lead times. (*Id.* at 002773)
- * The current level of errors is alarming due to the low volume level and the fact that current employees whom we studied have been on their current jobs from four months to a year. (*Id.* at 002773)
- * No systems are in place to "evaluate performance by individual or work group." (*Id.* at 002786)

After receiving this initial report, BellSouth hired the consultant to establish new work flow processes, training programs and other measures to improve LCSC performance. The subsequent reports from the consultant state that significant progress has been made, and that many of the problems identified in the March 13 report have been fixed. Even so, the later reports still identify a grossly inadequate level of performance. For example, the July 8 report states that the "Percent of calls abandoned is about 17%."

(EXH 22, July 8 Report at 5) While this is reported as a 23% improvement over the preceding month, this figure still indicates a wholly inadequate level of service to ALECs.

Similarly, the July 8 report states that, of all the requests for service submitted by AT&T and MCI during the week of June 25, 64.6% of the orders were rejected and returned to AT&T and MCI. (*Id.* at 2) The report further states that, on average, MCI and AT&T had to resubmit the orders 1.7 times before they were finally processed. (*Id.* at 2) The report does not mention the quality of service provided to ALECs other than AT&T and MCI. While the consultant issued another report on August 15, 1997, that report did not address the percent of ALEC orders that were rejected and the average resubmission rate. Therefore, the data provided in the July 8 report is the most recent data in the record of this proceeding.⁵

The most recent report was issued on August 15, 1997. While it states that many of the earlier-reported problems in supervision, work flow processing, and employee training have been fixed, the report makes clear that the new systems have not been

⁵ In addition, the July 8 report notes that the measures of LCSC performance that are documented employ both real orders and fictitious orders used as a work simulation. July 8 Report, at 5. The report does not identify what percentage of the orders reflected in the tests represents fictitious, as opposed to real orders. The August 15 report, however, does indicate that the level of fictitious orders is 10-17%. (EXH 22, August 15 Report, at 8) It is impossible to tell from the report if this level of fictitious orders skewed the service quality measurements included in the reports, and resulted in more favorable performance than a test based entirely on real orders.

implemented yet. The report states that "we are developing" a new training organization; (EXH 22, August 15 Report at 3) that key employees "will report" to department heads; (*Id.* at 3) a copy of a new Procedures Manual "will be prepared" for a manager; (*Id.* at 4) a Performance Improvement Plan "is still in process;" (*Id.* at 5) and that 50 additional service representatives will be hired. (*Id.* at 8) As the language of the report makes clear, most of the systems and processes have yet to be fully implemented, and the full staff of the LCSC has yet to be hired. In fact, the final report made available by BellSouth does not even pretend to have evaluated a fully staffed LCSC operating under the new systems and procedures that are intended to remedy the gross deficiencies identified in the March 13 report.

In sum, the reports commissioned by BellSouth provide compelling evidence that the quality of service provided to ALECs out of BellSouth's LCSC is grossly deficient, and clearly inferior to the standards of order processing that BellSouth provides to itself and its retail customers. Moreover, Intermedia notes that the tests conducted in the latter reports have not been subject to review or confirmation by the Commission or by any interested parties. The record therefore presents a *prima facie* case that the BellSouth LCSC is inadequate to provide reasonable and nondiscriminatory service to ALECs.

The Record in this Proceeding Demonstrates that BellSouth's LCSC Fails to Meet the OSS Standards Established by the FCC for 271 Authorization.

In *Ameritech*, the FCC established the standard of performance it requires of a BOC's operations support systems before 271 authority can be granted:

In assessing a BOC's operations support systems, we conclude that it is necessary to consider all of the automated and manual processes a BOC has undertaken to provide access to OSS functions to determine whether the BOC is meeting its duty to provide nondiscriminatory access to competing carriers. (*Ameritech* ¶ 134 (emphasis added))

* * *

For example, although the Commission has not required that incumbent LECs follow a prescribed approach in providing access to OSS functions, we would not deem an incumbent LEC to be providing nondiscriminatory access if limits on the processing of information between the interface and the legacy systems prevented a competitor from performing a specific functions in substantially the same time and manner as the incumbent performs that function for itself. (*Ameritech* ¶ 135)

The BellSouth-commissioned reports on the functioning of its LCSC clearly demonstrate an order processing system that is inferior to the internal systems the BellSouth employs to provide services to its own retail customers. The original analysis conducted on March 13 illustrates a department that is in complete disarray, and is wholly incompetent to process ALEC orders. While subsequent reports indicate substantial improvement over the state of the LCSC in March of this year, they still demonstrate levels of service to ALECs that are fundamentally unacceptable: the most recent studies show that 65% of the orders submitted by AT&T and MCI were rejected, and that, on average, they had to be resubmitted almost two times. Moreover, the reports that many of the problems

identified with the LCSC on March 13 are based on studies that include fictitious test orders as well as real orders submitted by ALECs.

In short, the LCSC reports commissioned by BellSouth fully support the statements by Intermedia and other ALECs that BellSouth is not processing their orders for unbundled elements and resold service in a reasonable and timely manner, and that the service they obtain from BellSouth is inferior to the service BellSouth provides to itself and its retail customers. BellSouth bears the burden of proof in demonstrating that it is providing nondiscriminatory access to the operations support systems necessary to provide ALECs with unbundled network elements and resale services. (See *Ameritech* ¶ 132) It is incumbent upon BellSouth to demonstrate that the inferior functionality of the LCSC identified in its commissioned reports has been cured, and that the LCSC is processing orders with the same speed and competence that its Data Service Center and other internal order processing organizations process orders for BellSouth's retail services. BellSouth has not even attempted to meet this burden, and the record in this proceeding provides no data that allows a responsible comparison between BellSouth's internal order processing functions and those performed by the LCSC. Absent a showing that BellSouth's internal organizations function at parity with the LCSC, the Commission is compelled to find that BellSouth has failed to demonstrate nondiscriminatory access to its OSS, and so fails to meet the requirements for 271 authorization.

ISSUE 3(a): Has BellSouth developed performance standards and measurements? If so, are they being met?

INTERMEDIA'S POSITION: * No. BellSouth has not developed performance standards and measures specifically to Intermedia. Such performance standards necessarily should focus on both traditional voice services and advanced data services provided by BellSouth. Moreover, BellSouth has not provided the necessary empirical data for the Commission to determine whether BellSouth is actually providing access to its network that is nondiscriminatory.*

ARGUMENT:

Performance Measures under the 1996 Act and Ameritech

The 1996 Act obligates BOCs to provide access to services, unbundled network elements, and databases and other network functionalities in a manner that does not discriminate against interconnected carriers, and that is in parity with the quality of service that BellSouth provides to itself, its subsidiaries and its own customers. (47 U.S.C. §§ 251, 252) These performance standards and measurements are necessary to determine whether BellSouth is actually providing access to its network that is nondiscriminatory.

The FCC established the empirical evidence upon which it could determine whether Ameritech is providing nondiscriminatory access to OSS functions. (Ameritech ¶ 212) The FCC found that it is essential to have such empirical evidence necessary to make a reasoned and informed decision.

Specifically, the FCC found that Ameritech should include the following performance data in a subsequent application: 1) average installation intervals for resale; 2) average installation intervals for loops; 3) comparative performance information for

unbundled network elements; 4) service order accuracy and percent flow through; 5) held orders and provisioning accuracy; 6) bill quality and accuracy; and 7) repeat trouble reports for unbundled network elements. (Id.) Moreover, performance measurements need to be clearly defined, permit comparisons with the BOC's retail operations, and must be sufficiently disaggregated to permit meaningful comparisons. (Id.)

BellSouth's Inadequate Performance Measures

BellSouth has not developed performance standards and measures specifically to Intermedia. Intermedia proposes that the Commission adopt, as a starting point, the standards proposed by the Local Competition User Group (LCUG), which is consistent with standards recommended by some of the other parties. (Strow, TR 2402 and EXH 76 (JS-1); Pfau, TR 2158; Kinkoph, TR 2500-2502; and Ball, TR 3383) BellSouth and AT&T have negotiated some performance measurements for some items in their Interconnection Agreement, that have been incorporated into BellSouth's proposed SGAT. BellSouth's witness, Mr. Stacy, admits that its proposed measures are just a starting point. (Stacy, TR 1537)

In this proceeding, BellSouth has not provided the empirical data necessary for the Commission to make a reasoned and informed decision. BellSouth has failed to meet the standards that the FCC will use to evaluate performance measurements.

Upon cross-examination of Mr. Stacy, BellSouth admitted that it has not submitted specific performance measurements for the following items: 1) interim number portability cut over duration

(Stacy, TR 1549); 2) average installation interval for resale (Stacy, TR 1560); 3) average installation interval for loops (Stacy, TR 1560); 4) percentage of orders that require manual intervention (1561-1562); 5) average installation interval for unbundled local switching (Stacy, TR 1562); 6) percentage of orders rejected as percentage of total CLEC orders placed (Stacy, TR 1562-1563); BellSouth system downtime (Stacy, TR 1564); 10) completion notification timeliness (Stacy, TR 1564-65); 11) timeliness of rejects (Stacy, TR 1567); 12) timeliness of BellSouth sending Firm Order Confirmations to CLECs; and 13) average installation intervals for purchase of combination of UNES. (Stacy, TR 1584)

Also, the Local Interconnection Unbundled Loops Interim Report and the Resale Parity Report (EXH 51) do not meet the guidelines established by the FCC. For example, although this is a "parity report," BellSouth has not provided sufficient information to compare parity to BellSouth-Florida operations. At best, BellSouth has provided BellSouth-Florida specific information only for two months in its Loop Interconnection Report and one month for its Resale Parity Report. Another significant deficiency is that these charts only follow orders that were not rejected and do not reflect the problems in entering CLEC orders in BellSouth's systems. (Stacy, TR 1618); (Chase, TR 3074) Data tracking due dates met appear to hide the full impact of modification of due date on competing carriers. (Ameritech ¶ 181) Also, BellSouth has not specifically identified "winbacks" to BellSouth in these reports.

BellSouth has merely included winbacks in the BellSouth number as a new connection but not separately identified. (Stacy, TR 1636-37)

BellSouth also admitted that it measures the following items for CLECs at the LCSC; however, it does not currently measure these items for analogous functions it performs for itself for retail purposes: percent first time quality; service orders pending on the questionable; order process duration; and percent LSRs processed within the first 48 hours. (Stacy, TR 1638-1641) BellSouth measures percent calls abandoned only for the Customer Services Organization, one of three organizations internal to BellSouth that provide the same functions for processing orders for BellSouth's own customers. (Stacy, TR 1638) In fact, BellSouth does not even measure percentage of clarifications for itself for its retail customers. (Stacy, TR 1640)

Moreover, the FCC has directed Ameritech to provide empirical evidence that must be sufficiently disaggregated to permit meaningful comparisons. (Ameritech ¶ 212) BellSouth must provide empirical evidence of parity for CLECs, such as Intermedia, that offer substantial data offerings. The data presented by BellSouth, however, focus on traditional voice services and do not specifically address many of the advanced data services provided by BellSouth. (Stacy, TR 1636) BellSouth simply has not sufficiently disaggregated its data to provide meaningful comparisons for the data services it provides. In fact, BellSouth admitted that it has not produced a report that covers the special services. (*Id.*)

The FCC established in *Ameritech* that for those OSS functions that have no retail analogue, such as the ordering and provisioning of unbundled network elements, the BOC must demonstrate that the access it provides to competing carriers satisfies its duty of nondiscrimination because it offers an efficient competitor a meaningful opportunity to compete. (*Ameritech* ¶ 141) BellSouth admitted that it takes longer to provide the following unbundled network elements to its CLEC customers than it takes to provide the equivalent services to BellSouth's own retail customers: 2 wire analogue loop versus B-1; unbundled DS-1 versus retail DS-1; unbundled Basic Rate ISDN versus retail ISDN; and unbundled Primary Rate ISDN versus retail ISDN. (*Stacy*, TR 1624-1631) BellSouth also admitted that it is establishing different standards for services provided to resale customers, whether they are retail customers of BellSouth and CLECs, and customers purchasing UNEs because the processes and intervals are still somewhat different. (*Stacy*, TR 1625-1626)

This Commission should require BellSouth to provision high-capacity and data circuits to CLECs using provisioning intervals consistent with Commission regulations and/or approved BellSouth tariffs. For example, BellSouth should commit to provisioning DS-1, DS-3 and other digitally-conditioned loops (e.g., ISDN) consistent with Commission regulations and/or BellSouth tariffs. (*Strow*, TR 2441) Otherwise, efficient competitors will not have a meaningful opportunity to compete, because it will be impossible for competitors to compete with

BellSouth in essentially the same time frame for customers seeking equivalent services.

It is critically important to competing carriers that performance measurements and reporting requirements exist against which BellSouth's nondiscrimination and parity obligations can be measured. Only by having quantifiable and easily ascertainable performance measures and reporting requirements can the Commission appropriately gauge whether the requirements of the 1996 Act are being met. BellSouth has not submitted the empirical evidence that is essential for the Commission to make a reasoned and informed decision.

ISSUE 4: Has BellSouth provided nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by BellSouth at just and reasonable rates in accordance with the requirements of section 224 of the Communications of 1934 as amended by the Telecommunications Act of 1996, pursuant to 271(c)(2)(B)(iii) and applicable rules promulgated by the FCC?

INTERMEDIA'S POSITION: * No. Although the BellSouth-Intermedia interconnection agreement provides for nondiscriminatory access to poles, ducts, and conduits, Intermedia has little, if any, experience within this matter. *

ISSUE 5: Has BellSouth unbundled the loop transmission between the central office and the customer's premises from local switching or other services pursuant to section 271(c)(2)(B)(iv) and applicable rules promulgated by the FCC?

INTERMEDIA'S POSITION: * No. BellSouth has not provided Intermedia with access to requested certain unbundled network elements and thus not provided Intermedia with unbundled loop transmission. In particular, BellSouth has not provided Intermedia with unbundled digitally conditioned loops and unbundled subloops in conformity with Section 271(c)(2)(B)(iv) of the 1996 Act. *

ARGUMENT:

As previously discussed, Intermedia has requested local loop transmission from BellSouth pursuant to Section 271(c) (2) (B) (iv) of the 1996 Act but BellSouth has not provided the requested local loops. To reiterate briefly, Intermedia has requested but not received 4-wire digitally conditioned loops, which loops are critical to Intermedia's business plan.

Intermedia remains uncertain as to why BellSouth has failed to provide the requested UNEs. As Intermedia's witness, Ms. Strow, observed, several possible explanations suggest themselves:

Perhaps the requested UNEs raise technical and administrative issues that take time to resolve;

Perhaps there are communication problems and bureaucratic delays within BellSouth;

Perhaps BellSouth is failing to allocate the resources necessary for implementation; or

Perhaps BellSouth is intentionally to delay facilities-based competition by "slow-rolling" the implementation process.

(TR 2384-2385)

Irrespective of the reason for the failure to implement the Interconnection Agreement, the end-result is the same: BellSouth has impaired Intermedia's ability to provide widespread facilities-based local exchange service through UNEs in Florida and delayed Intermedia's entry as a facilities-based carrier into the local exchange market in Florida. (EXH 79 at 248)

In addition to not providing certain requested loops, BellSouth was unable to provide timely to Intermedia DS-1 unbundled local loops. As previously noted, BellSouth has not deployed the

systems that allow for the efficient submission of orders for such circuits or for their timely provisioning. To reiterate, in late May Intermedia submitted an order for a DS-1 loop it took BellSouth six weeks to complete the order. Again, when a BellSouth customer orders a DS-1 service from BellSouth, provision is typically achieved in one or two weeks. Thus, BellSouth has not provided unbundled the loop transmission between the central office and the customer's premises from local switching or other services as required by section 271(c)(2)(B)(iv) and applicable rules promulgated by the FCC.

ISSUE 6: Has BellSouth unbundled the local transport on the trunk side of a wireline local exchange carrier switch from switching or other services, pursuant to section 271(c)(2)(B)(v) and applicable rules promulgated by the FCC?

INTERMEDIA'S POSITION: * No. BellSouth has not provided Intermedia with access to requested UNEs and, as a result, BellSouth has not provided Intermedia with unbundled local transport in a usable manner consistent with Section 271(c)(2)(B)(v). *

ARGUMENT:

Intermedia has no direct experience with ordering unbundled local transport. Nevertheless, based on BellSouth's failure to provide Intermedia requested unbundled network elements, including key OSS functionalities, it appears that BellSouth cannot in this proceeding demonstrate by a preponderance of the evidence that this checklist item has been satisfied.

Intermedia's negative inferences about local transport appear to be supported by direct evidence of several of the parties in this proceeding. For example, AT&T, MCI, WORLDCOM, SPRINT/SMNI,

and FCCA all contend that unbundled local transport has not been provided in conformity with Section 271(c)(2)(B)(v), the Ameritech and the Local Transport Order. Intermedia anticipates that these parties will more fully brief the Commission on these contentions.

ISSUE 7: Has BellSouth provided unbundled local switching from transport, local loop transmission, or other services, pursuant to section 271(c)(2)(B)(vi) and applicable rules promulgated by the FCC?

INTERMEDIA'S POSITION: * No. BellSouth has not provided Intermedia with access to UNEs and, as a result, BellSouth has not provided Intermedia with local switching unbundled from transport, local loop transmission, or other services consistent with Section 271(c)(2)(B)(vi). *

ARGUMENT:

Intermedia has no direct experience with ordering unbundled local switching. Nevertheless, based on BellSouth's failure to provide Intermedia requested unbundled network elements, including key OSS functionalities, it appears that BellSouth cannot in this proceeding demonstrate by a preponderance of the evidence that this checklist item has been satisfied. Moreover, Intermedia is not aware of record evidence that BellSouth is providing unbundled local switching to other communications carriers.

Intermedia's negative inferences about BellSouth's inability to provide non-discriminatory unbundled local switching appear to be supported by direct evidence of at least two of the parties in this proceeding. Specifically, both AT&T and FCCA contend that BellSouth has failed to provide non-discriminatory access to unbundled switching, as a separate element and in combination with other elements, and that BellSouth cannot provide automatic billing

for unbundled switching at parity with what it provides itself. Intermedia anticipates that AT&T and FCCA will more fully brief the Commission on these contentions.

ISSUE 8: Has BellSouth provided nondiscriminatory access to the following pursuant to section 271(c)(2)(B)(vii) and applicable rules promulgated by the FCC:

(a): 911 and E911 services;

(b): directory assistance services to allow the other telecommunications carrier's customers to obtain telephone numbers; and

(c): operator call completion services?

INTERMEDIA'S POSITION: * BellSouth has provided Intermedia with access to checklist item (vii) services but only to the extent limited local exchange service is being provided by Intermedia over Intermedia's local exchange facilities. To the extent that Intermedia has requested such access in association with requested UNES, BellSouth has not provided nondiscriminatory access to such services. Intermedia does not know whether BellSouth will be able to provide access to such services in connection with requested UNES. *

ARGUMENT:

Intermedia requires interconnection to 911 and E911 services in conjunction with other requested UNES to provide telecommunications services. Because BellSouth has not yet provided Intermedia with the requested UNES, BellSouth also has not provided Intermedia with nondiscriminatory access to 911 and E911 services pursuant to Section 271(c)(2)(B)(vii) of the 1996 Act. Moreover, because BellSouth has not yet furnished these services in connection with the requested UNES, BellSouth must demonstrate with reliable operational data that such services are available as practical matter, i.e., that it is operationally ready to furnish

the item in quantities that competitors may reasonably demand and at an acceptable level of quality. BellSouth has not produced such data in this proceeding.

ISSUE 9: Has BellSouth provided white pages directory listings for customers of other telecommunications carrier's telephone exchange service, pursuant to section 271(c)(2)(B)(viii) and applicable rules promulgated by the FCC?

INTERMEDIA'S POSITION: * BellSouth has provided very limited white pages directory listings for Intermedia's customers. Intermedia does not know, however, if BellSouth will be able to provide such listings in connection with unbundled network elements, which BellSouth has not yet been able to provide. *

ARGUMENT:

Because BellSouth has not yet provided Intermedia with the requested UNEs, BellSouth also has not provided Intermedia with white pages directory listings for customers as contemplated under section 271(c)(2)(B)(viii) and applicable rules promulgated by the FCC, which are designed to assure non-discriminatory access to checklist items. Additionally, because BellSouth has not yet furnished these services in connection with the requested UNEs, BellSouth must demonstrate with reliable operational data that such services are available as practical matter, i.e., that it is operationally ready to furnish the item in quantities that competitors may reasonably demand and at an acceptable level of quality. BellSouth has not produced such data in this proceeding.

ISSUE 10: Has BellSouth provided nondiscriminatory access to telephone numbers for assignment to the other telecommunications carrier's telephone exchange service customers, pursuant to section 271(c)(2)(B)(ix) and applicable rules promulgated by the FCC?

INTERMEDIA'S POSITION: * Yes, BellSouth has provided nondiscriminatory access to telephone numbers to Intermedia. *

ISSUE 11: Has BellSouth provided nondiscriminatory access to data bases and associated signaling necessary for call routing and completion, pursuant to section 271(c)(2)(B)(x) and applicable rules promulgated by the FCC?

INTERMEDIA'S POSITION: * No, BellSouth has not provided Intermedia with nondiscriminatory access to databases and associated signaling necessary for call routing and completion in conjunction with requested UNEs. *

ARGUMENT:

Because BellSouth has not yet provided Intermedia with the requested UNEs, BellSouth also has not provided Intermedia with data bases and associated signaling necessary for call routing and completion as contemplated under section 271(c)(2)(B)(x) and applicable rules promulgated by the FCC, which are designed to assure non-discriminatory access to checklist items. Additionally, because BellSouth has not yet furnished these services in connection with the requested UNEs, BellSouth must demonstrate with reliable operational data that such services are available as practical matter, i.e., that it is operationally ready to furnish the item in quantities that competitors may reasonably demand and at an acceptable level of quality. BellSouth has not produced such data in this proceeding.

Intermedia's negative inferences about BellSouth's inability to provide non-discriminatory access to data bases and associated signaling necessary for call routing and completion appear to be supported by direct evidence of at least two of the parties in this proceeding. For example, AT&T contends that BellSouth has failed

to deploy and test the methods and procedures to assure access to these items. In addition, MCI contends that BellSouth is not providing non-discriminatory access to the advanced intelligent network database or to its service creation environment/service management systems. Intermedia anticipates that AT&T and MCI will more fully brief the Commission on these contentions.

ISSUE 12: Has BellSouth provided number portability, pursuant to section 271(c)(2)(B)(xi) and applicable rules promulgated by the FCC?

INTERMEDIA'S POSITION: * Yes, BellSouth has provided interim number portability to Intermedia principally through Remote Call Forwarding and Direct Inward Dialing, which complies with the 1996 Act until such time as a permanent number portability solution is required. *

ISSUE 13: Has BellSouth provided nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of the Telecommunications Act of 1996, pursuant to section 271(c)(2)(B)(xii) and applicable rules promulgated by the FCC?

INTERMEDIA'S POSITION: * No. BellSouth is providing Intermedia with dialing parity on a very limited scale (i.e., within the limited scope of local exchange services that Intermedia can provide today principally through its own facilities). *

ARGUMENT:

BellSouth has not entirely complied with this checklist item. Specifically, because BellSouth has failed to provide access to certain UNEs required to provide competitive service offerings, the ultimate effect is tantamount to preventing Intermedia from implementing local dialing parity. Consequently, Intermedia cannot evaluate or quantify dialing delay until BellSouth is actually

providing the UNEs requested by Intermedia. Because the issue of dialing parity/dialing delay is so critical to competition, it is incumbent upon the Commission to defer Section 271 relief until the issue can be evaluated to ensure competitive neutrality.

ISSUE 14: Has BellSouth provided reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of the Telecommunications Act of 1996, pursuant to section 271(c)(2)(B)(xiii) and applicable rules promulgated by the FCC?

INTERMEDIA'S POSITION: * While BellSouth has implemented mutual compensation arrangements for some services, BellSouth recently has informed Intermedia that it unilaterally will refuse to provide mutual compensation for local calls made to internet service providers ("ISPs"). This refusal violates Sections 252(d)(2) and 271(c)(2)(B)(xiii) of the 1996 Act, as well as the dispute resolution provisions of the Intermedia/BellSouth interconnection agreement. *

ARGUMENT: In a letter dated August 12, 1997, BellSouth informed Intermedia that it will refuse to pay mutual compensation for local calls terminated to ISPs located on Intermedia's network. (EXH 17) Currently, BellSouth has informed Intermedia that it will not pay Intermedia's bill for terminating compensation for local traffic that includes local calls to ISPs on Intermedia's network.

The BellSouth/Intermedia interconnection agreement contains the broad provision that "(e)ach party will pay the other for terminating its local traffic on the other's network" (EXH 79, JS-5 at 3) "Local Traffic" is defined as "any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange." (EXH 79, JS-5 at 2) The interconnection agreement does not limit or restrict the definition of local calls or BellSouth's

obligation to provide mutual compensation for them, and contains no discussion of local calls to ISPs. During the negotiations between BellSouth and Intermedia that resulted in their interconnection agreement, BellSouth never once raised the issue of excluding local calls to ISPs from mutual compensation. Similarly, to date, BellSouth has never proposed any means by which such local calls could be identified, distinguished from other local calls, and excluded from the measure of local traffic that is subject to mutual compensation.

Moreover, Intermedia has been paying mutual compensation rates for traffic that it terminates on BellSouth's network without regard to whether those calls are made to ISPs or other customers on the BellSouth network. Intermedia has reason to believe that it has in fact been paying compensation to BellSouth for calls to ISPs on the BellSouth network. Indeed, the wording of BellSouth's August 12 letter suggests as much:

Every reasonable effort will be made to insure that ESP traffic does not appear on our bills and such traffic should not appear on your bills to us. We will work with you on a going forward basis to improve the accuracy of our reciprocal billing processes. The ESP category includes a variety of service providers such as information service providers (ISPs) and internet service providers, among others. (EXH 17; TR 336)

The BellSouth letter therefore strongly indicates that BellSouth has been paying -- and receiving -- mutual compensation for local calls to ISPs in the past, and indicates that exclusion of such traffic from mutual compensation was not the practice or the intent of BellSouth prior to August 12.

This conclusion is also supported in the testimony on the record in this proceeding. When questioned about BellSouth's current business practices, BellSouth witness Varner admitted that, when BellSouth's own customers make calls to ISPs located on BellSouth's network, the calls are treated as local calls, and are charged at R1 and B1 rates out of BellSouth's local services tariff. (Varner, TR 339)

The fact that no discussion of excluding local calls to ISPs was ever conducted with Intermedia prior to BellSouth's August 12 letter, and BellSouth's documented business practices, establish a *prima facie* case that no such restriction was contemplated by BellSouth and Intermedia at the time the interconnection agreement was signed, or during the time it was implemented. As a result, on the basis of the record in this proceeding, the Commission must conclude that BellSouth is failing to meet its mutual compensation obligations under Sections 252(d)(2) and 271(c)(2)(B)(xiii) of the 1996 Act.

In addition, BellSouth's unilateral refusal to pay mutual compensation for local calls to ISPs violates the terms of the BellSouth/Intermedia interconnection agreement. The interconnection agreement negotiated between BellSouth and Intermedia -- and approved by the Commission -- contains a provision that directs the actions that the parties must take if a rate provision of the agreement is in dispute:

Except as otherwise stated in this Agreement, the parties agree that if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the parties will

initially refer the issue to the individuals in each company that negotiated the Agreement. If the issue is not resolved within 30 days, either party may petition the Commission for a resolution of the dispute. (EXH 79, JS-5, at 27)

On cross-examination, BellSouth witness Varner admitted that the issue of mutual compensation for local calls to ISPs is currently in dispute, and is the subject of two separate proceedings before the FCC. (Varner, TR 341) This issue is also the subject of complaints filed by CLECs in several states, including before the New York Public Service Commission. It is therefore beyond debate that the matter of mutual compensation for ISP traffic is "in dispute," and that under the terms of the interconnection agreement, BellSouth is prohibited from taking unilateral action, but is required to petition this Commission to resolve the matter. Rather than exercise this provision of the agreement, however, BellSouth has chosen unilaterally to withhold payments for the mutual compensation owed to Intermedia, and therefore obligates the Commission to review this issue in the instant proceeding. (EXH 17; TR 336)

Because the issue has remained unresolved for a period of 30 days, Intermedia may now exercise the dispute resolution provision of the contract and ask the Commission to resolve this matter. Unless BellSouth changes its current position, Intermedia intends to do so in the near future. Until the matter is resolved, however, this Commission may not find that BellSouth is in

compliance with the mutual compensation obligations imposed by Sections 252(d)(2) and 271(c)(2)(B)(xiii) of the 1996 Act.⁶

ISSUE 15: Has BellSouth provided telecommunications services available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of the Telecommunications Act of 1996, pursuant to section 271(c)(2)(B)(xiv) and applicable rules promulgated by the FCC?

INTERMEDIA'S POSITION: * No. Although BellSouth has made its retail services available to Intermedia for resale, Intermedia does not enjoy non-discriminatory access to such services nor to the OSS functions that support them. *

ARGUMENT:

BellSouth has not provided telecommunications services available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of the Telecommunications Act of 1996, pursuant to section 271(c)(2)(B)(xiv) and applicable rules promulgated by the FCC. Specifically, BellSouth has failed to provide Intermedia non-discriminatory access to any of its telecommunication services available for resale. During the past year Intermedia has in fact been reselling mostly simple voice

⁶ Intermedia notes that BellSouth has the ability to remedy this situation simply by paying the full amount of mutual compensation for the terminating local ISP traffic, and asking the Commission to resolve the matter. In so doing, BellSouth could exercise its rights under the interconnection agreement, while pursuing a full refund of the disputed amounts before this Commission. Under such an approach, no dispute would exist over whether BellSouth was meeting its mutual compensation obligations under the 1996 Act, and this matter would have no bearing on BellSouth's attempts to obtain interLATA relief under Section 271. Rather than take this approach, however, BellSouth has chosen unilateral action that forces the Commission to consider the mutual compensation issue in the instant proceeding.

services (TR 3045, 3077), but this experience establishes that the access provided to these services by BellSouth is anything but non-discriminatory.

Perhaps the best way to demonstrate that the discriminatory nature of BellSouth provision of telecommunication services available for resale is to compare how long it takes an Intermedia customer to switch back to BellSouth with how long it takes to convert a BellSouth customer to an Intermedia customer. As Intermedia's witness Lans Chase observed at hearing:

If an ICI resale customer wants to convert back to BST for any reason, he or she can do that in one day. The customer simply calls BST and has the service switched almost instantly, with or without changes to the service itself.

On the other hand, if a BST customer wants to convert his or her service to ICI, it takes two working days if things work perfectly. Unfortunately, it has been our experience that things rarely work perfectly, and delays in conversion are routine. Indeed, about one third of the time it takes two to four weeks to achieve the conversion of basic resale service. This is not parity. (TR 3078)

The local service orders to which Mr. Chase refers are BellSouth's simplest, most basic voice business services handled as a "switch As-Is" conversion. (TR 3077) These "As-Is" local service orders ("LSRs") are the easiest for BellSouth to handle on a non-discriminatory basis (TR 3072); more difficult are the "Move Adds and Change" local service orders, as well as local service orders for complex voice or data services. Until BellSouth can handle these simple conversions on a non-discriminatory basis, it is premature to suggest that it provides non-discriminatory access to all services available for resale.

Non-discriminatory Access to OSS

Section 271(c)(2)(B)(xiv) requires that telecommunication services be made available for resale in accordance with the non-discrimination requirements of section 251(c)(4) and the wholesale pricing requirements of section 252(d)(3). Focusing on the non-discrimination requirement, for BellSouth to demonstrate that it is providing resale services at parity it must demonstrate, *inter alia*, that it is providing non-discriminatory access to the systems, information and elements that support the services resold. As noted by the FCC, "(w)ithout equivalent access to the BOC's operations support systems, many items required by the checklist, such as resale services . . . would not be practically available." (*Ameritech* ¶ 132) Intermedia's experience confirms the wisdom of this ruling.

Meaning of "Provided"

As previously discussed under Issue 3, in *Ameritech*, the FCC defined what it means to "provide" checklist items, including OSS functions. CLECS had generally been interpreting the word "provide" to mean "furnish" while BOCs had been interpreting the word to mean "furnish or make available." The FCC staked out a middle ground by accepting *Ameritech* definition with the clarification that "to make available" means more than just to make a paper promise.

Under *Ameritech*, "providing" means either "furnishing" or making the item available as a legal and practical matter. To be available as a legal matter means that "a BOC must have a concrete

and specific legal obligation to furnish the item upon request pursuant to a state approved interconnection agreements"

To be available as a practical matter means that the ". . . BOC must demonstrate that it is operationally ready to furnish the item in quantities that competitors may reasonably demand and at an acceptable level of quality." (Ameritech ¶ 110)

Thus, BellSouth can "provide" a checklist item or a necessary OSS function by either "furnishing" it or by making it "available as a legal and practical matter." Whichever definition of "provided" BellSouth cares to use in this proceeding with respect to resale services and OSS functions, the record is clear that BellSouth continues to discriminate in providing such services and functions. More specifically, Intermedia's experience, as reflected in the record, demonstrates that BellSouth's OSS functions for resale services are inferior to the OSS functions it provides itself for analogous services.

Intermedia's Experience

As suggested above, there are two kinds of simple resale orders placed by Intermedia: switch "As-Is" orders and "Move, Add, or Change" (MAC) orders. Switch "As-Is" orders are the initial conversion orders used to make a BellSouth customer an ICI local resale customer. Under a switch "As-Is" order the customer retains the same features and services as obtained from BellSouth. The customer is no longer billed by BellSouth, however; instead, BellSouth bills ICI for services and features, and ICI then bills the customer for local resale services. (TR 3045-3046)

MAC orders, on the other hand, are placed with BellSouth after the customer is an ICI local resale customer. These orders typically are triggered when an ICI customer requests changes in service, such as the addition of a line or a new feature such as call waiting. When ICI receives such a request, it must place a MAC order with BellSouth to make these changes. (TR 3046)

When Intermedia began reselling BellSouth telecommunication services in the fall of 1996, it had to use a manual system for placing all of its orders. As noted by Mr. Chase: Unfortunately, the manual process is complex, cumbersome, time-consuming and prone to errors that undermine ICI's marketing efforts. (TR 3046)

In August of 1997, Intermedia began to use LENS for pre-ordering and Harbinger EDI software for placing switch "As-Is" LSRs for simple voice services. In addition, at the time of the hearing Intermedia was testing the EDI process for MAC LSRs for simple services. For more complex services, however, Intermedia must continue to use a manual system. (TR 3071) Thus, it is useful to address the manual process for placing LSRs for both switch "As-Is" and MAC orders.

Manual Ordering Processes

To place manually either a switch "As-Is" order or a MAC order, ICI must complete a local service request (LSR) form. For switch "As-Is" orders, this form identifies who is submitting the order for ICI, as well as the ICI billing address. The LSR also contains information such as the name, address, and main account (billing) telephone number of the end-user customer. The LSR also

identifies all of the end-user telephone numbers to be converted to ICI for local resale.

The above information is imputed into an ICI database that prints out each LSR a standard format. On average, it takes about 15 minutes to enter the information for each LSR. The printed LSRs are sent daily via overnight mail to the BellSouth local carrier service center (LCSC), which is the business office order center created by BellSouth to process the CLEC local resale orders. (TR 3047)

From the printed LSRs, BellSouth issues the appropriate orders in the BellSouth system to convert the end user to ICI "As-Is." Once these orders are issued, BellSouth faxes to ICI firm order confirmations (FOCs) and a copy of the BellSouth customer service records (CSRs). The FOC contains the BellSouth order numbers and date that the conversion will take place. The CSR is a complete record of the end user's features and services. The FOC and CSR are supposed to be faxed to ICI within 48 hours, but typically this does not happen. (TR 3048)

The Intermedia local resale billing coordinators take the FOC and CSR and enter the items into ICI's billing service data base using the date of conversion contained on the FOC. (TR 3051) This process for manually placing switch "As-Is" orders is reflected in Exhibit 105.

The system for placing MAC orders with BellSouth is also complex, cumbersome, time consuming and prone to errors. To place a MAC order with BellSouth, ICI must again complete an LSR form.

This LSR form contains the following basic information: (1) identity of the person placing the order on behalf of ICI; (2) ICI's address for billing; (3) name, address, and main account (billing) telephone number of the end-user customer; (4) all of the end user telephone numbers that are being changed; and (5) identification of the changes to be made. (TR 3050)

As with switch "As-Is" orders, before placing the MAC LSR, ICI must verify that the address of the customer is correct and that the feature or service requested is available in the customer's central office. This can be done using BellSouth's LENS system. (TR 3050)

Intermedia then faxes the modified printed LSR form to BellSouth. BellSouth takes the form and issues the appropriate service orders to make the requested changes. BellSouth then faxes the firm order confirmation (FOC) back to ICI with the date the services will be added. BellSouth attempts to send the FOC back to ICI within 48 hours. Once the FOC is received, the ICI MAC coordinator calls the customer to give him or her the due date. The local resale billing coordinators then enter the changes into ICI billing system. The process for manually placing MAC orders is reflected in Exhibit 105.

Manual Processes Discriminatory

As suggested by the FCC, BOC reliance on manual processing is troublesome because serious deficiencies will arise as the volume of orders increases. (Ameritech ¶ 173) Although BellSouth devoted considerable time and testimony trumpeting its electronic

interfaces, many resold services still require manual processing. Moreover, as will be demonstrated shortly, to date the electronic interfaces have not brought Intermedia parity in pre-ordering and ordering functions. Thus it is instructive to review briefly the problems Intermedia experienced in using manual processes to handle pre-ordering and ordering activities.

Problems with Manual Ordering

Intermedia has experienced two basic kinds of problems with manual processes. First, Intermedia has experienced delays and other quality of service problems from BellSouth that have interfered with its competitive efforts. (TR 351) Second, manual system imposes on ICI a high per-customer cost for achieving conversion and changes, which also impedes Intermedia's ability to compete with BellSouth.

With respect to delays, some 30 to 40 percent of the time it took BellSouth two to four weeks to provide a complete and accurate FOC and CSR to Intermedia after the submission of the LSR. (TR 3053) Importantly, it was and is BellSouth's goal to have a complete and accurate FOC and CSR to ICI within 48 hours of receiving the LSR. (TR 3048)

Delays in provisioning create downstream problems for Intermedia. For example, sometimes BellSouth continues to bill customers who have signed up with ICI but whose conversion is delayed. This confuses the customer and undermines Intermedia's credibility. (TR 3054) Intermedia has also experienced problems with manual switch "As-Is" LSRs for complex services such as ISDN,

Centrex and Dedicated circuits. (TR 3054) There have been instances in which BellSouth sent the FOC and CSRs for complex services to Intermedia before BellSouth had processed the orders. As a result, the customers were billed by both Intermedia and BellSouth. This also damages Intermedia's credibility with its customers. (TR 3054) In some cases, delays in provisioning has even caused Intermedia's new customers to switch back to BellSouth. (TR 3058-3061)

BellSouth Response: Blame the Victim

In its rebuttal testimony, BellSouth's responds to these real world problems by blaming Intermedia. For example, BellSouth suggests that its whiz-bang electronic interfaces have been available since December of 1996 and thus problems suffered by Intermedia due to the inadequacy of the manual system were self-imposed. (TR 1116) Similarly BellSouth witness Milner suggested that problems of double-billing were because Intermedia did not understand the true function of a FOC. (TR 834)

There are several problems with this blame-the-victim defense. First, Intermedia was not informed by BellSouth of EDI and LENS availability until a CLEC conference in April of 1997. (TR 3076) Thus, if management at BellSouth believed alternatives to manual processing were realistically available to CLECs in January 1997, that message did not get out to Intermedia's account team. Moreover, Intermedia has responded prudently and timely to the availability of the electronic interfaces. (TR 3076)

Next, blaming the victim demonstrates that BellSouth has not satisfactorily deployed its OSS systems. In determining whether OSS functions are being provided, the FCC created a two-step analysis. The first step is to determine whether the BOC has deployed the systems, personnel and assistance necessary for CLECs to use OSS. (Ameritech ¶ 136) In other words, there can be no "blame-the-victim" defense because BellSouth has the affirmative duty to adequately educate CLECs as to what is available and how to use it. BellSouth's rebuttal approach confirms that it cannot satisfy even the first step of the FCC analysis of OSS deployment.

The third major problem with BellSouth's rebuttal is that LENS and EDI are not the cure to Intermedia's frustration with BellSouth OSS pre-ordering and ordering functions. Indeed, based on Intermedia's experiences to date, even with LENS for pre-ordering and EDI for ordering, in terms of BellSouth response time it is unfortunately business as usual.

LENS and Harbinger EDI: Limited Improvements

As MCI's counsel predicted in his opening argument, BellSouth spent a great deal of time displaying its pretty OSS gateway LENSs. (TR 85) As he also suggested, looks don't get the job done (TR 85); as discussed under Issue 3, supra, LENS is inferior to RNS, BellSouth's internal system for a number of reasons. And as important as these disparities are in addressing the issue of non-discriminatory access to OSS, it is perhaps even more important to recognize that the functions of LENSs and EDI are limited. For the

purpose of this brief, there are three basic limitations inherent in LENS and EDI that this Commission must recognize.

First, both LENS and EDI serve a narrow function within the arena of necessary OSS functions BellSouth must provide. Specifically, they provide a limited pre-ordering and ordering gateway interface to the BellSouth's resources that link to its legacy systems. This gateway is important to the provision of non-discriminatory access, but even a well functioning gateway would not in itself constitute non-discriminatory access to OSS. In other words, the provision of a workable, non-discriminatory gateway to the BOC's systems is a necessary but not sufficient condition to non-discriminatory access to OSS. As the FCC pointedly observed in *Ameritech*, ". . . the incumbent LEC's duty to provide non-discriminatory access extends beyond the interface component." (*Id.* ¶ 135) In short, the gateway is only the beginning of the BOCs provision of non-discriminatory access to OSS. And to reiterate, BellSouth has failed to demonstrate that such provision is even well begun.

The second limitation is that LENS and EDI support pre-ordering and ordering functions for only some resale services. (TR 3070-3071) Most complex resale services, for example, must be handled manually. And, of course, LENS and EDI do not support pre-ordering and ordering functions in connection with most unbundled network elements. (TR 3070)

The third limitation of LENS and EDI is that these gateways have not led to any faster provisioning by BellSouth. As already

noted, when Intermedia used manual processes to place simple switch "As-Is" LSRs, about 30 to 40 percent of the time it took BellSouth three to four weeks to supply the requisite FOC and CSR to Intermedia. (TR 3053) Moreover, on any given day there were 125 or more "backlogged orders." (TR 3111)

At the time of the hearing, Intermedia had been using EDI to place simple switch "As-Is" orders for about one month. According to Mr. Chase, based on that month, about 70 per cent of the time BellSouth did not provide the requisite FOC within 48 hours. Moreover, about one-third of the time it still took BellSouth three to four weeks to deliver the FOC. (TR 3113)

These data are consistent with BellSouth's handling of a specific batch of backlogged orders submitted to BellSouth via EDI. At the time of Mr. Chase's deposition there were 125 backlogged orders. (TR 3092) During August 1997, Intermedia submitted these orders via EDI. (TR 3092) At the time of the hearing - four weeks later - Intermedia had yet to receive an FOC or clarification notice for 29 of the orders. (TR 3093)

Through cross-examination of Mr. Chase, BellSouth's counsel gamely attempted to establish that these were hung up because Intermedia submitted them twice. (TR 3092) This approach ignores a telling fact: these 29 orders had been backlogged for at least two months and during that time Intermedia had never received any communication from BellSouth about their status. The only rational conclusion one can reach based on the experience with these backlog orders is that neither BellSouth's manual system nor its electronic

gateway currently deliver non-discriminatory access to resale services.

Intermedia Does a Good Job in Submitting Orders

BellSouth has no satisfactory answer for why provisioning of simple switch "As-Is" LSRs remains delayed when Intermedia submits orders via Harbinger EDI software. Certainly BellSouth cannot reasonably blame Intermedia. Intermedia uses LENS for pre-ordering functions, so the information included in the "EDI LSR" should be correct. Next, when Intermedia sends the "EDI LSR" it receives a validation message back reflecting that the LSR conformed to EDI protocols. Having cleared the EDI "filter", the LSR either is either processed as an order through LEO or rejected by LEO and routed to the LCSC where it is handled manually. In either case, Intermedia should receive either an FOC or a "clarification notice" from BellSouth within 48 hours. Again, this frequently does not occur, perhaps as much as 70 percent of the time (Chase, TR 3113). The problem is therefore on BellSouth's side of the interface.

Reinforcing the conclusion that the problems lie with BellSouth's system is the fact that Intermedia enjoys a good working relationship with the LCSC and has received feedback from the LCSC that it does a good job on its LSRs. (Chase, TR 3109, 3114)

Operational Data on Manual Processing Needed

Given that the FCC has emphasized the limitations of manual systems, there is an aspect of the EDI system that is worth noting. Specifically, when an EDI LSR is rejected by LEO and routed to the

LCSC, provisioning of that order becomes manual. Intermedia does not know what that percentage is either for its own EDI LSRs or for those of other ALECs. Nevertheless, based on the delays Intermedia has experienced in provisioning, one may reasonably infer that an unacceptable number of EDI LSRs are unnecessarily handled manually. Thus it is incumbent upon BellSouth to establish the percentage of EDI LSRs that are ultimately handled manually.

Access to OSS for Complex Services is Discriminatory

As acknowledged by BellSouth, pre-ordering and ordering activities for many complex resale services must be handled manually. BellSouth maintains that it provides non-discriminatory access to these services because it must also handle its analogous retail services manually. On cross-examination, BellSouth witness Calhoun admitted, however, that any conclusion of non-discriminatory access was based on the presumption that there existed comparable proficiency between the centers providing support to the CLEC and the centers providing support to BellSouth. (Calhoun, TR 1393) She also stated that the proficiencies of these centers was the beyond the scope of testimony. (TR 1393)

BellSouth has certainly produced no operational data to support this proposition and thus has not carried its burden of persuasion on this point. Moreover, to the extent the LCSC is involved in the provisioning of a service, the data that does exist establishes that there is not comparable proficiency between the BellSouth centers providing support to CLECs and the BellSouth centers providing support to its retail services. (EXH 21) For

example, BellSouth's own audit of its LCSC reflects that some 52 per cent of LCSC employees filling key positions were not competent for their jobs. (EXH 21, at 002797) Moreover, according to their supervisors, 35% of the jobs have employees who are marginally qualified to perform the tasks. (Id.)

Providing Non-discriminatory Access An Evolutionary Process

The above competency problem reinforces a view advanced by Intermedia witness Chase in this proceeding: the provision of non-discriminatory access to entry strategies, checklist items, and OSS functionalities cannot be flash-cut; rather, the provision of non-discriminatory access is an evolutionary process. (TR 3073) It takes time, money, and hard work on everyone's part to achieve the level of access contemplated under the Telecommunications Act of 1996. And it is simply unreasonable to believe that BellSouth could develop the hardware, software, systems and employee expertise necessary for non-discriminatory access in the relatively short period since the Act became law.

As observed by Mr. Chase in the oral summary of his direct and rebuttal testimony:

BellSouth has made progress. I do not want to minimize the task before BellSouth in achieving parity, nor the effort it has put into developing workable mechanical and electronic interfaces with ALECs. Likewise, Intermedia is working hard to take full advantage of those developing interfaces. We look forward to the day that it is just as easy to convert a BellSouth customer to Intermedia as it is for an Intermedia customer to switch back to BellSouth. Nevertheless, that day has not yet arrived and to say that it has is to ignore reality. (TR 3078)

ISSUE 15(a): Has BellSouth developed performance standards and measurements. If so, are they being met?

INTERMEDIA'S POSITION: * No. BellSouth has not developed performance standards and measurements applicable specifically to Intermedia. Such performance standards necessarily should focus on both traditional voice services and advanced data services provided by BellSouth. *

ARGUMENT: See Intermedia's response to 3(a).

Issue 16: By what date does BellSouth propose to provide intraLATA toll dialing parity throughout Florida pursuant to section 271(e)(2)(A) of the Telecommunications Act of 1996?

INTERMEDIA'S POSITION: * Section 271(e)(2)(A) requires BellSouth to provide intraLATA toll dialing parity throughout Florida coincident with its authorized exercise of interLATA services. BellSouth is the proper party to respond to this issue. *

ISSUE 17: If the answer to issues 2-15 is "yes," have those requirements been met in a single agreement or through a combination of agreements?

INTERMEDIA'S POSITION: * Intermedia incorporates its responses to issues 2-15 as though more fully set forth herein. *

ISSUE 18: Should this docket be closed?

INTERMEDIA'S POSITION: * Yes, this docket should be closed until such time as BellSouth is able to satisfy the requirements of the 1996 Act for in-region interLATA entry. *

IV. CONCLUSION

Based on the record developed in this docket and the applicable provisions of the Federal Telecommunications Act of 1996, this Commission must recommend to the Federal Communications Commission that it deny BellSouth's application for entry into IntraLATA services pursuant to Section 271 of the Act. BellSouth has not satisfied Track A, Track B, or the fourteen-point

checklist. BellSouth has not provided non-discriminatory access to OSS for the checklist items. BellSouth has not truly opened its local markets are to meaningful competition, and, in the words of Intermedia witness Chase, ". . . to say that it has is to ignore reality." (TR 3078) BellSouth's entire application can indeed be summed up in one word: premature.

Respectfully submitted this 23rd day of September, 1997.

INTERMEDIA COMMUNICATIONS INC.

By: Donna L. Canzano
Patrick K. Wiggins
Donna L. Canzano
WIGGINS & VILLACORTA, P.A.
501 East Tennessee Street
Suite B
Post Office Drawer 1657
Tallahassee, Florida 32302
(850) 222-1534
(850) 222-1689 (facsimile)

and

Jonathan E. Canis
Enrico C. Soriano
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600
(202) 955-9792 (facsimile)

Its Attorneys

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, hand delivery* and/or Federal Express** this 23rd day of September, 1997, to the following:

Floyd R. Self*
Norman H. Horton, Jr.
Messer, Caparello, Madsen,
Goldman & Metz
215 South Monroe Street
Post Office Box 1876
Tallahassee, FL 32302-1876

Laura L. Wilson*
Charles F. Dudley
Florida Cable Telecommunications
Association
310 North Monroe Street
Tallahassee, FL 32301

John R. Marks, III*
Knowles, Marks & Randolph, P.A.
528 East Park Avenue
Tallahassee, FL 32301

Monica Barone*
Division of Legal Services
Florida Public Service Comm.
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Joseph A. McGlothlin*
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas, P.A.
117 South Gadsden Street
Tallahassee, FL 32301

Rick Melson*
Hopping Green Sams & Smith
123 South Calhoun Street
Post Office Box 6526
Tallahassee, FL 32314

C. Everett Boyd, Jr.*
Ervin, Varn, Jacobs,
Odom & Ervin
P.O. Drawer 1170
Tallahassee, FL 32302

Richard M. Rindler**
Swidler & Berlin, Chartered
3000 K. Street, N.W.
Suite 300
Washington, D.C. 20007

Charles J. Beck*
Deputy Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

Marsha E. Rule*
AT&T
101 N. Monroe, Suite 700
Tallahassee, FL 32301

Robert G. Beaty*
Nancy B. White c/o
Nancy H. Sims
Southern Bell Telephone
Company
150 S. Monroe St., Suite 400
Tallahassee, FL 32301

Kenneth A. Hoffman*
William B. Willingham
Rutledge, Ecenia, Underwood,
Purness & Hoffman
215 South Monroe Street
Suite 420
Tallahassee, FL 32301-1841

J. Phillip Carver**
William J. Ellenberg, II
BellSouth Telecommunications,
Inc.
675 West Peachtree Street
Suite 4300
Atlanta, GA 30375-0001

Peter M. Dunbar*
Robert S. Cohen
Pennington, Culpepper, Moore,
Wilkinson, Dunbar & Dunlap
Post Office Box 10095
Tallahassee, FL 32302



Donna L. Canzano