



date, in this process of setting permanent rates under the Section 252(d) pricing standard, the Commission has only allowed the principals involved in the unsuccessful negotiations to be parties in the arbitration dockets. Since the Act requires 252(d) review of only arbitrated agreements (as opposed to negotiated agreements), entities who have approved negotiated agreements have never participated in any such Commission review of the rates of BellSouth Telecommunications, Inc. (BellSouth).

The rationale behind excluding intervention in these arbitration proceedings is that they are limited to determining issues between those parties seeking arbitration. This rationale was reiterated in the Order denying Intermedia intervention. The Order suggests that the decisions in the arbitration proceedings may have an indirect affect on Intermedia, but will not determine any of its substantial interests. For example, the Order states that "[t]he decisions to be made here will become part of the ultimate interconnection agreements between the parties to the initial negotiations and will be binding only upon them." (Order at 3) Thus, according to the Order, the resolution of those issues has no *res judicata* effect on Intermedia.

The Order, however, overlooks the fact that the Commission has announced its intention to use the findings of this proceeding to bind Intermedia in future proceedings in which Intermedia's interests will be determined. Specifically, in Order No. PSC-97-1459-FOF-TL, issued November 19, 1997, in Docket No. 960786-TL, the

Commission explicitly stated that "we believe that the permanent rates we set in the BellSouth arbitration proceedings meet the cost based requirements of the Act." (*Id.* at 75) The Commission also states,

Thus, to the extent permanent rates have been set by this Commission, we continue to believe that they comply with the requirements of Section 252(d)(1) of the Act, and we approve BellSouth's use of those rates for purposes of checklist compliance. For those items for which only interim rates have been set thus far, we have required TSLRIC studies to be filed in the arbitration dockets in order to establish permanent rates. (*Id.* at 45)

Thus the Commission intends to use these findings as matters adjudicated in future Section 271 proceedings, and in approving BellSouth's Statement of Generally Available Terms (SGAT). If the Commission (1) continues to refuse intervention in this proceeding and (2) then uses the rates established in this docket as the basis for determining whether BellSouth is checklist compliant under Section 271, Intermedia and other entities who successfully negotiated interconnection agreements will be denied due process because they will have been denied the opportunity to participate in the proceeding that determined their interests.

The Commission Must Either Allow Intervention Or Clarify That Findings In This Proceedings Bind Only The Parties And May Not Be Used As Matters Adjudicated In Future Proceedings With Different Parties

The problem here is that the Commission is attempting to embrace mutually inconsistent views of this proceeding. The first view is that this proceeding is only a dispute between BellSouth and certain specific ALECs who could not successfully negotiate

interconnection agreements. Under this view, whatever is determined in this proceeding binds only these specific local carriers. To the extent interests of Intermedia and other would-be intervenors are affected by these determinations, these effects are not direct or substantial enough to warrant party status.

The second view is that this is proceeding in which permanent rates are being set for generic purposes. Under this view, the Commission would use these permanent rates in future proceedings without BellSouth or any other party having to reprove the validity of those rates under Section 252(d).

The Commission cannot have it both ways, at least not without violating Intermedia's right to due process. Fortunately, this is easy to solve. If the Commission wishes to use the permanent rates in future proceedings as matters adjudicated, then it need only allow intervention those who would participate as parties. On the other hand, if the Commission wishes to limit this proceeding to the existing parties, it need only issue a clarifying order stating that the determinations in this docket will not be matters adjudicated for any other docket.

#### CONCLUSION

For the reasons stated above, the Prehearing Officer should reconsider the Order Denying Intervention and grant Intermedia's Petition to Intervene, or in the alternative, clarify that the rates established in arbitration proceedings will not be used to collaterally establish matters in any other docket, including

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without limitation, future Section 271 proceedings and the  
Commission review of BellSouth's SGAT.

Respectfully submitted this 12th day of January, 1998.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of Intermedia Communications Inc.'s Motion for Reconsideration Or In The Alternative Request for Clarification has been furnished by Hand Delivery\* or U.S. Mail this 12th day of January, 1998, on the following:

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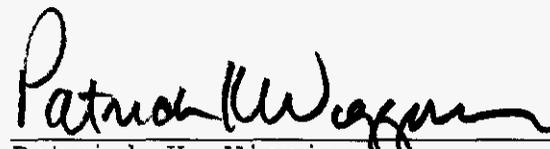
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