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May 30, 2001

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Re: Docket No. 000121-TP (OSS)

Dear Ms. Bayó:

Enclosed is an original and 15 copies of BellSouth Telecommunications, Inc.'s Brief of the Evidence, which we ask that you file in the captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

J. Phillip Carver (KA)

Enclosures

cc: All parties of record
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Nancy B. White
R. Douglas Lackey

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Docket No. 000121-TP

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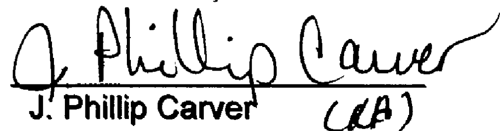

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(+) Signed Protective Agreement

#237366

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the Establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies	))))))	Docket No. 000121-TP Filed: May 30, 2001

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STATEMENT OF THE CASE

This docket, which is to be conducted in three phases, is for the purpose of establishing permanent performance measurements for BellSouth Telecommunications, Inc. and eventually for all Florida Incumbent Local Exchange Companies ("ILECs"). Permanent performance measurements will serve to demonstrate that BellSouth and other ILECs in Florida are providing Alternate Local Exchange Companies ("ALECs") with non-discriminatory access to the ILECs' networks.

STATEMENT OF BASIC POSITION

BellSouth's proposed Performance Assessment Plan should be approved by the Commission. BellSouth's plan includes measures that will allow for the Commission and the ALECs to monitor BellSouth's performance to determine that BellSouth is providing non-discriminatory access to its Operations Support Systems ("OSS") and to its network. BellSouth's plan, in contrast to a competing plan offered by the ALECs, recognizes that not all metrics should be treated the same, and it applies this recognition by only applying penalties to those measurements that are customer-affecting and by offering greater remedies for some measurements than for others. Like the competing plan, BellSouth's plan is multi-tiered, and escalates penalties for continued violations of the standards established by the plan. Finally, the statistical methodology proposed by BellSouth is capable of identifying systematic disparate treatment, thereby ensuring that BellSouth provides non-discriminatory service to all.

As to the timing of plan implementation, the purpose of the enforcement provisions of the plan is to prevent "backsliding" after BellSouth obtains authority to provide interLATA service. For this reason, the enforcement portion of the plan should not go into effect until BellSouth obtains interLATA relief in Florida.

BellSouth's plan is similar in many respects to the StrawMan Proposal developed by Staff, and described in the testimony of Staff's witness, Paul Stallcup. While BellSouth supports most aspects of the Staff's proposal, BellSouth respectfully submits that its plan should be adopted in the areas in which it differs from Staff's proposal. At the same time, the Commission should reject the ALEC plan, which provides for the excessive payment of penalties from BellSouth to ALECs, even in those circumstances in which BellSouth is providing service at parity. Adoption of the ALEC plan would result in a transfer from BellSouth to ALECs of extremely large amounts of unwarranted penalty payments, but would accomplish little else.

Specifically, the ALEC plan suffers from a number of problems, including, (1) a degree of measurement disaggregation that would result in so many submeasurements that the plan could likely never be implemented, (2) excessively large and unwarranted penalties, and (3) the association of an excessive penalty payment with every disaggregated sub-measurement. Finally, even under the most optimistic set of assumptions, the ALEC plan would take a very long time to implement, and after implementation, would be so complicated that its administration would be difficult, if not impossible.

STATEMENT OF POSITIONS ON THE ISSUES

Issue A: How should the results of KPMG's review of BellSouth performance measures be incorporated into this proceeding?

**Position: This issue has been resolved by stipulation of the parties.

Issue 1a: What are the appropriate service quality measures to be reported by BellSouth?
Issue 1b: What are the appropriate business rules, exclusions, calculations, and levels of disaggregation and performance standards for each?

**Position: The appropriate service quality measures, business rules, exclusions, calculations, levels of disaggregation and performance standards to be reported by BellSouth are those contained in the BellSouth Service Quality Measurements (SQM) plan that is attached to the testimony of BellSouth witness, David Coon, as Exhibit DAC-1.

BellSouth's Service Quality Measurements (SQM) "are calculated to evaluate the quality of service delivered to BellSouth's customers, both wholesale and retail." (Tr. 241). These measurements, which are explained fully in Exhibit DAC-1 (Hearing Ex. 16), are as Mr. Coon stated, "the result of over two years of work with direction provided by several state Commissions and the FCC plus input from various ALECs." (Id.). Further, "the SQMs are more than adequate to allow the Florida Public Service Commission and the ALECs to monitor BellSouth's performance and to determine that non-discriminatory access to BellSouth's operations and support systems (OSS) is being provided to ALECs in Florida." (Id.).

In contrast, as Mr. Coon also testified, "the ALECs propose an absurd number of performance measurements that go far beyond the most extreme definition of what is necessary for this Commission to satisfy itself that BellSouth is providing non-discriminatory performance to the ALECs." (Tr. 295). Further, "the ALECs' proposal involves a level of complexity and volume that would make it virtually impossible to implement in any reasonable time frame." (Id.). In point of fact, Mr. Coon was likely being overly generous since, if the ALECs' plan were adopted in toto, the extreme degree of disaggregation proposed would likely make it absolutely impossible to implement the plan in any timeframe.

The problems with the ALECs' proposed plan are principally the result of two factors: 1) the additional measures proposed by the ALECs, and 2) the degree of measurement disaggregation proposed by the ALECs.

There appears to be no disagreement among the parties as to the measures proposed by BellSouth (although there is some disagreement as to the business rules that should apply). In other words, the ALECs do not argue that any of the measurements that BellSouth proposes should not be adopted by the Commission. Instead, the gist of the dispute over measurements concerns whether the Commission should also order the additional measurements advocated by the ALECs through the testimony of Ms. Kinard.

Ms. Kinard attempts to support the addition of a substantial number of measurements by claiming that they were either ordered by the Georgia Commission, Ordered by the Tennessee Commission, or Ordered by the Texas Commission. (Kinard Direct, pp. 6-10). In fact, BellSouth has already adopted a number of those proposed measures in its most recent SQM, but the remainder are unnecessary and inappropriate, as a closer look at the actions of each of these Commissions and of BellSouth's proposal will demonstrate.

Beginning with the additional measures ordered in Georgia, thirteen of the sixteen measurements she cites are included in BellSouth's most recent SQM. As Mr. Coon testified, the included measures are as follow:

- Average Response Time for Loop Makeup Information (Manual & Mechanized)
- Acknowledgement Timeliness
- Acknowledgement Completeness
- Firm Order Confirmation and Reject Response Completeness
- Coordinated Customer Conversion—Average Recovery Time
- Cooperative Acceptance Testing Attempts vs. Requested by ALECs
- Recurring Charge Completeness
- Non-recurring Charge Completeness
- Mean Time to Notify ALECs of Network Outages
- Mean Time to Notify ALECs of Interface Outages
- Average Database Update Interval
- Average Database Update Accuracy
- NXX and LRNs loaded and tested by LERG date

(Tr. 299-300).

Indeed, of the 16 measurements added in Georgia, BellSouth declined to add only three to its current SQM, and it had a good reason for doing so in each instance. The three measures and the respective reasons for not adding them, are,

1. Completions/Attempts w/o Notice or < 24 hours Notice. This measurement was proposed because "sometimes BellSouth works an ALEC order without giving what the ALEC considers to be appropriate notice." (Tr. 300). However, BellSouth currently has five separate provisioning measurements that deal with order completion intervals, held orders and completion notices. Indeed, this measurement, if included, would penalize BellSouth where the ALEC asked for an expedited installation of less than three days (which resulted in the manual handling of the order) and where BellSouth took 48 hours to return the FOC to the ALEC. In this situation, the FOC would have been returned in the allowed time, the order would have been worked on the exact date requested by the ALEC, but because less than 24 hours separated the FOC and the time the order was worked, a penalty would be charged. Given this, and the fact that the particular measure adds little in the way of additional information that would assist this Commission in making parity decisions, it should be rejected. (Id.).

2. BFRs Processed in 30 business Days
3. BFR Quotes Provided in X Days. The Georgia Commission did, in fact, order BellSouth to add measurements to the SQM to reflect the percentage of Bona Fide requests that are processed within 30 days and "the percentage of quotes that are provided for BFRs within certain intervals." (Tr. 301). However, in the first ten months of the year 2000, BellSouth received only seven BFRs from ALECs in its entire nine-state region. (Id.). Further, given the nature of the BFR process, there is no reason to assume that there will ever be a substantial

volume of this type of request. Given the extremely small volume of requests, it is impossible to draw valid conclusions about BellSouth's performance in this area. (Id.). For this reason, and because volumes are likely to remain small, BellSouth does not believe it is appropriate to add these measurements.

As to Ms. Kinard's reference to the action of the Tennessee Regulatory Authority ("TRA"), her testimony, while technically correct, does not tell the full story. The TRA did direct BellSouth to incorporate some of the Texas metrics into the Interconnection Agreement between BellSouth and ITC^DeltaCom in Tennessee. However, the TRA has also opened a generic performance measurements docket (Docket No. 01-00193) in which it will set, on a generic basis, permanent performance measurements. The ITC^DeltaCom agreement contains only measurements that have been applied on a provisional basis to one carrier, and which are subject to change in the generic docket that was only recently initiated in Tennessee. Given this, the interim action of the TRA provides no real support for any action by this Commission in the context of a generic docket.

Finally, in addition to relying on what the TRA supposedly did, Ms. Kinard commends a number of measurements to this Commission on the basis of what was done in Texas. The general problem with her approach is that, as Mr. Coon observed, she is merely asking the Commission to copy what has been done in Texas, without engaging in any critical analysis of its own. (Tr. 303). Further, Ms. Kinard's citation to the Texas Commission as a definitive statement of what should be done is misleading at best. At this juncture, two Commissions in BellSouth's region, Georgia and Louisiana, have set performance measurements based upon a review of BellSouth's systems, and what they believe to be the specific parity requirements that apply when using these systems. Moreover, these Commissions have done so in dockets that

have been participated in by many of the same parties that are in the docket before this Commission. Ms. Kinard ignores the rulings in Georgia and Louisiana, however, and instead commends to the Commission what Texas has done. The reason for this is obvious: the ALECs are simply advocating to this Commission the adoption of the action of whatever Commission most favors the ALECs.

Of the remaining measures proposed by Ms. Kinard in her testimony, twenty have already been incorporated into BellSouth's SQMs (Tr. 304). The remaining measurements proposed by Ms. Kinard should not be adopted by this Commission for reasons that fall roughly into one of two categories: 1) measures that would add nothing to the measures that are already in BellSouth's plan; 2) measures that are unneeded or inappropriate. In his testimony, Mr. Coon provided a point-by-point rationale for rejecting each of these measurements. Specifically, he testified as follows:

1. OP – Mean Time to Provide Response to Request for BellSouth-to-ALEC Trunks
2. OP—Percent Responses to Request for BellSouth-to-ALEC Trunks Provided within 7 Days
3. OP—Percent Negative Responses to Requests for BellSouth-to-ALEC Trunks

These measurements are to determine the sufficiency of the trunking capacity from BellSouth to the ALEC switch when traffic is increased substantially, such as when an ALEC adds an ISP provider as a customer. BellSouth has no way of knowing when these potentially dramatic increases in demand may occur, and BellSouth does not believe it is appropriate to have a measurement of its success in meeting this unanticipated demand. The better approach would be to ensure that adequate trunking capacity exists by requiring each ALEC to give BellSouth an adequate forecast of future demand so that BellSouth can meet its needs. (Tr. 305).

4. OP – Order Accuracy

This metric is designed to determine whether BellSouth has improperly changed "an ALEC order as a result of its manual handling of the order." (Tr. 306). BellSouth already has in place measurements of Percent Provisioning Troubles within 30 days of Service Order Activity and Invoice Accuracy, both of which reflect BellSouth's completion of orders. In light of this, the FCC has specifically held that there is no need to add the particular type of measure the ALECs advocate. (See Order, FCC 98-72, paragraph 68) (Tr. 306).

5. OP—Percent of Orders Cancelled or Supplemented at the Request of the ILEC

This proposed measurement is based on the ALEC's apparent view that BellSouth will request that ALECs supplement or cancel orders just to obtain a later due date. The ALECs presented no evidence that this has occurred, or will occur. This measurement is not necessary. (Tr. 307).

6. OP –Percent of Coordinated Cuts Not Working as Initially Provisioned

BellSouth is adding a new 'hot cut' measurement, which is described in Exhibit DAC-1 (Tr. 307; Ex. 16). Services that do not work should be identified during the cut-over process, before the order is completed in the system. If an order is not so identified, then the new measurement BellSouth proposes should do so. Given this, this ALEC proposed measurement is simply duplicative. (Tr. 307).

7. OP – Mean Time to Restore a Customer to the ILEC
8. OP – Percent of Customers Restored to the ILEC

"These measures relate to customers who were going to be switched to the ALECs but who were not because of a problem in the porting process." (Tr. 307-08). However, these measures are not meaningful because it is impossible to know the nature of the problem in the

porting process or whether it is properly attributable to BellSouth. There are already a number of measurements in place to detect any problem that exists in the "hot cut" process. (Tr. 308).

9. OP – Call Abandonment Rate – Ordering and Provisioning
10. MR – Call Abandonment Rate – Maintenance

There is no need for these additional measurements because they simply duplicate the BellSouth proposed measurements "Speed of Answering in the Ordering Center and Average Answer Time—Repair Center." (Tr. 308).

11. OP – Percent Successful xDSL Service Testing
12. OP – (disaggregation or new metric) – Percent Completion of Timely Loop Modification/Conditioning on xDSL Loops

These two measures also address activity already measured by BellSouth's provisioning measures. (Tr. 309).

13. BL – Percent Billing Errors Correct in X Days
14. BL – Percent On-Time Mechanized Local Service Invoice Delivery

These measurements are unnecessary because the BellSouth proposed measurements, B-1, Invoice Accuracy and B-2, Mean Time to Deliver Notices provide adequate information to assess the performance of BellSouth's billing processes (Tr. 309).

15. MI – Percent Response Commitments Met On Time

Apparently, this measurement is an attempt to determine the time between when a question is posed "to a BellSouth 'help desk' and when the answer is received by the ALEC." (Tr. 309). This measure would be all but impossible to implement because of difficulties in determining specifically when a question is asked, the nature of the question, and a reasonable timeframe to answer the question. This is a good example of an issue that cannot appropriately be addressed through performance measurements. (Tr. 310).

16. CM – Percent ILEC vs. ALEC Changes Made

This is another good example of an issue that cannot be appropriately dealt with by the use of performance measurements. This measurement would compare the percentage of changes BellSouth makes in the change management process, as opposed to those proposed by the ALEC's. Apparently, the underlying assumptions are that all BellSouth changes are favorable to BellSouth, all ALEC changes are favorable to the ALECs, and all are of equal validity. The first and third assumptions are simply wrong. The change control process is, as described in the testimony of Mr. Pate, a collaborative process by which BellSouth and the CLECs work together to resolve issues related to change requests. (Tr. 893-94). Further, all charges made through this process "whether ALEC or BellSouth requested are intended to serve the ALEC community." (Tr. 891). It makes no sense to treat each change by BellSouth as creating an entitlement for each ALEC to make a change of its own, even if the ALEC-requested change is unreasonable or not technically feasible. (Tr. 892).

17. OSS – Percent Software Certification Failures
18. OSS – Software Problem Resolution Timeliness
19. OSS – Software Problem Resolution Average Delay Days

These measures apply to software updates. BellSouth believes that this is another issue that is better dealt with in the context of the change management process than through performance measurements. (Tr. 311).

Thus, the ALECs' proposed additional measures are either covered already by a BellSouth measurement, will not provide any useful information, or are categorically inappropriate to include in a performance measurement plan. For this reason, the measurements that should be adopted by the Commission are those proposed by BellSouth.

Issue 1b involves two distinct questions. The first involves the appropriate business rules, exclusions, calculations, and standards for each measurement. The second, much larger issue has to do with the level of disaggregation that should be included in the plan.

As to business rules, etc., BellSouth's SQM (Ex. 16) presents BellSouth's view as to the appropriate business rules for each of the measurements. Ms. Kinard has attached to her testimony an analysis of BellSouth's business rules, but it appears to be based on an older version of the SQM, and does not deal with the fact that a number of her proposed revisions have been addressed in the new SQM (Tr. 316). Mr. Coon provides this example: "in connection with the measurement identified as OSS-1, Average Response Time and Response Interval, BellSouth now provides this measurement in the manner that she requested." (Tr. 316) Beyond this, BellSouth notes that the business rules, etc. in its SQM have been "modified to incorporate changes proposed by KPMG, as part of the Georgia and Florida testing, as well as the Georgia and Louisiana Commission Orders." (Id.).

Ms. Kinard's testimony attacking BellSouth's business rules is largely a rehashing of complaints that the ALECs raised, and that were discussed extensively during the last two years in the context of generic performance measurements Dockets in Louisiana and Georgia. (Tr. 316). The parties discussed the ALEC complaints ad infinitum and, in almost every instance, the ALEC proposals were not adopted in either Louisiana or Georgia. Ms. Kinard is simply rehashing these old issues once again, but once again, she offers no real substantive reason that BellSouth's business rules should be changed. (Id.). The Commission should adopt the business rules that BellSouth proposes in conjunction with its measures.

The issue of the appropriate level of disaggregation is, with the possible exception of penalty amounts and the system to apply penalties, the single issue of greatest practical

importance in this docket. In principle, both parties agree that the measurement categories should be broken down to a level so that there are meaningful direct comparisons between the performance BellSouth gives its customers and that provided to ALECs and their customers. As to precisely how to implement this principle, the parties differ drastically.

BellSouth's proposed measurements are disaggregated into 1200 sub-metrics, (Tr. 296) according to a methodology that is described in detail in DAC-4. (Ex. 16). As Mr. Coon noted, the disaggregation proposed by BellSouth is comparable to that proposed by Staff, and in some instances, greater. (Tr. 249). BellSouth believes that the level of disaggregation it proposes (which is comparable to what was adopted in Georgia and Louisiana) is more than adequate to make meaningful comparisons for the purpose of determining whether BellSouth is providing service at parity.

On the other hand, the ALECs have taken a radically different approach. The ALECs advocate that the measurements be disaggregated by ten separate categories, which are identified in the testimony of Ms. Kinard as "geography, interface type, pre-order query type, product, service order activity, volume category, trouble type, trunk design and type (for trunk blockage measurements), maintenance and repair query type, and collocation category." (Tr. 144). Not every disaggregation category would apply to every measurement in the ALEC proposal, but many (if not most) measurements would have multiple types of disaggregation applied to them. This would result in the number of smaller measurements, or sub-metrics, expanding exponentially. In other words, as Ms. Kinard acknowledged, the ALEC disaggregation plan would involve disaggregating a given measure by a certain number, then multiplying that number by a second number (representing a second disaggregation category),

and then, in some instances, multiplying the result again and again until there are potentially thousands of sub-metrics for each measurement (Exhibit 9, Kinard Deposition, pp. 73-74).

Mr. Coon gave in his testimony a specific example of how disaggregation would affect one particular measure, Mean Held Order and Distribution Interval. The ALECs proposed that this category be disaggregated by 41 types of products, 13 levels of geography, 3 levels of volume, and 3 levels of dispatch status. Thus, to determine the number of sub-metrics that would result from the dissaggregation proposed by the ALECs, one would have to multiply 41 times 13 times 3 times 3, for a total of 4,797 sub-metrics for the single measurement of mean held order interval and distribution interval (Tr. 318). In the words of Mr. Coon, "this is absurd." (Id.).

The fact that a single measure would be broken down under the ALEC proposal into so many sub-measures prompts the question of how many sub-measurements there would be in the ALECs' plan in the aggregate. The answer is that no one knows. However, it would appear that, by the most conservative possible estimate, there are almost certainly more than 100,000 measures, and there could well be more than a million.

Ms. Bursh stated in her deposition that she had calculated the number of sub-measurements and concluded that there are exactly 10,000 (Ex. 10, Bursh Deposition, p. 67). At the time of the hearing, however, she admitted that her analysis was wrong, and the ALECs stipulated to this effect. (Tr. 1043)

At the same time, Mr. Coon made his best effort to interpret the proposal of the ALECs to determine exactly how many measurements there would be. His initial estimate was that there would be approximately 75,000 (Tr. 319). A review of the exhibit that reflects his analysis

shows that even he did not disaggregate by all of the categories proposed by the ALECs (e.g. trouble type). Thus, even his number of 75,000 is low, and perhaps by a fairly large amount.

Ms. Kinard readily admitted that she had no idea how many sub-metrics there are in the ALEC plan. (Tr. 198). Moreover, based upon her deposition testimony and testimony on cross-examination, it is clear that, at this juncture, it is impossible to know precisely the number. When asked during her deposition how many disaggregation categories there should be for interface type, she could not provide a specific number and stated,

> I don't have the specific ones listed out here that are in operation in your region. We just want anything anyone is actually using to be covered.

(Ex. 9, Kinard Depo., p. 61).

She also testified that she did not know the number of query types to use, and that she would have to get this information from BellSouth (Ex. 9, p. 62). Likewise, she said the number of trouble types to use for disaggregation purposes would depend on the number of BellSouth trouble codes, a number that she could not supply (Ex. 9, p. 67). In short, the ALECs are proposing a disaggregation process, while having absolutely no idea how many measurement categories this process would create. Further when one considers the minimum and maximum possible numbers of measures in the ALEC plan, the result is alarming, to say the least.

Again, when asked the number of trouble types to be utilized for disaggregation purposes, Ms. Kinard testified in her deposition that it would be based upon the number of trouble codes that BellSouth utilizes. As established at the hearing by Exhibit 15 (BellSouth LMOS Performance Aid), BellSouth uses 165 trouble codes. Thus, if one were to take the approximately 24,000 sub-measurements that Mr. Coon has estimated are included in the ALEC

plan for repair and maintenance, and multiply by the 165 trouble types, this would result in about 3,960,000 measurements for repair and maintenance alone.

At the hearing, Ms. Kinard testified that in her view, there would need to be disaggregation by only three of the 165 trouble types. (Tr. 211-12). At the same time, she admitted that she could not speak for all the ALECs, and some might well want disaggregation by more than three trouble types (Id.). Still, if we use Ms. Kinard's extremely conservative estimate of 3, this means that the 24,000 repair measurements would (assuming each was disaggregated) grow to 72,000, bringing the total number of measurements to more than 120,000. Of course, all the measurements that are adopted, regardless of number, would have to be tracked, compared to a standard and reported for every ALEC in every month. (Tr. 319).

Given the above, perhaps all that can be said definitively is that the ALECs' proposed disaggregation would result in somewhere between 100,000 measurements and millions of measurements. This range of possibilities represents one of the most troubling aspects of the ALEC plan. The evidence noted above demonstrates that the ALECs have made a proposal so vague and undefined that it is impossible to know what would be required by the ALEC plan when (or if) the details are sorted out at some future date.

The most compelling reason to reject the ALECs' plan is that it appears to be impossible to implement. As Mr. Coon testified, there are 155 ALECs that are actively operating in Florida at this time. (Tr. 312). Thus, even under the most conservative assessment of the ALEC proposal, BellSouth would have to track and report information for 15.6 million sub-measurements every single month (100,000 times 155 ALECs equal 15.5 million; plus 100,000 statewide average measurements). Again, this is the minimal level of what would be required.

During the hearing, Ms. Kinard admitted in response to a question from Commissioner Jaber that that no State Commission anywhere in the United States has adopted the level of disaggregation proposed by the ALECs. (Tr. 216). Ms. Kinard also admitted that even the New York and Texas Commissions (which she relies heavily upon as support for other aspects of the ALEC plan) ordered hundreds of measurements rather than thousands (Tr. 216-19). Ms. Kinard then admitted that no one, anywhere has even attempted to implement the ALEC plan in its entirety (Tr. 218). Finally, this exchange occurred:

> Q [By Mr. Carver] Well, given the fact that no one's ever tried to implement your plan, combined with the fact that you're not sure how many sub-metrics there are, you really don't know if its even possible to implement your plan, do you?
>
> A [By Ms. Kinard] I mean, I guess that's something I believe is possible, but no, you don't know until you try to implement it.

(Id.).

If the impossibility of the ALEC plan were not enough reason to reject it, there is also the fact that it is conceptually flawed. There is no question but that more disaggregation will result in smaller numbers of events that are captured in each sub-measure. Both Ms. Kinard and Ms. Bursh testified that for many of the sub-measurement categories proposed by the ALECs, there would be no activity in a given month. (Kinard: Tr. 177; Bursh; Ex. 10, Bursh Deposition, p. 48). Likewise, Ms. Kinard admitted that even when there is activity, some sub-metrics would likely capture as few as one, two, or three events. (Tr. 179). As Dr. Ford, a witness for Z-Tel testified, generally speaking, smaller sample sizes result in a lower level of statistical confidence in any test performed on the samples. (Ex. 12, Ford Deposition, p. 62). In other words, (as Dr.

Ford also admitted) the smaller the sample size, the less sure one can be from a statistical standpoint that the occurrence of a particular event is attributable to something other than random chance. (Id.) Thus, more disaggregation would result in smaller samples, which as a general proposition, would raise the possibility that BellSouth is being adjudged as providing service at something less than parity, when any observed disparity is actually nothing more than a random occurrence.

BellSouth has proposed a reasonable plan that is calculated to accomplish the task that performance measurement plans are supposed to do, detect discriminatory performance. The ALEC plan is simply a monster: impossible to implement, impossible to monitor and calculated only to prevent BellSouth from obtaining interLATA relief in Florida. It should be rejected.

Issue 2a: What are the appropriate Enforcement Measures to be reported by BellSouth for Tier 1 and Tier 2?

**Position: The enforcement plan should utilize key measures in areas that affect customers. BellSouth's plan does so. It is not appropriate to have a penalty associated with each and every measurement in the performance plan.

Issue 2b: What are the appropriate levels of disaggregation for compliance reporting?

**Position: The appropriate level of disaggregation for compliance reporting is that proposed by BellSouth and set forth in Exhibit DAC-4 to the testimony of BellSouth witness, David Coon.

Under BellSouth's plan, penalties are paid for the failure to achieve key measures in areas that affect customers. (Tr. 250). Further, "the measurement set is patterned after those used in New York and Texas." (Id.). BellSouth took the approach ordered by those Commissions of assigning penalties only to the measurements that are most "customer impacting." (Id.). Applying this standard, BellSouth proposes to pay Tier I penalties for 57 specifically identified measures. Obviously, this is somewhat less than 1200 sub-metrics that

represent the level of disaggregation for measurement purposes. However, there are specific factors that BellSouth believes make the small number appropriate. Applying these factors results in the identification of the measures listed in DAC-5, (Ex. 16) for which BellSouth proposes to pay penalties. The factors correspond to six categories of measurements for which penalties are not proposed. Specifically:

1. Aggregation of Measures. Although there may be some usefulness in disaggregating measurements to a fairly granular level for purposes of making comparisons, this level of disaggregation is not always appropriate when penalties are applied. An example is xDSL services. Various xDSL services are provided over copper wires. The different services are distinguishable based upon the electronics installed by the ALEC. Given the similarity of these products, BellSouth has aggregated them together for the purpose of determining whether remedy payments are warranted. This aggregation is also appropriate to avoid the inherent unreliability of small samples (discussed earlier), in other words, to ensure meaningful comparisons.

2. Diagnostic Measurements. There are a number of measurements included because they provide information to ALECs, but a failure to meet these measures really has no effect on the customer. An example of this type of measurement is Percent Rejected Service Requests. This measurement could help an ALEC determine whether its service representatives are completing and issuing local service requests properly, but it does not truly reflect BellSouth's performance.

3. Method of Submission. For some measurements (reject interval, for example), BellSouth's SQM disaggregates the measure by method of submission, in other words, fully mechanized, partially mechanized and non-mechanized. (See Exhibit 16). In BellSouth's

remedy plan, however, only the measurement for fully mechanized submission has an attendant penalty, since this is the measurement category in which virtually all activity will occur.

4. Parity by Design Measures. Certain measures are categorized as parity by design. An example of this would be the E911 measures in Exhibit DAC-1. A parity by design measure occurs when BellSouth orders and ALEC orders are processed in a way that makes it impossible for BellSouth to distinguish between the two. In these instances, discrimination is just not possible.

5. Correlated Measures. In some instances, measurements are correlated, so that the failure of one measure will also result in the failure of a second measure. BellSouth does not believe that it is appropriate to pay multiple penalties for a single failure. Therefore, it proposes that only a single penalty be associated with any measures that are correlated.

6. Regional Measures. Some of BellSouth's measurements are regional in nature. Since BellSouth's OSS systems are regional, measurements such as OSS Average Response Time and Response Interval and OSS Interface Availability would apply regionally, i.e., to the ALEC industry as a whole. Since the point of Tier 1 penalties is to provide penalty payments to particular affected ALECs, it makes no sense to have a penalty for a measurement that, if failed, will affect the entire ALEC industry.

A second salient feature of BellSouth's remedy plan is that penalties are paid on a transaction basis. In other words, there is a schedule of penalties set forth as an exhibit to Mr. Coon's testimony (Ex. 16, DAC-6) that includes the amount that BellSouth proposes to pay in every instance in which BellSouth's performance falls short of parity. The penalty payable is calculated simply by taking the dollar amount associated with any given failure and multiplying it by the number of failed transactions. The penalty payments of differing amounts reflected on

DAC-6 are appropriate for measurements that, when failed, result in different degrees of impact. As Mr. Coon testified, "the BellSouth plan recognizes that not all metrics are treated equal, and that all are not equally important to ALECs, by offering greater remedies for certain measurements than others--installation intervals and average response interval—OSS, for example (Tr. 326-27). From a common sense standpoint, it is difficult to believe that absolutely every measurement, if failed, would have precisely the same effect on an ALEC and its customers. In fact, one of the ALEC witnesses, Dr. Ford, expressly agreed that this result is unlikely, and that it is more likely that a failure to meet some measures "would be more harmful to the ALEC" than others (Ex. 12, Ford Deposition, p. 67). BellSouth has varied the size of penalties associated with different measures in its plan to reflect this reality.

The ALEC plan stands in dramatic contrast to that of BellSouth. The ALEC plan appears in every detail to have been designed to generate incredible penalties. First, the ALEC plan has a penalty associated with every single sub-metric. (Tr. 1021-22). As stated previously, the number of sub-metrics in the ALEC plan is somewhere between 100,000 and several million, which means that the ALEC plan could require 100,000 or more penalty payments every month. Further, the ALEC penalty plan provides for BellSouth to pay penalties any time it misses a measurement in the given month, regardless of the number of transactions that are captured by that measurement. Finally, the penalty to be paid can, based on the severity of the failure, be as much as $25,000. (Tr. 1022). Taken together, these factors (i.e., 100,000 plus measurements, and a penalty of up to $25,000 for the failure of each and every one) result in the potential for BellSouth to pay penalties every month in amounts that are truly staggering.

For example, even if we make the extremely conservative assumption that there are only 100,000 sub-metrics in the ALECs' plan, this means that the theoretical limit of BellSouth's

liability under the plan would be 2.5 billion dollars per month for just the ALEC aggregate measurements. Granted, it is very unlikely that BellSouth could severely miss every measure in any given month, no matter how much activity ALECs generate (or, for that matter, how much gaming of the system they engaged in). Nevertheless it is alarming that the ALECs' proposed plan has even the theoretical potential for a result that is so extreme.

Moreover, the massive penalties that could attach to each of the ALECs' proposed measurements bear no relationship to the damage that would be suffered by the ALECs. There is not a shred of evidence in the record that the ALECs made any attempt at all to actually tie the amounts of the penalties proposed to the damages incurred. For example, all parties agree that there are certain diagnostic measures in the plan. As stated previously, BellSouth does not believe there should be a penalty associated with these measures. Nevertheless, the ALEC plan assesses penalty when measures of this sort are failed.

As stated previously, BellSouth's plan is patterned after the plans utilized in Texas and New York in that penalties are assigned only to certain, key measures. The Louisiana and Georgia plan do the same. In each instance, the selection of key measures has entailed winnowing out those measurements that are less critical, and that should not have penalties associated with them for this reason. Ms. Bursh claims on behalf of the ALECs to apply the same standard. If this is indeed true, then the ALEC method of applying this standard is novel, to say the least. As Ms. Bursh testified, "in the ALEC plan, because the sub-measures monitor key areas of ALEC and BellSouth activity, all submeasures proposed by the ALECs are included in the determination of remedy payments" (Tr. 956). In other words, all 100,000 plus sub-measures in the ALEC plan are simply assumed to be important enough to justify a penalty.

On its face, this claim seems fairly implausible given the fact that the ALEC witnesses readily admitted that they could not even identify all the sub-metrics in their plan.

Likewise, Ms. Bursh testified on behalf of the ALECs that there should not be multiple penalty payments for a single failure. (Tr. 1017). More specifically, she testified that there should not be a multiple payment of penalties if the measures in question are correlated. (Tr. 957). This is, of course, one of the reasons cited above by BellSouth as part of the explanation of how its 1200 sub-metrics in its SQM plan were reduced to 57 Tier I measurements in BellSouth's enforcement plan. She skirted this admission, however, by claiming that it is impossible to know whether measures are correlated unless there is, at some undefined future point, an industry process that will develop a consensus as to what is correlated. (Tr. 957-58). She maintains this position, of course, even though a variety of witnesses, including Ms. Kinard---the ALEC expert on measurements---testified that there are correlated measurements in the plan. (Tr. 187). Again, the ALECs will forego no opportunity to claim a penalty should apply, even when their own expert testimony strongly suggests otherwise.

The ALEC plan appears designed to create massive penalties, not only because there is a penalty for every measurement, but because there are so many measurements. The mere fact of disaggregation creates the tendency to have more failures and, accordingly, to generate more penalties. For example, consider a situation in which a particular sub-metric captures a hundred events in a month. Assume that a 95% benchmark applies, and assume further that BellSouth severely fails this measure by performing acceptably in only 85 of the 100 instances measured.[1] Under the ALEC plan, BellSouth would pay the penalty for a severe failure, $25,000. If,

[1] Under the ALEC plan, when a 95% benchmark applies, performance of 90% or less constitutes a severe failure (Ex. 25, CLB-1, p. 48).

however, this measurement is disaggregated into three sub-metrics with an equal number of successes and failures in each (i.e., 100 ÷ 3 = 33.3 measurable events, 5 of which BellSouth fails), then this creates three separate failures and three payments of $25,000.

The ALEC plan appears designed to cause exactly this result. As the ALEC witnesses admitted, the degree of disaggregation they propose will result in many measurement categories with no activity whatsoever in a given month, and many more with only slight activity. (Kinard: Tr. 177, 179; Bursh: Exhibit 10, Bursh Deposition, p. 59) Further, in these sub-measurement categories with a very small volume of activity, any failure would appear to result in a penalty. In her deposition, Ms. Bursh stated that if a particular sub-measurement captures only one event in a month, and BellSouth fails to provide service at parity in this one incident, a payment will be assessed. (Ex. 10, Bursh Deposition, p. 77). At the time of the hearing, however, Ms. Bursh claimed that this would not occur because of the way the model treats small sample sizes. Instead, she contended that the model operates so that a single failure can never prompt a penalty. (Tr. 1033-35). When she was referred specifically to the document attached to her testimony (Ex. 25) that deals with small sample sizes, however, it became apparent that this document did not support her position. The document to which she referred showed that, in the context of measurements that utilize the benchmark, the benchmarks are adjusted downward if there are small sample sizes. (Ex. 25, CLB-1, p. 14) The document attached to her testimony, however, showed no adjustment for sample sizes of less than four, only a footnote that states that "the table can be expanded to include all possible data sizes from 1 upward." (Id., p. 15). There is absolutely nothing in this document, however, that says that BellSouth will not be penalized if a measurement captures a single failed event. All of this raises the question of

exactly how the ALEC plan truly functions. In the instance discussed above, would a single failure result in a $25,000 penalty or not? As with many aspects of the ALECs' plan, it is impossible to know based on the evidence presented.

Finally, the size of the penalties that the ALECs propose are unsupportable. Again, it is inconceivable that every single failure would have precisely the same impact on ALECs or their customers. The ALEC plan, nonetheless, is structured as if this were the case. Specifically, the ALEC plan is set up so that any failure would result in a penalty of somewhere between $2,500 and $25,000. The penalties vary by the ALEC plan's assessment of severity, but penalties do not vary from one failed measurement to the next. There is no objective basis whatsoever for the ALECs' decision to assess penalties of up to $25,000. (Tr. 1024-25). Instead, Ms. Bursh testified that the ALECs "just collectively decided that $25,000 would be the amount." (Id.).

Further, the difference in actual performance that would cause a penalty of $25,000 as opposed to $2500 is, in some cases, very slight. To give one example, the lowest benchmark proposed by the ALECs is 95%. Under the ALEC plan, performance at 90% for a measure that has a 95% benchmark constitutes a severe failure. (Ex. 25, CLB-1, p. 48). To put this in context, for BellSouth's proposed measure 07—Firm Order Confirmation Timeliness, the standard for "nonmechanized" is 85% in less than 36 hours. This is the same percentage that is advocated by the Staff in the StrawMan Proposal, and it is exactly the same number that has been approved by the Georgia Commission. Thus, BellSouth, the Georgia Commission, and the PSC Staff (at least preliminarily), all believe that parity would be achieved by meeting a benchmark of 85%. Under the ALEC plan, BellSouth could perform five percent better than the near consensus standard for parity, and still be penalized $25,000.

In a nutshell, the ALEC plan has the potential to generate massive penalties by applying excessive penalties to 100,000 or more measurement categories, and doing so every month for every ALEC. It is almost difficult to image a more egregious example of abusing the penalty process. There is obviously a good reason that no Commission anywhere in the United States has accepted the ALECs' invitation to authorize this abuse.

Issue 3a: What performance data and reports should be made available by BellSouth to ALECs?

**Position: The appropriate performance reports to be made available by BellSouth to ALECs are those identified in BellSouth's SQM. The raw data that supports all reports derived from PMAP should also be provided.

The performance data and reports that should be made available to the ALECs are those identified in BellSouth's SQM. BellSouth has proposed to make these data and reports available, as well as the raw data underlying the reports that are derived from BellSouth's Performance Measurement Analysis Platform (PMAP). BellSouth's proposal is consistent with Section 2.3 of Staff's proposed Performance Assessment Plan ("Staff Plan" or "Strawman Proposal") (Ex. 13). In contrast, the ALECs have demanded that BellSouth produce raw data for every one of the measurements, regardless of whether the data can be derived from PMAP or not.

There is no compelling need to provide raw data for every one of the measures, and to do so is simply not possible. As to the former point, the raw data that is derived from PMAP (which is available on BellSouth's website) will, as Mr. Coon testified, "include the most critical ordering, provisioning, and maintenance and repair measurements in which ALECs generally are interested, including, but not limited to, FOC Timeliness, Reject Interval, Percent Missed Installation Appointments, Average Completion Interval, Order Completion Interval

Distribution, Missed Repair Appointments, Customer Trouble Report Rate and Maintenance Averaged Duration." (Tr. 312-13). Thus, BellSouth is willing and able to produce the raw data that underlies the most important reports.

BellSouth, however, does not have the capability to make available electronically the raw data that is used to generate performance reports outside of PMAP, such as raw data for regional reports that are not (and cannot) be separated by ALEC (e.g., Speed of Answer in the Maintenance Center) (Tr. 255). These measurements reflect the time that a call, in effect, waits in line before it is answered by a BellSouth representative. The work centers that receive the calls are regional, and hundreds of thousands of calls are received each month from throughout the entire region. (Id.). As Mr. Coon stated, "although each call is individually timed and the averages for the month are posted in the SQM reports, it is not possible to electronically identify each and every ALEC call underlying these SQM reports." (Id.).

The ALECs demand that they receive raw data for every measure, but provide no evidence that there is a need for the raw data, or that it will ever be used. BellSouth, being the party that has to produce this data, obviously must be mindful of practical questions such as whether the raw data can be produced as the ALECs demand. Given that producing the raw data outside of PMAP is difficult or impossible, coupled with the ALECs' failure to demonstrate any need for this data, BellSouth's approach should be adopted.

Issue 3b: Where, when, and in what format should BellSouth performance data and reports be made available?

**Position: Performance reports for all BellSouth SQMs should be made available electronically on a monthly basis at BellSouth's website and should be posted by the 30th day after the month in which the reported activity occurs.

As to the format of reports, the parties appear to agree that it is appropriate for the reports to be produced electronically on BellSouth's website. BellSouth has done this, and will continue to do it by posting the data on its website (https:\\pmap.bellsouth.com) every month (Tr. 254). The disputed aspect of this issue concerns the timeframe for providing this information. BellSouth has committed to posting reports by the 30th day of the month after the month to which the information relates. Staff has proposed that the information be posted by the 20th day of the month. The ALECs have demanded that the information be posted by the 15th day of the month.

Posting by the 20th day has been achievable in the past because of the relatively low volume of ALEC specific data and performance measurement reports (Tr. 254). Today, however, there are approximately 155 ALECs operating in Florida (Tr. 312). Further, there are 105 ALEC-specific reports included in the BellSouth SQMs, and 129 reports that reflect BellSouth/ALEC aggregate reports. (Id.). Thus, to determine the maximum amount of reporting that might be due in any month would require multiplying the 155 ALECs times 105 reports (16,275 reports) and adding the 129 aggregate reports, which would total 16,404 reports. Further, raw data would have to be produced for many of the reports, as described previously. Given the magnitude of the reporting that must be done by BellSouth, combined with the fact that BellSouth makes every effort to validate the data before it is reported, BellSouth submits that posting a report by the 30th day of the month is the most reasonable of the proposals that have been made.

Issue 4a: Does the Commission have the legal authority to order implementation of a self-executing remedy plan?

Issue 4b: With BellSouth's consent?

Issue 4c: Without BellSouth's consent?

**Position: The Commission has the legal authority to enter an Order that is consistent with the voluntary enforcement mechanism offered by BellSouth. The Commission does not have the legal authority to order a self-executing remedy plan that includes elements to which BellSouth does not agree.

The answer to the first question, whether the Commission may order a "self-effectuating remedy plan" (i.e., penalties) with BellSouth's consent, is fairly straightforward. As a general proposition, BellSouth believes that the Commission has the authority to act as it sees fit in any matter under its general jurisdiction to the extent that the affected parties consent to the action. Thus, the answer to 4(a) is "yes."

The more difficult question is whether the Commission has the ability under either federal or state law to impose upon BellSouth a "self executing remedy plan" (i.e., a plan under which BellSouth would pay penalties (or damages) when it fails to meet the plan's measurements) without its consent. BellSouth submits that the Commission lacks this ability. The answer to Issue (4)(b) is "no."

To begin with Federal law, there is no Circuit Court case that BellSouth is aware of that has stated definitively whether the Federal Act gives the Commission the authority to order automatic penalties that would function in much the same manner as liquidated damages. All we really know for sure is that there is clearly no explicit grant of such authority in the Act. Consistent with this, the FCC has specifically stated that imposition of an enforcement plan (i.e., penalties) is not a prerequisite to Section 271 relief. (See Issue 8). Further, any argument that the authority to do so is implicitly granted by Section 251 is undercut by the fact that this Commission has specifically declined to impose automatic penalties that are akin to liquidated damages in the context of Interconnection Agreements arbitrated pursuant to Section 251. This

issue, of course, initially came up in the context of arbitrations between BellSouth and AT&T and BellSouth and MCI almost five years ago. In those arbitrations, the Commission properly ruled that automatic, or self-effectuating, penalties are tantamount to liquidated damages, and that this Commission has no authority under state law to order liquidated damages. This would likely be the end of this inquiry, but for the decision of the United States District Court for the Northern District of Florida in *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 112 F. Supp 2d 1286 (U.S.D.C., No. D. FL, 2000). In that case, the Federal Court considered the claim of MCI that this Commission erred by refusing to consider the question of whether a provision for damages should be included in the interconnection agreement between the parties. The Federal Court prefaced its consideration of this issue by categorizing it as follows: "As part of its Petition for Arbitration before the Florida Commission, MCI sought to include in the interconnection agreement specific performance criteria and a compensation mechanism similar to a liquidated damages provision." (Order, p. 31-32).

Although the Federal Court suggested that this Commission might well have the ability to award liquidated damages under state law (contrary to the Commission's finding), the gravamen of the decision was that it simply does not matter. The Court noted in this regard that "if a compensation provision were truly required by the Telecommunications Act and could be adopted in some form without imposing on the Florida Commission an unconstitutional burden . . . [Citation Omitted] . . ., then any contrary Florida law obviously would not preclude adoption

of such a provision." (Order, p. 36). Of course, there is no authority anywhere for the conclusion that automatic penalties are required by the Act.[2]

The Court then went on to hold that this Commission must consider literally anything that a party raises in an arbitration. The Court's logic was as follows: 1) parties are free to negotiate anything they wish; 2) to the extent negotiations fail to yield an agreement, parties may raise in arbitration issues that were the subject of negotiations; 3) when a Commission undertakes to arbitrate a dispute between the parties, it is required to arbitrate all "open issues", i.e., whatever the parties raise. This constitutes perhaps the broadest interpretation of the Act that has been made by any Federal Court in the Country. Still, the Court was careful to clarify its ruling as follows:

> Nothing in this Order should be read as an indication that the Telecommunications Act imposes on state Commissions an obligation to perform any enforcement role requested by the parties, or that Congress lawfully could impose any such obligation on state commissions. The holding here is simply that, having undertaken to arbitration any open issues under the Act, the Florida Commission must arbitrate the open issue of whether or not the parties' arbitrated interconnection agreement should or should not include an enforcement or compensation mechanism of the type requested by MCI.

(Id., p. 36, footnote 16)(emphasis added).

Further, the Federal Court does state that the Commission is not prohibited from arbitrating a "compensation provision" by Southern Bell v. Mobil America Corp., 291 So. 2d 199 (Fla. 1977), the legal authority upon which the Commission relied (MCI, at 1298). However, the Court did not identify any state law that actually provides the authority to order a liquidated damages provision/enforcement mechanism/penalty. Considering the well-accepted fact that the Commission does not have the authority to award damages, it is not surprising that

[2] Even the parties that have taken the most aggressive stance on this issue argue only that the Commission can

no specific provision of Florida law presents itself as even possible authority for the award of damages/penalties.

In the Pre-Hearing Order, the Commission Staff takes the position that "the Commission is vested with jurisdiction over this matter pursuant to Section 364.01(3) and (4)(g), Florida Statutes." (Pre-Hearing Order, p. 22). While it is certainly true that Section 364.01 gives the Commission a broad grant of general jurisdiction over telecommunications issues, there is nothing in this Section that empowers the Commission to order the payment of penalties under the instant circumstances.

The StrawMan proposal by the Commission states specifically in several places that Section 364.285(1) gives the Commission the ability to order penalties (e.g. § 2.4). However, the difficulty arises in the particular way that this StrawMan Proposal attempts to apply the statute. One example will suffice:

> 2.5 If performance data and associated reports are not published under the BellSouth website by the (20th) calendar day of each month, each day past the due date shall constitute an admission of a willful violation of the Commission order implementing this enforcement plan pursuant to Section 364.285, Florida States, and a penalty of $2,000 will be deemed assessed.

The statement that failure to comply with the plan will be deemed "to be an admission of a willful violation of the Commission rules" is repeated several times throughout the StrawMan Proposal. This language, standing alone, is a marked (and ultimately untenable) deviation from the way in which Section 364.285 has always been applied by the Commission. Further, Section 364.285, Florida Statutes, provides for the payment of a penalty when a party is "found to have refused to comply with or to willfully violate" any Commission rule, Order of the

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impose these penalties if it wishes to do so, not that it is required by Federal law to do so.

Commission or provision of Chapter 364. Historically, when the Commission has reason to believe that a party may have willfully violated, for example, a Commission rule, a show cause proceeding takes place to determine whether there is a basis to assess a penalty.

At the same time, Mr. Stallcup testified (Direct, p. 5, line 6) to his understanding that

> The Commission does not have the authority to order any payments that could be considered monetary damages. Therefore, it would appear that adoption of any Tier 1 enforcement mechanism would require that the parties enter into a voluntary agreement that these payments be made before the Commission could approve a Tier 1 enforcement mechanism.

(Tr. 50).

Further, Mr. Stallcup testified to his understanding that,

> [T]he Commission does not have the authority to receive penalty payments absent a finding of a willful violation of a Commission order, rule or statute. Such violations are normally determined through a process called a "show cause" proceeding which provides the party an opportunity to present a case as to why it should not be fined for the alleged violation. In order to make the Tier 2 enforcement mechanism self-effectuating and avoid potentially frequent and lengthy "show cause" proceedings, my plan proposes that any Tier 2 payments be based upon an agreement by BellSouth that any failure to provide compliant service under Tier 2 would constitute a willful violation of the final order resulting from this docket.

(Id.).

BellSouth agrees with Mr. Stallcup's understanding of the law.

The language of the StrawMan Proposal, taken together with Mr. Stallcup's testimony, prompts the conclusion that the Staff Proposal is written as if BellSouth will agree to all penalties proposed by the Staff. Clearly, however, BellSouth has not done so to date. All of which brings up the question of what penalties BellSouth would consent to pay. Obviously, this is not an issue if the Commission approves BellSouth's plan. Moreover, BellSouth certainly will not reject out of hand the prospect of agreement with any reasonable self-effectuating

remedy proposal ordered by the Commission, even if it deviates from that to which BellSouth has already consented. At the same time, the ALECs have proposed an enforcement mechanism plan which, as described above, is a virtual "cash machine" that is guaranteed to affect the transfer of truly astounding amounts of money from BellSouth to the ALECs, even when BellSouth is providing service at parity. For reasons that are obvious, BellSouth cannot agree to the ALEC plan.

Issue 5a: Should BellSouth be penalized when BellSouth fails to post the performance data and reports to the Web site by the due date?

**Position: No. BellSouth should not be subject to an automatic penalty for the late posting of a report, unless there is a systematic failure to post reports.

Issue 5b: If so, how should the penalty amount be determined, and when should BellSouth be required to pay the penalty?

**Position: As stated above, there should be no penalty. If, however, Commission determines it is appropriate to assess such a penalty, the amount of the penalty proposed by the Staff ($2,000 per day), would be reasonable if the $2,000 per day applies to the aggregate of all reports.

As Mr. Coon testified, "BellSouth should not be subjected to an automatic penalty for the late posting of reports." (Tr. 256). BellSouth will make every effort to meet any deadline that is imposed upon it. However, "the volume of data processed and the validation of reports prior to posting impose" . . . fairly severe burdens on BellSouth. (Id.) It is not reasonable to assume that this burden will be met each and every month without exception, i.e., that BellSouth will achieve perfection in filing reports. Therefore, unless there is a systematic failure in posting reports, there should be no penalty for late posting.

In additional to the fact that setting perfection as the standard seems patently unfair, there should also be no penalty because there is no evidence that the occasional posting of a late report would cause any harm to the ALECs. As Mr. Coon testified, the data in question is

available for every ALEC certificated in the BellSouth region but very few ALECs access the data. (Tr. 311). Thus, the ALECs would be hard pressed to argue that they would be harmed by the occasional late posting of data which, to date, they have generally chosen not even to review.

The issue of the amount of any penalty to be levied for late filing involves two separate questions. One, whether the Commission can assess any penalty against BellSouth that is involuntary and automatic. Two, if the Commission can do so, how much should the penalty be.

For the reasons discussed previously in response to Issue 4, BellSouth does not believe that the Commission has the power to assess voluntary penalties against BellSouth. However, if the Commission finds otherwise, then the next question is the amount of the penalty. As Mr. Coon notes in his testimony, the Staff has proposed a penalty of $2,000 per day. (Tr. 257). Assuming that this applies to the aggregate of reports, rather than each individual report, BellSouth believes that this amount is reasonable. (Id.).

The ALECs took the contrary position that the Commission should impose a penalty of $5,000 per day. However, the ALECs have provided no rationale for this position, or for the contention that $2,000 per day would be an inadequate penalty. Clearly, if the Commission determines that it can impose an involuntarily penalty, $2,000 per day is the more reasonable amount.

Issue 6a: Should BellSouth be penalized if performance data and reports published on the BellSouth Web site are incomplete or inaccurate?

**Position: No. BellSouth should not be subject to involuntary, automatic penalties for incomplete or inaccurate reports. Such a penalty would be difficult to administer. Applying a penalty after an error is detected is inconsistent with errors or omissions as quickly as possible after they are discovered.

Issue 6b: If so, how should the penalty amount be determined, and when should BellSouth be required to pay the penalty?

**Position: As stated in response to 6(a), there should be no penalty. If the Commission determines otherwise, the $400 per day proposed by Staff is an appropriate amount, if this amount applies to the aggregate of all reports and not to each incomplete or inaccurate report.

BellSouth's position on Issue 6 is much like its position on 5. BellSouth believes that it is no more appropriate to set the standard for providing accurate reports at perfection, than it is to apply this standard to the timeliness of reports. There should be no penalty for the occasional issuance of an inaccurate report.

As to the amount of the penalty, again, BellSouth believes that the Commission does not have the authority to impose an involuntary fine upon BellSouth. If the Commission concludes that it may do so, however, BellSouth believes that the amount that has been proposed by the Staff ($400 per day) is reasonable.

Moreover, there are also two factors that favor BellSouth's positions regarding the submission of inaccurate reports that did not apply to late reports. First, there is no generally accepted definition of what would constitute "an incomplete or inaccurate" report, and no party in this proceeding has proposed one. (Tr. 258). Thus, one could anticipate ongoing disputes as to how minor a discrepancy renders a report "incomplete" or "inaccurate." By setting up a debate on this point, the penalty for inaccurate or incomplete reports virtually invites ALECs to game the penalty system.

Second, as Mr. Coon testified, finding and correcting errors is the sort of activity that should be encouraged. It makes little sense to create a system in which discovering and correcting errors would prompt a penalty payment. The only ALEC witness to respond to this point was Dr. Ford, who proposed an approach that is unusually harsh, even by ALEC

standards. Dr. Ford claims that the appropriate approach would be to set up a two tiered penalty whereby, if BellSouth finds and corrects an error, it would be penalized; if an ALEC finds an error before BellSouth corrects it, the penalty would be doubled (Tr. 1183). Thus, Dr. Ford has proposed a sort of "scavenger hunt", whereby each and every month ALECs would be encouraged to comb the data and reports supported by BellSouth in an effort to find some error that would generate a penalty.[3] Although every ALEC position on the issues in this docket seems designed to turn the penalty plan into an ALEC remedy stream, Dr. Ford's proposal on this point is perhaps the most blatant.

There is no record evidence that occasional inaccuracies in the reports would cause any harm to the ALECs, and there should be no penalty for these inaccuracies.

Issue 7: What review process, if any, should be instituted to consider revisions to the Performance Assessment Plan that is adopted by this Commission?

**Position: This issue has been resolved by stipulation of the parties.

Issue 8: When should the Performance Assessment Plan become effective?

**Position: Assuming the Commission issues an Order by July 31, 2001, BellSouth can produce all data and measurements included in the BellSouth proposal during the fourth quarter of 2001. The enforcement portions of the performance assessment plan, however, should not become effective until after BellSouth receives 271 authority in Florida.

Setting the effective date of the Performance Assessment Plan involves two distinct questions: 1) When can the plan be implemented (i.e., how long will it take to put the plan into effect? 2) When should the Plan become effective in order to serve the purpose for which it is intended.

[3] Even worse, under the ALEC proposal for "mini-audits" (discussed below in Issue 27), the ALECs could use individual audits to conduct this search, and force BellSouth to pay 50% of the cost.

If the Commission adopts BellSouth's proposal, then the answer to the first question is fairly simple. If an order is issued by July 31, 2001 adopting the SQM proposed by BellSouth, BellSouth can produce all measurements and data during the fourth quarter of 2001 (Tr. 260). If the Commission approves some or all of the plan proposed by the ALECs, then the issue of when the plan can be implemented is much less clear. As stated previously, BellSouth believes that the ALECs proposal would prove to be tremendously difficult, and perhaps impossible, to implement.

Between the polar opposites of a relatively swift implementation schedule under BellSouth's plan and the possibility that the ALEC plan could never be implemented, there is a considerable range of possible time requirements to implement whatever the Commission may order. As Mr. Coon testified, "each modification and change to what BellSouth has proposed will require a substantial amount of intensive effort developing the requirements associated with the change, writing software code and testing the software code to protect the integrity of the production PMAP system while continuing to process and produce monthly SQM reports." (Tr. 248). Suffice to say, if the Commission orders measures that go significantly beyond those proposed by BellSouth, implementation will likely take considerably longer than the fourth quarter of 2001.

The question of when both the measurement and penalty aspects of the plan can be implemented is a technical question. The question of when the penalty aspect of the plan <u>should</u> be implemented is a policy question.

As a matter of policy, the enforcement provisions of any plan approved by the Commission should not go into effect until after BellSouth receives 271 relief and is able to provide long distance service in Florida. The FCC has never indicated that it considers the

existence of an enforcement plan to be a prerequisite to 271 relief. Instead the FCC has plainly stated that the penalty plan is simply one way to satisfy the public interest requirements of 271 by ensuring that there will be no backsliding by the respective ILEC after 271 authority is granted. (*See* Bell Atlantic New York Order, Paras. 429-430; Southwestern Bell Texas Order, para. 420-421; Southwestern Bell Kansas/Oklahoma Order, par. 269).

For example, in the context of stating its public interest analysis, the FCC provided the following in the Bell Atlantic, New York Order:

> [O]ur examination of the New York monitoring and enforcement mechanisms is solely for the purpose of determining whether the risk of post-approval [271] non-compliance is sufficiently great that approval of its section 271 application would not be in the public interest.

(footnote 1326).

Further, referring to Bell Atlantic's proposed plan, the FCC stated that,

> [b]ecause this aspect of our public interest inquiry necessarily is forward-looking and requires a predictive judgment, this is a situation where it is appropriate to consider commitments made by the applicant to be subject to a framework <u>in the future</u>.

(emphasis added)(footnote 1326).

In short, while the FCC has encouraged "state performance monitoring and post-entry level enforcement," it has "never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval". (Paragraph 429).

Not surprisingly, the ALECs contend to the contrary. Again, the gist of every ALEC position is a quest for more penalty-generated revenue. So it should not surprise that the ALECs want this revenue stream to begin sooner rather than later.

Ms. Bursh contends, on behalf of the ALECs, that there is little or no competition in the local Florida market, and that BellSouth has no incentive to comply with a performance plan without penalties. She is wrong on both counts. As Ms. Cox testified, competition in the local

market is in fact developing in Florida (Tr. 550). Further, as Ms. Cox also testified, "BellSouth has a multitude of incentives to comply with the Act absent a penalty plan". (Tr. 551). First, to the extent BellSouth's obligations are set forth in the form of interconnection agreements, BellSouth is legally bound to honor these agreements. (Id.) If it fails to do so, there are a variety of enforcement measures available to the ALECs, and there have been for a number of years, even though no penalty plan has been in place.

Likewise, Dr. Ford argues on behalf of Z-Tel, that "the role of the performance plan is to ensure BellSouth's compliance with the terms of the interconnection agreement[s], not simply to get BellSouth 271 relief." (Tr. 1167) On the contrary, a specific agreement between BellSouth and an ALEC is to be enforced by way of a complaint to the Commission, or by remedies that appear in the contract. Dr. Ford's idea that penalties must be generically set to enforce contracts that do not currently include those penalties is fundamentally wrongheaded.

Also, both Dr. Ford and Ms. Bursh contend that the plan should be put into effect sooner rather than later since this would provide evidence that BellSouth is providing compliant performance prior to filing its 271 application with the FCC. (Ford: Tr. 1167; Bursh: Tr. 983). First, as noted previously, the FCC does not require that performance be monitored prior to the grant of 271 relief. Further, this Commission has undertaken in a related docket, third party testing based upon interim performance measures, and this test will be used, along with other evidence, to judge BellSouth's compliance. Ms. Bursh and Dr. Ford appear to contend that the Commission should approve performance measures and penalties, then put them into place so that BellSouth's performance under these measurements can be monitored for some period of time as well. Although this would have the obvious (and from the ALECs perspective, desirable) effect of delaying BellSouth's 271 application, there is no indication that this action is

otherwise necessary or appropriate. It would essentially duplicate the third party testing to date, and render the Commission's considerable effort in that regard a waste of time.

Finally, even if the Commission were to determine that there would be some incremental benefit to having the performance measurements in place in order to monitor how well BellSouth is performing under these measurements, this has nothing to do with the early imposition of penalties. Again, both witnesses Ford and Bursh argue generally for the immediate implementation of "the plan", without making the critical distinction between measurements and penalties. Even if their point had some merit regarding the implementation of measurements pre-271 relief, it provides no basis for the immediate implementation of penalties.

Issue 9: What are the appropriate Enforcement Measurement Benchmarks and Analogs?

**Position: The appropriate enforcement measurement benchmark and analogs are those set forth in the Exhibit DAC-1 to the testimony of David Coon, and summarized in Exhibit DAC-5.

BellSouth and the ALECs appear to agree on the circumstances in which either retail analogs or benchmarks should apply: if a retail analog exists, it should apply; if there is no retail analog, then there should be a benchmark. As to the selection of appropriate analogs and the level of the benchmarks (e.g., 90%, 85%), BellSouth's proposal is set forth in Exhibit DAC-1 to the testimony of Mr. Coon. (Ex. 16). As he noted, the particular retail analogs and benchmarks BellSouth proposes "are the result of several years work and have been conformed to the results reached in Georgia" (Tr. 321). The ALECs have provided little in the way of substantive criticism of the BellSouth-proposed retail analogs. Further, in those instances in

which the ALECs do have criticism, it appears to have more to do with the level of disaggregation, than with the retail analog selected.[4]

As to benchmarks, however, the dispute between the parties is more clearly drawn. Again, BellSouth has chosen benchmark values that it believes are appropriate based upon the Louisiana and Georgia proceedings, and which are the same as those approved by the Georgia Commission. In contrast, the ALECs have proposed benchmarks that range from 95% to 100% (i.e., perfection). The ALECs have proposed no benchmark below 95%. In making their proposal, the ALECs have obviously deviated from what was accepted in Louisiana and Georgia.[5] The specific values of the benchmarks proposed by Ms. Kinard on behalf of the ALECs are not substantively supported anywhere in her testimony. Further, Ms. Kinard admitted upon cross-examination that the ALECs have no analysis or study to support the conclusion that a 95% benchmark is the minimum "that would allow ALECs a meaningful opportunity to compete." (Tr. 181).

Instead, Ms. Kinard stated that the ALECs are advocating whatever benchmarks have been selected in Texas and New York (Tr. 181). In doing so, the ALECs have, of course, ignored the fact that in Texas and New York, the respective Commissions were considering different ILECs with different systems. The ALECs also ignore the results in Georgia and Louisiana even though the respective Commission was considering precisely same issues, the same ILEC (BellSouth) and the same ILEC systems. Given this, it is obviously that the ALECs are simply advocating the highest benchmarks that have been ordered anywhere by any

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[4] For example, see Ms. Bursh's testimony criticizing BellSouth's use of Retail Residence and Business Dispatch as an analog for OCI-UNE loops. (Tr. 1002).

[5] In fact, Ms. Kinard "accepted" that almost half of the benchmarks ordered in Georgia are below the 95% minimum benchmark level advocated by the ALECs (Tr. 181).

Commission, even in circumstances that may have no applicability to the systems of BellSouth.

When questioned about the ALECs' proposed benchmarks on cross-examination, however, Ms. Kinard stated that the use of these other states was "to show that other ALECs can meet these standards" (Tr. 182). In other words, to the extent some Commission somewhere has ordered a particular benchmark, it must mean that the accomplishment of this benchmark is possible. Even if we ignore the fact that Ms. Kinard is making a considerable assumption, we cannot ignore the fact that she seems to believe that benchmarks should be set at the outer edge of theoretical possibility. In other words, any benchmark that is possible should be ordered. Obviously, this is not the appropriate standard. Rather, the standard is whether a benchmark will allow the ALECs a meaningful opportunity to compete, and Ms. Kinard conceded that she has no objective information that the exceedingly high benchmarks advocated by the ALECs are the minimum that is adequate for this purpose.

Issue 10: Under what circumstances, if any, should BellSouth be required to perform a root cause analysis?

**Position: BellSouth should not be required under any circumstances to perform a root cause analysis. A root cause analysis is an expensive and time-consuming process that is not needed in the present context.

BellSouth does not believe that there is any need to perform a root cause analysis if BellSouth fails to meet a particular measure. As Mr. Coon testified (and the parties appear to agree), an enforcement mechanism, once implemented, should function automatically. (Tr. 262). As Mr. Coon also testified, a root cause analysis is "an often formalized, comprehensive and detailed investigation of all the component activities related to the delivery of the service in question. It may include participation by all BellSouth entities involved in the delivery of the service and include not only problem identification, but also the development and

implementation of solutions. This is a very time consuming and expensive process". (Tr. 261-62). Thus, a root cause analysis is precisely the sort of burdensome administrative process that an automatic plan should seek to avoid. Further, there is no need for such an analysis. "BellSouth has the information necessary to identify problems and the incentive, by virtue of enforcement penalties, to correct those problems." (Tr. 262).

The ALECs contend that a root cause analysis is needed, but have presented no evidence to suggest that BellSouth will lack either the information or the motivation to correct mistakes for which it is penalized. BellSouth believes that it should not be ordered to go through a process that is formal, time-consuming, and expensive unless there is some demonstrated need to do so. Again, the ALECs have failed to demonstrate such a need.

Issue 11a: What is the appropriate methodology that should be employed to determine if BellSouth is providing compliant performance to an individual ALEC? (Tier 1)

Issue 11b: How should parity be defined for purposes of the Performance Assessment Plan?

Issue 12a: What is the appropriate methodology that should be employed to determine if BellSouth is providing compliant performance on a statewide ALEC-aggregate basis? (Tier 2)

Issue 12b: How should parity be defined for purposes of the Performance Assessment Plan?

**Position: The determination of whether BellSouth is providing "compliant performance" to an individual ALEC is identical to the determination of whether BellSouth is providing service at parity. The FCC has expressly defined parity. Where a retail analog exists, BellSouth must provide access to competing carriers in substantially the same time and manner as it provides to itself. For functions that have no retail analog, BellSouth must provide access that would allow an efficient carrier a meaningful opportunity to compete. This would be determined by the use of a benchmark.

Issue 11C and 12C: What is the appropriate structure?
Issue 11C(1) and 12C(1): What is the appropriate statistical methodology?

**Position: The appropriate statistical methodology to use when comparing the service BellSouth provides to ALECs with the service that BellSouth provides to its retail operations is the methodology jointly created by BellSouth and a number of the ALECs in Louisiana, referred to as the Truncated Z method with error probability balancing.

This issue actually consists of two separate sub-issues that need to be addressed by the Commission. The two sub-issues involve (1) whether BellSouth's "truncated z test statistic" or the ALECs' "modified Z test statistic" will be used in this proceeding; and (2) whether "error probability balancing" will be used. The first sub-issue will be resolved by the Commission's decision on an entirely different issue that has nothing at all to do with statistical processes. There is little disagreement between the parties about the second sub-issue.

With regard to the first sub-issue, the plan that the Commission adopts will dictate whether the "modified Z test statistic" is used, or whether a combination of the "modified Z and the truncated Z test statics" will be used. In this proceeding the ALECs have offered a plan that consists of hundreds of thousands of individual measurements and sub-measurements. The ALECs are asking this Commission to impose penalties for every violation of any one of these measurements. Since there is no aggregation of data or measures, the ALECs propose to use the "modified Z statistic." In contrast, BellSouth has offered a plan that, while having thousands of "like-to-like" comparisons at what BellSouth calls the "cell" level, aggregates these results into higher level groupings in its proposed penalty plan. Under the BellSouth plan, a "modified Z test statistic" is calculated at the "cell" level (Tr. 630), and those test statistics are then aggregated to a higher level, where a "truncated Z test statistic" is calculated.

To illustrate how BellSouth's approach uses both test statistics, Dr. Mulrow explained that, under BellSouth's plan, the first step in evaluating a measurement that involved retail analogs is to break the measurement down into appropriate "cells" in which "like-to-like"

comparisons can be done between the services provided to the ALECs by BellSouth and the comparable services that BellSouth provides to itself. (Tr. 630). As an example, one cell might compare residential orders with less than 10 circuits that were submitted for a specific central office during the first part of the month, but that were non-dispatched. (Id.) In that cell BellSouth would include all of its orders that met this description, as well as all of the orders of the ALECs that met this description. Under BellSouth's plan, once all of the data is collected, a modified z score for that "cell" is determined. (Id.) BellSouth, however, does not stop there. It then aggregates the test statistics for the "cells" and calculates a "truncated Z test statistic" for the aggregated group of cells.

The issue of whether to aggregate determines which test statistic to use, and the parties are not in disagreement on this point. This correctness of this conclusion is easily demonstrated.. The ALEC's statistician, Dr. Bell[6], addressed the matter in this fashion:

> Q. (By Mr. Lackey) Okay. Now, if the Commission in this case approves a plan that allows a reasonable and appropriate level of aggregation, the use of the truncated z as BellSouth has proposed is appropriate, correct?
>
> A (By Dr. Bell) Yes. If the aggregation is appropriate, then I believe the truncated z is the method that should be used.

(Tr. 1096)

In fact, this is exactly the same conclusion that the Staff's witness, Mr. Stallcup, reached, as was demonstrated in the following exchange:

[6] Dr. Bell filed testimony on behalf of 8 different ALECs in this proceeding. Z-Tel Communications, Inc filed a separate witness who testified on this issue. Even Dr. Ford recognizes that it is possible to deal with Type I and Type II problems simultaneously, although he says the procedure does so "roughly." (Tr. 1145)

> Q (By Mr. Prescott) Mr. Stallcup, when you were talking about the choice of the modified z test or the choice of the truncated z test, I think, you indicated that the ALEC coalition agreed that if the truncated z statistic was chosen that BellSouth's disaggregation was appropriate?
>
> A (Mr. Stallcup) The cause effect would be reversed. It's my understanding from the comments from the statistical experts that if the Commission should determine that BellSouth's method of disaggregating the enforcement measures is the appropriate one to use, then the test statistic proposed by BellSouth would also be the appropriate test statistic to use. Similarly, if the ALEC disaggregation scheme is adopted, then the ALEC test statistic would be appropriate.

(Emphasis added) (Tr. 88).

Consequently, once the Commission determines the form of the plan that it wishes to adopt, the appropriate test statistic will become obvious and will not be in dispute.

The second sub-issue involves the use of "error probability balancing." (Tr. 608). In any statistical analysis there is a possibility of making one of two types of errors in the analysis. First, there is the possibility that the test statistics will suggest that there is a statistical difference in the observed data when, in fact, there is none. This is called a Type I error. (Tr. 614). There is also a second kind of possible error, where the test statistic suggests that there is no statistical difference in the observed data, and there, in fact, is a real difference. This is called a Type II error. (Tr. 617) Obviously, a Type I error would suggest that the service that BellSouth is providing is not in parity when it, in fact, it is. A Type II error would suggest that BellSouth is providing service at parity when in fact it is not. One equitable way to account for such errors is to simply set the probability of each occurring at the same level, so that both BellSouth and the ALECs are equally exposed to the possibility of a statistical error. "Error probability balancing" does exactly that. (Id.).

In application, "error probability balancing" means that a formula is used to make a calculation that yields a single number that represents the "critical balancing value" where the probability of a Type I error and a Type II error are exactly the same. (Tr. 617). Once that single number or "critical balancing value" is determined, the test statistic, whether it is the modified Z statistic or the truncated Z statistic, can be compared to the "critical balancing value" to determine whether there is a material statistical difference between the service BellSouth provides to the ALECs and the service it provides to itself.

Again, this particular aspect of the statistical methodology is not seriously in dispute, and the issue of using "error probability balancing" is equally applicable irrespective of whether the Commission adopts a plan that requires the use of a truncated Z test statistic or the use of a modified Z test statistic. The statistician representing the majority of the ALECs, Dr. Bell, addressed the matter in the following exchange:

> Q Thank you. Now, we have agreed -- I mean, the BellSouth statisticians and the ALEC statisticians agree that the principle of balancing, critical value balancing should be applied, right, in this case?
>
> A Yes.

(Tr. 1100)

The real controversy surrounding the issue of "error probability balancing" involves the fact that the calculation of the "critical balancing value," discussed above, is dependent upon an assumed value for "delta" (to be discussed in connection with Issue 11 (c) 2) and whether an arbitrary limit or "floor" should be put on the value of the "balancing critical value" (which is the subject of Issue 11 (c) 5, and also discussed below).

Consequently, the statistical methodology that the Commission should adopt in this proceeding will be determined by the Commission's selection of a basic plan, either one that aggregates data or one that does not. Once that occurs, the proper statistic will follow and most parties agree, subject to the caveats above, that using that test statistic together with "error probability balancing" is the proper statistical methodology to use in this proceeding.

Issue 11(c)(2) and 12(c)(2): What is the appropriate parameter delta, if any?

**Position: The appropriate parameter delta for Tier 1 is 1.0. The appropriate parameter delta for Tier 2 is 0.5. BellSouth recommends utilizing each delta for an initial period of six months to see what results are produced, and upon analysis of these results, to set a permanent value.

The discussion of Issue 11 (c) 1, above, addressed the issue of "error probability balancing" as a part of the appropriate statistical methodology for use in this proceeding. Essentially "error probability balancing" involves the determination of a "balancing critical value," a figure that represents the point at which, in a statistical analysis, the probability of Type I and Type II errors are exactly balanced. (Tr. 617). As Dr. Mulrow discussed, there are formulas that are used to calculate this " balancing critical value." (Id.)

Although there are complicated formulas that can be used to calculate the single value that represents a "critical balancing value," (Id.), a simple approximation of that figure can be determined that will facilitate the discussion of this issue. This approximation is calculated by simply taking the square root of the number of ALEC transactions that have been observed, and multiplying that figure by a number that is derived by dividing "delta" by 2. (Tr. 618). To illustrate, if there were 25 ALEC transactions, and a "delta" of 1 is used, the resulting "critical

balancing value" would be "-2.5."[7] Using "-2.5" as the balancing critical value, any test statistic smaller than "-2.5" (that is any number further from 0) would indicate the presence of a material statistical difference. Any number larger than "-2.5" would indicate the absence of a material statistically significant difference.

Clearly, in such circumstances the value of "delta" has a significant impact on the single number that has been identified as the "critical balancing value." The higher the value of "delta," the higher the "balancing critical value," all other things being equal. Therefore, it is not surprising that there was a dispute among the parties as the appropriate value of "delta." BellSouth proposed a value for "delta" of 1.0. for Tier 1 measurements and .5 for Tier 2 measures. (Tr. 270, 277). The Staff's "strawman" proposal suggested a value for "delta" of .5 for Tier 1 and .33 for Tier 2. (Tr. 59). The ALECs proposed a value for "delta" of .25 for both tiers. (Tr. 1072). These differences frame the debate raised by Issue 11 (c) 2 and Issue 12 (c) 2.

In order to resolve which value to use for "delta," it is important to understand the purpose it serves. Basically, "delta" is a factor that is used to identify whether a meaningful difference exists between the BellSouth and ALEC performance, in addition to a statistical difference. (Tr. 621) To use an example, assume that for a given month the average time that BellSouth took to provision a dispatched residential retail order was 5 days. Assume further that the standard deviation associated with that average was half a day. This means that about 68 percent of all of those services were provisioned to BellSouth customers within a period of 4.5 to 5.5 days. (Id.) If the threshold of materiality, as represented by "delta" were set at a value of 1.0, as long as the average time to provision similar services to the ALECs did not take

[7] The "balancing critical value" is always assumed to be negative, because if the test statistic were positive, it would suggest that the ALECs were getting better service than BellSouth was providing to itself, which is, of

longer than one half of the standard deviation (or one-quarter of a day), the difference in the averages would not be material. Stated another way, if the average interval for BellSouth to provision services to its customers were 5 days and the average of the time to provision services to the ALECs was less than 5.25 days, the difference, even though it exists, would not be material. (Id.)

The question then becomes, how do you decide what is material? How was the decision made that a quarter of a day's difference between the service performed for the ALECs and for BellSouth's own customers was not material? The simple answer is that this has to be a business judgment. (Tr. 94, 1098) Unfortunately, as Dr. Ford stated, testifying for Z-Tel Communications, Inc, the exercise of business judgment requires time and experience (Tr. 1252) and this process is so new that assumptions have to be made is selecting the value of "delta." It is precisely for that reason that BellSouth has proposed that the Commission set a value for "delta" and revisit that decision six months after the plan goes into effect in order to determine whether the value of "delta" was set inappropriately.

If the Commission elects that course, it still has to determine the initial value of "delta." In this regard, BellSouth has proposed the values for "delta," selected by the Louisiana Public Service Commission. (Tr. 270, 277), while the Staff has proposed .50 and the ALECs have proposed .25.

In resolving this issue, BellSouth has suggested a value of 1.0 for Tier 1. However, as both Dr. Mulrow and Dr. Bell testified (Tr.665, 1098-1099), BellSouth will begin paying penalties to the ALECs when the observed differences between BellSouth transactions and the ALEC transactions equal one-half of the value of "delta." As a practical matter, this means that

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course, not the issue in this proceeding.

under BellSouth's proposal, BellSouth would begin paying penalties when the difference in the observed means of the BellSouth and ALEC transactions was equal to half a standard deviation. Under the ALECs proposal, the penalties would start when the discrepancy was equal to one-eighth of a standard deviation.

The simple truth is that not all differences are material and some judgment has to be exercised in determining whether a difference equal to half a standard deviation is material, or whether materiality requires that one-eighth of a standard deviation is appropriate. Again, because of this uncertainty, BellSouth urges the Commission to adopt the same standards that Louisiana adopted, and plan to review that decision at six month intervals until the Commission can be certain that it has found the correct value for "delta."

Issue 11(c)(5) and 12(c)(5): Should there be a floor on the balancing critical value?

**Position: There should be no floor placed on the "critical balancing value." An artificial floor will inappropriately prevent the balancing critical value from changing as it should, with changes in sample size.

This issue addresses the "balancing critical value" that was first discussed in response to Issue 11(c)2, above. Again, the "critical balancing value" is the single figure that represents the point at which Type I and Type II errors are exactly balanced, so that neither the ALECs nor BellSouth are unduly prejudiced by the existence of such errors. (Tr. 617)

One of the things that is obvious from the discussion of Issue 11 (c)2, above, is that the size of the "balancing critical value" changes as the number of ALEC transactions changes. In the example first given, it was assumed that there were 25 ALEC observations, and a "delta" of 1.0. This lead to a "balancing critical value" of "-2.5." If however, there had been 100 ALEC observations, using the same formula would have yielded a "balancing critical value" of "-5" instead of "-2.5." Some of the ALECs, and particularly Z-Tel Communications, Inc., argue that

allowing the "balancing critical value" to float with sample size, allows the observed statistical difference to vary more from zero without finding a material discrepancy.

Perhaps the most understandable explanation of why using an artificial floor is simply wrong is found in Dr. Mulrow's testimony. There he gives an example that highlights the problem with a floor. Specifically, Dr. Mulrow assumes that an average provisioning interval for service to an ALEC is 3.3 days. He assumes that the average interval for BellSouth is 3 days, with a standard deviation of 4 days. Finally, he assumes that an artificial floor of "-3" is imposed on the "balancing critical value." (Tr. 623) As Dr. Mulrow illustrates, an ALEC average of 4 days would trigger a penalty with only 5 ALEC transactions. However, as the number of BellSouth and ALEC transactions increased, the point at which a penalty would be triggered with a fixed floor drops from 4 days to 3.44 days to 3.24 days as sample size increases. (Id.) The point that Dr. Mulrow makes is that, in the first instance, the parties would presumably agree, if they agreed to the value of "delta" used in the calculation, that until the ALEC average interval reached 4 days, no penalty is due. That is, the parties would have agreed that the difference between 3.3 days and 4 days was not material. However, as the number of transactions grows, the effect of an artificial floor is to use the threshold, which everyone agreed should be four days, to decrease all the way to 3.24 days, a period that is actually less than the observed mean for BellSouth itself. This is a nonsensical result. In short, fixing a floor on the "balancing critical value" has the impact of simply lowering the point at which penalties will be paid as sample sizes increase, without any rational reason for doing so.

Interestingly, Dr. Bell, testifying for the majority of the ALECs, as noted above, supported the "balancing critical value" concept. In discussing the problems with the "fixed critical value" approach, Dr. Bell testified as follows:

Q (By Mr. Lackey) Now, one of the problems with a fixed critical value is that in large sample sizes a fixed critical value might tend to trigger remedies associated with very small actual differences, correct?

A (By Dr. Bell) That's correct. That is one of two problems with it, the other being at small sample sizes.

(Tr. 1101)

Dr. Bell also conceded that imposing a floor on the "critical balancing value" would operate like a "fixed critical value," which he had not recommended:

Q Okay. Now, at least one of the parties in this proceeding has recommended a floor on the balancing critical values, correct?

A Yes.

Q And what that means is that instead of letting the balancing critical value float according to sample size, that when you get to a specific level, say minus 3, continuing my example, that the critical balancing value would become fixed and would not change anymore, is that correct?

A That is correct.

(Id.)

As Dr. Mulrow, stated, "The point is that the artificial floor simply creates a situation where the materiality level is artificially and arbitrarily reduced." (Tr. 624) There is no rational basis for the arbitral imposition of a floor on the "balancing critical value," given the unsupportable affect this would have on the materiality level. No floor should be imposed.

Issue 13: When should BellSouth be required to make payments for Tier 1 and Tier 2 noncompliance, and what should be the method of payment?

**Position: Both Tier 1 and Tier 2 payments should be made by check, with Tier 1 payments to the affected ALEC and Tier 2 payments to the Florida State Treasury. For both Tiers, payment should be rendered at the end of the second month after the month for which penalties are due.

The parties appear to agree that both Tier 1 and Tier 2 payments should be made by check. Further, no party appears to have any objection to BellSouth's proposal that Tier 1 payments would be made to the affected ALEC, and Tier 2 payments would be made to the Florida State Treasury. Instead, the only dispute between the parties involves the timing of these payments.

In practical effect, BellSouth and the Commission Staff have proposed the same standard, although the standard is stated somewhat differently by each. The Straw Man proposal states, in section 4.6.1 that "BellSouth shall make payment in the required amount on or before the 30th day following the due date of the performance measurement report for the month in which the obligation arose." (Ex. 13, pp. 6-7). BellSouth proposes that payment be made by the end of the second month following the month for which the disparate performance is detected (Tr. 280). Thus, if performance in question relates to the month of April, then the payment would take place by the 30th of June.[8]

The ALEC coalition has proposed that these payments be made fifteen days after the date upon which the data for the performance period in question is reported. However, the ALECs provides no specific reason that the longer period proposed by BellSouth and Staff is inappropriate, and states no reason that a shorter time frame is necessary. Given this, BellSouth submits that the time period proposed by the staff (and the almost identical equivalent time period proposed by BellSouth) is the more reasonable alterative.

Issue 14a: Should BellSouth be required to pay interest if BellSouth is late in paying an ALEC the required amount for Tier 1?

Issue 14b: If so, how should the interest be determined?

[8] Staff's 30 day proposal would result in a slightly different calculation than BellSouth's in months not having 30 days. The two proposals, however, are otherwise the same.

**Position: Issue 14 has been resolved by Stipulation of the Parties.

Issue 15: Should BellSouth be fined for late payment of penalties under Tier 2? If so, how?

**Position: No. BellSouth should not be subjected to a fine (in other words, an involuntary payment) for the late payment of penalties under Tier 2. However, BellSouth has voluntarily agreed to a payment to the Commission of $1,000 for each day that payment is late.

The positions of BellSouth and the Staff on Issue 15 are, in practical effect, the same, although each arrives at the common result by a somewhat different route. The StrawMan proposal provides that BellSouth should be penalized $1000 per day for "each day after the due date that BellSouth fails to pay penalties under the Tier 2 Enforcement Mechanism." (Ex. 13). Section 364.285, Florida Statutes, is cited as the authority to impose this penalty. As previously discussed, BellSouth does not believe that this Section of the Florida Statute authorizes an automatic penalty. However, BellSouth has also proposed to pay $1,000 per day for every day that the payment of Tier 2 penalties is late (Tr. 281). As also stated previously, to the extent BellSouth consents to the automatic payment of a penalty (as opposed to an involuntary penalty or fine), the Commission certainly has the authority to accept BellSouth's consent. Thus, assuming the Commission determines that the $1,000 per day is an appropriate late payment, BellSouth and Staff are in accord on this issue.

The ALECs propose a different approach, which would presumably result in a higher penalty payment, but it is impossible to conclude this given the byzantine nature of the ALEC proposal. Specifically, the ALEC witness, Ms. Bursh, states in her testimony that any penalty for late payment should be set at "a per diem interest rate that is equivalent to the ILEC's rate of return for its regulated services for the most recent reporting year . . .." (Tr. 984). The ALECs

offered no justification for the application of this formula and, as with other issues, provided no evidence that this approach is preferable to that advocated by BellSouth or the Staff. The ALEC proposal should also be rejected because it is unnecessarily complex as well as arbitrary.

The late payment proposed by both BellSouth and Staff is, by virtue of being a finite amount, fairly simple to determine and administer. The ALEC's proposal requires a calculation to determine the amount payable in every instance. Further, Ms. Bursh's reference to rate of return makes no sense. In Florida, of course, BellSouth is not subject to rate of return regulation, but rather the form of alternative regulation described in Section 364, Florida Statutes. Despite this, Ms. Bursh appears to contend that the amount of late payment should be calculated based upon the type of rate of return for regulated services that would be set in a rate case pursuant to the statutory authority that pertained in Florida in earlier decades. Thus, the ALEC proposal not only contains an overly complex calculation, it has the additional drawback of basing this calculation on a strangely anachronistic view of the status of regulation in Florida.

Issue 16: What is the appropriate process for handling Tier 1 disputes regarding penalties paid to an ALEC?

**Position: BellSouth generally concurs with the proposal set forth in Mr. Stallcup's StrawMan proposal. BellSouth also proposes the addition of provisions to discourage the submission of frivolous disputes.

The ALEC's evidence on this issue is limited to a statement in Ms. Bursh's testimony that when BellSouth and the ALECs cannot settle a dispute regarding penalty payment, then the Commission should do so. (Tr. 984). The StrawMan Proposal states basically the same approach in Section 4.6.4, albeit in a more detailed fashion that actually describes how disputes would be resolved. BellSouth agrees with Staff's approach. Thus, there appears to be little disagreement among the parties, at least as to this much of Issue 16.

BellSouth also proposed that the Plan should include provisions to discourage the submission of frivolous disputes (Tr. 282).

<u>Issue 17</u>: What is the appropriate mechanism for ensuring that all penalties under Tier 1 and Tier 2 Enforcement Mechanisms have been paid and accounted for?

**<u>Position</u>: BellSouth agrees with the proposal set forth in the testimony of Mr. Stallcup.

As with Issue 16, BellSouth believes that the Staff Proposal is appropriate. The Staff proposal provides the following in Section 4.6.5:

> At the end of each calendar year, BellSouth will have its independent auditing and accounting firm certify that all penalties under Tier 1 and Tier 2 enforcement mechanisms were paid and accounted for in accordance with generally accepted accounting principles.

The ALEC Coalition appears to propose a very similar process, but one that would have, rather than an annual review, reviews "on a random basis." (See Statement of ALEC position, Pre-Hearing Order, p. 42). Nothing in the testimony of the ALEC witnesses, however, supports the need for random, as opposed to scheduled, reviews. Further, BellSouth is concerned that an open-ended instruction to auditors to conduct reviews randomly could result in multiple annual reviews or reviews done in a manner that would otherwise create an administrative burden. The better alternative is the annual review approach contained in the Staff's proposal.

<u>Issue 18</u>: What limitation of liability, if any, should be applicable to BellSouth?

**<u>Position</u>: BellSouth agrees with the Staff Proposal, which includes limitations of liability for events such as the submission of orders in unreasonable quantities, findings of noncompliance that are attributable to an ALEC, and an ALEC's noncompliance with its interconnection agreement.

The StrawMan Proposal, Section 4.7, <u>Limitation of Liability</u>, states the various circumstances under which a limitation of liability is appropriate. Essentially, these circumstances include: 1) CLEC acts or omissions (Section 4.7.1); 2) CLEC bad faith (Section

4.7.2); and 3) a variety of miscellaneous circumstances such as Force Majeure, CLEC breach of agreement, and a CLEC violation of law. BellSouth's testimony on this issue, is, for the most part, limited to simply stating that it agrees with Staff's proposal (Tr. 282-83).

Ms. Bursh takes issue with two aspects of what she characterizes as BellSouth's proposals.[9] First, Ms. Bursh objects to a limitation of liability when there is a "submission of orders in unreasonable quantities or times." (Tr. 995). She claims that "the ALECs are unclear as to what constitutes 'unreasonable quantities'" (Id.). She also claims that it may be the operation of BellSouth's OSS gateways that cause the volume of orders to be perceived as unreasonable. BellSouth submits that Ms. Bursh is creating (or at least perceiving) confusion where none exists. The reference to orders in unreasonable quantities appears in the portion of the limitation of liability section that Staff has drafted to include "CLECs acts or omissions that cause performance measurements to be missed or failed." (§ 4.7.1). Thus, if there is a mere "perception" of unreasonable volume, and it is attributable to the operation of BellSouth's gateway, then clearly this would not be a CLEC act or omission.

BellSouth believes that this particular limitation of liability is not only appropriate, but necessary. As Dr. Taylor testified, the limitation of liability provisions in the StrawMan Proposal would appear to be designed to prevent, or at least discourage, the gaming of the performance plan by ALECs. (Tr. 241). For example, a CLEC might withhold orders until there is such tremendous volume that not only BellSouth's system, but any ILECs system, would be hard pressed to timely process them. Clearly, this type of action would constitute both a "CLEC act" and a submission of orders in "unreasonable quantities."

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[9] As noted above, the limitation of liability proposal was contained in the Staff Proposal, which BellSouth supports. However, Ms. Bursh apparently mistakenly attributes this proposal to BellSouth rather than Staff.

Second, Ms. Bursh objects to the portion of the Staff's proposal in which the limitation of liability applies because of a Force Majeure event. Ms. Bursh contends that there is no reason to believe that such an event would have "disproportionate impact on ALEC customers as opposed to BellSouth customers," (Tr. 996) and she argues that BellSouth should have to specifically seek relief (presumably from the Commission) on an ad hoc basis. Ms. Bursh, however, really misses the point. If, for example, a hurricane occurs, then certainly the hurricane would have an effect on BellSouth's ability to provide service to both its end users and to ALECs. Assuming that this hypothetical hurricane prevents BellSouth from providing service to either, then every sub-measure proposed by the ALECs that has a benchmark would almost certainly be missed. The fact that the hurricane would prevent BellSouth from serving its end customers also would do nothing to provide BellSouth with relief. Instead, a limitation of liability is necessary to accomplish this.

Ms. Bursh believes that BellSouth should have to "pursue relief" in the event of Force Majeure in some way that she does not define, but that would presumably involve petitioning the Commission. BellSouth submits that there is really no point to require BellSouth to go to either ILECs or to the Commission and seek relief if a catastrophic event that affects service, such as a hurricane, occurs. Ms. Bursh offers no reason that an automatic limitation in such an instance would be inappropriate, and, indeed, there is none.

Issue 19a: What type of cap, if any, is appropriate for inclusion in the Performance Assessment Plan?

Issue 19b: What is the appropriate dollar value of a cap if applicable?

Issue 20: What process, if any, should be used to determine whether penalties in the excess of the cap should be required?

Issue 21: If there is a cap, for what period should the cap apply?

**Position: An absolute cap is appropriate. This cap should be set at 36% and should apply annually. There should be no penalties in excess of this cap.

Both BellSouth's proposal and the Staff's StrawMan Proposal appear to be based on the position that there should be a cap on the payment of penalties of some sort. BellSouth, of course, advocates an absolute cap, while the StrawMan Proposal describes a procedural cap in Section 4.8. BellSouth submits that an absolute cap is more appropriate.

As Mr. Coon testified, the use of an automatic cap is more consistent with the concept of a self-effectuating remedy plan:

> BellSouth's enforcement plan was developed with the thought that an enforcement plan should be self-effectuating. Consequently, each of the two tiers of remedies in the enforcement plan is automatic. While the Commission can step in at any time, remedies will be rendered as the performance is being monitored. However, no Commission order is necessary to render payment . . .. The Staff's procedural cap, on the other hand, only determines the point at which the ILEC is permitted to seek relief from additional penalties from the state commission. Thus, the procedural cap is not really a cap at all, but rather a threshold that must be reached before the process of setting a cap begins.

(Coon Direct, p. 46).

If one believes that a cap is appropriate, then it only makes more sense to set the cap at the outset so that it can go into effect automatically, just as will every other aspect of the remedy plan. There is no point in deferring to some future time the potentially lengthy process of filing testimony and other evidence and conducting a hearing, prior to determining whether (or at what point) a real cap should be set.

Moreover, setting an absolute cap is the only approach that is consistent with what has been done in other states, as well as by the FCC. As Mr. Coon testified, "the New York, Texas, Kansas and Oklahoma plans all have annual monetary caps similar to the absolute cap proposed

by BellSouth." (Tr. 285). Thus, in every state in which the FCC has granted 271 authority, there has been an absolute cap. No state has employed a procedural mechanism whereby the cap (if any) would be set at a future point.

The ALEC witnesses pay lip service to the idea of a procedural cap. Specifically, both Ms. Bursh and Dr. Ford testify that a procedural cap is acceptable. (Bursh: Tr. 973; Ford: Tr. 1182). During their respective depositions, however, it became apparent that the ALECs' witnesses believe that there should not be a cap under any circumstances. Upon examination, both Ms. Bursh and Dr. Ford stated that they could think of no circumstances whatsoever under which the payment of damages should be capped. (Ex. 12, Ford Deposition, p. 81; Ex. 10, Bursh Deposition, p. 84). Further, Ms. Bursh conceded that under the ALECs' proposed approach, the ALECs would be free during a subsequent proceeding to consider a procedural cap to argue that there would be no cap whatsoever. (Ex. 10, p. 83). Thus, it is obvious that the ALECs' nominal support of a procedural cap is simply a way to ensure that, in the short-term, there will be no cap, while preserving the option of arguing in a future procedural cap proceeding that there should be no cap at any time or for any reason.

Consistent with this view, the ALECs argue, in effect, that penalties beyond the procedural cap should be paid without limitation. BellSouth, also consistent with its position, believes that there should be an absolute cap, and that no penalties should be paid in excess of the absolute cap.

The difference in the position of the ALECs and BellSouth comes down to a fundamental difference in the way that each views the plan. Again, the FCC has specifically stated that penalty payments are a means to ensure that there is no backsliding post-271. Under a voluntary plan (and for the reasons set forth above, the penalty plan must be voluntary), the

cap is, in effect, the amount that BellSouth is willing to place at risk to provide assurances there will be no future backsliding. In every successful 271 application, the FCC has set an absolute cap in an amount that it considers to be appropriate to provide this assurance. Further, as Dr. Taylor testified, 36% is the amount that has been accepted by the FCC as sufficient (Tr. 1243).[10]

As discussed previously, the ALECs appear to view the remedy plan as a way to guarantee a virtually unlimited stream of future revenue to themselves. They have proposed standards that are far in excess of anything required by parity, and have advocated a penalty plan that creates a hundred thousand or more measurements for which an excessive penalty could be assessed each and every month. Consistent with this, the ALECs argue that this revenue stream should not be capped, no matter what. Although this approach clearly serves the self-interest of the ALECs, it is otherwise completely unsupportable.

As Dr. Taylor testified, BellSouth is in the position where it must provide both wholesale services to ALECs and retail services to its end user customers:

> Without a cap on . . . liability, BellSouth would have to prepare for compensation claims almost without limit. This could affect BellSouth in at least one important way, namely, compromise BellSouth's ability to utilize its resources efficiently in all possible uses, including serving retail customers. BellSouth's resources to meet its various needs are not unlimited. While delivering retail services at the desired level is both an obligation and a competitive necessity, BellSouth also has an obligation to provide wholesale services of the desired ability to its competitors. An excessive and unreasonable financial liability on one flank of its operations could clearly jeopardize BellSouth's ability to meet its goals elsewhere.

(Tr. 1241).

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[10] As Mr. Coon testified, a 39% cap is consistent with what the FCC ordered in New York only if one "includes a 3% adjustment to offset a major OSS malfunction that occurred after 271 relief was granted in New York." (Tr. 286). No such malfunction has occurred here; therefore, this adjustment is not justified in Florida.

As Dr. Taylor also testified, it is unwise to sanction an unlimited revenue stream of penalty payments to the ALECs in a way that would encourage them to engage in improper behavior. (Tr. 1241). Without question, a remedy plan can be gamed. One example of how an ALEC could game the system would be to hold orders, then submit them in such volume that they cannot be processed, and thereby create failures in the system. As discussed previously, Staff's limitation of liability proposal (which, not coincidentally, the ALECs oppose) would help prevent this particular type of gaming. Gaming can also be addressed by creating a plan that does not unduly encourage improper gaming of the system by making the reward for this improper conduct limitless.

Issue 22: Should the Performance Assessment Plan include a Market Penetration Adjustment, and if so how should such an adjustment be structured?

Issue 23: Should the Performance Assessment Plan include a Competitive Entry Volume Adjustment, and if so how should such an adjustment be structured?

**Position: Both penalties should be rejected because they would increase penalties under inappropriate circumstances, penalize BellSouth for ALEC's strategic business decisions, and encourage ALECs to improper "game" the measurement process.

Both the Market Penetration Adjustment and the Competitive Entry Volume Adjustment have the effect of inappropriately decreasing remedies under circumstances when the decrease is not justified. As Dr. Taylor stated in his testimony, "the essential point here is that compensation owed to ALECs for BellSouth's failure to comply with set performance standards must be proportional to the financial or economic significance of the non-compliance." (Tr. 1247-48). This principle supports the sort of transaction-based remedy plan that is advocated by BellSouth, and, indeed, is also included in the StrawMan Proposal. Under this approach, a small number of failed transactions results in a small penalty, and a larger

number of failed transactions results in a commensurately larger penalty payment. In general, this is as it should be.

Both Staff and the ALECs contend in their respective testimony that an adjustment of some sort is necessary because, under a transaction-based system, a performance failure in a situation in which there are very low levels of ALEC activity will not result in sufficient penalties to make it worth BellSouth's while, economically speaking, to address performance problems. These adjustments are what Dr. Taylor refers to as "infant industry" protections that "would apply in addition to, rather than in place of, the usual Tier 1 and Tier 2 protections that would always apply." (Tr. 1246). Although the rationale that supports these proposals is generally logical, the specific proposals of both the ALECs and Staff create many more (and more severe) problems than they address.

The ALECs' plan calls for an unnecessary adjustment that creates both a general and a specific problem. Although the ALECs have not proposed a specific Competitive Market Entry Adjustment, Ms. Bursh summarily claims that such an adjustment is necessary in a transaction based plan. (Tr. 966). The ALECs <u>have</u> proposed a Market Penetration Adjustment (for Tier II penalties), whereby, based on the percentage of the local market that is served by BellSouth (as opposed to ALEC competitors), penalties would be multiplied substantially.

This approach is not appropriate because, as Dr. Taylor stated,

> [T]he use of market share in isolation, as a predictor or estimate of the state of competition in a market, can be particularly misleading. The real issue is whether the incumbent firm here BellSouth, has either the incentive or the ability to exercise market power (e.g., restrict competitive entry and/or manipulate market prices), not market share per se. If other indicators confirm that BellSouth is unable, in any way, to exercise that market power, then adjusting Tier 2 remedies for BellSouth's current market share is both unnecessary and distortive. Indeed, the whole point of Tier 1 remedies is to prevent BellSouth from exercising market power, such as by raising barriers to entry for potential

> competitors. If Tier 1 remedies are successful at accomplishing this, then scaling Tier 2 penalties by a market penetration factor would be overkill and economically inefficient.

(Tr. 1245).

In our case, there is absolutely no evidence to suggest that the comparatively low penetration levels achieved to date by ALEC competitors is the result of barriers to entry. The ALECs simply gloss over this crucial point, and assume that low market penetration on their part necessarily justifies much larger penalties in any instance that parity is not achieved. As Mr. Coon noted, however, a market penetration adjustment penalizes BellSouth for what may very well be strategic decisions by the ALECs: "this adjustment will unfairly penalize BellSouth for ALEC's business decisions not to include Florida in initial entry level strategies or to target other areas before moving to Florida" (Tr. 287).

The general problem caused by this unnecessary adjustment is, in the words of Dr. Taylor, that "any adjustment that creates arbitrary and excessive penalty payments also sows the seed for perverse behavior by the recipients of those payments." (Tr. 1248). This is precisely what the ALEC proposal plan would do. As Dr. Taylor testified, larger penalties in circumstances whenever there is a low volume of orders creates an incentive for "an ALEC to maintain a low number of transaction in circumstances where 1) BellSouth would have a relatively high probability of committing a performance disparity and 2) the additional compensation due to the ALEC (over and above what it would receive anyway) becomes a greater payoff than what it could earn in profit from consumer sales or to receive wholesale services of the desired quality from BellSouth." (Tr. 1247). Appropriate regulatory policies should encourage increased competition and the attendant greater availability of services to

consumers. However, any adjustment that rewards an ALEC for limiting its offerings or competitive efforts necessarily discourages the development of competition.

The ALEC proposal is especially inappropriate (i.e., the "specific problem" referred to above) because it is structured to increase penalties excessively when there is low market penetration. Under the ALEC proposal, there is a factor identified as "n" that multiplies Tier 2 penalties whenever market penetration is relatively small. The value of "n" is set from 1 to 10. In other words, penalties can be increased by a factor of 10, depending on market penetration (Tr. 1245). As Dr. Taylor stated (based upon figures supplied in the testimony of Ms. Cox, at Tr. 550), the ALECs collectively serve 8.1% of the local market in Florida. (Tr. 1245). Under their approach, the ALECs would adjust "n" in the current competitive environment to multiply by a factor of 8. (Id.). Clearly, a multiplier of this magnitude creates the perverse incentive of which Dr. Taylor warns.

Further, the fact that the multiplier applies to Tier 2 penalties, which would be paid to the state rather than the ALECs, does not avoid the problem. Dr. Taylor testified that excessive Tier 2 penalties,

> . . . [w]ould greatly reduce BellSouth's profitability and be a considerable drain on its resources. Although ALECs can benefit from BellSouth being financially weakened in this manner, ironically, ALECs would have a greater incentive to 'remain small', i.e., not reduce BellSouth's market share too much. The more the status quo could be preserved, the more BellSouth would be in danger of making very large penalty payments.

(Tr. 1247).

The StrawMan Proposal has a less extreme multiplier than the ALEC plan, but it still suffers from the same possible problem of creating perverse incentives for ALECs to take whatever action will allow them to obtain enhanced penalties. In fact, the Staff's Proposal

makes improper ALEC activity an even greater possibility in one respect. The Staff's proposals for the Market Penetration and Competitive Entry Volume Adjustments are not tied to the market share of the ALEC, but rather only to the volume of orders submitted. Further, as Dr. Taylor testified, "as proposed by Mr. Stallcup, the adjustments are not characterized as temporary or specific at any stage of local exchange competition. As such, once implemented, they may continue into the indefinite future as long as the applicable conditions exist but regardless of what the overall market looks like." (Tr. 1246). Thus, the Staff's Proposals allow enhanced penalties when volumes are low for a given submeasure[11] regardless of the ALECs' overall ordering volume or market share. If an ALEC can increase penalty payments by artificially limiting volumes of certain type of orders, while still growing its local business generally, the temptation to game the system (and the ease with which this can be done) increases considerably. The Staff's proposal would allow exactly this type of inappropriate ALEC behavior.

Further, even if Staff's proposal were acceptable in theory, the specifics of the Staff proposal create another problem. It treats the volume of activity as small (and increases penalties accordingly) when a submeasurement captures less than a certain number of events, even though some submeasurements will always have small volume because some events naturally occur less often than others. Mr. Coon provided as an example the enforcement measurement category C-3, Collocation Percent of Due Dates missed. (Tr. 288). As Mr. Coon stated, "for the month of January 2001, 105 collocation arrangements were completed. There were approximately 65 facility based ALECs operating in Florida for an approximate average of

[11] The Market Penetration Adjustment would apply only to certain designated submeasures with less than 100 observations; the Competitive Entry Volume Adjustment would apply to any submeasures with monthly volume of

two collocation arrangements per ALEC." (Id.). This means that, in all likelihood, any collocation due date missed for any ALEC would result in an increased penalty to BellSouth. Further, since collocation requests are, by their nature, less frequent than other ALEC orders, this situation would almost certainly persist as long as the Staff Proposal were in place. Again, although there may be some theoretical basis for "infant industry" protections, the reality is that the specific proposals for adjustment made by the ALECs and Staff would likely create substantially greater problems than those the adjustments are intended to address.

Issue 24a: Should periodic third-party audits of Performance Assessment Plan data and reports be required?

**Position: Yes. Third-party audits of Performance Assessment Plan data and reports are appropriate, within reason. Because BellSouth's measurement data is produced by a regional system and managed by a regional organization, audits should be conducted regionally whenever possible.

Issue 24b: If so, how often should audits be conducted, and how should the audit scope be determined?

**Position: There should be a comprehensive audit of the current year aggregate level reports for both BellSouth and the ALECs for each of the next five years. BellSouth, the PSC and the ALECs should jointly determine the scope of the audits.

BellSouth and the ALEC Coalition would appear to generally agree on third party audits. Both assert that there should be comprehensive annual audits, and the audit process should be determined by BellSouth, the ALECs and the Commission. The only real dispute is whether the audits should be regional. BellSouth believes they should because, as Mr. Coon states, "BellSouth's measurement data is produced by a regional system and managed by the same regional organization. To the extent possible, audits should be conducted regionally since many of the processes and programs are the same from state to state." (Tr. 290).

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less than 25 transactions.

Ms. Kinard disagrees on behalf of the ALECs, and states in her testimony that "many of BellSouth's processes, such as provisioning, repair and collocation are handled at the state level." (Tr. 164). Therefore, she concludes, audits should not be regional. In her deposition, however, Ms. Kinard admitted that many of the processes are in fact, regional, and that portions could be done regionally (Ex. 9, Kinard Deposition, pp. 44-5). Thus, Ms. Kinard's deposition testimony actually supports the position of BellSouth that audits should be regional in nature "whenever possible."

Issue 25: If periodic third-party audits are required, who should be required to pay the cost of the audits?

**Position: The cost of these audits should be borne 50% by BellSouth and 50% by the ALEC or ALECs.

The cost of comprehensive annual audits should be borne 50% by BellSouth and 50% by the ALECs (Tr. 291). This is consistent with the Staff proposal attached to the testimony of Mr. Stallcup. This approach is also appropriate because ALECs can effectively define the scope of the audit, which will determine the audit cost. Ms. Kinard, however, maintains on behalf of the ALECs that BellSouth should pay 100% of the audits. Her nominal rationale for this position is that "audits are an integral part of a performance measurement plan designed to ensure BellSouth's compliance with the Telecommunications Act." (Tr. 165). Thus, her fundamental assumption is that a performance measurement plan is required (as opposed to merely allowed) by the 1996 Act. As discussed previously, there is nothing in the Act that states this. Moreover, the measurements in BellSouth's plan, and the scrutiny of BellSouth's performance otherwise will prove compliance. Mr. Coon testified that, "BellSouth has already invested significant resources and dollars, under the direction of the Georgia and

Florida Commissions, in the validation and testing of BellSouth's performance measurements by an independent third-party, KPMG." (Tr. 323).

To the extent that the ALECs are required to pay 50% of the audit cost, this total cost will be divided among the various ALECs, which will result in each paying a relatively small amount. BellSouth has agreed to a comprehensive annual Audit and has agreed to pay, by itself, 50% of the cost. Requiring the ALECs to split the remaining 50% of the costs among themselves is fair and reasonable.

Issue 26: Who should select the third-party auditor if a third-party audit is required?

**Position: The independent third party auditors should be selected based upon input from BellSouth, the PSC (if applicable), and the ALECs.

Although the parties have not stipulated this issue, there appears to be little or no dispute. In the StrawMan Proposal, the Staff proposed (in Section 7.3) that "the independent third-party auditors shall be selected with input from BellSouth and the Florida Public Service Commission." In their respective testimony, Mr. Coon and Ms. Kinard each suggested that BellSouth, the ALECs and Staff should have a part in the selection of the auditor (Tr. 153, 291). Thus, BellSouth and the ALECs agree. Assuming that Staff is amenable to the ALECs having a role in the selection process, there is no dispute.

Issue 27a: Should an ALEC have the right to audit or request a review by BellSouth for one or more selected measures when it has reason to believe the data collected for a measure is flawed or the report criteria for the measure is not being adhered to?

**Position: No. BellSouth provides ALECs with the raw data that underly many of the BellSouth service quality measure reports. The ALECs can use the raw data to validate the results of the BellSouth Service Quality Measurement reports posted on the BellSouth website.

Issue 27b: If so, should the audit be performed by an independent third party?

**Position: Additional audits beyond the yearly comprehensive audit discussed under Issue 24 are not necessary.

BellSouth does not believe that an ALEC should have the right to require BellSouth to undergo an individual audit by a third party (i.e., a "mini-audit") whenever it "has reason to believe" that the data collected for the measure is flawed or that the report criteria is not being adhered to. As Mr. Coon testified, "BellSouth provides the ALECs with the raw data underlying many of the BellSouth Service Quality Measurement reports as well as the user manual on how to manipulate the data into reports." (Tr. 291-92). This raw data can be used to validate the results that appear in the BellSouth Service Quality Measurements. On behalf of the ALECs, Ms. Kinard contended that raw data would not be useful in when, for example, "an ALEC has reason to believe that BellSouth's method of capturing the data is flawed." (Tr. 165-66). With little more than one sentence of pre-filed testimony, the ALECs thus, reject entirely the possibility of even attempting to utilize raw data rather than having mini-audits. BellSouth believes that the ALECs have not adequately considered whether raw data will provide them with what they need, and they have provided no evidence upon which the Commission would conclude that raw data could be inadequate.

At the same time, the ALECs propose a method of conducting mini-audits that would be, at best, extremely burdensome and, more likely, impossible. Ms. Kinard testified that each ALECs should be able to request an audit of "all systems, processes and procedures associated with the production of reporting and performance measurement results for the audited measure/sub-measure." (Tr. 154). Further, each ALEC would be able to demand each year an audit of "three single measures/submeasures or one domain area (preorder, ordering, provisioning, maintenance or billing)" (Id.).

As Mr. Coon testified, a conservative estimate based on comprehensive audits in Georgia and Florida is that the annual comprehensive audit would take six months to complete in each given year. (Tr. 325). This leaves a total of six months to conduct all of the mini-audits requested by the ALECs. If each demands an audit of a sub-measure three times in each year, BellSouth would be responsible for conducting 465 ALEC-specific audits in each year.[12] Further, a mini audit that covers an entire domain would cover as man as fifteen measures (Id.). Thus, if all (or even a substantial percentage) of the ALECs wanted this type of Audit each year, BellSouth would have to conduct annually thousands of measure-specific Audits. How BellSouth could possibly accomplish this is a mystery. Clearly, the ALECs have, once again, proposed something that simply cannot be done.

Moreover, the extreme number of audits would have to be conducted by BellSouth in any circumstances that the ALECs subjectively consider to be appropriate. Ms. Kinard testified that ALECs should have a right to a mini audit "when an ALEC has reason to believe the data collected for a measure is flawed or the reporting criteria for the measure is not being adhered to . . .." (Tr. 153-54). She does not offer, however, any objective standard for determining whether the ALEC has a sound basis for such a request. Thus, it would appear that the ALECs are suggesting that whenever they hold the subjective belief that an audit is necessary, they should have an absolute right to such an audit.

Further, under the ALEC proposal, BellSouth would have to pay for one-half of this audit. Ms. Kinard testified that BellSouth should pay for a minimum of 50% of the cost of each and every mini audit demanded by any ALEC. (Tr. 155). This is a minimum figure because, if

[12] Mr. Coon made a comparable calculation based on the 80 ALECs in Florida that currently have the BellSouth SQM in their Interconnection Agreements. (Tr. 325) Under the ALEC proposal, however, all 155 ALECs would

BellSouth were found to be materially at fault, then, under Ms. Kinard's proposal, BellSouth would have to pay all of the audit costs. (Id.). Thus, the ALECs' proposal creates the possibility of ALECs' demanding hundreds of audits without good cause, and BellSouth having to pay for fifty percent of all these audits, even those that are generated by frivolous requests.

The ALECs' Audit demand is not only unreasonable, it is, in all likelihood, impossible to meet. BellSouth submits that the Commission should not approve any result in the performance measurement docket that has the potential to place upon BellSouth (or for that matter any other party), a burden that is impossible to sustain. The ALECs' demand for mini audits should be rejected.

Issue 28: Should BellSouth be required to retain performance measurement data and source data, and if so, for how long?

**Position: The data that is maintained by the PMAP system should be retained for a period not to exceed eighteen months. The retention of this data for longer than eighteen months would result in large and burdensome costs to BellSouth.

BellSouth's position on this issue was expressed succinctly in the testimony of Mr. Coon, as follows:

> . . . Exhibit DAC-2 explains the enormous scope of data addressed here that must be maintained by the PMAP system. BellSouth proposes to retain this data for a period not to exceed eighteen months. The retention of this volume of data longer than eighteen months would represent tremendous costs to BellSouth in data storage, and, therefore, would be unreasonable and overly burdensome.

(Tr. 293).

The ALEC position set forth in the Pre-Hearing Statement, provides, in its entirety, that "performance measurement data and source data should be retained for eighteen months or as required to audit BellSouth's performance," and cites to Ms. Kinard as the ALEC witness on

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have the right to demand three audits.

this issue. (Order, p. 53). This issue is not addressed, however, in the testimony of Ms. Kinard. Given this, it is impossible to know whether the ALECs are just proposing that the data be retained for eighteen months, or for some longer period that the ALECs would deem necessary to conduct an audit. If the ALEC position is the former, then the parties agree on this issue. If the ALEC position is the latter, the ALECs have provided no evidence that the data should be retained for some longer, undefined period in which an audit might be requested.

Issue 29: What is the appropriate definition of "affiliate" for the purpose of the Performance Assessment Plan?

Issue 30a: Should BellSouth be required to provide "affiliate" data as it relates to the Performance Assessment Plan?

**Position: The term affiliate is defined in the Telecommunications Act. If affiliate data is required, the only BellSouth affiliate data that should be reported is that which reflects the provision of wholesale services from BellSouth to a BellSouth-affiliated ALEC.

Issue 30b: If so, how should data related to BellSouth affiliates be handled for purposes of

1. **Measurement reporting?**
2. **Tier 1 compliance?**
3. **Tier 2 compliance?**

**Position: Affiliate data should not be used at this time to develop measurements or in the context of Tier 1 and Tier 2 enforcement. The Commission need not take any current action with regard to this data. However, if the Commission deems it appropriate to monitor this data, BellSouth has no objection to this approach.

As Ms. Cox testified, the term "affiliate" is defined in the Act (Tr. 543). Specifically, the Act provides the following:

> AFFILIATE—the term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than ten percent.

(47 U.S.C. 153(1)).

The statutory definition of affiliate is clear and unambiguous. However, as Ms. Cox testified, the real issue "is not how the term 'affiliate' should be defined, but whether there are circumstances in which BellSouth's performance related to its transactions with its affiliates should be considered in the context of the Performance Assessment Plan." (Tr. 513). Put differently, the term affiliate is defined rather broadly in the Act because, given some of the requirements of the Act, a broad definition is necessary. For example, Section 272 provides that separate affiliates must be utilized when an ALEC provides long distance service. Thus, the focus on "ownership" in the definition noted above makes sense. For our purposes, however, the real question has little to do with the corporate structure of BellSouth, and more to do with the question of which BellSouth affiliates have data that would be meaningful for the purposes of determining parity.

Accordingly, BellSouth submits that the only performance data of BellSouth affiliates that should be considered is the data that can be used to make an "apples to apples" comparison with the services provided to ALECs. Under this standard, the only BellSouth affiliate that should report data is one that provides local service in Florida, i.e., an ALEC. Thus, to the extent the Commission is inclined to resolve Issue 29 by defining specifically the type of affiliate that should be considered in a performance assessment plan, the definition should be limited to a BellSouth-affiliated ALEC.

The parties appear to agree that information related to BellSouth affiliates should not be used at this time to measure BellSouth's performance, or as the basis for any penalty. (Tr. 157, 546-47). Thus, the dispute on this issue comes down to two specific issues: 1) What data

should be reported, or, put differently, which affiliate should report data and 2) to whom should this data be reported.

To put the former question in perspective, it is important to consider the fact that, as Ms. Cox's testified, the FCC has made virtually no use of affiliate data. A good example of the FCC's typical treatment of affiliate data appears in the Bell Atlantic-New York Order. In that Order, the FCC discusses the development of a retail analog based on the performance that the BOC provides to "itself, its customers or its affiliates." Ms. Cox noted, however, that,

> [A]t the same time, the FCC held that nondiscriminatory access had been demonstrated because there was 'no statistically significant difference between Bell Atlantic's provision of service to competitive LECs and its own retail customers.' (emphasis added)(See Bell Atlantic New York Order, ¶ 58) See also Southwestern Bell Kansas/Oklahoma Order, ¶ 58). In other words, performance to affiliates did not play any specific role in the FCC's comparative analysis.

(Tr. 544).

Having made this point, BellSouth also notes that it does not object specifically to reporting affiliate data. Instead, BellSouth requests only more limited reporting than that urged by the ALECs.

To date, two states in BellSouth's region have considered the issue of affiliate reporting. As Ms. Cox noted, "the Georgia PSC refused to adopt the ALECs' proposal for comparisons between the performance for ALECs and the performance for the BellSouth affiliate, concluding that if an ALEC believed that BellSouth is showing preference to its affiliate, the ALEC may file a complaint with the Commission (GPSC Order at p. 13)." (Tr. 545-46). The Louisiana PSC has ordered that if "the activity in Louisiana of BellSouth's affiliated ALEC reaches a certain threshold, then it should be reviewed in the context of future audits to determine whether there is any statistically significant indication of discriminatory treatment." (Tr. 546).

BellSouth believes that either of these approaches is appropriate. In other words, it is reasonable to either take no action unless an ALEC believes that BellSouth has shown preference to its affiliates, and it is equally reasonable to require only reporting of BellSouth's affiliated ALEC for the time being. However, any reporting requirement should apply only to a BellSouth affiliated-ALEC, not all BellSouth affiliates. As Ms. Cox testified, affiliate data can only be appropriately considered if doing so allows for "a meaningful, 'apples-to-apples' comparison between ALECs and any BellSouth affiliate that is in a position comparable to that of the ALECs." (Tr. 543). The only ALEC that is in this comparable position is an ALEC that is affiliated with BellSouth. As Ms. Cox testified,

> "it makes no sense to scrutinize data that relates to BellSouth affiliates whose business is not comparable to ALEC business, for example, BellSouth International's provision of service in Venezuela. Thus, the only affiliate data that might properly be considered is that which relates to a BellSouth-affiliated ALEC."

(Id.).

The ALECs argue for a considerably broader reporting requirement. Specifically, in Ms. Kinard's pre-filed testimony, she states that BellSouth should be required to report data related to "any affiliate activity," including any future BellSouth affiliate providing long distance service. (Tr. 157). Ms. Kinard stated in her deposition, however, that there was really no purpose in requiring the reporting of orders placed by BellSouth affiliates that are for services or facilities that are not comparable to that which can be ordered by competitive ALECs (Ex. 9, Kinard Deposition, pp. 46-47). Ms. Kinard would presumably agree that in the example noted above of a BellSouth affiliate providing independent service in a foreign country, no reporting would be required. Ms. Kinard also stated in her deposition, however, that to the extent that any BellSouth affiliate purchases something comparable to what is provided to ALECs, then it

should be reported. (Id.). Apparently, she holds this view even if the BellSouth affiliate is not in the local market, and even if it does something totally different with this wholesale input than would an ALEC providing local service.

First, there is no reason to believe that non-ALEC affiliates of BellSouth will purchase, for example, local services on a wholesale basis, and then use them to do something other than provide local service. Certainly, the ALECs presented no testimony to identify a situation in which this might occur. Moreover, Ms. Kinard acknowledged (in the context of why BellSouth affiliate data should not be measured at this time) that, "BellSouth affiliates may have different service delivery plans . . .." (Tr. 148). Thus, the more reasonable approach is to require reporting of only data from a BellSouth-affiliate ALEC.

Finally, BellSouth and the ALECs disagree as to who should receive data that is reported. Specifically, the ALECs take the position that both the Commission and ALECs should receive any data that a BellSouth affiliate is required to report. BellSouth submits that this information should only be provided to the Commission and Staff. BellSouth believes it is inappropriate to unnecessarily put a BellSouth-affiliated ALEC in the position of being the only ALEC that must report its competitive activity to its competitors. The only legitimate reason for the reporting of this data is to determine whether there is some indication of preferential treatment, or some other basis to consider putting into place measurements that compare service to competitive ALECs and a BellSouth affiliated ALEC. The Florida Commission and its Staff are more than capable of scrutinizing the information to make this determination. BellSouth does not believe that the Staff would be greatly aided by providing this information to ALEC competitors and requesting their input as to whether they believe that there is some basis for creating new measurements. The only result of providing this information to competitive

ALECs would be to give them access to BellSouth's extremely sensitive, competitive information. Given the fact that there is no need to do so, BellSouth believes that the Commission should reject the request of the ALECs to provide them with this information.

CONCLUSION

For the reasons set forth above, this Commission should accept each of BellSouth's positions on the issues in this case and enter an Order to that effect.

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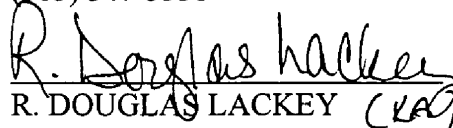

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