Marsha E. Rule
Attorney

Suite 700
101 N. Monroe St.
Tallahassee, FL 32301
904 425-6365
FAX: 904 425-6361

August 29, 1997

Mrs. Blanca S. Bayo
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Docket No. 960786-TL

Dear Ms. Bayo:

Enclosed for filing in the above referenced docket are the original and fifteen (15) copies of the Joint Motion to Strike Draft Statement of Generally Available Terms or in the Alternative, Sever proceeding.

Copies have been served on the parties shown on the attached Certificate of Service.

Yours truly,

Marsha E. Rule

MER:sad

Enclosures

cc: Parties of Record

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DOCUMENT NUMBER-DATE
08812 AUG 29 97
FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Consideration of BellSouth Telecommunications, Inc.'s entry into InterLATA services pursuant to Section 271 of the Federal Telecommunications Act of 1996	)	DOCKET NO: 960786-TL FILED: 08/29/97

JOINT MOTION TO STRIKE DRAFT STATEMENT OF GENERALLY AVAILABLE TERMS OR, IN THE ALTERNATIVE, SEVER CONSIDERATION OF SGAT FROM THIS PROCEEDING

AT&T Communications of the Southern States, Inc. (AT&T), American Communication Services of Jacksonville, Inc. (ACSI), Florida Competitive Carriers Association (FCCA), Intermedia Communications Inc. (Intermedia), MCI Telecommunications Corporation (MCI), and Metropolitan Fiber Systems of Florida, Inc./WorldCom, Inc. (WorldCom) hereby file this motion to strike BellSouth's draft Statement of Generally Available Terms(SGAT) filed in this docket on July 7, 1997, and revised on August 25, 1997, as well as testimony supporting the drafts. Alternatively, Joint Movants request that the Commission sever from this proceeding any consideration of an SGAT and its supporting testimony. In support whereof, Joint Movants state as follows:

1. The purpose of this docket is for the Commission to determine, in order to consult with the FCC, whether BellSouth has met the requirements for entry into its in-region interLATA market

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under section 271(c) of the Telecommunications Act of 1996 (the Act). There are two avenues by which BellSouth may apply for such authority, generally referred to as Track A and Track B. On July 15, 1997, the Commission determined that its role is limited to consultation with the FCC, and thus it cannot prohibit BellSouth from pursuing Track B access to interLATA authority. Thereafter, however, BellSouth's witnesses stated under oath that BellSouth is proceeding under Track A, not Track B.

2. The Commission should strike or sever BellSouth's SGAT from this proceeding whether BellSouth chooses to proceed under Track A or Track B. As shown below, an SGAT is irrelevant to Track A and it is procedurally inappropriate for consideration under Track B.

BellSouth's SGAT is Irrelevant to Track A

3. BellSouth's witnesses have stated under oath that BellSouth is proceeding under Track A in this proceeding, not Track B. See deposition of Robert Scheye at page 114 and deposition of Alphonso Varner at page 25. Mr. Varner explained that BellSouth relies upon its interconnection agreements to show compliance with checklist items actually purchased by competitors, but relies upon its draft SGAT to demonstrate compliance with those checklist items not yet purchased by competitors. Varner deposition transcript at pages 14 - 15. As the FCC recently

determined in its order denying Ameritech's Section 271 application to provide interLATA services in Michigan (the FCC Ameritech Order), however, under Track A a Bell Operating Company's (BOC's) ability to "provide" checklist elements must be based on its interconnection agreements - not an SGAT.

4. The FCC determined that a BOC "provides" a checklist item under Track A in one of two ways - neither of which is an SGAT:

> For the reasons discussed below, ***we conclude that a BOC "provides" a checklist item if it actually furnishes the item at rates and on terms and conditions that comply with the Act or, where no competitor is actually using the item, if the BOC makes the checklist item available as both a legal and a practical matter.*** Like the Department of Justice, we emphasize that the mere fact that a BOC has "offered" to provide checklist items will not suffice for a BOC petitioning for entry under Track A to establish checklist compliance. ***To be "providing" a checklist item, a BOC must have a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item.*** Moreover, the petitioning BOC must demonstrate that it is presently ready to furnish each checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality. For instance, the BOC may present operational evidence to demonstrate that the operations support systems functions the BOC provides to competing carriers will be able to handle reasonably foreseeable demand volumes for individual checklist items. As discussed below, such evidence may include carrier-to-carrier testing, independent third-party testing, and internal testing of operations support systems functions, where there is no actual commercial usage of a checklist item.

Paragraph 110, FCC Ameritech Order, footnotes omitted, emphasis supplied. In other words, demonstrated ability to perform the terms of its interconnection agreements is the only way BellSouth can meet Track A requirements.

5. The FCC further elaborated on the distinction between the Track A requirement that a BOC "provide" interconnection and access and the Track B requirement that it "generally offer" interconnection and access:

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

FCC Ameritech Order at paragraph 114, emphasis supplied. Again, the FCC made it perfectly clear that an SGAT is irrelevant to a BOC's ability to meet the requirements of Track A. BellSouth's testimony that it is proceeding under upon Track A renders the SGAT and supporting testimony irrelevant and immaterial.[1]

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[1] In a recent ruling, the Kentucky Public Service Commission recognized the irrelevance of BellSouth's SGAT to a Track A proceeding. Citing the FCC Ameritech Order, the Kentucky Commission determined that Track B was closed to BellSouth and therefore BellSouth's SGAT would not be considered in its 271 proceeding. See Order dated August 21, 1997, attached hereto as Attachment A.

The Commission Should Decline an SGAT Review Under Track B In This Proceeding

6. Even if BellSouth had not announced its reliance on Track A, the Commission should strike or sever the draft SGAT and supporting testimony from this proceeding in order to ensure that that the Commission has the opportunity to fulfill its obligations under section 252(f) of the Act and that the parties are accorded due process. The Commission should not allow BellSouth's actions in this proceeding to limit the Commission's SGAT review pursuant to section 252(f) or the parties' opportunity to test the SGAT provisions, particularly the requirement that SGAT prices be cost-based pursuant to section 252(d).

7. Assuming that BellSouth could elect to attempt a Track B case at the FCC despite its reliance on Track A herein, and despite the FCC's rulings on this subject, BellSouth would be required by Section 271(c)(2)(B) to produce an SGAT that has been approved by the Commission pursuant to Section 252 of the Act:

> 272(c)(1)(B) Failure to request access: A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) . . . ***and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f).***

Emphasis supplied. A fully operational SGAT therefore is a condition precedent to initiation of a Track B case, assuming, *arguendo*, that BellSouth could proceed under Track B.

8. BellSouth has no operational SGAT. Instead, it filed what it calls a "Draft" SGAT, found in Exhibit RCS-1, sponsored by Robert C. Scheye. Mr. Scheye asserts that the draft SGAT meets requirements of federal law and requests that the Commission approve a future version of the draft SGAT, to be filed at some unspecified time:

> . . . I request that the Commission confirm, within sixty days from the date the Statement is formally filed with the Commission, that it does in fact meet the 14-point checklist requirements, and that BellSouth has fully implemented each of the checklist items.

Scheye Direct Testimony at 3.

9. On August 25, 1997, BellSouth filed a Revised Draft SGAT "in response to the decision of the Eighth Circuit Court of Appeals . . . ." Although BellSouth's witnesses addressed the decision in their rebuttal testimony filed on July 31, 1997,[2] and two BellSouth witnesses stated that there would be <u>no</u> substantive changes to the draft SGAT,[3] BellSouth waited an additional 25 days before filing revisions to its draft SGAT. The completion of discovery in this docket, however, was August 22, 1997. The additional and revised terms in this draft SGAT therefore cannot

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[2] <u>See</u>, for example, rebuttal testimony of Alphonso Varner at pages 53 - 56 and rebuttal testimony of Robert Scheye at page 38.

[3] Rebuttal testimony of Alphonso Varner at page 47, deposition of Robert Scheye at page 229.

be subjected to discovery because it was filed after the discovery deadline in this docket - even though the Eighth Circuit Court of Appeals rendered its decision on July 18, 1997.

10. There are several reasons why the Commission should reject BellSouth's attempt to secure in this 271 proceeding an SGAT ruling under Section 252(f). First, there is no legal significance to a draft of an SGAT. In essence, BellSouth is asking the Commission to determine what it might do if and when it decides to request approval of an SGAT that might look like the draft found in Exhibit RCS-1 or Revised RCS-1.[4]

11. Second, BellSouth has proposed no issues necessary to the Commission's review of an SGAT, the requirements for which are set forth in Section 252(f)(2) of the Act:

> (2) State Commission review: A state commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

This docket has been open for more than one year. To date, BellSouth has failed to propose issues specific to the Commission's review of an SGAT pursuant to Sections 252 and 251 of

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[4] The procedure chosen by BellSouth was not necessary to allow this Commission a period longer than 60 days in which to complete its review. Section 252(f)(3) allows BellSouth to agree to an extension of the review period.

the Act - yet the bulk of BellSouth's filing is devoted to support of a draft SGAT. It is unreasonable to expect the parties and the Commission to devote tremendous resources - including time that will be spent at hearing - to address a draft of an SGAT, let alone 86 volumes of supporting material, when such review is not directed to a specific issue in the docket and the parties cannot divine the issues that will be raised by the "actual" SGAT ultimately to be filed.

12. Issue I.B., which BellSouth has identified as the basis for its request that the Commission approve its SGAT, incorporates none of the substantive requirements of section 252(f):

> ISSUE 1.B. Has BellSouth met the requirements of section 271(c)(1)(B) of the Telecommunications Act of 1996?
>
> (a) Has an unaffiliated competing provider of telephone exchange service requested access and interconnection with BellSouth?
> (b) Has a statement of terms and conditions that BellSouth generally offers to provide access and interconnection been approved or permitted to take effect under Section 252(f)?

Section 252(f) of the Act sets forth specific prerequisites for state commission approval of a BOC SGAT: the Commission must examine the SGAT for compliance with the pricing standards of section 252(d), the interconnection standards set forth in section 251, and the FCC's implementing regulations. Further, the Commission is explicitly authorized to establish or enforce additional requirements of state law in its review, "including

requiring compliance with intrastate telecommunications service quality standards or requirements." Issue I.B. captures none of these prerequisites, all of which are necessary for SGAT approval. The Commission should consider these issues in another docket, if at all.

13. Finally, the Commission should refuse to consider the draft SGAT in conjunction with this proceeding because it does not comply with the Commission's procedural orders. On July 2, 1997, the Prehearing Officer issued Order No. PSC-97-0703-PCO-TL, Second Order Establishing Procedure, in this docket. Among other things, the order directed BellSouth to file the following evidence on July 7, 1997:

> 2. Evidence to be relied upon demonstrating that each requirement of Section 271(c)(2)(B) ***has been met***. BellSouth shall indicate with specificity which issue and checklist item it believes the evidence supports. (emphasis added)

The order contemplated that BellSouth would take steps to fulfill the requirements of Section 271(c)(2)(B) ***prior*** to filing its petition for 271 approval. Instead, BellSouth has chosen to evade the Commission's SGAT review under Sections 252 and 251 by filing a draft of an SGAT and requesting its approval pursuant to Issue 1.B.

14. BellSouth's failure to pursue SGAT approval prior to its 271 filing underscores the fact that this proceeding is woefully premature - even if BellSouth had elected a Track B

filing. Filing a draft of an SGAT along with a request for Track B approval is analogous to filing a petition for arbitration of an interconnection agreement along with a request for Track A approval. Just as it would have been premature for BellSouth to file its 271 case in conjunction with an arbitration proceeding that could, upon completion, allow it to meet Track A requirements, it is premature for BellSouth to file its 271 case in conjunction with an SGAT review proceeding that could, upon completion, allow it to try to invoke Track B.

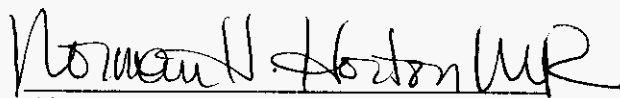
15. BellSouth is attempting to compress two proceedings into one - and to blur the requirements for both in the process. The Commission should not allow BellSouth to limit the Commission's consideration of the SGAT under Section 252 or to confuse its review of BellSouth's 271 petition.

WHEREFORE, Joint Movants request that the Commission strike BellSouth's draft SGAT and the supporting testimony detailed in Attachment B, or in the alternative, sever such material from this proceeding in order to allow full consideration of such material under section 252.

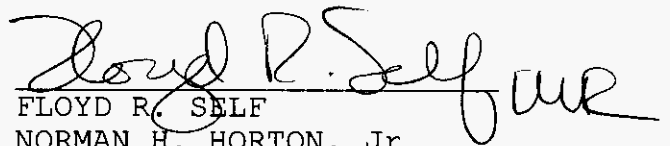
Respectfully submitted this 29th day of August, 1997.

JOSEPH A. McGLOTHLIN
VICKI GORDON KAUFMAN
Attorneys for Florida
Competitive Carriers Assoc.

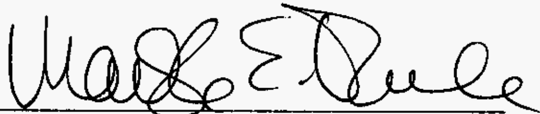
PATRICK K. WIGGINS
DONNA L. CANZANO
Attorneys for Intermedia
Communications Inc.



NORMAN H. HORTON, Jr.
FLOYD R. SELF
Attorneys for
American Communications of
of Jacksonville, Inc.



FLOYD R. SELF
NORMAN H. HORTON, Jr.
Attorneys for
WorldCom, Inc.



MARSHA E. RULE
TRACY HATCH
Attorneys for AT&T

RICHARD D. MELSON
THOMAS K. BOND
Attorneys for MCI
Telecommunications Corp.

Respectfully submitted this 29th day of August, 1997.

JOSEPH A. McGLOTHLIN
VICKI GORDON KAUFMAN
Attorneys for Florida
Competitive Carriers Assoc.

PATRICK K. WIGGINS
DONNA L. CANZANO
Attorneys for Intermedia
Communications Inc.

NORMAN H. HORTON, Jr.
FLOYD R. SELF
Attorneys for
American Communications of
of Jacksonville, Inc.

FLOYD R. SELF
NORMAN H. HORTON, Jr.
Attorneys for
WorldCom, Inc.

MARSHA E. RULE
TRACY HATCH
Attorneys for AT&T

RICHARD D. MELSON
THOMAS K. BOND
Attorneys for MCI
Telecommunications Corp.

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JOSEPH A. McGLOTHLIN
VICKI GORDON KAUFMAN
Attorneys for Florida
Competitive Carriers Assoc.

PATRICK K. WIGGINS
DONNA L. CANZANO
Attorneys for Intermedia
Communications Inc.

NORMAN H. HORTON, Jr.
FLOYD R. SELF
Attorneys for
American Communications of
of Jacksonville, Inc.

FLOYD R. SELF
NORMAN H. HORTON, Jr.
Attorneys for
WorldCom, Inc.

MARSHA E. RULE
TRACY HATCH
Attorneys for AT&T

RICHARD D. MELSON
THOMAS K. BOND
Attorneys for MCI
Telecommunications Corp.

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION CONCERNING THE PROPRIETY OF PROVISION OF INTERLATA SERVICES BY BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996	) CASE NO. 96-608

ORDER

On August 8, 1997, MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc. (collectively "MCI"), filed a motion to dismiss this case ("MCI Motion") claiming that the order of the Federal Communications Commission ("FCC") in Application by SBC Communications, Inc., Pursuant to §271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma (CC Docket No. 97-121, June 26, 1997) ("SBC Order") resolves all issues relating to the application of BellSouth Telecommunications, Inc. ("BellSouth") to provide interLATA services in Kentucky. MCI argues that the SBC Order clarifies that BellSouth's application is governed by §271 (c)(1)(a) ("Track A") rather than §271 (c)(1)(B) ("Track B") and concludes that, since BellSouth itself has admitted there are no qualifying competitors providing residential and business service in Kentucky, any Track A application must fail.

MCI correctly points out that the Commission, in its Order dated December 20, 1996, determined that Track A is appropriate for BellSouth in Kentucky because qualifying competitors have requested interconnection. See 47 U.S.C. §271. Track B enables a Bell Operating Company to present a Statement of Generally Available Terms

Attachment A

("Statement") rather than one or more interconnection agreements to demonstrate that it has legally opened its local market to competition. Track B does not require the presence of a facilities-based competitor, for the obvious reason that Track B was created to ensure that Bell operating companies were not prevented from entering the interLATA market simply because no such competitor had requested interconnection.

BellSouth, in its response to MCI's motion, filed August 15, 1997 ("BellSouth Response"), asserts that "[t]he choice of Tracks is up to the Bell Company."[1] The Commission does not agree. The statute itself, as well as the SBC Order, makes it abundantly clear that a request for interconnection forecloses Track B if the requestor is facilities-based and requests access and interconnection to provide local exchange service to business and residential customers as described in §271(c)(1)(A).[2] The Commission earlier ruled that BellSouth's Statement would be considered in this proceeding only because it is not entirely clear that a "facilities-based" carrier has requested interconnection. In its Order dated April 16, 1997, the Commission explained that it was not clear whether, for purposes of §271, a carrier is considered "facilities-based" only if it is constructing its own facilities as opposed to purchasing unbundled elements from the incumbent local carrier. Because the Commission's role under §271 is to advise the FCC, the Commission did not wish to foreclose consideration of the Statement in the absence of a clear statement from the FCC that a carrier is "facilities-based" if it provides service pursuant to unbundled elements. MCI in its motion does not

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[1] BellSouth Response at 6.

[2] SBC Order at Para. 54.

address this issue. However, the FCC has done so in Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in Michigan (CC Docket No. 97-137, August 19, 1997) At Paragraphs 88-103, pursuant to a lengthy legal analysis with which this Commission concurs, the FCC confirmed that unbundled elements purchased from an incumbent carrier are the purchaser's own facilities for purposes of §271. Accordingly, the Commission finds that Track B is closed to BellSouth in Kentucky and that its Statement should not be considered in this docket.

However, Track A remains open. BellSouth currently has entered into numerous negotiated agreements that have been approved by this Commission, as well as binding arbitrated agreements with MCI and AT&T. Accordingly, this proceeding should focus on whether the terms of those agreements satisfy the checklist, and whether BellSouth is making all items on the competitive checklist found at §271(c)(2)(B) available as a practical matter, at parity and without discrimination.

As a final matter, MCI points out that BellSouth itself has stated that there are currently no Track A providers in Kentucky and that such a provider must be present for a Track A application to succeed.[3] However, the quoted statement of BellSouth was made many months ago. Since then, MCI itself has entered into a binding agreement with BellSouth that may be found to satisfy Track A. It is true that MCI has not begun to serve customers pursuant to its agreement with BellSouth. However, the agreement through which it may do so is in place. The incentive provided by §271 and discussed

[3] MCI Motion at 2.

in the SBC Order, at Paragraph 57, has been serving its purpose: BellSouth appears to have moved expeditiously to satisfy the interconnection requests of potential competitors, including MCI. Moreover, BellSouth claims to provide each item of the competitive checklist to competitors. MCI says itself that the interconnection agreements with BellSouth, when fully implemented, will result in "the type of business and residential services satisfying Track A."[4]

In contrast, the FCC rejected SBC Communications' ("SBC") Oklahoma application because the company could not show that Brooks Fiber, a competitor relied upon exclusively by SBC for purposes of satisfying Track A,[5] was a provider of both residential and business service. Brooks Fiber, after all, stated it would not accept requests for residential services in Oklahoma,[6] and the record showed that Brooks Fiber was providing residential services without charge to only a few employees for testing purposes. It remains to be seen which competing carriers' business activities will be relevant to BellSouth's application to the FCC.

The FCC has stated there must be an actual commercial alternative to the Bell operating company in order for a Track A application to succeed.[7] Whether such an alternative exists in BellSouth's market is a matter to be determined -- particularly since events are moving so rapidly that, even if such an alternative does not exist as of the

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4 MCI Motion at 11-12.

5 SBC Order at Para. 6.

6 SBC Order at Para. 9, 20.

7 SBC Order at Para. 14.

date of this Order, it might very well exist by the time BellSouth files its application with the FCC. AT&T and MCI appear to be reasonable commercial alternatives to BellSouth which will serve both residential and business customers and, given that they have entered into binding agreements with BellSouth, it is to be expected that they will actually be competing in BellSouth's market in short order. Thus, the Commission cannot definitively state at this time that the hearing should be canceled.

This Commission has previously stated that it will not truncate this proceeding absent firm legal standards applied to irrefutable facts demonstrating that such truncation is appropriate and will not simply prevent this Commission from compiling as complete a record as possible to advise the FCC in making its decision.

For the foregoing reasons, IT IS HEREBY ORDERED that MCI's motion to dismiss this proceeding is denied.

Done at Frankfort, Kentucky, this 21st day of August, 1997.

By the Commission

ATTEST:

Executive Director

Joint Motion to Strike Draft SGAT
or in the Alternative, Sever Proceeding

ATTACHMENT B
Testimony to be Stricken

Alphonso Varner

Direct testimony:	Page 3, lines 11-16
	Page 5, lines 2-13 and lines 16-24
	Page 18, lines 4-7
	Page 37, lines 7-25
	Page 38, lines 1-22
	Page 38, lines 1-5
	Page 40, lines 20-25
	Page 41, lines 1-9
Rebuttal testimony:	Page 4, lines 22-25
	Page 5, lines 1-17
	Pages 47-57
	Page 58, lines 1-2

Robert Scheye

Direct testimony:	All testimony and exhibits
Rebuttal testimony:	Page 2, lines 2-4
	lines 11 ("I discuss") through 15
	line 25 ("In responding to the")
	Page 3, lines 1-10
	Page 4, lines 4-25
	Pages 5-9
	Page 10, lines 1-20
	Page 14, lines 13-25
Deposition:	Page 7, line 1 through page 31, line 17
	Page 37, lines 12-24
	Page 46, lines 14-25
	Pages 47 - 50
	Page 51, line 1
	Page 56, lines 22-25
	Pages 57-59
	Page 60, lines 1-15
	Page 77, lines 19-25

Page 78, lines 1-4
Page 92, lines 5-22
Page 95, lines 14-25
Page 96
Page 97, lines 1-5
Page 99, lines 21-25
Page 100, lines 1-5
Page 108, lines 11-16
Page 130, lines 19-25
Page 131, lines 1-17, 25
Page 132, lines 1-8
Page 134, lines 1-10
Page 137, lines 23-25
Page 138
Page 139, lines 1-11
Page 159, lines 8-25
Page 160, lines 1-5
Page 202, lines 19-25
Page 203, lines 1-13
Page 209, lines 1-22
Page 210, lines 5-25
Page 211, lines 1-12
Page 225, lines 22-25
Page 226
Page 227
Page 220, lines 17-24

William Stacy

Direct testimony:	Page 4, lines 11-13 Page 16, line 13 through page 21, line 7 Exhibit WNS-D
Rebuttal testimony:	Page 4, lines 16-17
Deposition:	Page 29, line 16 through page 39, line 1 Page 40, line 10 through page 46, line 12 Page 102, line 12 (starting with "end") through line 20 Page 103, line 13 through page 106, line10

Keith Milner

Direct testimony

Page 3, line 20 everything after "VOLUMES"
Page 3, line 22 through "Florida." on L. 25
Page 4, line 14 "in the Draft Statement"
Page 8, line 15 - 25 through page 9, lines 1-2
Page11, line 20-25 through page 12 L. 1 - 5.
Page 14, line 1-9
Page 16, lines 1-15
Page 18, lines 13-22
Page 20, lines 11-14
Page 22, lines 14 - 22
Page 24, lines 6 - 21
Page 28, lines 1-7
Page 29, lines 15 - 21
Page 31, lines 1-12
Page 34, lines 16 - 25 through page 35 lines 1 - 2
Page 36, lines 4 - 8
Page 37, lines 12 - 16
Page 39, lines 12 - 25

CERTIFICATE OF SERVICE

DOCKET NO. 960786-TL

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties of record this 29th day of August, 1997:

BellSouth Telecommunications
c/o Nancy H. Sims
150 S. Monroe St., Suite 400
Tallahassee, FL 32301

Kenneth Hoffman, Esq.
Rutledge, Ecenia et al
P. O. Box 551
Tallahassee, FL 32302

Floyd R. Self, Esq.
Messer Caparello & Self, P.A.
P. O. Box 1876
Tallahassee, FL 32302

Richard D. Melson, Esq.
Hopping Green Sams & Smith
123 South Calhoun Street
Tallahassee, FL 32301

Donna Canzano, Esq.
Patrick K. Wiggins, Esq.
Wiggins & Villacorta, P.A.
P. O. Drawer 1657
Tallahassee, FL 32302

C. Everett Boyd, Jr., Esq.
Ervin, Varn, Jacobs et al
P. O. Drawer 1170
Tallahassee, FL 32302

Vicki Gordon Kaufman, Esq.
Florida Competitive Carriers
117 S Gadsden Street
Tallahassee, FL 32301

Brian Sulmonetti
LDDS WorldCom Communications
1515 S. Federal Hwy., #400
Boca Raton, FL 33432-7404

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

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

Steve Brown, Esq.
Intermedia Communications Inc.
3625 Queen Palm Drive
Tampa, FL 33619-1309

Benjamin W. Fincher, Esq.
Sprint Communications
3100 Cumberland Circle
Atlanta, GA 30339

Peter M. Dunbar, Esq.
Robert S. Cohen, Esq.
Pennington, Culpepper et al
P. O. Box 10095
Tallahassee, FL 32302

Sue E. Weiske, Esq.
Time Warner Communications
160 Inverness Drive West
3rd Floor North
Englewood, CO 80112

Laura Wilson/Charles Dudley
Florida Cable
Telecommunications Assoc.
310 N. Monroe St.
Tallahassee, Fl. 32301

Tom Bond, Esq.
MCI-Telecommunications
780 Johnson Ferry Rd. #700
Atlanta, GA. 30342

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

Norman H. Horton, Jr., Esq.
Messer, Caparello & Self, P.A.
215 S. Monroe St., Suite 701
Tallahassee, FL 32301

James C. Falvey
American Communications
131 National Business Parkway
Suite 100
Annapolis Junction, MD 20701

Marsha E. Rule