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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of)
)
Petition of BellSouth Telecommunications, Inc.)
For a Section 252(b) Arbitration of)
Interconnection Agreement with Intermedia)
Communications Inc.)

Docket No. 991854-TP

POST-HEARING BRIEF

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POST-HEARING BRIEF OF
INTERMEDIA COMMUNICATIONS INC.

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**POST-HEARING BRIEF OF
INTERMEDIA COMMUNICATIONS INC.**

INTERMEDIA COMMUNICATIONS INC. (“Intermedia”), through its undersigned counsel, hereby respectfully files its Post-Hearing Brief in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

A. OVERVIEW

Intermedia is a Florida-based integrated telecommunications carrier that provides a wide variety of voice and data services, including circuit-switched and packet-switched telephone exchange, exchange access, and toll services. Since 1987, Intermedia has been transforming complex communications technologies into integrated, easy-to-use voice and data solutions. These services are made possible through Intermedia’s ubiquitously deployed advanced, state-of-the-art networks and facilities. Having transformed itself into one of the nation’s largest and fast

growing telecommunications companies, Intermedia now offers seamless end-to-end services virtually anywhere in the world through a comprehensive portfolio of local, long distance, high-speed data, and Internet services.

In Florida, which has served as Intermedia's "incubator," Intermedia is a certificated provider of local exchange and toll services. Intermedia has deployed five DMS-500 switches—one each in Jacksonville, Tampa, and Miami, and two in Orlando. In addition, it has thousands of miles of glass fiber, arranged in a SONET ring configuration, which Intermedia uses to provide service to its many customers in Florida.

Pursuant to the requirements of the Communications Act of 1934, as amended (the "Communications Act"), in or about July 1, 1996, Intermedia entered into a voluntarily negotiated interconnection agreement with BellSouth Telecommunications, Inc. ("BellSouth"). The two-year interconnection agreement expired on July 1, 1998, but was subsequently extended by mutual agreement between Intermedia and BellSouth (the "Parties") to December 31, 1999.

On June 28, 1999, by letter, BellSouth requested the negotiation of a new interconnection agreement, and proposed a starting point for negotiations between the Parties. The Parties agreed that these negotiations would be deemed to have started on July 1, 1999. The Parties have agreed to operate under the terms of the existing interconnection agreement until a new interconnection agreement is approved.

On December 7, 1999, BellSouth filed a petition for arbitration with the Commission, which triggered this proceeding. Intermedia filed its answer and new matter to BellSouth's petition on January 3, 2000. Issue identification and prehearing conference were subsequently held. Limited discovery was permitted, and the hearing in this matter was held on April 10, 2000, before Commissioners E. Leon Jacobs, Jr. and Lila A. Jaber.

B. SUMMARY

In this proceeding, the Parties initially sought resolution of over fifty (50) issues, inclusive of sub-issues. The Parties have since resolved a substantial number of issues and, indeed, at the hearing, resolved two more.¹ Consequently, at the time of the hearing, only twenty-one (21) issues (inclusive of sub-issues) remained open. These issues include the following:²

- Reciprocal compensation for Internet Service Provider (“ISP”)-bound calls.
- Applicable reciprocal compensation rate.
- Virtual-to-physical collocation conversion.
- Access to combinations of unbundled network elements (“UNEs”), including Enhanced Extended Links (“EELs”), at cost-based rates, and conversion of special access service to EELs.
- Access to unbundled packet switching capabilities.
- Access to unbundled interoffice transport at cost-based rates.
- Access to Frame Relay UNEs, including User-to-Network Interface (“UNI”), Network-to-Network Interface (“NNI”), and Data Link Control Identifiers (“DLCIs”) at specified Committed Information Rates (“CIRs”), at cost-based rates.

¹ At the hearing, the Parties voluntarily closed Issue Nos. 7 and 38 in Florida.

² At the mediation held before the Tennessee Regulatory Authority on April 13, 2000, the Parties further agreed to close Issue No. 45 (relating to the provision of “Exchange Access Frame Relay Service” and “InterLATA Frame Relay Service”). Specifically, the Parties agreed that Attachment 3, Section 7.9.6 of the proposed interconnection agreement, should be stricken in its entirety. However, because that issue was outstanding at the time of the hearing in Florida, Intermedia will discuss it in this brief.

- Assignment of numbering resources (*i.e.*, NPA (Numbering Plan Area)/NXXs).
- Establishment of Points of Interconnection (“POIs”).
- “Homing” of NPA/NXXs and routing of traffic.
- Appropriate definition of “IntraLATA Toll Traffic.”
- Appropriate definition of “Switched Access Traffic.”
- Classification of, and compensation for, intraLATA packet switched data traversing virtual circuits.
- Appropriate charges for Frame Relay interconnection trunks and Frame Relay UNEs, including but not limited to, NNI ports and DLCIs at CIRs.
- Provision of “Exchange Access Frame Relay Service” and “InterLATA Frame Relay Service.”

Intermedia’s position with respect to each of these issues can be summed up in one sentence: BellSouth is obligated, under applicable state and federal statutes, decisions, and rules and regulations, to provide the interconnection, unbundled access, collocation, and reciprocal compensation requested by Intermedia in this arbitration proceeding, and Intermedia is entitled to receive same from BellSouth at the rates mandated by law. Intermedia asks no more and no less of this Commission.

Specifically, the evidence in this proceeding unequivocally demonstrates that ISP-bound traffic is, and should be, subject to reciprocal compensation. Moreover, with respect to the reciprocal compensation rate to which local calls (including ISP-bound calls) that are transported and terminated by Intermedia to its customers, are subject, Intermedia is entitled to be compensated at the tandem interconnection rate. Likewise, the record shows that BellSouth’s

policies with respect to the conversion of virtual collocation to physical collocation is unreasonable, and should be reformed to comply with applicable law.

The evidence also reflects that BellSouth's refusal to provide access to existing combinations of UNEs, including EELs, packet switching capabilities (including Frame Relay elements), and all types of interoffice transport, at cost-based rates, is inconsistent with its statutorily mandated obligations. Similarly, BellSouth's attempts to control the manner in which Intermedia assigns its numbering resources, establishes its calling areas, and interconnects with BellSouth for the purpose of sending and receiving traffic, are untenable.

Finally, the record further demonstrates that BellSouth's insistence that the interconnection agreement reflect BellSouth's own definitions of such terms as "switched access traffic" and "intraLATA toll traffic," to name a few, is legally unsupportable. Accordingly, the Commission should resolve each and every issue in this arbitration proceeding in favor of Intermedia.

This Commission clearly has the unenviable task of resolving a number of complicated issues in this arbitration proceeding. The Commission is not, however, without any guidance from its prior rulings, as well as the rulings of the FCC, the courts, and other state regulatory commissions. Indeed, many of the issues have been directly addressed and resolved in favor of competitive carriers in other contexts or proceedings.

Separate and apart from the body of law that fully supports Intermedia's position on each and every issue, the public interest in encouraging the development of the local exchange market in Florida also dictates a pro-competitive result. That principle is at the heart of the market-opening provisions of the Communications Act and should guide the Commission as it wrestles with competing policy arguments presented by the Parties. To the extent that the issues can be

resolved without conferring an unfair advantage on either Party, while encouraging the continued growth of nascent local exchange competition in Florida, the balance should tip in favor of Intermedia.

II. ARGUMENT

A. **RECIPROCAL COMPENSATION SHOULD APPLY TO CALLS ORIGINATED BY BELL SOUTH AND TRANSPORTED AND TERMINATED BY INTERMEDIA TO ITS ISP CUSTOMERS, AND VICE VERSA. [ISSUE NO. 2(A)]**

The issue here is whether calls that are originated by either Party and destined to the ISP customers of the other Party should be subject to reciprocal compensation. Applicable law, as well as public policy considerations, dictate that they should.

Sections 251(b)(5), 251(c)(2), and 252(d)(2) of the Communications Act establish the obligation of incumbent local exchange carriers to interconnect with competitive carriers and to provide reciprocal compensation for the exchange of local traffic. The Communications Act defines the interconnection obligations of incumbent local exchange carriers in very broad terms and does not exclude local calls to ISPs from interconnection and reciprocal compensation obligations. Calls to ISPs are typically local calls and, hence, are subject to reciprocal compensation.

That calls to ISPs are typically local is demonstrated in Carl Jackson's ("Jackson") cross-examination:

Q: [Comm. Jaber] For the sake of consistency, let me keep my hypothetical so I can keep the flow of the conversation in my head. AOL is my Internet service, Sprint is my local provider, AT&T is my long distance carrier. This morning Mr. Varner said that getting on American Online is local access as opposed to the local exchange service. If I understand your testimony correctly you disagree with that and you are saying—is it correct that your testimony is that my provider is Sprint?

A: [Jackson] For your local service, yes.

Q: [Comm. Jaber] And is it your testimony that that is local exchange and not just local access?

A: [Jackson] Commissioner, yes, that would be a local call, because I assume you are dialing seven or ten digits on a local basis, so it would be a local call and there wouldn't be an interexchange carrier involved. It would be a call to AOL just like it would be to any other business or residential customer in that local area.

Q: [Comm. Jaber] Explain the difference with your own words why that is not local access. Where is Mr. Varner incorrect?

A: [Jackson] It would not be interexchange access from my standpoint. That call originates and terminates within the same local area. And thus by definition it is a local exchange service, period. The call is not being sent to an interexchange carrier to take it all over the country and transmit a voice call or a data call from one place to the other. It originates and terminates because you dial a seven-digit local number and there is something on the end of that local number where the call terminates which answers the phone.

Tr. at 306-307. Indeed, as Mr. Jackson testified, the call from BellSouth's customer to Intermedia's ISP customer (assuming it is made within the same local calling area) is local "telecommunications" and the processing that occurs once that call is terminated by Intermedia to its ISP customer is an entirely separate "enhanced" or "information" service. Tr. at 308. The local call "terminates" at the point where that call is delivered to the ISP. Id. Significantly, BellSouth has not offered credible evidence to rebut Intermedia's position:

Q: [Canis] Now, on Page 8, Line 7, you say, once it is understood that ISP-bound traffic terminates only at distant websites, which are almost never in the same exchange as the end user. On what do you base that statement?

A: [Varner] Well, on a number of things. Just looking at the way that the Internet functions. . . .

* * * * *

Q: [Canis] You stated in your description of what is local when I am on the Internet and what is not local. Let me make clear. Is that your interpretation of what you believe the FCC said, or is that based on any of your own knowledge, or your own experience, or your own analysis of Internet usage?

A: [Varner] It is both.

Q: [Canis] Okay. Could you elaborate a little bit on your own personal knowledge and experience of the Internet?

A: [Varner] Well, I use it all the time. You know, I subscribe to an ISP and I use it for a number of different things.

Q: [Canis] But you have not conducted studies of usage on various networks or anything like that?

A: [Varner] Of my own. I mean I am familiar with the way in which I use it. And hardly ever do I end up accessing somebody who is in the same exchange where I am. I'm not even sure that anybody exists in my exchange that does provide websites.

* * * * *

Q: [Canis] Outside of your personal experience, though, you have not conducted any studies, anything like that?

A: [Varner] With regard to the jurisdictional nature of this traffic?

Q: [Canis] Or actual traffic usage and traffic patterns on the Internet.

A: [Varner] No. No, I have not. I'm aware of some, but I have not.

Tr. at 85-88. Unsubstantiated conclusions, such as those proffered by Mr. Varner, of course are only valid to the extent one could throw a two-ton rock across the Pacific.

From a public policy and equity standpoint, compensating Intermedia (and for that matter, BellSouth) for the transport and termination of ISP-bound calls makes sense because Intermedia is providing a valuable service to BellSouth and its customers by completing their

calls. Without Intermedia's participation, those calls will never reach their intended destination.

Tr. at 257-258.

Moreover, reciprocal compensation for ISP-bound calls is appropriate because a contrary determination would result in a class of calls for which no compensation is provided to Intermedia. This result is, of course, inconsistent with the carefully drawn compensation scheme articulated in the Communications Act, which contemplates that carriers will receive compensation for the use of their respective networks through either access charges or reciprocal compensation. Tr. at 259. In addition, without compensation for the use of their networks, alternative local exchange carriers ("ALECs") will be discouraged from serving ISPs as they begin to find that the cost of offering service to ISPs become increasingly prohibitive. Id.

The potential anticompetitive impact of denying ALECs reciprocal compensation for the transport and termination of ISP-bound traffic has been recognized, time and again, by state commissions that have looked beyond the ILECs' self-serving arguments. Tr. at 451-452. The Maryland Public Service Commission's statements are particularly noteworthy:

We are very concerned that the adoption of BA-MD's position will result in CLECs receiving no compensation for terminating ISP-bound traffic. Such an effect will be detrimental to our efforts to encourage competition in Maryland. No one disputes that local exchange carriers incur costs to terminate the traffic of other carriers over their network. In the absence of finding that reciprocal compensation applies, a class of calls (ISP traffic) will exist for which there is no compensation. . . .³

BellSouth's arguments in support of its position are transparently flawed. BellSouth argues that because ISP-bound traffic is not local traffic but rather interstate access traffic, it is

³ *In the Matter of the Complaint of MFS Intelenet of Maryland, Inc. Against Bell Atlantic-Maryland, Inc. for Breach of Interconnection Terms and Request for Immediate Relief*, Case No. 8731, Order No. 75280, at 17 (rel. June 11, 1999). *See also* Tr. at 453 (Jackson Direct).

not subject to the reciprocal compensation obligations of Section 251 of the Communications Act. It further asserts that payment of reciprocal compensation for such traffic is inconsistent with the law and is not sound public policy. Tr. at 25. BellSouth anchors its first argument on the FCC's *ISP Declaratory Ruling*.⁴ Tr. at 26. It bases its second argument on the flimsy proposition that payment of reciprocal compensation distorts the market. Tr. at 392. Both arguments fail dismally.

With respect to the FCC's pronouncements in the *ISP Declaratory Ruling* on which BellSouth specifically relies, as Mr. Jackson testified, those have been vacated and remanded by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). In particular, in the *ISP Remand Order*,⁵ the D.C. Circuit vacated and remanded the FCC's decision for lack of "reasoned decision-making." In deciding whether ISP-bound traffic is "local," the FCC looked at whether such traffic is jurisdictionally interstate or intrastate. The FCC applied the so-called "end-to-end" analysis, and found that most ISP-bound traffic is jurisdictionally interstate because the termination points of Internet traffic are usually located in a different state or country from the end-user subscriber. The D.C. Circuit did not reject the "end-to-end" analysis for purposes of establishing jurisdiction, but held that this analysis has no relevance to the question of whether ISP-bound traffic is "local" for reciprocal compensation purposes. Put another way, even if ISP-bound traffic is considered to be jurisdictionally interstate, the call from

⁴ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, , Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999) (*ISP Declaratory Ruling*).

⁵ See *Bell Atlantic Cos. V. FCC*(Nos. 99-1094, *et al.* (decided Mar. 24, 2000) (*ISP Remand Order*).

the end-user subscriber to the ISP still could be “local” traffic and thereby qualify for reciprocal compensation under Section 251(b)(5) of the Communications Act. Accordingly, BellSouth’s reliance on the FCC’s *ISP Declaratory Ruling* for the proposition that ISP calls is non-compensable, non-local traffic must fall.

And even if the FCC’s *ISP Declaratory Ruling* remained good law, BellSouth’s protestation that, under that decision, ISP-bound traffic cannot be subject to reciprocal compensation, is not sustainable. In the *ISP Declaratory Ruling*, the FCC specifically stated:

Even where parties to interconnection agreements do not voluntarily agree on an inter-carrier compensation mechanism for ISP-bound traffic, state commissions nonetheless may determine in their arbitration proceedings at this point that reciprocal compensation should be paid for this traffic. The passage of the 1996 Act raised the novel issue of the applicability of its local competition provisions to the issue of inter-carrier compensation for ISP-bound traffic. Section 252 imposes upon state commissions the statutory duty to approve voluntarily-negotiated interconnection agreements and to arbitrate interconnection disputes. As we observed in the Local Competition Order, state commission authority over interconnection agreements pursuant to section 252 “extends to both interstate and intrastate matters.” Thus the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the section 251/252 negotiation and arbitration process. However, any such arbitration must be consistent with governing federal law. While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic.⁶

Thus, pursuant to the FCC’s explicit conclusions in the *ISP Declaratory Ruling*, this Commission has the requisite authority to find that ISP-bound calls are subject to reciprocal compensation. Indeed, this Commission did exactly that in several arbitration proceedings,

⁶ *ISP Declaratory Ruling*, 14 FCC Rcd at 3704-3705.

where it found it reasonable that “the parties shall continue to operate under the terms of their current interconnection agreement regarding reciprocal compensation until the FCC issues its final ruling on whether ISP-bound traffic should be defined as local or whether reciprocal compensation is otherwise due for this traffic.”⁷ BellSouth itself acknowledges in Alphonso Varner’s (“Varner”) prefiled direct testimony that this Commission has made a definitive finding on this issue:

Q: Has this Commission previously ruled on the inclusion of ISP-bound traffic in the definition of local traffic subject to reciprocal compensation?

A: Yes. In its Order No. PSC-00-0128-FOF-TP dated January 14, 2000, in the ICB/BellSouth Arbitration Case, Docket No. 990691-TP, the Commission found that “the parties should continue to operate under the terms of their current contract until the FCC issues its final ruling on whether ISP-bound traffic should be defined as local and whether reciprocal compensation is due for this traffic.” . . . The Commission noted that it reached this same decision in its Order No. PSC-99-2009-FOF-TP dated October 14, 1999 in the MediaOne/BellSouth Arbitration Case, Docket No. 990149-TP.

Tr. at 28. Significantly, notwithstanding BellSouth’s explicit recognition of applicable law, BellSouth continues to resist complying with its reciprocal compensation obligations. Surely, such a show of intransigence cannot be condoned.

BellSouth’s “market distortion” argument, on the other hand, is based on a faulty premise that ISP-bound traffic between BellSouth and the ALECs will continue to be unbalanced in favor of the ALECs. BellSouth suggests that the ALECs will target only ISPs, thereby raking in vast amounts of reciprocal compensation. This argument misses the point by a wide margin. ALECs cannot survive in the long-run by targeting only ISPs. While there may be niche players at the

⁷ See *Petition by ITC DeltaCom Communications, Inc. d/b/a ITC DeltaCom for Arbitration of Certain Unresolved Issues in Interconnection Negotiations Between ITC DeltaCom and BellSouth Telecommunications, Inc.*, Docket No. 990750-TP, Order No. PSC-00-0537-FOF-TP, Final Order on Arbitration (issued Mar. 15, 2000).

moment, ultimately these ALECs need to diversify in order to sustain their business. Inevitably, competition in the local exchange market will advance to the level where traffic exchange is relatively balanced. It is, of course, beyond the ALECs' control if BellSouth chooses not to market aggressively to ISPs—nothing precludes BellSouth from targeting ISP subscribers.

BellSouth complains about “subsidizing” the ALECs. Tr. at 393. That argument is baseless, however. On the contrary, denial of reciprocal compensation for ISP traffic will force ALECs, including Intermedia, to subsidize BellSouth's operations. As Mr. Jackson testified, Intermedia incurs costs that otherwise would not be incurred when Intermedia transports and terminates BellSouth-originated local calls to Intermedia's ISP customers. Tr. at 311. It is no answer that Intermedia purportedly could collect these costs from its ISP customers (and Intermedia continues to believe that it cannot impose access charges on its ISP customers), because, as Mr. Jackson pointed out, doing so could drive its customers away, to BellSouth's competitive advantage:

Q: [Kitchings] All right. And given that it is Intermedia's position in this case that it is not recovering its costs if those calls go without reciprocal compensation, isn't it true that Intermedia in order to recover its costs could raise the rates it charges to ISP providers?

A: [Jackson] If we did, I believe we would lose those customers. You had mentioned cost causer pays earlier. In our view, BellSouth's end user is causing a cost on our network. We are providing a valuable service for you for your end user to get to my end user, and therefore part of that compensation should be borne by the cost causer. I'm getting something from the ISP, but it is market-based. And I assume if I raise that rate to compensate for somebody else's cost I could well lose a customer.

Tr. at 311. Forcing Intermedia to raise the rates it charges its ISP customers at the risk of potentially losing those customers to BellSouth, in order that BellSouth may escape its reciprocal compensation obligation, is unconscionable and anticompetitive.

B. INTERMEDIA FULLY SATISFIES THE REQUIREMENTS OF FCC RULE 51.711(A)(3) AND IS THEREFORE ENTITLED TO RECEIVE RECIPROCAL COMPENSATION AT THE TANDEM INTERCONNECTION RATE. [ISSUE NO. 3]

The Parties disagree as to whether Intermedia is entitled to receive reciprocal compensation for the exchange of local traffic at the higher composite tandem interconnection rate rather than at the lower elemental end-office rate. As the evidence reflects, Intermedia satisfies the requirements of the applicable FCC regulation and, hence, qualifies for reciprocal compensation at the tandem interconnection rate.

The determinative question here is whether Intermedia's switches in Florida serve geographic areas comparable to the area served by BellSouth. Tr. at 261-262, 454. The controlling law requires no more. Rule 51.711(a)(3) of the FCC's regulations states:

Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.⁸

Nor does the rule require that the ALEC's calling area be "identical," but rather "comparable." Tr. at 366. As the evidence shows, Intermedia has five DMS-500 switches in Florida: one each in Jacksonville, Tampa, and Miami, and two in Orlando. Tr. at 263. These switches have been in operation for several years and are serving customers in Florida. Tr. at 313. In addition, Intermedia has seventeen collocations in Florida, eleven of those are in BellSouth's calling area. Tr. at 322.

Intermedia submitted into evidence overlay calling area maps. These overlay maps delineate Intermedia's serving areas and show that Intermedia's switches do cover the areas

⁸ 47 C.F.R. § 51.71(a)(3).

covered by BellSouth. Tr. at 315. In addition, the record reflects that Intermedia either has operational customers in the areas it serves⁹ or has facilities ready to serve potential customers. Tr. at 318-320.

Moreover, as witness Jackson testified on cross-examination, Intermedia even serves additional areas not covered by BellSouth:

Q: [Kitchings] Okay. And to save us both time, I would ask you the same question for the second page map and then the third page map. The second page map is your Orlando area, the third page map is the Jacksonville area. Would your answers be the same if I were to ask you about serving customers in each of the blue delineated areas there?

A: [Jackson] Again, I can't tell you whether we have zero or 100 per geographic area. But I think two important points, Mr. Kitchings, on these two maps, if you look at the blue area, I'm serving an area and have customers in areas outside BellSouth's calling area. So not only serving the preponderance of the BellSouth area, I am also providing service in GTE and adjoining Sprint areas as well in both, you know, in both of these other cases that you mentioned. So my calling area there may well be larger than BellSouth's in serving customers in that manner.

Tr. at 319. Thus, Intermedia's switches actually serve areas larger than those covered by BellSouth's tandems. Tr. at 365.

The FCC's rule is silent as to what constitutes "serving" a geographic area. Nor does the rule state what type of proof must be submitted by an ALEC to demonstrate that it meets the "geographic comparability" standard. Nevertheless, Intermedia has submitted credible proof that its switches serve geographic areas comparable to those served by BellSouth's tandem switches. Significantly, BellSouth has not offered any evidence to rebut Intermedia's geographic comparability showing. It has neither shown that Intermedia is not serving customers in the

⁹ Even BellSouth acknowledges that there is no "specific customer count or bogey" that is required to demonstrate geographic comparability. Tr. at 120.

relevant geographic areas, nor has it adduced any evidence that calls into question Intermedia's delineation of its service coverage.

BellSouth insists that Intermedia must also satisfy the "functional equivalency" test. Tr. at 33. In other words, BellSouth wants Intermedia to show that its tandem switches perform the functions of BellSouth's tandem switches. This requirement is not, however, in the applicable rules. As discussed above, FCC Rule 51.711(a)(3) requires only that a competing local provider demonstrate geographic comparability. Indeed, the language of Rule 51.711(a)(3) demonstrates that Intermedia's switches do not have to perform the functions of BellSouth's tandem switches. The rule refers to "the switch of a carrier other than an incumbent LEC" serving a comparable geographic area to the area served by "the incumbent LEC's tandem switch." If the FCC intended to require competing carriers to have tandem switches in order to qualify for the tandem interconnection rate, it would have said so. This argument is supported by the fact that the FCC specifies the ILEC switch as a "tandem," but uses the broad, unqualified word "switch" when referring to competing carriers' equipment.

It is a well-recognized rule of law that, when a rule or a statute is unambiguous and conveys a clear and ordinary meaning, there is no need to resort to other rules of construction, and its plain meaning must be given effect.¹⁰ BellSouth's attempt to engraft an additional requirement to Rule 51.711(a)(3) by lifting extraneous language from the FCC's *First Report and Order*¹¹ is improper and must be rejected out of hand.

¹⁰ See generally, *Starr Tyme, Inc. V. Cohen*, 659 So. 2d 1064, 20 Fla. Law.W. S 447 (Fla. 1995).

¹¹ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, *First Report and Order*, 11 FCC Rcd 15499 (1996) (*First Report and Order*).

But even if the actual language of the *First Report and Order* were germane, a plain reading of that language demonstrates that it is completely consistent with the FCC's rule. Paragraph 1090 of the *First Report and Order* (the very paragraph BellSouth insists supports its "functional equivalency" test) states, in relevant part:

[S]tates shall also consider whether new technologies (*e.g.*, fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. *Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnection carrier's additional costs is the LEC tandem interconnection rate.*¹²

As the italicized portion of paragraph 1090 of the *First Report and Order* above shows, the *First Report and Order* itself expressly states that where the interconnecting carrier's switch serves a geographic area comparable to that served by the ILEC tandem, the appropriate proxy is the tandem interconnection rate. Similar switch functionality, at least in this instance, is *not* a precondition to obtaining reciprocal compensation at the tandem interconnection rate—and that is entirely consistent with the way FCC Rule 51.711(a)(3) was drafted.

BellSouth vehemently protests that Intermedia fails to demonstrate that its switches perform tandem functionality. Tr. at 101, 33. But BellSouth's target is a continually moving one. On cross-examination, BellSouth witness Varner stated quite authoritatively that if there is only *one* switch in the local calling area, then Intermedia cannot be performing a tandem function, suggesting that an ALEC must have at least two switches in the calling area to qualify for tandem interconnection rate. Tr. at 103. Yet, on further cross-examination, when informed

¹² *Id.* at ¶ 1090 (emphasis added).

that Intermedia has in fact two switches in Orlando, Mr. Varner suggested that there may be additional requirements to qualify for the tandem interconnection rate:

A: [Varner] . . . What we are looking at here is whether or not they are providing a local tandem function; that is, are they taking local calls and providing a tandem function on those local calls. So if they only have one switch in the local calling area, they can't be doing that. . . .

Q: [Canis] I have just been informed by my colleague that Intermedia, in fact, maintains two DMS-500 switches in Orlando. Does this cause BellSouth then to change its position and to find that at least in the Orlando area Intermedia is due compensation at the tandem rate?

A. [Varner] No, it does not. What would have to happen is that of Intermedia is, in fact, handling traffic on a tandem basis in the Orlando area, then yes. The reason I brought up the fact that the issue of the one local switch in each local calling area is if that is all you have, the answer is very obvious. It is impossible to be doing tandem switching. Now if you have more than one switch it is possible that you could, but that doesn't mean that you, in fact, are.

Tr. at 103-104. Yet, again, further into the cross-examination, Mr. Varner stated that one switch would be sufficient. Tr. at 112. Even further into the cross-examination, Mr. Varner changed his tune once again to state that it would be impossible to perform tandem switching with only one switch. Tr. at 113. A few seconds later, he states that tandem switching is possible with two switches, but "highly unlikely." Tr. at 113.

Q: [Canis] Okay. So when Alcatel comes out and says ALECs, we have got a major advancement in technology, rather than having you go out and buy a big old end office switch and a big old tandem switch, we are going to give you a smaller, smarter scalable product that combines the functionality of both into one. Or when Lucent comes out with its Class 5 port ESS that does exactly the same thing, you are telling me that that because those functions are put into one machine instead of being in two different or three different machines, that ALECs that use those machines can never get the higher tandem recip comp rate?

A: [Varner] No, that is not correct at all. And, again, you have combined two scenarios here. If Alcatel comes out with a switch that says, okay, you can do end office switching and tandem switching in the same switch; if Intermedia is, in fact, doing that, is, in fact, utilizing that switch to provide tandem switching, then, yes, Intermedia would be entitled to the tandem switching rate. . . .

Q: [Comm. Jaber] Mr. Varner, do you know for a fact whether Intermedia uses those functions or not?

A: [Varner] They can't be. Because in order to be providing local tandem switching, you have to have at least two switches in the local calling area. And if you only have one, it is not possible. Now, he has just informed me that they did have two in Orlando. In that case, you just have to look at the switches to determine. But typically if you only have two switches you don't do local tandem switching. . . . And if you have only got the one switch in the local calling area, it is impossible. If you have got two, it is possible, but highly, highly unlikely.

Tr. at 111-113. Under BellSouth's criteria, how many switches would be required for an ALEC to qualify for the tandem interconnection rate? Is it one, two, three, or some infinite number?

Regrettably, as the exchange between Intermedia's counsel and BellSouth witness Varner above demonstrates, even BellSouth does not seem to know. And, indeed, under BellSouth's proposed schizophrenic test, no ALEC in Florida could ever qualify for the tandem interconnection rate.

Tr. at 116.

BellSouth's protestations notwithstanding, Intermedia has adduced sufficient evidence to show that its switches perform tandem functionality (and Intermedia strongly rejects the proposition that it must show "functional equivalency" to qualify for tandem interconnection rate). As Mr. Jackson testified, Intermedia's switches are multifunctional and perform some of the traditional functions of tandem switches, including the aggregation of traffic from multiple remote locations. Tr. at 262, 455. In addition, Intermedia's switching platforms meet the definition and perform the same functions identified within the Local Exchange Routing Guide

(“LERG”) for tandem offices and for Class 4/5 switches. Tr. at 455. Significantly, BellSouth has not proffered any evidence to rebut Intermedia’s showings. Consequently, although the relevant FCC rule does not require Intermedia to demonstrate tandem functionality, Intermedia has shown—and BellSouth has not rebutted—that its multifunctional switches perform many of the functions performed by BellSouth’s tandem switches.

Finally, a number of state commissions have ruled in favor of competing carriers on the issue of whether these carriers are entitled to reciprocal compensation at the tandem interconnection rate.¹³ Tr. at 455-457. The showings made by the competing carriers in those proceedings were, in material respects, similar to the ones Intermedia has proffered in this proceeding. BellSouth’s reliance on this Commission’s *ICG Order*¹⁴ (Tr. at 35) is misplaced. There, the Commission rejected ICG’s position because of failure of proof, that is, ICG failed to prove that its switch would serve “a geographic area comparable to an area served by a BellSouth tandem switch” because ICG had no existing facilities in Florida upon which the Commission could reasonably make that determination. Because Intermedia is fully operational in Florida and has deployed extensive facilities in this State, the basis upon which the

¹³ See, e.g., *Petition of MediaOne Telecommunications of Massachusetts, Inc. and New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement*, D.T.E. 99-42/43, 99-52 (rel. Aug. 25, 1999); *Petition by ICG Telecom Group, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 27069, Final Order on Arbitration (Nov. 11, 1999); *Petition by ICG Telecom Group, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. P-582, Sub 6, Order Ruling on Objection, Request for Clarification, Reconsideration and Composite Agreement (rel. Mar. 1, 2000).

¹⁴ *Petition of ICG Telecom Group, Inc. for Arbitration of Unresolved Issues in Interconnection Negotiations with BellSouth Telecommunications, Inc.*, Docket No. 990691-TP, Order No. PSC-00-0128-FOF-TP (issued June 14, 2000).

Commission rejected ICG's request for tandem interconnection rate is inapplicable in this proceeding.

C. INTERMEDIA SHOULD BE ALLOWED TO CONVERT ITS VIRTUAL COLLOCATION ARRANGEMENTS TO PHYSICAL COLLOCATION ARRANGEMENTS WITHOUT REQUIRING THE RELOCATION OF ITS EQUIPMENT. [ISSUE NO. 10]

Conversion of virtual collocation arrangements to physical collocation arrangements should not give rise to additional costs, delays, and service interruptions. Intermedia posits that these concerns can be addressed by allowing "in place" conversions of virtually collocated equipment. This means that, when Intermedia elects to convert a virtual collocation arrangement, BellSouth need not move or relocate Intermedia's equipment; rather, BellSouth should simply convert it "in place," even if Intermedia's equipment is in the same line-up as BellSouth's equipment. Tr. at 270.

BellSouth states that it will authorize the conversion of virtual collocation arrangements to physical collocation arrangements "in place" and without requiring the relocation of the virtually collocated equipment, absent extenuating circumstances or technical reasons, where (a) there is no change to the arrangement, (b) the conversion would not cause the arrangement to be located in the area reserved for BellSouth's future use, and (c) the conversion would not affect BellSouth's ability to secure its own facilities. Tr. at 172-173.

Intermedia does not disagree with BellSouth that it should be able to reserve space for future use, so long as it is reasonable. Consequently, Intermedia is willing to accept the proposition that "in place" conversion of virtual collocation to physical collocation may not be permitted where the conversion would cause the arrangement to be located in the area served for BellSouth's future growth.

Likewise, Intermedia recognizes BellSouth's concern that some ALECs might "game" the process by requesting in place conversion with the ultimate intent of augmenting their collocation space. Tr. at 165. While BellSouth has not shown that ALECs have, in fact, abused the system,¹⁵ Intermedia agrees that that practice is fundamentally wrong. Consequently, Intermedia is willing to agree that "in place" conversion will be allowed if (a) Intermedia does not increase the amount of space it occupies, and (b) any changes to the arrangement can be accommodated by existing power, HVAC, and other requirements.

Intermedia disagrees with BellSouth on two things, however. First, BellSouth hinges its commitment to provide "in place" conversion on the absence of "extenuating circumstances" or "technical reasons." Tr. at 172. These conditions are ambiguous. It is not entirely clear what would constitute "extenuating circumstances" in BellSouth's mind. Likewise, it is not clear what BellSouth would consider "technical reasons." Because these conditions lack specificity, BellSouth retains the flexibility of expanding the universe of potential "extenuating circumstances" and "technical reasons" to suit its needs.

Second, BellSouth suggests that, because its equipment is "bolted" to ALECs' virtually collocated equipment, it is not able to secure its equipment physically from those of the ALECs. Tr. at 205. By suggesting that it is impossible to secure its equipment from the equipment of the ALECs, BellSouth effectively is suggesting that conversions of virtual collocation arrangements to physical collocation arrangements will always necessitate relocation of the ALECs' equipment. Intermedia does not agree that that result is acceptable. Indeed, BellSouth's premise

¹⁵ In response to Commissioner Jaber's question whether Intermedia has given BellSouth any reason to believe that it would game the system, witness Milner responded in the negative. Tr. at 200.

is fundamentally flawed because, as witness Jackson testified, he has never seen an ALEC

equipment “bolted” to an ILEC equipment:

Q: [Canis] Are you aware of any situation in which a piece of Intermedia network equipment would actually be bolted together to a piece of BellSouth network equipment?

A: [Jackson] No. I have walked through a number of collos and I have never seen that, but—it’s a no.

Q: [Canis] Have you seen carriers put enclosures, that is locked cabinet doors that cover one equipment bay and one equipment bay only?

A: [Jackson] Yes, I have.

Q: [Canis] So in that situation you can have one equipment bay, you can have one right here and one right here, loaded with Intermedia equipment here and BellSouth equipment here. You can leave the Intermedia equipment open and put a security door that just spans the bay housing the BellSouth equipment, isn’t that the case?

A: [Jackson] Sure.

Tr. at 369-370. Equally important, it is not entirely clear that BellSouth should even be concerned at all with “commingling” its equipment with those of the ILECs. As witness Jackson testified, neither BellSouth nor Intermedia should be concerned about potential damage to, or interference with, their commingled equipment. Tr. at 370. Mr. Milner’s statement on cross-examination that it will allow conversion “in place” in the event there is no space available (even if it is unable to secure its equipment) (Tr. at 209), supports Intermedia’s position that security is not necessarily breached when equipment is commingled. If BellSouth will agree to commingle its equipment with the ALECs’ equipment when there is no space available, why then will it not agree to commingle its equipment with the equipment of the ALECs prior to space exhaust?

D. THE COMMISSION SHOULD REQUIRE BELLSOUTH TO PROVIDE INTERMEDIA WITH ACCESS TO COMBINATIONS OF UNES THAT ARE ALREADY PHYSICALLY COMBINED AND TYPICALLY COMBINED. [ISSUE NOS. 12]

The dispute between BellSouth and Intermedia centers around the meaning of “currently combines” in FCC Rule 315(b). BellSouth argues that its obligation under the rule should be limited to providing combinations that currently exist to serve a particular customer at a particular location. Tr. at 43, 121. Intermedia seeks a more realistic interpretation of the rule, and wants BellSouth to provide UNE combinations that are typically or ordinarily combined by BellSouth. Tr. at 272. In other words, Intermedia interprets the FCC rule to mean that, if the UNE combinations are offered in BellSouth’s tariff (*e.g.*, special access service), BellSouth “currently combines” those UNEs and, accordingly, they must be made available by BellSouth to Intermedia pursuant to the mandates of Rule 315(b). Tr. at 332.

Intermedia’s reading of the rule is consistent with the pro-competitive mandates of the Communications Act. Indeed, the Georgia Public Service Commission (“Georgia Commission”) recently found that “currently combines” means “ordinarily combined”:

Rule 315(b), by its own terms, applies to elements that the incumbent “currently combines,” not merely elements which are “currently combined.” In the FCC’s First Report and Order, the FCC stated that the proper reading of “currently combines” is “ordinarily combined within their network, in the manner which they are typically combined.” First Report and Order, ¶ 296. In its Third Report and Order, the FCC stated that it was declining to address this argument at this time because the matter is currently pending before the Eighth Circuit. Third Report and Order, ¶ 479. Accordingly, the only FCC interpretation of “currently combines” remains the literal one contained in the First Report and Order. The Commission finds that “currently combines” means ordinarily combined within the BellSouth network, in the manner which they are typically combined. Thus, CLECs can order combinations of typically

combined elements, even if the particular elements being ordered are not actually physically connected at the time the order is placed.¹⁶

Aside from the fact that Intermedia's interpretation of the FCC's rule is more consistent with the spirit of the Communications Act, this interpretation avoids the delays and costs associated with first requiring the ALECs to order special access service through BellSouth's tariff, and then having them submit another order to convert those services to UNE combinations. As the Georgia Commission concluded, even assuming, *arguendo*, that "currently combines" means "currently combined," rather than go through the circuitous process of submitting two separate orders, the process should be streamlined to allow ALECs to obtain UNE combinations via one order. *See UNE Combinations Order*, at 23.

E. BELLSOUTH IS OBLIGATED BY LAW TO PROVIDE ACCESS TO EELS, AND TO ALLOW THE CONVERSION OF SPECIAL ACCESS SERVICE TO EELS, AT UNE RATES. [ISSUE NO. 13]

Consistent with Intermedia's position that BellSouth is required to provide access to combinations of UNEs that are already physically combined and those that BellSouth ordinarily combines, BellSouth should be required to provide access to EELs and permit special access services to be converted to EELs at cost-based UNE rates. Tr. at 272-273. BellSouth argues, however, that it does not have any obligation to provide ALECs with the EEL unless the elements that comprise the EEL are already combined. Tr. at 45. Moreover, BellSouth wants to severely restrict Intermedia's ability to convert special access services to EELs. Tr. at 46, 129.

As Intermedia discussed above, the "currently combines" requirement of FCC Rule 315(b) requires that BellSouth provide access to existing UNE combinations as well as UNE

¹⁶ *Generic Proceeding to Establish Long-Term Pricing Policies for Unbundled Network Elements*, Docket No. 10692-U, Order, at 23-24 (Feb. 1, 2000) (*UNE Combinations Order*).

combinations that BellSouth makes available by tariff. These include UNE combinations that make up the EEL. These combinations must be made available to Intermedia at cost-based rates. BellSouth does not appear to contest that it is required to make available currently combined UNEs that make up the EEL. Tr. at 121. It does refuse to provide “new” EEL combinations. Id. However, as Intermedia pointed out, even assuming that BellSouth is not required to provide new UNE combinations (including new EELs), requiring Intermedia to go through the circuitous process of ordering special access circuits and subsequently converting them to UNE combinations or EELs, is simply unnecessary, dilatory, and wasteful. Consequently, BellSouth should be required to provide access to existing UNE combinations that make up the EELs, as well as to UNE combinations that BellSouth ordinarily makes available by tariff, including those UNEs that make up the EELs.

Intermedia acknowledges that, with respect to converting existing special access circuits to EELs or UNE combinations, the FCC requires that the requesting carrier must be providing a significant amount of local exchange service over the combination. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-370, Supplemental Order (Nov. 24, 1999) (*Supplemental Order*). Intermedia does not dispute this requirement. Nor does Intermedia dispute that it is required to “self-certify” to BellSouth that it is in fact providing a significant amount of local exchange service over the facilities. However, Intermedia does take issue with BellSouth’s attempt to impose upon Intermedia additional requirements not contemplated by the FCC. In particular, despite the FCC’s explicit instructions that competing carriers are entitled to convert special access to UNE combinations or EELs so long as they are able to self-certify that the facilities carry a significant

amount of local traffic, BellSouth would appear to engraft an audit requirement onto the FCC's

unambiguous, self-explanatory mandate:

Q: [Canis] Assuming that the FCC is not going to come out with an order clarifying its position on what a significant amount of local traffic is for another six months, if Intermedia today submitted a request to BellSouth and simply said we want to convert a special access circuit to an EEL, we hereby certify that this circuit carries a significant amount of local traffic, would BellSouth process the request or would it refuse?

A: [Varner] That's what I said. If that is all we had, then what we would enter into is a discussion with Intermedia to see if, in fact, it met the criteria or the standards that are in the letter that we provided. If you just said that, then I guess the answer would be that we would refuse.

Q: [Comm. Jaber] You would refuse?

A: [Varner] Yes. If that is all we knew. What would actually happen is we would then contact Intermedia and say, okay, we need to figure out what is here and whether or not it meets the criteria or not.

Tr. at 129.

Thus, it would appear that BellSouth would perform a protracted analysis, akin to an audit which the FCC has explicitly forbidden, before it would convert an existing special access circuit to an EEL. This is bogus. While it is true that the FCC requires that Intermedia must self-certify that it carries a significant amount of local exchange traffic over the EEL facilities, BellSouth may not impose auditing requirements upon Intermedia. Put another way, Intermedia's self-certification should be *prima facie* evidence that Intermedia is providing a significant amount of local exchange service over the UNE combinations. BellSouth's dilatory ploy is precisely the situation addressed by the FCC in its *Supplemental Order*:

We expect that allowing requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled loops and transport network element

will not delay their ability to convert these facilities to unbundled network element pricing, and we will take swift enforcement action if we become aware that any incumbent LEC is *unreasonably delaying the ability of a requesting carrier to make such conversions.*¹⁷

F. THE COMMISSION SHOULD REQUIRE BELL SOUTH TO PROVIDE ACCESS TO PACKET SWITCHING CAPABILITIES, INCLUDING FRAME RELAY ELEMENTS, AT UNE RATES. [ISSUE NOS. 18, 25, AND 39]

The packet switching capability network element has been defined by the FCC, in relevant part, as “the basic packet switching function of routing or forwarding packets, frames, cells or other data units based on address or other routing information contained in the packets, frames, cells or other data units, and the functions that are performed by Digital Subscriber Line Access Multiplexers” or “DSLAMs”. *See Third Report and Order.*¹⁸ *See also* 47 C.F.R. § 51.319(c)(4).

The FCC has explicitly found that an ILEC must provide nondiscriminatory access to unbundled packet switching capability where: (a) the ILEC has deployed digital loop carrier (“DLC”) systems, including integrated digital loop carrier or universal digital loop carrier systems, or has developed any other system in which fiber optic facilities replace copper facilities in the distribution section; (b) there are no spare copper loops capable of supporting xDSL services the requesting carrier seeks to offer; (c) the ILEC has not permitted a requesting carrier to deploy a DSLAM in the remote terminal, pedestal or environmentally controlled vault of other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points; and (d) the ILEC has deployed packet

¹⁷ *Supplemental Order*, at fn. 9 (emphasis added).

¹⁸ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, Third Report and Order and Further Notice of Proposed Rulemaking, at 141, ¶ 304 (rel. Nov. 5, 1999) (*Third Report and Order*).

switching capability for its own use. *See Third Report and Order*, at 145, ¶ 313. *See also* 47

C.F.R. § 51.319(c)(5).

BellSouth refuses to agree to include the definition of packet switching capability in the interconnection agreement. Likewise, it refuses to include in the agreement a discussion of the conditions under which BellSouth must provide access to packet switching capability to Intermedia, as provided under the FCC rules. Evidently, BellSouth believes that it will conform with the requirements of Section 51.319(c) of the FCC rules and, consequently, it need not specify the conditions under which it will provide access to packet switching capabilities. Tr. at 53. While BellSouth's intentions may be commendable, mere intentions alone do not guaranty that BellSouth ultimately will comply with applicable law. Accordingly, BellSouth's refusal to include language concerning its obligation to provide packet switching is unreasonable.

Intermedia seeks only to specify in the clearest possible manner its right to obtain access to packet switching element as mandated by the FCC. In other words, Intermedia's proposed language only conforms the terms of the Parties' agreement to the letter of the law. Tr. at 278. Thus, the Commission should require BellSouth to include in the interconnection agreement a definition of packet switching capability, as well as the conditions under which BellSouth will provide packet switching capability to Intermedia, pursuant to Rule 51.319(c) of the FCC's rules.

Separate and apart from requiring BellSouth to comply with applicable FCC rules, Intermedia also requests that this Commission require BellSouth to provide unbundled access to Frame Relay network elements at cost-based rates. The FCC has expressly found that "section 251(d)(3) provides state commissions with the ability to establish additional unbundling obligations, as long as the obligations comply with subsections 251(d)(3)(B) and (C) of the Communications Act." *Third Report and Order*, at 73, ¶ 153. This applies to Frame Relay

network elements. Id. at 145, ¶ 312. Accordingly, this Commission has the requisite authority to find that packet switching, more specifically Frame Relay, must be unbundled by BellSouth. Tr. at 283.

Specifically, BellSouth should be required to provide unbundled access, at cost-based rates, to the following Frame Relay UNEs: User-to-Network Interface,¹⁹ Network-to-Network Interface,²⁰ and Data Link Control Identifiers at specified Committed Information Rates.²¹ Likewise, consistent with its interconnection obligations under the Communications Act, BellSouth should be required to provide interconnection trunks between its Frame Relay Network and Intermedia's Frame Relay Network, at cost-based rates. As witness Jackson testified, packet switching is becoming more and more essential to competition in the local exchange market. Tr. at 280.

Despite the fact that access to packet switching elements is critical to compete effectively in the telecommunications market, alternatives to packet switching elements outside BellSouth's network in Florida are sorely lacking. Packet switching is an expensive proposition and, consequently, not many ALECs can deploy the kinds of advanced facilities that BellSouth already has in its arsenal. Because cost-effective alternatives to BellSouth's packet switching facilities are not reasonably available, lack of access to these elements materially diminishes Intermedia's ability to provide packet-switched services in Florida. Accordingly, pursuant to Rule 317 of the FCC's regulations, this Commission is empowered to mandate that BellSouth provide packet switching and Frame Relay network elements to Intermedia, at cost-based rates.

¹⁹ A UNI port provides connectivity between the end user and the frame relay network.

²⁰ An NNI port provides carrier-to-carrier connectivity to the frame relay network.

²¹ DLCIs at CIR define the path and capacity of virtual circuits over which frame relay frames travel across the frame relay network.

In the absence of TELRIC rates for these Frame Relay network elements, the Commission should require BellSouth to establish interim rates at 50% of BellSouth's currently effective tariffed rates for UNIs, NNIs, and DLCIs at CIR. These rates may be subject to true-up once the Commission has had the opportunity to conduct a cost proceeding.

G. BELLSOUTH IS REQUIRED BY LAW TO PROVIDE ACCESS TO ALL TYPES OF UNBUNDLED TRANSPORT AT COST-BASED RATES. [ISSUE NO. 22]

In the *Third Report and Order*, the FCC required the ILECs to unbundle high-capacity transmission facilities, including DS1 to DS3 and OC3 to OC96 dedicated transport. The FCC also included dark fiber in the unbundling obligations of Section 251(c)(3). See *Third Report and Order*, at 150, ¶ 323. Intermedia very simply wants BellSouth to provide all types of transport identified by the FCC in the *Third Report and Order*, at TELRIC rates. Tr. at 346. BellSouth appears to agree that it is required to provide the types of transport requested by Intermedia. Tr. at 57.

The dispute, however, concerns the rates that should apply when BellSouth provides these facilities. BellSouth proposes interim rates for high-capacity transmission facilities and dark fiber. Tr. at 58. It is not entirely clear whether these rates are consistent with the pricing standards of the Communications Act. While Intermedia does not vigorously oppose the adoption of interim rates, subject to true up once cost-based permanent rates are established by the Commission, Intermedia is concerned that BellSouth's interim rates may well be too high. Tr. at 346. Accordingly, Intermedia requests that, before the Commission adopts BellSouth's proposed interim rates for high-capacity and dark fiber transport, the Commission should get assurances from BellSouth that the proposed interim rates are consistent with the pricing standards of the Communications Act.

H. INTERMEDIA SHOULD BE ALLOWED TO ASSIGN ITS NUMBERING RESOURCES AND ESTABLISH ITS CALLING AREAS AS IT SEES FIT. [ISSUE NO. 26]

The heart of the controversy is whether Intermedia's ability to assign NPA/NXXs as it sees fit should be subject to BellSouth's control. Intermedia wants to be able to assign its NPA/NXXs freely within its calling areas, and not be forced to mimic BellSouth's own calling areas. Tr. at 285. BellSouth, on the other hand, wants Intermedia to use its NPA/NXXs in a manner that would make it easy for BellSouth to differentiate its own subscribers' calls. Tr. at 60. In other words, BellSouth would restrict Intermedia's use of its NPA/NXXs in order to further its own objectives.

The answer to this dispute is rather clear-cut: there is no law that says a competing carrier cannot assign an NPA/NXX to a subscriber that is physically located outside the area with which BellSouth typically associates the NPA/NXX. BellSouth acknowledges as much:

Q: [Vaccaro] Do you know of any statute, rule, or law, or any other authority that would prohibit an ALEC from assigning NPA-NXXs to ALEC local calling areas that may exceed the boundaries of the ILEC local calling area?

A: [Varner] No, I do not. . . .

Tr. at 148. Despite the fact that nothing *legally* precludes Intermedia from assigning its NPA/NXXs outside BellSouth's calling area, BellSouth stubbornly insists that Intermedia must mimic the manner in which BellSouth assigns its own NPA/NXXs. As Intermedia witness Jackson testified, the flexibility to assign its NPA/NXXs freely is key to Intermedia's ability to compete in the marketplace. Tr. at 470. By taking that flexibility away from Intermedia, BellSouth would create an uneven playing field. Accordingly, Intermedia should be allowed to assign its NPA/NXXs and establish its own calling area as it sees fit.

Allowing Intermedia to assign its NPA/NXXs across multiple rate centers is beneficial for another reason. It is beyond question that the United States is facing a major numbering exhaust problem. A contributing factor to this numbering resource exhaust is the fact that each carrier must be assigned an NPA/NXX in each rate center. Allowing Intermedia to assign its NPA/NXXs across multiple rate centers potentially could help alleviate numbering resource problems in the United States and, more particularly, in Florida.

I. INTERMEDIA SHOULD NOT BE REQUIRED TO ESTABLISH POINTS OF INTERCONNECTION AT EACH AND EVERY BELL SOUTH ACCESS TANDEM IN THE EVENT IT CHOOSES MULTIPLE TANDEM ACCESS. [ISSUE NO. 29]

The issue here is whether, having chosen the Multiple Tandem Access (“MTA”) option offered by BellSouth, Intermedia should be required to establish trunk groups to each and every access tandem where Intermedia has NPA/NXXs homed. Intermedia believes that any such requirement would defeat the purpose of MTA. Tr. at 287.

MTA is an option that would allow Intermedia to send traffic to, and receive traffic from, end users served by end offices which subtend BellSouth’s tandems, by connecting to one tandem or less than all of the tandems. The requirement that Intermedia establish interconnections to each and every tandem, as proposed by BellSouth, is antithetical to the concept of MTA. Accordingly, the Commission should reject BellSouth’s proposal.

J. THERE IS NO NEED TO REQUIRE INTERMEDIA TO DESIGNATE A “HOME” LOCAL TANDEM FOR EACH ASSIGNED NPA/NXX AND TO ESTABLISH POINTS OF INTERCONNECTION TO EACH ACCESS TANDEM WHERE NPA/NXXs ARE HOMED. [ISSUE NO. 30]

The Parties disagree as to whether Intermedia should be required to designate a home local tandem for each of Intermedia’s NPA/NXXs, as well as establish a point of interconnection

("POI") at each and every tandem where its NPA/NXXs are homed. Intermedia believes that such a requirement is inefficient and uneconomical.

In particular, Intermedia wants to be able to interconnect where it is efficient and economical to do so. Tr. at 288. As witness Jackson testified, it is extremely expensive to interconnect at each and every BellSouth tandem. Tr. At 371.

BellSouth's requirement is unnecessary. Perhaps very telling is the fact that the currently effective interconnection agreement between Intermedia and BellSouth does not contain restrictive language requiring Intermedia to designate a local tandem for each NPA/NXXs, as well as to have a POI at each and every tandem. BellSouth attempts to justify its "new" requirements by claiming that they are needed in order to correctly deliver traffic. Tr. at 440. At the hearing, however, witness Jackson testified that Intermedia has been interconnecting with BellSouth since 1996, but has yet to experience any call completion problems notwithstanding the absence of these requirements in the currently effective Intermedia-BellSouth interconnection agreement. Accordingly, the interconnection agreement between BellSouth and Intermedia need not specify that Intermedia should designate a local tandem for each NPA/NXXs, and establish a POI at each and every tandem.

K. THE TERM "INTRALATA TOLL TRAFFIC" SHOULD BE DEFINED MORE PRECISELY. [ISSUE NO. 31]

BellSouth seeks to define "intraLATA toll traffic" in a manner that specifically excludes messaging or data, and only includes voice traffic. However, the law makes no distinction between voice and data for interconnection purposes:

For purposes of determining the interconnection obligations of carriers, the Act does not draw a regulatory distinction between voice and data services.²²

The FCC has, therefore, made clear that intraLATA toll traffic includes both voice and data traffic, and no legal distinction can be made between them. However, that is precisely what BellSouth is seeking to accomplish in its proposed definition.²³ Consequently, Intermedia's proposed definition should be adopted.²⁴

L. BELLSOUTH'S DEFINITION OF "SWITCHED ACCESS TRAFFIC" MUST BE REJECTED BECAUSE, AMONG OTHER THINGS, IP TELEPHONY IS NOT ACCESS TRAFFIC. [ISSUE NO. 32]

BellSouth proposes to define "Switched Access Traffic" as follows:

Switched Access Traffic is as defined in the BellSouth Access Tariff. Additionally, IP Telephony traffic will be considered switched access traffic.

Tr. at 63. Intermedia, on the other hand, proposes the following definition:

Switched Access Traffic is defined as telephone calls requiring local transmission or switching services for the purpose of the origination or termination of Telephone Toll Service. Switched Access Traffic includes the following types of traffic: Feature Group A, Feature Group B, Feature Group D, 800/888 access and 900 access and their successors or similar Switched Exchange Access Services.²⁵

The problem with BellSouth's definition is two-fold. First, switched access traffic is not defined in BellSouth's access tariff. Second, IP telephony is not access.

²² *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, ¶ 47 (rel. Aug. 1998).

²³ BellSouth has proposed the following definition: "IntraLATA Toll Traffic is defined as any telephone call that is not local or switched access per this Agreement."

²⁴ Intermedia proposes that "IntraLATA Toll Traffic" be defined as "all basic intraLATA message service calls other than Local Traffic."

²⁵ Draft Interconnection Agreement, at § 6.8.1.

Intermedia has scoured BellSouth's access tariff to find BellSouth's definition, but to no avail. If the definition of switched access traffic is not included in BellSouth's access tariff, then BellSouth's proposed definition is invalid on its face (because it refers to nothing) and should be summarily rejected. Even assuming, *arguendo*, that BellSouth's access tariff does contain the purported definition (and Intermedia submits that it does not), the Commission should reject BellSouth's definition for the simple reason that adoption of BellSouth's proposed language would put Intermedia at the mercy of BellSouth. Because the proposed definition refers to BellSouth's access tariff, BellSouth could unilaterally change its tariff to "rewrite" its interconnection agreement with Intermedia. This result is inconsistent with the spirit and intent of the Communications Act, which contemplates negotiation of interconnection agreements.

BellSouth's proposed definition is unacceptable for another reason: BellSouth considers IP telephony traffic as switched access. Tr. at 63. This is wrong as a matter of law. The FCC has not classified IP telephony as other than information services. Tr. at 465. BellSouth cites to the FCC's April 10, 1998 Report to Congress (*see Federal State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998)) for the proposition that IP telephony is telecommunications service and not information or enhanced service. As witness Jackson testified, BellSouth misinterprets the decision. While the FCC, in that Report, did state that the record before it "suggests" that certain forms of phone-to-phone IP telephony services lack the characteristics that would render them "information services," it went on to explicitly state that it did not believe that it was "appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings." *Id.* at 11541. Thus, by including IP telephony within the definition of switched

access, BellSouth is putting the cart before the horse and prejudging the FCC's ultimate determination. This it cannot do.

Likewise, BellSouth's assertion that IP telephony has been classified as access in other FCC decisions, is false. Tr. at 142. Indeed, on cross-examination, witness Varner was unable to identify any rule or decision by the FCC which expressly states that IP telephony is a form of access. Tr. at 144. In fact, there is no such rule or decision. Accordingly, the Commission should reject BellSouth's proposed definition of "Switched Access Traffic."

M. INTRALATA DATA PACKETS TRAVERSING A VIRTUAL CIRCUIT ARE LOCAL TRAFFIC AND SUBJECT TO RECIPROCAL COMPENSATION. [ISSUE NO. 37]

The relevant question here is whether Frame Relay traffic originated and terminated within the LATA should be treated as local traffic. Intermedia believes that those data packets constitute local traffic and, hence, should be subject to some form of reciprocal compensation. Tr. at 37. BellSouth, on the other hand, will treat such traffic as local circuit switched traffic for purposes of establishing interconnection only. It will not consider that traffic to be subject to reciprocal compensation. Tr. at 69-70. BellSouth's approach, while admittedly novel, does not pass muster.

BellSouth concedes that Frame Relay traffic can be local and that to the extent it is local, BellSouth is obligated to provide interconnection to ALECs for the exchange of traffic. Tr. at 136. The exchange of local traffic, of course, is subject to reciprocal compensation obligations. This notwithstanding, BellSouth has not established a mechanism for paying reciprocal compensation. Instead, BellSouth has sought to "define away" the problem by treating Frame Relay traffic as local only for purposes of interconnection. BellSouth perceives that it would be difficult to compute the reciprocal compensation payments because there are no minutes of use

as such. Tr. at 138. BellSouth suggests a bill-and-keep-type arrangement, where no reciprocal compensation is exchanged between the parties. Tr. at 139-140.

Intermedia acknowledges that it has not proposed a mechanism to compute the appropriate reciprocal compensation for the exchange of local Frame Relay traffic. Nevertheless, as the record reflects, the Parties appear to agree that Frame Relay traffic is subject to some type of reciprocal compensation. Accordingly, in the absence of an acceptable mechanism, the Commission should require Intermedia and BellSouth to submit either a joint proposal or an individual “best offer” for reciprocal compensation of local Frame Relay traffic.

N. EXTRANEOUS AND AMBIGUOUS LANGUAGE CONCERNING THE PARTIES’ PROVISIONING OF EXCHANGE ACCESS FRAME RELAY SERVICE OR INTERLATA FRAME RELAY SERVICE SHOULD BE DELETED. [ISSUE NO. 45]

The specific issue here is whether the interconnection agreement should state that the agreement does not address or alter either Party’s provision of Exchange Access Frame Relay Service or interLATA Frame Relay Service. Intermedia presented this issue for arbitration for two reasons: The first reason is the uncertain legal effect of the language contained in Attachment 3, Section 7.9.6 of BellSouth’s proposed interconnection agreement. The second reason is the effect of BellSouth’s proposed language on Intermedia’s ability to set its own rates.

The provision at issue states:

Except as expressly provided herein, this Agreement does not address or alter in any way either Party’s provision of Exchange Access Frame Relay Service or interLATA Frame Relay Service. All charges by each Party to the other for carriage of Exchange Access Frame Relay Service or interLATA Frame Relay Service are included in the BellSouth access tariff FCC No. 1.²⁶

²⁶ Interconnection Agreement, Attachment 3, Section 7.9.6.

The purpose of this section of the interconnection agreement (“Frame Relay Service”) is to address the Parties’ relationship with respect to Frame Relay service, including Exchange Access Frame Relay Service, and to a lesser degree, interLATA Frame Relay Service. BellSouth’s proposed language is ineffective and, indeed, counterproductive. BellSouth has been unable to explain to Intermedia the intent or effect of this provision.

Perhaps more importantly, BellSouth’s proposed language will have the effect of limiting the rates Intermedia is able to charge for these services to BellSouth’s rates as set forth in BellSouth’s tariff. Intermedia is a competing local provider, and BellSouth simply may not dictate to Intermedia what it can and cannot charge.

The agreement from which the Parties have been negotiating speaks to exchange access Frame Relay service and interLATA Frame Relay service in several other sections (*e.g.*, §§ 7.1, 7.9.6.). The proposed language cited above adds nothing to the Parties’ understanding. Section 7.9.6, as proposed by BellSouth, should be stricken in its entirety. The remaining sections of the agreement adequately address the services at issue.

Having said this, Intermedia notes that this issue was closed at the mediation session before the Tennessee Regulatory Authority on April 13, 2000. Specifically, the Parties have agreed that Attachment 3, Section 7.9.6 of the proposed interconnection agreement, should be stricken in its entirety. In light of this development, it would appear that the issue has been mooted.

III. CONCLUSION

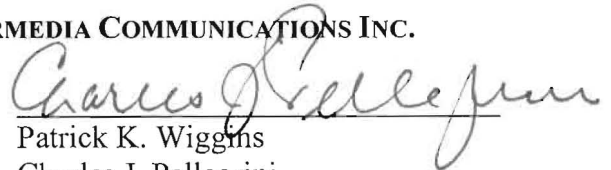
Intermedia and BellSouth have negotiated in good faith to arrive at a mutually acceptable interconnection agreement. Yet, a number of issues remain unresolved. These issues involve

BellSouth's fundamental obligations under the Communications Act. Intermedia requests only that BellSouth abide by its statutorily mandated duties. Because Intermedia's requests are properly and substantially grounded in law and sound public policy, the Commission should rule in favor of Intermedia on each and every open issue in this proceeding.

Respectfully submitted,

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Dated: May 2, 2000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by Hand Delivery(*) or by Federal Express overnight delivery(**) this 2nd day of May, 2000 to the following:

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