

ORIGINAL

RUTLEDGE, ECENIA, PURNELL & HOFFMAN

PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

STEPHEN A. ECENIA
JOHN R. ELLIS
KENNETH A. HOFFMAN
THOMAS W. KONRAD
MICHAEL G. MAIDA

POST OFFICE BOX 551, 32302-0551
215 SOUTH MONROE STREET, SUITE 420
TALLAHASSEE, FLORIDA 32301-1841

J. STEPHEN MENTON
R. DAVID PRESCOTT
HAROLD F. X. PURNELL
GARY R. RUTLEDGE

TELEPHONE (850) 681-6788
TELECOPIER (850) 681-6515

October 5, 2000

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

HAND DELIVERY

RECEIVED-FPSC
00 OCT -5 PM 4:49
RECORDS AND REPORTING

Re: Docket No. 000907-TP

Dear Ms. Bayo:

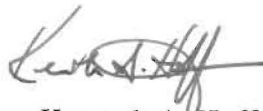
Enclosed herewith for filing in the above-referenced docket on behalf of Level 3 Communications, LLC ("Level 3") are the following documents:

1. Original and fifteen copies of the Prefiled Direct Testimony of William P. Hunt, III;
2. Original and fifteen copies of the Prefiled Direct Testimony of Kevin Paul; and
3. Original and fifteen copies of the Prefiled Direct Testimony and Exhibits TJG-1 through TJG-7 of Timothy J. Gates.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me. Copies of the above-referenced testimony have been provided to Staff counsel and counsel for BellSouth Telecommunications, Inc. in accordance with the attached Certificate of Service.

Thank you for your assistance with this filing.

Sincerely,



Kenneth A. Hoffman

APP _____
 CAF _____
 CMP Dawds
 COM 3trp
 CTR _____
 ECR _____
 LEG 2
 OPC _____
 PAI _____
 RGO _____
 SEC L
 SER _____
 OTH _____

KAH/rl

Enclosures

cc: Parties of Record

Blanca S. Bayo, Director

Page 2

October 5, 2000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by United States Mail to the following this 5th day of October, 2000:

T. Michael Twomey, Esq.
BellSouth Telecommunications, Inc.
675 West Peachtree Street, N.E.
Suite 4300
Atlanta, GA 30375

Michael Goggin, Esq.
c/o Nancy Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, FL 32301

Felicia R. Banks, Esq.
Staff Counsel
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, FL 32399-0850



Kenneth A. Hoffman, Esq.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition of Level 3 Communications,)
LLC for arbitration of certain terms and)
conditions of proposed agreement with)
BellSouth Telecommunications, Inc.)
pursuant to the Telecommunications Act)
of 1934, as amended by the Telecommuni-)
cations Act of 1996.)
_____)

Docket No. 000907-TP

Filed: October 5, 2000

**DIRECT PREFILED TESTIMONY
OF
WILLIAM P. HUNT, III
ON BEHALF OF
LEVEL 3 COMMUNICATIONS, LLC**

Michael R. Romano
Attorney
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, Colorado 80021
(720) 888-7015 (Tel.)
(720) 888-5134 (Fax)
e-mail: mike.romano@level3.com

Kenneth A. Hoffman
Rutledge, Ecenia, Purnell & Hoffman, P.A.
215 South Monroe Street
Suite 420
Tallahassee, FL 32301-1841
(850) 681-6788 (Tel.)
(850) 681-6515 (Fax)

Russell M. Blau
Tamar E. Finn
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, DC 20007
(202) 424-6917 (Tel.)
(202) 424-7645 (Fax)
e-mail: tefinn@swidlaw.com

Its Attorneys

DOCUMENT NUMBER-DATE

12739 OCT-58

FPSC-RECORDS/REPORTING

1 **Q: PLEASE STATE YOUR NAME, TITLE, AND BUSINESS ADDRESS**
2 **FOR THE RECORD.**

3 A: My name is William P. Hunt, III. I am Vice President and Regulatory
4 Counsel for Level 3 Communications, LLC (“Level 3”). My business
5 address is 1025 Eldorado Boulevard, Broomfield, CO, 80021.

6 **Q: PLEASE DESCRIBE YOUR RESPONSIBILITIES FOR LEVEL 3.**

7 A: As Vice President and Regulatory Counsel, I am responsible for developing,
8 implementing and coordinating regulatory policy for Level 3’s North
9 American operations. I am also responsible for ensuring the company’s
10 regulatory compliance with state and federal regulations. In addition, I am
11 a member of Level 3’s Global Regulatory Committee that develops
12 worldwide regulatory policy.

13 **Q: PLEASE SUMMARIZE YOUR EDUCATIONAL BACKGROUND**
14 **AND PROFESSIONAL EXPERIENCE.**

15 A: I received a Bachelor of Journalism from the University of Missouri in 1984.
16 I received my Juris Doctor from Western New England College School of
17 Law in 1991. I joined Level 3 as Regulatory Counsel in February, 1999 and
18 was promoted to Vice President and Regulatory Counsel in January, 2000.
19 Prior to joining Level 3, I spent almost five years at MCI Communications
20 (“MCI”). I joined MCI’s Office of General Counsel in 1994 as a commercial
21 litigator. In March of 1996, I joined MCI’s state regulatory group in Denver,
22 Colorado, where I was responsible for securing state certifications in the
23 western United States, supporting arbitrations under the Communications Act
24 of 1934, as amended (“Act”), and prosecuting complaints against U S West
25 Communications, Inc. (“U S West”) in Washington and Minnesota.

1 **Q: HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE FLORIDA**
2 **PUBLIC SERVICE COMMISSION?**

3 A: No. I have testified before the South Dakota Public Utilities Commission
4 during MCI's state certification proceeding and before the California Public
5 Utilities Commission, the Illinois Commerce Commission, the Michigan
6 Public Service Commission, and the Texas Public Utilities Commission,
7 during Level 3 arbitration proceedings. At the date of filing this testimony,
8 I am scheduled to testify before the North Carolina Utility Commission
9 during an arbitration there.

10 **Q: PLEASE DESCRIBE THE OPERATIONS OF LEVEL 3.**

11 A: Level 3 Communications, Inc., through its subsidiaries, including Level 3, is
12 a global next-generation service provider with a state-of-the-art Internet
13 Protocol based network capable of delivering a full range of services,
14 including data, voice, video, fax and multi-media. Level 3's network
15 employs a "softswitch" technology. A softswitch is a software system
16 running on commercially available servers that provides Level 3 with the
17 ability to offer voice services over the same Internet Protocol network that
18 carries broadband data services. Level 3's system has non-proprietary
19 interfaces intended to encourage the development of innovative new services
20 and applications by software and hardware developers, Level 3's bandwidth
21 customers, and other service providers. Level 3's initial service offerings
22 have been focused on enhanced service providers, web-centric companies,
23 and, on a carrier's carrier basis, competitive local exchange carriers, fax
24 service providers, and long distance carriers.

25 **Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

1 A: The purpose of my testimony is to explain Level 3's position on Issue 8, how
2 the Agreement should define switched access traffic, and the legal basis for
3 Level 3's position on Issue 1, establishing Interconnection Points.

4 **Q: PLEASE SUMMARIZE THE DISPUTE WITH RESPECT TO ISSUE**
5 **8.**

6 A: The dispute centers on BellSouth's attempts to pull an unregulated form of
7 traffic into its access revenue stream. Level 3 has proposed that switched
8 access traffic be described as it is in the Act and in Federal Communications
9 Commission ("FCC") rules and orders. BellSouth, on the other hand, wants
10 its tariff to govern. Further, BellSouth has proposed an additional sentence
11 stating that all interexchange telecommunications are switched access traffic,
12 regardless of the protocol method used to transport the traffic.

13 **Q: HAS THE COMMISSION ADDRESSED THIS ISSUE BEFORE?**

14 A: Yes, in the Intermedia arbitration, the Commission adopted the definition of
15 switched access service proposed by BellSouth, which was similar to the
16 definition BellSouth proposes in this arbitration.

17 **Q: WHAT WAS THE COMMISSION'S BASIS FOR ADOPTING**
18 **BELLSOUTH'S DEFINITION?**

19 A: Based on my reading of the Commission's order, it determined that there was
20 no real dispute between Intermedia and BellSouth regarding the reference to
21 BellSouth's tariff. With respect to inclusion of Internet Protocol telephony
22 in the definition, the Commission appears to have relied on two factors.
23 First, it relied on BellSouth's definitions of Internet Protocol and Internet
24 Protocol telephony that were not contradicted by Intermedia. Second, it

1 accepted BellSouth's argument that the proposal was consistent with federal
2 law because Intermedia failed to rebut that argument.

3 **Q: DO YOU AGREE WITH THE COMMISSION'S DETERMINATION?**

4 A: I believe the Commission's determination was based on an inadequate record.
5 I believe it is inappropriate to rely on BellSouth's tariff to define switched
6 access traffic and inappropriate to classify Internet Protocol telephony as
7 switched access traffic. Furthermore, I will show that the Internet Protocol
8 telephony classification BellSouth proposes in this docket is inconsistent with
9 the Act, FCC rules, and federal policy. I also explain why the Commission's
10 determination in the Intermedia case was premature and could have a
11 negative impact on competition in Florida.

12 **DEFINING SWITCHED ACCESS TRAFFIC BY REFERENCE TO A**
13 **TARIFF**

14 **Q: HOW DOES FEDERAL LAW DEFINE "SWITCHED ACCESS**
15 **TRAFFIC?"**

16 A: Although section 3(16) of the Act defines "exchange access," which includes
17 both switched and special access, it does not define "switched access" or
18 "switched access traffic." That is why Level 3 used the word "described"
19 instead of "defined" in its proposed definition.

20 **Q: HOW DOES BELLSOUTH'S TARIFF DEFINE "SWITCHED**
21 **ACCESS TRAFFIC"?**

22 A: Based on my review of BellSouth's Florida Access Services Tariff, I do not
23 believe that the tariff contains either a clear definition or description of
24 "Switched Access Traffic." The tariff definitions section (E2.6) does not
25 contain a specific definition for "Switched Access Traffic." I understand that

1 Section E6 of the tariff includes terms, conditions, and rates for BellSouth's
2 SWA service (which I presume means switched access service) and the
3 Commission has pointed to Section E6.1 as "defining" BellSouth's SWA.¹
4 Notably, the tariff provision cited by the Commission makes no reference to
5 Commission or FCC rules.

6 **Q: APART FROM THE FACT THAT THE PHRASE "SWITCHED**
7 **ACCESS TRAFFIC" DOES NOT APPEAR IN BELLSOUTH'S**
8 **TARIFF, DO YOU OBJECT GENERALLY TO RELYING ON**
9 **BELLSOUTH'S TARIFF TO DEFINE A SERVICE SUBJECT TO**
10 **THE PARTIES' AGREEMENT?**

1

Section E6.1 of BST's Access Services Tariff provides the following definition of BST's switched access service (SWA). BellSouth SWA service, which is available to interexchange carriers (IXC) for their services to end users, provides a two-point electrical communications path between an IXC terminal location and an end user's premises. It provides for the use of common terminating, switching and trunking facilities, and both common subscriber plant and unshared subscriber plant of the Company. BellSouth SWA service provides for the ability to originate calls from an end-user's premises to an IXC's terminal location, and to terminate calls from an IXC's terminal location to an end-user's premises in the LATA where it is provided. BST's SWA service is provided in nine service categories, four service categories of standard and optional features called BellSouth SWA FGs, BellSouth SWA Service, BellSouth SWA 8XX Toll Free Dialing Ten digit Screening Service, BellSouth SWA 900 Service and two unbundled basic service arrangements. (Each service arrangement is describe more completely in the tariff.)

In re: Petition of BellSouth Telecommunications, Inc. for Section 252(b) arbitration of interconnection agreement with Intermedia Communications, Inc., Docket No. 991854-TP, Final Order on Arbitration, Order No. PSC-00-1519-FOF-TP, 52, n.1 (Aug. 22, 2000) ("Intermedia Order").

1 A: Yes, I do. Level 3 and BellSouth have invested time and money to negotiate,
2 and now arbitrate, our Agreement. The Agreement should contain all of the
3 rules, rates and procedures that govern the Parties' relationship as co-carriers.
4 Level 3 should be able to rely on the Agreement to address operational issues
5 that may arise as we implement the Agreement and interconnect our
6 networks. We have tried to ensure that this Agreement defines our
7 substantive rights and trumps any referenced document in the event of a
8 conflict. (For example, see Section 26 of the General Terms and Conditions
9 which provides that the Agreement controls in the event of a conflict with a
10 BellSouth "Guide.")

11 Permitting BellSouth to define a category of traffic exchanged under
12 the Agreement by reference to its tariff conflicts with making the Agreement
13 the document that controls our relationship with BellSouth. BellSouth can
14 change its tariff at any time and for any reason, thus changing our Agreement
15 if the tariff is relied upon to describe Switched Access Traffic.

16 **Q: DON'T THE COMMISSION AND LEVEL 3 HAVE THE**
17 **OPPORTUNITY TO REVIEW AND CONTEST ANY TARIFF**
18 **CHANGES BELLSOUTH SUBMITS?**

19 A: Although I am not familiar with this Commission's tariff protest rules, I
20 assume there is some opportunity for Commission staff and third Parties to
21 object to BellSouth's proposals. But Level 3 has chosen to expend time and
22 effort to negotiate an Agreement. Once we finalize the Agreement, Level 3
23 prefers to rely on the commercial certainty of contract and not current or
24 subsequent BellSouth tariff filings. By this reasoning, one might wonder
25 why parties even negotiate a contract; presumably all of the relations could

1 be governed by tariff instead, but Congress has chosen to use an
2 interconnection agreement structure to govern the parties' relationship.

3 **Q: HAVE THE PARTIES RELIED ON DEFINITIONS IN THE ACT AND**
4 **FCC RULES FOR OTHER TERMS?**

5 A: Yes we have. The definitions of "information service,"
6 "telecommunications," and "telecommunications service" are taken from the
7 Act (47 U.S.C. §153(20), (43) & (46)), and the definition of "network
8 element" is almost identical to the definition in FCC rules (47 C.F.R. § 51.5).

9 **Q: WHY IS IT APPROPRIATE TO RELY ON DEFINITIONS IN THE**
10 **ACT AND FCC RULES?**

11 A: The Act is the fundamental premise underlying the entire Agreement. It
12 defines both Parties' obligations to exchange traffic with one another and
13 BellSouth's obligations as an ILEC to provide Level 3 unbundled access to
14 its network. FCC rules provide the guidance necessary to implement these
15 concepts. It is therefore appropriate to rely on the Act and FCC rules to
16 define Switched Access Traffic that the Parties exchange pursuant to the
17 Agreement.

18 **Q: WHAT DOES BELLSOUTH PROPOSE WITH RESPECT TO USING**
19 **THE FCC DEFINITION?**

20 A: BellSouth insists that because the FCC oversees approval of the BellSouth
21 interstate access tariff, it is appropriate to refer to and depend upon
22 BellSouth's tariff. As BellSouth witness Cox testified in North Carolina:

23 As stated above, "switched access traffic" is defined
24 by the FCC. BellSouth could not unilaterally modify
25 the definition of "switched access traffic" in its tariffs.
26 Such a modification would only result from action by
27 the FCC . . . The Access Tariff is the document that

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

defines and governs such traffic, and the FCC governs that tariff.²

Q: DO YOU AGREE WITH BELLSOUTH?

A: No. The FCC rules and orders represent the primary source of how switched access should be defined or described, and the Parties should rely on this primary source rather than face the possibility of disputes over whether BellSouth's tariff, a secondary source, reflects the FCC's rulings.

Q: DO YOU HAVE REASON TO DOUBT THAT BELLSOUTH'S DESCRIPTION OF SWITCHED ACCESS SERVICE REFLECTS FCC RULES?

A: Yes. As I discuss in more detail later, BellSouth makes the broad, sweeping claim that "Internet Protocol Telephony is a telecommunications service that is provided using Internet Protocol for one or more segments of the call." BellSouth Response at ¶31. BellSouth ignores the fact that the FCC, in the Report to Congress cited in part at paragraph 31 of BellSouth's Response, deferred making any determination about whether phone-to-phone Internet Protocol telephony is a telecommunications service. BellSouth's broad, sweeping claim also ignores the fact that the FCC has not acted on a U S West petition asking the FCC to make such a determination even though that petition has been pending since April 5, 1999. BellSouth Response at ¶30. I am thus skeptical that Level 3 will agree that BellSouth's tariff reflects the FCC's definition of switched access traffic. If, as BellSouth implies, the

²*Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act*, BellSouth Telecommunications, Inc., Direct Testimony of Cynthia K. Cox Before the North Carolina Utilities Commission, Docket no. P-779, Sub 4, p 39:9-15 (Aug. 29,2000).

1 FCC had resolved this issue, there would be no need for BellSouth to include
2 clarifying language in the Agreement.

3 **CLASSIFICATION OF INTERNET PROTOCOL TELEPHONY**

4 **Q: HOW HAS BELLSOUTH PROPOSED TO CLASSIFY INTERNET**
5 **PROTOCOL TELEPHONY?**

6 A: In the Intermedia arbitration, BellSouth proposed the following:
7 “Additionally, IP Telephony traffic will be considered switched access
8 traffic.”³ BellSouth has revised the sentence and now proposes:
9 “Additionally, any public Switched Telephone Network interexchange
10 telecommunications traffic, regardless of transport protocol method, where
11 the physical location of the calling Party and the physical location of the
12 called Party are in different LATAs or are in the same LATA and the Parties’
13 Switched Access services are used for the origination or termination of the
14 call, shall be considered Switched Access Traffic.” Although the sentence
15 is longer and does not include the word “Internet” (which I presume is what
16 the “T” in the “IP” stood for in the first proposal), and the definition is
17 circular, BellSouth’s intent is clear. BellSouth wants to impose access
18 charges on all communications, both voice and data, that are transported via
19 Internet Protocol regardless of whether such communications are classified
20 as telecommunications or information services.

21 **Q: WHAT DO YOU THINK IS WRONG WITH BELLSOUTH’S NEW**
22 **SENTENCE?**

23 A: The fundamental problem is that BellSouth is mixing telecommunications
24 and information services, both of which are defined in the Act and in our

³ *Intermedia Order* at 52.

1 Agreement. The FCC has determined that the categories of
2 “telecommunications service” and “information service” are *mutually*
3 *exclusive*.⁴ In other words, a particular service can be an information service
4 or a telecommunication service, but it cannot be both. Although providers
5 of information services may offer their service by using telecommunications
6 services, they provide a separate and distinct information service that is not
7 regulated by the FCC. For instance, ISPs buy local telephone lines from
8 carriers, and may also purchase private line transport services from carriers,
9 and combine these carrier-provided telecommunications services with the
10 ISP’s equipment to provide Internet access service to the ISP’s end users. In
11 short, although the ISP uses telecommunications services as an input, the
12 services it offers to others are information services because they include, for
13 instance, the capability for generating, acquiring, storing, transforming,
14 processing, and/or retrieving information.

15 The Act defines “telecommunications service” as the “offering of
16 telecommunications for a fee directly to the public or to such classes of users
17 as to be effectively available directly to the public regardless of the facilities
18 used.” 47 U.S.C. §153(46). The term “telecommunications” is defined as
19 “transmission, between or among points specified by the user, of information
20 of the user’s choosing, without change in the form or content of the
21 information as sent and received.” 47 U.S.C. §153(43). The definitions of
22 “telecommunications” and “telecommunications service” can be contrasted
23 with “information service,” which is defined as the “offering of a capability

⁴ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, FCC 98-67, ¶39 (rel. April 10, 1998) (“*Report to Congress*”).

1 for generating, acquiring, storing, transforming, processing, retrieving,
2 utilizing or making available information via telecommunications, and
3 includes electronic publishing, but does not include any use of any such
4 capability for the management, control, or operation of a telecommunications
5 system or the management of a telecommunications service.” 47 U.S.C.
6 §153(20). By referring to telecommunications services “regardless of
7 transport protocol method,” BellSouth is trying to redefine a term defined by
8 the Act and incorporated in our Agreement. It is also ignoring the FCC’s
9 enhanced service framework.

10 **Q: PLEASE EXPLAIN THE FCC’S ENHANCED SERVICE**
11 **FRAMEWORK.**

12 **A:** The FCC established the distinction between “basic services” and “enhanced
13 services” in the *Second Computer Inquiry*, 77 F.C.C.2d 384 (1980)
14 (“*Computer II*”). There, the FCC defined “basic services” as “the common
15 carrier offering of transmission capacity for the movement of information.”⁵
16 In general, a basic service transmits information generated by a customer
17 from one point to another, without changing the content of the transmission.
18 Thus, the “basic” service category is intended to define the transparent
19 transmission capacity that makes up conventional communications service.
20 Because the FCC considers “basic” services to be “wholly traditional
21 common carrier activities,” they are regulated under Title II of the Act.⁶
22 Among other things, Title II requires that basic interstate and international
23 services be offered by tariff at fully disclosed rates.

⁵ *Computer II* at ¶420.

⁶ *Id.* at ¶435.

1 By contrast, the FCC defined unregulated “enhanced services” as:
2
3

4 services, offered over common carrier transmission facilities
5 used in interstate communications, which [1] employ
6 computer processing applications that act on the format,
7 content, code, protocol or similar aspects of the subscriber’s
8 transmitted information; [2] provide the subscriber additional,
9 different or restructured information; or [3] involve subscriber
10 interaction with stored information.⁷
11

12 Clause one of this definition is often referred to as the protocol
13 processing test. To determine whether a service meets the enhanced services
14 definition, the FCC has traditionally acted on a *case-by-case basis*, applying
15 each clause of the definition against the specific functionalities of the service
16 in question. The service is generally deemed “enhanced” if it meets the
17 language of one of the three clauses, as interpreted by the FCC. After the
18 1996 Act was passed, the FCC determined that protocol processing services
19 that qualified as enhanced should be treated as information services under the
20 Act.⁸

21 In *Computer II*, the FCC concluded that regulation of enhanced
22 services is unwarranted because the market for those services is competitive
23 and consumers benefit from that competition.⁹ The FCC reached this
24 conclusion notwithstanding the close relationship between communications
25 and some services it classified as enhanced:

⁷ 47 C.F.R. §64.702(a).

⁸ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955-58, &&104-107 (1996) (“*Non-Accounting Safeguards Order*”).

⁹ *Computer II* at ¶433.

1 We acknowledge, of course, the existence of a communications component.
2

3 And we recognize that *some enhanced services may*
4 *do some of the same things that regulated*
5 *communications services did in the past.* On the
6 other side, however, is the substantial data
7 processing component in all these services.¹⁰
8

9 **Q: PLEASE EXPLAIN HOW BELL SOUTH'S PROPOSAL VIOLATES**
10 **THIS FRAMEWORK.**

11 A: By adding the phrase "regardless of transport protocol method," BellSouth
12 violates the protocol processing prong of the FCC's enhanced services test.
13 Although a service may qualify as an information service under the Act
14 because the provider transforms a communication from circuit-switched
15 transport to Internet Protocol transport (or vice versa), it will not qualify as
16 an information service under proposed Section 5.8 of BellSouth's
17 interconnection agreement.

18 It is crucial to consider the wider industry environment in which the
19 Parties operate and which the Act administers. The inter-networked,
20 multi-carrier environment that characterizes the telecommunications industry
21 requires that all Parties operate according to certain basic, common legal,
22 technical and operational precepts. The distinct concepts of
23 "telecommunications services" and "information services," and the regulatory
24 and commercial consequences flowing therefrom, are two such precepts.
25 BellSouth's proposal contradicts definitions in the Act, negotiated language
26 in the Agreement, and the FCC's enhanced services test. The Commission
27 should reject it.

¹⁰ *Id.* at ¶435 (emphasis added).

1 **Q: HAS THE FCC REVIEWED LANGUAGE SIMILAR TO THAT**
2 **PROPOSED BY BELLSOUTH?**

3 **A:** Yes, and they rejected it. In an attempt to reduce the reporting requirements
4 placed on interstate common carriers, the FCC consolidated a number of
5 worksheets carriers complete to support various federal programs. When the
6 FCC proposed the consolidated worksheet, it included language that would
7 have required carriers to report revenue from “calls handled using internet
8 technology as well as calls handled using more traditional switched circuit
9 techniques.”¹¹ The FCC removed this language when it adopted the final
10 consolidated worksheet:

11 As noted by certain commenters, this Commission in its *April*
12 *10, 1998 Report to Congress* considered the question of
13 contributions to universal service support mechanisms based
14 on revenues from Internet and Internet Protocol (IP)
15 telephony services. We note that the Commission, in the
16 Report to Congress, specifically decided to defer making
17 pronouncements about the regulatory status of various forms
18 of IP telephony until the Commission develops a more
19 complete record on individual service offerings. We,
20 accordingly, delete language from the instructions that might
21 appear to affect the Commission’s existing treatment of
22 Internet and IP telephony.¹²

23

¹¹ *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Notice of Proposed Rulemaking and Notice of Inquiry, 13 FCC Rcd 19295 (1998).

¹² *1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, CC Docket No. 98-171, Report and Order, ¶22 (rel. July 14, 1999) (footnotes omitted).

1 BellSouth's proposed definition ignores the cautious approach
2 adopted by the FCC, and instead takes a simplistic and overly broad
3 one-size-fits-all approach to this complicated question.

4 **Q: HOW DID THE FCC DEFINE INTERNET PROTOCOL**
5 **TELEPHONY IN THE APRIL 1998 REPORT TO CONGRESS?**

6 A: The April 1998 Report to Congress did not include a definition of Internet
7 Protocol telephony. The FCC briefly reviewed one service, described as
8 "phone-to-phone" Internet Protocol telephony, but it deferred making any
9 definitive classification of this service until a better record could be
10 established.¹³

11 **Q: IN THE INTERMEDIA ARBITRATION, BELL SOUTH DEFINED**
12 **PHONE-TO-PHONE INTERNET PROTOCOL TELEPHONY AS A**
13 **TELECOMMUNICATIONS SERVICE THAT IS PROVIDED USING**
14 **INTERNET PROTOCOL FOR ONE OR MORE SEGMENTS OF THE**
15 **CALL.¹⁴ DO YOU AGREE WITH THIS DEFINITION?**

16 A: No. As an initial matter, I note that BellSouth's proposed contract language
17 is not limited to applying switched access charges to phone-to-phone Internet
18 Protocol telephony. As I explained earlier, BellSouth's contract language is
19 much broader and contradicts the FCC's enhanced services rules.

20 But even if BellSouth revised its proposed contract language, defining
21 switched access traffic to include Internet Protocol telephony, or even
22 phone-to-phone Internet Protocol telephony, would not solve the problem.

¹³ *Report to Congress* ¶¶88-89.

¹⁴ *Intermedia Order* at 53.

1 The phrase “Internet Protocol telephony” can mean different things to
2 different people and could encompass a wide variety of services. For
3 instance, it could be phone-to-phone, computer-to-phone, phone-to-computer,
4 or computer-to-computer. In some cases it could be delivered to a World
5 Wide Web address, in others, to a North American Numbering Plan number,
6 in others to an Internet Protocol address not on the World Wide Web.
7 Internet Protocol telephony could include other bells and whistles such as
8 storage and retrieval of data or conversion of English to French. As I stated
9 earlier, the FCC evaluates whether services are information or
10 telecommunications on a case-by-case basis and applies a three-part test. If
11 the service meets any one of the three prongs, it qualifies as enhanced. In the
12 *Report to Congress*, the FCC crafted a loose definition of phone-to-phone
13 Internet Protocol telephony, but refused to classify that service as
14 telecommunications absent further information about how such services are
15 provided. The Colorado Commission, after evaluating Qwest’s and ICG’s
16 arguments about phone-to-phone Internet Protocol telephony, refused to
17 classify the service as information or telecommunications, but prohibited
18 Qwest from assessing access charges on the service because it found that the
19 service did not use Qwest’s routing, switching, and transmission path
20 services that make up switched access.¹⁵

¹⁵ *In the Matter of Petition by ICG Telecom Group, Inc., for Arbitration of an Interconnection Agreement with U S West Communications, Inc., Pursuant to § 252(B) of the Telecommunications Act of 1996*, Docket No. 00B-103T, Initial Commission Decision, Decision No. C00-858, 8 (Col. PUC, Aug. 7, 2000). (“We reject Qwest’s proposal to subject phone voice interexchange traffic transmitted over a carrier’s packet switched network to switched access charges.”)

1 **Q: DO YOU AGREE WITH BELL SOUTH'S DISTINCTION BETWEEN**
2 **THE WORLD WIDE WEB AND NETWORKS THAT CARRY**
3 **INTERNET PROTOCOL TELEPHONY?¹⁶**

4 A: No. Although BellSouth tries to draw a black and white distinction between
5 private networks that carry Internet Protocol telephony and the World Wide
6 Web, I do not believe it is possible to make such a distinction. There is a
7 reason that people often draw a cloud to represent the Internet. The Internet
8 is a loosely organized group of private networks that connect and exchange
9 information at public access points. Because Level 3 is connected to these
10 public access points, it is possible that providers of Internet Protocol
11 telephony will handle communications that begin, traverse, or end on the
12 “public” Internet. Even if it were possible to make a black and white
13 distinction between the public internet and private networks, as the Colorado
14 Commission found, imposition of switched access charges will not be
15 justified where Internet Protocol telephony does not use BellSouth’s network
16 in the same manner as other long distance carriers.

17 **Q: IS THIS ARBITRATION AN APPROPRIATE FORUM TO ADDRESS**
18 **THE QUESTION OF WHETHER INTERNET PROTOCOL**
19 **TELEPHONY SHOULD BE SUBJECT TO ACCESS CHARGES OR**
20 **OTHER FORMS OF TRADITIONAL TELECOMMUNICATIONS**
21 **REGULATION?**

22 A: No. As an initial matter, the questions of how (if at all) Internet Protocol
23 telephony should be regulated, and whether it should be subject to access

¹⁶See *Intermedia Order* at ¶53.

1 charges, are before the FCC.¹⁷ Level 3 recommends that this Commission
2 defer consideration of this issue until the FCC takes action. It would be an
3 administrative nightmare for all Parties involved if the two regulatory bodies
4 were to adopt inconsistent rulings. For instance, this Commission's
5 Intermedia arbitration ruling conflicts with a ruling in the
6 Intermedia/BellSouth North Carolina arbitration, where the arbitrator
7 declined to adopt BellSouth's proposed definition of switched access traffic,
8 including the reference to Internet Protocol telephony.¹⁸ The Commission's
9 Intermedia ruling also conflicts with a Colorado Public Utilities Commission
10 order. Thus, all other things being equal, Level 3 and other providers of
11 Internet Protocol Telephony would be more likely to deploy these services
12 in states such as Colorado and North Carolina rather than Florida.

13 Second, this arbitration is not the appropriate place to determine
14 whether Internet Protocol telephony is subject to access charges because any
15 ruling will bind only BellSouth and Level 3. This could put Level 3 at a
16 competitive disadvantage *vis-a-vis* other LECs operating in Florida that do
17 not have such a classification included in their interconnection agreements.
18

¹⁷ On April 5, 1999, U S West submitted a petition for declaratory ruling asking the FCC to determine that certain types of phone-to-phone Internet Protocol telephony are subject to access charges. The FCC has taken no action on U S West's petition.

¹⁸ *Petition of BellSouth Telecommunications, Inc. for Arbitration of Interconnection Agreement with Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. P-55, Sub 1178, Recommended Arbitration Order, 23-25 (N.C. Util. Com'n, June 13, 2000).

1 Third, if the Commission were to subject Internet Protocol telephony
2 to switched access charges, it would do so without the benefit of a record that
3 could be established in a generic proceeding open to all LECs, interexchange
4 carriers, and Internet Protocol telephony providers. The Commission should
5 not permit BellSouth to establish such precedent in an arbitration against a
6 single carrier on an issue this far-reaching.

7 Finally, it is dangerous to address only one piece of the puzzle. If the
8 Commission were to rule in BellSouth's favor, it would have to find that
9 Internet Protocol telephony is a telecommunications service for purposes of
10 access charges. The classification of Internet-based services raises many
11 complicated and overlapping issues, with implications far beyond access
12 charges. As noted above, what might be considered subject to access charges
13 under BellSouth's definition could in fact come in many different flavors.
14 Yet this proceeding does not permit the Commission to consider the host of
15 other regulatory requirements that would be imposed on Internet Protocol
16 telephony service providers based on a telecommunications classification.
17 If the Commission, contrary to our recommendation, decides to address this
18 issue prior to an FCC determination, the Commission must at least examine
19 all relevant issues in a proceeding open to all affected Parties before
20 determining that Internet Protocol telephony is a telecommunications service
21 subject to access charges.

22 **Q. HAS THE FCC ISSUED ANY POLICY STATEMENTS ABOUT THE**
23 **TREATMENT OF INTERNET PROTOCOL TELEPHONY?**

1 A. Yes. In a speech delivered on September 12, 2000 regarding Internet
2 Telephony, FCC Chairman Kennard urged regulators to decline to impose
3 existing regulatory schemes on new technologies:

4 [D]uring this transition, the answer is not to saddle
5 nascent technology with the increasingly obsolete
6 legacy regulations of the past. . . . Their
7 architectures fundamentally differ, and so should
8 their rules. In short, one-size regulation does not fit
9 all. . . . It just doesn't make sense to apply
10 hundred-year old regulations meant for copper wires
11 and giant switching stations to their IP networks of
12 today. . . . And I oppose any plan to levy any new
13 fees or taxes on IP telephony.¹⁹
14

15 Chairman Kennard's statements not only support the conclusion that
16 the FCC has *not* found Internet Telephony to be the same as switched access,
17 but they also indicate that the FCC sees good reason to *reject* labeling this
18 technological development by reference to older categories of service. As the
19 FCC stated, information services may do some of the things regular
20 communications services did in the past. However, a "duck is a duck"
21 comparison doesn't automatically classify new services as
22 telecommunications subject to regulation.

23 **Q: WHY IS THIS APPROACH GOOD POLICY?**

24 **A: Contrary to BellSouth's claim that Internet Protocol telephony is an**
25 **established long distance service, Internet Protocol telephony is in its**
26 **infancy, and regulators may stunt its growth and stifle innovation by**
27 **imposing burdensome regulatory obligations on such services at this**
28 **time. As Chairman Kennard indicated, regulations designed for**

¹⁹ See www.fcc.gov/Speeches/Kennard/2000/spwek019.html.

1 **circuit-switched networks make little sense in an environment where**
2 **packet switching, Internet Protocol transmission protocols, optical**
3 **switching, and decreasing transport costs permit more efficient**
4 **networks.**

5 The nature of Internet Protocol could make enforcement of traditional
6 regulatory classifications next to impossible. While BellSouth narrowly
7 argues that there is no service distinction involved between Internet Protocol
8 and circuit-switched networks, as Commissioner Kennard's comments make
9 clear, Internet Protocol technology blurs traditional distinctions between local
10 and long distance service and between voice, fax, data, and video services,
11 thereby making "one-size regulation" a difficult proposition. The
12 fundamental design of Internet Protocol networks converts all forms of
13 information into indistinguishable packets of digital bits. Packets are routed
14 through networks based on a non-geographical, non-hierarchical addressing
15 scheme that allows packets to follow several possible routes between network
16 nodes. At any given node, it is impossible to determine the geographic origin
17 of an incoming packet, or its destination. Additionally, Internet Protocol
18 technology allows users to designate multiple "ports" on their terminals so
19 that multiple applications may simultaneously send and receive information.
20 This means that in the streams of packets flowing to a particular terminal,
21 some may be carrying digitized voice messages, others may be carrying a
22 computer program being downloaded from a remote server, and others may
23 be carrying video entertainment. To impose access charges on one Internet
24 Protocol application and not another would raise privacy concerns, since a

1 provider would have to determine the nature of the packet. Moreover, such
2 monitoring would be expensive if it could be done at all.

3 Applying regulations designed for circuit-switched communications
4 could also distort pricing incentives for Internet Protocol-based services.
5 Today's access charges are assessed on a per-minute basis. Assessment of
6 a per-minute charge on a provider of Internet-based service will inevitably
7 lead to that provider passing on its costs in the form of per-minute charges to
8 end users. The relative higher usage of the Internet in the United States has
9 been attributed to the prevalence of flat-rate local telephone service pricing.
10 Flat-rate pricing for Internet access is a by-product of the exemption from
11 per-minute access charges for providers of enhanced services. Assessment
12 of per-minute access charges on Internet Protocol telephony providers would
13 result in a per-minute pricing structure and a hampering of demand for this
14 information service.

15 BellSouth's description of switched access traffic by reference to its
16 tariff, and its broad statement that such traffic includes interexchange
17 telecommunications regardless of transport protocol, provides BellSouth
18 unfettered discretion to determine when its access charges will apply. The
19 Commission should not grant BellSouth such dominion over Level 3 as well
20 as the emerging marketplace for Voice over Internet Protocol services.
21 BellSouth's proposal is vague and contradicts FCC policy and precedent.
22 The Commission should reject BellSouth's proposal and adopt Level 3's.

23 **Q: WHAT ACTION DO YOU RECOMMEND?**

24 **A:** The Commission should adopt Level 3's proposed contract language. In
25 addition, the Commission should direct the Parties to include an affirmative

1 statement in the contract that Internet Protocol telephony is not included in
2 the definition of switched access. Level 3 recommends that the Commission
3 adopt the following contract language for Section 5.8.1 of Attachment 3:

4 **Switched Access Traffic.** Exchange Access and Switched
5 Access traffic are described as in the Act and/or relevant and
6 applicable FCC and Commission rules and orders. In this
7 arbitration, the Commission declines to require a definition of
8 Switched Access Traffic that includes Internet Protocol
9 Telephony.
10

11 **POINTS OF INTERCONNECTION**

12 **Q: WHAT IS THE LEGAL BASIS FOR LEVEL 3'S POSITION ON**
13 **ISSUE 1?**

14 **A:** The Act and the FCC recognize that new entrants, such as Level 3, must be
15 able to determine the most efficient location for their switches. The Act
16 grants ALECs, not BellSouth, the right to select the Interconnection Point
17 ("IP"). Under 47 U.S.C. § 251(c)(2)(B), BellSouth must provide
18 interconnection at *any* technically feasible point within its network selected
19 by Level 3. BellSouth's ability to mandate interconnection at any point
20 unilaterally selected by BellSouth may require Level 3 to mirror BellSouth's
21 legacy network architecture, which may not be the most efficient
22 forward-looking architecture for an entrant deploying a new network, and
23 therefore constitutes a barrier to entry. Since Level 3 shares the cost of
24 interconnecting facilities -- by providing facilities up to the IP that both
25 deliver Level 3 traffic to BellSouth and deliver traffic to Level 3 customers
26 -- Level 3 will avoid burdening either itself or BellSouth with undue expense
27 by choosing an economically sound IP. However, economic considerations
28 do not limit Level 3's ability to select its IP. As the FCC argued in an amicus

1 brief submitted to the U.S. District Court for the District of Colorado, a state
2 commission may not consider the cost to the ILEC in determining the
3 technical feasibility of points of interconnection. (We included a copy of the
4 FCC's amicus brief as Attachment C to Level 3's Petition.) More recently,
5 the FCC stated in reviewing whether SWBT was eligible for interLATA
6 authority in Texas: "Section 251, and our implementing rules, require an
7 incumbent LEC to allow a competitive LEC to interconnect at any technically
8 feasible point. *This means that a competitive LEC has the option to*
9 *interconnect at only one technically feasible point in each LATA.*"²⁰ Thus the
10 FCC has confirmed yet again that the choice of how and where to
11 interconnect lies with the ALEC under the Act.

12 **Q: WHAT PROVISIONS OF THE ACT GOVERN SELECTION OF IPS?**

13 A: Congress placed the requirement to provide technically feasible IPs in
14 Section 251(c)(2), which applies only to incumbent LECs. If Congress had
15 wanted to have ALECs bear the same duty in establishing IPs as incumbent
16 LECs bear, it would have specifically stated that outcome, rather than
17 separating out the interconnection obligations to apply only to incumbent
18 LECs under Section 251(c)(2). Although Level 3 has an obligation under
19 Section 251(a) to interconnect directly or indirectly with BellSouth, the Act
20 places no obligation on Level 3 to provide BellSouth interconnection at all
21 technically feasible points.

²⁰ *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, ¶ 78 (rel. June 30, 2000) (emphasis added).

1 **Q: ARE THERE PUBLIC POLICY REASONS TO DENY BELLSOUTH**
2 **THE ABILITY TO ESTABLISH IPS FOR TRAFFIC IT ORIGINATES**
3 **TO LEVEL 3?**

4 A: Yes. If BellSouth were allowed to identify IPs for originating traffic it would
5 be able to disadvantage ALECs and impose additional and unwarranted costs
6 on new entrants. Such a result is not in the public interest and would severely
7 impede the development of competition. Indeed, if BellSouth were allowed
8 such discretion, it may force ALECs to essentially duplicate the incumbent's
9 network. Such a result has been rejected by regulators as not in the public
10 interest. The reasons for rejecting BellSouth's proposed interconnection
11 structure are addressed in more detail in Kevin Paul's testimony concerning
12 Issue 1 and Tim Gates' testimony concerning Issue 2.

13 **Q: DOES THIS CONCLUDE YOUR TESTIMONY?**

14 A: Yes, it does.

15