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May 30, 2001

Ms. Blanco Bayó, Director  
Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

Re: Docket No. 000121-TP

Dear Ms. Bayó:

Enclosed for filing are an original and 15 copies of the ALEC Coalition's Post-hearing Brief in the above-referenced docket. The ALEC Coalition members include AT&T Communications of the Southern States, Inc. (AT&T), MCI metro Access Transmission Services, LLC and MCI WorldCom Communications, Inc., (WorldCom), DIECA Communications Company d/b/a Covad Communications Company (Covad), Mpower Communications Corp. (Mpower), e.spire Communications, Inc. (e.spire), ITC^DeltaCom Communications, Inc. (ITC^DeltaCom), and Rhythms Links, Inc. (Rhythms).

I am also enclosing an extra copy, which I ask that you stamp and return to me.

Thank you for your assistance in this matter.

Sincerely,

*Donna Canzano McNulty*  
Donna Canzano McNulty

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LNF \_\_\_\_\_  
LMP \_\_\_\_\_  
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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Investigation into the )  
Establishment of Operations Support )  
Systems Permanent Performance )  
Measures for Incumbent Local )  
Exchange Telecommunications )  
Companies )  
\_\_\_\_\_ )

Docket No. 000121-TP

Filed: May 30, 2001

**ALEC COALITION'S POST-HEARING BRIEF**

The ALEC Coalition, consisting of AT&T Communications of the Southern States, Inc. (AT&T), MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc., (WorldCom), DIECA Communications Company d/b/a Covad Communications Company (Covad), Mpower Communications Corp. (Mpower), e.spire Communications, Inc. (e.spire), and ITC^DeltaCom Communications, Inc. (ITC^DeltaCom) hereby submits its Post-Hearing Brief .

**INTRODUCTION**

Performance metrics and self-executing remedies are crucial to ensuring that local exchange markets remain open irreversibly to competition. Improved OSS functionality, enhanced performance measurements, appropriate performance standards and remedies will be critical factors in enabling ALECs to enter the Florida local market, particularly the residential market. Many of the metric revisions and new metrics proposed by the ALEC Coalition are geared toward ensuring that the ALECs' market entry does not run into many of the same impediments encountered elsewhere. Without them, any inroads made into the exchange and exchange access market through implementation of the requirements of Section 251 of the Telecommunications Act of 1996 cannot be sustained.

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FPSO-RECORDS/REPORTING

Adoption of comprehensive metrics, thorough annual audits of the accuracy of BellSouth's self-reporting, and meaningful self-executing remedies will be one of the most significant actions this Commission can take. The performance measurement plan adopted by this Commission should be comprehensive because significant gaps in coverage can make it extraordinarily difficult and time-consuming to detect and deter below-parity performance. Measurements should cover all problems that can and have arisen through real market experience. When an area of BellSouth's performance is not covered by a metric, the primary tool available to an ALEC to remedy poor performance is an action to enforce the parties' interconnection agreement, which can take a year or more to complete and is far too long for an ALEC attempting to resolve an immediate business problem. Therefore, in addition to adopting a comprehensive set of measures that covers all aspects of ALEC and BellSouth activities, this Commission should adopt a self-executing remedy plan designed to provide sufficient incentive for BellSouth to meet its obligations under the Telecommunications Act of 1996 to provide ALECs with parity service and open its local markets to competition.

The remedy plan proposed by the ALEC Coalition incorporates the criteria identified by the FCC for designing an effective remedy plan and is the appropriate plan for this Commission to adopt in this proceeding.

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

**POSITION:** STIPULATED

**ISSUE 1a:** What are the appropriate service quality measures to be reported by BellSouth?

**ALEC COALITION:** \*\* The Commission should require BellSouth to implement additional measures and to modify its existing measures as proposed by the ALEC Coalition in testimony and Exhibit 14. \*\*

Along with better pricing and improved OSS functionality, enhanced performance measurements, standards, and remedies will be critical factors in enabling ALECs to enter the Florida local market, particularly the residential market. Many of the metric revisions and new metrics are geared toward ensuring the ALECs' market entry does not run into many of the same impediments elsewhere. (Tr. 120) As competitors gain more experience in the market, they find that additional metrics are necessary that they had not thought of previously. All new metric levels of disaggregation brought into this proceeding are based on ALECs' real market experience. (Tr. 173, Exh. 9, Kinard Deposition, p. 26).

In November, 2000, BellSouth revised its Service Quality Measurement (SQM) for the interim metrics for the Florida third-party test. (Tr. 124) The ALEC Coalition's direct testimony including the additional metrics found I Exhibit 14, KK-4, was based on that filing. BellSouth's witness Coon filed another revised SQM in this proceeding, and the ALEC Coalition, through witness Kinard, responded to those revisions in Exhibit 14, KK-5. ALECs are requesting that twenty measures be added to the revised SQM.

Although the ALEC Coalition does not object to the other BellSouth proposed metrics, it does take issue with some of BellSouth's proposed business rules, exclusions, calculation, and levels of disaggregation and performance standards for those measures, which will be discussed in Issue 1(b). The ALEC Coalition is requesting the following additional measures:

## ADDITIONAL ORDERING METRICS

Timeliness of Response to Request for BellSouth-to-CLEC Trunks Mean Time...  
Call Abandonment Rate – Ordering and Provisioning

## ADDITIONAL PROVISIONING METRICS

Percent Service Order Accuracy  
Percent Completions/Attempts without Notice or Less Than 24 Hours Notice  
Percent On-Time Hot Cut Performance  
Percent of Orders Cancelled or Supplemented at the Request of the ILEC  
Percent of Coordinated Hot Cuts Not Working as Initially Provisioned  
Mean Time to Restore a Customer to the ILEC  
Percent of Customers Restored to the ILEC  
Mean Jeopardy Interval for Maintenance & Trouble Handling  
Percent Successful xDSL Loops Cooperatively Tested  
Percent Completion of timely Loop Modification/De-Conditioning on xDSL  
Loops

## ADDITIONAL MAINTENANCE AND REPAIR METRIC

Call Abandonment Rate - Maintenance

## ADDITIONAL BILLING METRICS

Percent Billing Errors Corrected in X Days  
Percent On-Time Local Service Invoice Delivery

## OTHER ADDITIONAL METRICS

Percent Response Commitments Met On-Time  
Percent ILEC vs. ALEC Changes Made  
Percent Software Certification Failures/Software Problem Resolution Timeliness  
and Average Delay Days.  
BFRs Processed Within 30 Business Days  
BFR Quotes Provided in X Days.  
EEL Provisioning, Billing Rate

Discussion of the ALEC Coalition's additional proposed measures follows.

## ADDITIONAL ORDERING METRICS

**Timeliness of Response to Request for BellSouth-to-CLEC Trunks  
Mean Time To Provide Response, Percent Within 7 Days, Percent  
Negative Responses**

1 2

These measures deal with BellSouth having sufficient trunk capacity from the BellSouth network to the ALEC switch when the ALEC's traffic is increased substantially. ALECs cannot expand without adequate trunk capacity inbound from the ILEC as well as outbound to the ILEC. ILEC delays in providing reciprocal trunks or delays in providing ALECs a due date for such trunks forces ALECs to delay installing new customers. ILEC delays on trunk resizing prevent ALECs from increasing market share. (Tr. 130) BellSouth summarily dismisses these measures, suggesting that these issues are better resolved through accurate ALEC forecasts of traffic requirements. (Tr. 305)

BellSouth summarily dismisses these measures, suggesting that these issues are better resolved through accurate ALEC forecasts of traffic requirements. (Tr. 305) BellSouth's response is unrealistic and does not reflect the customer-focused attitude needed in today's rapidly expanding telecommunications marketplace. Accurate forecasting by the ALEC will not prevent BellSouth from rejecting ALECs' requests for augments. BellSouth adheres to an outmoded policy that trunk augmentation of a final trunk group should begin when utilization reaches 75-85%. (Tr. 131) ALECs' growth is more dynamic than BellSouth's and a 50% fill can quickly move to blocking levels with the addition of one large customer. In other words, when utilization reaches 50%, it is prudent to plan for trunk augmentation. (Tr. 131) The problem is not that ALECs need to improve traffic forecasts; rather, it is that BellSouth's ability to throttle ALEC market growth through slow provisioning of inbound trunks, including the sending of the initial request for such BellSouth-to-ALEC trunks requires an enforcement mechanism. The measures proposed by the ALEC Coalition would capture BellSouth's performance and

motivate improvement. New York, Pennsylvania and New Jersey metrics include a measurement for the time it takes to respond to ALECs' TGSRs for trunks inbound from Verizon to them.

**Call Abandonment Rate – Ordering and Provisioning**  
**Call Abandonment Rate - Maintenance**

These measures monitor the ILEC's handling of support calls from ALECs, when ALECs experience operational problems dealing with ILEC processes or interfaces. Prompt responses from the ILEC ordering and provisioning support centers are required to ensure that the ALEC customers are not adversely affected, because any delay will adversely affect ALEC retail customers who may be holding on-line with the ALEC customer service agent. (Exh. 14, KK-4, p. 13) BellSouth's O-12, Speed of Answer in Ordering Center, does not capture the full abandonment time. It is important to capture how long ALECs are on hold, including the time when calls are abandoned, to provide a true picture of when customers or ALECs may get frustrated with the hold times. (Exh. 9, Kinard Deposition, p. 7)

**ADDITIONAL PROVISIONING METRICS**

**Percent Service Order Accuracy**

This metric would capture whether orders are changed through BellSouth's manual handling of partially mechanized or faxed orders and thus provisioned inaccurately in great annoyance to the customer. (Tr. 132) A service provider that is unreliable in fulfilling service orders will not only generate ill-will with customers when errors are made, but will also incur higher costs to rework orders and to process customer complaints. When the ILEC provides the comparable measure for its own operation, it is

possible to know if provisioning work performed for ALECs is at least as accurate as that performed by the ILEC for its own retail local service operations. (Exh. 14, KK-4, p. 12)

**Percent Completions/Attempts without Notice or Less Than 24 Hours Notice**

This metric relates to the situation where the ALEC did not receive a confirmation on a due date or received it only 24 hours in advance. (Exh. 9, Kinard Deposition, p. 12) Late confirmations from BellSouth force ALECs to scramble at the last minute to try to meet the looming due date, if it can be met at all. Customers and ALECs may be unable to schedule necessary vendors to complete the installation, resulting in customer frustration with the ALEC. The ALEC Coalition proposes this measure so that “customer not ready” situations due to late/no notice from BellSouth can be highlighted, and BellSouth’s performance can be monitored and corrected. (Tr. 132, Exh. 14, KK-4, p.16)

BellSouth seems to suggest that this measure is unnecessary because the same information can somehow be obtained by combining several of its provisioning measurements (P-1 to P-5, P-6, P-6A). (Tr. 300, 356-356) These measures do not capture the complete picture from the ALEC perspective. (Tr. 356) Using these measures is an insufficient substitute, because none of them cover the situation where an ALEC fails to receive a FOC. Even in those instances where a FOC is received, a review of the data suggested by BellSouth will not reveal whether a FOC was delivered 24 hours before the due date. Indeed, BellSouth even admitted that none of its measures capture the situation when BellSouth sends an firm order confirmation less than 24 hours before the cutover. (Tr. 357) The Commission should follow Georgia’s lead and adopt this metric.



### **Percent On-Time Hot Cut Performance**

Customers must not be subjected to unscheduled service disruptions because of lengthy or uncoordinated cutovers of loops. (Exh. 14, KK-4, p. 17) An early cut of facilities can cause the customer to lose service, and a late cut translation often means the customer cannot receive all calls or certain incoming calls. (Tr. 353) Either is harmful to customers and ALECs' reputations. Although BellSouth has proposed a similar measure, under BellSouth's proposal, BellSouth is considered to have met its metric if it *starts* within 15 minutes of its start time. Under the ALEC Coalition's proposal, BellSouth is measured by whether it is *started* and *completed* within the specific cut over window. (Exh. 9, Kinard Deposition, p. 24) Both Texas and New York have similar measures to capture these important processes. (Tr. 132)

### **Percent of Orders Cancelled or Supplemented at the Request of the ILEC**

This metric captures the situation where BellSouth requests an ALEC to extend a due date to adjust for BellSouth-caused failures to complete the order. (Tr. 132) What would have been a missed due date becomes a new date for the future. (Tr. 133) BellSouth can end up meeting the measure, but the new due date masks the fact that BellSouth missed the original one. New York adopted this metric to provide the full picture of Bell Atlantic's performance.

### **Percent of Coordinated Hot Cuts Not Working as Initially Provisioned**

This metric captures when loops are provisioned on time but are not working. Often ALECs cannot log a trouble report until the order is completed in the ILEC's billing system, which may take hours or days. Consequently, these provisioning troubles are undetectable by BellSouth's current performance measures. (Tr. 133) This metric is

necessary to track how BellSouth performs its coordinated cutovers. Without it, it will appear that all loops BellSouth provisions on time are working when in fact, they may not be.

BellSouth claims that this metric is not needed because it is addressed in “% Installation Troubles within 7 Days.” (Tr. 307) But that metric only captures those troubles that occur after the order has been completed. It does not show whether the order was completed correctly and in working condition. While the ALEC measure captures troubles that occur during the provisioning process, the need for this measurement remains.

**Mean Time to Restore a Customer to the ILEC**  
**Percent of Customers Restored to the ILEC**  
**Mean Jeopardy Interval for Maintenance & Trouble Handling**

These metrics measure the speed of restoring service to BellSouth when a customer conversion fails and the percent of accurate port-backs to BellSouth when necessary. All of these measures are necessary to provide an accurate picture: one needs to see the magnitude of how many customers are affected that need to be restored to the ILEC as well as how long it took. (Exh. 9, Kinard Deposition, pp. 14-15) The purpose of the third metric is to ensure that BellSouth notifies the ALEC when BellSouth is unable to make an appointment to the customer’s premise for maintenance and trouble handling. (Exh. 9, Kinard Deposition, p. 15)

**Percent Successful xDSL Loops Cooperatively Tested**

As the evidence demonstrated, xDSL loop delivery is comprised of two separate and equal components: whether the loop was delivered on time and whether it was working when delivered. (Tr. 377) To test these two components of xDSL loop delivery,

the ALEC Coalition proposes both that the Commission measure whether BellSouth participates in Joint Acceptance Testing and whether BellSouth's loops pass that joint acceptance testing on time. Participation in testing is important, but the real question is how many of the loops PASS the joint tests conducted between an ALEC, like Covad, and BellSouth. The ALEC measure makes it clear that BellSouth must both test the loop and pass the test to receive a successful report on that metric.

BellSouth takes the position that it intends its P-7 Cooperative Acceptance Testing - % of xDSL Loops Tested to test whether the loop passed cooperative testing, but the metric does not say that. In fact, in SEEM Disaggregation - Analog/Benchmark section, BellSouth proposes that it pay Tier II penalties if it fails to meet the benchmark of "95% of Lines Tested." Thus, BellSouth will test the lines, but makes no commitment to pass the tests or record the installation as a failure. BellSouth witness Coon seemed to be unclear on whether BellSouth's measure would test whether an xDSL loop passed the cooperative testing or not. (Tr. 379-393) After receiving some guidance or clarification, Mr. Coon agreed that BellSouth would accept an adjustment to its P-7 measurement to ensure that it captured the percentage of xDSL cooperatively tested which passed the tests from both the ALEC and ILEC point of view. (Tr. 419). The ALEC Coalition proposes the following additions to P-7: (1) In the Definition Portion, add "A loop will be considered successfully cooperatively tested when both the ALEC and ILEC representative agree that the loop has passed the cooperative testing"; and (2) In the SEEM Analog/ Benchmark, replace "95% of Lines Tested" with "95% of Lines Tested Successfully Pass Cooperative Testing." These adjustments are necessary to capture the appropriate data in this measure.

### **Percent Completion of Timely Loop Modification/De-Conditioning on xDSL Loops**

Incumbent local exchange carriers, including BellSouth, regularly perform maintenance and provisioning on their outside plant facilities, including placing and removing certain devices from those loops, such as load coils and excessive bridged tap. Since DSL will not work in most instances on a loop that contains excessive bridged tap, filters, load coils, range extenders, or repeaters, DSL providers must have these loops conditioned before they will support DSL service. The ALEC Coalition proposes that a separate metric measure BellSouth performance in this area, because none of the existing SQM metric capture the appropriate information.

BellSouth has argued that that loop conditioning is included within its Order Completion Interval measurement (BellSouth P-4). That measures the time from the issuance of a firm order confirmation (FOC) with a delivery date to the time when the order is closed, indicated that the loop has been provisioned. (Tr. 420) In contrast, loop modification/conditioning is performed during the service inquiry processes, before the FOC is delivered to the ALEC. (Tr. 423, Exh. 18) Thus, the BellSouth measurement P-4 does not measure the process BellSouth actually has in place for loop conditioning. Rather, it will supposedly measure “the process we're going to be using in the future.” (Tr. 424)

The evidence clearly demonstrates that BellSouth’s P-4 would not capture performance on how BellSouth actually conditions loop. Thus, the ALEC Coalition measure must be adopted on this issue. BellSouth would ask this Commission to trust that it will change its process so that the conditioning process will fit within the P-4 measure. The Commission should not be fooled. ALECs and BellSouth have been

discussing this issue since July 2000, during the Georgia Performance Measures hearing. (Tr. 427-431) In the ten months since that hearing, BellSouth has done nothing to change its processes or to revise its metrics to adequately capture performance on loop conditioning. At the hearing, BellSouth refused to commit to when it was “going to change the process to be consistent with these measurements.” (Tr. 428)

For this reason, the ALEC Coalition proposes a separate measurement for loop conditioning and a benchmark of five days in which that conditioning should be performed. This provides three important benefits for DSL providers in Florida. First, it gives us a firm benchmark in which we can tell our customers their loop will be conditioned and delivered. Second, it enables DSL providers to measure whether BellSouth is meeting this commitment. Third, it gives this Commission an opportunity to review BellSouth’s performance for competitors in routine maintenance tasks that are performed every day for BellSouth’s own facilities and for BellSouth’s own retail customers. Loop conditioning should be one of the areas in which this Commission can most accurately assess whether BellSouth’s treatment of competitors is non-discriminatory since the exact same work is routinely conducted in BellSouth’s outside plant for its own retail services.

## **ADDITIONAL BILLING METRICS**

### **Percent Billing Errors Corrected in X Days Percent On-Time Local Service Invoice Delivery**

The ALEC Coalition’s proposed Percent Billing Errors Corrected in X Days would assess whether errors in BellSouth’s daily usage file and carrier bills are corrected within a reasonable time. This affects customers because such errors result in either the wrong charges assessed on the customer’s bill or the ALEC has to delay billing until the

error is corrected. BellSouth's existing invoice accuracy does not cover this situation. (Exh. 9, Kinard Deposition, p. 16) There is no way to ensure that when ALECs ask for an adjustment because of errors in the bill it is done in a timely manner. The ALEC Coalition's proposed metric compliments BellSouth's proposed billing accuracy measure to make sure the adjustments are done properly. (Exh. 9, Kinard Deposition, p. 16)

The ALEC Coalition's second metric would monitor BellSouth's performance in successfully transmitting invoices to the ALEC within 10 days of the close of a bill cycle. (Exh. 14, KK-4, p. 32) The formatting of charges on bills must follow industry standards so that they can be electronically processed in the ALEC systems; otherwise, the ALECs will be doomed to reconcile boxes of paper bills for charges that cannot be accepted or audited by their electronic equipment. (Tr. 136)

## **OTHER ADDITIONAL METRICS**

### **Percent Response Commitments Met On-time**

The ALECs' proposed this metric to measure the timeliness of BellSouth's representatives answer questions or resolve problems asked by the ALECs. (Tr. 136) Obviously it is important for ALECs to have timely responses and resolutions to problems. Yet, BellSouth claims that this issue would be better addressed through individual, contract negotiations rather than developing a group of measures for all ALECs. (Tr. 310) The ALECs disagree: that kind of delay is unnecessary when equitable resolution for all ALECs is available right now. Surely, BellSouth has internal performance objectives to rate its employees on responsiveness. And it can establish a database, just as Verizon has in New York, to help to track whether its Systems Help Desk has responded to ALEC trouble tickets on missing notifiers (confirmations,

rejections, provisioning and billing completion notices) as required by the metric Missing Notifier Trouble Tickets Cleared in Three Days, which was added to Verizon's Performance Assurance Plan last year.

**Percent ILEC vs. ALEC Changes Made**

BellSouth has veto power over ALEC change requests in broadly defined circumstances, such as when BellSouth concludes that a requested change would be too expensive to implement or would not be technically feasible. (Tr. 914-15.) This metric provides some gauge as to how many ALEC requests to the change management processes are discarded. (Exh. 9, Kinard Deposition, p. 19, Exh. 14, KK-3)

**Percent Software Certification Failures  
Software Problem Resolution Timeliness and Average Delay Days**

This metric examines how quickly BellSouth corrects software errors caused by changes to an existing interface, establishment of a new query type or other changes. (Tr. 140) BellSouth admits that this type of information is not captured in any BellSouth measurement. (Tr. 366, Exh. 6, Coon Deposition, p. 94) BellSouth claims that this measure is unnecessary because the testing arrangements made available with any software update are adequate to resolve these issues before the software is loaded and that the change management process will eliminate the need for this measure. (Tr. 311) The problem with BellSouth's reliance on the change management process is that the change management process cannot screen out all failures or problems prior to implementing a software program or software change. (Tr. 367) Also, there is no assurance that BellSouth will follow such processes. The only way to prove BellSouth's theory is to test it -- metrics will show whether systems are tested and problems resolved quickly. The

Georgia Commission recently required BellSouth to add a Software Error Correction timeliness metric and the New York and Texas plans also include such a metric.

**BFRs Processed Within 30 Business Days  
BFR Quotes Provided in X Days**

These measures reflect the percentage of Bona Fide Requests processed within thirty days and the percentage of quotes provided for Bona Fide Requests within certain intervals. The Georgia Commission has ordered these metrics and the Florida Commission also should adopt them. (Tr. 161)

**EEL Provisioning, Billing Rates**

e.spire proposes additional measures for enhanced extended link (EEL) provisioning. Although e.spire submitted data to BellSouth nearly one year ago, BellSouth has not processed e.spire's order. (Tr. 779) e.spire maintains that this delay runs counter to the FCC's recognition that "the process by which special access circuits are converted to unbundled loop-transport combinations should be simple and accomplished without delay." See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Supplemental Order on Clarification, 15, FCC Rcd 9578 para.30. The standard interval for migrations from special access to EELs should be 95% within 10 days from receipt of an error-free request for conversion. (Tr. 163)

e.spire also proposes a new measure of how quickly BellSouth would change billing rates from special access to EELs charges. The proposed benchmark for this measure is 95% within 30 days from the receipt of an error-free order. (Tr. 164)

**ISSUE 1b:** What are the appropriate business rules, exclusions, calculations, and levels of disaggregation and performance standards for each?



**ALEC COALITION:** \*\* The appropriate business rules, calculation formulas, disaggregation levels and standards of metrics currently included in BellSouth's SQM and for the additional metrics proposed by the ALEC Coalition are described in detail in testimony and Exhibit 14. \*\*

To properly assess the service BellSouth provides ALECs against that which it provides its retail customers and affiliates, in addition to establishing measures, those measures need to be documented in detail so that clarity exists regarding what will be measured, how long it will be measured and in what situations a particular event may be excluded from monitoring. It requires sufficient disaggregation of measurement results so that only the results for similar operational conditions are compared and so that the results will not mask discrimination. Also, it requires pre-specified and pro-competitive performance standards of the reasonably analogous performance delivered by the ILEC to its own operations, or when analogous comparative standards are not readily identifiable, establishment of benchmarks.

#### **Several of BellSouth's Measures Are Inadequately Defined**

Each measurement begins with a definition which briefly describes what the measurement is designed to measure. Business rules are the heart of each measure, stating the start and stop time of each metric and providing details necessary to describe the processes in between. The business rules need to be structured to ensure that BellSouth discrimination is not being masked. (Tr. 142) Misleading results flow from poorly defined metrics. A simple example is where a metric provides an interval of thirty *calendar* days, but BellSouth may calculate the metric based on thirty *business* days. This provides BellSouth more time to meet the metric, resulting in an appearance of better performance than that which is actually provided. Sometimes there are legitimate reasons to provide exclusions to the defined business rules. These should be easily

understood. The metric calculation is simply a mathematical equation that generates the performance result. (Tr. 142,143) Appropriately defined business rules, exclusions and calculations are essential to a good performance measurements plan.

Proper definitions, business rules and exclusions are critical. For example, BellSouth has proposed two similar measures, CM-5, Notification of CLEC Interface Outage, and MNR-7, Mean Time to Notify CLEC of Network Outages. (Exh. 16) The problem with these metrics as proposed is that the time it takes BellSouth to verify such an outage is not included in the metrics themselves. (Tr. 365) Indeed, none of BellSouth's measures actually captures the amount of time it takes BellSouth to verify either of those types of outages.

Another example demonstrates how exclusions must be carefully scrutinized. BellSouth has proposed an 18-hour benchmark for O-8, Reject Interval for Partially Mechanized Orders, but after-hours time is specifically excluded. An 18-hour benchmark with an after-hours exclusion can stretch into four days. (Tr. 348-349) This interval is far too long. Rejections for partially mechanized orders should be received in five hours.

There are many problems with BellSouth's definitions, exclusions, business rules, and calculations. The results of the ALEC Coalition's scrutiny of BellSouth's proposed business rules, exclusions, and calculations for BellSouth's proposed measures in this proceeding are found in Exhibit 14, specifically KK-1, KK-2, KK-3, and KK-5. The ALECs also were asked to evaluate the revised interim performance standards of that are currently in place in the third party test. This evaluation is found in Exhibit 2. The appropriate business rules, exclusions and calculations for the ALECs' proposed

measures are described in detail in Exhibit 14, KK-4. For the reasons outlined above, to foster local competition, the Commission should approve the ALEC Coalition's proposal and modifications, because they are more comprehensive and meaningful than BellSouth's.

**Not All of BellSouth's Proposed Measures Are Adequately Disaggregated**

The ALEC Coalition proposes that the Commission require BellSouth to provide a level of disaggregation such that deficiencies in BellSouth's performance can neither be masked nor ignored. Disaggregation should be required by interface type, pre-order query type, product, service order activity, volume category, trouble type, trunk design and type (for trunk blockage measurements), maintenance and repair query type and collocation category. (Tr. 144-149, 225-231) Exhibit 14 provides in-depth details regarding the appropriate levels of disaggregation.

Disaggregation is key to obtaining an accurate snapshot of BellSouth's performance, because poor performance in particular areas can be masked when grouped into one large report. During cross-examination BellSouth spent considerable time attempting to quantify the number of measures it would be responsible for reporting. BellSouth claims that the ALEC plan should be rejected out of hand based on the number of sub-metrics that need to be measured each month and that the Commission would be faced with the daunting proposition of sifting through all of the sub-metrics each month. (Tr. 297) BellSouth also raised concerns about its capacity to handle such number of sub-metrics.

BellSouth's concerns are unfounded and certainly do not obviate the need for the Commission to establish the level of disaggregation necessary to accurately track

BellSouth's performance. First, the ALECs proposed the level of disaggregation needed for an accurate depiction of parity. (Tr. 225) Second, BellSouth admitted that it is technically capable of providing this level of disaggregation, including disaggregation to the MSA level. (Tr. 368, Exh. 6, Coon Deposition, p. 98)

Q. And Bell is capable of providing disaggregation at the MSA level in Florida, isn't it?

A. Yes, we are.

(Exh. 6, Coon Deposition 98) In fact, BellSouth is required to and reports to the MSA level in Louisiana. (Tr. 368) Disaggregation by MSA prevents masking of discriminatory treatment by geographic area. Third, BellSouth's claim that the review of the ALECs' sub-metrics is too burdensome is misplaced. The Commission staff envisions that it "would not actively review the data on an on-going basis, but would rely on the parties to look out for their own best interests. And should a dispute arise, other than the way the data is calculated or perhaps the way that it's used, they could bring that to the Commission for resolution." (Tr. 102)

The levels of disaggregation should cover all of the products ALECs purchase when there is large-scale entry in both the residential and business markets, including the popular xDSL services. To be effective in measuring BellSouth's performance, the reporting should categorize the information by product type to identify with specificity the services provided by BellSouth. Examples of product disaggregation include resale, UNEs and trunks, broken down by residential and business customer, where appropriate. Further disaggregation for resale and UNEs include DS1s and DS3s, separating BRI ISDN from PRI ISDN. Unbundled loop types, such as analog voice-grade loops, digital loops, ADSL loops, HDSL loops, UCLs, and xDSL loops should be disaggregated

because BellSouth's performance will vary for each loop type. Also, UNE-Platform needs to be reported separately because this product combines a loop with switching and transport and is different than just ordering a loop without the switching and transport. (Tr. 146-147)

Aggregating multiple product offerings together, particularly offerings that have different standards, provides an inaccurate view of BellSouth's performance. BellSouth's poor performance on some measurements would be masked due to aggregation with other measures that show adequate performance.

BellSouth's proposed disaggregation levels miss the mark in a number of areas. BellSouth fails to address appropriate retail disaggregation for the products ALECs are ordering so that a like-to-like comparison can be made to determine whether discrimination is occurring. For example, BellSouth inappropriately compares UNE Loops to retail dispatch services. Physical work done in a central office, which is all that is required of many UNE migration orders, should not be compared to work done in the field, including at the customer premises. Provisioning and repair measures should be divided into three categories: 1) Switched based orders; 2) central office or "dispatch in" orders; and 3) field work or "dispatch out" orders. (Tr. 162-163)

Other key examples of BellSouth's inappropriate loop disaggregation include the following. First, DS1 loops should not be included with DS3 loops because BellSouth has different intervals for DS1 and DS3 loops. Second, various types of xDSL services should be disaggregated to detect discrimination in the ALECs' chosen mode of service delivery of problems in checking facilities for certain types of DSL products. Third, line

splitting should be disaggregated from line sharing in order to detect discrimination when the ILEC is not the voice provider on the loop. (Tr. 163, 226)

Accordingly, the Commission should order BellSouth to report measurements according to the ALEC Coalition's proposed levels of disaggregation.

### **Appropriate Performance Standards Must Be Developed**

Analogs and benchmarks are the measuring sticks of a good performance measurements plan. As described by ALEC Coalition witness Kinard,

A retail analog is a service of function that BellSouth provides for itself, its customers or its affiliates that is analogous to a service or function that BellSouth provides to ALECs. When a BellSouth retail analog exists, BellSouth's performance for itself, its customers and its affiliates should be compared to its performance for ALECs to determine if BellSouth is meeting the Act's parity requirement. If no retail analog exists, BellSouth's performance must be gauged by a performance standard, also known as a benchmark.

(Tr. 149-150) Benchmarks should be based on the level of performance that can be expected to offer an efficient carrier a meaningful opportunity to compete, not simply on BellSouth's historical performance. (Tr. 150) The ALEC Coalition proposes the appropriate analogs and benchmarks for BellSouth's proposed measures in Exhibit 14, KK1, KK-3, and KK-5, and for the ALECs' proposed measures in KK-4.

The ALEC Coalition takes issue with those BellSouth proposed benchmarks that are below the 95% or higher thresholds that have been set in other states, such as New York and Texas, for most metrics except for call center and OS/DA answer times. (Tr. 151) Often, the intervals themselves are set below those adopted in other states. *Id.* As was done in New York and Texas, the Commission should require BellSouth to meet the 95% or higher thresholds to foster competition. In some instances, the ALECs propose a benchmark of more than 95% when there is a long interval for a particular measure

because BellSouth should have a good chance at perfection. Generally, the ALEC Coalition would be willing to reduce the threshold of the benchmark, if BellSouth were to propose a “cutting-edge” interval. (Tr. 181)

In some instances, BellSouth has proposed measures without retail analogs or benchmarks, in what it terms “diagnostic.” For some measures, ALECs do not disagree, but for some, the Commission should establish a benchmark. For example, BellSouth has proposed O-12, Speed of Answer in the Ordering Center, which measures the average time an ALEC is in queue at the LCSC, sometimes with customers on the line. Because BellSouth has decided to label it “diagnostic” there is no performance standard that BellSouth is held accountable for meeting. (Tr. 351) Mpower testified that generally it experiences excessively long hold times when calling into the LCSC trying to clarify the BellSouth business rules it is required to follow. (Tr. 818) Often Mpower is put on hold when it calls the LCSC from 20 minutes to over 90 minutes. *Id.* There is no reason for this metric to be diagnostic: the Commission should adopt the ALECs’ proposed benchmark of 95% in 20 seconds and 100% in 30 seconds.

Furthermore, with respect to benchmarks for xDSL loop delivery, BellSouth has proposed that it be given 7 business days from issuance of the FOC (for loops without conditioning) and 14 business days from issuance of the FOC (for loops with conditioning). As we have noted above, BellSouth’s measurement will not capture its performance of conditioning whatsoever. For loops without conditioning, BellSouth is actually asking for two days longer to deliver a loop than it promises in its product and services guide. BellSouth performance will improve only when this Commission orders that performance to improve. For example, Mr. Latham admitted that BellSouth only

began offering to perform conditioning in 14 days after the Georgia Commission ordered that benchmark. (Tr. 881) Mr. Latham admitted that BellSouth could deliver a loop in 5 days, but had never tried to deliver one in 3 days, although it was technically feasible to do so. (Tr. 875) Moreover, Mr. Latham testified that he was not aware that BellSouth was proposing 7 business day for the provisioning plus 48 hours for issuance of a FOC, for a total interval of 9 business days. (Tr. 879-880) BellSouth fails to justify this excessive interval, while admitting it can provision loops in a shorter period and that it should be working to improve loop delivery intervals. (Tr. 878-879) No improvement will happen until this Commission orders a reasonable xDSL loop interval of 3 days, or 5 days with conditioning.

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

**ALEC COALITION:** \*\* Because the sub-measures proposed by the ALEC Coalition monitor key areas of ALEC and BellSouth activity, all sub-measures proposed are included in Tier 1 and Tier 2 of the enforcement plan. Consequently, BellSouth should report all proposed sub-measures in both Tier 1 and Tier 2. \*\*

The FCC has stated that one of the key characteristics of an effective enforcement plan is that it contains clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance.<sup>1</sup> (Tr. 989) In the ALEC Plan, BellSouth's service to ALECs and to its own retail operations is gauged using a comprehensive set of performance measurements, referred to in the Plan as "sub-

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<sup>1</sup> *FCC Memorandum Opinion And Order in the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region InterLATA Service in the State of New York*, CC Docket No. 99-295, p. 214, ¶ 433, December 21, 1999.



measures.” These sub-measures cover the full panoply of BellSouth’s activities that ALECs must rely upon in order to deliver their retail service offerings in the local market place. (Tr. 955) Every sub-measure is designed to identify and measure a key area of activity that affects ALEC and BellSouth customers, and consequently, the development of competition in Florida’s local telecommunications market. (Tr. 955) In the ALEC Plan, because the sub-measures monitor key areas of ALEC and BellSouth activity, all sub-measures proposed by the ALECs are included in the determination of remedy payments. (Tr. 956) The measures proposed in the ALEC remedy plan, including disaggregation, benchmarks and retail analogs, are set forth in of the testimony and exhibits of Karen Kinard.

BellSouth’s reliance upon the FCC’s New York Bell Atlantic Order for support of its position that the Enforcement Plan should not include all measures is misplaced. In its Bell Atlantic Order, the FCC simply stated that the measures the New York Commission selected for inclusion in its remedy plan were sufficient. (Tr. 997) The FCC did not, however, exclude the possibility that in a different circumstance an appropriate enforcement plan should include all measures. This is such a circumstance.

BellSouth continues to imply that the measures in SEEM were patterned after those used in New York and Texas. (Tr. 250) Contrary to BellSouth’s suggestion, however, the measures in BellSouth’s SEEM were not selected in the same manner as the measures contained in the New York Bell Atlantic Plan. In New York, the ALECs participated in developing the list of comprehensive measures from which the enforcement measures were selected. Additionally, Mr. Coon stated in his direct testimony that the New York and Texas Commissions charged the ALECs with

identifying the measurement set that was most customer impacting. (Tr. 250) The measures in SEEM and BellSouth's SQM, however, were unilaterally selected by BellSouth without any direct input from the ALEC community. (Tr. 996-997) Moreover, BellSouth has unilaterally made its determination of the measures that are "key" ALEC customer impacting measures. (Tr. 250) While BellSouth has been ordered to include certain measures requested by ALECS in its SQM, BellSouth has not requested and has even ignored, input from the ALECs regarding the measures that should be included in its SQM and SEEM. (Tr. 997) Consequently, the measures in BellSouth's SEEM do not encompass a comprehensive range of carrier-to-carrier performance.

#### **BellSouth's Remedies Plan Is Too Narrow**

BellSouth's SEEM is far narrower than its SQM Plan. SEEM contains only a small subset of the measures BellSouth proposes to report on for the Commission. (Tr. 250, 997) Consequently, many important aspects of BellSouth's performance critical to the ALECs' ability to compete in the local market will not be subject to remedies under BellSouth's plan. (Tr. 996) As an example, BellSouth acknowledges that FOC Timeliness is a key measure for ALECs. (Tr. 312-313, 476) Nevertheless, BellSouth excludes FOC Timeliness from Tier I of SEEM. (Tr. at 476.)

Moreover, SEEM does not specify LNP-FOC Timeliness or LNP- Reject Interval as Enforcement measures. For many facilities-based ALECs, LNP orders are a critical aspect of their business. Without a FOC, ALECs cannot provide their customers with an expected date of service. End user customers are not willing to rely on providers who cannot provide something as simple as a service due date in a timely manner. Therefore, monitoring BellSouth's performance in this area is critical to ALECs. (Tr. 999)

Under SEEM, however, an individual ALEC can experience excessively long intervals before receiving FOCs from BellSouth, and BellSouth would not incur any remedy. In other words, BellSouth can hinder an individual ALEC's ability to provide its customers with timely notice of service without a consequence to BellSouth. (Tr. 1000) BellSouth has not provided any satisfactory justification for excluding these measures from Tier 1 of SEEM.

Mr. Coon attempted to justify the exclusion of FOC Timeliness from Tier 1 by stating that in a fully mechanized arena for FOC Timeliness, if BellSouth had a failure in the ordering systems, "it would affect not just one CLEC but presumably could affect all of them." (Exh. 6, Coon Depo., p. 106). However, Mr. Coon admitted that there are instances where it will only affect some of the ALECs and not others. (*Id.*) Mr. Coon also admitted that in the circumstance where some ALECs are affected and others are not, it would not be industry-affecting and therefore, those violations would go without remedy under BellSouth's plan. (*Id.*)

Further, while Mr. Coon states that BellSouth has expanded the SQM to include 13 additional measures not specified in the Florida Staff proposal, he fails to convey the fact that all of the 13 measures were not included in SEEM. (Tr. 997) Mr. Coon neglects to mention that BellSouth independently selected only a subset of those measures to be included in SEEM as enforcement measures. The additional measures that BellSouth decided to omit from its remedy plan include the following:

- Coordinated Customer Conversion – Average Recovery Time
- Meantime to Notify ALEC of Network Outage
- Recurring Charge completeness
- Non-Recurring Charge Completeness
- Database Update Interval
- Database Update Accuracy

- NXX and LRNs Loaded by LERG Effective Date
- Notification of Interface Outages

Additionally, BellSouth's SEEM inappropriately excludes the following enforcement measures from Tier I remedies:

- Invoice Accuracy
- Mean Time To Deliver Invoice
- Usage Data Delivery Accuracy
- Reject Interval
- FOC Timeliness
- Acknowledgement Message Timeliness – EDI
- Acknowledgement Message Timeliness – TAG
- Acknowledgement Message Completeness – EDI
- Acknowledgement Message Completeness – TAG

Thus, even though BellSouth will measure its performance on all of the measures in its SQM, under BellSouth's proposal there would be no consequences for BellSouth's failure to meet its performance obligations on many of them and therefore, no incentive for BellSouth to meet performance standards. There must be consequences for the failure to perform adequately in regard to all measures that this Commission orders BellSouth to include in its SQM. BellSouth's proposal is simply too narrow to deter noncompliance or to deter backsliding on any measures on which BellSouth currently may be performing well.

BellSouth's object is clear: narrow the measures that are subject to penalties, relax the standards by which penalties will be assessed, and drop measures that count as the penalties increase. Indeed, at the hearing Mr. Coon revised his testimony to eliminate three additional measures from Tier 1 of SEEM. BellSouth provided no explanations for its eleventh hour decision to further reduce the number of measures subject to remedies under Tier 1. While it is neither possible nor desirable to measure each and every step in each and every process involved in the delivery of local telephone service, failure to

include an adequate sampling of key performance criteria in the measures subject to a remedies plan would permit, and indeed, encourage BellSouth to perform well on the measures that “count,” without providing BellSouth an incentive to be diligent about providing nondiscriminatory service in other areas. Such “gaming” of the process must be avoided.

The measures proposed by the ALECs represent a more comprehensive view of the measures necessary to ensure that the goals of the Act are satisfied. BellSouth’s SEEM plan simply does not meet the FCC criteria that penalties should cover “a comprehensive range of carrier-to-carrier performance.” BA NY Order ¶ 433.

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

**ALEC COALITION:** \*\* The ALEC Coalition proposes that disaggregation be required by interface type, pre-order query type, product, volume category, work activity type, trouble type, trunk design and type (for trunk blockage measurements), maintenance and repair query type and collocation category to allow for like-to-like comparisons. \*\*

Disaggregation is the process of breaking down performance data into sufficiently specific categories or dimensions so that like-to-like comparisons can be made. For example, BellSouth’s retail offering contains a number of varying products. In order to compare BellSouth’s performance for its own retail customers to its performance for ALECs, it is necessary for UNE analog loop products to be compared separately with BellSouth’s retail POTS product. Therefore, sufficient disaggregation is absolutely essential for accurate comparison of results to expected performance. This is true regardless of whether a retail analog or a benchmark serves as the performance standard.

Disaggregation is critical to an effective remedy plan because it prevents poor performance in one area from being obscured by being lumped together with dissimilar

performance data. For example, comparing central office provisioning work to field dispatch provisioning work masks discriminatory performance. ALECs believe that disaggregation should be required by interface type, pre-order query type, product, volume category, work activity type, trouble type, trunk design and type (for trunk blockage measurements), maintenance and repair query type and collocation category. The required disaggregation for each measure proposed by the ALECs is included in the direct testimony of Karen Kinard.

While BellSouth takes issue with the level of disaggregation proposed by the ALECs, the level of disaggregation in SEEM is inadequate and facilitates comparison of unlike observations. BellSouth states that its position endorses “like-to-like” comparisons. However, BellSouth’s position is contradicted by the inadequate product disaggregation that continues to be a characteristic of SEEM. In SEEM, BellSouth continues to aggregate all UNE loops together even though the processes (i.e. intervals) for various loops, such as ADSL or analog loops, may differ. For example, the interval for one DS1 Loops is 23 days and the interval for one 2-Wire Analog Loops is 4 days. This is a critical failing of SEEM. (Tr. 995)

Mr. Coon testified that in the SEEMs disaggregation, there is some recognition of the fact that these products are different, but when BellSouth aggregates them to determine the penalty, they are grouped to make the statistical determination and to determine the appropriate penalty. (Exh. 6, Coon Deposition, p. 104.) Mr. Coon noted, however, that doing so could distort the performance data. (*Id.* at 105.) Nevertheless, throughout SEEM, BellSouth reduces the level of disaggregation from that contained in its SQM.

For example, in his testimony, Mr. Coon emphasizes that BellSouth has more disaggregation than that represented in the Staff Proposal. He emphasizes this by stating that the Staff Proposal had 7 levels of disaggregation for Reject Interval and that BellSouth had 17. (Tr. 251) What Mr. Coon failed to state, however, is that the 17 levels of disaggregation contained in BellSouth's SQM are absolutely meaningless to the SEEM remedy plan. In SEEM, BellSouth only specifies one level of disaggregation for the Reject Interval. (Tr. 1002; Exh. 16, DAC-1 2.21-2.23) Similarly, while there are 20 levels of disaggregation for the Average Completion Interval (Order Completion Interval Distribution) measure in BellSouth's SQM, there are only 8 levels of disaggregation for the same measure in SEEM. (Exh. 16, DAC-1 3.9-3.10)

Mr. Coon contends that all 20 levels of disaggregation (Exh. 6, Coon Deposition, p. 103) with the exception of local number transport, are reflected in the SEEM disaggregation. However, as stated above aggregating dissimilar products as BellSouth admits to doing, can mask discriminatory performance by BellSouth. (Tr. 1002) Thus, contrary to BellSouth contentions, SEEM does not facilitate like-to-like comparisons. Even Dr. Taylor, BellSouth's witness recognizes that the ALEC plan looks at similar sets of measures. (Exh. 7, Taylor Deposition, p. 6)

Accordingly, the level of disaggregation ALECs have proposed is appropriate and leads to the like-to-like comparisons that all parties agree are necessary to make an accurate determination of BellSouth's level of performance and should be adopted in the Commission's enforcement plan.

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

**ALEC COALITION:** \*\* BellSouth's reports should include data on its provision of services to its retail customers, services and facilities provided to carriers, including BellSouth local exchange affiliates, and benchmark results. BellSouth should provide all raw data underlying reports, provide a manual to interpret and a single point of contact to answer questions about raw data. \*\*

BellSouth should provide ALECs with performance data and reports that include BellSouth's provision of:

- a. Services to BellSouth's retail customers in aggregate;
- b. Services and facilities provided to any BellSouth local exchange affiliate purchasing interconnection, unbundled network elements or resale;
- c. Services and facilities provided to carriers purchasing interconnection, unbundled network elements or resale in the aggregate; and
- d. Services and facilities provided to individual carriers purchasing interconnection, unbundled network elements or resale.

The reports should reflect the outcome of statistical procedures applied to each sub-measure for which a parity determination will be made. Benchmark results should also be reported. (Tr. 975-76)

Additionally, access to the raw data used to create performance reports is essential to an ALEC's ability to validate the performance data and reports provided by BellSouth. (Tr. 976) BellSouth admits to not providing the raw data for all the measures in its SQM. Mr. Coon testified that BellSouth provides raw data underlying performance data and reports, **only** to the extent such reports are derived from BellSouth's Performance Measurement Analysis Platform (PMAP). (Tr. 312; Exh. 6, Coon Deposition, p. 11) Mr. Coon testified that BellSouth does not have the capability to make available electronically the raw data that is used to generate reports outside of PMAP. (Tr. 313) But, Mr. Coon admits that BellSouth determines what goes into PMAP. (Exh 6, Coon



Deposition, p. 112) BellSouth is currently not providing access to raw data for a number of measures such as the following:

**Ordering**

- LNP\_PCT\_Reject\_Interval\_Service\_Requests\_Total\_Mech.txt
- LNP\_PCT\_Reject\_Interval\_Service\_Requests\_Partial\_Mech.txt
- LNP\_PCT\_Reject\_Interval\_Service\_Requests\_Fully\_Mech.txt
- LNP\_Reject\_Interval\_Service\_Requests\_Total\_Mech.txt
- LNP\_Reject\_Interval\_Service\_Requests\_Partial\_Mech.txt
- LNP\_Reject\_Interval\_Service\_Requests\_Fully\_Mech.txt
- LNP\_Firm\_Order\_Confirmation\_Total\_Mech.txt
- LNP\_Firm\_Order\_Confirmation\_Partial\_Mech.txt
- LNP\_Firm\_Order\_Confirmation\_Fully\_Mech.txt

**Provisioning**

- LNP\_Total\_Order\_Cycle\_Time\_Mechanized.txt
- LNP\_Total\_Order\_Cycle\_Time\_Mechanized\_with\_Appointment\_codes.txt
- LNP\_Percent\_Missed\_Installation\_Appointments.txt
- LNP\_Disconnects.txt

**Billing**

- Invoice Accuracy CLEC (Region)
- Mean Time to Deliver Invoices CLEC (Region)
- Usage Data Delivery Accuracy CLEC
- Usage Timeliness & Completeness CLEC

For many facilities-based ALECs, LNP orders are a critical aspect of their business. By not providing access to LNP raw data, BellSouth prohibits ALECs from validating its reported performance. Mr. Coon testified that BellSouth's database is "about the size of the entire Internet." (Exh 6, Coon Deposition, p. 112) If that is true, it is difficult to understand why BellSouth does not include LNP raw data in PMAP. An effective remedy plan should provide performance reports and the supporting raw data for all measures in the plan. BellSouth's SEEM does not.

Furthermore, if BellSouth or an ALEC discovers that raw data records or performance reports exclude data, omit data, are calculated incorrectly, or contain an error of any type, BellSouth should be required to immediately notify affected ALECs. BellSouth should then make arrangements to correct the raw data or performance reports, and submit the corrected report to the ALECs. If BellSouth or an ALEC discovers a data error after the report is no longer accessible to ALECs, BellSouth should remain responsible for correcting the error and immediately notifying the ALECs of the error and the measures taken to make the correction. The obligation to correct errors after access to the reports has ended should remain for 12 months after the date the report is no longer accessible to ALECs. (Tr. 977)

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

**ALEC COALITION:** \*\* Performance data and reports should be made available on an Internet web site by the 15<sup>th</sup> of each month; be accessible by use of standard database management tools; be reported in a summarized spreadsheet format and include, at a minimum, those fields of information specified on Exhibit CLB-3. \*\*

BellSouth should make performance data and reports available to ALECs in a readily accessible manner on an Internet web site. The performance reports should be specified in a summarized spreadsheet format and include, at a minimum, those fields of information specified on the attached spreadsheet. (See Exh. 25, CLB-3) The performance data should be provided in a format that can be readily utilized by standard database management tools such as Excel, Access, or Oracle. If any data is excluded from the reports, BellSouth should be required to identify and justify all exclusions before excluding them from reports. The data and reports should be made available on the 15<sup>th</sup> day of each month. (Tr. 977-78)

Additionally, BellSouth should maintain a current and accurate user's manual to support ALECs when accessing and interpreting the raw data. The user's manual should include detailed descriptions of what the data means, i.e., beginning and ending parameters for fields, and include definitions for the codes use by BellSouth. BellSouth should also provide a knowledgeable single point of contact with whom ALECs can confer to resolve questions about accessing the raw data including, but not limited to, explanations of the fields, parameters, code definitions, file column purposes and headings. (Tr. 978)

BellSouth agrees with the ALEC position on these issues, and contends that it already posts a comprehensive User Manual on the same website that it posts performance data and reports, and provides a single point of contact to answer questions regarding the raw data and User Manual. (Tr. 314) Consequently, BellSouth should have no objection to the inclusion of these requirements in the enforcement plan ordered by the Commission.

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

**ALEC COALITION:** \*\* Yes. The Commission has the legal authority to order the implementation of a self-executing remedy plan under Section 251 of the Telecommunications Act of 1996, with or without BellSouth's consent.\*\*

The Commission has the legal authority to order the implementation of a self-executing remedy plan under the Telecommunication Act of 1996, with or without BellSouth's consent. By enacting the Federal Telecommunications Act of 1996, Congress mandated the opening of local telecommunications markets to competition. Specifically, ILECs like BellSouth are obligated, among other things, "to provide, to any requesting telecommunications carrier for the provision of a telecommunications service,

nondiscriminatory access to network elements on an unbundled basis. . .” (47 U.S.C. §251(c)(3)). The Commission has oversight authority to ensure that ILECs, including BellSouth, provide nondiscriminatory access to their OSS pursuant to Section 251. As the Pennsylvania Commission found “[t]his Commission’s implementation of performance measures and standards is a legitimate exercise of the Commission’s authority to ensure that BA-PA fulfills its Section 251 obligations.” *Joint Petition of NEXTLINK Pennsylvania, Inc., RCN Telecommunications Services of Pennsylvania, Inc., Hyperion Telecommunications, Inc., ATX Telecommunications, Focal Communications Corporation of Pennsylvania, Inc., CTSI, Inc., MCI WorldCom, e.spire Communications, and AT&T Communications of Pennsylvania, Inc., for an Order Establishing Performance Standards, Remedies, and Operations Support Systems Testing for Bell Atlantic-Pennsylvania, Inc.*, Opinion and Order, Docket No. P-00991643, December 31, 1999. (Pennsylvania Order) The Florida Commission has the authority to enforce Section 251 and adoption of a self-executing remedies plan is simply an enforcement technique.

Because the Commission’s authority to establish performance measures, standard and self-executing remedies is based on authority delegated to it by the Act, under the Supremacy Clause, any contrary Florida law would not preclude adoption of such a plan. In *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 112 F. Supp. 2d 1286 (N.D.Fl., 2000), the United States District Court, Northern District of Florida, rejected the proposition that this Commission has no authority to arbitrate a request for a performance measurement plan.

[I]f a compensation mechanism were truly required by the Telecommunications Act and could be adopted in some form without imposing on the Florida Commission an unconstitutional burden, see *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L.Ed. 2<sup>nd</sup> 914, (1997), then any contrary Florida law

obviously would not preclude adoption of such a provision. Under the Supremacy Clause, see U.S. Const. Art. VI, the Telecommunications Act, not any contrary Florida law, is the supreme law of the land.

112 F. Supp. at 1298. Further, this Commission has recognized its authority to implement such policies on a generic basis rather than in individual arbitrations. Order No. PSC-99-1078-PCO-TP, issued May 26, 1999. *See also In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommincations Act of 1996*, Docket No. 99-00430, Interim Order of Arbitration Award, p. 12 (Aug. 11, 2000)(TRA concludes it has authority to arbitrate enforcement mechanisms).

BellSouth has taken the position that the Commission does not have the authority to require BellSouth to implement a self-executing remedies plan, and therefore the only plan the Commission may adopt is BellSouth's plan. BellSouth essentially is saying "my way or the highway." BellSouth opines that the plan should go into effect after it is given relief pursuant to section 271 of the Act. Because the Commission is charged with ensuring nondiscriminatory treatment pursuant to Section 251, the Commission can and must require BellSouth to implement a self-effectuating remedy plan now, not just when BellSouth meets the criteria for Section 271 approval. ALECs are entering the market now and need immediate relief if there is nondiscriminatory treatment rather than waiting up to a year to resolve complaints for enforcement of interconnection agreements.

This Commission cannot be forced to accept BellSouth's plan. The Act gives the Commission the authority to decide what the best plan should be and the Commission should act now to require BellSouth to implement the best self-effectuating remedies plan. As the Georgia Public Service Commission noted:

[A]voiding backsliding is only one of the purposes served by a remedies plan. By delaying adoption of a penalty plan until BellSouth enters the long distance market, the Commission would forego the opportunity to enable more rapid development of competition . . . . An appropriate penalty plan will further encourage BellSouth to provide nondiscriminatory service during the critical early stages of competition, while providing some compensation to CLECs for additional costs they incur when BellSouth's performance falls short. *In re: Performance Measurements for Telecommunications Interconnection, Unbundling and Resale*, Docket No. 7892-U, Order, p.22 (Oct. 3, 2000) This Commission should follow the same course.

**ISSUE 4b:** With BellSouth's consent?

**ALEC COALITION:** See response to Issue 4(a)

**ISSUE 4c:** Without BellSouth's consent?

**ALEC COALITION:** See response to Issue 4(a)

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

**ALEC COALITION:** \*\* Yes. Posted performance data and reports are the main means available to ALECs' to ensure that BellSouth is complying with designated performance standards and providing parity service to ALECs and also a means by which ALECs can identify issues regarding BellSouth's performance that need to be addressed. \*\*

Discussed under Issue 6(b).

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

**ALEC COALITION:** \*\* BellSouth should be liable for payments of \$5,000 a day for each report not posted by the due date. BellSouth's payment amount should be based upon the date the latest report is delivered to an ALEC, and should be paid into a state fund by the 15<sup>th</sup> day after the latest report is filed. \*\*

Discussed under Issue 6(b).

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

**ALEC COALITION:** \*\* Yes. The posting of incomplete or inaccurate performance data and reports by BellSouth prevents ALEC and the Commission from

obtaining an accurate picture of BellSouth's performance to ALECs and disrupts the self-executing nature of the remedy plan by creating the possibility of protracted litigation over remedies. \*\*

Discussed under Issue 6(b).

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

**ALEC COALITION:** \*\* BellSouth should pay \$1,000 a day for each day past the original due date that complete and accurate data or reports are not posted. BellSouth's payment should be based upon the latest report delivered to an ALEC, and should be paid into a state fund by the 15<sup>th</sup> day after the latest report is filed. \*\*

BellSouth contends that it will make every effort to post reports by the due date, but that it should not be subject an automatic penalty for the late posting of reports because there is little evidence that late is reporting is harmful to ALECs or the Commission. (Tr. 256) Similarly, BellSouth asserts that it should not be subject to automatic penalties for posting incomplete or inaccurate reports because applying a penalty, once an error has been corrected or a report has been completed would discourage such corrections, even if they were appropriate. (Tr. 258) BellSouth is wrong.

One of the key functions of an effective remedy plan is to motivate an ILEC to provide parity service to ALECs. (Tr. 1013) BellSouth's posted performance data and reports are the most effect means available to ALECs' and this Commission to ensure that BellSouth is complying with designated performance standards and providing parity service to ALECs as required by the Act. BellSouth's posted performance data and reports are also the best means by which ALECs can identify issues regarding BellSouth's systems, processes and performance that need to be addressed. If this information is not provided to ALECs by the due date, or is incomplete or inaccurate

when provided, the ability of the ALECs and the Commission to determine if BellSouth is providing parity service is hindered. Moreover, problems that affect an ALECs ability to service its customers cannot be detected or corrected in a timely manner.

Additionally, all parties agree that the self-effectuating nature of an enforcement mechanism is essential to its success. However, the self-executing nature of the remedy plan will likely be compromised if BellSouth does not meet its obligation to post performance data and reports by the due date. ALECs should not be put in the position of having to approach the Commission to force BellSouth to provide performance data and reports as required in the enforcement plan. Therefore, BellSouth should be required to comply with all reporting deadlines ordered by the Commission.

The \$5000 and \$1000 amounts included in the ALEC plan represent the amounts that the ALECs think are necessary to motivate BellSouth to comply with its reporting obligations. It is critical, however, that the Commission set penalty amounts for late, inaccurate, and incomplete posting of reports and data are sufficient to motivate BellSouth to comply with its reporting obligations. Otherwise, the self-enforcing mechanism of the remedy plan will be hampered, because neither ALECs, nor the Commission, will be able to properly monitor BellSouth's performance.

Mr. Coon's suggestion that BellSouth would be willing to accept the \$2000 a day for late posting of reports and \$400 a day for the incomplete or inaccurate posting or reports and performance data in Staff's proposal, so long as it applies to the aggregate of all reports, is ridiculous. (Tr. 257, 259) The purpose of this penalty is to motivate BellSouth to meet its performance reporting obligations, not to find an amount that BellSouth is comfortable with paying as a cost of doing business. Common sense



suggests that in order to affect behavior, any consequence must be set at a level that the party does not wish to pay, otherwise the desired result will not be achieved. Thus, penalties of \$2000 and \$400 a day for the aggregate of late reports, and inaccurate or incomplete reports or performance data, which BellSouth is apparently willing to pay, would not be adequate to motivate BellSouth to meet its performance reporting obligations.

Consequently, any penalty amount this Commission orders BellSouth to pay for late reporting should be assessed for each individual report that is not posted by the required due date. Other states have adopted these additional consequences to help ensure the smooth operation of their performance measurements plan, this Commission do so as well. (Tr. 1006)

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

**POSITION:** STIPULATED

**ISSUE 8:** When should the Performance Assessment Plan become effective?

**ALEC COALITION:** \*\* The Performance Assessment Plan should be effectively immediately in order to ensure that BellSouth is providing ALECs parity service as required by Sections 251 and 252 of the Act. Immediate implementation will also allow the Commission to measure BellSouth's compliance prior to ruling on BellSouth's 271 application. \*\*

A well-developed remedies plan serves several important purposes. First, it promotes the initial development of competition by providing the incentive for BellSouth to allow nondiscriminatory access to its network required by Section 251 of the Act. (Tr. 949-50) The ability to offer customers at least the same level of service that they would receive from BellSouth is critical to ALEC efforts to attract and retain customers. Second, once competition develops, self-enforcing penalties help to guarantee that

BellSouth will continue to provide ALEC customers with the same quality service it provides to its retail customers. (Tr. 950-51) Third, where BellSouth does provide discriminatory or non-parity service to ALEC customers, penalties are paid to ALECs to partially defray the additional costs attributable to inferior service provided by BellSouth. These costs include additional internal costs to resolve problems attributable to BellSouth's sub-par performance, in addition to credits given to customers to keep the customers' good will when service problems arise.<sup>2</sup> (Exh. 10 Bursh Deposition 11-13) Fourth, uncovering discriminatory service may lead to the discovery of underlying problems in BellSouth's systems and/or procedures. Once such problems are identified, penalties provide the incentive for BellSouth to address them head-on rather than to simply implement quick, short term fixes. Fifth, rather than waiting for problems to be discovered, the prospect of remedies for discriminatory performance will provide an incentive for BellSouth to take proactive steps to avoid providing poor quality performance to ALECs. Finally, adverse consequences for discriminatory behavior will discourage backsliding once BellSouth has attained approval to enter the inter-LATA market.

The varied purposes served by a remedies plan make it essential to institute such a plan as soon as possible. (Tr. 1009) Other state commissions have recognized that the enforcement plans should be implemented prior to an ILEC receiving 271 approval. In its November 3, 1999 *Opinion and Order* in Docket No. P-00991643, the Pennsylvania Public Utility Commission (Pennsylvania PUC) stated, "*[t]his Commission's implementation of performance measures and standards is a legitimate exercise of the*

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<sup>2</sup> Of course, low quality service and repeated service problems causes harm to a ALEC's

*Commission's authority to ensure that BA-PA fulfills its Section 251 obligations."*  
Pennsylvania Order at 11. (Emphasis added).

Consistent with its understanding that performance measures and standards are a necessary to ensure that an ILEC fulfill its Section 251 obligations, the Pennsylvania PUC rejected Bell Atlantic-Pennsylvania Inc.'s (BA-PA) position that the performances measures and remedies adopted should become effective when BA-PA is able to provide inter-LATA telecommunications service. The Pennsylvania PUC stated: "Consistent with our determination set forth ... below, we shall *implement the performance measures and standards immediately*, unless otherwise explicitly specified, consistent with this Opinion and Order . . . ." *Id. at 33.*

BellSouth maintains that remedies should only be adopted to prevent backsliding once BellSouth has entered the long distance market. (Tr. 542) Yet avoiding backsliding is only one of the purposes served by a remedies plan. As Ms. Cox acknowledged at the hearing, BellSouth has the obligation to provide parity service to ALECs under Section 251 whether or not BellSouth applies for 271 relief. (Tr. 561) Ms. Cox further acknowledged that nothing in the Act prohibits this Commission from implementing an enforcement plan to ensure that BellSouth complies with its obligations to provide parity service under Sections 251 and 252 of the Act. (Tr. 561) In fact both the Georgia and Louisiana Commissions directed that their enforcement plans would be effective prior to BellSouth receiving approval to offer interLATA service. (Tr. 563, 596)

By delaying adoption of a penalty plan until BellSouth enters the long distance market, the Commission would forego the opportunity to enable more rapid development  

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reputation in ways that cannot be repaired through monetary sanctions.

of competition. As evidenced by the testimony of e.spire, Mpower, and Covad, many ALECs are currently experiencing problems with the quality of service they are receiving from BellSouth. (Tr. 730-35, 783-86, 811-814) These problems make it more difficult for ALECs to attract and retain customers. An appropriate penalty plan will encourage BellSouth to provide nondiscriminatory service during the critical early stages of competition, while providing some compensation to ALECs for the additional costs they incur when BellSouth's performance falls short.

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

**ALEC COALITION:** \*\* Because the sub-measures proposed by the ALEC Coalition monitor key areas of ALEC and BellSouth activity, all sub-measures are included in Tier 1 and Tier 2 of the ALEC enforcement plan. The appropriate performance standards for the sub-measures are set forth in Exhibit KK-2 attached to Karen Kinard's direct testimony. \*\*

See Discussion of Issue 2a above.

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

**ALEC COALITION:** \*\* Root cause analysis is a useful for identifying the source of a continuing failure to provide parity of service, and should be required for any measure that fails twice in any 3 consecutive months in a calendar year. It should be required by the terms of the Performance Assessment Plan.

A "root cause analysis" is an investigation of all component activities related to the delivery of a service to an ALEC identified as being inferior. (Tr. 261) BellSouth argues that the Performance Assessment Plan adopted by the Commission should not impose a requirement that BellSouth conduct a root cause analysis of a continuing source of disparity. (Tr. 261) BellSouth contends that the enforcement feature of the plan should provide an incentive sufficient to lead BellSouth to correct the problem.

BellSouth also contends that the structured, formalized process of a root cause analysis is inconsistent with the “self-effectuating” design of a PAP.

In a sense, there are some similarities between BellSouth’s position and that of the ALEC Coalition. Like BellSouth, the ALEC Coalition believes it is imperative that the self-effectuating nature of the PAP not be disrupted. Specifically, the ALEC Coalition believes the conducting of a root cause analysis should not interfere with the timely payments called for by a BellSouth failure. (Tr.1008)

One significant point of departure between BellSouth and the ALEC Coalition lies simply in the fact that the ALEC Coalition disagrees that including a “root cause analysis” provision would necessarily interfere with the other mechanisms of the plan. The ALEC Coalition believes that such a requirement can coexist with the self-effectuating payment plan. More fundamentally, however, the parties disagree over the basic role of the Performance Assessment Plan. Where a source of disparity is deemed to be systemic and the prejudice to the ALEC Coalition is continuing in nature, is the role of the plan simply to require BellSouth to pay penalties? Or should the plan incorporate a mechanism that would require BellSouth to search for the cause of the disparity and root it out? It is ironic that BellSouth, who accused the ALEC Coalition of being interested primarily in constructing a plan that would become a revenue - producing device, argues against a provision that would identify the source of the disparity, require that it be rectified, and in the process turn off the penalty payments. The ALEC Coalition wants parity of service. The Commission’s regulatory tools should be designed to lead to parity of service. Penalty payments constitute one means to that end; the requirement that BellSouth perform a root cause analysis and remedy the source of an ongoing disparity is

another that should be applied where indicated. The ALEC Coalition believes such a requirement is consistent with the role of the plan and the requirements of the 1996 Act.

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

**ALEC COALITION:** \*\* For parity sub-measures, remedies are paid if the difference between BellSouth's performance for itself or affiliates and an ALEC exceeds the gap specified in the ALEC remedy plan. When a benchmark is the performance standard, a performance failure occurs if the calculated performance is not equal to or greater than the benchmark. \*\*

Discussed under Issue 11(c).

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

**ALEC COALITION:** \*\* The term "parity" refers to absolute equality of service. \*\*

Discussed under Issue 11(c).

**ISSUE 11c:** What is the appropriate structure?

1. What is the appropriate statistical methodology?
2. What is the appropriate parameter delta, if any?
3. What is the appropriate remedy calculation?
4. What is the appropriate benchmark table for small sample sizes?
5. Should there be a floor on the balancing critical value?

**ALEC COALITION:** \*\*

1. The statistical methodology the ALECs recommend is the modified z statistic.
2. The ALECs propose that this Commission adopt 0.25 or less as the parameter delta value for all sub-measures in Tier 1 and Tier 2.
3. The value of the modified z statistic is compared with a pre-specified negative number, called the critical value. The ALEC plan uses "balancing" to determine the critical value. The parameter delta defines the degree of violation of parity that the probability of Type II error is balanced against the probability of Type I error under parity.

4. For small sample sizes, 30 or fewer observations in either of the data sets to be compared, permutation analysis is used to compute the score.

5. The ALEC Plan does not require a floor. \*\*

The passage of the 1996 Act places BellSouth in the unique position of being the main supplier and the main competitor of ALECs in Florida. As such, BellSouth currently has the incentive to maintain its existing monopoly by delivering lower quality service to ALEC customers than it provides to its own retail customers. (Tr. 1012) Thus, in order to ensure that competition develops in the local exchange market and continues to flourish over time, this Commission must adopt a meaningful system of self-enforcing consequences to deter BellSouth from providing ALECs and their customers with discriminatory service and encourage BellSouth to correct performance deficiencies when they are detected. (Tr. 1012)

#### **Characteristics of an Effective Remedies Plan**

The object of an effective remedies plan is to ensure that BellSouth is providing the same level of service to ALEC customers that it provides to BellSouth retail customers. (Tr. 1013) The FCC has identified five key characteristics of an effective enforcement plan:

- a reasonable structure that is designed to detect and sanction poor performance when it occurs;
- clearly articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance;
- potential liability that provides a meaningful and significant incentive to comply with the designated performance standards;

- a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and
- reasonable assurances that the reported data is accurate.

BA NY Order ¶ 433. As discussed in more detail below, the remedy plan proposed by the ALEC Coalition meets each of the FCC's requirements, while BellSouth's SEEM does not. (Tr. 990)

#### **ALEC Joint Performance Incentive Plan**

The Performance Incentive Plan (PIP) proposed by the ALECs embraces all of the characteristics identified by the FCC as key to an effective remedy plan. (Tr. 1015) The ALECs recommend that the Commission adopt a plan with a two tiered structure that measures: (1) the quality of support delivered to each individual ALEC (Tier 1), and (2) the quality of support delivered to the ALEC industry as a whole (Tier 2). (Tr. 954) For Tier 1 violations, BellSouth would pay remedies directly to the affected ALEC. For Tier 2 violations, BellSouth would make payment directly to a governmental agency, to protect the public interest. (Tr. 957) Under the ALEC PIP, the dollar value of Tier 1 and Tier 2 remedies depends on the severity of the violation. (Tr. 962)

All measures proposed by ALECs in the performance measurement plan are included in the proposed remedies plan. (Tr. 956) ALECs believe that all of the measures they have proposed are necessary in order to cover all of the areas upon which ALECs must depend on BellSouth in providing service to their customers. (Tr. 955) Moreover, if a measure is deemed important enough to be included in the performance measurement plan, then logically the plan must provide the incentive for BellSouth to meet the applicable analog or benchmark by including the measure in the remedies plan. (Ex. 10 Bursh Deposition 9)



A performance measurements plan must include an appropriate statistical methodology to determine whether BellSouth is providing ALEC customers with service at parity to the service it provides to its retail customers. ALECs recommend the use of the modified z score as the appropriate statistical methodology. The modified z score is used to evaluate parity measures with retail analogs. (Tr. 1064) Where there is no retail analog to the service provided to ALECs, a benchmark has been established. No statistical methodology is required for benchmark measures. BellSouth either passes or fails the benchmark. (Tr. 964) However, the ALECs recognize that in some instances the number of transactions (e.g., in a particular geographic area) may be small. In those situations, BellSouth could have a harder task to meet the benchmark. Thus, for benchmark measures with small sample sizes, the ALECs remedy plan allows adjustments to be made when the size of the data set is small. (See Benchmark Adjustment Table, Exh. 25, CLB-2) In either case, the monetary consequences increase with the severity of the violation.

Increasing penalties as the severity of the violation increases is appropriate because the more severe the violation, the more disruption and inconvenience experienced by ALECs and their customers. For example, if BellSouth misses a deadline by days instead of hours, it should expect the consequences to be greater because the effect on ALECs and consumers likely will be much greater. A customer may forgive a few hours delay in meeting a deadline despite being aggravated, but if deadlines slip by several days, that customer may experience business losses and may decide not to switch providers at all. In addition, increasing the consequences as severity increases will encourage BellSouth to provide the best service possible even if BellSouth recognizes

that it will not meet a certain measure within a given month. If the consequence for a “big miss” is the same as a “small miss,” BellSouth may be tempted to write off certain measures once it realizes they will not be met for the month.

Under the ALECs’ remedy plan, Tier 1 violations would be assessed on a monthly basis and penalties for noncompliant performance would be paid directly to the ALEC that received the degraded service. (Tr. 961-62) The ALEC plan addresses chronic performance failures by increasing the monthly penalty payment to the rate assessed for severe violations (\$25,000) beginning in the third month that a particular submeasure is violated. This additional payment would continue monthly until BellSouth complied with that measure. One month of compliant service resets the clock. (Tr. 965) Chronic failures may indicate a serious problem. Providing the additional incentive to address such problems is in the best interest of ALECs and their customers.

Payments for Tier 2 violations are paid to a state-designated fund, such as the State Treasury. If the difference in any given month between BellSouth’s performance for itself or affiliates and that which it provides to the aggregate of ALECs exceeds the gap specified in the ALEC plan. (Tr. 968) Penalties for Tier 2 violations also would increase depending on severity, with parameters defined for those violations that are market impacting and those designated as market damaging or market constraining. The amount of consequences as a function of severity is accomplished by use of a quadratic function. (Tr. 968-69)

In addition, a factor “n” would be applied as a multiplier to the basic penalty amount. The factor “n” corresponds to the number of ALEC served lines in Florida. The value of “n” would decrease as the ALEC market penetration increases. (Tr. 971) Thus,

the plan is devised to encourage BellSouth to open its market by reducing its exposure to penalties as it does so.

**BellSouth's Plan Fails to Provide a Meaningful and Significant Incentive to Comply With the Designated Performance Standards**

The most basic attribute of an effective remedies plan is that the remedies must be significant enough to provide incentive for BellSouth to comply. (Tr. 951) This means that remedies must not only be sufficient for each individual violation, but also the remedies must be scaled according to the size of the local market. (Tr. 951) Further, remedies should escalate and even accelerate with respect to the duration and magnitude of the poor performance. (Tr. 952) The size of the penalties must be significant enough to make it more cost effective for BellSouth to provide nondiscriminatory service than to provide a degraded level of service to ALECs to avoid competition. (Tr. 951) BellSouth's plan fails to provide a meaningful incentive to assure compliant performance.

First, SEEM determines remedy amounts on a transaction basis that is inappropriate given the present small volume of ALEC transactions. (Tr. 994) Second, BellSouth's SEEM remedy calculation uses a factor that reduces the number of transactions to which penalties apply without justification. (Tr. 991) Third, SEEM uses an inappropriate calculation methodology to further eliminate transactions subject to remedies. (Tr. 991) Fourth, the Fee Schedule in SEEM does not adequately reflect the potential cost to an ALEC of BellSouth's discriminatory performance. (Tr. 994) Finally, SEEM includes an absolute cap that does not provide sufficient incentive for BellSouth to provide parity service. All of these factors detract from BellSouth's incentive to provide ALECs and their customers with nondiscriminatory service.

### **Remedies Should Not Accrue On A Transaction Basis**

As an initial matter, accruing remedies on a r transaction basis as set forth in SEEM minimizes BellSouth's liability because a significant number of ALECs are currently at an embryonic level of activity. (Tr. 994) Mr. Coon of BellSouth admits in his rebuttal testimony that BellSouth's plan would result in lower penalties where ALECs have very few transactions. Thus, BellSouth will incur few penalties until the volume of ALEC transactions increases. (Tr. 334) BellSouth's proposal leaves ALECs in a Catch-22 situation. To get the level of support required from BellSouth, a remedy plan must be put in place to provide a real incentive to BellSouth to provide parity service. However, under BellSouth's proposal, the consequences for poor performance that would supply that incentive would not reach meaningful levels until ALECs had a stronger hold in the market. (Tr. 334)

Currently, BellSouth does not allow ALECs a full and fair opportunity to compete, resulting in transaction volumes that are virtually insignificant. Basing penalties on these low volumes would not generate sufficient remedies to motivate compliant behavior by BellSouth. (Tr. 994) Consequently, a transaction based plan will not generate sufficient remedies to motivate compliant behavior by BellSouth. As proposed by the ALECs, therefore, remedies should accrue on a per measure basis. In a measures based plan, remedies accrue at the level in which the comparisons are made (i.e. at the measure/sub-measure level). Thus, the remedy amount is a direct function of the departure of BellSouth's performance from parity. (Tr. 994)

A measure-based plan as proposed by the ALECs generates more remedies as the severity of the discriminatory performance increases. Consequently, at a time when

ALECs are struggling to get into market, a measure based plan, rather than the transaction based plan in SEEM, would be more effective in motivating compliant performance on the part of BellSouth. If the consequences are inadequate, then discriminatory support from BellSouth could suppress an ALEC's market entry. (Tr. 995)

Under the remedy calculation methodology used in SEEM, even though BellSouth's plan is transaction based, BellSouth does not pay remedies on all transactions where a violation of the performance standard occurs. Through the remedy calculation contained in SEEM, BellSouth systematically limits its potential liability by reducing the number of transactions for which BellSouth will be subject to remedies. (Tr. 991)

**BellSouth's Plan Uses a Factor That Inappropriately Reduces BellSouth's Liability**

The final remedy payout in BellSouth's SEEM is based on a subset of failed transactions, called the "affected volume." The affected volume computed in SEEM equals the product of two factors: a fraction referred to as the "volume proportion" and the number of transactions, representing violations, from cells having negative z-scores. As a component of the SEEM, the remedy calculation uses a factor, a slope of  $\frac{1}{4}$ , that inappropriately reduces BellSouth's liability. Use of this factor, which is used for even gross violations of parity, results in BellSouth paying only a fraction of the maximum penalty amount. (Tr. 991) In other words, the volume of transactions to which remedies would be applied is reduced. There exist no substantiated reason for BellSouth to use a slope of  $\frac{1}{4}$  to reduce the transactions that are subject to remedies. (Tr. 991)

The "affected volume" is further reduced given that the remedy calculation methodology used in SEEM determines violations at the aggregate level and applies remedies at the disaggregated level, which is biased toward BellSouth. (Tr.991)

Therefore, the SEEM calculation methodology improperly excludes failed transactions from the cells with positive z scores, even though these cells have already contributed to the aggregate z. (Tr. 991) In other words, BellSouth will use some failed transaction in making the compliance determination, but neglect to use these same failed transactions in determining the remedy amount. The result is that BellSouth will make smaller payments than if the volume proportion, which is calculated from the state aggregate-z, is applied to all cells. Therefore, BellSouth will only pay remedies on a small fraction of the transactions where it has violated the designated performance standards. (Tr. 991)

The very example BellSouth provided to illustrate its remedies calculation methodology clearly shows that under SEEM, BellSouth is allowed to escape paying remedies for a large number of ALEC transactions where BellSouth is in violation of the performance standard. (Exh. 6, DAC-6, Section B, p. 4) Mr. Coon testified that the example accurately reflect what could happen using BellSouth's remedy calculation methodology. (Tr. 498) In BellSouth's example, there are a total of 96 ALEC transactions where Bellsouth missed the required performance standard. BellSouth, however, would only be required to pay remedies on 29 of the 96 transactions.

Thus, the example shows that the use of the SEEM remedy calculation methodology could result in BellSouth not paying remedies on a significant number of transactions where BellSouth violated the performance standard. A remedy calculation that produces such a result will not incent BellSouth to provide ALECs with parity service, or to open its market to local competition as envisioned and required by the Act.

The ALECs, have consistently taken the position that the remedy calculation methodology in SEEM inappropriately limits BellSouth's liability and that SEEM is not

the appropriate plan for this Commission to adopt in order to ensure that BellSouth complies with its obligation to provide ALECs with parity service. (Tr. 1010) ALECs continue to believe that the ALEC PIP, which is measure based and contains an appropriate remedy calculation methodology, is the appropriate plan for this Commission to adopt. Should the Commission, however, decline to adopt the ALEC PIP in its entirety, at the very least the Commission should adopt the remedy calculation methodology proposed by the ALECs. The ALECs remedy calculation is a simple quadratic function that is fair to all parties. (Ex. 25 Bursh Deposition 80; Tr. 962-63)

Moreover, even if the Commission desired to use the truncated-z test statistic to determine compliance, it could use a remedy calculation other than that proposed by BellSouth. (Tr. 1122) Even Dr. Taylor, BellSouth own witness, could find no theoretical fault with the ALEC remedy calculation, and agreed that it could be used along with the truncated-z. (Exh. 7, Taylor Deposition, p. 32-34) In fact, BellSouth's own witness Dr. Taylor testified:

...[w]hat I guess this is based on is the idea that the quadratic by itself is theoretically okay. I mean it floats upward and, you know, that's roughly right, but it doesn't have in it and where it's wrong in the ALEC's plan as proposed is that it doesn't take into account the difference in strategic value of different measures that are embodied in the proposed penalty levels in the BellSouth table. So, if you can get that element into a per measure or a measure-based compromised plan, then you've got the best parts of those worlds . . . .

(Exh. 7, Taylor Deposition, p. 34)

BellSouth's SEEM proposal is inconsistent with the FCC's requirement that a remedies plan provide for potential liability that is a meaningful and significant incentive to an ILEC to meet designated performance standards. Although there are many areas in which SEEM is inadequate to protect ALEC interest, the SEEM remedy calculation is

particular offensive to all notions of fairness. Thus, even if the Commission does not adopt the ALEC PIP entirely, it should adopt the ALEC proposed remedy calculation.

**BellSouth's Plan Is Not Structured To Adequately Detect and Sanction Poor Performance**

The very structure of BellSouth's remedies plan is inadequate to detect and sanction poor performance. The plan is based upon an inadequate set of measures and a questionable methodology, imposes an absolute cap, fails to disaggregate results appropriately, and requires sustained levels of poor performance before remedies are invoked.

SEEM also attempts to avoid the imposition of consequences by imposing artificial timing requirements before penalties apply. For example, SEEM would permit a pattern of Tier 2 violations so long as they were timed so as not to occur for three consecutive months. Under BellSouth's proposal it could miss two months, be compliant for one month and avoid Tier 2 sanctions. (Tr. 47-78) Linking Tier 2 remedies to three consecutive months of reporting, as opposed to monthly reporting, needlessly delays self-enforcement of consequences for violations of the performance requirements affecting not just one ALEC, but also the entire industry. The Staff and ALEC's proposal that Tier 2 remedies be calculated on a monthly basis is appropriate.

As discussed above, BellSouth inappropriately excludes many SQM measures from its remedy plan. The narrow scope of measures for which penalties would be assessed would result in critical support areas not being monitored or subject to remedies. (Tr. 996) The only alternative for ALECs who are experiencing poor performance on an area BellSouth does not include in its remedies plan would be to bring an action before the Commission. (Tr. 551) Such an action could at best correct BellSouth's performance



prospectively, providing no compensation to the ALEC for the harm it has suffered, and the uncertainties of litigation mean that the threat of such actions would provide little incentive for BellSouth to avoid them. The narrow scope of BellSouth's plan violates FCC guidance that a remedies plan be structured to detect and sanction poor performance.

For these reasons alone, SEEM cannot and will not adequately detect and sanction poor performance by BellSouth. In addition, as discussed below, BellSouth's proposed methodology to analyze performance data would result in underreporting of discriminatory treatment of ALECs.

**The Commission Should Adopt The ALECs' Approach To Determining Whether BellSouth Is Providing Parity Performance**

Merely reporting averages of performance measurements alone, without further analysis, does not indicate whether differences in performance results for ALEC customers versus a retail analog reflect actual discrimination or simply random variation. Once appropriate measures and comparison samples have been established, statistical tests compare the size of observed differences with the amount that could be expected to occur by chance under conditions of true parity of service. These comparisons help to determine quantitatively whether BellSouth has provided nondiscriminatory treatment to ALECs for measures with a retail analog. (Tr. 1062)

The ALECs recommend use of the modified  $z$  statistic. The ALEC statistical procedure for testing whether BellSouth is providing parity service to ALECs has three primary steps: (1) determination of a test statistic " $z$ "; (2) determination of a critical value " $c$ "; and (3) comparison of the test statistic  $z$  to the critical value  $c$  to determine whether the service provided is discriminatory. (Exh. 27 RMB-1) When the  $z$ -value exceeds the

agreed upon critical value  $c$ , BellSouth has provided non-parity performance. (Tr. 1064-65)

For small sample sizes (30 or fewer observations in either of the data sets to be compared), permutation analysis is used to compute the  $z$  score. Permutation analysis is a computer-intensive method that compares the observed results for the ALEC customers with the distribution of results that would be observed if ALEC had been drawn at random from the pool of ALEC and BellSouth customers. (Exh. 25 RMB-2; Tr. 1064-65)

**The Commission Should Adopt the ALEC Proposal As the Method For Generating the Test Statistic For Assessing Remedies**

Although the parties agree to use the modified  $z$  score to determine the test statistic for each sub-measure, they differ in regard to the method for generating the test statistic that will be used to determine whether BellSouth is providing parity service. ALECs recommend the use of the modified  $z$  scores calculated for each sub-measure to determine for each sub-measure whether BellSouth has provided parity performance. The New York and Texas Commissions have adopted the modified  $z$  test for determining compliance. (Exh. 10, Bursh Deposition, p. 56-57)

BellSouth, however, after calculating the modified  $z$  score for each sub-measure, proposes the additional step of aggregating the individual test statistics for a group of sub-measures into one overall statistic-- the truncated  $z$  score. (Tr. 1085) That one test statistic would be compared to the critical value to make a parity determination. ALEC's have no theoretical objection to the truncated- $z$ . As Dr. Bell explained, however, if dissimilar things are aggregated, the use of truncated  $z$  can mask discriminatory performance. (Tr. 1085)

Based upon BellSouth's inappropriate aggregation of different products, the ALECs propose that the Commission adopt the use of the modified z score for making parity determinations at the sub-measure level.

**The Parameter Delta Proposed by BellSouth Will Not Adequately Protect Against Discrimination**

As discussed above, the critical value  $c$  is the value that determines whether BellSouth is providing nondiscriminatory service. (Tr. 1066) Ideally, this is the value that would yield a balance between the possibility that the data would indicate discrimination where it did not exist (Type 1 error) and the possibility that a random error would be made it appear that there was no discrimination when, in fact, there was non-parity performance (Type 2 error). (Tr. 1068) This "balancing critical value," which computes an appropriate critical value, however, cannot be completely developed until the value of the parameter delta is determined. (Tr. 1069) BellSouth wants a large delta because this means a smaller Type 1 error and hence, larger Type 2 errors for all degrees of violations. The ALECs have proposed a smaller delta value because ALECs believe it is important to be able to detect a small *but meaningful* degree of violation, if it occurs. (Tr. 1072) Resolution of the appropriate parameter delta cannot be based solely on a technical analysis. Ideally, this decision should be based on business judgment, namely by consideration of how large a violation of parity must be before it is "important." The parameter delta measures the size of the violation. (Tr. 1071)

The ALECs propose that this Commission adopt .25 as the parameter delta value. (Tr. 1072) BellSouth, on the other hand, proposed a delta equal to 1.0 for Tier 1 measures and .50 for Tier 2 measures. (Tr. 270, 278) The differences when applying the

proposed values are dramatic. (Tr. 1073) Therefore, it is extremely important that the Commission select the right value.

BellSouth's delta is absolutely unacceptable because of the great disparity that is allowed exist between the number of ALEC customers and BellSouth customers receiving the same quality service. The Table contained in Dr. Bell's testimony demonstrates the impact on ALEC customers if the parameter delta value is set at .25, .50 and 1.0, is reproduced below. (Tr. 1073, 1081) Even from a cursory review of the Table, it is readily apparent that setting the delta parameter at 1.0 and .50 does not come close to requiring BellSouth to provide ALECs with parity service, but rather allows BellSouth to unreasonably discriminate against ALECs and their customers without any consequences.

For example, consider a measure where 1% of BellSouth's customers are receiving an unacceptable quality of service. Using a delta parameter of 1.0 means that the disparity in service being provided to ALEC customers would not be material until 31.9% of the ALEC customers are receiving an unacceptable quality of service. Accordingly, it is not until 31.9% of ALEC customers are receiving inferior service that BellSouth is even determined not to be in compliance with applicable performance standards. (Tr. 1073)

Likewise, a delta value of 1.0 implies that if BellSouth takes 5 days to provide a specific service to its customers, BellSouth could take up to ten days to provide the ALEC customer with the same service before it is determined to have committed a material violation. (Tr. 1080-81)

By contrast, setting the delta value at .25 as proposed by AT&T is clearly more reasonable. While a delta value of .25 still allows BellSouth to miss twice as many

appointments for ALEC customers than for BellSouth's customers before a determination of non-compliance is made, it better protects the interests of ALECs and their customers, the Florida consumers. Setting the parameter delta value at a level that allows BellSouth to provide 31.9% of ALEC customers with inferior service, when it provides only 1% of its customers with inferior service, and take five days longer to provide ALECs with a service than it does its own customers, even for six months, would cripple the development of competition in Florida and could drive some ALECs out of business.

Moreover, setting the parameter delta values at 1.0 and .50 is clearly inconsistent with enforcing BellSouth's obligation to provide ALECs with parity service under Sections 251 and 252 of the Act. Setting a parameter delta value which allows BellSouth to escape any consequences until its providing nearly nine times the number of ALEC customers with as poor a level of performance as its own customers does nothing to incent BellSouth to open its market to local competition or to ensure that ALEC's have a fair and equal opportunity to compete for and serve customers.

BellSouth has arbitrarily proposed the delta parameters of 1.0 and .50. (Tr. 270, 278). On the other hand, ALECS have produced compelling evidence of the negative impact BellSouth's proposed delta values will have on ALECs and their customers. In its ITC^DeltaCom/BellSouth arbitration Order, the Tennessee Regulatory Authority adopted a delta value of .25. That order is now the basis of the generic performance measures proceeding in Tennessee. (Ex. 10 Bursh Deposition 54-55) ALECS urge this Commission to also adopt a delta parameter no greater than .25. While the adoption of .25 does not result in a situation where BellSouth is providing ALEC customers with absolute parity

service, the result yielded is far more reasonable than if the parameter delta value is set at 1.0 and .50 or at .50 and .35 as set forth in the Staff's proposal.

Based on the above and the work of Dr. Bell, ALECs propose that this Commission order (1) the modified z the test statistic used in the decision rule for determining when remedies should be invoked, (2) the ALEC remedy calculation and (3) a parameter delta value of 0.25.

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

**ALEC COALITION:** \*\* The same business rules used in Tier 1 apply to aggregate data of the individual ALECs under Tier 2, except that a different consequence threshold is used. \*\*

See discussion of Issue 11a

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

**ALEC COALITION:** \*\* See discussion of Issue 11b \*\*

**ISSUE 12c:** What is the appropriate structure?

1. What is the appropriate statistical methodology?
2. What is the appropriate parameter delta, if any?
3. What is the appropriate remedy calculation?
4. What is the appropriate benchmark table for small sample sizes?
5. Should there be a floor on the balancing critical value?

**ALEC COALITION:** \*\*

1. See 11c.
2. See 11c.
3. The Tier 2 remedy calculation includes a factor "n" in the calculation that is based upon ALEC market penetration levels. The value of "n" decreases as the number of ALEC served lines increases, resulting

results in Tier 2 payments decreasing as ALEC market penetration increases.

4. See 11c.

5. See 11c.\*\*

See discussion of Issue 11c

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

**ALEC COALITION:** \*\* BellSouth should be required to make payment for Tier 1 and Tier 2 noncompliance by the 15th business day following the due date of the data and the reports upon which the remedies are based. Payments should be made in the form of a check. \*\*

BellSouth should be required to pay all remedies owed by on or before the 15<sup>th</sup> business day following the due date of the reported performance results upon which consequences are based. (Tr. 1006) BellSouth proposal to sixty days, to provide the ALECs with checks is absolutely unreasonable. (Tr. 280) BellSouth offers no explanation for needing such an extended period of time to process a simple check. Consequently, the Commission should reject BellSouth's proposal out of hand.

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

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

#### **POSITION STIPULATED**

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

**ALEC COALITION:** \*\* Yes. If BellSouth fails to make payment by the 15<sup>th</sup> business day following the due date of the data and reports that the payment is based upon, BellSouth should be liable for accrued interest for every day that the payment is late. Interest should be calculated in the same manner as the late payment for Tier 1 measures.

See discussion following Issue 16

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

**ALEC COALITION:** \*\* When an ALEC and Bellsouth are unable to reach a mutually agreeable settlement pertaining to the amount of remedies owed by Bellsouth the Commission should settle the dispute. \*\*

The ALECs generally agree with the process outlined in Section 4.6.4 of the FPSC Staff's proposal. (Exh. 13, PWS-1) ALECs believe, however, that the Commission should define precisely what expenses are encompassed in "administrative costs" so that ALECs can properly determine whether to pursue a claim for remedies with BellSouth. Moreover, ALECs believe that they should have the right to pursue relief from the Commission within the context of the remedy plan should they be unable to satisfactorily resolve a remedies dispute with BellSouth. The Staff's Proposal leaves the final determination of whether additional remedies are owed to BellSouth. Because BellSouth has an incentive to pay as little as possible in remedies, is a party to the dispute, and could cause potential exposure to ALECs resulting from an unsuccessful remedies dispute, it is inappropriate for BellSouth to control the outcome of the process.

Consequently, when an ALEC and BellSouth are unable to reach a mutually agreeable settlement pertaining to the amount of remedies owed by Bellsouth, the Commission should settle the dispute.

**ISSUE 17:** What is the appropriate mechanism for ensuring that all penalties under Tier 1 and Tier 2 Enforcement Mechanisms have been paid and accounted for?

**ALEC COALITION:** \*\* The Commission should have an independent auditing and accounting firm certify, on a random basis, that all the penalties under Tier I and Tier II Enforcement Mechanisms are properly and accurately assessed and paid in accordance with Generally Accepted Accounting Principles. \*\*



The ALECs believe that in order to provide BellSouth with a continuing incentive to meet designated performance standards, the Commission should have an independent auditing and accounting firm certify, on a random basis, that all penalties under Tier I and Tier II are properly and accurately assessed and paid in accordance with Generally Accepted Accounting Principles. (Tr. 980) Simply providing for an annual audit as proposed by BellSouth and Staff is insufficient. If BellSouth is not accurately determining and paying penalties, given the circumstances some ALECs are in currently, having to wait twelve months for validation of BellSouth's remedy payments could have devastating consequences. Consequently, the Commission should order random audits to ensure the accuracy of BellSouth's penalty payments.

**ISSUE 18:** What limitation of liability, if any, should be applicable to BellSouth?

**ALEC COALITION:** \*\* ALECs do not support an absolute limitation on BellSouth's liability. Rather, ALEC's propose a procedural cap that, when reached, would allow BellSouth to seek regulatory review of the remedy payments that are due. \*\*

See discussion following Issue 21

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

See discussion following Issue 21

**ALEC COALITION:** \*\* ALECs support a "procedural cap" that, when reached, allows BellSouth to seek regulatory review of the remedy payments that are due. BellSouth would continue to make payments into a designated account until the Commission decides if BellSouth has presented sufficient justification for not paying remedies in excess of the procedural cap. \*\*

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

**ALEC COALITION:** \*\* The 39% procedural cap in the Strawman Proposal is reasonable. \*\*

See discussion following Issue 21

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

**ALEC COALITION:** \*\* BellSouth would have the burden of showing, by clear and convincing evidence, that the remedies due in excess of the procedural cap are unwarranted. The Commission would then decide whether and to what extent the amount in excess of the procedural cap should be paid out. \*\*

See discussion following Issue 21

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

**ALEC COALITION:** \*\* The procedural cap should apply on a rolling twelve-month basis for the life of the enforcement plan. \*\*

BellSouth proposes an absolute cap on its potential liability of 36% of its Florida revenue. (Tr. 285) ALECs believe that an absolute cap is inappropriate for several reasons. First, an absolute cap represents a limit on BellSouth's liability for providing non-compliant service to ALECs. An absolute cap provides BellSouth with the means to evaluate the cost of market share retention through the delivery of non-compliant performance. Second, absolute caps send the signal that once BellSouth's performance deteriorates to a particular level (i.e. reaching the absolute cap) then further deterioration in performance is irrelevant. (Tr. 992-93) Mr. Coon admitted that once the absolute cap is reached, BellSouth would not pay any additional remedies even though it continues to provide ALECs with non-compliant performance. (Tr. 286).

Therefore, if BellSouth were to reach the absolute cap within the first eight months of a year, it would pay no remedies for the remaining four months despite continued deterioration in its performance. (Exh. 6, Coon Deposition, p. 109) Consequently, once BellSouth reaches the absolute cap it no longer has any incentive to

correct its non-compliant performance. With an absolute cap on liability, BellSouth's liability is limited no matter how severe the discriminatory performance may become. (Tr. 992) As discussed above, remedies must be significant enough to make it more beneficial to BellSouth to provide nondiscriminatory service than to pay penalties for non-compliance. While other states such as New York and Texas have adopted caps of 36%, the FCC and the New York Commission recently determined that the 36% cap was insufficient. (Tr. 286)

Thus, the ALECs recommend that this Commission reject BellSouth's proposed absolute cap, and instead adopt the procedural cap of 39% proposed by the Florida Staff and ALECs. This procedural cap is reasonable based on the guidance from the FCC, adjusted for the probability of detection of discriminatory behavior, and the experience in New York where an increase in the cap was required. By establishing a procedural cap in this range, the Commission will remove any incentive for BellSouth to take advantage of potential economic benefits of providing ALECs with discriminatory service.

If the Commission does adopt a procedural cap, however, BellSouth should be required to continue making remedy payments into an interest-bearing registry or escrow account. Of course, the object of a self-executing remedies plan is to avoid coming to the Commission to resolve disputes about poor performance. Self-executing remedies remove the delays and expense of pursuing litigation. As the FCC stated, an effective enforcement plan shall "have a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal." BA NY Order ¶ 433. Therefore, a procedural cap, if adopted, must be set sufficiently high so as not to negate the benefits of self-executing remedies. (Tr. 975)

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

**ALEC COALITION:** \*\* Yes. The Tier 2 remedy calculation in the ALEC Plan includes a factor “n” in the calculation. The value of “n” is based on ALEC market penetration levels and decreases as the number of ALEC served lines increases. Thus, as ALEC market penetration increases, Tier II payments decrease. \*\*

The inclusion of a Market Penetration Adjustment in the remedy plan adopted by the Commission is essential. At present, BellSouth has a strong business incentive and the means to maintain its current monopolies through the delivery of inadequate levels of operational support to ALECs. If the consequences for providing such discriminatory service are inadequate, then BellSouth will be able to hinder an ALEC’s ability to enter the local market. Low ALEC penetration in the local market can be a good indication that market suppression behaviors are occurring. (Tr. 994-95)

Therefore, the Tier II remedy calculation in the ALEC plan includes a factor “n” in the calculation. The Table below illustrates how the market penetration adjustment is determined:

**Tier II – Determining “n”**

Lines provided to CLECs	Value of “n”
more than or equal to 40% less than 50%	1
more than or equal to 30% less than 40%	2
more than or equal to 20% less than 30%	4
more than or equal to 10% less than 20%	6
more than or equal to 5% less than 10%	8
0% to less than 5%	10

As shown in the Table the value of “n” depends upon the openness of the local market to competition. (Tr. 971) In other words, “n” is based on ALEC market penetration levels. The value of “n” decreases as the number of ALEC served lines increases. This results in Tier II payments decreasing as the ALEC market penetration increases.

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

**ALEC COALITION:** \*\* Yes, if a transaction-based plan is used. Payments on a transaction basis will be too small to incent BellSouth not to discriminate. As a result, nascent services and ALECs in an embryonic stage would be negatively affected. A market penetration adjustment is necessary to address this inadequacy. \*\*

Given the present state of competition, payments on a per transaction basis will be too small to provide an incentive to BellSouth to behave in a nondiscriminatory manner. As a result, nascent services or embryonic ALECs would be most negatively affected by a transaction-based plan. In an attempt to address this inadequacy, some type of adjustment is necessary. A competitive volume entry adjustment attempts to compensate for the inadequate remedies generated by a transaction-based plan such as SEEM. (Tr. 966)

Conversely, even though the transaction volumes for embryonic ALECs and nascent services are very low, because the ALECs’ PIP is a measure-based plan, it will generate sufficient remedies to motivate compliant behavior by BellSouth without the necessity of a competitive entry volume adjustment. (Tr. 966)

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

**ALEC COALITION:** \*\* Yes. Periodic third-party audits should be required. The audit should cover all reporting procedures and reportable data and should include all systems, processes and procedures associated with the production and reporting of performance measurement results. \*\*

Comprehensive annual audits of reporting methodology and accuracy of data are required. In addition, BellSouth's adherence to metric change control policies should be reviewed, because the lack of follow-through on such policies would thwart the replication of past metric reports. The audit should cover all reporting procedures and reportable data and should include all systems, processes and procedures associated with the production and reporting of performance measurement results. (Tr. 152)

Periodic audits need to be addressed at a state level rather than at the regional level as BellSouth advocates. (Tr. 290) First, many of BellSouth's processes, such as provisioning, repair, and collocation, are handled at the state level. Second, BellSouth states that the Commission should be involved in determining the scope of audit but that would prove difficult for the Commission to implement on a regional basis. (Tr. 164)

A thorough audit process by a neutral third party will allow the ALECs and the Commission to verify that BellSouth is providing accurate data and is appropriately incurring the consequences of the remedies plan adopted by this Commission.

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

**ALEC COALITION:** \*\* A comprehensive audit should be conducted every twelve months, with the first such audit commencing twelve months after the conclusion of the KPMG OSS Test's metric replication. The audit scope should be determined in an audit process that is open to ALECs. \*\*

There is little dispute on this issue. BellSouth is willing to agree to annual audits for the next five years, if the Commission or an ALEC (pursuant to an audit contract provision) so requests. The audits are appropriate and should be required.

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

**ALEC COALITION:** \*\* BellSouth is the dominant market provider with the incentive and ability to discriminate. To ensure that BellSouth's reporting is accurate and triggers remedies designed to curb its incentives to discriminate, comprehensive annual audits are critical. Costs for these annual audits should be borne by BellSouth. \*\*

BellSouth is the dominant market provider with the incentive and ability to discriminate. To ensure that BellSouth's reporting is accurate and triggers remedies designed to curb its incentives to discriminate, comprehensive annual audits are critical. (Tr. 153) Audits are an integral part of a performance measurements plan designed to ensure BellSouth's compliance with the Telecommunications Act of 1996. (Tr. 165) The FCC's order approving Verizon's 271 application to enter the New York long distance market noted that an important characteristic of Verizon's Amended Performance Plan was "reasonable assurances that the reported data is accurate." *In re: Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in New York*, CC Docket No. 99-295, Memorandum Opinion and Order ¶ 433 (rel. Dec. 22, 1999). This assurance should come at the incumbent's expense. (Tr. 153) Although BellSouth states that the audits and testing conducted in Georgia and Florida for the third-party tests satisfy the "reasonable assurance" characteristic of the FCC order, the third-party test is based upon interim measures rather than the permanent measures established in this proceeding. (Tr. 347) Also, the third-party test is expected to conclude this year. Accordingly, BellSouth should be required to bear the costs of the annual audits.

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

**ALEC COALITION:**       \*\* BellSouth and the ALECs should jointly select the third-party auditor. If the parties cannot agree on the auditor, the Commission should determine the auditor. \*\*

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

**ALEC COALITION:**       \*\* Yes, under such circumstances, the ALEC should be allowed, upon written request, to have a mini-audit performed on the specific measure/sub-measure. After thirty days, the ALEC may begin the mini-audit upon providing BellSouth five business days advance written notice.\*\*

When an ALEC has reason to believe the data collected for a measure are flawed or the report criteria for the measure are not being adhered to, in addition to an annual audit, the ALEC should have the right to have a mini-audit performed on the particular measure or sub-measure in question upon written request, including e-mail. (Tr. 153, 154) If after thirty days of the ALEC request, the ALEC believes the issue has not been resolved, the ALEC should be able to begin the mini-audit upon providing BellSouth five business days advance written notice. Each ALEC would be limited to auditing three single measures/sub-measures or one domain area during the audit year. The audit year would be with the start of the OSS test or an annual audit and could be tested for months including and subsequent to the month in which the KPMG OSS test or annual audit was performed. ALECs could not request mini-audits while the OSS third-party test or annual audit was being conducted. (Tr. 154)

Mini-audits would include all systems, processes and procedures associated with the production and reporting of performance measurements results for the audited measure/sub-measure. Mini-audits would include two months of data. (Tr. 154) Currently, most raw data supporting the performance measurement results will be



available monthly to ALECs. (Tr. 291, 292) BellSouth, however, should be required to provide the raw data upon which all of its performance reports are based. Although BellSouth provides raw data for some measurements, it does not provide it for others, such as LNP. Other times, BellSouth provides raw data but not in a manner that allows for meaningful use by the ALECs. In other instances, BellSouth provides raw data but it is flawed and cannot be used to evaluate BellSouth's performance reports. (Tr. 156) Access to raw data, however, does not obviate the need for mini-audits. For example, if an ALEC believes that BellSouth's method of capturing data is flawed, access to corrupt rate data is of no use. The only way to resolve the problem is through an audit. (Tr. 166)

Although BellSouth is concerned about the number of mini-audits that potentially could be conducted, the ALECs propose that no more than three mini-audits would be conducted simultaneously. (Tr. 154, 324, 325) If more than one ALEC wanted the same measure/sub-measure to be reviewed, it could be audited at the same time and count as one mini-audit. Mini-audits would be conducted by a neutral third-party as described in Issue 26. BellSouth would pay for fifty percent of the costs, and the other fifty percent would be divided among ALECs requesting the mini-audit unless BellSouth is found to be materially misreporting or misrepresenting data or to have non-compliant procedures. In such instances, BellSouth should be required to pay for the entire cost of the third-party auditor. BellSouth should be found to be materially at fault if a reported successful measure changed as a consequence of the audit to a missed measure or if there was a change from an ordinary missed measure to intermediate or severe. Each party to the mini-audit should bear its own internal costs, regardless of the outcome of the mini-audit. (Tr. 155)

If it is found during a mini-audit that BellSouth is materially at fault for more than thirty-percent of the measures in a major service category, the entire service category should be re-audited at BellSouth's expense. (Tr. 155) The major service categories are:

- Pre-Ordering/Ordering
- Billing
- Provisioning - POTS and UNE Loop and Port Combinations
- Provisioning - Resale Specials and UNE Loop and Port Combinations
- Provisioning - Unbundled Network Elements
- Maintenance - POTS and UNE Loop and Port Combinations
- Maintenance - Resale Specials and UNE Loop and Port Combinations
- Maintenance - Unbundled Network Elements
- Interconnection Trunks
- Local Number Portability
- Database - 911
- Database - Directory Assistance
- Database - NXX
- Collocation
- Coordinated Conversions

Each mini-audit should be submitted to the ALEC involved and to the Commission on a confidential basis. BellSouth should notify all ALECs of any request for a mini-audit when the request is made. (Tr. 156)

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

**ALEC COALITION:** \*\* Yes, in most cases an unbiased third-party would be the best choice as an auditor, although there may be cases in which the ALECs and BellSouth could jointly review certain metric reporting issues with Commission oversight. \*\*

On this point the parties do not disagree. BellSouth acknowledges that if mini audits are permitted, they should be conducted by an independent third party.

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

**ALEC COALITION:** \*\* Yes. Performance measurement data and source data should be retained for 18 months or as required to audit BellSouth's performance. \*\*

BellSouth and the ALECs agree that the performance measurement data and source data should be retained for 18 months. The ALECs position differs slightly from BellSouth's in that retention should be for 18 months or as required to audit BellSouth's performance, in the unlikely event that an audit exceeds 18 months.

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

**ALEC COALITION:** \*\* The affiliate reporting should include all affiliates that purchase wholesale services from BellSouth. The term "affiliate" should be defined pursuant to Section 3(1) of the Telecommunications Act. \*\*

Affiliate reporting should include all affiliates that purchase wholesale services from BellSouth. The term "affiliate" should be defined pursuant to Section 3(1) of the Telecommunications Act:

AFFILIATE – The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent. (47. U.S.C. 153(1))

The Pennsylvania Public Utilities Commission ordered such affiliate reporting in its December 31, 1999 performance standards and remedies order.

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

**ALEC COALITION:** \*\* Yes. BellSouth should report monthly affiliate activity related to PAP, including all affiliates that buy interconnection or unbundled network elements or that resell BellSouth's services. Information should be reported separately by each affiliate with activity in the metric category. The number of affiliate observations should be reported to the Commission. \*\*

BellSouth should be required to provide affiliate data on a monthly basis for the metrics the Commission adopts in this proceeding. The Act requires BellSouth to provide interconnection with its network "that is at least equal in quality to that provided

by [BellSouth] to itself or to any subsidiary, affiliate, or any other party to which [BellSouth] provides interconnection.” Section 251(c)(2)(C). The FCC has interpreted this to requirement to mean that the quality of a UNE and the quality of access to the UNE that an ILEC provides to a requesting carrier must be the same for all requesting carriers. *See* 51 C.F.R. § 311(a). Moreover, the FCC has confirmed that for Section 271 purposes, a Bell Operating Company must establish that for functions that it provides ALECs that are analogous to the functions it provides itself, the BOC must provide access that is substantially the same as the level of access the BOC provides to itself, its customers or its affiliates. *In re: Application by Bell Atlantic New York for Authorization Under Section 271 of the Communication Act to Provide In-Region, InterLATA Service in New York*, CC Docket No. 99-295, Memorandum Opinion and Order (rel. Dec. 22, 1999), ¶ 44.

The affiliate information should be reported separately by each affiliate (data, wireless, future long distance, or other) with activity in the metric category. (Tr. 157) BellSouth should include all affiliates that buy interconnection or unbundled elements or that resell BellSouth’s services. BellSouth states that the only current BellSouth affiliate that could potentially be relevant is BellSouth’s ALEC, which is the only affiliate that could provide local exchange services. (Tr. 555) Other BellSouth affiliates, however, can be relevant to the analysis. The Commission should require all BellSouth affiliates, which would include any future BellSouth long distance affiliate, that buy or sell services similar to those purchased by ALECs to be included to ensure BellSouth is not being given more favorable treatment than BellSouth’s combined local and long distance competitors. (Tr. 166) BellSouth may exclude the number of affiliate observations

from data reported to individual ALECs but not in data reported to the Commission. (Tr. 157)

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

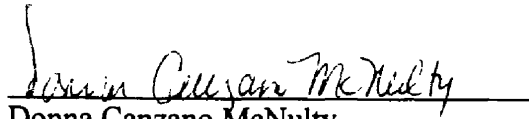
1. Measurement reporting?
2. Tier 1 compliance?
3. Tier 2 compliance?

**ALEC COALITION:** \*\* Data should be reported for several months before deciding whether to give up set benchmarks for parity comparisons with ALECs. If BellSouth's affiliate is deemed in a future collaborative as an appropriate retail analog, ALECs may either adopt a standard of parity with the affiliate or use an existing benchmark. \*\*

The ALECs propose that data should be reported for several months before a decision is made on giving up set benchmarks for parity comparisons with the ALEC. BellSouth's affiliates may have different service delivery plans or not have enough activity yet to make it an appropriate and dependable analog for parity comparisons. If the affiliate is deemed in a future collaborative as an appropriate retail analog, ALECs may choose either to adopt a standard of parity with the affiliate or choose to use an existing benchmark, perhaps updated periodically based on historical affiliate treatment during the study period. (Tr. 158)

BellSouth proposes that its affiliate's data should be included in aggregate ALEC data used to determine performance for purposes of the enforcement mechanism. (Tr. 546) To include BellSouth's affiliate's data with other ALECs' data, however, could potentially improve BellSouth's overall performance, thus enabling BellSouth to benefit from discriminatory treatment. (Tr. 170, 574-75) Because BellSouth's affiliates provide a powerful means to mask discrimination, the ALECs strongly disagree with BellSouth's contention that tying BellSouth-affiliate performance to the PAP is not needed. The

treatment received by BellSouth affiliates is a critical aspect of any performance plan established by the Commission to proactively monitor for discrimination and to assess penalties for non-compliance. (Tr. 171)



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## CERTIFICATE OF SERVICE

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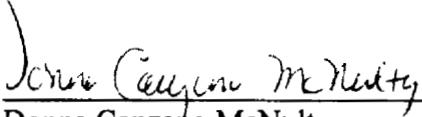
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