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September 21, 2001

Mrs. Bianca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
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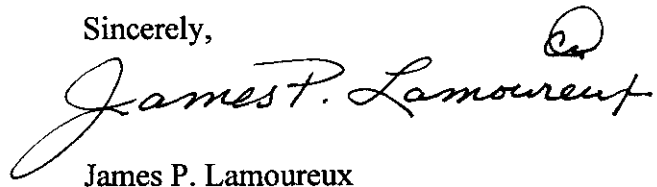
Dear Mrs. Bayo:

RE: **Docket No. 960786-TL**  
A

Enclosed please find the original and 15 copies of the Motion for Commission Reconsideration of Pre-Hearing Officer's September 11, 2001, Order on Motions to Strike and Remove Certain Testimony from Hearing Track. Please stamp the extra copy provided and return for our files.

Thank you and please contact the undersigned if there are any questions regarding this matter.

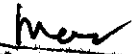
Sincerely,

  
James P. Lamoureux

Enclosures

cc: Parties of Record

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Consideration of BellSouth Telecommunications, )  
Inc.'s entry into interLATA services pursuant to ) Docket No. 960786-TL  
Section 271 of the Federal Telecommunications )  
Act of 1996 ) Filed: September 21, 2001

**MOTION FOR COMMISSION RECONSIDERATION OF PRE-HEARING  
OFFICER'S SEPTEMBER 11, 2001, ORDER ON MOTIONS TO STRIKE  
AND REMOVE CERTAIN TESTIMONY FROM HEARING TRACK**

Pursuant to Rule 25-22.0376, Florida Administrative Code, AT&T Communications of the Southern States, Inc.; AT&T Broadband Phone of Florida, LLC; TCG South Florida, Inc.; Covad Communications, Inc.; KMC Telecom, Inc.; NuVox Communications, Inc.; and XO Florida, Inc. (collectively "Joint ALECs") move for Commission reconsideration of the Pre-hearing Officer's September 11, 2001, Order on Motions to Strike and Remove Certain Testimony from Hearing Track. The Pre-hearing Officer's decision overlooks the need for this Commission to resolve critical factual disputes regarding BellSouth Telecommunications Inc.'s ("BellSouth's") compliance with Section 271 of the federal Telecommunication Act of 1996's ("Act's") fourteen point checklist. *See* 47 U.S.C. § 271(c)(2)(B).<sup>1</sup> In evaluating Section 271 applications, the Federal Communications Commission ("FCC") relies on the states "to resolve

<sup>1</sup> The purpose of a motion for reconsideration is to point out some matter of law or fact which has been overlooked. *See Diamond Cab. Co. of Miami v. King*, 146 So. 2d 889 (Fla. 1962). *See also, Pingree v. Quaintance*, 394 So. 2d 161 (Fla. 1st DCA 1981); *Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335 (Fla. 1966).

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factual disputes whenever possible.”<sup>2</sup> Contrary to the role that Florida is required to play in any BellSouth Section 271 application to the FCC, the Pre-hearing Officer apparently<sup>3</sup> determined that the Commission need not hear evidence concerning the real world experiences of several ALECs attempting to compete in Florida. The Pre-hearing Officer also determined that testimony relating to the integrity of the self-reported performance measures data BellSouth produces is not appropriate for consideration in a Section 271 hearing. Instead, the Pre-hearing Officer has relegated such information to the non-hearing, third-party test track of this proceeding, in which no specific provision has been made for any such evidence to be reviewed by the third party tester, to be heard by the Commission or to be subjected to the rigors of a hearing. By itself, without consideration of the real world experiences of the ALECs, the third-party test will not provide the information necessary to establish whether BellSouth is actually using its operational support systems (“OSS”) in such a way as to provide ALECs with non-discriminatory access to all of the items in the fourteen point checklist.

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<sup>2</sup> See *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communication Act to Provide In-Region, InterLATA Service in the State of New York* (“*Bell Atlantic New York Order*”) ¶ 51, 15 FCC Rcd. 3953 (F.C.C. Dec. 22, 1999) (No. CC99-295, FCC 99-404).

<sup>3</sup> The conclusion of the Pre-hearing Officer is described as “apparent,” because, while agreeing that the Commission should hear the testimony from NuVox as to its “real world” experience concerning BellSouth’s compliance with a particular checklist item, the Pre-hearing Officer nonetheless struck the testimony of every other ALEC who presented similar testimony addressing their own real world experiences with BellSouth as to various specific checklist items. Consistent application of the premise of the Pre-hearing Officer that the Commission should hear testimony as to the real world experiences of the ALECs, the Pre-hearing Officer should have allowed *all* ALECs to present testimony and be heard on the subject of their real world experiences with BellSouth.

**I. THE PRE-HEARING OFFICER'S DECISION REMOVING TESTIMONY FROM THE HEARING TRACK WILL INHIBIT THIS COMMISSION'S ABILITY TO RESOLVE FACTUAL DISPUTES NECESSARY TO A SECTION 271 DETERMINATION**

On September 11, 2001, the Pre-hearing Officer issued an order granting requests from BellSouth and the Staff to remove certain testimony from the hearing track of this docket, in effect eliminating the prospect of a hearing on those issues and substantially truncating the scope of what will be heard by the Commission in a hearing.<sup>4</sup> The Pre-hearing Officer struck some of this testimony on grounds that it addressed OSS issues that are covered by the OSS testing. The Pre-hearing Officer stated that this testimony could be filed as comments in the OSS testing phase of the docket.<sup>5</sup> The Pre-hearing Officer struck other testimony on grounds that it set forth company-specific complaints that were not appropriate for resolution in this proceeding.<sup>6</sup> There are several errors of fact and law in the Pre-hearing Officer's decision that warrant reconsideration.

First, to the extent that the Pre-hearing Officer believed any of the testimony addressed by this motion pertains to individual ALEC complaints, this belief in no way renders such information irrelevant to a hearing in this proceeding.<sup>7</sup> The Staff and the Pre-hearing Officer

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<sup>4</sup> See *Order on Motions to Strike and Removing Certain Testimony from Hearing Track*, Order No. PSC-01-1830-PCO-TL, Docket No. 960786-TL (Sept. 11, 2001).

<sup>5</sup> See *id.* at 7.

<sup>6</sup> See *id.* at 6.

<sup>7</sup> As a preliminary matter, neither the Staff or the Hearing Officer identified specifically why they believed each portion of testimony that was struck should be eliminated from being heard by the Commission. It is not clear what testimony the Pre-hearing officer struck because it allegedly relates to third party testing and what testimony they struck because it allegedly relates to individual ALEC complaints.

appear to be confusing the remedies and outcomes of a complaint proceeding and the evidence that the Commission should consider in this proceeding. Joint ALECs agree that the Commission would not have the authority in this proceeding to effect resolution of any complaint concerning a particular failure on BellSouth's part with respect to a specific ALEC. However, the lack of such remedies in this proceeding should not preclude the Commission from hearing the evidence of these real world failures on BellSouth's part to comply with specific checklist items as to specific ALECs.

Second, as to testimony that the Pre-hearing Officer struck because he found it "OSS related", his decision reflects a fundamental mistake as to what is being evaluated in the third part test and the role state commissions must play in Section 271 determinations. If not reconsidered and modified, the Pre-hearing Officer's decision will prevent this Commission from obtaining the full evidentiary record and resolving the factual disputes which the FCC relies on state commissions to resolve. The determination of whether a Regional Bell Operating Company ("RBOC") meets the Section 271 checklist is a "contextual decision based on the totality of the circumstances . . . ." <sup>8</sup> When it considers BellSouth's application, the FCC will consider performance measures data and anecdotal evidence from ALECs, as well as evidence from the third-party test. <sup>9</sup> Moreover, the FCC has acknowledged that actual commercial usage information is the most probative of whether a Bell Operating Company is providing nondiscriminatory access. <sup>10</sup> The FCC "will look to the state to resolve factual disputes whenever

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<sup>8</sup> *Bell Atlantic New York Order* ¶ 60.

<sup>9</sup> *See id.* at ¶¶ 50, 53, 89.

<sup>10</sup> *Bell Atlantic New York Order* ¶¶ 53 & 89.

possible.”<sup>11</sup> Absent the acceptance of testimony in the hearing track of this docket related to ALECs’ factual disputes regarding whether BellSouth *actually* is complying with checklist items in the marketplace, this Commission will be unable to make recommendations on the factual disputes that will be brought to the attention of the FCC.

The Pre-hearing Officer thus erred in assigning consideration of such evidence to the non-hearing track of this proceeding. While KPMG will gather aggregate BellSouth performance data as part of the third part test, there is no provision for KPMG to solicit evidence from ALECs regarding how BellSouth *actually* performs with respect to specific checklist items and as to specific ALECs. More fundamentally, there is no provision for the Commission itself to hear such evidence or for such evidence to be subject to the necessary rigors of a hearing. Joint ALECs do not believe the purpose of the Commission’s decision to conduct a third party test was ever intended to delegate to KPMG the Commission’s responsibility for gathering such information and fulfilling its consultative role in the Section 271 process.<sup>12</sup>

In 1997, in connection with this Commission’s consideration of BellSouth’s compliance with checklist item 4 for purposes of Section 271 approval, ALECs alleged BellSouth was not providing provisioning intervals that were at parity with those BellSouth provided to itself.<sup>13</sup> The Commission determined BellSouth met the checklist requirement despite the ALEC

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<sup>11</sup> *Id.* at ¶ 51.

<sup>12</sup> Joint ALECs suggest that such a delegation would be inappropriate in any event.

<sup>13</sup> *See* Petition filed Pursuant to Section 271 (C) of the Telecommunications Act of 1996 and Proposed Agency Action Order on Statement of Generally Available Terms and Conditions, *In re Consideration of BellSouth Telecommunications, Inc.’s entry into InterLATA services pursuant to Section 271 of the Federal Telecommunications Act of 1996*, Order No. PSC-97-1459-FOF-TL, Docket No. 960786-TL (Nov. 19, 1997) at 119.

allegations of discriminatory treatment because “there [was] no data to support [ALECs’] claim in the record.” *Id.* The testimony submitted by ALECs in this proceeding contains just such concrete data demonstrating BellSouth’s discriminatory treatment. It is unclear why the Commission would now refuse to hear such evidence.

Indeed, if the Pre-hearing Officer’s decision to strike most of the ALEC testimony stands, the Commission will be faced with the highly unusual prospect of having a hearing only on what BellSouth has promised on paper. The Commission will never actually hear the more salient evidence as to how BellSouth is actually performing with respect to its paper promises. The Commission will be left with an incomplete and largely hollow evidentiary record on which to rely in fulfilling its consultative role to the FCC. Moreover, it will be faced with an evidentiary record substantially less developed than the record in several other states, including Alabama, North Carolina, and South Carolina.

On the important issue of whether BellSouth meets the fourteen point checklist, the Commission should hear testimony from the ALECs that are attempting to obtain nondiscriminatory access to BellSouth’s network and should allow the ALECs to cross-examine BellSouth’s witnesses as to BellSouth’s assertions about its compliance. Such evidence will not be considered in the third-party test and will not be heard by the Commission in the non-hearing track of this proceeding. The real world experience of ALECs was properly presented in the hearing track of this docket to demonstrate to the Commission that BellSouth fails to provide nondiscriminatory treatment to ALECs in the marketplace. The evidence of discrimination is highly relevant to the issue of checklist compliance. BellSouth’s actual conduct and interaction with ALECs is highly probative evidence as to whether BellSouth can satisfy the requirements of

the Act. Indeed, BellSouth's conduct in providing the items in the Section 271 checklist is relevant to whether it provides nondiscriminatory access to those items.

**II. ALL OF THE TESTIMONY STRUCK BY THE PRE-HEARING OFFICER CONCERNS REAL WORLD EXPERIENCES OF ALECS IN FLORIDA WHICH THE COMMISSISON SHOULD HEAR IN ORDER TO FULFILL ITS CONSULTATIVE ROLE**

The testimony struck by the Pre-hearing Officer reveals BellSouth's discriminatory conduct. For example, the testimony of AT&T witness Denise Berger provides the Commission with examples of BellSouth's duplicate billing of AT&T customers after these customers switched local service providers from BellSouth to AT&T and ported their numbers.<sup>14</sup> The testimony contains facts and figures on how often this happens and why it happens. This marketplace problem can have significant negative impact on ALEC-customer relations and affect ALECs' ability to compete with BellSouth. Without Ms. Berger's testimony, the Commission could not fully evaluate whether BellSouth provides number portability as required by the checklist. Ms. Berger's testimony also addresses the significant problems AT&T has experienced in its attempt to provide its customers with predictable and reliable loop hot cuts.<sup>15</sup> Ms. Berger discusses BellSouth's failure to take the steps to provide reliable hot cuts in a timely manner and the impact of these delays on Florida consumers. This conduct and its impact on an ALECs' ability to compete will not be revealed by the third-party test report and will not be heard by the Commission in the non-hearing track of this proceeding.

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<sup>14</sup> See Rebuttal Testimony of Denise C. Berger, filed with the Florida Public Service Commission, Docket No. 960786-TL, July 20, 2001 at 24-35. This problem concerns BellSouth's compliance with checklist item 11, Issue 12.

<sup>15</sup> See *id.* at 4-12. These issues are relevant to BellSouth's compliance with checklist items 4 and 11.



Other AT&T witnesses' testimony detailing real world problems will also be excluded absent reconsideration. For example, AT&T's Steven Turner provides specific and detailed evidence supporting the problems ALECs have experienced in connection with ordering bundled services from BellSouth. In particular, Mr. Turner explains BellSouth's obligation to provide line splitting and the impact of BellSouth's failure to provide this service.<sup>16</sup> AT&T witness Bernadette Seigler describes the loss of service incidents suffered by newly migrated AT&T UNE-P customers; explains the principal cause of the loss of dial tone; and details BellSouth's response to the problem.<sup>17</sup> AT&T witness Judy Wheeler explains to the Commission the number porting process and the problems AT&T Broadband has experienced in providing service to its customers that are directly attributable to BellSouth.<sup>18</sup> Finally, the testimony of AT&T's Jay Bradbury addresses BellSouth's method of dealing with ALECs in the marketplace.<sup>19</sup> These real world issues reveal facts about BellSouth's conduct in the marketplace that are relevant to a Section 271 decision, but will not be fully explored absent submission of testimony and an opportunity for cross-examination.

Covad Communications, Inc.'s ("Covad") witness Colette Davis chronicles Covad's experience in attempting to secure access to unbundled loops from BellSouth and the numerous

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<sup>16</sup> See Rebuttal Testimony of Steven E. Turner, filed with Florida Public Service Commission, Docket No. 960786-TL, July 20, 2001 at 5-6.

<sup>17</sup> See Rebuttal Testimony of Bernadette Seigler, filed with Florida Public Service Commission, Docket No. 960786-TL, filed July 20, 2001 at 7-14.

<sup>18</sup> See Rebuttal Testimony of Judy Wheeler, filed with Florida Public Service Commission, Docket No. 960786-TL, filed July 20, 2001 at 7-21.

<sup>19</sup> See Rebuttal Testimony of Jay Bradbury, filed with Florida Public Service Commission, Docket No. 960786-TL, filed July 20, 2001 at 13-14.

discriminatory situations it has endured in attempting to do so. Specifically, Ms. Davis demonstrates that BellSouth fails to provide Covad with the same access to loops that it does for its retail customers.<sup>20</sup> In addition, Ms. Davis testifies that BellSouth does not appropriately provision loops to Covad and does not appropriately provide line sharing to Covad.<sup>21</sup> All of these issues impact Covad's ability to compete and should be heard by the Commission. Covad's testimony demonstrates that there is a factual dispute over whether BellSouth provides nondiscriminatory access to local loops. That dispute should be considered by the Commission in the hearing track.

KMC Telecom, Inc. ("KMC") presented testimony of two of its Florida City Directors, Messrs. Espin and Sfakianos, to show the significant problems KMC is experiencing in its attempt to provide KMC customers with predictable and reliable T-1 service and to explain to the Commission the consequences of these problems to KMC and Florida consumers.<sup>22</sup> These problems include: missed appointments, problems with loop installation practices, initial loop quality issues, post-installation loop outages, and repairing troubles. Further, Mr. Espin also relates how KMC previously filed a complaint with this Commission against BellSouth for past similarly deficient behavior.<sup>23</sup> In connection with that complaint, BellSouth admitted some

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<sup>20</sup> See Rebuttal Testimony of Colette Davis, filed with Florida Public Service Commission, Docket No. 960786-TL, filed July 20, 2001 at 4-5.

<sup>21</sup> See *id* at 9.

<sup>22</sup> See Rebuttal Testimony of Mario Espin, filed with Florida Public Service Commission, Docket No. 960786-TL, filed July 20, 2001 at 4-6 ("*Espin Testimony*") & Rebuttal Testimony of Jim Sfakianos, filed with Florida Public Service Commission, Docket No. 960786-TL, filed July 20, 2001 at 4-6 ("*Sfakianos Testimony*").

<sup>23</sup> See *Espin Testimony* at 3.

performance deficiencies and promised better performance in order to settle the action. These areas of testimony are important for this Commission to consider in gauging BellSouth's actual commercial performance in Florida and are being considered by other state Commissions and by the FCC.<sup>24</sup> Without this testimony, evidence of BellSouth's inadequacies in this area would likely be excluded from the record and from the Commission's consideration.

As part of its Section 271 burden, BellSouth must demonstrate that it is complying with the nondiscrimination requirements of the Act. Third-party tests alone will not reveal whether BellSouth engages in conduct to discriminate against ALECs. Evidence that BellSouth is engaging in a pattern of discrimination designed to undermine competition must be factored into the Commission's evaluation.

The Commission has recognized that testimony regarding real world ALEC experiences can be appropriate for the hearing docket. Indeed, the Commission has accepted the testimony of NuVox Communications, Inc. ("NuVox") witness Jerry Willis that demonstrates actual problems with the BellSouth-ALEC relationship.<sup>25</sup> Mr. Willis details that BellSouth has failed to appropriately provide interconnection and has failed to charge TELRIC-based rates. Mr. Willis' testimony highlights for the Commission that BellSouth is ignoring its contractual obligation to charge NuVox the rates the parties agreed upon in their interconnection agreement.<sup>26</sup> Instead, BellSouth is charging NuVox higher rates for interconnection trunks and facilities. This example

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<sup>24</sup> See, e.g., *Bell Atlantic New York Order* ¶¶ 8, 20, 34-36 and 293-295.

<sup>25</sup> See Rebuttal Testimony of Jerry Willis of NuVox Communication, filed with Florida Public Service Commission, Docket No. 960786-TL, filed July 20, 2001 at 5 ("*Willis Testimony*").

<sup>26</sup> See *id.* at 5.

shows the Commission that even if on paper BellSouth's contract might appear to support checklist compliance, NuVox's real world experience demonstrates BellSouth is not following that contract.

Like Mr. Willis' testimony, the Joint ALECs' testimony that the Pre-hearing Officer has excluded from the hearing track provides the Commission with important real world commercial usage information. This Commission should hear this testimony prior to evaluating whether BellSouth complies with the nondiscriminatory provisions of the Act.

### **III. BELLSOUTH'S ABILITY TO ACCURATELY REPORT ITS PERFORMANCE IS CRITICAL TO A DETERMINATION OF WHETHER BELLSOUTH COMPLIES WITH THE FOURTEEN POINT CHECKLIST**

The FCC encourages RBOCs to provide performance data in their Section 271 applications.<sup>27</sup> Because of the numerous problems ALECs have identified in BellSouth's reported performance data, ALECs believe that BellSouth cannot establish that its data is accurate and reliable. Among the testimony the Pre-hearing Officer has removed from the hearing track is the testimony demonstrating the problems BellSouth has reporting accurate data. *See, e.g.*, Testimony of Sharon Norris, Mary Campbell, Elina Padfield. The concerns ALECs have about the accuracy of BellSouth's data should be heard and evaluated by the Commission in a hearing format so that this Commission can resolve an important factual dispute: Is BellSouth's reported performance data accurate and reliable?

BellSouth witness Varner presented BellSouth's monthly state summary report for Florida for this Commission's consideration on August 20, 2001.<sup>28</sup> BellSouth contends that this

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<sup>27</sup> *See Bell Atlantic New York Order* ¶ 51.

<sup>28</sup> *See* Testimony of Alphonso Varner filed with Florida Public Service Commission, Docket No. 960786-TL, August 20, 2001.

data establishes that BellSouth offers nondiscriminatory access to the items in the Section 271 checklist. Ms. Norris' testimony demonstrates why this Commission cannot trust that data.<sup>29</sup> The errors, exclusions, and other data problems Ms. Norris discusses call into question the accuracy of all of BellSouth's self-reported data. Similarly, Ms. Campbell of NuVox Communications discusses how BellSouth's May 2001 reports are missing thousands of local service requests NuVox submitted to BellSouth.<sup>30</sup> Like Ms. Norris, Ms. Campbell reaches the conclusion that BellSouth's self-reported performance data is incomplete, inaccurate and unreliable.<sup>31</sup> XO's witness Elina Padfield reaches the same conclusions.<sup>32</sup> Ms. Padfield's testimony demonstrates, among other things, that data provided by BellSouth on local service requests and number portability, among other things, are inaccurate and unreliable.<sup>33</sup>

BellSouth will not rely solely on the third-party test when it files its application at the FCC. As it has done here, BellSouth will submit performance measures data. Indeed, BellSouth has told other commissions in its region that those commissions should make a decision based on the reported performance measures data.<sup>34</sup> The missing, inaccurate and unreliable data Joint

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<sup>29</sup> See Rebuttal Testimony of Sharon E. Norris filed with the Florida Public Service Commission, Docket No. 960786-TL, July 20, 2001 at 6.

<sup>30</sup> See Rebuttal Testimony of Mary H. Campbell of NuVox Communications, Docket No. 960786-TL, filed July 20, 2001, at 6.

<sup>31</sup> See *id.* at 6.

<sup>32</sup> See Rebuttal Testimony of XO Florida Witness Elina Padfield, Docket No. 960786-TL, filed July 20, 2001 at 4-5 ("*Padfield Testimony*").

<sup>33</sup> See *id.* at 6.

<sup>34</sup> See, e.g., *Hearing Transcript*, Testimony of Ronald M. Pate before the South Carolina Public Service Commission on August 23, 2001, Docket No. 960786-TL at 2660-2661.

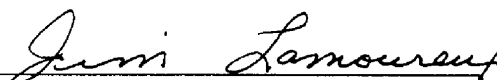
ALECs have documented, however, call into question all of the performance reports BellSouth has submitted in support its Section 271 application. BellSouth contends that the data is reliable. The Joint ALECs' testimony demonstrates that it is not. This Commission should resolve that factual dispute in the hearing track of this docket by receiving ALECs evidence and allowing cross-examination of BellSouth on the accuracy of its data.

### CONCLUSION

It is incumbent upon this Commission to consider allegations regarding whether BellSouth provides nondiscriminatory access to Section 271's checklist items and to resolve these factual disputes. In order to make these evaluations, it is essential that this Commission be provided a complete factual record from which to perform its analysis. The concerns raised by ALECs should not be relegated to the non-hearing track.

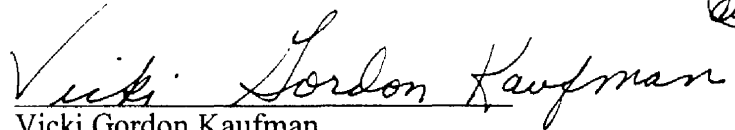
This Commission should hear the testimony regarding discriminatory and anticompetitive activity so it can determine whether BellSouth discriminates in providing the checklist items in the marketplace. These are the issues raised by the Joint ALECs' testimony that the Pre-hearing Officer has excluded from this proceeding. These issues should not be excluded; they are critical to this Commission's ability to make a Section 271 determination. Accordingly, this Commission should reconsider the Pre-hearing Officer's decision and should include in the hearing in this proceeding all of the Joint ALECs' testimony filed by the ALECs.

Respectfully submitted,




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**CERTIFICATE OF SERVICE**

**DOCKET NO. 960786-TL**

I HEREBY CERTIFY that a copy of the foregoing has been furnished via U.S.

Mail this day 21st of September, 2001, to the following parties of record:

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