Legal Department

J. PHILLIP CARVER
General Attorney

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404)335-0710

July 31, 1997

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

RE: Docket No. 960786-TL

Dear Mrs. Bayo:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Rebuttal Testimony of Alphonso J. Varner, Gloria Calhoun, W. Keith Milner, William N. Stacy, and Robert C. Scheye. We ask that this be filed in the captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served on the parties shown on the attached Certificate of Service.

Sincerely,

J. Phillip Carver

J. Phillip Carver (BW)

Enclosures

cc: All Parties of Record
A. M. Lombardo
R. G. Beatty
W. J. Ellenberg

Varner — 07780-97
Calhoun — 07781-97
Milner — 07782-97
Stacy — 07783-97
Scheye — 07784-97

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CERTIFICATE OF SERVICE
DOCKET NO. 960786-TL

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by Federal Express this 31st day of July, 1997 to the following:

Mr. Brian Sulmonetti
LDDS WorldCom Communications
Suite 400
1515 S. Federal Highway
Boca Raton, FL 33432
(407) 750-2529

Floyd R. Self, Esq.
Norman H. Horton, Esq.
Messer, Caparello, Madsen,
Goldman & Metz, P.A.
215 South Monroe Street
Suite 701
P.O. Box 1876
Tallahassee, FL 32302-1876
Atty. for LDDS WorldCom Comm.
(904) 222-0720

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Atty. for FCCA
(904) 222-2525

Thomas K. Bond
MCI Telecommunications Corp.
780 Johnson Ferry Road
Suite 700
Atlanta, GA 30342
(404) 267-6315

Richard D. Melson
Hopping Green Sams & Smith
123 South Calhoun Street
P.O. Box 6526
Tallahassee, FL 32314
(904) 222-7500

C. Everett Boyd, Jr.
Ervin, Varn, Jacobs,
Odom & Ervin
305 South Gadsden Street
P.O. Drawer 1170
Tallahassee, FL 32302
Atty. for Sprint
(904) 224-9135

Benjamin W. Fincher
3100 Cumberland Circle
Atlanta, Georgia 30339
Atty. for Sprint
(404) 649-5145

Monica Barone
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Patrick K. Wiggins, Esq.
Donna L. Canzano, Esq.
Wiggins & Villacorta, P.A.
501 East Tennessee Street
Suite B
Post Office Drawer 1657
Tallahassee, Florida 32302
Tel. (904) 222-1534
Fax. (904) 222-1689
Attys. for Intermedia

Patricia Kurlin
Intermedia Comm., Inc.
3625 Queen Palm Drive
Tampa, Florida 33619-1309
(813) 829-0011

Peter M. Dunbar, Esq.
Robert S. Cohen, Esq.
Pennington, Culpepper, Moore,
Wilkinson, Dunbar &
Dunlap, P.A.
215 South Monroe Street
2nd Floor
Post Office Box 10095
Tallahassee, FL 32302
(904) 222-3533

Sue E. Weiske, Esq.
Time Warner Communications
160 Inverness Drive West
2nd Floor North
Englewood, Colorado 80112
(303) 799-5513

Tracy Hatch, Esq.
AT&T
101 North Monroe Street
Suite 700
Tallahassee, FL 32301
(904) 425-6364

Marsha E. Rule, Esq.
c/o Doris M. Franklin
AT&T
101 North Monroe Street
Suite 700
Tallahassee, FL 32301

Andrew O. Isar
Director - Industry Relations
Telecomm. Resellers Assoc.
4312 92nd Avenue, N.W.
P.O. Box 2461
Gig Harbor, WA 98335-4461
(206) 265-3910

Richard M. Rindler
Swindler & Berlin, Chartered
3000 K Street, N.W.
Suite 300
Washington, D.C. 20007
Tel. (202) 424-7771
Fax. (202) 424-7645

Kenneth A. Hoffman, Esq.
William B. Willingham, Esq.
Rutledge, Ecenia, Underwood,
Purnell & Hoffman, P.A.
215 South Monroe Street
Suite 420
Tallahassee, FL 32301-1841
(850) 681-6788

Mr. Paul Kouroupas
TCG-Washington
2 Lafayette Centre
1133 Twenty First Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 739-0030

J. Phillip Carver
J. Phillip Carver (RW)

BELLSOUTH TELECOMMUNICATIONS, INC.

REBUTTAL TESTIMONY OF ALPHONSO J. VARNER

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 960786-TL

JULY 31, 1997

Q. PLEASE STATE YOUR NAME, ADDRESS AND POSITION WITH BELLSOUTH TELECOMMUNICATIONS, INC. (HEREINAFTER REFERRED TO AS "BELLSOUTH".)

A. My name is Alphonso J. Varner. I am employed by BellSouth as Senior Director for Regulatory for the nine state BellSouth region. My business address is 675 West Peachtree Street, Atlanta, Georgia, 30375.

Q. ARE YOU THE SAME ALPHONSO J. VARNER THAT FILED DIRECT TESTIMONY IN THIS PROCEEDING?

A. Yes. I filed direct testimony with the Florida Public Service Commission (the "Commission" or the "FPSC") on July 7, 1997.

Q. WHAT IS THE PURPOSE OF THE TESTIMONY THAT YOU ARE FILING TODAY?

A. My rebuttal testimony addresses the direct testimony filed by most of the other parties' witnesses on July 18, 1997. Specifically, my testimony

refutes the following erroneous assertions raised in the intervenor's testimony: 1) the allegation that BellSouth's entry into the in-region interLATA market should be delayed until full local competition has developed; 2) the representation that BellSouth does not meet the requirements of Section 271(c)(1)(A) of the Telecommunications Act of 1996 (the "Act") and that the above section is, therefore, not available to BellSouth; 3) attempts by witnesses to expand the Act's 14 point checklist; 4) proposals for rearbitration of issues already resolved by this Commission; 5) the inappropriateness of interim rates to satisfy the requirement of 252(d)(1); 6) BellSouth's draft Statement of Generally Available Terms and Conditions (Statement) does not meet the requirements of the 14 point checklist; 7) alleged bad acts committed by BellSouth; and 8) the inability of BellSouth to provide items on the checklist as identified by the various intervenors.

Q. THE INTERVENORS HAVE SPENT MANY WORDS AND PAGES ON THE TRACK A VS. TRACK B ARGUMENT AND THE PERTINENCE OF BELLSOUTH'S STATEMENT. PLEASE COMMENT.

A. As I stated in my direct testimony, BellSouth meets the requirements of Track A with regard to filing for interLATA relief in Florida with the Federal Communications Commission ("FCC"). In response to Issue 1.c. of this Commission's Issues List, BellSouth's Statement may or may not be necessary to supplement the approved interconnection agreements in effect at the time we file with the FCC.

BellSouth is asking the Commission in this proceeding to do two things:

1) Approve BellSouth's Statement as being compliant with the checklist in Section 271(c)(2)(B) of the Act; and

2) Accumulate the facts necessary to assess the current market conditions existing in Florida and fulfill its consultative role for the FCC when BellSouth does file its application for interLATA entry.

When BellSouth Corporation files its for interLATA relief with the FCC, it anticipates using a combination of its approved interconnection agreements and its approved Statement to fulfill the requirements of the 14-point checklist and demonstrate that it meets the conditions of Track A.

Q. WOULD YOU COMMENT GENERALLY ON THE TESTIMONY FILED BY THE OTHER PARTIES?

A. Yes. This Commission has received detailed testimony from thirteen (13) witnesses generally opposing the views of BellSouth. Through my testimony, and the testimony our other witnesses, BellSouth responds to a substantial portion of the detail in their testimony to demonstrate that there are serious flaws in these parties' conclusions. However,

BellSouth does not attempt to respond to every erroneous allegation. Given the complexity of these filings, it would become very easy for this Commission to become mired in the details. However, it is unnecessary and hazardous for this Commission to do so. The policy choices that this Commission has to make are very clear and, by keeping them in focus, will result in the best decision for Florida consumers. To benefit Florida consumers, this Commission will need to do only the two things listed above.

Contrary to Mr. Wood's erroneous assertion that he is responding to "BellSouth's application to provide in-region interLATA services", BellSouth has not asked this Commission to give it interLATA authority. The Commission could not do so even if BellSouth did ask. As recognized in the discussion of Item Number 26 during the July 15, 1997 Agenda Conference, Commissioner Clark @ p.32, Commissioners Kiesling and Deason @ p.33, and Chairman Johnson @ p. 35, the role of this Commission with respect to the FCC is "consultative" and "advisory". The authority for granting interLATA relief rests with the FCC. In order to satisfy its responsibilities, this Commission must determine whether it is appropriate to take the two actions that BellSouth has requested.

Q. PLEASE COMMENT ON HOW THE STATEMENT AFFECTS THE OTHER PARTIES IN THIS PROCEEDING.

A. It is somewhat puzzling that so many parties are critical of the Statement. The parties who filed testimony in this proceeding have an agreement with BellSouth, either through negotiation or through arbitration. Although these parties could use the Statement, one would expect that their agreements would provide for their needs.

BellSouth's Statement is designed primarily for those local market entrants who do not have an agreement and do not want to go through the negotiation process. Criticisms by parties who already have agreements are largely attempts to turn the Statement into an improved form of their agreement or delay interLATA entry by BellSouth. They would have this Commission arbitrate issues again and reject the Statement because it does not provide them with a better agreement than they negotiated or received through arbitration. The Commission does not need to rearbitrate issues in this proceeding. Of course, the Interexchange Carriers (IXCs) are motivated to support rejection of the Statement since rejection forestalls BellSouth from competing with them.

Q. GENERALLY, ARE THE INTERVENORS' STANDARDS FOR INTERLATA ENTRY CONSISTENT WITH THE ACT?

A. No. Throughout their testimony, intervenors propose for this Commission to establish additional barriers to interLATA entry that are not in the Act. Congress obviously debated and considered this subject extensively and established its view of the appropriate standards that

should apply to determine interLATA entry. Congress also established a prohibition against adding additional criteria. Despite these clear requirements of the Act, intervenors would have this Commission ignore Congress and institute a set of more stringent criteria. Some examples of these criteria include:

- delaying entry until local competition is developed;
- expanding the checklist to include additional capabilities;
- requiring that each checklist item actually be in use before checklist compliance can be determined;
- an ongoing need to eliminate dangers of discrimination, even with safeguards; and
- redefining Sections 271(c)(1)(A) and (B).

The recurring fallacy in each of these requirements is that they are prohibited by the Act. Obviously, intervenors' self interest is promoted by establishing more stringent criteria than the Act requires. However, Congress specifically prohibited the imposition of additional criteria. Furthering their self interest does not permit intervenors to ignore the Act's requirements and rewrite the requirements to their satisfaction. This Commission should critically examine each of the intervenors' proposals to determine their consistency with the Act. More often than not, such examination will reveal a glaring inconsistency.

Q. SEVERAL INTERVENORS USE THE TERM FULLY IMPLEMENTED. PLEASE DEFINE THE TERM "FULLY IMPLEMENTED" AS USED BY BELLSOUTH.

A. As I stated in my direct testimony, "fully implemented" means that either the items are actually in service or are, in fact, functionally available. The intervenors have incorrectly defined the term as meaning only actually provided. Even the DOJ, which many of these parties use to support several of their positions, apparently disagrees with the definition being used by the intervenors. The DOJ stated in its response to SBC's Oklahoma request for interLATA relief, "[a] BOC is providing an item, for purposes of checklist compliance, if the item is available both as a legal and practical matter, whether or not any competitors have chosen to use it...A BOC...can satisfy the checklist requirement with respect to an item for which there is no demand."

Q. HOW IS THE REMAINDER OF YOUR TESTIMONY ORGANIZED?

A. I have organized the remainder of my testimony into seven sections that address the issues raised by the intervenors. These sections are as follows: 1) Timeliness of BellSouth's Entry; 2) Track A vs. Track B; 3) Statement of Generally Available Terms and Conditions; 4) Checklist Expansion; 5) Rebundled Elements; 6) Sufficiency of Interim Rates; and 7) Allegations of Unfair Competition. Also, where applicable in response to intervenor testimony, I address the effect of the Eighth Circuit Court of

Appeals' Ruling No. 96-3321, filed July 18, 1997 (attached to my testimony as Exhibit AJV-4).

TIMELINESS OF BELLSOUTH'S ENTRY

Q. WHAT ARE SOME EXAMPLES OF INTERVENORS' CONTENTIONS THAT IT IS NOT TIMELY FOR BELLSOUTH TO RECEIVE INTERLATA ENTRY?

A. It is a pervasive theme of the intervenors' testimony that BellSouth should not be allowed into the interLATA business until some level of facilities based local competition has occurred. A few examples of these contentions include:

Strow p.17 - "meaningful" facilities-based competition is a precondition to a grant of in-region interLATA authority;

Murphy p.4 - PSC should withhold support of BellSouth's 271 application until significant facilities-based competition has developed;

Hamman p.5-6 - BellSouth entry would take away incentive for BellSouth to continue to work with the industry to resolve issues necessary to ensure checklist items are being offered;

Gillan p. 9 - there is no measurable local exchange competition in Florida today;

Gillan p. 6 - competition must be present on a broad scale commercial level;

Gillan p. 31 - interLATA authority should be delayed until others can just as easily offer local services and compete;

Wood p. 7 - local competition must develop first, then BOC entry into interLATA may be permitted;

Wood p. 12 - if BellSouth is granted interLATA entry before local competition develops, BellSouth will have the opportunity to use its control of local facilities to gain an advantage in the interLATA market;

Gulino p. 5 - checklist must be fully and fairly implemented; and

McCausland p.2- once BellSouth receives interLATA authority, BellSouth will no longer have an incentive to ensure that local competition is implemented and could actually slow the development of local competition.

Q. PLEASE RESPOND TO THESE ALLEGATIONS.

A. The language of the Act clearly does not permit imposition of a mandate that BellSouth face some level of facilities-based competition in the local market before obtaining interLATA relief. The criteria of Section 271 (c)(1)(A) ("Track A") requires the presence of a facilities-based competitor providing service to residential and business customers predominantly over their own telephone exchange service facilities. It does not specify or refer to any minimum threshold level. In fact, as

more fully discussed in my direct testimony, attempts by Senator Kerry and Representative Bunn to add a threshold were defeated. In addition, an application may be filed under Section 271(c)(1)(B) ("Track B") even if no facilities-based local competitor exists under Subparagraph (A). Subparagraph (B)'s statement of generally available terms must meet the requirements of the 14 point competitive checklist to indeed prove that the local market is open to competition, not that any level of competition has developed. Congress felt this standard and the requirements of Section 271(d)(3) of the Act struck a balance between opening local markets and the BOCs being granted interLATA relief.

In many cases, intervenors have attempted to supplant the Act's requirements with their own more stringent standards. Although they may not like the standards imposed by the Act, they cannot simply rewrite or ignore them. The requirements for interLATA entry, which were Congress' decision to make, are specified in the Act. Despite intervenors' dissatisfaction with those specifications, they, like BellSouth, must abide by them.

Q. MR. WOOD, ON PAGE 8, REFERS TO STATEMENTS OF SENATOR HOLLINGS WHICH SUPPOSEDLY INFER THAT LOCAL COMPETITION MUST DEVELOP BEFORE THE RBOCS MAY ENTER THE LONG DISTANCE MARKET. HOW WOULD YOU DESCRIBE MR. WOOD'S CONCLUSIONS?

A. There was substantial discussion and debate in Congress on this issue. Congress affirmatively chose not to establish a threshold level of local competition as a precondition of interLATA entry by BellSouth. Consequently, Mr. Wood misconstrues the statement of Senator Hollings. When viewed in relation to the events that were occurring, his statement cannot be interpreted as meaning that the Act requires some level of competition before interLATA entry can be granted to BellSouth.

Senator Hollings is quoted on page 8 of Mr. Wood's testimony. This statement is not referring to conditions for interLATA entry. Senator Hollings is referring to conditions that should apply before telecommunications services are deregulated. Mr. Wood quotes the following portion of Senator Hollings statement:

> "The basic thrust of the bill is clearly competition is the best regulator of the marketplace. Until that competition exists, monopoly providers of services must not be able to exploit their monopoly power to the consumer's disadvantage. Timing is everything. Telecommunications services should be deregulated after, not before, markets become competitive." (emphasis added)

There is no mention of criteria for interLATA entry at all. The Act was a deregulatory bill. Senator Hollings is describing the conditions that should exist before he believes that telecommunications services should

be deregulated. In contradiction of Mr. Wood's assertion, Senator Hollings made the following statements in the same speech (142 Cong. Rec. S688):

> "I believe that this legislation on the whole presents a balanced package that deserves the support of every Member of this body."
>
> "We should not attempt to micromanage the marketplace; rather we must set the rules in a way that neutralizes any party's inherent market power, so that robust and fair competition can ensue."
>
> "I am pleased that the conference agreement recognizes that the RBOCs must open their networks to competition prior to entry into long distance." (emphasis added)

Senator Hollings made these statements on February 1, 1996, after the Conference Report was submitted to the Senate. He had full knowledge that Track B existed and he did not indicate that some level of local competition must exist. No reasonable interpretation of his statements could lead to the conclusions reached by Mr. Wood.

Q. PLEASE RESPOND TO THE CONCLUSIONS REACHED BY MR. WOOD AS A RESULT OF SENATOR KERRY'S STATEMENT.

A. His conclusions here are also unfounded. First, Mr. Wood's quote of Senator Kerry is incorrect. Mr. Wood substitutes the word competitor for competition in the quotation. The actual quote is as follows:

> "Neither bill had sufficient provisions to ensure that the local telephone market was open to competition before the RBOCs entered long distance." (emphasis added)

Senator Kerry's statement refers to competitive tests and openness to competition as the criteria for permitting entry. He does not indicate that some level of competitive development needs to occur first.

Senator Kerry, probably better than any other Senator, knew that the Act did not require development of local competition before interLATA entry could be granted. As I stated in my direct testimony, Senator Kerry introduced an amendment to change Section 271(c)(1) to say that "a Bell operating company may provide interLATA services in accordance with this Section only if that company has reached interconnection agreements with...telecommunications carriers capable of providing a substantial number of business and residential customers with service". 141 Cong. Rec. S8319 (June 14, 1995) (emphasis added). That amendment, which only attempted to require the presence of a carrier who was capable of providing service to a substantial number of customers, not even that the carrier was providing service, was defeated.

Surely, Senator Kerry knew that the Act, which he voted to approve, did not contain any competitive development requirements.

Q. DO THE STATEMENTS OF REPRESENTATIVES BUNNING AND FORBES QUOTED IN MR. WOOD'S TESTIMONY SUPPORT A CONCLUSION THAT THE ACT REQUIRES COMPETITION TO BE DEVELOPED TO SOME DEGREE BEFORE INTERLATA ENTRY CAN BE GRANTED?

A. No. These Congressmen's statements have been either misunderstood or misinterpreted. Representative Bunning's statement reflects his opposition to the fact that the House Bill did not contain requirements for competitive local development as a condition for entry into long distance. Representative Bunning opposed the Bill because he believed that the entry restrictions were too lax. Thus, his statement supports the point that attempts to impose some degree of competitive local market development were rejected by Congress and is not required by the Act. This is definitely contrary to Mr. Wood's conclusion.

The only reasonable interpretation of Representative Forbes' statement is that he refers to the Track A provisions of the Bill. He supported H1555 which included both Track A and Track B. The Congressional record indicates that how Track A and Track B operated was very clearly presented to Representative Forbes.

Q. WHY DOES BELLSOUTH BELIEVE IT WAS NOT THE INTENT OF CONGRESS THAT LOCAL COMPETITION BE FULLY DEVELOPED PRIOR TO BOC ENTRY INTO LONG DISTANCE?

A. As I stated in my direct testimony, Congress wanted to open all telecommunications markets in order to bring consumers the benefits of full competition. Section 271 ensures that opening the BOCs' local markets will not only allow competition in local services, but will also enhance competition in the long distance business through BOC entry. Nowhere did Congress establish that any particular type of local competition must exist as a prerequisite to BOC entry into the long distance business within its region. Congress intended that Section 271 would provide a path for BOCs to seek authority from the FCC to enter the long distance market as soon as they demonstrate that their local markets are open.

In addition, Congress recognized that competitive providers could attempt to thwart BellSouth's entry into the long distance market. Congress did not allow a competitor to prevent a BOC from filing under Track B because the competitor requested access and interconnection without making the pro-competitive investment in local facilities that Congress thought necessary under Track A. If this was permitted, a competitor could foreclose the BOC's entry into interLATA by simply requesting access and interconnection and then limiting facilities investments to only residential or business customers. In fact, Mr.

Gillan, beginning on page 37, has stated that it is too expensive for competitors to build facilities and it will be a long time before there will be true facilities-based competition. However, under their interpretation of the Act, these same competitors can enter the local market through resale, establish a strong presence in that market, and use mischaracterization of the Act to prevent BellSouth from entering the interLATA market for years.

Q. AS A POLICY MATTER, SHOULD THE COMMISSION DELAY BELLSOUTH'S ENTRY AS PROPOSED BY THE OTHER PARTIES?

A. No. Without the maximum number of choices of providers for all services, the public will certainly be harmed. Intervenors clearly can offer the full range of telecommunications services that customers want. They can offer local and long distance service today. However customers cannot avail themselves of all of the services that BellSouth can offer until interLATA relief is granted. With interLATA relief for BellSouth, customers' choices will be increased.

Q. MR. WOOD ON PAGE 14 , MR. MCCAUSLAND ON PAGE 2, MR. GULINO ON PAGE 40, AND SEVERAL OTHER WITNESSES STATE THAT IF THE "CARROT" OF INTERLATA ENTRY IS OFFERED TOO SOON, BELLSOUTH WILL NO LONGER HAVE AN INCENTIVE TO CONTINUE THE DEVELOPMENT OF LOCAL COMPETITION. WHAT IS YOUR RESPONSE TO THIS ASSERTION?

A. The intervenors seem to have forgotten one thing - whether or not BellSouth is in the interLATA long distance business, BellSouth is legally obligated to comply with the requirements of the Act, in particular Sections 251 and 252. After interLATA authority is granted, BellSouth must continue to comply with Sections 271 and 272. These legal obligations are not magically removed once in-region interLATA authority is granted. As I stated in my direct testimony, the Act, the FCC and the State Commission all have significant safeguards in place to ensure BellSouth's compliance. Some of the safeguards are that BellSouth will have to continue to negotiate agreements subject to arbitration and approval by this Commission. Current agreements will have to be renegotiated subject to arbitration and approval by this Commission. This Commission must approve any changes that are made in the Statement of General Terms and Conditions once it is initially approved. The FCC has authority under Section 271 of the Act such that if BellSouth ceases to meet the requirements of interLATA entry after it is granted, it can take a number of steps, including revoking the grant of relief that it had previously given. BellSouth also must comply with the structural requirements of Section 272, i.e., create a separate interLATA affiliate, maintain non-discriminatory safeguards as prescribed by the FCC and participate in biennial audits. The inclusion of these safeguards was Congress' way to ensure that BellSouth, or any RBOC, does not stop cooperating with potential competitors once they are granted in-region interLATA authority.

Practical experience has proven that BellSouth's entry into new markets indeed enhances competition. Before real competition was established, BellSouth entered other markets, such as cellular, PCS, and enhanced services when legal safeguards existed. BellSouth's entry has proven to be in the public interest. Safeguards in these other markets have certainly worked and will work in the interLATA market. To delay BellSouth's entry into the interLATA market until local competition has fully developed is simply to insulate the interLATA market from more effective competition.

Q. ON PAGE 12 OF MR. WOOD'S TESTIMONY HE SURFACES A CONCERN OVER "DOCUMENTED ANTICOMPETITIVE BEHAVIOR" RESULTING IN THE LONG DISTANCE RESTRICTION IMPOSED BY THE CONSENT DECREE. PLEASE COMMENT.

A. While BellSouth does not disagree, in general, with Mr. Wood's assessment, the behavior that Mr. Wood is referring to was exhibited by AT&T and not the post-divestiture Bell operating companies. One overt purpose of Sections 251, 252 and 272 of the Act as well as the checklist requirements is to prevent just the behavior to which Mr. Wood refers.

Mr. Wood goes on to further discuss the 1986 Court ruling banning interLATA entry by the RBOCs, citing their ability to "utilize their monopoly advantages to affect competition". The Court ruling that Mr.

Wood notes is talking about the future conditions. It makes no claim of anticompetitive behavior by the RBOCs. Again the Act substitutes Sections 251, 252, 271 and 272, in addition to federal and state oversight, for the previous ban on interLATA entry by the RBOCs.

Mr. Wood's apparent lapse in memory is again displayed as he states that "[t]his danger has not diminished merely with the passage of time;". He is correct in one aspect; it is not the passage of time that has diminished the danger, if there was any, but the passage of the Telecommunications Act that he seems to overlook. With this in mind, Mr. Wood has absolutely no basis for his conclusion that BellSouth "will have both the incentive and the opportunity to use its control of these local bottleneck facilities to again gain an advantage in the interLATA market."

Q. MS. MURPHY, ON PAGE 27 OF HER TESTIMONY, STATES REGARDING SECTION 271, "IT WILL BE NEARLY IMPOSSIBLE TO RETRACT THIS AUTHORITY." PLEASE RESPOND.

A. Before BellSouth has a significant base of customers, it would be relatively simple for the FCC to withdraw interLATA authority. I would agree, however, that BellSouth would have to engage in egregious behavior before the authority would be retracted after a substantial customer base has been built. Retracting interLATA authority, however, is only one of several actions that can be taken to penalize BellSouth if it

does not continue to fulfill its obligations under the Act. Section 271(d)(6) of the Act provides the FCC with the authority to enforce the conditions of the Act. If the FCC determines that BellSouth is not meeting the conditions required for interLATA entry, the Commission may:

1) "issue an order to the Company to correct the deficiency;
2) impose a penalty on such company...; or
3) suspend or revoke such approval."

To make Ms. Murphy's argument even more ludicrous, the Florida Commission may also penalize the Company for actions that do not comply with its rules. BellSouth must legally abide by the terms and conditions of its agreements and also its Statement when it is approved. In addition, complaint processes before regulatory bodies may be used and the courts are certainly available for an aggrieved party to seek relief under antitrust laws, other statutes, or common law.

There are ample avenues, other than retracting authority, that can be pursued if BellSouth does not continue to comply with legal and regulatory requirements after interLATA entry has been granted. Since there are so many viable avenues to ensure compliance, it can hardly be said that it will be nearly impossible to retract the grant of interLATA authority as Ms. Murphy has stated.

Q. DOES BELLSOUTH HAVE ANOTHER BUSINESS INCENTIVE TO CONTINUE DEVELOPMENT OF LOCAL COMPETITION?

A. Yes. In addition to complying with the law, BellSouth will continue to have a strong business incentive to cooperate in the development of local competition after interLATA authority is granted. BellSouth will still be heavily regulated and its competitors will not. This inequality increases BellSouth's costs and constrains its ability to compete. As markets become more competitive, regulation of BellSouth must be relaxed for it to have any possibility of competing effectively. Regulators are not likely to relax regulation until they are confident that the marketplace will discipline the behavior of BellSouth. An uncooperative BellSouth cannot hope to achieve the equality of regulation that it needs. Although interLATA relief is important, it is by no means the ultimate relief that BellSouth needs from regulators.

Another incentive that BellSouth has to continue the development of local competition is that BellSouth now provides unbundled network elements to ALECs as a wholesaler. Provision of such wholesale services is expected to be a substantial business for BellSouth. As a wholesale provider, BellSouth needs to provide quality service to the needs of its customers in order to stay in business and generate revenues.

Q. SEVERAL WITNESSES, INCLUDING MR. GULINO ON PAGE 5 AND MR. HAMMAN ON PAGE 5, STATE THAT ACTUAL PROVISION OF THE CHECKLIST ITEMS IS REQUIRED BEFORE CHECKLIST COMPLIANCE CAN BE DETERMINED. PLEASE COMMENT.

A. Section 271(c)(2)(B) contains each of the 14 points referred to as the competitive checklist. BellSouth is required to generally offer and provide, if requested, access and interconnection to other telecommunications carriers as specified by the 14-point checklist. The term generally offer is key. Any competitor can obtain any of the items on the 14-point checklist from the statement of generally available terms and conditions. If the Statement is approved, it will then be available to all Alternative Local Exchange Companies ("ALECs"). The Act does not include the requirement that BellSouth currently provide each of these checklist items. It is ludicrous to conclude from the language of the Act that all of the items must already be provided in order for BellSouth to comply with the checklist. There may be items on the checklist that no competitor will ever request.

Q. MR. HAMMAN ON PAGE 5 STATES THAT BELLSOUTH HAS NOT YET FULLY IMPLEMENTED AN INTERCONNECTION AGREEMENT OR ITS STATEMENT TO DEMONSTRATE THAT IT IS OFFERING THE ELEMENTS REQUIRED UNDER THE CHECKLIST. SHOULD THIS BE CAUSE TO REJECT BELLSOUTH'S STATEMENT OF TERMS AND CONDITIONS AS NOT MEETING THE CHECKLIST?

A. No. First, BellSouth does not agree with Mr. Hamman's statement. BellSouth meets all of the requirements of the checklist. If this were not the case, however, what Mr. Hamman would have this Commission do is wait until ALECs decide that they want each of the checklist items before BellSouth can seek entry into long distance. Since BellSouth does not control the speed or degree with which competitors choose to enter the market, waiting until ALECs order each checklist item would put BellSouth's ability to enter the long distance market solely under the control of the people who most want to keep BellSouth out of this business. Congress recognized this possibility and prevented this tactic by establishing Track B.

In addition, Congress provided the ability to use the Statement to supplement negotiated/arbitrated agreements when interLATA entry is sought under Track A. As Commissioner Clark states on page 30 of the July 15, 1997 Agenda Conference transcript, "...but that in determining whether they have met the checklist for A you can look at the SGATC. It's not a hybrid of B." The Act recognizes that agreements used under Track A may not contain all items on the checklist. For capabilities that new entrants are not using, the only demonstration that can be made is readiness to provide such capability. Upon approval of the Statement, BellSouth will have complied with the requirements of the competitive checklist in Section 271(c)(2)(B) of the Act. Whether competitors take advantage of this opportunity is up to the competitor, not BellSouth. In

fact, Congress recognized that development of competition was under the control of the competitors after local markets were open.

Q. YOU USED THE TERM "READINESS" IN YOUR PREVIOUS RESPONSE. WHAT DO YOU CONSIDER READINESS TO MEAN?

A. Readiness means that when a competitor requests a checklist item, BellSouth will provide it within a reasonable period of time, in accordance with applicable rules and regulations.

Q. ACCORDING TO THE INTERVENORS, WHAT MUST BE DONE TO DEMONSTRATE FULL IMPLEMENTATION?

A. It is not clear from the testimony of witnesses for AT&T and MCI what must be done to demonstrate full implementation. A stated set of criteria is noticeably absent. It presents an insurmountable challenge to provide something that is not (and cannot be) defined. The only thing that can be concluded is that AT&T and MCI will know "full implementation" when they see it. In short, these intervenors want BellSouth's interLATA entry to be deferred until they decide that it is okay to allow such entry. Of course, AT&T and MCI have a vested interest in keeping BellSouth out of the long distance market.

Further, beginning on page 36 of his testimony, Mr. Gillan compares current barriers to local entry to entry into the long distance market. He

implies a set of criteria regarding the establishment of interLATA competition and states the establishment of long distance networks was successful and relatively rapid - "only" taking 20 years. He then states that entering the local market is even more difficult than entering the interLATA market. It appears Mr. Gillan is suggesting the local exchange companies (LECs) must wait at least 20 years before being allowed entry into the interLATA market. This kind of delay is ridiculous on its face.

Q. IN THE SUMMARY OF HIS TESTIMONY, MR. GILLAN STATES "THE COMMISSION SHOULD REMEMBER THAT BELLSOUTH MUST PROVE THAT IT HAS SATISFIED EACH OF THESE CONDITIONS. IT IS NOT THE RESPONSIBILITY OF OTHER PARTIES, THE STAFF, OR THE COMMISSION TO PROVE BELLSOUTH'S NON-COMPLIANCE." DO YOU AGREE WITH MR. GILLAN?

A. Although it seems a strange statement for Mr. Gillan to make after spending the previous 39 pages disputing the logic that BellSouth purports, we certainly agree with him. In the July 15, 1997 Agenda Conference, Commissioner Deason states "[a]nd I think that BellSouth should be granted latitude to bring in any information or evidence they think is relevant to those 14 checklist items, but that's what we need to concentrate on." BellSouth is trying to do exactly what Mr. Gillan and Commissioner Deason suggest; submit information to support the fact

that it has satisfied the conditions necessary to gain interLATA relief in Florida.

Q. ON PAGE 8, MR. GILLAN PRESENTS A TABLE ON THE STATUS OF LOCAL ENTRY IN BELLSOUTH'S REGION. PLEASE COMMENT ON THIS TABLE.

A. This chart is not a comparison of similar capabilities. Although we do not agree with the accuracy of all of the information portrayed in the table, e.g., it does not include interoffice trunks within the competitors' networks which the competitors provide themselves, we will not argue about the magnitudes of the results. With the recent opening of the local market, it would be ludicrous to expect anything different. A point that Mr. Gillan fails to note in his table, however, is that once the ALECs are connected to BellSouth's network in Florida, they too will have access to all of the BellSouth trunks, regardless of what the quantity actually is.

Q. DO YOU AGREE WITH MR. GILLAN THAT LOCAL SERVICE FIRST MUST BECOME COMPETITIVE OR FULL SERVICE COMPETITION WILL NEVER BE A REALITY?

A. No. Mr. Gillan is attempting to rewrite the Act to suit his (and the IXCs) own purposes. There is no requirement in the Act that local service markets must be competitive prior to BellSouth's interLATA entry. The Act requires BellSouth to open the local markets and BellSouth has done

so. Mr. Gillan further confuses BellSouth's ability to offer interLATA services with the success BellSouth will have in this market as a new entrant. It is totally unnecessary as a matter of law and policy to delay full competition in the long distance market until AT&T and MCI decide to compete in the local market.

Q. MR. WOOD, ON PAGE 9, REFERS TO A REPORT BY THE STAFF OF THE TENNESSEE REGULATORY AUTHORITY (TRA) WHICH SUGGESTS THAT BELLSOUTH'S OPPORTUNITY TO COMPETE IN THE LONG DISTANCE BUSINESS SHOULD BE DELAYED UNTIL LOCAL COMPETITORS ARE ESTABLISHED AND MEETING THEIR BUSINESS OBJECTIVES. DOES BELLSOUTH AGREE WITH THE STAFF'S ASSESSMENT?

A. No. On February 10, 1997, BellSouth filed comments on the Tennessee Staff's draft report which I have attached as Exhibit AJV-5. BellSouth explained to the staff that Section 271 and Congress' debates concerning BOC entry into long distance point to the existence of an open local market, not the existence of some level of local competition. Congress recognized that allowing such entry would create enormous consumer benefit. The staff's approach would serve to penalize Tennessee consumers by unnecessarily delaying the benefits that real long distance competition will bring. Section 271 does not create any quantitative requirement of competition in the local market and provides

no invitation to import any other additional measure of competition into Section 271 in order for a BOC to enter the interLATA services market.

On February 18, 1997, the TRA staff provided its report to the Directors of the TRA. The report included a minority staff position. It states in part that:

> "While we do not disagree with the overall conclusion of the Staff Report, we do object to the implication that the profitability, or success relative to a business plan, of any individual competitor is relevant to the assessment of competition."
>
> "Indeed, the Staff Report analysis of the long distance market (p. 6) is mildly inconsistent with the Statement on pp. 7-8. In long distance, despite the presence of successful rivals to AT&T, the Report suspects that consumers are not receiving all the potential benefits of price competition."
>
> "Moreover, the Report suggests that the TRA may be about to commit the oft-derided policy error of protecting or promoting *competitors* at the expense of *competition*."
>
> "In the end, we concur with the Report that regulators must endeavor to create an environment conducive to fair competition among all market participants, with special favor toward none."

This minority report shows that the TRA staff has some disagreement with Mr. Wood's assessment. On April 18, 1997, the Hearing Officer issued his recommendation to adopt the informal Section 271 Investigation and Report conducted by the TRA staff including the minority staff report and BellSouth's comments.

Q. MR. GILLAN, BEGINNING ON PAGE 32, POINTS OUT THAT IT WILL BE EASY FOR BELLSOUTH TO OFFER LONG DISTANCE BECAUSE OF ALL OF THE INDUSTRY INFRASTRUCTURE CHANGES THAT HAVE BEEN MADE OVER THE LAST 15 YEARS. PLEASE COMMENT ON MR. GILLAN'S ASSERTIONS.

A. Mr. Gillan accurately describes many of the changes that have occurred in the telecommunications industry since divestiture. However, he fails to point out that most of the changes he listed were actions taken by the LECs to open the long distance market. For example, the LECs were responsible for deploying equal access software, providing new switch software to establish different trunk groups for different traffic categories, and designing carrier billing systems. With our experience in helping to successfully open the long distance market, the LECs should once again be able to use that experience to successfully open the local market.

Q. PLEASE COMMENT ON MR. GILLAN'S ASSERTION THAT BELLSOUTH'S INTERLATA ENTRY IS IMMEDIATE AND UBIQUITOUS.

A. Mr. Gillan trivializes the hurdles that BellSouth must overcome to compete in this market. BellSouth must first gain approval of its Statement from the state commissions. Once the Statement is approved at the state level, then BellSouth must go to the FCC to seek relief. The FCC must decide to grant interLATA authority in order to remove the legal barrier to BellSouth's providing long distance services in its region. The Act has been in effect for well over a year and still no RBOC has been granted in-region, interLATA authorization.

Once the legal barriers have been eliminated, BellSouth will then enter the in-region interLATA market with 0% market share. BellSouth will be competing against huge, experienced, global competitors who are offering similar packages of telecommunications services. BellSouth will face immense market barriers. On page 33 of his testimony, Mr. Gillan lists some of the hurdles that BellSouth will face in offering long distance services. Although he concludes that such hurdles are trivial, Mr. Gillan provides no basis or analysis for his belief. If, in fact, these hurdles are so easy to overcome, why did MCI and Sprint have so much trouble doing it when they started; and why did it take them so long to get a good foothold? His assertion is simply without merit.

Q. MR. GILLAN, BEGINNING ON PAGE 36, MR. MCCAUSLAND ON PAGE 16, AND MR. WOOD ON PAGE 13, DISCUSS THAT IT IS MORE DIFFICULT AND/OR COSTLY FOR COMPETITORS TO ENTER THE LOCAL MARKET THAN IT IS FOR BELLSOUTH TO ENTER THE LONG DISTANCE MARKET. DOES BELLSOUTH AGREE THAT THIS IS INDEED THE CASE?

A. No. Entering the local market as a pervasive facilities-based competitor would be costly and may initially be difficult for competitors. These witnesses, however, seem to suggest that the only way to enter the local market is to build a pervasive facilities-based network. There is no mention that, just as BellSouth's entry into the interLATA market will be as a reseller, potential competitors have the capability to enter the local market using resale which requires no network investment. They can also enter by purchasing unbundled elements with minimal network investment.

Also, the FCC does not believe that disparate capabilities of IXCs and LECs are cause for concern. In its Memorandum Opinion and Order Report No. LB96-32, January 31, 1997, the FCC stated the following at paragraphs 48 and 50:

> "We observe that MCI and others are also capable of offering one-stop shopping, by building their own local facilities, by reselling unbundled network elements, or by reselling PacTel's

facilities and adding that local offering to their existing long distance service. The customers who want one-stop shopping may choose the combined local and long distance services of SBC/PacTel or one of its competitors. If SBC/PacTel composes such an offering first and satisfies all regulatory requirements, then it should benefit from being first to the market with one-stop shopping."

"Customers have grown accustomed to receiving long distance service from AT&T, MCI, Sprint, and many others for more than a decade. A massive shift of customers upon the entry of a new supplier (SBC/PacTel) is unlikely unless that new supplier offers them something more attractive than the existing suppliers are offering and can possibly offer in response. MCI has not established that if SBC/PacTel wins a modest share of the traffic for which it will be newly able to compete, the incentives for entry into its local markets will be reduced to a significant degree."

These statements indicate that it will be quite difficult for BellSouth to compete in the interLATA market and that IXCs will be able to compete effectively in the local market.

Q. ARE THERE ANY OTHER FALLACIES IN THEIR ARGUMENT?

A. Yes. The intervenors are suggesting that they will have to build facilities to provide service to all customers in all markets that BellSouth serves. In the event an ALEC decides it is feasible to construct facilities, it would only have to build the facilities for its particular customers in specific areas, e.g., major urban areas. They can use the BellSouth network to serve other areas. In addition, there are Alternative Access Vendors ("AAVs") who have already constructed local networks in urban areas in Florida. An IXC and an AAV could join services, add switching and be in business.

One additional fallacy that seems common throughout the testimony of the intervenors is that they ignore the existence of any statutory requirements. Mr. Wood, on page 13 of his testimony, complains about a "monopoly supplier that is hardly a motivated seller and faces no competitive constraints on the rates it seeks to charge." There are so many requirements regarding local competition that this assumption is absurd.

Q. HAVE MR. GILLAN AND MR. MCCAUSLAND CORRECTLY CHARACTERIZED THE AVAILABILITY OF INTERLATA CAPABILITIES TO BELLSOUTH?

A. No. These witnesses suggest that BellSouth is free to mix and match interLATA network elements in any combination it chooses to create any services it desires and use of these elements parallels the interLATA

market opportunities. Although Mr. Wood states that there are numerous long distance carriers that have capacity to sell or lease, there is, however, no requirement that their network elements must even be offered. There are no pricing standards which apply to these so called network elements. BellSouth will enter this market as a reseller, not as a user of unbundled elements. Nowhere has AT&T stated its willingness to give BellSouth interLATA capacity at cost. Mr. Gillan's analysis of the number of switches, on page 37 of his testimony, is irrelevant to addressing barriers to entry. It does show, however, that, assuming the price of the switches is comparable, IXCs should offer switching to BellSouth at 1/20 the price that BellSouth offers them switching.

Q. MR. WOOD ON PAGE 13 ALLUDES TO BELLSOUTH'S ADMINISTRATIVE NETWORK AS HAVING SUFFICIENT CAPACITY TO ALLOW IT TO OFFER IN-REGION INTERLATA SERVICES IMMEDIATELY WITH NO ADDITIONAL INVESTMENT. IS THIS A POSSIBILITY?

A. No. Again, Mr. Wood seems simply to ignore the FCC's First Report and Order, In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, which appears to allay this concern. As long as BellSouth owns the official services network, paragraphs 261 and 262 of that Order appear to prohibit use of that network to provide almost all interLATA services, with the exception of grandfathered and incidental interLATA services.

Paragraph 218 appears to prohibit the transfer of the official services network to any BellSouth long distance affiliate unless "unaffiliated entities have an equal opportunity to obtain ownership of this facility."

Q. HOW DOES MR. GILLAN BELIEVE BELLSOUTH'S ABILITY TO OFFER "ONE-STOP SHOPPING" AFFECTS THE MARKETPLACE?

A. Mr. Gillan implies that the "one-stop shopping" capability will be unique to BellSouth. What he fails to mention is that the interexchange carriers (IXCs) can enter the local market today and have the same one-stop shopping capability concurrent with BellSouth. In fact, they will receive this capability on February 8, 1999 whether or not BellSouth has entered the interLATA market. This is a key point. The only benefit the IXCs gain from BellSouth's entry into the long distance market is the ability to offer one-stop shopping sooner. Therefore, they have nothing to lose by delaying BellSouth's interLATA entry since they gain this capability in February 1999 regardless of what BellSouth does. This is a strong incentive for their continuing baseless assertions that BellSouth's entry is premature.

Q. ON PAGE 36, MR. GILLAN ASSERTS THAT BELLSOUTH'S POTENTIAL CLAIM OF A COMPETITORS' "HEAD START" IF BELLSOUTH IS NOT GRANTED INTERLATA ENTRY IS AN ILLUSION. PLEASE COMMENT ON MR. GILLAN'S ASSERTION.

A. Mr. Gillan is simply wrong. BellSouth does not assert that competitors get a "head start" if BellSouth is not guaranteed immediate entry. BellSouth only asserts that an unfair "head start" occurs when additional criteria are imposed as a condition to such entry which is contrary to the Act. Mr. Gillan's analogy of the IXCs only receiving a head start like the outside runner in a race is cute, but inaccurate. The situation is more analogous to IXCs wanting to run the entire race before BellSouth is allowed onto the track. For example, the IXCs have already benefited from 1+ presubscription in Florida prior to BellSouth's authorization to provide interLATA long distance service. This head start has resulted in an intraLATA toll loss to BellSouth in Florida of almost 1,000,000 residential access lines in one year. This is hardly an illusion and does not even consider business lines.

Q. MR. GILLAN AND MR. GULINO STATE, AND MS. STROW IMPLIES THAT EACH AND EVERY ASPECT OF LOCAL COMPETITION IS NEW AND UNTESTED. IN FACT, MR. GULINO STATES, ON PAGE 5 OF HIS TESTIMONY, "THERE ARE NO TIME-TESTED PROCESSES IN PLACE THROUGH WHICH A CUSTOMER CAN ORDER, BILL, AND MAINTAIN THE CRITICAL ELEMENTS NEEDED TO ACTUALLY PARTICIPATE IN THE LOCAL MARKET." DO YOU AGREE WITH THIS ASSUMPTION?

A. No. Their presumption is not true. First, there is no requirement that all items on the Statement must be ordered. BellSouth must generally offer

the items and they must be functionally available. BellSouth may demonstrate through testing procedures that all items are in fact available. Nonetheless, most of these items are currently being provided. This is discussed in more detail in the testimony of Mr. Keith Milner. As Mr. Milner shows, BellSouth is actually providing many of the checklist items and, therefore, these items can no longer be considered new and untested.

Mr. Gulino and Ms. Strow submit that the interconnection agreements are paper promises to try to do what the competitive checklist requires. Mr. Gulino alleges that the contracts lack the particulars needed to provide service. If these particulars were lacking in the contracts, the ALEC could have requested them in arbitration. The ALECs have now decided to establish yet another, after the fact, hurdle that the arbitrated agreements do not contain all of the particulars they need. This is obviously just more evidence of their desire to stall BellSouth's entry by any means necessary.

Ms. Strow contends that BellSouth is not meeting the terms of the interconnection agreement between the two companies. Ms. Strow's dispute is based primarily on her insupportable contentions regarding unbundled network elements related to frame relay service. Her conclusions are simply wrong. As of March 24, 1997, BellSouth has made available the capabilities that Intermedia has requested. This

issue is discussed in more detail in the rebuttal testimony of Mr. Keith Milner.

Q. ARE THERE ANY BARRIERS TO PREVENT THE ALECS FROM ENTERING THE LOCAL MARKET?

A. No. Since BellSouth has opened its local markets to competition, barriers no longer exist. ALECS have negotiated agreements to provide access and interconnection. They can purchase unbundled network elements or resell BellSouth's services today. The timing of their entry is now their decision. BellSouth, on the other hand, still has the legal barrier of gaining approval for in-region interLATA entry from the FCC. Specifically, BellSouth must prove checklist compliance as required in the Act .

Q. MR. GILLAN, ON PAGE 38 OF HIS TESTIMONY, SUGGESTS THAT BELLSOUTH'S ENTRY INTO LONG DISTANCE SHOULD BE DELAYED BECAUSE EVEN WITH THE SAFEGUARDS IN SECTION 272 THERE ARE STILL ONGOING DANGERS OF DISCRIMINATION. PLEASE COMMENT.

A. Mr. Gillan is attempting to supplant Congress' views with his own. Congress implemented substantial nondiscrimination provisions in Sections 251, 252, 271, and 272 of the Act. If Congress wanted additional safeguards to further delay entry, it certainly knew how to

enact them. Although Mr. Gillan is apparently dissatisfied with the Act's provisions, he cannot simply ignore them and impose his own requirements. His speculation about possible discrimination despite the numerous safeguards is not a valid basis for denying a BellSouth application for interLATA relief. If this allegation was valid, BellSouth would never be authorized to offer in-region long distance.

Q. MR. GULINO, ON PAGE 7, STATES THERE IS NO GENERAL UNDERSTANDING OR PAST PRACTICE TO FALL BACK ON SHOULD THERE BE A DISPUTE. FOR THESE REASONS THERE NEEDS TO BE DETAILED AND SPECIFIC IMPLEMENTATION PROVISIONS THAT HAVE NOT BEEN ADDRESSED. HOW DO YOU RESPOND?

A. Mr. Gulino is simply mistaken. There are numerous vehicles to settle disputes. There are federal and state complaint processes. BellSouth must continue to negotiate agreements and this Commission can arbitrate disputes. There is also recourse to the Courts. Certainly there are means to settle disputes. With regard to the need for implementation detail, BellSouth has filed extensive documentation containing such details and is continuing to share such details with ALECs. Two ALEC training conferences have recently been held to assist with the process and procedures for implementation.

Q. MR. GULINO, ON PAGE 8, IMPLIES THAT SINCE BELLSOUTH'S WITNESSES RECOGNIZED THAT OPERATIONAL INTERFACES ARE

EVOLUTIONARY, EVEN BELLSOUTH CANNOT KNOW WHEN ITS SYSTEMS WILL BE AVAILABLE. DO YOU AGREE WITH THIS STATEMENT?

A. No. Mr. Gulino's statements are a mischaracterization of the testimony of BellSouth's witnesses. Although it is true that the systems will continue to evolve as needs change and as new capabilities are developed, as is the case with any mechanized system, the systems are ready and operational today.

Q. THE INTERVENORS HAVE SUGGESTED A NUMBER OF REASONS WHY BELLSOUTH'S ENTRY IS PREMATURE. SPECIFICALLY, WHEN DOES THE ACT SAY ENTRY IS PREMATURE?

A. Section 271(c) of the Act states that entry is premature under Track A without an agreement with a qualifying carrier, under Track B in less than 10 months of enactment; and when the checklist has not been met. It does not include any of these other standards that the intervenors attempt to establish.

TRACK A VS TRACK B

Q. HOW GERMANE IS THE ISSUE OF WHICH ROUTE, I.E., SECTION 271(c)(1)(A) (TRACK A) OR 271(c)(1)(B) (TRACK B), BELLSOUTH IS

PERMITTED TO FOLLOW TO SEEK INTERLATA RELIEF IN THIS PROCEEDING?

A. Track A vs. Track B is a federal, rather than a state, decision. The issue of which track BellSouth is permitted to follow to seek interLATA relief, therefore, should have little, if any, significance in this proceeding. I believe, however, that we have clearly stated our position on this issue and that is, BellSouth meets Track A in Florida. We have interconnection agreements with facilities-based ALECs that serve both business and residence customers.

The FCC will review the facts and make its decision after BellSouth files its application for interLATA relief. Contrary to Mr. Wood's contention, on page 4 of his testimony, that "a determination of whether BellSouth must proceed according to Track A or Track B has certain implications for the decision and recommendation that the Commission must make in this proceeding," there has been no indication that this Commission will need to determine whether the correct track was followed. As I stated in my direct testimony, this Commission will need to provide factual input to enable the FCC to make the decision of whether the appropriate track was followed. This Commission should be in the best position to advise the FCC of the relevant facts regarding the status of competition in Florida.

Subjecting itself to hearing long-winded arguments about the intent of Track A or Track B, or which track is appropriate or foreclosed, will not provide this Commission with the information that it needs. These arguments will only waste the Commission's time by having it listen to debate of a question or questions that it will not need to answer.

Q. WHAT ARE THE CONSEQUENCES OF THE INTERVENORS' POSITIONS REGARDING WHETHER BELLSOUTH MAY FILE FOR INTERLATA AUTHORITY UNDER TRACK A OR TRACK B?

A. Let me first reiterate what I have said previously in both this testimony and in my direct, the positions that the intervenors are taking are simply erroneous. It is the FCC, not the FPSC, that must approve the track on which BellSouth will base its request for interLATA relief. It appears, however, that based on their positions, the intervenors are requesting the Commission to abandon this whole docket. Ms. Murphy says, on page 5 of her testimony, that Track B is not available to BellSouth because Track B is "only available under very limited circumstances which do not apply here." Since ACSI and other carriers have requested access and interconnection, she contends that Track B is not available. She further states that BellSouth cannot comply with Track A because there is no facilities-based competition in the business or residential market. Similarly, Ms. Strow states on page 4, that BellSouth is precluded from pursuing Track B because BellSouth has had several requests for access and interconnection. She states that although Track A is

available, "the facts in this case will demonstrate that BellSouth does not meet the requirements of Track A..."

If BellSouth cannot request relief from the FCC under either Track A or Track B, then there is nothing more for this Commission to decide on the issue of interLATA relief. Of course, the plain language of the Act belies that ludicrous assertion. BellSouth is certainly not in some type of sustained no-man's land, or "Catch-22" as referred to by Commissioner Deason in the July 15, 1997 Agenda Conference, where "there is just no alternative, and BellSouth cannot proceed under either Track A or Track B."

Q. MR. BRADBURY ON PAGE 11, MS. STROW ON PAGE 10, MR. GILLAN ON PAGE 25, AND OTHERS DISCUSS THE DEPARTMENT OF JUSTICE'S (DOJ) EVALUATIONS IN SOUTHWESTERN BELL'S (SBC) OKLAHOMA AND AMERITECH'S MICHIGAN APPLICATIONS WITH THE FCC. WHAT SHOULD THE DOJ'S ROLE BE IN THE 271 PROCEEDING?

A. Under section 271(d)(2)(A), the DOJ is required to provide to the FCC "an evaluation of the application using any standard the Attorney General considers appropriate." It is clear, however, that the role Congress envisioned for the DOJ in Section 271 was limited to the DOJ's expertise regarding the impact the BOC's entry into the interLATA market would have on competition in that market. The DOJ has gone far beyond this

role by offering its opinions on the availability of Track A and Track B under Section 271; by accepting, without any independent analysis, complaints of competitors concerning SBC's provision of physical collocation, interim number portability and OSS access; and by setting a subjective standard for measuring and managing competition in the local market even though Congress specifically and intentionally did not set such a standard.

Congress provided examples of the kinds of inquiries that the DOJ might pursue. These examples include such antitrust-based questions as whether the BOC's entry into the in-region interLATA market would allow the BOC to impede competition in the interLATA market or whether there is a substantial possibility that the BOC could use its power in the local market to impede competition in the interLATA market. The many statements made by Congress support that Congress intended for the FCC to give "substantial weight" only to an evaluation grounded in the DOJ's expertise in antitrust matters. By venturing into areas in which it has no expertise and by establishing vague standards that are inconsistent with Congressional design, the DOJ has effectively abdicated its responsibility under Section 271 and delegated to BellSouth's competitors in the local market the decision whether BellSouth may enter the in-region interLATA market.

To my knowledge the DOJ has no particular expertise in OSS or in the technical requirements of providing telecommunications services. It is

BellSouth's position that the DOJ's role in consulting with the FCC is limited to antitrust issues. Thus, the DOJ's opinions concerning OSS or checklist compliance are not binding or persuasive.

Q. MS. STROW, ON PAGE 18 OF HER TESTIMONY, SUGGESTS THAT IT IS NECESSARY FOR AN INDIVIDUAL FACILITIES-BASED COMPETITOR TO PROVIDE SERVICE TO BOTH RESIDENTIAL AND BUSINESS CUSTOMERS. SHE ALSO STATES THAT IT IS NECESSARY FOR COMPETING PROVIDERS TO BE PROVIDING SERVICE TO MORE THAN ONE RESIDENTIAL SUBSCRIBER AND ONE BUSINESS SUBSCRIBER. ARE THESE REQUIREMENTS OF THE ACT?

A. No, Ms. Strow is mistaken. As I stated in my direct testimony, if a competing provider is providing facilities-based services to one group of customers and resale to the other group, that provider still allows BellSouth to qualify for interLATA entry under Track A. The Act requires only that a competing provider serve both business and residential customers and be exclusively or predominately facilities-based. It does not require that both classes of customers be served over that provider's own facilities. In fact, one competitor may provide facilities-based service to business customers and another may provide facilities-based service to residential customers. This combination may also allow Track A to be met.

With regard to the number of subscribers necessary in any one class, Ms. Strow is also incorrect. As I have previously stated, nowhere in the Track A criteria does the Act require that service be provided to more than one residential and one business customer in order to satisfy the Track A requirement. Ms. Strow's reference to "principles of statutory construction" is just obfuscation at its best.

Q. IN SEVERAL REFERENCES THROUGHOUT HER TESTIMONY, MS. STROW STATES THAT BELLSOUTH HAS NOT MET THE REQUIREMENT FOR A SPECIFIC ITEM ON THE CHECKLIST. SHE INSINUATES THAT BELLSOUTH MAY INTENTIONALLY BE ATTEMPTING TO DELAY COMPETITION, PARTICULARLY FOR FACILITIES-BASED COMPETITORS. IS THERE ANY TRUTH TO MS. STROW'S INSINUATION?

A. Absolutely not. First, BellSouth does not agree that it is not in compliance with many of the points on the checklist that Ms. Strow cites. Second, and of equal if not more importance, BellSouth is certainly not attempting to delay competition in the local market, particularly with regard to facilities-based providers. Delaying local competition would be extremely counter productive to BellSouth's business objective to enter the in-region interLATA market; even mentioning the possibility is absurd. BellSouth is working diligently with ICI, as well as all other ALECs, to meet their needs and facilitate their local market entrance. Ms. Strow is

just trying to obfuscate the real issues in this docket and may be trying to mislead this Commission.

STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS

Q. WHY IS BELLSOUTH FILING ONLY A DRAFT STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS?

A. BellSouth has filed a Draft Statement to allow this Commission additional time to review the Statement before it must make a final decision. Under Section 252(f) of the Act, the Commission must, within 60 days of submission, either complete its review of the Statement or permit it to take effect. This Commission's decision in this proceeding is currently scheduled for November 3, 1997. Filing the Draft Statement allows the Commission approximately two additional months for review. BellSouth plans to file its final Statement on a schedule that will allow the Commission to make its decision within the 60 day limit. There will be no substantive differences between the Draft Statement and the Final Statement. BellSouth simply intends to remove the word "Draft".

Q. MS. STROW SUGGESTS THAT SINCE ICI DOES NOT BELIEVE BELLSOUTH MEETS TRACK A, THERE IS NO NEED FOR THE COMMISSION TO EVEN REVIEW BELLSOUTH'S STATEMENT. PLEASE COMMENT.

A. Ms. Strow, through her suggestion, would apparently have the Commission terminate this proceeding. That suggestion is ridiculous on its face. BellSouth's Statement has more uses than just as a tool for BellSouth to qualify for entry into the interLATA market under Track B. Upon Commission approval, BellSouth's checklist compliant Statement will be available to any competitor desiring to enter the local exchange market.

Moreover, there are several ways that BellSouth can establish its compliance with the requirements of the 14-point checklist for entry under Track A. In addition to the several combinations of approved agreements, discussed in my direct testimony, that are available to demonstrate checklist compliance, Section 271(d)(3) of the Act allows that a combination of the agreements and the Statement can be used to meet the checklist requirements for a filing under Section 271(c)(1)(A).

Also, if a competitor would otherwise qualify under Track A but this Commission certifies that the competitor has not negotiated in good faith or has somehow delayed implementation of its agreement, Track B must be followed. The Commission's ability to certify that a competitor has delayed implementation its agreement becomes important as a result of the FCC's SBC 271 Order which creates a situation where competitors can forestall BellSouth's entry into the in-region interLATA market. While BellSouth does not necessarily agree with the FCC's interpretation, its existence heightens the importance of the Commission's evaluation of

whether competitors have delayed implementation of their agreements. Such delay by competitors could cause the FCC to inappropriately delay BellSouth's interLATA entry. For example, delayed implementation may result when competitors that have negotiated agreements with BellSouth and have stated that they plan to provide service are still not doing anything yet to provide that service. Or, perhaps a substantial timeframe has passed and the competitors are providing facilities-based service to business customers but have not provided any service to residential customers. Clearly, BellSouth has opened the markets to competition, but these competitors would be delaying BellSouth's entry into the in-region interLATA market by delaying implementation of their agreements.

Q. HAVE ANY OTHER STATES REVIEWED BELLSOUTH'S STATEMENT?

A. No BellSouth state has refused to review BellSouth's statement. In addition to the reference in Mr. Wood's testimony to Georgia and Louisiana, South Carolina has recently determined unanimously (7-0) that BellSouth had opened the local market to competition. The South Carolina Commission ruled that BellSouth's Statement meets the requirements of the 14 point checklist and that interLATA entry by BellSouth in South Carolina is in the public interest. That Order has not yet been issued.

Q. DO YOU HAVE ANY FURTHER COMMENTS ON THE SOUTH CAROLINA RULING?

A. Yes. There are three companies that are currently offering businesses in South Carolina alternative local service. According to South Carolina Commissioner Dukes Scott, "[t]his isn't a ruling for BellSouth. This is a ruling for competition. This will let the customer decide what they want." In addition to "lock-step" pricing among long-distance companies, which was one of the reasons the Commission made its decision, the Commission hopes to force AT&T to enter the local markets in South Carolina. AT&T's reported response of "fat chance" certainly brings into question its true intentions with regard to the local market. If it is not willing to enter a local market where BellSouth can apply for interLATA relief, what incentive does it have to enter a local market where BellSouth cannot yet apply?

Q. MR. WOOD, ON PAGES 28 AND 29 OF HIS TESTIMONY, DISCUSSES THE RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGE ("ALJ") IN LOUISIANA TO THE LOUISIANA PUBLIC SERVICE COMMISSION. WOULD YOU PLEASE COMMENT ON HER RECOMMENDATION.

A. As Mr. Wood describes in his testimony, the ALJ suggested to the LPSC that there was insufficient information available to make a decision with regard to BellSouth's Statement filed in Louisiana and it should,

therefore, be rejected. What Mr. Wood fails to mention in his testimony, is the fact that the ALJ's recommendation was directly contradicted by the LPSC. In its decision on July 16, 1997, and confirmed in its Order dated July 28, 1997, the Louisiana Commission rejected the ALJ's Recommendation. The matter was remanded to the ALJ, and the staff is to provide a recommendation that is limited to whether BellSouth's Statement complies with the 14-point competitive checklist. The Louisiana PSC will vote on BellSouth's Statement on August 20, 1997 .

Q. MR. MCCAUSLAND STATES ON PAGE 8 OF HIS TESTIMONY, THAT BELLSOUTH MAY NOT RELY ON ITS STATEMENT IN ORDER TO OBTAIN SECTION 271 AUTHORITY. DO YOU AGREE?

A. No. Mr. McCausland bases his allegation on the FCC's Order rejecting SBC's Section 271 application. However, the FCC did not reject use of the Statement. If this Commission confirms that the Statement is checklist compliant, it can be used to demonstrate compliance under the Act. The Act makes it clear that the BOC has the ability to file under Track A or Track B, depending upon the facts in existence.

In addition, BellSouth may rely on its Statement even when interLATA relief is sought under Track A. There is nothing in the Act that says the Statement and Track A are mutually exclusive conditions. Qualifying agreements used under Track A may not contain all items on the checklist. The combination of approved agreements with the Statement

may provide a means for BellSouth to meet the checklist if the qualifying competitors under Track A do not elect to have or use all of the checklist items included in their agreements.

Q. INTERVENORS HAVE COMMENTED THAT BELLSOUTH'S STATEMENT OF GENERALLY AVAILABLE TERMS FILED IN GEORGIA WAS REJECTED. PLEASE COMMENT ON THE RECENT GEORGIA DECISION.

A. There were two basic premises included in the Georgia Order rejecting the Statement. First, the Operational Support Systems (OSS) were not complete and operational. BellSouth agreed with this finding and in fact requested an extension until the end of April to provide OSS. The second reason for rejection was that the interim rates in the Statement did not comply with Section 252(d) of the Act which requires rates to be cost based. BellSouth has filed a Motion for Rehearing and Clarification or, in the Alternative, for further Consideration of this issue. The Georgia Commission denied the Motion because of concerns about the validity of retroactive adjustments caused by the true-up. That situation does not, however, exist in Florida. The Florida rates are not subject to retroactive treatment. The Georgia Commission's finding in the March 20, 1997 Order that the rates it adopted in the arbitration proceedings were not "cost-based rates under Section 252(d)" conflicts with the requirements of Section 252(c) and the Commission's statements that it was establishing rates in the arbitrations consistent with Section 252(d).

Section 252(d) requires that the rates for interconnection and unbundled network elements be cost based; it does not specify what methodology the Commission must use. The Commission can use a different methodology when establishing permanent rates if it so desires. This premise was certainly upheld by the Eighth Circuit Court of Appeal's Ruling.

Q. YOU MENTION THE EIGHTH CIRCUIT COURT'S RULING ABOVE. DOES BELLSOUTH'S STATEMENT NEED TO BE CHANGED TO COMPLY WITH THE COURT'S OPINION?

A. No. The terms, conditions, and prices are permitted by the Eighth Circuit's opinion.

Q. DOES THE COURT'S OPINION HAVE AN IMPACT ON ANY OF THE INTERVENORS' TESTIMONY PRESENTED IN THIS PROCEEDING?

A. Yes, it certainly does. The Eighth Circuit Court's Ruling vacated a number of the FCC's Rules in its First Report and Order in CC Docket No. 96-98. The Court held that State Commissions have exclusive jurisdiction to interpret the statutory requirements and set prices for local interconnection, unbundled elements, and resale without interference or input from the FCC. Since the Court ruled that the FCC lacked jurisdiction to issue the pricing rules, the Court declined to review the merits of those rules.

The Court also vacated the FCC's "pick and choose" rule. It found the rule to be an unreasonable interpretation of the statute. The Court found the FCC's interpretation to be inconsistent with Act's preference for negotiated agreements. The Court went on to explain that an interconnector seeking to receive the benefit of a term in a preexisting interconnection agreement must also accept the trade-offs negotiated by the original party. In addition, the Court vacated the requirement for submission to the State Commissions for approval, pre-Act agreements between incumbent LECs. The Court also found that the FCC cannot preempt state rules simply because they are inconsistent with FCC regulation. The Court interpreted subsection 251(d)(3) of the Act to preserve state statutes enacted prior to the Act that were designed to open local markets to competition.

Further, the Court vacated the presumption that any item that can technically be unbundled should be unbundled. The Court rejected the FCC's attempt to use "technical feasibility" to define those elements that are subject to unbundling. The Court agreed with the LECs that "technical feasibility" defines where within the network unbundling is to take place, not which elements are subject to unbundling. In addition, the rules requiring ILECs to offer interconnection and unbundled elements superior in quality to their own, and requiring that ILECs recombine unbundled network elements for the ALECs were also vacated.

The Court also rejected the FCC's claim that it could enforce its interpretations of Sections 251 and 252 through Section 208 complaint proceedings, holding that the State Commissions have exclusive authority to enforce the terms of the interconnection agreements reached under the Act. If there is a disagreement with the State Commission in decisions regarding Sections 251 and 252, the Court stated that the exclusive means to review such decisions lies with Federal District Court under Section 252(e)(6) of the Act. The Court upheld the FCC rules applicable to CMRS providers and reversed the FCC's standards for determining when a rural LEC is exempt from the requirements of Sections 251 and 252.

Although the ramifications of vacating many of these rules is readily apparent, due to the short timeframe since the filing by the Eighth Circuit, BellSouth has not completed its analysis of the implications of several of the decisions.

Q. WHAT SECTIONS OF THE FCC'S RULES WERE VACATED BY THE EIGHTH CIRCUIT?

A. Specifically, the Court vacated the following provisions:

Section 51.303 - Preexisting agreements;

Section 51.305(a)(4) - requirement for superior quality of interconnection, if requested;

Section 51.311(c) - requirement for superior quality of access to unbundled network elements, if requested;

Section 51.315(c)-(f) - requirement to combine unbundled network elements;

Section 51.317 - Standards for identifying network elements to be made available. This section was only vacated to the extent that the rule establishes a presumption that a network element must be unbundled if it is technically feasible to do so;

Section 51.405 -Rules with regard to rural telephone companies;

Sections 51.501-51.515 - Pricing standards for elements, including the application of access charges;

Sections 51.601-51.611 - Pricing standards for resale;

Sections 51.701-51.717 - Reciprocal Compensation for Transport and termination of Local Telecommunications Traffic (some sections in this group are excluded as they apply to CMRS providers); and

Section 51.809 - Availability of agreement provisions to other telecommunications carriers under section 252(I) of the Act.

Q. MR. HAMMAN AND MR. BRADBURY SUGGEST THAT THE STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS SHOULD BE REJECTED BECAUSE IT DOES NOT INCLUDE SEVERAL FEATURES OF THE AT&T ARBITRATED AGREEMENT. DOES THIS ARGUMENT HAVE MERIT?

A. Absolutely not. The Statement fulfills the requirement to offer each of the items on the 14-point checklist. This is the only requirement that the Statement has to meet. It provides the proper vehicle for other carriers to use, if they so desire, to enter the local market quickly without negotiating agreements and possibly going through the complex process of arbitration. Of course, negotiation is still available to these competitors as well. The Statement, as written, is checklist compliant as is required by Section 271(c)(2)(B).

Mr. Hamman and Mr. Bradbury argue that the Statement must contain capabilities included in AT&T's arbitrated agreement without regard for whether those capabilities are required by the checklist. The Statement does not include nor is it required to have included, every item that is included in negotiated or arbitrated agreements because some of these items go beyond the requirements of the checklist and were specifically requested by individual carriers to be included for their own purposes. Other carriers may not necessarily want all the conditions that AT&T has in its agreement. Of course, if other carriers choose, they can avail themselves of previously negotiated or arbitrated agreements. In addition, they can use the bona fide request process provided for in the Statement to obtain additional capabilities. It seems disingenuous for AT&T to complain about the lack of provisions in the Statement when it already has an arbitrated agreement that is more extensive than the Statement and AT&T should have no interest in the Statement as long as

the items in its agreement are at least as good as what is included in the Statement. One questions the motivation for such complaints.

CHECKLIST EXPANSION

Q. THROUGHOUT THE TESTIMONY OF MANY OF THE WITNESSES THERE HAVE BEEN ATTEMPTS MADE AT EXPANDING THE REQUIREMENTS INCLUDED IN THE COMPETITIVE CHECKLIST. IS SUCH EXPANSION ALLOWED BY THE TELECOMMUNICATIONS ACT?

A. No. Section 271(d)(4) clearly states that: "The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." Congress decided the checklist was necessary and sufficient to open the local markets to competition and apparently gave great thought as to what the provisions should be. Congress could have added more items but they chose not to do so and even included this provision prohibiting expansion of the checklist. This Commission should ignore the self-serving recommendations of parties in this docket to expand the checklist. Checklist expansion is in contravention of the Act.

Q. PLEASE PROVIDE SOME EXAMPLES OF CHECKLIST EXPANSION.

A. First, on page 7, Mr. Gillan concludes that "local competition depends...upon whether the tools entrants actually needed are available in ways that support entry on a commercial scale." Nowhere in the Act is there a requirement that the checklist items be in use on a commercial scale before interLATA entry can be sought. This assertion is contrary to the logic that produced Track B. BellSouth can comply with the checklist even if no facilities-based competitor exists. Given this fact, it is impossible for the checklist to contain any kind of actual use requirement before compliance can be demonstrated.

In addition, several intervenors, like Mr. Wood on page 9 of his testimony, recommend that regulators should wait to authorize BOC interLATA entry until the Commission is confident that markets are indeed open. This recommendation is simply a market share test in disguise. Again, market share thresholds are not a requirement of the Act and were affirmatively rejected by Congress.

In addition, several intervenors try to expand the checklist to include a laundry list of items necessary to BOC entry, that they believe should not have been omitted from the Act . Mr. Hamman, beginning on page 3, adds operational expertise to the list. Mr. Pfau, on page 3, states that BellSouth must demonstrate it is providing nondiscriminatory access by obtaining data through performance measurements. Mr. Hamman's and Mr. Bradbury's additional requirements place competitors in control of when the local market will be open to competition. None of these

requirements are in the checklist. These requirements would totally belie Track B, as stated above, and force a de facto market share test that Congress affirmatively rejected.

Q. HAVE THERE BEEN OTHER CRITERIA PROPOSED WHICH WOULD EXPAND THE CHECKLIST?

A. Yes. Mr. Gillan on page 39, although not specific, alludes that access charges must be reduced to cost prior to BellSouth's entry into long distance. Reduced access charges has been a recurring theme in many dockets across the nation for years.

However, this issue of access charge reductions is so far removed from the scope of this proceeding that it is obviously just another attempt to hold interLATA entry by BellSouth hostage until their demands are met. The IXCs have provided a whole wish list of items that they say must be met prior to BellSouth's entry into the long distance market. Reducing access charges is unnecessary in this proceeding and should not be considered. I predicted in my direct testimony that this argument would be made by interexchange carriers. What I said in that testimony is still true. Reducing access charges to cost is not included in the fourteen checklist points. If Congress had intended this to be a requirement, they clearly would have included it in the checklist.

Q. WHAT ARE THE CONSEQUENCES OF REDUCING ACCESS CHARGES TO COST?

A. As I stated in my direct testimony, the consequence of this proposed reduction in access charges is the elimination of a substantial source of support for universal service. If this source of support is eliminated, then universal service could be jeopardized. Access charge reductions, as well as their effects on universal service, are so far removed from this docket that these issues should be considered at another time. Universal service and access reform, although vitally important, are extremely complex issues; reform of these systems, however, simply has no role in this proceeding. The Commission's attention should not be misdirected to address such issues.

Q. ARE THERE OTHER ATTEMPTS TO EXPAND THE CHECKLIST THAT YOU WOULD LIKE TO COMMENT ON?

A. Yes. Mr. Gillan repeatedly concludes that availability of network element combinations is a necessary precondition for interLATA entry. Network element combinations are not a checklist requirement. In fact, as I stated above, the Eighth Circuit Court ruled that BellSouth is not required, by the Act, to offer such combinations. A capability that is not even required to be offered by the Act, surely cannot be a checklist requirement.

REBUNDLED ELEMENTS

Q. SEVERAL OF THE INTERVENORS HAVE RAISED THE ISSUE OF REBUNDLED NETWORK ELEMENTS. WOULD YOU PLEASE COMMENT.

A. Yes, since it has received so much attention, I would like to comment briefly on the issue of the recombining or rebundling of network elements into services equivalent to those offered at retail. Several of the intervenors have opined that BellSouth has not provided recombined elements as they, the intervenors, have requested. This is simply not the case. BellSouth has provided recombined elements as ordered by this Commission. In the Order on Motions for Reconsideration of the Arbitration Orders ("Reconsideration Order"), the Commission stated that it had not addressed the price of rebundled elements in its original Order. In its original Order on arbitration, the Commission expressed its concern with the FCC's interpretation of Section 251(c)(3) of the Act, Unbundled Access. Specifically, the Commission was "concerned that the FCC's interpretation could result in the resale rates we set being circumvented if the price of the same service created by combining unbundled elements is lower." The issue here is not the technical provision of the elements, but the price that BellSouth charges for the recombined elements.

As information, I have attached Exhibit AJV-6, which illustrates the consequences of pricing recombined elements as proposed by AT&T. This exhibit is the same format that was used in the arbitration

proceeding. However, I have changed the resale discount and unbundled prices to reflect this Commission's Order.

Q. WOULD YOU PLEASE BRIEFLY EXPLAIN THE CHART YOU HAVE INCLUDED AS AJV-6?

A. Certainly. Exhibit AJV-6 illustrates the financial effect of this issue. Let me give you a hypothetical example. Assume there is a business customer with two business lines with hunting and a single vertical feature on each of his lines. Based on these assumptions, this business customer pays BellSouth $69.62 each month for his first line.

Now consider that this business customer decides to purchase local service from AT&T, for instance. As a reseller of BellSouth's local service, AT&T would pay BellSouth $61.27, the retail rate less the avoided cost discount approved by this Commission, each month for the line and the Company would continue to receive access charges from that customer.

Now consider that AT&T orders unbundled elements to provide the equivalent service as provided above. The revenues paid to BellSouth, based on the unbundled rates ordered by this Commission, would drop to $32.77 for this line. Not only does BellSouth lose significant revenue, but AT&T is not subject to the joint marketing restriction on resold services.

Page 2 of the exhibit further illustrates the effect of recombination. It shows the average rate for business lines and trunks and residence lines, including vertical services, toll and access. First, it shows the average retail price of the service. Next, it shows the price for the combination of these services for an average customer if the services are resold. Then, it shows a difference of ($21.27) for business, if the same package of services was sold as AT&T requested. As can be seen, the difference between the revenues for the recombined elements and the resold services, the loss due to regulatory rules, is significant. When the per line losses are multiplied by the number of respective lines, it produces the contribution loss at various levels of market share erosion. For residence customers, the difference is positive so ALECs would not order recombined elements. Essentially, for each ten percent of market share that an ALEC gains in this manner, BellSouth loses $35M in contribution. This is the loss experienced over and above that from providing the services at the resale discounted level.

Based on these results, I believe that this Commission was correctly concerned about allowing AT&T to usurp the contributions that this Commission placed in retail rates through the artifice of renaming resale as rebundling.

Q. IS BELLSOUTH REQUIRED TO REBUNDLE UNBUNDLED ELEMENTS TO COMPLY WITH THE CHECKLIST?

A. No. The Eighth Circuit Court examined the FCC Rules and determined that BellSouth is not required to rebundle under the Act. As stated above, the Court vacated rule 51.315(c)-(f) as well as its affiliated discussion sections. The Court found that "Section 51.315(c)-(f), cannot be squared with the terms of subsection 251(c)(3)." They go on to say that "[w]hile the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the Commission, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements." Certainly if BellSouth is not required to rebundle under the Act, it cannot be a requirement of the checklist.

Q. MR. GILLAN CONTENDS THAT THE ABILITY TO RECOMBINE NETWORK UNBUNDLED ELEMENTS AT THE UNBUNDLED ELEMENT PRICES IS A NECESSARY CONDITION FOR DEVELOPMENT OF LOCAL COMPETITION. MR. GULINO ASSERTS ON PAGE 18, THAT PRICING OF REBUNDLED SERVICES IS INCONSISTENT WITH THE FEDERAL ACT. ARE EITHER OF THESE ASSERTIONS CORRECT?

A. No. There are substantial margins in business vertical services and access prices. That is no surprise. As a matter of public policy, this Commission originally set these prices to support local residential rates. If new entrants are permitted to capture or eliminate those margins

immediately, residential, principally rural, customers will be harmed. It is the customers that AT&T and MCI do not want to serve who will fund the multi-million dollar price breaks that AT&T, MCI and other ALECs will receive. This windfall will be achieved by simply changing the way services are ordered. ALECs will simply request rebundled elements instead of resold service. Nothing else is different. To protect consumers, the price for recombined elements cannot equal the sum of unbundled element prices when the rebundled and resold services are equivalent. This Commission has heard the intervenors arguments before and there is no need to address them again in this proceeding. BellSouth has not said that it will not provide the recombined elements that, in this case, AT&T is requesting. In fact, BellSouth currently offers rebundled elements. We believe that we will continue to offer such rebundled elements, if BellSouth can establish the appropriate prices for these elements. BellSouth is, however, evaluating this decision in light of the Eighth Circuit's opinion. What BellSouth has said is that there is no requirement in the Act and there is no valid policy reason for the carriers to receive recombination priced as they have requested. Additionally, the Eighth Circuit found that BellSouth does not have to offer such rebundling; and, consequently, such rebundling is not a criterion for determining whether the Statement is checklist compliant.

Q. HOW DOES BELLSOUTH RESPOND TO MR. GILLAN'S ASSERTION ON PAGE 12, LINES 13-14, THAT IN PRICING NETWORK ELEMENTS

THE ENTRANT AND THE INCUMBENT SHOULD FACE THE SAME COST STRUCTURE FOR THE NETWORK THEY SHARE?

A. Mr. Gillan's suggestion that interconnectors will only utilize unbundled elements is contrary to the intent of Congress to provide incentives to build infrastructure. He incorrectly implies that prices should be set equal to cost and that interconnectors will only utilize unbundled elements. Setting prices equal to cost is not required by the Act and would not be sound public policy. In addition, in its Reconsideration Order, the Commission states, on page 24, "[w]e note that AT&T expected all rates to be set at cost. However, our rates were based on TSLRIC cost and included contribution to joint and common costs. We agree with BellSouth that we were not required to set rates at cost." (emphasis added)

Q. PLEASE COMMENT ON MR. GILLAN'S STATEMENT ON PAGE 12, LINES 28-30, THAT "NETWORK ELEMENTS ESTABLISH THE ENTRANT AS A COMPLETE PROVIDER OF LOCAL AND EXCHANGE ACCESS SERVICES, AN ECONOMIC PREDICATE TO FULL SERVICE COMPETITION."

A. Much has been said about the different business opportunities that rebundled elements present. The only different business opportunity is that ALECs want to pay less for the resold service; avoid paying access charges; and avoid the joint marketing restriction. The carrier is no more

the customer's access service provider using rebundled elements than they are using resale. The access service is provided by the same BellSouth loop and switch in either case.

Another baseless reason to support their contention of a difference between resale and rebundling is the need to bill for access services. Under either scenario, BellSouth provides the access services to the carrier. If AT&T, for instance, is the end user's long distance provider, AT&T will not bill access to anyone. End users don't pay carrier access charges, carriers do. AT&T, in this case won't be billing access to anyone; they will simply stop paying it to BellSouth, even though they continue to use the same BellSouth equipment in the same way.

Now, if an AT&T end user served by rebundled elements decides to use MCI as their IXC, AT&T would propose to bill MCI for access, but that is unnecessary. BellSouth does not need AT&T to bill MCI for the access service that BellSouth provides. And, by the way, AT&T also wants to keep the revenue in this case. Somehow they believe that it is appropriate for BellSouth to provide all of the investment but AT&T to receive all of the revenue.

Q. HOW DOES BELLSOUTH RESPOND TO MR. GILLAN'S ASSERTION, ON PAGE 13, THAT NETWORK ELEMENTS ENABLE THE COMPETITIVE PROVIDER TO DEVELOP ITS OWN UNIQUE LOCAL SERVICES?

A. Mr. Gillan asserts that there are additional capabilities the competing provider can offer that are different than what they can provide under resale. We disagree with Mr. Gillan's assertion in this matter. If a competitive provider uses unbundled elements combined with facilities of their own, unique local services could be developed. However, by strictly using elements rebundled by the LEC, no additional capabilities beyond resale can be gained. A competitor gets the same capabilities of the BellSouth network that are provided through resold services. What they can add to the service, what they can do with the service, their ability to innovate and serve the customer are all the same under either circumstance.

Q. ON PAGE 26, MR. GILLAN STATES THAT THE FCC REAFFIRMED ITS DECISION ON THE PROVISION OF NETWORK ELEMENT COMBINATIONS. HOW DO YOU RESPOND?

A. First, Mr. Gillan is incorrect; all the FCC did in the recent access reform decision was reaffirm its rule that access charges should not apply to unbundled elements. It did not reaffirm that recombined elements should be offered. As I stated previously, the Eighth Circuit Court vacated the FCC rules that prohibited charging access on unbundled elements and that required BellSouth to rebundle network elements. The fact that the FCC has resurrected the access charge rule under access reform has no bearing on this proceeding.

Q. PLEASE COMMENT ON MR. GILLAN'S ASSERTION, ON PAGE 16, THAT UNBUNDLED LOCAL SWITCHING IS THE HEART OF LOCAL EXCHANGE SERVICE.

A. If unbundled local switching is truly the most critical element to create services and generate revenues, then competition should be in full force. The switch is one of the easiest items for the IXCs to provide on their own, as several ALECs have already done. If what Mr. Gillan says is true, then there should be broad scale local competition from all carriers providing services using their own switches.

Q. DOES THE UNBUNDLED LOCAL SWITCHING NETWORK ELEMENT ESTABLISH THE PURCHASER AS ITS SUBSCRIBER'S LOCAL TELEPHONE COMPANY IN EVERY RESPECT?

A. No. Nowhere in the Act or the FCC rules does it state that the unbundled local switch establishes its purchaser as its subscriber's local carrier. The part of the FCC Order that Mr. Gillan quotes on page 18 says nothing about the entrant becoming the subscriber's local telephone company. It is ludicrous to believe that the unbundled local switching network element could do this alone. Other elements are required in conjunction with the switch to provide service coequal to BellSouth. The ALEC can purchase the unbundled local switching element from

BellSouth and combine it with loop, transport and other services obtained from a third-party or provided themselves.

Q. DOES BELLSOUTH PROVIDE AN UNBUNDLED LOCAL SWITCHING ELEMENT THAT SATISFIES THE REQUIREMENTS OF THE ACT AND THE FCC RULES?

A. Yes. The ALEC can buy BellSouth unbundled switching and receive all of the features the switch provides. Mr. Gillan's criticism of unbundled switching is based on the fact that BellSouth advocates that AT&T should not receive the access revenues when it purchases the combined loop and port. Mr. Gillan just does not like the price AT&T should pay for the recombined services. Mr. Gillan has repeatedly attempted to distinguish between recombination and resale but has not successfully achieved this goal.

Q. PLEASE COMMENT ON MR. GILLAN'S REFERENCE, ON PAGE 24, TO THE DOJ'S REJECTION OF AMERITECH'S MICHIGAN COMPLIANCE WITH THE CHECKLIST.

A. First, whether the DOJ is right in their rejection of Ameritech's Michigan compliance is not germane. The DOJ nor the Attorneys General have any expertise in evaluating the requirements of the competitive checklist. The DOJ stated that Ameritech could not receive in-region interLATA authority unless it makes common transport available in conjunction with

both unbundled switching and the "network platform". The "network platform" is available in the BellSouth region and ALECs can purchase combinations of network elements. In addition, the way Ameritech provides common transport is different than the way BellSouth provides common transport. Common transport is available to competitors in Florida. BellSouth does not have the same problems offering common transport that the DOJ was alluding to in the Ameritech evaluation.

Q. DOES THE ACT REQUIRE BELLSOUTH TO PROVIDE UNBUNDLED NETWORK ELEMENTS IN A MANNER EQUIVALENT TO THE MANNER BELLSOUTH PROVIDES SUCH ELEMENTS TO THEMSELVES AS MR. GULINO STATES ON PAGE 22?

A. No, the Act requires the provision of nondiscriminatory access. In addition, BellSouth does not provide unbundled loops to itself so the statement that BellSouth provides loops to itself in 48 hours or less is simply not true. In addition, Mr. Gulino expresses concern about huge delays in BellSouth's provisioning of unbundled loops. This is a mischaracterization with regard to the parity issue. If no facilities are available, BellSouth as well as the competitor would be delayed by an equal amount of time in providing service.

Q. WHAT OTHER ISSUES RELATED TO RECOMBINATION NEEDS TO BE ADDRESSED?

A. Mr. Hamman, at pages 27-32, uses the term unbundled platform or platform configuration to describe recombination of elements. He then states that BellSouth is unable to implement this unbundled platform. There is nothing unique about the means to provision this unbundled platform which is simply recombination of network elements. Their platform is simply retail services that will be resold. Consequently, BellSouth can implement AT&T's request, provisioned as resale. Again, BellSouth is not required to offer this capability and, therefore, it has no bearing on checklist compliance.

SUFFICIENCY OF INTERIM RATES

Q. MR. WOOD ON PAGE 5, ALLEGES THAT THE INTERIM RATES AND PERMANENT RATES SET BY THIS COMMISSION IN ARBITRATION DOCKETS DO NOT SATISFY THE REQUIREMENTS OF 252(d)(1) OF THE ACT. HOW DO YOU RESPOND?

A. Mr. Wood is just plain wrong. Interim and permanent rates as established by this Commission satisfy the requirements of Section 252(d) of the Telecommunications Act. Again, I reiterate what the Commission stated in its Reconsideration Order, "[w]e agree with BellSouth that we were not required to set rates at cost." Mr. Wood's erroneous contention is based on his misrepresentation that Section 252(d)(1) requires that rates should <u>equal</u> cost. However, Section 252(d)(1)(A) states that interconnection and network element charges

should be "based on the cost of providing the interconnection or network element..." Mr. Wood acknowledges this definition on page 16 of his testimony but chooses to ignore it.

Q. MR. WOOD, ON PAGE 24, STATES THAT THE RATES SET IN THE ARBITRATION ARE INTERIM AND NEED FURTHER INVESTIGATION BEFORE PERMANENT COST-BASED RATES ARE SET. DOES THIS MEAN THE INTERIM RATES ARE NOT COST BASED?

A. No. The Commission has adopted TSLRIC as the cost methodology for establishing permanent rates. Where TSLRIC studies were not provided, the Commission set interim rates based on Hatfield Model costs or BellSouth tariffs. The FPSC will set permanent rates for these items based on TSLRIC studies that have now been filed by BellSouth. The fact that a different cost methodology was used to set interim rates does not change the Commission's conclusion that the interim rates are cost-based. Section 252(d) requires the rates for interconnection and unbundled network elements to be cost-based but does not specify what methodology this Commission must use. The Commission is certainly free to use one methodology in establishing interim cost-based rates, while using a different methodology to adjust these costs and prices on a permanent basis. The rates ordered by this Commission in the arbitration will remain in effect until such time as the Commission orders the rates changed just as is done today with tariffed rates. Existing rates

are always subject to review and change - a characteristic that is common in the marketplace.

The Florida Commission will determine what the proper permanent rates should be. BellSouth is currently in compliance with the Act and, therefore, there is no reason to delay BellSouth's entry into the interLATA long distance until permanent rates are set.

Q. ON PAGES 30-32 OF HIS TESTIMONY, MR. WOOD DISCUSSES THE GEOGRAPHIC DEAVERAGING OF SOME NETWORK ELEMENTS. PLEASE COMMENT ON HIS DISCUSSION.

A. First, rate deaveraging is not a requirement of the Act, is not required to be checklist compliant or to obtain interLATA relief. It is, therefore, not a relevant issue to be considered in this proceeding. Since Mr. Wood has raised it, I will, however, respond briefly. BellSouth has never agreed to deaverage rates in Georgia, which is what Mr. Wood seems to be trying to insinuate in his testimony. While BellSouth agrees that <u>costs</u> may vary by geographic area and that there are different levels of universal service support in different rates, this is not the arena to address the issue. The different levels of universal service support, while an important issue, is more appropriately addressed in conjunction with all other issues, including rate rebalancing, related to universal service, not as a stand alone issue. The Commission addressed geographic deaveraging of unbundled elements in its Order No. PSC-96-1579-FOF-TP. In that

Order on page 23, they state,"[w]e also find that the Act can be interpreted to allow geographic deaveraging of unbundled elements, but we do not believe it can be interpreted to require geographic deaveraging. We further find that the record in this proceeding does not support a decision to geographically deaverage the price for unbundled elements..."

Q. DO YOU AGREE WITH MR. WOOD'S ASSERTION THAT TSLRIC CANNOT BE USED AS A COST BASIS FOR DETERMINING RATES UNDER SECTION 252 OF THE ACT?

A. No. Mr. Wood claims that because TELRIC and TSLRIC produce different results, this Commission's rates are not cost based. This claim is irrelevant, as well as being wrong. The Act does not specify a particular cost method. The Commission decided to use TSLRIC. The fact that it is different from TELRIC is obvious and does not change the fact that this Commission set prices based on cost. In addition, the Eighth Circuit's Ruling has vacated the FCC's pricing rules and has given sole responsibility for pricing to the states. This Commission is free to choose the appropriate cost method to meet the Act's requirement that prices are set based on cost. As I stated previously, the Eighth Circuit's Ruling gave the State Commission exclusive jurisdiction over such issues as this.

ALLEGATIONS OF UNFAIR COMPETITION

Q. VARIOUS PARTIES HAVE ALLEGED THAT BELLSOUTH HAS EXHIBITED UNFAIR COMPETITIVE PRACTICES IN THE PAST. ARE THEIR CHARGES TRUE?

A. No. In an attempt to demonstrate that BellSouth does not compete fairly, the intervenors have listed several past occurrences in which BellSouth and these parties have not agreed on certain issues. Some of these alleged acts were ordered by Commissions; some have been resolved by the parties through the normal course of business; and others have been resolved by regulators in favor of BellSouth. These parties would have the Commission believe that anytime BellSouth has a legitimate disagreement with another carrier, that BellSouth is acting anticompetitively. This is not only untrue, it is simply an attempt to keep BellSouth out of the interLATA market and retain the existing oligopoly.

BellSouth has been a leader among local exchange carriers in pro-competitive policies and actions. A USTA advertisement in The Wall Street Journal on February 13, 1997 shows that BellSouth has negotiated more interconnection agreements than any other RBOC. In fact, BellSouth has over 577 signed agreements to date, 93 in Florida. BellSouth has repeatedly stated that it believes that competition for local exchange services will be in the public interest if implemented in a competitively neutral manner.

In my following testimony, I will address many of the allegations presented by the intervenors. BellSouth has provided reasonable explanations to these allegations which clearly do not reflect that BellSouth has participated in any anticompetitive activity.

Q. ALLEGATIONS HAVE BEEN MADE BY SEVERAL WITNESSES THAT THE ACSI AND SPRINT METROPOLITAN EXPERIENCES DEMONSTRATE THAT BELLSOUTH CANNOT PROVIDE INTERCONNECTION AND ACCESS AS REQUIRED BY THE ACT. PLEASE RESPOND TO THESE ALLEGATIONS.

A. As these customers can attest, BellSouth has indeed provided the access and interconnection that was agreed upon in their negotiated contracts. BellSouth agrees that, as with most new processes, there have been some start-up problems. BellSouth has handled these problems and is currently providing the services requested. Further, BellSouth is continually striving to ensure that these new processes work properly. There is no basis for concluding from these occurrences that BellSouth cannot meet the requirements of the checklist.

Q. MS. CLOSZ TESTIFIED CONCERNING SPRINT METROPOLITAN NETWORK'S DIFFICULTIES IN OPERATING AS AN ALEC IN CENTRAL FLORIDA. HAS BELLSOUTH ADDRESSED HER CONCERNS?

A. Yes. The events Ms. Closz references in her testimony are past operational issues concerning unbundled loop provisioning. These issues have been subsequently resolved. If additional issues arise, BellSouth will naturally continue to work with Sprint Metro to resolve them.

Q. ON PAGE 7, MS. MURPHY STATES THAT BELLSOUTH'S PRICING POLICIES MAKE IT ECONOMICALLY INFEASIBLE FOR ACSI TO PROVIDE LOCAL SERVICE TO RESIDENTIAL CUSTOMERS. WHAT IS YOUR RESPONSE TO THIS ALLEGATION?

A. Ms. Murphy is suggesting that BellSouth's unbundled loop is priced too high and BellSouth should lower its unbundled loop price in order for the ALECs to be able to compete. However, she totally ignores the fact that BellSouth's residential local exchange service is priced below cost. As required by the Act, the unbundled loop is priced based on cost and therefore exceeds BellSouth's basic residential exchange service rate. An ALEC can offer vertical services, long distance or other features in conjunction with basic service to the residential customer which makes the offering economically feasible and allows the ALEC to compete with BellSouth's retail offerings. See Exhibit AJV-6.

One way to resolve this problem is through the establishment of a universal service fund from which ACSI and other parties could draw funds to support the unbundled loop. Another resolution would be rate

rebalancing in which residential local exchange service is increased to cover its cost and business exchange service is reduced closer to cost. Ironically, this solution has been proposed in Kentucky and Ms. Murphy objected to rebalancing rates. In Kentucky she stated that rebalancing is anticompetitive because ACSI would have difficulty competing for business customers if BellSouth decreased business rates closer to cost.

Q. MS. MURPHY, ON PAGE 10 OF HER TESTIMONY, BEGINS A DISCUSSION REGARDING COMPLAINTS ACSI HAS FILED WITH THE GEORGIA PUBLIC SERVICE COMMISSION AND WITH THE FCC DUE TO "BELLSOUTH'S CONTINUING FAILURE TO PROVISION UNBUNDLED LOOPS TO ACSI ON A TIMELY BASIS". PLEASE COMMENT.

A. ACSI is attempting to bring forward again the complaint which was filed with the Georgia Commission in December, 1996. BellSouth responded to that complaint on January 16, 1997. The Georgia Commission ordered that ACSI's original complaint be held in abeyance pending review and recommendation by the Commission staff. ACSI withdrew that complaint and refiled in July, 1997, making many of the same allegations that were made in December. On June 3, 1997, BellSouth filed its Opening Brief in File No. E-97-09 with the FCC in response to ACSI's Federal Complaint on this same issue. A copy of BellSouth's brief in reply to ACSI's complaint at the FCC is attached as Exhibit AJV-7.

In BellSouth's responses to the complaints, BellSouth acknowledged that ACSI had experienced some unintended delays and service interruptions in connection with the initial unbundled loops it ordered from BellSouth. These problems have been corrected. In addition, BellSouth has demonstrated that ACSI's own failures contributed significantly to the problems of which it complains. Moreover, since ACSI's complaint was filed, BellSouth has successfully provisioned several hundred loops in compliance with the performance criteria contained in the BellSouth/ACSI agreement.

Her allegation of continuing problems is contradicted by ACSI's own witness Richard Robertson in Georgia. On March 3, 1997, Mr. Robertson admitted under cross examination that ACSI has no current complaint with the status of BellSouth's efforts to correct service problems (Georgia PSC Docket No. 6863-U, March 3, 1997, Hearing Transcript pages at 1216 and 1219). He further stated that BellSouth has been "responsive" in addressing such issues (Georgia PSC Docket 6863-U, March 3, 1997, Hearing Transcript at page 1219).

Q. MS. MURPHY ASSERTS ON PAGE 11 THAT "BELLSOUTH *UNILATERALLY* ADMINISTERED THE CUTOVER WITHOUT CONTACTING ACSI". WOULD YOU EXPLAIN WHY BELLSOUTH DID NOT CONTACT ACSI FOR A COORDINATED CONVERSION?

A. It is not solely BellSouth's responsibility to contact ACSI regarding conversions of end user customers from BellSouth to ACSI. As stated in Section IV, D3. of the ACSI/BellSouth Interconnection Agreement, approved by the Commission in Order No. 961509 dated December 12, 1996, issued in Docket No. 960969, it is both ACSI's and BellSouth's responsibility to establish "a 30-minute window within which both the ACSI and BellSouth personnel will make telephone contact to complete the cutover." There obviously was a miscommunication or no communication made by either party for these initial cutovers of unbundled loops. ACSI submitted these "live" customer orders without contacting BellSouth for proper procedures or testing for the orders. To ensure this is not an on-going problem, BellSouth is currently initiating contact with ACSI on each conversion of end user customers to ensure each conversion is performed on a coordinated, consistent and accurate basis.

Ms. Murphy does not admit that the agreement is also binding on the part of ACSI with regard to coordination and communication efforts. Per Section XVIII. of the Interconnection Agreement, ACSI and BellSouth were to "adopt a schedule for the implementation of this Agreement. The schedule shall state with specificity, ordering, testing, and full operational time frames."

According to BellSouth's records, there has been no discussion to implement this part of the agreement. Instead, without communicating

with BellSouth, without testing any ordering processes, without establishing any time frames for coordination, ACSI began submitting orders for the conversion of "live" access lines from the BellSouth switch to ACSI's equipment.

Q. ON PAGE 12, MS. MURPHY SAYS THAT ON DECEMBER 23, 1996, ACSI RECEIVED ORDERS FOR 113 ACCESS LINES AND ASSUMING A FIVE DAY TURN AROUND, THESE 113 ACCESS LINES SHOULD HAVE BEEN CUT OVER BY DECEMBER 28, 1996, BUT IN FACT, BELLSOUTH HAD CUTOVER FAR FEWER LINES BY THAT DATE. WOULD YOU ADDRESS THIS ASSERTION?

A. Yes. According to BellSouth's documentation, as of December 28, 1996, BellSouth had received only 37 orders for unbundled loops, not 113. Of those 37 unbundled loop orders, 16 unbundled loops were completed by December 28, 1997 and an additional 21 unbundled loops were pending with a due date that had not arrived. Orders issued by ACSI in mid and late December were either worked by the due date or were re-negotiated with ACSI for deferred due dates. Since December 18, 1996, BellSouth has processed all ACSI orders for unbundled loops by the agreed upon due dates.

Q. MS. MURPHY STATES, ON PAGE 14, THAT THE PROBLEMS ACSI HAS EXPERIENCED ARE NOT RESOLVED. ADDITIONALLY, SHE GOES ON TO STATE THAT BELLSOUTH HAS NOT PUT THE

PROPER SYSTEMS IN PLACE TO HANDLE ANY SIGNIFICANT VOLUMES. DO YOU AGREE WITH THAT CLAIM?

A. No. It is unclear why Ms. Murphy continues to make such a claim. BellSouth is processing orders for unbundled network elements from any ALEC. As stated earlier, BellSouth has resolved the problems encountered with ACSI's initial orders for unbundled loops. According to BellSouth documentation, when ACSI filed the complaint with the Georgia Commission on December 23, 1996, BellSouth had worked all orders that had been submitted by ACSI with a due date of December 23, 1996 or earlier.

Q. HAS ACSI SUBMITTED ORDERS TO BELLSOUTH IN ACCORDANCE WITH ITS INTERCONNECTION AGREEMENT?

A. No. ACSI has submitted and continues to submit orders to BellSouth's Local Carrier Service Center (LCSC) in a variety of formats in contravention of Section IV.C.1 of the Interconnection Agreement. This type of ordering behavior causes delays and errors to occur with the process. The submission of orders in non-standard formats has caused severe processing delay in some of the orders that Ms. Murphy refers to.

Q. CAN YOU EXPLAIN SOME OF THE FORMATS IN WHICH BELLSOUTH HAS ACCEPTED ORDERS FROM ACSI FOR

UNBUNDLED LOOPS AND THE ASSOCIATED NUMBER PORTABILITY?

A. Yes. For example, some of the orders for unbundled loops submitted by ACSI include the printing of a "computer screen form" and faxing that printed form to the center as a Local Service Request (LSR). This computer screen form does not match the LSR. The Local Carrier Service Center (LCSC) representative who has been specifically trained on what information to utilize on the LSR is unnecessarily delayed in processing the order by having to translate and interpret the information and populate the LSR, all without introducing errors.

Service Provider Number Portability (SPNP) forms are designed to provide the information required for porting the existing BellSouth number to the new local exchange carrier number, and to also provide information for the directory listing. ACSI has provided copies of the actual directory page, attached to the SPNP form, with the end user customer's information circled for the BellSouth LCSC representative's use to complete the directory information on the SPNP form.

Most of ACSI's unbundled loop orders have included and have required SPNP orders to be worked simultaneously with the installation of the unbundled loops. Contrary to Ms. Murphy's claims, some of ACSI's orders carried a due date for the unbundled loops two days prior to the due date for the telephone numbers to follow the new loops. If BellSouth

had worked the orders the way the orders appeared in the LCSC, the ACSI end user customers would not have been able to receive incoming calls for two days. BellSouth negotiated another due date with ACSI for the conversion of these customers so the loop and the telephone number would be worked simultaneously.

When supplementing LSRs to defer due dates, ACSI has provided the information in the form of a typed sheet versus a supplemental LSR. The sheet appears with a list of telephone numbers in one column, the due date in the next column and the new or supplemental due date in the last column. This information is provided to the BellSouth LCSC representative for the representative's use in completing the supplemental LSR forms on behalf of ACSI.

Upon receipt of such non-standard ordering information from ACSI, the LCSC representative must input the customer's information on the proper ordering forms to accommodate the customer's requests. The ordering systems can only process information which is provided in the correct format. This is true of ACSI's and any other Company's orders, including BellSouth's. This type of ordering behavior causes confusion, creates additional potential for error, and a need for special handling by the LCSC representative. It also results in delay in processing orders for other customers utilizing the LCSC. In order for the service to be properly and promptly provisioned, both BellSouth and ACSI, or any ALEC, have to fulfill their obligations to the process.

Q. ON PAGE 20, MS. MURPHY STATES THAT IN ORDER FOR ACSI TO BE ABLE TO COMPETE EFFECTIVELY, BELLSOUTH MUST PROVIDE INSTALLATION SERVICES AT PARITY WITH BELLSOUTH'S INSTALLATION FOR ITS OWN CUSTOMERS. PLEASE RESPOND.

A. Ms. Murphy misrepresents that installation intervals for unbundled loops ordered by the ALEC must be the same as installation intervals for bundled services provided by BellSouth to its basic exchange service customers. From her statements, it appears that the installation of these services is similar. However, this is not the case. Provisioning unbundled loops requires physical labor to separate the facility from the BellSouth network and connect it to ACSI's facilities. On the other hand, when BellSouth provisions bundled service for basic exchange customers, the loop usually already exists and the only activity required is to activate the service in the switch. The requirements to provide these two types of installation are totally different.

The FCC recognized the difference in setting its rules for unbundled elements. In the FCC's First Report and Order in CC Docket 96-98, the FCC established Rule 51.313 on combination of unbundled network elements. Specifically, Rule 51.313(b) states that "where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to

unbundled network elements, shall at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself." The rule requires BellSouth to provide the ALEC access to unbundled elements the same as BellSouth would provision unbundled elements for itself. As stated above, installing unbundled loops is not the same activity as provisioning an existing loop for a new end user customer. In order to have parity with BellSouth's service to end users, ACSI could resell BellSouth's services while they are establishing their network.

Q. HAS BELLSOUTH REFUSED TO NEGOTIATE SPECIFIC INSTALLATION INTERVALS WITH ACSI?

A. No. The ACSI agreement contemplates that the parties will establish installation intervals that will enable ACSI to provide service via unbundled loops to its customers in an equivalent timeframe as BellSouth provides services to its own customers. Such intervals are currently being negotiated and have not yet been agreed upon. However, BellSouth has provided proposed language to ACSI that it will cutover subscribers to ACSI within five days of receipt of a complete order from ACSI. ACSI has not accepted this proposal; nevertheless, BellSouth has adhered to this commitment since December 12, 1996 in Georgia and will continue to meet the due dates requested by ACSI on orders for unbundled loops.

Q. WHAT IS BELLSOUTH'S RESPONSE TO MS. MURPHY'S ALLEGATION ON PAGE 21 OF HER TESTIMONY, THAT BELLSOUTH IS ENGAGING IN ACTIVITIES THAT ARE IMPEDING ACSI'S ABILITY TO COMPETE IN THE MARKET FOR LOCAL SERVICE?

A. Ms. Murphy has provided several examples of BellSouth activities that she states prevent ACSI from freely competing for local customers. Her first complaint is that BellSouth has signed up business customers to multi-year contracts before opening its local markets. The Customer Service Arrangements that she is alluding to have been in place for years as BellSouth's response to certain competitive situations. Once these contracts expire, ALECs as well as BellSouth can bid on providing future services. In addition, ALECs can still market to these customers. If a particular ALEC provides a more appealing service offering, these business customers can certainly opt out of the BellSouth contract according to the termination of contract provisions.

Ms. Murphy also presents testimony regarding access to buildings. She states that BellSouth has established entrances to all office buildings in the business district while ACSI has difficulty gaining access to some buildings due to limited space or requests for large sums of money to enter buildings. If any inequity exists here, it is controlled by the property owners, not BellSouth. BellSouth is not charging access fees to buildings; the property owners are. These fees are established by the property owner as a source of revenue from telecommunications

companies. For future entry, BellSouth would be subject to pay these same access fees to enter the buildings. In fact, BellSouth has encountered some of these same problems in Florida with regard to other ALECs. This is a problem, not only for ACSI but for all telecommunications carriers.

Q. WHAT OTHER EXAMPLES OF ANTICOMPETITIVE BEHAVIOR DOES MS. MURPHY PROVIDE TO SHOW THAT BELLSOUTH IS IMPEDING ACSI'S ABILITY TO COMPETE IN THE MARKET FOR LOCAL SERVICE?

A. On pages 22 and 23, Ms. Murphy further states that BellSouth's Property Management Services Agreement is anticompetitive. These agreements are voluntary agreements made between BellSouth and property management. There is nothing to prevent ACSI from offering this same type of agreement if they so desire. As a type of sales agent, the property manager recommends BellSouth as the provider of choice. However, the agreement in no way excludes ACSI's entry into the building. Paragraph 10 of the standard agreement states "even though Property Management shall recommend BellSouth as the provider of choice for local telecommunications services to tenants, nothing in this Agreement shall be construed to preclude any building tenant from obtaining telecommunications services from others legally authorized to provide such service." Clearly, ACSI can market to any of the tenants, the ultimate user of the service. In addition, the Property Management

Agreement has a provision that if either party is dissatisfied with the alliance, upon written notice, the contract can be terminated within 30 days and the property manager simply loses incentive credits. It should be noted here that, in Florida, ALECs are entering into similar, more exclusive agreements with property owners. In fact, BellSouth has been told by the property owners that it cannot serve customers on these properties or even come onto the property.

Finally, Ms. Murphy on page 24 of her testimony, states that BellSouth has been requiring sales agents to sell BellSouth local services exclusively. Again, these are voluntary arrangements between BellSouth and the sales agents. ACSI can do the same thing. Surely there are other sales agents available in Florida should ACSI choose to use this option.

Q. FINALLY, ON PAGE 25, MS. MURPHY CITES THE FORMAL COMPLAINT REGARDING ACTL MOVES FILED BY ACSI WITH THE FCC ON FEBRUARY 15, 1996, AS AN EXAMPLE OF ANTICOMPETITIVE CONDUCT ENCOUNTERED WITH BELLSOUTH FOR CARRIER BUSINESS. PLEASE RESPOND.

A. ACSI is trying to draw an interstate access issue that is currently being investigated by the FCC into this proceeding. ACSI alleges that BellSouth waived Reconfiguration Non-Recurring Charges (RNRCs) under the Network Optimization Waiver (NOW) tariff for its customers

and did not waive those charges for ACSI. This issue arises because the NOW project did not apply to Access Customer Termination Location (ACTL) Moves. An RNRC is always applicable for ACTL Moves, whether the activity involves a BellSouth customer or an ACSI customer. ACSI is, in fact, BellSouth's customer in this case.

As an example, there is no RNRC applicable for a single non-channelized special access DS3 (because of the LightGate Link architecture). However, because the switched access DS3s are not under the LightGate architecture, RNRCs do apply. These charges apply equally to a BellSouth customer or an ACSI customer. A special access DS3 may or may not be channelized; a switched access DS3 is always channelized to the DS0 level. The charges applicable for each type of service are indeed different, but these charges are applied equally without regard to the type of customer.

The FCC has an ongoing investigation into this complaint, FCC File No. E96-20. BellSouth responded to two sets of interrogatories dated June 3, 1996 and July 29, 1996 and two Motions to Compel both dated August 28, 1996 in this complaint proceeding. In the responses to the interrogatories, BellSouth outlined in detail how the charges are applied and described the functions to support the costs incurred for the work performed. The responses to the interrogatories are a matter of public record and we ask the Commission to take administrative notice of the responses.

Q. MS. STROW INCLUDES AS EXHIBITS JS-8 AND JS-9 TO HER TESTIMONY TWO LETTERS FROM ICI TO BELLSOUTH RAISING ISSUES. PLEASE COMMENT ON THESE ISSUES.

A. The issues that Ms. Strow raises by inclusion of these exhibits are old issues, as the dates on the letters demonstrate. These issues were responded to and, as far as the BellSouth personnel responsible were aware, satisfactorily resolved. BellSouth is committed to resolve all problems and/or misunderstandings with ALECs in as timely a manner as possible, and did so in this case. Ms. Strow appears either to be aware of only the problems that ICI encounters and not the solutions, or is trying to paint a very one-sided picture of BellSouth's performance. In either case, her portrayal is less than accurate.

Q. PLEASE SUMMARIZE YOUR TESTIMONY.

A. My rebuttal testimony has, I hope, made it very clear that BellSouth plans to file for, and meets the requirements for, entry into the interLATA market under Track (A) of the Telecommunications Act. I have emphasized throughout my testimony that, in this proceeding, BellSouth has requested this Commission to do just two things. First, the Commission should approve BellSouth's Statement, which will be used for several purposes, as being compliant with the checklist requirements in Section 271(c)(2)(B) of the Act. Second, this Commission, in order to

fulfill its consultative role to the FCC, should accumulate the facts necessary to assess the current market conditions existing in Florida. These are the only two actions that this Commission needs to address in this docket.

Based on the facts, this determination can easily be made. BellSouth has proven that the Statement does indeed meet the 14-point competitive checklist and should be approved to further open local markets. Consumers in Florida will indeed benefit from BellSouth's entry into the long distance market. The fact that the IXCs are so insistent that BellSouth's entry should be delayed for some unknown period of time proves that they are fearful of real competition in the long distance market that might break up the comfortable oligopoly that has existed since divestiture.

On the other hand, nothing has been presented in the cases of any of the intervenors which would prevent this Commission from concluding that the Statement should be approved as checklist compliant. The wish list of items the ALECs have provided is nothing more than a tactic to delay BellSouth's entry. This wish list, in many cases, runs counter to the Act and the intent of Congress to open all markets to competition.

BellSouth would ask that this Commission not be sidetracked by all of the issues raised which are not germane to the purpose of this docket. The requests to rearbitrate numerous issues, the expansion of the checklist to

include items such as reduced access charges, the list of alleged bad acts, etc. are simply red herrings and are clearly irrelevant to the task at hand. Clearly, the IXCs and the ALECs have been grasping at straws and pulling out every trick in the book to take the focus away from the two goals of this proceeding. BellSouth would ask this Commission to ignore all the attempted side-shows and distractions and keep focused on the goals of this proceeding.

Q. DOES THIS CONCLUDE YOUR REBUTTAL?

A. Yes.

BellSouth Telecommunications, Inc.
FPSC Docket No. 960786-TL
Varner Rebuttal Exhibit AJV-4_____

8th Circuit Court Ruling

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-3321

Submitted: January 17, 1997

Filed: July 18, 1997

Before BOWMAN, WOLLMAN and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

When Alexander Graham Bell, after spilling sulfuric acid on himself, first transmitted the words, "Mr. Watson, come here; I want you," across a rudimentary phone line in 1876,[1] he could not have possibly imagined that his invention would explode into the current technologically-advanced, multi-billion dollar telecommuni-cations industry. Nor could he have foreseen the amount of legislation, regulation, and litigation that his invention would generate.

I. Background

One hundred twenty years after Bell's discovery, Congress passed the Telecommunications Act of 1996[2] (the Act), which was designed, in part, to erode the

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[1]George P. Oslin, The Story of Telecommunications, 219 (Mercer University Press 1992).

[2]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be

monopolistic nature of the local telephone service industry by obligating the current providers of local phone service (known as "incumbent local exchange carriers" or "incumbent LECs") to facilitate the entry of competing companies into local telephone service markets across the country. Specifically, the Act forces an incumbent LEC (1) to permit a requesting new entrant in the incumbent LEC's local market to interconnect with the incumbent LEC's existing local network and thereby use the incumbent LEC's network to compete with the incumbent LEC in providing telephone services (interconnection); (2) to provide its competing telecommunications carriers with access to individual elements of the incumbent LEC's own network on an unbundled basis (unbundled access); and (3) to sell to its competing telecommunications carriers, at wholesale rates, any telecommunications service that the incumbent LEC provides to its customers at retail rates, in order to allow the competing carriers to resell the services (resale).[3] 47 U.S.C.A. § 251(c)(2)-(4) (West Supp. 1997). [4] A company seeking to enter the local telephone service market may request an incumbent LEC to provide it with any one or any combination of these three services. Through these three duties, and the Act in general, Congress sought "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996).

The Act also establishes a system of negotiations and arbitrations in order to facilitate voluntary agreements between incumbent LECs and competing carriers to implement the Act's substantive requirements. When a competing carrier asks an incumbent LEC to provide interconnection, unbundled access, or resale, both the incumbent LEC and the competing carrier have a duty to negotiate in good faith the terms and conditions of an agreement that accomplishes the Act's goals. 47 U.S.C.A. §§ 251(c)(1), 252(a)(1). If the parties fail to reach an agreement through voluntary negotiation, either party may petition the respective state utility commission to arbitrate and resolve any open issues. Id. § 252(b). The final agreement, whether accomplished

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codified as amended in scattered sections of Title 47, United States Code).

[3]We refer to these duties as "the local competition provisions."

[4]All references in this opinion to sections and subsections of the Telecommunications Act of 1996 in West's United States Code Annotated (U.S.C.A.) are to the 1997 supplement.

through negotiation or arbitration, must be approved by the state commission. Id. § 252(e)(1).

Several sections of the Act also direct the FCC to participate in the Act's implementation. See, e.g., id. §§ 251(b)(2), (d)(1), (e), 252(e)(5). On August 8, 1996, the FCC issued its First Report and Order.[5] This document contains the Agency's findings and rules[6] pertaining to the local competition provisions of the Act.

Soon after the FCC released its First Report and Order, many petitioners, consisting largely of incumbent LECs and state utility commissions from across the country, filed motions to stay the First Report and Order in whole or in part. Although most of the petitioners requested the court to stay the entire First Report and Order, their specific attacks focused primarily on the FCC's rules regarding the prices that the incumbent LECs could charge their new competitors for interconnection, unbundled access, and resale, as well as on the rules regarding the prices for the transport and termination of local telecommunications traffic.[7] The petitioners argued that the FCC exceeded its jurisdiction in establishing prices for what is essentially local intrastate telecommunications service and that the pricing rules violate the terms of the Act. After the cases were consolidated in this circuit, we decided to stay temporarily, pending our final review, the

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[5]First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (Aug. 8, 1996) [hereinafter First Report and Order].

[6]The FCC's rules are contained in Appendix B of the First Report and Order and now are codified in scattered sections of Title 47, Code of Federal Regulations.

[7]Transport and termination of telecommunications is the process whereby a call that is initiated by a customer of one telecommunications carrier is routed to a customer of a different telecommunications carrier and completed by that carrier. The telecommunications carrier that "terminates" or completes the call to its customer typically charges the other telecommunications carrier for the cost of terminating the call. The Act imposes a duty on all local exchange carriers (incumbents and new entrants) to establish reciprocal compensation arrangements for such transport and termination of phone calls. See id. § 251(b)(5).

operation and effect of the pricing provisions and the "pick and choose" rule found in the First Report and Order. Iowa Utilities Bd. v. FCC, 109 F.3d 418 (8th Cir.), motion to vacate stay denied, 117 S. Ct. 429 (1996); see id. at 423 (explaining "pick and choose" rule in greater detail).

In their main briefs and oral arguments, the petitioners now renew and refine their attacks against the Agency's pricing rules, and they also widen the scope of their challenge to the First Report and Order and assail additional FCC rules, particularly the agency's non-price regulations pertaining to the incumbent LECs' unbundling obligations. Our review of the extensive arguments in this case has confirmed our initial belief that the FCC exceeded its jurisdiction in promulgating the pricing rules regarding local telephone service. We also remain convinced that the FCC's "pick and choose" rule would frustrate the Act's design to make privately negotiated agreements the preferred route to local telephone competition. Our conclusions regarding the additional challenged policies and rules in the FCC's First Report and Order are contained throughout the remainder of this opinion.

II. Analysis

United States Courts of Appeals have been granted exclusive statutory jurisdiction to review the FCC's final orders pursuant to 28 U.S.C. § 2342(1) (1994) and 47 U.S.C. § 402(a) (1994). We must defer to administrative agency interpretations only if they are consistent with the plain meaning of a statute or are reasonable constructions of ambiguous statutes. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984). Thus, we are empowered to overturn an agency interpretation when the interpretation conflicts with the plain meaning of a statute, see id. at 842-43, when the interpretation is an unreasonable construction of an ambiguous statute, see id. at 844-45, or when an agency acted arbitrarily or capriciously in adopting its interpretation. See 5 U.S.C. § 706 (1994); Chevron, 467 U.S. at 844. In this case, we emphasize at the beginning that our review does not encompass any determination regarding the wisdom or prudence of the policies Congress set forth in the Act, those considerations being the Constitutionally-assigned prerogatives of the Legislative Branch of our national government.

A. The FCC's Pricing Rules

All of the petitioners vehemently challenge the FCC's pricing rules. Their primary target is the FCC's mandate that state commissions employ the "total element long-run incremental cost" (TELRIC) method to calculate the costs that an incumbent LEC incurs in making its facilities available to competitors. See 47 C.F.R. §§ 51.503, 51.505 (1996). After applying the TELRIC method and arriving at a cost figure, the state commissions, according to the FCC's rules, must then determine the price that an incumbent LEC may charge its competitors, based on the TELRIC-driven cost figure.[8] The petitioners also challenge the FCC's proxy rates, which, under the provisions of the First Report and Order, are to be used by the state commissions if they do not use the TELRIC method to calculate costs. See id. §§ 51.503(b)(2), 51.513, 51.705(a)(2), 51.707. The incumbent LECs assert that these proxy rates also do not accurately reflect their costs and are artificially low. The petitioners also challenge several other FCC regulations pertaining to the prices that the incumbent LECs are permitted to charge for fulfilling their new duties under the Act. See id. §§ 51.601-51.611, 51.701-51.717.

The petitioners' first line of attack against the FCC's pricing rules is their claim that the FCC has no jurisdiction to promulgate these rules. They argue that the Act plainly directs state commissions, not the FCC, to set the prices that an incumbent LEC may charge an incoming competitor for interconnection, unbundled access, and resale, and also to determine the prices for the transport and termination of calls, when the state commissions conduct arbitrations under the Act.[9] The petitioners also assert that section 2(b) of the

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[8]Many of the incumbent LECs complain that the TELRIC method does not incorporate their "historical" or "embedded" costs (costs that an incumbent LEC incurred in the past to build its local network and has not yet fully recovered under state regulations) into the cost figure that forms the basis for determining the rates that the incumbent LECs may charge. See id. § 51.505(d)(1). The incumbent LECs argue that the TELRIC method underestimates their costs to provide interconnection and unbundled access and results in prices that are too low, effectively requiring them to subsidize their new local service competitors.

[9]The FCC's rules and regulations have direct effect only in the context of the state-run arbitrations, because an incumbent LEC is not bound by the Act's substantive standards in conducting voluntary negotiations. See 47 U.S.C.A. § 252(a)(1), (e)(2). While we have no way of quantifying the indirect effect the existence of these new rules had or may have on the positions taken by the incumbent LECs and their new competitors during the negotiation phase, we

Communications Act of 1934, 47 U.S.C. § 152(b) (1994), denies the FCC jurisdiction to determine these rates because the rates involve local intrastate communications service. The FCC and its supporting intervenors, however, contend that the Act clearly grants the FCC the power to issue pricing rules regarding local telephone service and that section 2(b) does not prevent the Commission from having jurisdiction to issue the pricing rules at issue here. They do not claim that the FCC's pricing authority is exclusive; instead, they argue that the Act establishes shared or parallel jurisdiction between the states and the FCC under which the FCC is to issue general rules governing the ratemaking procedures, while the state commissions are left to establish the actual prices by applying the FCC's mandates. After carefully reading the language of the Act and fully considering and reviewing all of the arguments, we conclude that the FCC exceeded its jurisdiction in promulgating the pricing rules.

1. The Plain Language of Sections 251 and 252

The petitioners point to the language contained in subsections 252(c)(2) and 252(d) to support their claim that the Act directly grants the state commissions the authority to determine the rates involved in implementing the local competition provisions of the Act. Indeed, subsection 252(c)(2) requires a state commission to "establish any rates for interconnection, services, or network elements according to subsection (d) of this section." Meanwhile, subsection 252(d), entitled "Pricing standards," lists the requirements that the state commissions must meet in making their determinations of the appropriate rates for interconnection, unbundled access, resale, and transport and termination of traffic. 47 U.S.C.A. § 252(d)(1)-(3). These statutory provisions undeniably authorize the state commissions to determine the prices an incumbent LEC may charge for fulfilling its duties under the Act.

The FCC and its supporters do not contest the fact that state commissions have the responsibility to set prices under the Act. Instead, they claim that subsection 251(d)(1) gives the FCC parallel authority to issue regulations governing the rate-making methods by which state commissions establish the prices that incumbent LECs may charge their new competitors for connecting with and piggy-backing on the LECs' networks. They claim that subsection 252(c)(1)

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believe the mutual knowledge that a state commission would be required to abide by these rules during the arbitration phase (absent our stay) had or would have some impact on the negotiations.

requires the state commissions to follow these FCC mandates when they determine the actual prices. The FCC also believes that several general rulemaking provisions of the Communications Act of 1934, namely subsections 154(i), 201(b), and 303(r), provide it with additional authority to promulgate its pricing rules. See 47 U.S.C. §§ 154(i), 201(b), 303(r) (1994).

Despite the FCC's contentions, we are not convinced that these provisions supply the FCC with the authority to issue regulations governing the pricing of the local intrastate telecommunication services that the incumbent LECs are now legally obligated to provide to their new competitors. Subsection 251(d)(1) provides that

"[w]ithin 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." 47 U.S.C.A. § 251(d)(1). The FCC believes this provision supplies the Agency with overarching plenary authority to regulate all aspects of section 251 and reasons that because subsection 251(c) requires rates for interconnection, unbundled access, and collocation to be "just, reasonable, and nondiscriminatory," id. § 251(c)(2)(d), (c)(3), (c)(6), the FCC has the power to regulate these rates and any other rates mentioned in section 251. We are not persuaded by the FCC's interpretation. We believe that subsection 251(d)(1) operates primarily as a time constraint, directing the Commission to complete expeditiously its rulemaking regarding only the areas in section 251 where Congress expressly called for the FCC's involvement[10]. Nowhere in section 251 is the FCC authorized specifically to issue rules governing the rates for interconnection, unbundled access, and resale, and the transport and termination of telecommunications traffic.

The Commission's reliance on general rulemaking provisions that predate the Telecommunications Act of 1996 also fares no better. While subsection 201(b) does grant the FCC jurisdiction over charges regarding communications services, those services are expressly limited to interstate or foreign communications services by subsection 201(a). See 47 U.S.C. § 201. Consequently, subsection 201(b) does not provide the Commission with the authority to

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[10]Such areas are limited to subsections 251(b)(2) (number portability), 251(c)(4)(B) (prevention of discriminatory conditions on resale), 251(d)(2) (unbundled network elements), 251(e) (numbering administration), 251(g) (continued enforcement of exchange access), and 251(h)(2) (treatment of comparable carriers as incumbents).

regulate the rates of local intrastate phone service and neither do subsections 154(i) or 303(r). Both of these subsections merely supply the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute. Neither subsection confers additional substantive authority on the FCC. See id. §§ 154(i), 303(r); see also California v. FCC, 905 F.2d 1217, 1241 n.35 (9th Cir. 1990) (explaining that Title I of the Communications Act of 1934, in which section 154(i) is contained, confers only ancillary authority to the FCC). Thus, we conclude that none of the statutory provisions relied on by the FCC supply it with jurisdiction over the pricing of local telephone service.[11]

The absence of any direct FCC pricing authority over local telephone service is fatal to the Agency's theory that the Act requires the state commissions to share such local pricing authority with the FCC. While subsection 252(c)(1) does require the state commissions to ensure that their resolutions of arbitrated disputes comply with both section 251 and with the FCC's regulations made pursuant to section 251, as explained above, no provision in section 251 authorizes the FCC to regulate the rates of local phone service.[12] Moreover, the absence of any reference whatsoever to the FCC in the sections of the Act that directly authorize the state commissions to establish prices confirms to us that Congress did not envision the FCC's participation in determining the prices that the incumbent LECs will be able to charge for opening their networks to new entrants. Subsection 252(c)(2) commands state commissions to "establish any rates for interconnection, services, or network elements" and it requires them to follow only the standards in subsection (d). 47 U.S.C.A. § 252(c)(2). In turn, subsection 252(d) refers exclusively to the determinations by state commissions of the just and

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[11]At oral argument, counsel for one of the intervenors in support of the FCC for the first time argued that section 401 of the Act, 47 U.S.C.A. § 160 (West Supp. 1997), implies that the Commission has jurisdiction to issue its pricing rules. We decline to address this argument since it was not raised in the parties' opening briefs. See Stephenson v. Davenport Community Sch. Dist., 110 F.3d 1303, 1306-07 n 3 (8th Cir. 1997).

[12]We recognize that the Act does create such a division of labor between the state commissions and the FCC with respect to those areas where section 251 specifically calls for the Commission's participation. See supra note 10 and accompanying text.

reasonable rates, and it provides statutory standards for the state commissions to follow when setting the rates, thus negating any need for additional FCC-mandated ratemaking standards or guidelines.[13] See id. § 252(d).

Additionally, the FCC's reference to the Cable Act[14] as an example of a system of parallel federal and state jurisdiction over an industry's rates only bolsters our view that no such shared scheme regarding the power to set prices was intended by the Congress in the Telecommunications Act of 1996. In sharp contrast to the Telecommunications Act, several provisions of the Cable Act explicitly grant the Commission the authority to regulate the rates of cable companies and explicitly require state authorities to follow the Commission's ratemaking rules. See 47 U.S.C. § 543(a)(2)-(3), (b) (1994). The Cable Act simply and forcefully demonstrates that the Congress is capable of clearly expressing its desire to grant the FCC authority over local rates when it wishes to do so. The Telecommunications Act contains no such articulation with respect to the local competition provisions. Consequently, we conclude that the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act.[15]

2. Section 2(b) and the Impossibility Exception

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[13]Moreover, the provisions of subsection 252(d) expressly state that the states are setting the rates "for the purposes of" subsections 251(c)(2) (interconnection duty), 251(c)(3) (unbundling duty), 251(c)(4) (resale duty), and 251(b)(5) (reciprocal compensation duty).

[14]Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.).

[15]Our determination that the FCC's belief that it has jurisdiction to issue local pricing rules conflicts with the plain meaning of the Act negates any deference owed to the Commission's interpretation and obligates us to vacate the FCC's pricing rules. See Chevron, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); see also, Mississippi Power & Light Co. v. Moore, 487 U.S. 354, 382 (1988) (Scalia, J., concurring) ("[I]n defining agency jurisdiction Congress sometimes speaks in plain terms, in

Any ambiguity regarding the FCC's vacuum of authority over local telecommunications pricing under the Act is resolved by the operation of section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b). Section 2(b) provides that "nothing in this chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." Id. We believe that the prices that incumbent local exchange carriers may charge their new competitors for interconnection, unbundled access, and resale--the services and facilities that will enable the competitors to provide competing local telecommunications service--as well as the rates for the transport and termination of telecommunication traffic qualify as "charges . . . for or in connection with intrastate communications service."[16] Id. In Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 370 (1986), the Supreme Court explained that section 2(b) "fences off" intrastate matters from FCC regulation. The FCC and its supporting intervenors attempt to slip through the fence by arguing that this case qualifies as an exception to the operation of section 2(b).

The Supreme Court emphasized that section 2(b) constitutes an explicit congressional denial of power to the FCC and suggested that Congress could override section 2(b)'s command only by unambiguously granting the FCC authority over intrastate telecommunications matters or by directly modifying section 2(b). Louisiana, 476 U.S. at 377. The only other gate through the 2(b) fence is the "impossibility" exception, which has evolved out of the Court's opinion in Louisiana. This quite narrow exception provides that the FCC may preempt state regulation of intrastate telecommunications matters only when (1) it is impossible to separate the interstate and intrastate components of the FCC regulation and (2) the state regulation would negate the FCC's lawful authority over interstate communication. See, e.g., id. at 375-76 n.4; California v. FCC, 39 F.3d 919, 931 (9th Cir. 1994), cert. denied, 115 S.

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which case the agency has no discretion.")

[16]The FCC itself both acknowledges that the Telecommunications Act of 1996 deals predominantly with local intrastate markets and recognizes that the obligations of incumbent LECs to provide interconnection, unbundled access, and resale are designed to increase competition in local telecommunications markets. (FCC Br. at 1-3, 5.) The intrastate character of the requirements contained in sections 251 and 252 is discussed further infra.

Ct. 1427 (1995); NARUC v. FCC, 880 F.2d 422, 429 (D.C. Cir. 1989). The FCC and its supporting intervenors assert that the terms of the Act supply the Commission with a direct grant of intrastate pricing authority sufficient to overcome the operation of section 2(b). Alternatively, they argue that the impossibility exception removes section 2(b) as a barrier to the FCC's pricing rules. We are not convinced by the respondents' arguments here, and we believe that the 1996 Act, when coupled with section 2(b), mandates that the states have the exclusive authority to establish the prices regarding the local competition provisions of the Act.

As explained earlier, the FCC argues that Congress unambiguously granted it intrastate pricing authority through the relationship between subsections 251(d)(1) (directing the Commission to establish regulations to implement the requirements of section 251 by August 8, 1996) and 251(c) (periodically mentioning that the incumbent LECs' rates must be just and reasonable). We have now rejected this interpretation as being inconsistent with the plain meaning of the Act, and we have concluded exactly the opposite--that the Act directly and straightforwardly assigns to the states the authority to set the prices regarding the local competition provisions of the Act in subsections 252(c)(2) and 252(d). Consequently, the FCC's interpretation of the Act does not demonstrate an unambiguous grant of intrastate authority to the FCC required either to jump over or pass through section 2(b)'s fence. See Louisiana, 476 U.S. at 376-77 n.5 (explaining that section 2(b) also operates as a rule of statutory construction, commanding that nothing in the Act be construed to extend FCC jurisdiction to intrastate telecommunications).

Congress is fully capable of opening the gate in the 2(b) fence in order to grant the FCC intrastate ratemaking authority when it wishes to do so. Once again, provisions of the Cable Act illustrate this point. One such provision reads, "The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable." 47 U.S.C. § 543(b)(1). Moreover, section 276 of the Telecommunications Act itself directly requires the FCC to establish a compensation plan regarding both intrastate and interstate pay phone calls. 47 U.S.C.A. § 276(b); Illinois Pub. Telecomm. Ass'n v. FCC, No. 96-1394, 1997 WL 358160, at *5 (D.C. Cir. July 1, 1997). The FCC's roundabout construction in its effort to claim intrastate pricing authority under section 251 of the Telecommunications Act is notably strained in stark comparison to the direct grant of such authority contained in both the Cable Act and in section 276 of the Telecommunications Act, thus providing more indications that Congress intended to reserve for the states the retained authority to set the prices regarding the local competition provisions contained in section 251 of

the Telecommunications Act of 1996. Additionally, certain nonpricing provisions of the Telecommunications Act provide the FCC with much more direct and unambiguous grants of intrastate authority than the FCC's strained reading of subsections 251(d) and 251(c). For instance, subsection 251(b)(2) burdens LECs with "[t]he duty to provide . . . number portability in accordance with requirements prescribed by the Commission." 47 U.S.C.A. § 251(b)(2) (West Supp. 1997). In contrast, no provision of the Act unambiguously requires rates for the local competition provisions to comply with FCC-prescribed requirements, no provision unambiguously directs the FCC to issue such pricing regulations, and there is no straightforward and unambiguous modification of section 2(b) in the Act.[17] Consequently, section 2(b) remains a barrier
to the validity of these FCC pricing rules.

Faced with the absence of such an unambiguous grant of intrastate pricing authority to the FCC, the Commission and its supporting intervenors resort to arguing that section 2(b) is easily overcome whenever a federal statute's terms unambiguously apply to intrastate telecommunication matters, because they believe the FCC has plenary authority to implement all such federal statutory requirements. They believe that the Louisiana decision supports their proposition that section 2(b) prevents only the FCC's ancillary jurisdiction from extending into intrastate areas, but that it does not limit the federal Commission's primary jurisdiction, which, they argue, presumably extends as far as the reach of a federal communications statute. We do not believe that section 2(b) is limited in this manner, nor do we think the Supreme Court's decision in Louisiana stands for such a far-reaching proposition.

Although the Court's decision in Louisiana focused on whether section 220(b) of the Communications Act of 1934 itself applied to intrastate telecommunication matters, it did so only because section 220 undeniably directed the FCC to administer the depreciation calculations required by the statute. See 47 U.S.C. § 220(b) (1994) (repeatedly referring to "the Commission"); see also Louisiana, 476 U.S. at 366-68. In other words, we believe that the

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[17]In fact, provisions that expressly exempted the local competition provisions of the Act from the operation of section 2(b) were included in the earlier versions of both the House and Senate bills, but the Conference Committee deleted them from the final version of the Act. See S. 652, 104th Cong. § 101(c)(2) (1995); H.R. 1555, 104th Cong. § 101(e)(1) (1995).

Louisiana decision indicates that in order to qualify for the "unambiguous" exception to section 2(b), a statute must both unambiguously apply to intrastate telecommunication matters and unambiguously direct the FCC to implement its provisions. In Louisiana, section 220(b) clearly passed the second prong but failed to meet the first prong. In the present case, we have the opposite situation: the pricing provisions of sections 251 and 252 clearly apply to intrastate telecommunication service, but they do not unambiguously call for the FCC's participation in setting the rates. To the contrary, the Act specifically calls for the state commissions, not the FCC, to determine the rates for interconnection, unbundled access, resale, and transport and termination of traffic. See 47 U.S.C.A. § 252(c)(2), (d). Consequently, we reject the FCC's contention that its rulemaking authority is coextensive with the reach of every provision of a federal statute involving telecommunications. Section 2(b) is not a limit on Congress's ability to legislate in the area of intrastate telecommunications; it is, however, a limit on the FCC's ability to regulate in the area of intrastate telecommunications. Thus, a federal statute's mere application to intrastate telecommunication matters is insufficient to confer intrastate jurisdiction upon the FCC; the statute must also directly grant the FCC such intrastate authority in order to overcome the operation of section 2(b).[18]

The respondents' last chance to breach the section 2(b) fence lies with the "impossibility" exception to section 2(b). As mentioned above, the impossibility exception allows an FCC regulation to preempt a state regulation when it is impossible to separate the interstate and intrastate components of the asserted FCC regulation and the state regulation would negate the FCC's authority over interstate communication. See, e.g., Louisiana, 476 U.S. at 375-76 n.4; California v. FCC, 75 F.3d 1350, 1359 (9th Cir.), cert. denied, 116 S. Ct. 1841 (1996); NARUC, 880 F.2d at 429.

We believe that this exception does not apply to the circumstances of this case and thus

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[18]The FCC and its supporting intervenors assert that the provisions granting the Commission general rulemaking authority (47 U.S.C. §§ 154(i), 201(b), 303(r)) provide the FCC with plenary authority that is coextensive with the reach of all federal telecommunications law. For the reasons we previously found these sections to be inadequate to supply the Commission with the direct authority to issue the local pricing rules, we find them inadequate to provide the FCC with such sweeping authority here.

does not give the FCC the authority to dictate pricing regulations governing the local competition provisions of the Act. First, telecommunication ratemaking traditionally has been capable of being separated into its interstate and intrastate components. In fact, other statutory provisions predating the 1996 Act require such separation to occur and command a joint board of federal and state regulators to execute the separations process. 47 U.S.C. §§ 221(c), 410(c) (1994); see also NARUC, 880 F.2d at 425.

Second, and more importantly, the FCC has not demonstrated that the states' authority to establish the rates in connection with the local competition provisions of the Act would negate any valid authority the Commission has over interstate communications or impede any of its interstate regulatory goals. See California, 75 F.3d at 1359 (burden on FCC to demonstrate negation). The impossibility exception is premised on a preemption analysis, and "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."[19] Louisiana, 476 U.S. at 369. Consequently, our inquiry returns to the language of the Act. As illustrated above, the terms of the Act clearly indicate that Congress did not intend for the FCC to issue any pricing rules, let alone preempt state pricing rules regarding the local competition provisions of the Act. See 47 U.S.C.A. § 252(c)(2), (d). Because the Act clearly grants the states the authority to set the rates for interconnection, unbundled access, resale, and transport and termination of traffic, the FCC has no valid pricing authority over these areas of new localized competition for the states to negate. "An agency may not act at all, let alone preempt state authority, in an area where Congress has explicitly denied it jurisdiction." NARUC, 880 F.2d at 428. The fact that there are specific statutory provisions that expressly indicate that the states have the authority to determine the rates for these local telecommunications services distinguishes this case from all of the cases that invoke the impossibility exception to allow the FCC to preempt state regulations. See, e.g., California v. FCC, 39 F.3d 919 (9th Cir. 1994); California v. FCC, 4 F.3d 1505 (9th Cir. 1993); Public Utility Comm'n of Texas v. FCC, 886 F.2d 1325 (D.C. Cir. 1989). Because none of the courts invoking

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[19] Although the FCC claims it is merely seeking a joint role with the states in the ratemaking process under the Act, by requiring state commissions to employ the TELRIC methodology and its other assorted pricing mechanisms, the FCC is seeking to preempt any state pricing regulation that would employ a different methodology.

the impossibility exception had the assistance of a federal statute that specifically determined who had jurisdiction over the telecommunications area at issue, those courts had to resort to analyzing the interstate/intrastate character of the telecommunications services, as required by sections 151 and 152 of the Communications Act, in order to make such a determination. Here, however, subsections 252(c)(2) and 252(d) clearly assign jurisdiction over the rates for the local competition provisions of the Act to the state commissions, thus avoiding the need to analyze the interstate/intrastate character of these services.

Even a traditional analysis of the interstate/intrastate quality of the local competition provisions of the Act reveals that these functions (i.e., interconnection, unbundled access, resale, and transport and termination of traffic) are fundamentally intrastate in character; thus the FCC's traditional jurisdiction over interstate communications will not be negated by the states' regulation of the rates for these services. The Act primarily focuses on facilitating competition in local telephone service markets by imposing several new duties (interconnection, unbundled access, and resale--the local competition provisions) on incumbent local exchange carriers. 47 U.S.C.A. § 251(c). Allowing competing telecommunications carriers to have direct access to an incumbent local exchange carrier's established network in order to enable the new carrier to provide competing general local telephone services is an intrastate activity even though the local network thus invaded is sometimes used to originate or complete interstate calls.[20] Contrary to the respondents' contentions, section 2(b) does
not prevent the FCC from having jurisdiction only over matters that are purely intrastate. The

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[20]We note that the FCC's jurisdiction over the access charges that LECs collect from interexchange carriers (IXCs) for terminating the IXCs' interstate toll calls on the LECs' networks does not imply that the Commission also has jurisdiction over the rates that incumbent LECs may charge competing local exchange carriers for interconnection with or unbundled access to the incumbent LECs' networks. Interconnection and unbundled access are distinct from exchange access because interconnection and unbundled access provide a requesting carrier with a direct hookup to and extensive use of an incumbent LEC's local network that enables a requesting carrier to provide local exchange services, while exchange access is a service that LECs offer to interexchange carriers without providing the interexchange carriers with such direct and pervasive access to the LECs' networks and without enabling the IXCs to provide local telephone service themselves through the use of the LECs' networks.

Supreme Court rejected such a position in its decision in Louisiana:

> [W]e cannot accept respondents' argument that § 152(b) does not control because the plant involved in this case is used interchangeably to provide both interstate and intrastate service, and that even if § 152(b) does reserve to the state commissions some authority over "certain aspects" of intrastate communication, it should be "confined to intrastate matters which are `separable from and do not substantially affect' interstate communication."

476 U.S. at 373 (citation omitted). Moreover, we reiterate that the text of section 2(b) itself indicates that the FCC does not have jurisdiction over matters "in connection with" intrastate service. 47 U.S.C. § 152(b). Consequently, the fact that the local competition provisions of the Act may have a tangential impact on interstate services is not sufficient to overcome the operation of section 2(b) and does not alter the fundamentally intrastate nature of the Act's local competition provisions. We note that the Act's clear grant of ratemaking authority to the state commissions is entirely consistent with the states' historical role in telecommunications regulation, given the intrastate quality of the local competition provisions of the Act. Because the impossibility exception does not apply in this case, section 2(b) remains a Louisiana-built fence that is hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf.

Having concluded that the FCC lacks jurisdiction to issue the pricing rules, we vacate the FCC's pricing rules[21] on that ground alone and choose not to review these rules on

[21]The pricing rules refer to 47 C.F.R. §§ 51.501-51.515 (inclusive, except for section 51.515(b) which we found to be a legitimate interim rate for interstate access charges, see Competitive Telecomm. Ass'n. v. FCC, No. 96-3604, 1997 WL 352284, (8th Cir. June 27, 1997)), 51.601-51.611 (inclusive), 51.701-51.717 (inclusive).

Because Congress expressly amended section 2(b) to preclude state regulation of entry of and rates charged by Commercial Mobile Radio Service (CMRS) providers, see 47 U.S.C. §§ 152(b) (exempting the provisions of section 332), 332(c)(3)(A), and because section 332(c)(1)(B) gives the FCC the authority to order LECs to interconnect with CMRS carriers, we believe that the Commission has the authority to issue the rules of special concern to the CMRS providers, i.e., 47 C.F.R. §§ 51.701, 51.703, 51.709(b), 51.711(a)(1), 51.715(d),

their merits.

B. The FCC's "Pick and Choose" Rule

The petitioners next assert that the FCC's so-called "pick and choose" rule, 47 C.F.R. § 51.809, is an unreasonable interpretation of subsection 252(i). Subsection 252(i) provides:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 U.S.C.A. § 252(i). With its "pick and choose" rule, the FCC interpreted this section of the Act to allow requesting carriers to "pick and choose" among individual provisions of other interconnection agreements that have previously been negotiated between an incumbent LEC and other requesting carriers without being required to accept the terms and conditions of the agreements in their entirety. The petitioners argue that such a rule is unduly burdensome on incumbent LECs and that it will thwart negotiations because it allows a later entrant to select the favorable terms of a prior approved agreement without being bound by the corresponding tradeoffs that were made in exchange for the favorable provisions sought by the new entrant. The petitioners assert that subsection 252(i) allows requesting carriers the option to select the terms and conditions of prior agreements only as a whole, not in a piecemeal fashion.

Contrary to the FCC's belief that subsection 252(i) plainly mandates its approach, we think that the language of subsection 252(i) in isolation does not clearly reveal Congress's intent on this issue.[22] Consequently, we "must look to the structure and language of the statute as a

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and 51.717, but only as these provisions apply to CMRS providers. Thus, rules 51.701, 51.703, 51.709(b), 51.711(a)(1), 51.715(d), and 51.717 remain in full force and effect with respect to the CMRS providers, and our order of vacation does not apply to them in the CMRS context.

[22]We acknowledge that the words "any interconnection, service, or network element" could indicate that the FCC's approach was intended by Congress. However, these words do not foreclose the possibility that an entrant's selection of an individual provision of a prior agreement would require it to accept the terms of

whole" to determine if the FCC's interpretation of this ambiguous provision is a reasonable one. National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992). Our analysis leads us to conclude that the FCC's rule conflicts with the Act's design to promote negotiated binding agreements.

The structure of the Act reveals the Congress's preference for voluntarily negotiated interconnection agreements between incumbent LECs and their competitors over arbitrated agreements. Voluntary negotiation is the first method listed under section 252, and the Act indicates that the parties may begin negotiations as soon as an entrant submits a request to an incumbent LEC. 47 U.S.C.A. § 252(a)(1). Meanwhile, the parties' ability to request the arbitration of an agreement is confined to the period from the 135th to the 160th day after the requesting carrier submits its request to the incumbent LEC. Id. § 252(b)(1). These provisions reveal that the Act establishes a preference for incumbent LECs and requesting carriers to reach agreements independently and that the Act establishes state-run arbitrations to act as a backstop or impasse-resolving mechanism for failed negotiations.

The FCC's "pick and choose" rule, however, would thwart the negotiation process and preclude the attainment of binding negotiated agreements. During a negotiation, an incumbent LEC would be very reluctant to make a concession on one term in exchange for a benefit on another term when faced with the prospect that a subsequent competing carrier will be able to receive the concession without having to grant the incumbent the corresponding benefit. In this manner, the FCC's rule would discourage the give-and-take process that is essential to successful negotiations. Moreover, negotiated agreements will, in reality, not be binding, because, according to the FCC, an entrant who is an original party to an agreement may unilaterally incorporate more advantageous provisions contained in subsequent agreements negotiated by other carriers. See First Report and Order, ¶ 1316. This result conflicts with the Act's requirement that agreements be "binding," 47 U.S.C.A. § 252(a)(1), and is an additional impediment to subsequent negotiations, because an incumbent LEC will be even more hesitant to make concessions in subsequent negotiations when it knows that such concessions would be available to all of the competing carriers with which it previously had agreements.

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the entire agreement. In this context, the quoted words could simply indicate that an incumbent LEC would not be able to shield an individual aspect of a prior agreement from the reach of a subsequent entrant who is willing to accept the terms of the entire agreement.

In response to these arguments, the FCC points to the waiver provision of the "pick and choose" rule, *First Report and Order*, § 51.809(b), and asserts that incumbent LECs will not be so deterred from making concessions because the waiver provision prevents an entrant from adopting the provisions of a previous agreement when an incumbent LEC can persuade a state commission that such adoption would be
economically burdensome or technically infeasible. We do not believe, however, that the incumbent LECs can take solace in the waiver provision. With the burden of proof placed on the incumbent LECs, receiving an actual waiver would be an uphill battle that would likely be a rare occurrence. We remain convinced that even in light of the possibility that an exemption could be granted, the incumbent LECs' ability and willingness to negotiate would be severely stifled by the FCC's "pick and choose" rule.

We also find little merit to the Commission's assertion that the alternative interpretation of subsection 252(i), requiring entrants to accept the terms and conditions of prior agreements in their entirety, would cause incumbent LECs to include unrelated onerous terms in their agreements in order to discourage subsequent entrants from adopting those agreements. We believe that the incumbent LECs have as much interest in avoiding the costs of prolonged negotiations or arbitrations as do the requesting carriers, which gives the incumbent LECs an incentive to negotiate initial agreements that would be acceptable to a wide range of later requesting carriers.

We conclude that the FCC's interpretation conflicts with the Act's design to promote negotiated agreements. Thus, we find the FCC's "pick and choose" rule to be an unreasonable construction of the Act and vacate it for the foregoing reasons.

C. Rural Exemptions-Rule 51.405

A few petitioners take issue with the Commission's rule that establishes additional standards that the state commissions are to follow in determining whether rural and small LECs are entitled to exemptions from or suspensions or modifications of the duties imposed on incumbent LECs generally under the Act. The Commission's rule, 47 C.F.R. § 51.405, purports to implement subsection 251(f), which governs exemptions, suspensions, and modifications. The rule allocates the burden of proof to the small or rural LECs seeking exemptions or modifications

and embellishes the standard of proof to require the small or rural LECs to demonstrate that their compliance with the Act's local competition provisions would cause them to suffer an "undue economic burden beyond the economic burden that is typically associated with efficient competitive entry." 47 C.F.R. § 51.405(c). The petitioners attack the FCC's rule on both jurisdictional and substantive grounds. After carefully reviewing all of the pertinent arguments, we conclude that the FCC exceeded its jurisdiction in promulgating rule 51.405.

The plain meaning of subsections 251(f)(1) (governing exemptions) and 251(f)(2) (governing suspensions and modifications) indicates that the state commissions have the exclusive authority to make these determinations, and nothing in either of these provisions, or in the Act generally, provides the FCC with the power to prescribe the governing standards for such determinations. Subsection 251(f)(1)(B) explicitly provides, "The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A)." Repeated and exclusive references to such state commission determinations are contained throughout subsection 251(f). In contrast, there is no indication that state commissions must follow FCC standards in conducting these inquiries. The only reference to the Commission is contained in subsection 251(f)(1)(B) which provides, "Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations." The FCC asserts that this sentence supplies it with the authority to promulgate rule 51.405. By its very terms, however, this sentence requires the implementation schedule to comply with the FCC's regulations only after a state commission has independently determined to terminate a rural LEC's exemption. This reference does not empower the FCC to establish standards that states must follow in determining in the first place whether an exemption should continue or end; it merely indicates that after a state commission decides to terminate an exemption, the rural carrier must comply with the regulations that the Commission is specifically authorized to promulgate under section 251.[23]

The FCC responds by once again arguing that subsection 251(d)(1) of the Act authorizes

[23]To reiterate, the FCC is specifically authorized to issue regulations under subsections 251(b)(2) (number portability), 251(c)(4)(B) (limitations on resale), 251(d)(2) (unbundled network elements), 251(e) (numbering administration), 251(g) (continued enforcement of exchange access), and 251(h)(2) (treatment of comparable carriers as incumbents).

it to promulgate regulations implementing all of the requirements contained in section 251 generally and that its broad rulemaking powers contained in subsections 154(i), 201(b), and 303(r) also provide it with the authority to issue rule 51.405. For the same reasons that we previously found these provisions to be insufficient to supply the FCC with jurisdiction to issue the pricing rules, we find them to be insufficient to empower the Commission to promulgate standards governing state commission determinations of exemptions and modifications. Moreover, the legislative history reveals that the Congress rejected both a Senate bill and a House bill that gave the FCC concurrent jurisdiction with state commissions to administer the exemption and waiver provisions. See S. Rep. No. 104-23, 1995 WL 142161 at *206-07 (§ 251(i)(3)) (1995); H.R. 1555, 104th Cong. § 242(e) (1995). It would be unreasonable to infer from subsection 251(d) or the other general rulemaking provisions cited by the FCC that Congress intended to put the Commission--the agency it decided to exclude from the exemption process--in a position to dictate the substantive standards governing the exemption process.

Finally, we believe that section 2(b) bars the FCC from having jurisdiction to issue rule 51.405 as well. The FCC's rule regulates the procedures involved in determining exemptions from and modifications of the small and rural LECs' duties to implement the local competition provisions of the Act contained in subsections 251(b) and 251(c). As explained earlier, these duties (e.g., interconnection, unbundled access, and resale) fundamentally involve local intrastate telecommunications services. We believe that determinations of whether small or rural LECs should receive exemptions, modifications, or suspensions of such duties also qualify as practices or regulations "for or in connection with intrastate communication service" that are outside of the FCC's jurisdiction by the operation of section 2(b). 47 U.S.C. § 152(b). Furthermore, we find no straightforward or unambiguous grant of authority to the FCC with respect to these determinations that would be sufficient to overcome the section 2(b) fence. Therefore, we vacate rule 51.405 on the ground that the FCC exceeded its jurisdiction in promulgating this rule, and we decline to address the arguments attacking it on substantive grounds.

D. FCC Authority Under Section 208

In the discussion section of its First Report and Order, the FCC claims that its general authority to hear complaints under 47 U.S.C. § 208 empowers it to review agreements approved by state commissions under the Act and to enforce the terms of such agreements as well as the

actual provisions contained in sections 251 and 252. See First Report and Order, ¶¶ 121-128. The Commission's perception of its authority under section 208 is untenable, however, in light of the language and structure of the Act and by the operation of section 2(b).

As an initial matter, the FCC argues that the issue of its complaint authority under section 208 is not ripe for review, because it did not promulgate an actual rule regarding this subject and it would be difficult to determine the actual boundaries of state and federal authority in an abstract setting. Despite the FCC's contentions, we believe that the issue is ripe for review. Congress has granted the courts of appeals jurisdiction to review all final orders of the FCC under 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a). The fact that the FCC asserts its section 208 authority in the commentary section of its First Report and Order as opposed to stating its position as a rule is immaterial to our determination of ripeness. See Office of Communication of United Church of Christ v. FCC, 826 F.2d 101, 105 (D.C. Cir. 1987) (concluding that "whether an agency decision is labelled a 'Rule' or a 'Policy Statement' is of no consequence to the ripeness of the decision for review"). Instead, we focus on whether the agency's action is final, which requires us to determine if "the agency has completed its decisionmaking process." Franklin v. Massachusetts, 505 U.S. 788, 797 (1992). In paragraphs 127 and 128, the FCC definitively states that its authority to hear complaints under section 208 extends to disputes over the implementation of the requirements of sections 251 and 252. This statement and the contrary conclusions of several of the petitioners present us with conflicting interpretations of the statutory scheme's allocation of jurisdiction. This is a legal question that is ripe for our review.

The language and design of the Act indicate that the FCC's authority under section 208 does not enable the Commission to review state commission determinations or to enforce the terms of interconnection agreements under the Act. Instead, subsection 252(e)(6) directly provides for federal district court review of state commission determinations when parties wish to challenge such determinations. 47 U.S.C.A. § 252(e)(6). The FCC responds by arguing that federal district court review under subsection 252(e)(6) is not the exclusive remedy for a party aggrieved by state commission decisions under the Act and that such a party has the option of also filing a section 208 complaint with the FCC. Although the terms of subsection 252(e)(6) do not explicitly state that federal district court review is a party's "exclusive" remedy, courts traditionally presume that such special statutory review procedures are intended to be the exclusive means of review. See Defenders of Wildlife v. Administrator, EPA, 882 F.2d 1294, 1299 (8th Cir. 1989); City of Rochester v. Bond, 603 F.2d 927, 931 (D.C. Cir.

1979). We afford subsection 252(e)(6) our traditional presumption and conclude that it is the exclusive means to attain review of state commission determinations under the Act. Additionally, the complete absence of any reference to section 208 in the Act bolsters our conclusion that Congress did not intend to allow the FCC to review the decisions of state commissions.

We also believe that state commissions retain the primary authority to enforce the substantive terms of the agreements made pursuant to sections 251 and 252. Subsection 252(e)(1) of the Act explicitly requires all agreements under the Act to be submitted for state commission approval. 47 U.S.C.A. § 252(e)(1) (West Supp. 1997). We believe that the state commissions' plenary authority to accept or reject these agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved. Moreover, the state commissions' enforcement power extends to ensuring that parties comply with the regulations that the FCC is specifically authorized to issue under the Act, because the Act empowers state commissions to reject arbitrated agreements on the basis that they violate the FCC's regulations. See id. at § 252(e)(2)(B). Again, we believe that the power to approve or reject these agreements based on the FCC's requirements includes the power to enforce those requirements.[24] Significantly, nothing in the Act even suggests that the FCC has the authority to enforce the terms of negotiated or arbitrated agreements or the general provisions of sections 251 and 252. The only grant of any review or enforcement authority to the FCC is contained in subsection 252(e)(5), and this provision authorizes the FCC to act only if a state commission fails to fulfill its duties under the Act. The FCC's expansive view of its authority under section 208 is thus contradicted by the language, structure, and design of the Act.

The FCC's interpretation of its authority under section 208 also cannot survive the operation of section 2(b). As explained earlier, the obligations imposed by sections 251 and 252 fundamentally involve local intrastate telecommunications matters. Consequently, the state commission determinations that the FCC seeks to review and the agreements that it seeks to enforce also fundamentally deal with intrastate telecommunications matters. To reiterate, section 2(b) prevents the FCC from having jurisdiction over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service. . . ." 47 U.S.C. § 152(b). Allowing the FCC either to review state commission determinations regarding

[24]We believe that the enforcement decisions of state commissions would also be subject to federal district court review under subsection 252(e)(6).

agreements implementing sections 251 and 252 or to enforce the terms of such agreements effectively would provide the FCC with jurisdiction over intrastate communication services in contravention of section 2(b). More specifically, such review or enforcement authority would enable the FCC to review and redetermine state commission determinations of the just and reasonable rates that incumbent LECs can charge their competitors for interconnection, unbundled access, and resale--rates that we previously decided were off limits to the FCC. We refuse to undermine our earlier decisions by interpreting the Act and section 208 as authorizing the FCC to review state commission determinations and to enforce state-approved agreements. We conclude that the language and structure of the Act combined with the operation of section 2(b) indicate that the provision of federal district court review contained in subsection 252(e)(6) is the exclusive means of obtaining review of state commission determinations under the Act and that state commissions are vested with the power to enforce the terms of the agreements they approve.

E. Rule 51.303-Review of Preexisting Agreements

Some petitioners challenge the FCC's conclusion that subsection 252(a)(1) requires preexisting interconnection agreements that were negotiated before the enactment of the Telecommunications Act of 1996, including agreements between neighboring noncompeting LECs, to be submitted for state commission approval. See First Report and Order, ¶¶ 165, 166, 169; 47 C.F.R. § 51.303 (stating FCC's interpretation of subsection 252(a)(1)). While clearly requiring new agreements negotiated under the terms of the Act to be submitted for state commission approval, the last sentence of subsection 252(a)(1) reads, "The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section." 47 U.S.C.A. § 252(a)(1). The petitioners objecting to the FCC's interpretation of this provision claim initially that the Commission does not have jurisdiction to determine which agreements must be submitted for approval under the Act; alternatively, they attack the Commission's determination on its merits, arguing that the FCC's rule violates the terms of the Act. Our review of the arguments leads us to conclude that the FCC exceeded its jurisdiction in promulgating rule 51.303.

Once again, section 2(b), 47 U.S.C. § 152(b), prevents the FCC from issuing regulations involving telecommunication matters that are fundamentally intrastate in character. As we explained above, the duties imposed by sections 251 and 252 and the agreements fulfilling those

duties almost exclusively involve local intrastate telecommunication services. Consequently, section 2(b) forecloses the ability of the Commission to determine which interconnection agreements must be submitted for state commission approval.[25] Moreover, section 252 establishes the procedures and

standards that state commissions must follow when approving and arbitrating agreements under the Act. Nothing in this section can be read to authorize the FCC to issue regulations regarding which interconnection agreements must be submitted for state approval. The FCC claims that subsection 252(d)(2)(B)(ii) implies that the Commission has the power to regulate generally under section 252 because this subsection "withdraws" authority from the FCC to regulate the costs associated with the transport and termination of calls; the FCC argues that there would be no need to withdraw this authority unless the FCC had such general authority to begin with. We are not persuaded that this subsection's denial (not withdrawal) of power to the FCC to determine the costs of transporting and terminating calls implies that the Commission has the authority to determine which intrastate interconnection agreements must be submitted for state approval under subsection 252(a)(1). This grasp for some sort of statutorily-based jurisdiction over these interconnection agreements does not qualify as the straightforward grant of intrastate authority that is necessary to penetrate the section 2(b) fence.

We also are not convinced by the FCC's familiar refrain that its general rulemaking authority under 47 U.S.C. §§ 201(b), 303(r), and 154(i) provides it with jurisdiction to regulate in this area. For the reasons explained above, these general rulemaking provisions do not grant the Commission rulemaking authority beyond what is necessary to fulfill its obligations with regard to traditional interstate and foreign communications. Additionally, none of these provisions

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[25]We are cognizant of the fact that interconnection agreements negotiated prior to the enactment of the Telecommunications Act of 1996 may not necessarily share the same fundamental intrastate character as the agreements negotiated specifically under section 251 of the Act. This possibility does not circumvent the operation of section 2(b), however, because we are focusing on the FCC's authority to determine which agreements must be submitted for state commission approval in order to effectuate the local competition provisions in section 251. We believe that this determination qualifies as a "classification[]," "practice[]," or "regulation[] for or in connection with intrastate communication service" which is beyond the FCC's jurisdiction. 47 U.S.C. § 152(b).

supply the FCC with a sufficiently unambiguous grant of intrastate authority to overcome the operation of
section 2(b). Consequently, we vacate Rule 51.303 and its accompanying policy statements on the ground that the Commission did not have jurisdiction to issue this regulation.[26]

F. § 251(d)(3) and State Compliance With FCC Rules

In the commentary portion of the First Report and Order, the FCC asserts that "the Commission's regulations under section 251 are binding on the states, even with respect to intrastate matters." First Report and Order, ¶ 101. With this statement, as well as several others, the FCC purports to preempt any state policy that conflicts with an FCC regulation promulgated pursuant to section 251. See id. at ¶¶ 101-103, 180. The petitioners argue that the FCC's position is untenable in light of subsection 251(d)(3) and the structure of the Act. We agree.

Subsection 251(d)(3), entitled "Preservation of State access regulations," provides the following:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--
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> (A) establishes access and inter-connection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C.A. § 251(d)(3). Initially, we note that the FCC's authority to prescribe and enforce regulations to implement the requirements of section 251 is confined to the six areas in this section where Congress expressly called for the FCC's participation. See supra note 10 and accompanying text. Subsection 251(d)(3) further constrains the FCC's authority. Even when the FCC issues rules pursuant to its valid rulemaking authority under section 251, subsection

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[26]We emphasize that our conclusion that the FCC exceeded its jurisdiction in promulgating Rule 51.303 in no way reflects any view of the merits of the Commission's interpretation of subsection 252(a)(1), and we leave the determination of whether and which preexisting interconnection agreements must be submitted for state commission approval to the state commissions.

251(d)(3) prevents the FCC from preempting a state commission order that establishes access and interconnection obligations so long as the state commission order (i) is consistent with the requirements of section 251 and (ii) does not substantially prevent the implementation of the requirements of section 251 and the purposes of Part II, which consists of sections 251 through 261. This provision does not require all state commission orders to be consistent with all of the FCC's regulations promulgated under section 251. The FCC attempts to read such a requirement into this subsection by asserting that a state policy that is inconsistent with an FCC regulation is necessarily also inconsistent with the terms of section 251 and substantially prevents the implementation of section 251. See First Report and Order, ¶¶ 102-103. The FCC's conflation of the requirements of section 251 with its own regulations is unwarranted and illogical. It is entirely possible for a state interconnection or access regulation, order, or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251 or Part II. In this circumstance, subsection 251(d)(3) would prevent the FCC from preempting such a state rule, even though it differed from an FCC regulation.

The FCC asserts that other provisions of the Act justify its belief that state interconnection and access rules must be consistent with the Commission's regulations under section 251. The FCC claims that section 253 and subsections 252(c)(1) and 261(c) indicate that state commissions are bound by the FCC's regulations. While subsection 253(d) does empower the Commission to preempt some state policies, those state policies are limited to those that violate the terms of subsections 253(a) or 253(b). 47 U.S.C.A. § 253(d). Neither subsection 253(a) nor 253(b) requires state policies to
conform to any Commission regulations; 253(a) merely requires state policies not to prohibit "the ability of any entity to provide any interstate or intrastate telecommunications service," and 253(b) allows states to impose additional telecommunications requirements as long as they are competitively neutral and consistent with the universal service obligations of section 254. Id. § 253(a), (b). Meanwhile, subsection 252(c)(1) does require state commissions to ensure that arbitrated agreements comply with the Commission's regulations made pursuant to section 251, but by its very terms this provision confines the states only when they are fulfilling their roles as arbitrators of agreements pursuant to the federal Telecommunications Act of 1996. This provision does not apply to state statutes or regulations that are independent from the Telecommunications Act of 1996. Many states enacted legislation designed to open up local telephone markets to competition prior to the 1996 federal Act, see Iowa Utilities Bd., 109 F.3d

at 427 n.7, and subsection 251(d)(3) was designed to preserve such work of the states.

Finally, the FCC claims that subsection 261(c) provides support for its conclusion that the state regulations must be consistent with the Commission's rules on interconnection and access promulgated under section 251. While subsection 261(c) does require some state rules to be consistent with "the Commission's regulations to implement this part," we believe that this provision applies only to those additional state requirements that are not promulgated pursuant to section 251 or any other section in Part II of the Act. See 47 U.S.C.A. § 261(c). Because subsection 251(d)(3) specifically governs state rules that "establish[] access and interconnection obligations of local exchange carriers," which is the heart of the subject matter of section 251, and subsection 261(b) governs state rules that are issued to "fulfill[] the requirements of this part," we conclude that the additional state requirements referenced in subsection 261(c) refer to separate state rules that do not directly pertain to the matters found in sections 251 through 261 (Part II) of the Act. Consequently, this provision does not apply to the state rules pertaining to interconnection and access obligations that the Commission believes it has the power to preempt under its section 251 authority, and
thus, it does not support the FCC's view that such state rules must conform to the Commission's regulations.

The FCC's blanket statement that state rules must be consistent with the Commission's regulations promulgated pursuant to section 251 is not supportable in light of subsection 251(d)(3).[27] With subsection 251(d)(3), Congress intended to preserve the states' traditional authority to regulate local telephone markets and meant to shield state access and interconnection orders from FCC preemption so long as the state rules are consistent with the requirements of section 251 and do not substantially prevent the implementation of section 251 or the purposes of Part II. We conclude that the FCC's belief that merely an inconsistency between a state rule and a Commission regulation under section 251 is sufficient for the FCC to preempt the state rule, is an unreasonable interpretation of the statute in light of subsection 251(d)(3) and the structure of the Act.[28] See Chevron, 467 U.S. at 844-45 (standard of review).

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[27]We leave for another day any determination of whether a specific state access or interconnection regulation is inconsistent with section 251 or substantially prevents the implementation of section 251 or Part II of the Act.

[28]Our decision rejecting the FCC's broad preemption of all state regulations that conflict with the FCC's rules under section 251 does not render the FCC's

G. The FCC's Unbundling Rules

The FCC issued many rules purporting to implement the incumbent LECs' duties to provide unbundled access to the incumbent LECs' network under subsection 251(c)(3). The petitioners challenge these rules on multiple grounds ranging from assertions that particular rules violate the terms of the Act to claims that these rules altogether effect an unconstitutional taking of the incumbent LECs' property. We address these challenges to the FCC's unbundling rules one by one.

1. The Unbundling Rules in Light of the Terms of the Act

a. OSS, Operator Services, and Vertical Switching Features

Many of the petitioners claim that the FCC's decision to require incumbent LECs to provide competitors with unbundled access to operational support systems (OSS), 47 C.F.R. § 51.319 (f), operator services and directory assistance, Id. § 51.319 (g), and vertical switching features such as caller I.D., call forwarding, and call waiting, First Report and Order, ¶¶ 263, 413, unduly expands the incumbent LECs' unbundling obligations beyond the statutory requirements. After reviewing the relevant provisions of the Act, we believe that the FCC reasonably concluded that these features qualify as network elements that are subject to the unbundling requirements of the Act.

Subsection 251(c)(3) imposes a duty on incumbent LECs to provide competing carriers with "access to network elements on an unbundled basis. . . ." 47 U.S.C.A. § 251(c)(3). In turn, the Act provides the following definition of "network element":

> The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and

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rules meaningless, however. The FCC's rules under section 251 will be in force where there are no comparable state rules on access and interconnection obligations, or where such state rules conflict with the substantive provisions of section 251 or substantially prevent their implementation.

> capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

Id. § 153 (29). The petitioners suggest that the first sentence of this definition limits a "network element" to only the physical parts of an incumbent LEC's network that are directly involved in transmitting telephone calls from one point to another. They also contend that the second sentence's apparent expansion of the definition is actually confined by the fact that the additional "features, functions and capabilities" are limited to those "that are provided by means of such facility or equipment." Furthermore, the petitioners suggest that the Conference Committee's deletion of the term "services" from the unbundling provision contained in an earlier House bill indicates that any aspect of telecommunications that can be characterized as a "service" is not a network element subject to unbundling. See H.R. 1555, 104th Cong. § 242(a)(2) (1995).

Applying their narrow interpretation of the definition of "network element," the petitioners assert that operational support systems, which are software systems and accompanying databases that are necessary to process orders, handle billing, and provide maintenance and repair capabilities to phone customers, are not physical components of an incumbent LEC's network that are directly involved in transmitting a phone call from one person to another and thus do not qualify as "network elements." The petitioners reject operator services and directory assistance as well as call waiting, caller I.D., and call forwarding as network elements for the same reasons and for the additional reason that these features are "services" that were not intended to be subject to the unbundling requirements. We reject the petitioners' narrow interpretation of the Act's definition of "network element" and believe that all of these provisions qualify as network elements under the Act.

Initially, the Act's definition of network elements is not limited to only the physical components of a network that are directly used to transmit a phone call from point A to point B. The Act specifically provides that "[t]he term 'network element' means a facility or equipment used in the provision of a telecommunications service." 47 U.S.C.A. § 153 (29). Significantly, the Act defines "telecommunications service" as meaning "the offering of telecommunications for a fee directly to the public." Id. § 153 (46). Given this definition, the offering of telecommunications services encompasses more than just the physical components directly

involved in the
transmission of a phone call and includes the technology and information used to facilitate ordering, billing, and maintenance of phone service--the functions of operational support systems. Such functions are necessary to provide telecommunications "for a fee directly to the public." Id. We believe that the FCC's determination that the term "network element" includes all of the facilities and equipment that are used in the overall commercial offering of telecommunications is a reasonable conclusion and entitled to deference. See Chevron, 467 U.S. at 844.

Additionally, the second sentence of subsection 153 (29) substantially broadens the definition of "network element," and its explicit reference to "databases, signaling systems, and information sufficient for billing and collection" clearly indicates that operational support systems qualify as network elements under the Act. We are not persuaded that operational support systems are excluded from the definition of network elements merely because the referenced "features, functions, and capabilities" are limited to those "that are provided by means of such facility or equipment." Id. § 153 (29). Above, we demonstrated that "facilities or equipment" used in the provision of a telecommunication service encompasses a broad range of telecommunications technology and devices, including operational support systems, so the status of these systems as network elements is not dependent on the terms of the definition's second sentence. Nevertheless, we believe that operational support systems alternatively qualify as network elements under the terms of the definition's second sentence, because the information and databases of these systems constitute features, functions, and capabilities that are provided through the use of software and hardware that is used in the commercial offering of telecommunication services to the public. Moreover, even though the definition limits the general terms "features, functions, and capabilities" to those "that are provided by means of such facility or equipment," the definition definitively declares that subscriber numbers, databases, signaling systems, and information sufficient for billing and collection qualify as such features, functions, and capabilities, and thus are network elements under the Act. Operational Support Systems consist of databases and information relevant to ordering and billing; thus, they qualify as network elements under this definition as well.

Our agreement with the FCC's determination that the Act broadly defines the term "network element" leads us also to agree with the Commission's conclusion that operator services, directory assistance, caller I.D., call forwarding, and call waiting are network elements

that are subject to unbundling. We believe that operator services and directory assistance qualify as features, functions, or capabilities that are provided by facilities and equipment that are used in the provision of telecommunication services. The commercial offering of phone services to the public and the specific transmission of phone calls between locations implicates the use of operator services and directory assistance. Likewise, caller I.D., call waiting, and call forwarding are vertical "features" that are provided through the switching hardware and software that are also used to transmit calls across phone lines. Thus, they qualify as network elements as well.

The petitioners argue that these features are actually finished services and that the legislative history and structure of the Act suggest that "services" were not meant to be unbundled but rather sold to the requesting carrier for resale under subsection 251(c)(4). While we address this argument in greater detail in a subsequent section of this opinion, with respect to these particular features, we disagree with the petitioners' interpretation of the Act. Simply because these capabilities can be labeled as "services" does not convince us that they were not intended to be unbundled as network elements. While subsection 251(c)(4) does provide for the resale of telecommunications services, it does not establish resale as the exclusive means through which a competing carrier may gain access to such services. We agree with the FCC that such an interpretation would allow the incumbent LECs to evade a substantial portion of their unbundling obligation under subsection 251(c)(3). We believe that in some circumstances a competing carrier may have the option of gaining access to features of an incumbent LEC's network through either unbundling or resale. Regarding the features presently
at issue, as explained above, these aspects of telecommunications satisfy the definition of "network element;" consequently, they are subject to the unbundling requirements of subsection 251(c)(3).[29]

b. Definition of "Technically Feasible"-Rule 51.5

Subsections 251(c)(2) and 251(c)(3) direct interconnection and unbundled access to occur "at any technically feasible point." 47 U.S.C.A. §§ 251(c)(2), (3). In its definition of "technically feasible," the FCC states, "A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns. . . ." 47 C.F.R. § 51.5.

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[29]Even though the parties seem to agree that operator services, directory assistance, caller I.D., call forwarding, and call waiting can also be classified as "services," we make no ruling on this particular issue.

One petitioner claims that the FCC's exclusion of economic concerns from such determinations is unreasonable. The petitioner fears that ignoring the economic costs of points of interconnection or unbundled access could result in incumbent LECs having to incur unwarranted expenses in order to meet the demands of competing carriers seeking access to their networks. We, however, believe that the FCC's definition of "technically feasible" is reasonable and entitled to deference.

Although economic concerns are not to be considered in determining if a point of interconnection or unbundled access is technically feasible, the costs of such interconnection or unbundled access will be taken into account when determining the just and reasonable rates, terms, and conditions for these services. See 47 U.S.C.A. §§ 251(c)(2), (3). Under the Act, an incumbent LEC will recoup the costs involved in providing interconnection and unbundled access from the competing carriers making these requests. Consequently, we conclude that the FCC's definition of "technically feasible" will not unduly burden the incumbent LECs, and we uphold the Commission's definition.

c. Technically Feasible and the Presumption for Unbundling

Many petitioners also challenge the FCC's general standards that it proposes be used in determining what network elements must be unbundled. One such standard is the FCC's belief that incumbent LECs presumably must provide unbundled access to "all network elements for which it is technically feasible to provide access on an unbundled basis." First Report and Order, ¶ 278. A finding that it is technically feasible to unbundle a particular element creates a presumption that the element must be unbundled according to the FCC. See id., ¶ 281; 47 C.F.R. § 51.317. Although we just upheld the Commission's definition of the term "technically feasible," we reject the Commission's use of this term to determine what elements must be unbundled. As mentioned above, subsection 251(c)(3) places a duty on incumbent LECs to provide "access to network elements on an unbundled basis at any technically feasible point." By its very terms, this provision only indicates where unbundled access may occur, not which elements must be unbundled. Subsection 251(d)(2) establishes the standards to determine which elements must be unbundled, and this subsection makes no reference to technical feasibility. We think that the FCC's interpretation that an element for which unbundling is technically feasible must presumably be unbundled is contrary to the plain meaning of the Act and cannot stand. See Chevron, 467 U.S. at 842-43.[30]

[30]We vacate only the portion of 47 C.F.R. § 51.317 and the portions of paragraphs 278 and 281 of the FCC's First Report and Order that create the presumption that a network element must be unbundled if it is technically feasible

d. The "Necessary" and "Impair" Standards

While subsection 251(d)(2) does not mention technical feasibility as a relevant factor in determining what network elements should be unbundled, it does require the Commission to consider whether access to a network element that is proprietary in nature is "necessary" and whether the failure to provide access to a network element would "impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C.A. § 251(d)(2)(A), (B). The petitioners argue that the FCC's view of these standards is so broad that it essentially reads these requirements out of the statute. We disagree and believe the Commission reasonably interpreted these standards.

Several petitioners assert that the FCC unreasonably decided that the "necessary" and "impairment" standards in subsection 251(d)(2) do not require an evaluation of whether a requesting carrier could obtain the desired elements from an alternative source. See First Report and Order, ¶ 283. The petitioners believe that if a requesting carrier could obtain access to an element from a source other than an incumbent LEC, then that element is not "necessary," nor would the incumbent LEC's failure to provide access to such an element "impair" the ability of the requesting carrier to provide telecommunications service. Despite the petitioners' arguments to the contrary, we think the FCC reasonably determined that the "necessary" and "impairment" standards in subsection 251(d)(2) do not require an inquiry into whether a competing carrier could obtain the element from another source. Subsection 251(c)(3) requires incumbent LECs to provide competing carriers with fairly generous unbundled access to their network elements in order to expedite the arrival of competition in local telephone markets. Allowing incumbent LECs to evade their unbundling duties whenever a network element could be obtained elsewhere would eviscerate unbundled access as a means of entry and delay competition, because many network elements could theoretically be duplicated eventually. The Act, however, provides for unbundled access to incumbent LECs' network elements as a way to jumpstart competition in the local telecommunications industry. Thus, we do not think the Commission erred in rejecting the proposal that an element need not be unbundled if a carrier could obtain access to it from another source.

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to do so.

We also believe that the FCC's actual interpretations of the "necessary" and

"impairment" standards are reasonable. Under subsection 251(d)(2)(A), the Commission determined that an element proprietary in nature would be "necessary" if a requesting carrier's ability to compete would be "significantly impaired or thwarted" without it. First Report and Order, ¶ 282. The petitioners claim that this articulation is too broad and that "necessary" should be read narrowly to mean "indispensable" or "absolutely required." They also argue that the FCC's expansive interpretation will result in competing carriers having such broad access to incumbent LECs' networks that the incentive to innovate will be drastically reduced. We are not persuaded by the petitioners' arguments.

While in some contexts the petitioners' narrow definition of "necessary" may be accurate, courts have at times interpreted this term more liberally to mean "convenient, or useful." See M'Culloch v. Maryland, 17 U.S. 316, 413 (1819). On one occasion the Supreme Court specifically rejected reading the term "necessary" to mean "indispensable," "essential," or "vital" because such a reading would have been too rigid for a word that should "be harmonized with its context." Armour & Co. v. Wantock, 323 U.S. 126, 129-30 (1944). In light of this Act's purpose of promoting competition in local telephone markets, we believe that the FCC's interpretation of "necessary" is a reasonable one and entitled to deference. See Chevron, 467 U.S. at 844. An overly strict reading of the word "necessary," as the petitioners propose, would unduly restrict the unbundling duty of incumbent LECs and hinder the development of competition in the local telecommunications industry. Although the Commission's definition is broader than the petitioners', it is not toothless. A requesting carrier must demonstrate that without access to a particular proprietary element its ability to compete would be "significantly impaired or thwarted."[31] First Report and

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[31]The Commission's use of the word "impaired" in defining what proprietary elements are necessary does not inappropriately conflate the

"necessary" standard of subsection 251(d)(2)(A), applicable to proprietary elements, with the "impairment" standard of subsection 251(d)(2)(B), applicable to network elements in general. The requirement that a new entrant must demonstrate that its "ability to compete would be significantly impaired or thwarted" without access to proprietary elements, First Report and Order, ¶ 282 (emphasis added), is a higher standard to meet than the FCC's standard for nonproprietary elements, which merely requires a showing that denial of unbundled access to such elements would decrease the quality or increase the cost of the service sought to be offered by the requesting carrier. See First Report and Order, ¶ 285.

Order, ¶ 282. Moreover, under the Commission's rules, an incumbent LEC will not be forced to provide unbundled access to a proprietary network element if the requesting carrier could offer the same service through the use of the incumbent LEC's nonproprietary network elements.[32] See 47 C.F.R. § 51.317(b). These restrictions on the FCC's definition of "necessary" also persuade us that innovations will continue to occur under the FCC's rules. We agree with the Commission's belief that the procompetitive effects of unbundling under the Commission's rules could spur enough innovation to offset any potential reduction in innovation that the unbundling standard might cause. Consequently, we uphold the FCC's interpretation of the "necessary" standard.

For similar reasons we also uphold the Commission's articulation of the "impairment" standard under subsection 251(d)(2)(B). The Commission determined that a requesting carrier's ability to provide a particular service will be impaired "if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises." First Report and Order, ¶ 285. The petitioners offer a more restrictive definition that would require competing carriers to demonstrate that their technical capability to provide a service would be diminished without unbundled access to a particular element. While the petitioners' alternative may be plausible, dictionaries consistently define the word "impair" to mean "to make worse" or "to diminish in . . . value." See, e.g., Webster's Third New International Dictionary 1131 (1986); Webster's New World Dictionary 703 (2d ed. 1970). If the quality of the service declines or the cost of providing the service rises as a result of a requesting carrier's inability to gain access to a network element, then the requesting carrier's ability to provide the service has been made worse. The FCC's interpretation of the "impairment" standard is reasonable, and we give it deference. See Chevron, 467 U.S. at 844.

e. Superior Quality-Rules 51.305(a)(4), 51.311(c)

Another source of disagreement between the petitioners and the FCC arises over the

[32]This limitation on a requesting carrier's ability to gain unbundled access to an incumbent LEC's proprietary elements also serves to distinguish the "necessary" standard from the impairment standard as discussed in the previous footnote.

Agency's decision to require incumbent LECs to provide interconnection, unbundled network elements, and access to such elements at levels of quality that are superior to those levels at which the incumbent LECs provide these services to themselves, if requested to do so by competing carriers. See 47 C.F.R. §§ 51.305(a)(4), 51.311(c). Here, we believe that the FCC violated the plain terms of the Act when it issued these rules.

Subsection 251(c)(2)(C) requires incumbent LECs to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself. . . ." Plainly, the Act does not require incumbent LECs to provide its competitors with superior quality interconnection. Likewise, subsection 251(c)(3) does not mandate that requesting carriers receive superior quality access to network elements upon demand. The FCC argues that the terms "at least equal in quality" permit the provision of superior quality interconnection; it believes that the nondiscrimination requirements in both subsections 251(c)(2) and 251(c)(3) require incumbent LECs to provide superior quality interconnection and network elements when requested; and it asserts that the provision of superior quality interconnection and network elements will not unduly burden the incumbent LECs, because the requesting carriers will have to pay for these services. We are not convinced by the Commission's justifications for these rules.

While the phrase "at least equal in quality" leaves open the possibility that incumbent LECs may agree to provide interconnection that is superior in quality when the parties are negotiating agreements under the Act, this phrase mandates only that the quality be equal--not superior. In other words, it establishes a floor below which the quality of the interconnection may not go. Because the Commission's rule requires superior quality interconnection when requested, see 47 C.F.R. § 51.305(a)(4), the rule is not supported by the Act's language. We also agree with the petitioners' view that subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network--not to a yet unbuilt superior one. Additionally, the nondiscrimination requirements contained in these subsections of the Act do not justify these FCC rules. The fact that interconnection and unbundled access must be provided on rates, terms, and conditions that are nondiscriminatory merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others; it does not mandate that incumbent LECs cater to every desire of every requesting carrier. Finally, the fact that incumbent LECs may be compensated for the additional cost involved in providing superior quality interconnection and unbundled access does not alter the plain meaning of the statute, which, as we have shown, does not impose such a burden on the incumbent LECs. Therefore,

we conclude that sections 51.305(a)(4) and 51.311(c) cannot stand in light of the plain terms of the Act.[33]

f. Combination of Network Elements

We also believe that the FCC's rule requiring incumbent LECs, rather than the requesting carriers, to recombine network elements that are purchased by the requesting carriers on an unbundled basis, 47 C.F.R. § 51.315(c)-(f), cannot be squared with the terms of subsection 251(c)(3). The last sentence of subsection 251(c)(3) reads, "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C.A. § 251(c)(3) (emphasis added). This sentence unambiguously indicates that requesting carriers will combine the unbundled elements themselves. While the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the Commission, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements. The FCC and its supporting intervenors argue that because the incumbent LECs maintain control over their networks it is necessary to force them to combine the network elements, and they believe that the incumbent LECs would prefer to do the combining themselves to prevent the competing carriers from interfering with their networks. Despite the Commission's arguments, the plain meaning of the Act indicates that the requesting carriers will combine the unbundled elements themselves; the Act does not require the incumbent LECs to do all of the work. Moreover, the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them. Consequently, we vacate rule 51.315(c)-(f) as well as the affiliated discussion sections.

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[33]Although we strike down the Commission's rules requiring incumbent LECs to alter substantially their networks in order to provide superior quality interconnection and unbundled access, we endorse the Commission's statement that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." First Report and Order, ¶ 198. The petitioners themselves appear to acknowledge that the Act requires some modification of their facilities. (See Reply Br. of Regional Bell Companies and GTE at 40.)

g. Obtaining Finished Services Through Unbundled Access

The petitioners next engage in a broad-based attack on the bulk of the FCC's unbundling rules by arguing that the Commission's conclusion that the requesting carriers may obtain the ability to provide finished telecommunications services entirely by acquiring access to the unbundled elements of an incumbent LEC's network violates the terms and structure of the Act. See First Report and Order, ¶¶ 328-341 (stating the Commission's position). The petitioners contend that while subsection 251(c)(3) allows new entrants access to an incumbent LEC's network elements on an unbundled basis, it does not enable new entrants to provide telecommunications services to the public entirely by acquiring all of the necessary elements on an unbundled basis from an incumbent LEC. The petitioners assert that a competing carrier should own or control some of its own local exchange facilities before it can purchase and use unbundled elements from an incumbent LEC to provide a telecommunications service. The petitioners argue that subsection 251(c)(4) makes resale the exclusive means to offer finished telecommunications services for competing carriers that do not own or control any portion of a telecommunications network. Furthermore, the petitioners point out that under subsection 251(c)(4) a competing carrier may purchase the right to resell a telecommunications service from an incumbent LEC only at wholesale rates. Under subsection 252(d)(1), however, a competing carrier may obtain unbundled access to an incumbent LEC's network elements at a less expensive cost-based rate. The petitioners then argue that by allowing a competing carrier to obtain the ability to provide finished telecommunications services entirely through unbundled access at the less expensive cost-based rate, the FCC enables competing carriers to circumvent the more expensive wholesale rates that the Act requires for telecommunications services, and thereby nullifies the terms of subsection 251(c)(4). Additionally, the petitioners claim that by being able to obtain the ability to provide services at cost under subsection 251(c)(3), competing carriers will be able to capture many of the incumbent LECs' customers to whom the incumbent LECs are expected to charge high prices for certain services to offset the low prices incumbent LECs are required to charge other customers in order to promote universal service. The petitioners claim that the competing carriers will simply offer the same services to these particular customers at lower rates and capture a significant share of the market ("cherry-picking") without achieving any true gain in efficiency or technology. Finally, the petitioners contend that the

FCC's view of subsection 251(c)(3) allows carriers to circumvent the Act's restriction on joint

marketing of local and long-distance services contained in subsection 271(e)(1). This is because subsection 271(e)(1) prohibits a carrier's joint marketing only of local service obtained under subsection 251(c)(4) (resale) with the carrier's ability to provide long-distance service. 47 U.S.C.A. § 271(e)(1). It does not apply to local service that a competing carrier achieves under subsection 251(c)(3) (unbundled access). Despite the petitioners' extensive arguments to the contrary, we believe that the FCC's determination that a competing carrier may obtain the ability to provide telecommunications services entirely through an incumbent LEC's unbundled network elements is reasonable, especially in light of our decisions regarding the validity of other specific FCC rules.

Initially, we believe that the plain language of subsection 251(c)(3) indicates that a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LEC's network. Nothing in this subsection requires a competing carrier to own or control some portion of a telecommunications network before being able to purchase unbundled elements. To the contrary, this subsection imposes a duty on incumbent LECs to provide unbundled access "to any requesting telecommunications carrier for the provision of a telecommunications service." 47 U.S.C.A. § 251(c)(3) (emphasis added). The petitioners contend that the terms of subsection 251(c)(3) only allow a requesting carrier access to unbundled elements and that a carrier who obtains an entire network is getting more than elements on an unbundled basis. The additional terms of this subsection, however, expressly contemplate that competing carriers will use these elements to provide finished services. The last sentence of this subsection reads, "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." Id. Our previous ruling finding that this language does not require an incumbent LEC to combine the elements for a requesting carrier establishes that requesting carriers will in fact be receiving the elements on an unbundled basis. We now decide merely that under subsection 251(c)(3) a requesting
carrier is entitled to gain access to all of the unbundled elements that, when combined by the requesting carrier, are sufficient to enable the requesting carrier to provide telecommunications services.

We do not believe that this interpretation of subsection 251(c)(3) will cause all requesting carriers to select unbundled access over resale as their preferred route to enter the local

telecommunications market. Although a competing carrier may obtain the capability of providing local telephone service at cost-based rates under unbundled access as opposed to wholesale rates under resale, unbundled access has several disadvantages that preserve resale as a meaningful alternative. Carriers entering the local telecommunications markets by purchasing unbundled network elements face greater risks than those carriers that resell an incumbent LEC's services. A reseller can more easily match its supply with its demand because it can purchase telephone services from incumbent LECs on a unit-by-unit basis. Consequently, a reseller is able to purchase only as many services (or as much thereof) as it needs to satisfy its customer demand. A carrier providing services through unbundled access, however, must make an up-front investment that is large enough to pay for the cost of acquiring access to all of the unbundled elements of an incumbent LEC's network that are necessary to provide local telecommunications services without knowing whether consumer demand will be sufficient to cover such expenditures. Moreover, our decision requiring the requesting carriers to combine the elements themselves increases the costs and risks associated with unbundled access as a method of entering the local telecommunications industry and simultaneously makes resale a distinct and attractive option. With resale, a competing carrier can avoid expending valuable time and resources recombining unbundled network elements.

Given the disadvantages of completely relying on unbundled access as a means to provide local telecommunications services, we believe that many new entrant carriers will choose to resell such services under subsection 251(c)(4). Consequently, we do not believe that incumbent LECs will lose all of the customers to whom they
charge higher prices in order to fulfill their current universal service obligations. The increased risk and the additional cost of recombining the unbundled elements will hinder the ability of competing carriers to undercut these prices and lure these customers away from the incumbent LECs.[34] Nor do we believe that subsection 271(e)(1)'s limitation on the joint marketing of local

[34]To the extent that some incumbent LEC customers decide to switch to competing carriers, we believe this result is entirely consistent with the Act's purpose to promote competition in local phone markets. Additionally, section 254 of the Act, entitled "Universal Service," reveals Congress's intent to overhaul the current system of support for universal service, which is based on the incumbent LECs' supracompetitive prices for certain services. See 47 U.S.C.A. § 254. In fact, the FCC has recently issued its plan to reform the universal service support system. See Report and Order, Federal-State Joint Board on Universal Service,

services with long-distance services will be meaningless. Given the downsides of entering the local telecommunications market through unbundled access, we agree with the Commission's conclusion that some long-distance carriers will choose to enter local exchange markets through the resale provisions, subject to the joint marketing restriction, rather than assume the risks and burdens associated with unbundled access. We conclude that the Commission's belief that competing carriers may obtain the ability to provide finished telecommunications services entirely through the unbundled access provisions in subsection 251(c)(3) is consistent with the plain meaning and structure of the Act.

2. The Unbundling Rules and the Purpose of the Act

Several of the petitioners vaguely argue that the FCC's unbundling rules in combination provide competing carriers with such extensive access to the incumbent LECs' networks that they will thwart the Act's principal purpose, which, according to the petitioners, is to promote facilities-based competition and innovation in telecommunications technology. The petitioners claim that under these rules, competing carriers will have no incentive to construct their own facilities because they will be able to earn substantial profits by relying entirely on the incumbent LECs' networks to provide services to their customers. They also assert that neither the competing carriers nor the incumbent LECs will attempt to innovate their technology because the Commission's supposedly broad unbundling rules force a carrier to share such advances in technology with its competitors. We reject these claims and believe that the Commission's rules that we have found to be consistent with the terms of the Act are also consistent with the purpose of the Act.

Initially we note that the petitioners' arguments are generally based on the assumption that the FCC's unbundling rules would operate in conjunction with the Commission's proposed pricing rules. The petitioners have argued that the Commission's pricing rules would result in rates that are unreasonably low, making it inexpensive and thus highly profitable for competing carriers to provide local telecommunications services exclusively through the use of an incumbent LEC's network. In these circumstances, the petitioners argue, competing carriers would have no incentive to build their own network facilities. We have, however, vacated the FCC's pricing rules and determined that the Act requires state commissions to set the rates that

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competing carriers must pay for access to incumbent LECs' networks. Since we do not know what the state-determined rates will be, the petitioners' argument that competing carriers will incur only minimal costs in gaining access to incumbent LECs' networks and have no incentive to build their own is merely speculative at best.[35]

Even if the states establish "inexpensive" rates, we do not think that the Commission's unbundling rules would violate the Act's purpose, because, after study, we do not believe that the Act's exclusive goal is facilities-based competition. While Congress may have envisioned facilities-based competition in local telephone markets to occur down the road, Congress clearly included measures in the Act, such as the interconnection, unbundled access, and resale provisions, in order to expedite the introduction of pervasive competition into the local telecommunications industry. See H.R. Rep. No. 104-204, 1995 WL 442504 at *202-03, 494 (1995) (explaining importance of resale provision for the early development of competition and indicating that the local competition provisions "create the transition to a more competitive marketplace"). Congress recognized that the amount of time and capital investment involved in the construction of a complete local stand-beside telecommunications network are substantial barriers to entry, and thus required incumbent LECs to allow competing carriers to use their networks in order to hasten the influence of competitive forces in the local telephone business. The Commission's unbundling rules facilitate the competing carriers' access to these networks and thus promote the Act's additional purpose--the expeditious introduction of competition into local phone markets.

At the same time, we do not believe that the unbundling rules will hinder the development of facilities-based competition or impede innovation in telecommunications. Initially, we note that we have already vacated, on alternative grounds, several of the unbundling rules that the petitioners claim violate the purpose of the Act. See 47 C.F.R. §§ 51.305(a)(4) (interconnection superior in quality), 51.311(c)(network elements superior in quality), 51.315 (combination duty on incumbent LECs). Consequently, the degree and ease of access that competing carriers may

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[35]We recognize that the Act requires interconnection and network element charges to be based on cost, but we note that the Act also indicates that these rates "may include a reasonable profit" for the incumbent LECs. 47 U.S.C.A. § 252(d)(1).

have to incumbent LECs' networks is not as extensive as envisioned by the petitioners and far less than the amount of control that a carrier would have over its own network. We have upheld the remaining unbundling rules as reasonable constructions of the Act, because, as we have shown, the Act itself calls for the rapid introduction of competition into local phone markets by requiring incumbent LECs to make their networks available to their competing carriers. Even in light of the unbundling rules, we believe that competing carriers will continue to have incentives to build their own networks. Once a new entrant has established itself and acquired a sufficient customer base to justify investments in its own facilities, a carrier that develops its own network gains independence from incumbent LECs and has more flexibility to modify its network elements to offer innovative services. Additionally, as we stated earlier, we believe that the competitive environment that these unbundling rules create will result in more technological innovation than what occurs in the current monopolistic local telecommunications markets. We believe that the increased incentive to innovate resulting from the need of a carrier to differentiate its services and products from its competitors' in a competitive market will override any theoretical decreased incentive to innovate resulting from the duty of a carrier to allow its competitors access to its network elements. We thus conclude that the Commission's unbundling rules do not subvert the Act's purposes.

3. The Unbundling Rules in Light of the Intellectual Property Rights of Third Parties

Several petitioners claim that the FCC's unbundling rules as a whole infringe on the intellectual property rights of third parties[36] who license their technology to incumbent LECs for use in the LECs' networks. In particular, the petitioners claim that
by allowing requesting carriers "exclusive use" of an incumbent LEC's unbundled network element for a limited period of time, see id., § 51.309, the FCC's rules could potentially result in violations of license agreements between incumbent LECs and third party manufacturers of software and other telecommunications technology. Additionally, the petitioners argue that such a result would constitute a taking of the third party's intellectual property without just compensation in violation of the Fifth Amendment. While we are skeptical of the merits of such

[36]One group of such third parties, the Ad Hoc Coalition of Telecommunications Manufacturing Companies, asserts this claim on its own behalf as an intervenor in this case.

claims,[37] we believe that the speculative nature of these arguments indicates that neither the intervenor nor the petitioners presently have standing to raise these claims.

In order to have standing to bring a claim, a party must, among other things, have suffered an injury in fact which the Supreme Court describes as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotations, citations, and footnote omitted). With respect to this claim, neither the intervenor nor the petitioners have demonstrated that the FCC's unbundling rules will, in fact, enable requesting carriers to have direct access to the copyrights, patents, or trade secrets of these manufacturers. Presently, we do not have before us the specific unbundling duties contained in a particular negotiated agreement or a state arbitration decision that would be necessary to be able to determine if such infringements or takings were imminently likely to occur. Instead, we merely have the hypotheses of the intervenor and the petitioners, but "[a]ssertions of potential future injury do not satisfy the injury in fact test." Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir. 1994).

Moreover, to the extent that the petitioners seek to assert the rights of other copyright, patent, or trade secret owners, we do not believe that the circumstances of this case warrant an exception to the general rule that prevents "'litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves.'" Oebrleins v. Hennepin County, 1997 WL 304451, at *3 (8th Cir. June 9, 1997) (quoting Warth v. Seldin, 422 U.S. 490, 509 (1975)). Before a litigant will be allowed to assert a claim on behalf of a third party, the litigant must show, among other things, that the third party is unable to protect its own interests. See Powers v. Ohio, 499 U.S. 400, 411 (1991); United States v. Metropolitan St. Louis Sewer Dist., 952 F.2d 1040, 1043 (8th Cir. 1992). The petitioners have not claimed, nor do we have reason to believe, that these third-party manufacturers of telecommunications technology are or will be unable to protect their intellectual property or constitutional rights. Thus, we conclude that the petitioners do not presently have standing to raise these claims.

4. The Unbundling Rules in Light of the

[37]We note that the Act itself expressly contemplates that requesting carriers will have access to network elements that are proprietary in nature. 47 U.S.C.A. § 251(d)(2)(A).

Fifth Amendment's Takings Clause

The petitioners' final attack on the Commission's unbundling rules is their argument that the rules in general provide competing carriers with such extensive access and use of the incumbent LECs' networks that they effect unconstitutional takings of the incumbent LECs' property. The petitioners then argue that we should reject the FCC's overly broad interpretation of the Act's unbundling duties in order to avoid such constitutional infirmities.

Once again, we note that we have already vacated several of the unbundling rules that constitute a significant portion of this particular complaint. Thus, we are skeptical that the remaining FCC unbundling rules will effect an actual taking. Nevertheless, because many of the ratemaking procedures have been held in abeyance in anticipation of our decision and given the fact that we have vacated many of the FCC's pricing rules in this opinion, we cannot, as of yet, determine whether the incumbent LECs are receiving or will receive just compensation for providing
competing carriers with access to their networks. Therefore, we believe that this claim in not ripe for review. When a state or the federal government provides an adequate procedure for obtaining compensation, a takings claim is not ripe for review until the litigant has used the procedure and has been denied just compensation. See Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 195 (1985); McKenzie v. City of White Hall, 112 F.3d 313, 317 (8th Cir. 1997). Under the Act, if an incumbent LEC and a requesting carrier fail to negotiate the rates for unbundled access on their own, a state commission will determine the amount of compensation that the requesting carrier must pay to the incumbent LEC for such access in an arbitration proceeding. See 47 U.S.C.A. § 252(c)(2). Because the petitioners have not demonstrated that they have participated in such state arbitration proceedings and have been denied just compensation, we find that their takings claim is not ripe for review. We note that such a claim could be presented to a federal district court under the review provisions of subsection 252(e)(6).

Having found that the takings claim on its merits is not ripe, there is no justification for withholding the traditional deference that we afford to reasonable agency interpretations of statutes. See Chevron, 467 U.S. at 844. Consequently, we stand by our earlier determinations upholding several of the Commission's unbundling rules in light of the Act's terms, and we also find that the Commission's rules and policies regarding the incumbent LECs' duty to provide for

physical collocation of equipment to be consistent with the Act's terms contained in subsection 251(c)(6). See 47 C.F.R. § 51.323(f); First Report and Order, ¶ 585 (requiring, among other things, incumbent LECs to take account of projected demand for collocation of equipment when planning renovations or new constructions).[38]

H. The Scope of Incumbent LECs' Resale Obligations-Rule 51.613

One petitioner objects to the FCC's determination that discounted and promotional offerings are "telecommunication service[s]" that are subject to the resale requirement of subsection 251(c)(4) and that promotional prices lasting more than 90 days qualify as "retail rates," subject to a wholesale discount. See 47 C.F.R. § 51.613(a)(2); First Report and Order, ¶¶ 948-50. The petitioner claims that the FCC's pronouncements violate the terms of the Act because subsection 251(c)(4) requires only "telecommunications service[s]" to be offered for resale, and the petitioner asserts that promotional and discount programs are not "telecommunications service[s]" but rather mere marketing tools. The petitioner also points out that the Act requires only telecommunications services that are offered at retail rates to be offered for resale and argues that by definition, promotional offerings are not offered at retail rates and thus should not be subject to the resale obligation. Finally, the petitioner contends that the FCC's determination that promotional prices that last more than 90 days qualify as "retail rates" but those that last 90 days or less are not "retail rates" is arbitrary and capricious and beyond the Commission's jurisdiction.

Despite the petitioner's arguments to the contrary, we believe that the FCC has jurisdiction to issue these particular rules and that its determinations are reasonable interpretations of the Act. Although we have already held that the Commission does not have jurisdiction to issue rules governing the specific rate determinations for the local competition provisions of the Act, which include the resale obligation under subsection 251(c)(4), we have recognized that subsection 251(c)(4)(B) authorizes the Commission to issue regulations regarding the incumbent LECs' duty not to prohibit, or impose unreasonable limitations on, the resale of telecommunications services. See supra note 10 and accompanying text. While we

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[38]In sum, we uphold all of the Commission's unbundling regulations except for rules 51.305(a)(4), 51.311(c), 51.315(c)-(f), and 51.317, ¶¶ 278, 281 (only to the extent that these provisions create a presumption that a network element must be unbundled if it is technically feasible to do so); we vacate these listed provisions.

vacated the Commission's pricing rules that dictated the specific methodology for state commissions to use in determining the actual wholesale rates, see 47 C.F.R. §§ 51.601-51.611, the FCC's determination in section 51.613 merely defines the overall scope of the incumbent LECs' resale

obligation by indicating that telecommunications services offered at special promotional rates that last for more than 90 days will be subject to resale at a wholesale discount. This rule is a valid exercise of the Commission's authority under subsection 251(c)(4)(B) because it restricts the ability of incumbent LECs to circumvent their resale obligations under the Act simply by offering their services to their subscribers at perpetual "promotional" rates. Moreover, the Commission's determination that promotional rates that are effective for more than 90 days qualify as "retail rates" is a reasonable interpretation of the Act's terms and was not made arbitrarily or capriciously. The Commission evaluated the option of drawing the line at 120 days but rationally decided that "excluding promotions that are offered for as long as four months may unreasonably hamper the efforts of new competitors that seek to enter local markets through resale." First Report and Order, ¶ 950. Additionally, the Commission's inclusion of promotional rates that endure beyond 90 days in the category of "retail rates" deserves our deference, because the Act does not define the term "retail rates." See Chevron, 467 U.S. at 843-44 (requiring controlling weight to be given to agency regulations that fill gaps left by Congress). Finally, we find that the petitioner's argument that promotional programs are not "telecommunications service[s]" but rather marketing tools misses the point. The fact remains that the subject matters underlying the promotional programs and the promotional rates are telecommunications services which the FCC reasonably concluded must be made available for resale. We thus uphold section 51.613 as a valid regulation.

III. Conclusion

We decline the petitioners' request to vacate the FCC's entire First Report and Order and limit our rejection of FCC rules only to those that we have specifically overturned in this opinion.[39] We believe that the provisions of the Commission's First

[39]In total, we vacate the following provisions: 47 C.F.R. §§ 51.303, 51.305(a)(4), 51.311(c), 51.315(c)-(f), 51.317 (vacated only to the extent this rule establishes a presumption that a network element must be unbundled if it is technically feasible to do so), 51.405, 51.501-51.515 (inclusive, except for 51.515(b)), 51.601-51.611 (inclusive), 51.701-51.717 (inclusive, except for

Report and Order are severable and that the Commission intended them to be so. See Davis County Solid Waste Mgmt. v. EPA, 108 F.3d 1454, 1459 (D.C. Cir. 1997) (severability depends on issuing agency's intent).

As an aside, and while we do not pretend to possess the Rosetta stone that reveals the true meaning of every portion of this Act, we hope that our review of the FCC's First Report and Order in light of the Act's provisions offers some guidance to the participants in the telecommunications industry as they continue its evolution into the competitive marketplace Congress intended.

Upon the filing of this opinion and order, the provisions of our stay order are deemed expired.

The pending motion of the intervenors in support of the FCC to strike a claim allegedly raised for the first time in the reply brief of the Regional Bell Companies and GTE or, in the alternative, for leave to file a surreply is denied as moot because we did not adopt the argument advanced.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

51.701, 51.703, 51.709(b), 51.711(a)(1), 51.715(d), and 51.717, but only as they apply to CMRS providers), 51.809; First Report and Order, ¶¶ 101-103, 121-128, 180. We also vacate the proxy range for line ports used in the delivery of basic residential and business exchange services established in the FCC's Order on Reconsideration, dated September 27, 1996.

BellSouth Telecommunications, Inc.
FPSC Docket No. 960786-TL
Varner Rebuttal Exhibit AJV-5_____

Tennessee Reply to the Tennessee Regulatory Authority (TRA)

BellSouth Telecommunications, Inc.
Suite 2101
333 Commerce Street
Nashville, Tennessee 37201-3300

615 214-6301
Fax 615 214-7406

Guy M. Hicks
General Counsel

'97 FEB 10 PM 4 08

February 10, 1997

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: BellSouth Telecommunications, Inc.'s Entry into Long Distance (InterLATA) Services in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Response to Staff Report Dated January 31, 1997 in the above referenced matter.

Please contact me if you have any questions or need further information.

Very truly yours,

Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: ***BellSouth Telecommunications, Inc.'s Entry Into Long Distance (InterLATA) Services in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996***

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO STAFF REPORT DATED JANUARY 31, 1997

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits its response to the draft report prepared by the Staff of the Tennessee Regulatory Authority ("Staff Report") concerning BellSouth's anticipated request to provide interLATA services pursuant to Section 271 of the Telecommunications Act of 1996 ("Act"). 47 U.S.C. § 271. BellSouth appreciates the opportunity to participate in this process and will endeavor to offer its view of the Staff's analysis of Section 271 as well as the interplay between Section 271(c)(1)(A) ("Track A") and Section 271(c)(1)(B) ("Track B"). BellSouth also will address its current plans for filing with the Federal Communications Commission ("FCC") under Section 271 and will respond to the comments of the Consumer Advocate Division ("CAD").

II. DISCUSSION

A. Overview Of Section 271

Section 271 is a critical part of Congress's "pro-competitive, de-regulatory national policy framework" to "open telecommunications markets to competition." S. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996) ("Conference Report"). Section

271 was designed to end the old regime established under the Modification of Final Judgment, which had artificially divided local and long distance markets into two separate spheres, by creating head-to-head competition between long distance carriers and the Bell Operating Companies ("BOCs") in both the local and long distance markets. Congress intended to create a situation that would allow "everyone to compete in each other's business," which would bring consumers "low cost integrated service with the convenience of having only one vendor and one bill to deal with." 141 Cong. Rec. S713, S714 (daily ed. Feb. 1, 1996) (statement of Sen. Harkin).

The first step was opening local telecommunications markets. *See* 142 Cong. Rec. S688 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings) (Bell companies must "open their networks to competition prior to their entry into long distance"). Congress set out specific requirements for opening local markets in Sections 251-253 of the Act and made entry into long distance under Section 271 conditional upon the BOCs doing so. 141 Cong. Rec. S8138 (daily ed. June 12, 1995) (statement of Sen. Kerrey); *see* 141 Cong. Rec. S18,152-53 (daily ed. June 12, 1995) (statement of Sen. Breaux) (BOCs allowed to sell long distance and required the opening of local exchange markets). Section 271 was intended to allow a BOC to compete in the interLATA market consistent with the public interest as soon as it had opened the local exchange market; it was *not* enacted to give incumbent interexchange carriers the means to postpone such competition. 141 Cong. Rec. S7881, S7889 (daily ed. June 7, 1995) (statement of Sen. Pressler).

Section 271(c) sets out the two routes available for BOCs to begin competing for long distance customers -- the so-called Track A under Section 271(c)(1)(A) and Track B under Section 271(c)(1)(B). These routes provide two different ways for BOCs to obtain approval for entry into the long distance market if that entry is in the public interest and other statutory requirements are fulfilled, including consultation with the relevant state commission. Under either route, a BOC also must demonstrate that the relevant state is open to local competition by satisfying the 14-point competitive checklist set out in Section 271(c)(2). However, unlike Track A, which allowed a BOC to apply for long distance authority immediately, Track B required that the BOC wait ten months from the enactment of the Act before applying.[1]

B. **Section 271(c)(1)(A) Route**

Subparagraph 271(c)(1)(A) is titled "Presence of a Facilities-Based Competitor." It creates an expedited route for BOC entry into the long distance business without the waiting period required under Track B. However, Track A requires the presence of actual facilities-based competition. *See* 47 U.S.C. § 271(c)(1)(A) (requirements for in-region interLATA services are met if a BOC "is providing access and interconnection to its network facilities" to a "competing"

[1] Which route to follow depends largely on the relevant market facts existing at the time a BOC files its application at the FCC. Until an application is filed at the FCC, no conclusive judgment is possible about the routes that are open. After the FCC receives the BOC's filing, Section 271(d)(2)(B) requires the FCC to consult with the relevant state commission concerning whether the applying BOC meets the requirements of Section 271(c). At that time, the state commission may offer a timely assessment of how the BOC's application measures up to Section 271(c).

carrier or carriers providing telephone exchange service to "residential and business subscribers" either "exclusively" or "predominately" over their own facilities).[2]

Track A arose from Congress's belief that cable companies would emerge quickly as facilities-based competitors to telephone companies, justifying quicker BOC entry into the long distance business. According to the Conference Report, "large well established companies such as Time Warner and Jones Intercable are actively pursuing plans to offer local telephone service in significant markets," and at least one cable company, Cablevision, already had entered into an interconnection agreement with an incumbent BOC so that it could offer telephone service to 650,000 subscribers. Conference Report at 148. As one of the key authors of the Act explained:

> And, the biggest surprise to us was when Brian Roberts of Comcast Cable on behalf of the cable industry said that they wanted to be the competitors of the telephone companies in the residential marketplace. In fact, the next day, I called Brian and Jerry Levin of Time-Warner to have them reassure me that their intent was to be major players and competitors in the residential marketplace. After that discussion, I told my staff that we needed a checklist that would decompartmentalize cable and competition in a verifiable manner and move the deregulated framework even faster than ever imagined. And we came up with the concept of a facilities-based competitor who was intended to negotiate the loop for all within a State and it has always been within our anticipation that a cable company would in most instances and in all likelihood be that facilities-based competitor in most states.

142 Cong. Rec. H1152 (daily ed., Feb. 1, 1996) (statement of Congressman Fields).

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[2] The Act's definition of telephone exchange service excludes exchange access and restricted private line service. 47 U.S.C. § 153(47).

Thus, it was Congress's intention that a facilities-based competitor could "negotiate the loop for all within a State." Because this competitor would be a real, facilities-based competitor with the capability and incentive to begin quickly providing service over its facilities, Congress believed that it would be a reliable negotiator for the market. This competitor's agreement would be available to others within the State under Section 252(i) and would provide the basis for immediate BOC entry into long distance. *See, e.g.*, 142 Cong. Rec. S713 (daily ed. Feb. 1, 1996) (statement of Senator Breaux) ("[i]n those instances, we see no reason why the FCC should not act immediately and favorably on a Bell company's petition to compete").[3]

As noted in the Staff Report, NEXTLINK is a facilities-based competitor serving business customers in Tennessee predominantly over its own facilities. BellSouth understands that MCI Metro and Brooks Fiber also are serving business customers in Tennessee at least in part over their own facilities. BellSouth is not aware of a facilities-based competitive provider serving both residence and business customers predominantly over its own facilities. Thus, BellSouth agrees that Track

[3] The Conference Report makes clear that Track A requires an operational facilities-based competitor, noting that "[t]he requirement that the BOC 'is providing access and interconnection' means that the competitor has implemented the agreement and the competitor is operational." Conference Report at 148. That the access and interconnection agreement be implemented "is important because it will assist the appropriate State commission in providing its consultation ...." *Id.* at 148. Otherwise, state commissions would be called upon to assess interconnection agreements which they had not previously reviewed. *See* 47 U.S.C. § 252(e)(2)(A) (limiting state commission review of voluntarily negotiated agreements).

A does not appear to be presently available based on the circumstances as they exist today.

C. Section 271(c)(1)(B) Route

Section 271(c)(1)(B) describes the other route a BOC may follow to seek long distance authority. While imposing a ten-month waiting period, Track B supplies a date certain by which a BOC can submit Section 271 applications to the FCC if competing providers qualified under Track A have not emerged and if a general statement of the terms and conditions for access and interconnection has been approved or permitted to take effect by the state commission.

By its own terms, Track B is available, after the ten month waiting period, if "no such provider has requested the access and interconnection described in subparagraph (A)." 47 U.S.C. § 271(c)(1)(B). The "no such provider" language refers to the "competing provider" described in subparagraph (A). Thus, Track B remains open until a facilities-based competitor begins actually providing telephone exchange service to residential and business competitors and seeks access and interconnection. Unless a facilities-based competitor that meets the requirements of Track A has sought access and interconnection under the Act, Track B is the only route available to a BOC. (Indeed, a BOC may file with the FCC under Track B up to three months *after* it receives a request for access and interconnection from a competitor that meets the requirements of Track A, which ensures that competitors cannot block an application for long distance authority by seeking interconnection after the BOC has started down the Track B route).

The legislative history is clear that these requirements tying subparagraphs (A) and (B) together serve Congress's goal of opening the long distance market to competition by keeping a route open for BOCs to seek long distance authority. The Conference Report makes the point that Section 271(c)(1)(B) "is intended to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because *no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market.*" Conference Report at 148 (emphasis added). That is, Congress believed that a general statement of terms and conditions subject to state review would be at least as reliable a guarantor of open markets as the facilities-based competitor serving both business and residential customers pursuant to subparagraph (A).[4]

The Staff Report is consistent with both the language of the statute and the legislative history by concluding that Track B is available to BellSouth once the Tennessee Regulatory Authority "has approved or permitted to take effect a

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[4] During the House debate, Congressman Tauzin similarly explained that "[s]ubparagraph (b) uses the words 'such provider' to refer back to the exclusively or predominantly facilities based provider described in subparagraph (A)." 141 Cong. Rec. H8457, H8458 (daily ed. Aug. 4, 1995). He gave several examples of how subparagraph (B) would apply in practice. According to Congressman Tauzin, a BOC could file under subparagraph (B) if: (i) "no competing provider of telephone exchange service with its own facilities or predominantly its own facilities has requested access and interconnection"; (ii) the BOC had only received interconnection requests from carriers that do not use predominantly or exclusively competitive facilities; or (iii) a facilities-based competitor had requested access, but it served only business customers. *Id.* In all these instances, the BOC would not have received an interconnection request that satisfies Track A's requirement of a request from a facilities-based "competing provide[r] of telephone exchange service . . . to residential and business subscribers."

statement of the terms and conditions that BellSouth will offer to companies wishing to be facilities-based providers." (Staff Report at 5). BellSouth also acknowledges, consistent with the Staff Report, that BellSouth has not yet filed with the TRA a general statement of terms and conditions. It is BellSouth's present intention to do so in the near future and to then file an application with the FCC seeking long distance authority in Tennessee under Track B.

By acknowledging that BellSouth can proceed under Track B, the Staff implicitly rejected the argument advanced by some interexchange carriers that Track B is unavailable if a potential competitor simply requests negotiations for access and interconnection with the BOC, even if the competitor does not have the facilities or residential and business customers required by Track A. At the same time, these carriers argue that Track A also is foreclosed until the potential competitor requesting negotiations actually signs and implements the agreement, invests in sufficient facilities to serve business and residential subscribers predominately over its own facilities, and decides actually to provide service to both subscriber groups.

The Staff did not and should not embrace this convoluted interpretation, which would only serve to delay full competition in the telecommunications market. It would take the decision on opening the long distance market to competition out of the hands of the FCC, deny state commissions their role in the process, and put the timing of opening the market into the hands of potential BOC competitors. These firms could exploit the artificial no-man's land their interpretation creates by

simply making a request to negotiate for access and interconnection (thereby foreclosing Track B under their reading of the statute), and then limiting facilities investments or limiting facilities-based service to only residential or business subscribers (thereby foreclosing Track A as well). Such a result runs counter to the language and intent of Congress, which sought to establish rules to open markets, not keep them closed or allow them to be kept closed.

D. The 14-Point Competitive Checklist

In addition to satisfying the requirements of either Track A or B, a BOC seeking entry into long distance also must establish that it offers access and interconnection consistent with the 14-point competitive checklist set forth in Section 271(c)(2). As the Staff Report correctly points out, this checklist requires a BOC to provide:

(1) interconnection in accordance with Sections 251(c)(2) (interconnection requirement) and 252(d)(1) (interconnect pricing standards);

(2) nondiscriminatory access to network elements pursuant to Sections 251(c)(3) (unbundled access requirement) and 252(d)(1) (network elements pricing standards);

(3) nondiscriminatory access to its poles, ducts, conduits, and rights-of-way at just and reasonable rates pursuant to Section 224 (regulation of pole attachments);

(4) local loop transmission to the customer's premises unbundled from switching and other services;

(5) unbundled local transport from the trunk side of a wireline local switch;

(6) unbundled local switching;

(7) nondiscriminatory access to 911 services and E911, directory assistance, and operator call completion services;

(8) white pages directory listings for customers of the other carrier's telephone exchange service;

(9) non-discriminatory access to telephone numbers for assignment to the other carriers' telephone exchange service customers until numbering administration guidelines or rules are in place at which time a BOC must be in compliance with those guidelines or rules;

(10) nondiscriminatory access to databases and associated signaling for call routing and completion;

(11) interim number portability until the FCC issues regulations governing number portability (which can be provided via remote call forwarding, direct inward dialing trunks, or comparable arrangements);

(12) local dialing parity (nondiscriminatory access to information and services which will permit a competing local exchange carrier to provide local dialing parity in accordance with the Section 251(b)(3) dialing parity requirement);

(13) reciprocal compensation arrangements pursuant to Section 252(d)(2) (pricing standards); and

(14) telecommunications services for resale pursuant to Sections 251(c)(4) (resale rules) and 252(d)(3) (resale pricing standards).

47 U.S.C. § 271(c)(2).

Based on review of the interconnection agreements entered into by BellSouth and approved by the TRA as well as the record in the arbitration proceedings involving AT&T, MCI, and Sprint, the Staff Report concludes that BellSouth is in compliance with checklist items 4, 5, 6, 7, 8, 9, 10, 11, and 14. (Staff Report at 4, Attachment 1). BellSouth agrees with this conclusion. However, BellSouth disagrees with the Staff's analysis of the remaining checklist items as set forth in

greater detail below. BellSouth believes that it has complied with all aspects of the 14-point competitive checklist, and the final Staff Report should so find.

1. Items 1, 2, 3, & 13

The Staff Report maintains that BellSouth has not provided interconnection (Item 1), access to network elements (Item 2), access to pole attachments (Item 3), and reciprocal compensation arrangements (Item 13) in accordance with the Act because the prices for such items are interim rates not "based on cost." (Staff Report, Attachment 1 ¶¶ 1-3 & 13). The Staff Report concludes that "BellSouth should not be certificated as in compliance with these items until the cost studies are complete, and permanent rates are set." (Staff Report at 4). The analysis in the Staff Report is flawed.[5]

While interconnection agreements approved by the TRA and the January 23, 1997 Order of the Arbitrators contain interim prices that apply until permanent prices are established, these prices are "based on cost" consistent with 47 U.S.C. § 252(d). This is clear from the Arbitrators' January 23, Order, which reflects that the interim prices for interconnection and network elements "were based on one of two criteria: existing tariffs where available, with a preference for intrastate tariffs over interstate tariffs; or, where no tariff existed, a price which was logically

[5] The Arbitrators did not establish interim rates for pole attachments, conduit, ducts, and rights-of-way, notwithstanding the Staff's statement to the contrary. (Order at 58). Furthermore, the rates established by the Arbitrators for pole attachments, conduits, and ducts based on the FCC formula and for rights-of-way based on the lowest rates negotiated by BellSouth in Tennessee for existing license agreements are clearly "just and reasonable" rates based on cost, which is all the Act requires. *See* 47 U.S.C. § 224(d).

consistent with the prices submitted by the parties." (Order at 52). In either case, the interim price was "cost based."

With respect to prices based on existing tariffs, these prices were set and approved by the Tennessee Public Service Commission and were established consistent with the cost-based standard set forth in Section 252(d). (9/12/96 Prefiled Testimony of Robert C. Scheye, Docket No. 96-01152, at 34). Likewise, the prices proposed by BellSouth, AT&T, and MCI for new or unbundled services were all cost-based, and the parties submitted cost studies supporting such prices. (*Id.*) ("For new or additional unbundled elements, BellSouth proposes a price which covers cost, provides contribution to recovery of shared and common costs, includes a reasonable profit, and is not discriminatory"); (9/12/96 Prefiled Testimony of Wayne Ellison, Docket No. 96-01152, at 11-12) (AT&T's proposed rates "are based on compliant cost studies produced by the Hatfield Model" or "based on cost estimates provided by BellSouth"). Thus, the Staff's belief that the interim prices are not "cost based" is erroneous.

Furthermore, such a conclusion would be inconsistent with the Arbitrators' finding that they discharged their statutory duties in arbitrating BellSouth's interconnection agreements with AT&T and MCI. The Act plainly required the Arbitrators to "establish any rates for interconnection, services, or network elements" in accordance with the pricing standards under Section 252(d). 47 U.S.C. § 252(c)(2). The Arbitrators found that they did so. As set forth in their January 23 Order, the Arbitrators concluded that their resolution of the issues to be

arbitrated, including the establishment of interim prices, *"complies with the provisions of the Act*, and is supported by the record in this proceeding." (Order at 63) (emphasis added); *see also* November 14, 1996 Hearing TR at 114 ("We have fulfilled the intent of our State of Tennessee Legislature and *we have complied with the federal law"*) (statement of Director Kyle) (emphasis added).

The Staff's belief that Sections 252 and 271 requires the establishment of "permanent prices" also is at odds with the FCC's view of the Act. The FCC itself recognized the appropriateness of "interim arbitrated rates" that "might provide a faster, administratively simpler, and less costly approach to establishing prices ...." *First Report and Order*, Docket No. 96-325 ¶ 767 (August 8, 1996). Likewise, in reviewing Ameritech Michigan's Section 271 application, the Michigan Public Service Commission expressly rejected the contention "that interim rates may not be utilized to satisfy the requirements of the Act," noting that rates are always subject to review and revision. *See In re Application of Ameritech Michigan Pursuant To Section 271 of the Telecommunications Act of 1996*, CC Docket No. 97-1 (Feb. 5, 1997) at 13.

The Staff's suggestion that BellSouth cannot be in compliance with the competitive checklist until the uncertainty surrounding the FCC's August 8, 1996 Order has been resolved and "cost studies are complete, and permanent rates set" is completely incompatible with Congress's desire to "open all telecommunications markets to competition." (Staff Report at 4). The final outcome of the Eighth Circuit appeal may not be known for months, if not years. All the while, if the

Staff's view is adopted, consumers would be denied the substantial benefits associated with BellSouth's entry into long distance, and BellSouth would be forced to face competition in the local market without being able to compete in the long distance market. Such a result is not what either the Congress or the TRA intended.[6]

2. Item 12

The Staff Report reflects that BellSouth has submitted its plan for ensuring local dialing parity (Item 12) and concludes that, once this plan is implemented, "BellSouth will be in compliance with checklist item 12." (Staff Report at 4). BellSouth wishes to clarify the Staff Report to the extent it suggests that BellSouth is not presently in compliance with Item 12. That checklist item requires local dialing parity as prescribed in Section 251(b)(3), which defines dialing parity to include nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listings with no unreasonable dialing delays. BellSouth presently provides nondiscriminatory access to such services.

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[6] Chairman Greer correctly rejected any notion that the competitive local and long distance markets the Act intended to create should be held in abeyance by the uncertainty surrounding the FCC's order:

> I've noticed in two or three articles in the newspaper that when they refer to whatever happened with the FCC Order being stayed that competition was dealt a setback. And I don't believe that's true in Tennessee. I believe that we have done the very best we can to provide for a very pro-competitive market in this state. Let's get on with being good, clean competitors, and let's give the consumers some good prices.

November 14, 1996 Hearing TR at 115 (statement of Chairman Greer).

While BellSouth "is not providing intraLATA toll dialing parity," as noted in the Staff Report (Staff Report, Attachment 1, at (ii) ¶ 12), intraLATA toll dialing parity is not required under Item 12. *See* 47 U.S.C. § 271(c)(2)(B)(xii) (requiring implementation of "local dialing parity"). BOCs only have an obligation to provide intraLATA toll dialing parity coincident with the exercise of the "authority to provide interLATA services under subsection (d) ...." 47 U.S.C. § 271(e)(2)(A). Thus, that BellSouth may not be providing intraLATA toll dialing parity is irrelevant for purposes of determining compliance with the 14-point checklist. BellSouth fully intends to implement intraLATA toll dialing parity coincident with the Company's entry into the interLATA market.

E. **The Public Interest**

BellSouth's comments concerning the public interest discussion in the Staff Report will address two issues. First, Section 271 and Congress's debates concerning BOC entry into long distance point to the existence of an open local market, not the existence of some level of local competition, as the key to unlocking the long distance business to BOC competition. Congress recognized that allowing such entry would create enormous consumer benefits. Second, the FCC's recent order concerning Section 272 safeguards should alleviate the Staff's concerns that BellSouth's official services network may provide it with some unfair advantage.

1. Entry into long distance

The Staff Report suggests that the public interest may be served by delaying BellSouth's opportunity to compete in the long distance business until local competitors are established and meeting their business objectives. (Staff Report at 7). This approach to the public interest runs counter to the basic intent and purpose of the Act and is contrary to Tennessee law. *See* T.C.A. § 65-4-123 (declaring the policy of the State of Tennessee to permit competition "in *all* telecommunications services markets") (emphasis added). Substantively, this approach would serve to penalize Tennessee consumers by unnecessarily delaying the benefits that real long distance competition will bring. Procedurally, it could create an additional forum for never-ending litigation, and the consequent expenditure of the TRA's resources, as local competitors seek private gains from claiming they are not making the progress and profits "necessary" to allow BellSouth to enter the long distance market.

As set forth in greater detail above, Section 271(c) requires that a BOC open its local markets to competition either by entering into an approved agreement with an operational facilities-based competitor or by generally offering a statement of terms and conditions for access and interconnection. The adoption of Track B reflects Congress's judgment that a BOC's entry into long distance should be permitted even if no competitor were present in a particular state, as long as that state's local market was open to competition.

Section 271 does not create any quantification of competition in the local market and provides no invitation to import any other additional measure of competition into Section 271 in order for a BOC to enter the interLATA services market. Importing any such measurement into Section 271 as suggested by the Staff would clearly be contrary to the intent of Congress and its judgment that open markets be the appropriate gauge of competition. This view is bolstered by Congress's explicit prohibition against adding to "the terms used in the competitive checklist ...." 47 U.S.C. § 271(d)(4).

Congress rejected attempts to impose a quantification of competition requirement. For example, Senator Kerrey introduced an amendment that would have allowed a BOC to provide interLATA services "only if that company has reached interconnection agreements under Section 251 with ... telecommunications carriers *capable* of providing a *substantial* number of business and residential customers with service". 141 Cong. Rec. S8310, S8319 (June 14, 1995) (emphasis added). This amendment was rejected, even though it only required the *capability* to serve a substantial number of customers, and so did not even attempt to create a requirement that any particular number or percentage be served.[7]

The legislative history makes clear that Section 271 allows interLATA entry *regardless* of whether the qualifying local interconnection agreement is with a small company initially capturing only a few subscribers. *Id.* at S8319-8321. As the

[7] A similar proposal in the House would have required competitors to have 10% of the local market before the incumbent could enter the long distance market. 141 Cong. Rec. H8454 (daily ed. Aug. 4, 1995) (statement of Rep. Bunn). That proposal also failed.

successful opponents of Senator Kerrey's amendment noted, the Act "does not look at [a competitor's] size as being determinative of whether or not the Bell company could ... provide service in the interLATA area." *Id.* at S8321. Thus, Congress explicitly decided to exclude the level of local competition as a requirement for interLATA entry, which is one reason Congress allowed a BOC to apply for in-region interLATA relief under Section 271(c)(1)(B) even if it has no competitors at all.

Nowhere in the Act did Congress attempt to dictate the particular type or level of competition that was to result from the markets it was opening, whether in local as a prerequisite to the consumer benefits of BOC entry into the long distance business, long distance or cable television delivery. Tennessee should not attempt to add a competitive prerequisite to Congress's open market requirement.

Delaying BellSouth's entry into long distance has significant economic consequences, given Congress's recognition that the composition of today's long distance industry forces consumers to pay prices above competitive levels. As the legislative history reflects:

> This will tell anyone who studies rates and competition that there is no competition in the long distance market. What is causing the vast objection from AT&T, MCI and Sprint is the fact that they want to continue this cozy undertaking without any competition from the Baby Bells or from anybody else.

141 Cong. Rec. H8463 (daily ed., August 4, 1995) (statement of Rep. Dingell). These inflated charges can be very substantial. For example, Dr. William Taylor, a noted economist, has estimated that BellSouth's entry into the long business in

Georgia would create benefits worth $170 per access line per year for Georgia consumers. According to a nationally known consulting group, the total state-wide benefits in Georgia flowing from lower long distance prices due to BellSouth's entry would be worth about $3.3 billion over ten years. Similar benefits likely will accrue to consumers in Tennessee.

The benefits of BellSouth's entry into the long distance business in Tennessee would be entirely net benefits at least in part because, regardless of BellSouth's entry, there are more than sufficient tools available to the TRA, the FCC, and local market participants to ensure that the local exchange remains open to competition. Congress opened the local exchange principally through Sections 251 and 252 of the Act. BellSouth's local exchange obligations -- interconnection, unbundled network elements, resale and pricing -- exist independently of Section 271. Consequently, BellSouth must continue to negotiate in good faith over access and interconnections, and the arbitration process is always available. And, of course, BellSouth's numerous interconnection agreements with new entrants are fully enforceable contracts. BellSouth's provision of long distance service also would be subject to numerous statutory and regulatory safeguards under Section 272, and Section 271(d)(6) makes BellSouth's continued provision of long distance service contingent on its maintaining compliance with the competitive checklist and the other prerequisites for entry into the long distance market.

Even if denying long distance authority preserves some additional arrow in the quiver of regulators and new entrants, keeping that arrow in the quiver carries

enormous costs to consumers. The benefits to Tennessee consumers from increasing long distance competition will far outweigh any marginal value of maintaining the barrier to BOC entry into the long distance business.[8]

2. BellSouth's official services network

The Staff Report suggests that BellSouth's official services network may give it an unfair advantage by providing a ready vehicle for it to enter the long distance business as a facilities-based provider while local market entrants must construct their own facilities. (Staff Report at). The FCC's recently issued *FIRST REPORT AND ORDER In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended* (Dec. 24, 1996), appears to answer this concern. As long as BellSouth owns the official services network, paragraphs 261 and 262 of that Order appear to prohibit use of that network to provide almost all interLATA services, with the exception of grandfathered and incidental interLATA services. 47 U.S.C. § 271(f) - (g). Paragraph 218 appears to prohibit the transfer of the official services network to any BellSouth long distance affiliate unless "unaffiliated entities have an equal opportunity to obtain ownership of this facility." And, of course, local market entrants may enter the local market without the risks of sunk costs both through

[8] It is interesting to note that it appears that one of the first states in which AT&T will actually enter the local market is Connecticut, where SNET, the incumbent local provider, has already begun providing long distance service. It could well be that allowing BellSouth to enter the long distance business in Tennessee will spur interexchange carriers to enter the local market. Both Congress and the Tennessee General Assembly anticipated that a competitive free-for-all would result when *all* markets were open, not just local.

resale at mandatory discounts and through purchase of unbundled network elements.

F. The Comments Of The Consumer Advocate Division

Although not part of the Staff Report, attached to the Report are comments of the CAD concerning the public interest factor. BellSouth feels compelled to respond to certain of the CAD's comments, particularly the contention that there must be actual, facilities-based competition in the local exchange market before BellSouth can enter the long distance market. (Comments at 1-2). This contention is belied by the language and legislative history of the Act, as explained more fully above.

Further, the CAD's assertion that the TRA must find that BellSouth "is protecting the interests of consumers" in order to satisfy the public interest requirement is simply wrong. (Comments at 2). In addition to mischaracterizing the statute cited -- T.C.A. § 65-4-123 -- the CAD should know that it is competition which will protect the consumer. *See* T.C.A. § 65-4-123 (requiring that competition be permitted "in *all* telecommunications markets") (emphasis added). Until such competition is fully developed, one element of the telecommunications policy of this State provides that "*the regulation* of telecommunications services and telecommunications services providers shall protect the interests of consumers ...." Thus, there is ample protection for the consumer in the law, and no specific finding as suggested by the CAD is required.

The CAD claims that "there are already indications of unreasonable prejudice and disadvantage to the telecommunications service providers by BellSouth," citing a complaint filed by ACSI with the FCC. (Comments at 3). This complaint, and a similar one filed with the Georgia Public Service Commission, stem from unintended delays and service interruptions ACSI experienced in connection with the first few unbundled loops that have been ordered from BellSouth in Georgia. BellSouth has received orders from ACSI for a substantial number of unbundled loops, which BellSouth has successfully provided. That ACSI experienced some problems early on due to the start up nature of the operation is not evidence that competitors are being "prejudiced" or "disadvantaged" by BellSouth, as the CAD contends.[9]

Without taking the time to refute each of the CAD's misguided observations concerning Advanced Intelligent Network services and Alternate Carrier Selection, the CAD apparently believes that regulation is a superior mode of operation to competition. (Comments at 5-9). Such a view ignores the mandate by both the Congress and the Tennessee General Assembly that all telecommunications markets should be deregulated and that competition should be permitted to flourish. The CAD's contention that BellSouth should not be permitted to enter the long distance market is inconsistent with this legislative mandate, particularly when it cannot seriously be disputed that BellSouth's entry would benefit consumers.

---

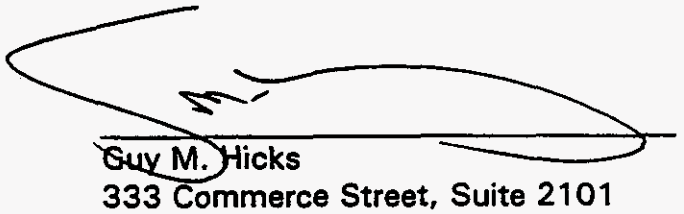
[9] The CAD does not mention ACSI's complaint with the Georgia Public Service Commission or that the Georgia Commission declined to award any of the relief sought by ACSI, deciding instead to hold the complaint in abeyance for sixty days pending the development of industry standards.

III. CONCLUSION

While BellSouth concurs with much of the draft Staff Report, BellSouth disagrees with the Staff's assessment that BellSouth has not complied with certain aspects of the 14-point competitive checklist. BellSouth respectfully requests that the Staff Report be revised accordingly and that, once it has filed an application with the FCC, BellSouth be found in compliance with Section 271 so as to permit its entry into the long distance market in Tennessee.

Respectfully submitted,

BellSouth Telecommunications, Inc.



Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

William J. Ellenberg, II
Bennett L. Ross
675 W. Peachtree St., NE, Suite 4300
Atlanta, GA 30375

Florida Retail, Resale and Rebundling Comparisons

A Typical Business Customer

	Rate Gp 12 Business Line	FL PSC Ordered Resale Discount @ 16.81%	FL PSC Ordered Unbundled Rates
Exchange Line	$29.10	$24.21	$17.00
Port	-	-	$2.00
Hunting	$9.55	$7.94	-
CF Don't Answer	$3.25	$2.70	-
Local Usage	-	-	$5.45
IntraLATA Toll/Local Calling Plus	$7.73	$6.43	$1.92
InterLATA Intrastate Access	$5.15	$5.15	$5.15
InterLATA Interstate Access	$7.87	$7.87	$1.25
SLC	$6.97	$6.97	$0.00
Total	$69.62	$61.27	$32.77
Effective Discount from Retail			52.9%

ILLUSTRATIVE

Florida Example of Unbundled Elements

Post 7/97 Analysis

(Statewide Average Rates)

End-User Generated Recurring Revenues	Business Lns	Business Trunks	Residence
Avg Rate	$27.52	$41.49	$9.80
Hunting	$4.45	$4.45	$0.00
Vert. Svc.	$2.66	$0.00	$3.92
Local Calling Plus	$2.84	$2.84	$1.16
IntraLATA Toll	$4.89	$4.89	$2.38
InterLATA Intrastate Toll Access	$5.15	$5.15	$3.56
InterLATA Interstate Toll Access	$7.87	$7.87	$7.05
Subtotal	$55.38	$66.69	$27.87
SLC	$5.78	$6.00	$3.50
Total Retail	**$61.16**	**$72.69**	**$31.37**
Total less Access and SLC	**$42.36**	**$53.67**	**$17.26**
Resale			
Staff Resale @21.83%(R),16.81%(B)	$35.24	$44.65	$13.50
SLC	$5.78	$6.00	$3.50
Intrastate and Interstate Access	$13.02	$13.02	$10.61
Total Resale Revenues	**$54.04**	**$63.67**	**$27.61**

Unbundled Network Elements - PSC Order	Business Lines	Business Trunks	Residence
Loop	$17.00	$17.00	$17.00
Switch Port	$2.00	$2.00	$2.00
Hunting	$0.00	$0.00	$0.00
Vert. Svc	$0.00	$0.00	$0.00
Local Calling Plus	$0.42	$0.36	$0.21
Local Usage	$5.45	$11.42	$4.78
IntraLATA Toll	$1.50	$1.50	$0.92
InterLATA Intrastate Toll	$5.15	$5.15	$3.56
InterLATA Interstate Toll	$1.25	$1.25	$1.12
Subtotal	$32.77	$38.69	$29.59
SLC	$0.00	$0.00	$0.00
Total	**$32.77**	**$38.69**	**$29.59**
Price/min for 2.0 min call	0.0113		
Price/min for 2.6 min call	0.0098		
Price/min for 3.9 min call	0.0082		
Unbundled less Resale	**($21.27)**	**($24.98)**	**$1.99**
Access Lines	**1,273,309**	**96,796**	**3,875,650**

Contribution Impact with 10% access line loss:	**$**	**(35,369,495)**
Contribution Impact with 20% access line loss:	**$**	**(70,738,989)**
Contribution Impact with 30% access line loss:	**$**	**(106,108,484)**
Contribution Impact with 40% access line loss:	**$**	**(141,477,979)**

Notes:

1. Average rev. for vertical svc & intraLATA toll computed from Dec. '95 actuals
2. SLC rate for business is weighted average of single line and multi-line SLCs, Dec '95 actuals.
3. SLC collected from resold lines, but not from unbundled network elements.
4. Retail revenues from vertical svc. and intraLATA toll will be significantly higher for the competitor's target market.
5. The unbundled business & residence average loop rate shown is from the FL PSC order.
6. Resale discount rate reflects FL PSC ordered discount levels.
7. Local minutes of use equals 482 orig. min. for bus.lines, 1164 orig. min. bus.trunks & 583 orig. min. for res. from FL SLUS.
8. IntraLATA toll (MTS) min. of use equals 26 min. for bus. & 16 min. for res. estimated from Dec 1995 actuals.
9. Local Calling Plus min. of use equals 37 orig. min for bus.lines and trunks and 25 min. for residence lines estimated from Dec 1995

BellSouth Telecommunications, Inc.
FPSC Docket No. 960786-TL
Varner Rebuttal Exhibit AJV-7_____

ACSI Reply

WILKINSON, BARKER, KNAUER & QUINN

LAW OFFICES
1735 NEW YORK AVENUE, N.W.
WASHINGTON, D. C. 20006-5209
(202) 783-4141

TELECOPIER
(202) 783-5851
(202) 833-2360

GERMAN OFFICE
GOETHESTRASSE 23
60313 FRANKFURT A.M. GERMANY
011-49-69-20809
011-49-69-297-8453 (TELECOPIER)

June 3, 1997

Kurt A. Schroeder, Chief
Formal Complaints and Investigations Branch
Enforcement Division, Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W., Room 6010
Washington, D.C. 20554

Re: *American Communications Services, Inc. v. BellSouth Telecommunications, Inc.*
File No. E-97-09

Attention: Gerald Chakerian, Esquire

Dear Mr. Caton:

Enclosed for filing on behalf of BellSouth Telecommunications, Inc. ("BellSouth") are copies of the "Public Version" of BellSouth's opening brief and accompanying appendix, which were originally filed under seal, pursuant to Sections 0.459, 1.731, and 1.732 of the Rules. In accordance with Section 1.732(e), the public version of the brief being filed today has been edited to remove materials that are subject to a claim of confidentiality.

Leave is hereby requested for the filing of this edited version one day out of time, due to constraints imposed by the completion and reproduction of the reply brief, which was also due to be filed yesterday.

Respectfully submitted,

WILKINSON, BARKER, KNAUER & QUINN

By: Michael Deuel Sullivan

Enclosures
cc: See certificate of service

CERTIFICATE OF SERVICE

I, Robert G. Kirk, hereby certify that public copies of the foregoing "Opening Brief for Defendant" and Appendix have been served on the following persons by hand delivery or by overnight delivery service this 3rd day of June 1997.

John B. Muleta, Chief
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W., Room 6008
Washington, D.C. 20554

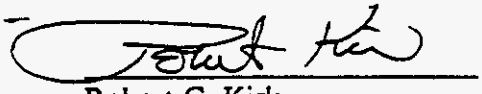
John B. Adams, Esquire
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W., Room 6114
Washington, D.C. 20554

Kurt A. Schroeder, Chief
Formal Complaints and Investigations Branch
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W., Room 6010
Washington, D.C. 20554

Brad E. Mutschelknaus, Esquire
Steven A. Augustino, Esquire
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Gerald Chakerian, Esquire
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W., Room 6310-C
Washington, D.C. 20554

Riley M. Murphy, Esquire
James C. Falvey, Esquire
American Communications Services, Inc.
131 National Business Parkway, Suite 100
Annapolis Junction, MD 20701



Robert G. Kirk

PUBLIC VERSION

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. E-97-09

In the matter of

AMERICAN COMMUNICATIONS SERVICES, INC.,
Complainant,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendant.

OPENING BRIEF FOR DEFENDANT BELLSOUTH TELECOMMUNICATIONS, INC.

R. DOUGLAS LACKEY
MICHAEL A. TANNER
675 West Peachtree Street, N.E.
Suite 4300
Atlanta, GA 30375
Telephone: (404) 335-0764
Fax: (404) 614-4054

L. ANDREW TOLLIN
MICHAEL DEUEL SULLIVAN
ROBERT G. KIRK
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W., Suite 600
Washington, D.C. 20006-5289
Telephone: (202) 783-4141
Fax: (202) 833-2360

WILLIAM B. BARFIELD
JIM O. LLEWELLYN
1155 Peachtree Street, N.E.
Suite 1800
Atlanta, GA 30309-2641
Telephone: (404) 249-4445
Fax: (404) 249-5901

DAVID G. FROLIO
1133 21st Street, N.W.
Washington, D.C. 20036
Telephone: (202) 463-4182
Fax: (202) 463-4195

Attorneys for BellSouth Telecommunications, Inc.

May 23, 1997

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Before the
Federal Communications Commission
Washington, D.C. 20554

File No. E-97-09

In the matter of

AMERICAN COMMUNICATIONS SERVICES, INC.,
Complainant,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendant.

OPENING BRIEF FOR DEFENDANT BELLSOUTH TELECOMMUNICATIONS, INC.

American Communications Service, Inc. ("ACSI") filed a formal complaint against BellSouth Telecommunications, Inc. ("BellSouth") relating to BellSouth's provision of unbundled loops to ACSI that are used by ACSI for the provision of local exchange telephone service to end users as a competitive local exchange carrier pursuant to an agreement negotiated by ACSI and BellSouth. ACSI's complaint is based on events that occurred during the ordering and provisioning of the first few unbundled loops ordered from BellSouth in Columbus, Georgia.

Based on its experience involving these initial unbundled loop orders, ACSI claims: (1) that when BellSouth negotiated its agreement with ACSI it failed to negotiate in good faith; (2) that BellSouth has failed to provide interconnection to ACSI equal to that which it provides itself; (3) that BellSouth has failed to provide interconnection to ACSI in accordance with the agreement; and

(4) that BellSouth has failed to provide ACSI with unbundled loops as required by the Telecommunications Act of 1996.

BellSouth has raised five affirmative defenses: (1) that the complaint concerns the provision of intrastate local exchange services and facilities pursuant to an agreement approved by state regulators and subject to an ongoing state complaint proceeding, and should accordingly be dismissed for lack of jurisdiction; (2) that ACSI's first claim, regarding alleged bad faith negotiation, should be dismissed for failure to state a *prima facie* case; (3) that ACSI's second and third claims, regarding BellSouth's alleged failure to provide interconnection, should be dismissed because the provision of unbundled loops is not "interconnection" for purposes of 47 U.S.C. § 251(c)(2); (4) that ACSI's second, third, and fourth claims should be dismissed or denied because any disruptions resulted from ACSI's failure to engage in reasonable testing and otherwise from ACSI's own acts; and (5) that ACSI's complaint should be dismissed for a lack of good faith.

In this opening brief, BellSouth submits proposed findings of fact and conclusions of law supporting its affirmative defenses. BellSouth will address ACSI's claims on the merits, to the extent they are not already addressed herein, in its reply brief, given that ACSI has the burden of proceeding with respect to its claims.

SUMMARY

In July 1996, ACSI negotiated an Agreement with BellSouth under which BellSouth would unbundle its network elements. ACSI planned to use unbundled loops to become a facilities-based competitive local exchange carrier. Due to difficulties it encountered in the initial few cutovers of customer lines from BellSouth local exchange service to unbundled loops, ACSI has complained to the Georgia Commission and the FCC that BellSouth has violated the Agreement and Section 251 of the Communications Act. Its complaint should be dismissed or denied.

First, the Commission lacks jurisdiction to entertain ACSI's complaint, because the unbundled loops at issue are purely intrastate telephone exchange facilities. Sections 2(b) and 221(b) deprive the Commission of jurisdiction regarding facilities for or in connection with intrastate service and local telephone exchange service. In light of the Supreme Court's decision in *Louisiana Public Service Commission v. FCC*, Sections 208 and 251 cannot be construed as granting the Commission authority to entertain complaints regarding purely intrastate telephone exchange service.

Second, ACSI's claim that BellSouth knew when it negotiated its Agreement that it was unable to provide unbundled loops is totally unsupported and false. BellSouth knew that it would be able to deliver unbundled loops, and it has in fact done so. BellSouth knew, however, that joint testing would be required before full implementation, and the Agreement provided for a testing phase. ACSI knew or should have known when it negotiated the Agreement that BellSouth was not representing its ability to provide trouble-free cutovers immediately, without any joint testing. Accordingly ACSI has failed to show a *prima facie* case of bad faith negotiation.

Third, ACSI's claims that BellSouth violated the provisions of Section 251 dealing with interconnection must be dismissed because ACSI has not made any factual allegations concerning BellSouth's interconnection practices. ACSI's allegations center on provision of unbundled loops, not interconnection. The statute, the Commission, and the Agreement all distinguish between interconnection and access to unbundled network elements. The interconnection provisions of the statute simply do not have any bearing on BellSouth's provision of unbundled loops.

Fourth, the Commission should dismiss or deny three claims in ACSI's complaint because the alleged disruptions in service that ACSI encountered are largely the result of its own conscious business decision to provide service to customers before it was ready, using its own customers as guinea pigs instead of engaging in adequate testing.

ACSI knew it was using customers to test a process with which it had virtually no experience, and it knew that disruptions were likely to occur, but it went ahead and risked its customers' ability to use their phones.

Now it is claiming that the disruptions that these and other customers experienced constitute violations by BellSouth of the Agreement and Section 251. They are not. ACSI failed to follow the provisions of the Agreement with respect to testing, ordering, and expediting; accordingly, BellSouth was under no obligation at all. Its attempt to provide unbundled loops despite ACSI's deviation from the Agreement cannot be held a violation of the Agreement or of the statute. In any event, minor disruptions and delays in provisioning simply do not constitute violations of the statute, whether or not they violate the Agreement, because they do not rise to the level of a failure to provide service. Moreover, the public interest would not be served by allowing ACSI to transform alleged minor contract violations into violations of the Communications Act subject to formal complaint proceedings.

Fifth, the Commission should dismiss ACSI's complaint because it was brought in bad faith. ACSI's Complaint is simply an attempt to cover up the recklessness and incompetence of its decision to begin service as a switched local service provider, using new and untried unbundled loops, before it was ready for prime time. ACSI points the finger at BellSouth after ACSI's

"success" in starting up operations as a CLEC turned out to be a failure. The Commission should not let ACSI use its processes to escape blame for its own decision to risk its customers' phone lines and livelihoods to an untested new service.

PROPOSED FINDINGS OF FACT

A. INTRODUCTION

BellSouth is a Bell Operating Company ("BOC")[1] that provides switched local exchange and other telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. BellSouth is an incumbent local exchange carrier ("ILEC")[2] in numerous locations in those states. ACSI is a telecommunications carrier[3] certified to operate as a competitive local exchange carrier ("CLEC")[4] — a local exchange carrier ("LEC")[5] other than an ILEC — in eight states in the BellSouth region. (GS 2; SF 1- 2, 6-8.)[6]

ACSI is certificated to operate as a CLEC in Georgia. In Columbus, Georgia, in particular, ACSI is a CLEC, and BellSouth operates as an ILEC. (GS 2; SF 5.)

All unbundled loops provided by BellSouth to ACSI are located entirely within the state of Georgia. (Affidavit of Martha G. Jackson, Attachment A, at ¶ 5 (Jackson Aff.); Complaint at ¶ 9; ACSI 0296, 0306, 0311, 0320, 0328, 0331, 0353, 0361-374.)[7] Unbundled loops are not utilized by

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1 As defined in 47 U.S.C. § 153(35).

2 As defined in 47 U.S.C. § 251(h).

3 As defined in 47 U.S.C. § 153(44).

4 In some of the documents involved in this case, CLECs are denominated by other terms — "alternative local exchange carrier" ("ALEC") and "other local exchange carrier" ("OLEC") — that are functionally equivalent to CLEC for purposes of this case. In this brief, we will generally use the term CLEC.

5 As defined in 47 U.S.C. § 153(26).

6 As used herein, "GS" refers to the General Stipulations and "SF" refers to the Stipulated Facts, by paragraph number, contained in the Joint Statement of Stipulated and Disputed Facts and Key Legal Issues filed by the parties.

7 As used herein, "ACSI" citations refer, by page number, to document production by ACSI. Similarly, "BST" citations refer, by page number, to document production by BellSouth.

BellSouth for the provision of any interstate service, including interexchange access. When BellSouth provides ACSI an unbundled loop in Columbus, Georgia, it gives ACSI the unfettered use of a dedicated circuit terminated at one end at the demarcation point at the customer's premises, which are located in Georgia, and terminated at the other end in a BellSouth central office on a distribution frame, also located in Georgia. At the time of cutover, the termination of the loop on the BellSouth distribution frame is hard-wired to ACSI facilities co-located at the central office. BellSouth does not provide unbundled loops to ACSI pursuant to any tariff on file with the FCC; it provides such loops pursuant to an agreement approved by the Georgia Public Service Commission ("Georgia Commission" or "GPSC") (SF 10-13; Agreement Section IV.A.3.)

B. THE INTERCONNECTION AGREEMENT

On July 25, 1996, ACSI and BellSouth entered into an Interconnection Agreement (the "Agreement") pursuant to 47 U.S.C. § 252, under which BellSouth will provide ACSI with a variety of facilities and services, including interconnection, traffic exchange, unbundled network elements ("UNEs"), and service provider number portability ("SPNP"). Certain issues had not been resolved at the time the agreement was executed, and in August 1996, ACSI filed a petition for arbitration with the Georgia Public Service Commission ("GPSC" or "Georgia Commission") regarding these issues. On October 17, 1996, prior to conclusion of the arbitrations, BellSouth and ACSI voluntarily amended the Interconnection Agreement to resolve all outstanding issues. The agreement, as amended, was approved by the Georgia Public Service Commission pursuant to Section 252(e) of the Communications Act. (SF 9-15.)

As of July 25, 1996, the Commission had not yet issued its *Interconnection Order* (*Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 95-185, *First Report and Order*, 11 F.C.C.R. 15499 (1996), *petitions for review pending.)*, which established the FCC's rules and policies for the provision of unbundled loops. The difficulty

and complexity of this task is clear from the fact that the Commission's *Interconnection Order* devoted some 150 pages to issues relating uniquely to the provision of access to unbundled elements.

While BellSouth had not yet begun providing UNEs as of July 25, 1996, BellSouth had been successfully providing special access services, a process similar to the provision of UNEs in some respects, particularly with respect to ordering procedures. BellSouth had engaged in extensive planning with respect to the provision of UNEs in light of its experience providing other services, including special access services and local exchange service loops and trunks. At the time BellSouth entered into the Agreement, BellSouth believed that it would be fully capable of providing unbundled loops in accordance with the terms of the Agreement, after ordering procedures had been refined and testing had been completed. (BSRI 6-8.)[8]

BellSouth had prepared a draft "Facilities Based Ordering Guide" ("FBOG") that addressed the procedures BellSouth planned to use for the provision of UNEs, among other things. A copy of the FBOG draft was supplied to ACSI in the course of negotiations. The FBOG is referenced in the Agreement. (Agreement at IV.B.11, IV.C.1.)

Section IV of the Agreement governs the provision of UNEs, including unbundled loops. Sections V and VI of the Agreement contain provisions governing Interconnection and Traffic Exchange. The latter sections do not contain any provisions concerning the provision of unbundled loops. Section XVIII of the Agreement governs the timing of implementation. Entitled "Implementation of Agreement," that section states, in its entirety:

> The Parties agree that within 30 days of the execution of this Agreement they will adopt a schedule for the implementation of this Agreement. The schedule shall state with specificity, ordering,

[8] As used herein, "BSRI" refers, by number, to the response by BellSouth to an Interrogatory propounded by ACSI.

> testing, and full operational time frames. The implementation shall be attached to this Agreement as an addendum and specifically incorporated herein by this reference.

No written implementation schedule was ever executed or attached to the Agreement as an addendum. (SF 14, 16-17.)

Section IV.C.2 of the Agreement addresses order processing for unbundled loops. That section provides, in relevant part: "Order processing for unbundled loops shall be mechanized, in a form substantially similar to that currently used for the ordering of special access services." At the time BellSouth entered into the Agreement, BellSouth had well-established procedures in place for the ordering of special access services. (SF 15(a); BSRI 6.)

Section IV.C.10 of the agreement states that "[t]he parties will negotiate in good faith to establish expedite and escalation procedures for ordering and provisioning, including establishment of a process for ACSI to request the expedite [of] an order on a customer's behalf." These procedures have never been established. (Jackson Aff. at 3(i).)

Section IV.D of the Interconnection Agreement governs the provision of unbundled loops, including the conversion, or cutover, of exchange service to unbundled loops. Section IV.D.1 provides:

> Installation intervals must be established to ensure that service can be established via unbundled loops in an equivalent time frame as BellSouth provides services to its own customers, as measured from the date upon which BellSouth receives the order to the date of customer delivery.

Section IV.D.2 provides:

> On each unbundled network element order in a wire center, ACSI and BellSouth will agree on a cutover time at least 48 hours before that cutover time. The cutover time will be defined as a 30-minute window within which both the ACSI and BellSouth personnel will make telephone contact to complete the cutover.

Section IV.D.3 provides:

> Within the appointed 30-minute cutover time, the ACSI contact will call the BellSouth contact designated to perform cross-connection work and when the BellSouth contact is reached in that interval, such work will be promptly performed.

Section IV.D.6 provides:

> The standard time expected from disconnection of a live Exchange Service to the connection of the unbundled element to the ACSI collocation arrangement is 5 minutes. If BellSouth causes an Exchange Service to be out of service due solely to its failure for more than 15 minutes, BellSouth will waive the non-recurring charge for that unbundled element.

Section IV.D.7 provides:

> If unusual or unexpected circumstances prolong or extend the time required to accomplish the coordinated cut-over, the Party responsible for such circumstances is responsible for the reasonable labor charges of the other Party. Delays caused by the customer are the responsibility of ACSI.

Section IV.D.8 provides:

> If ACSI has ordered Service Provider Number Portability (SPNP) as part of an unbundled loop installation, BellSouth will coordinate implementation of SPNP with the loop installation.

(SF 15(b)-(g).)

C. THE PROCEDURE FOR PROVIDING UNBUNDLED LOOPS

Unbundled loop orders received pursuant to the agreement are processed by BellSouth as follows:

> When BellSouth receives a Local Service Request (LSR) order at its Local Carrier Service Center (LCSC) via a facsimile message, the service representative will verify that the proper ordering information is contained on the LSR and will then input the order into the Exchange Access Control and Tracking (EXACT®) system. If the alternative local exchange company (ALEC) submits the order in electronic format through the EXACT system, the BellSouth service representative will review the LSR for accuracy prior to releasing the order to other BellSouth systems.

Once the information has been verified by the BellSouth service representative, the representative will release the LSR to the Service Order Communications System (SOCS). This system creates a service order from the information contained on the LSR. SOCS will then pass the order to Service Order Analysis and Control (SOAC). SOAC then routes the service orders to the appropriate provisioning and installation systems.

The Loop Facility Assignment and Control System (LFACS) is the initial system to receive the service order. LFACS's function is to keep an inventory of available loops in a given cross-section of the BellSouth facility pool. LFACS will attempt to locate cable pairs (from the Main Distribution Frame in the central office to the customer premises) that are compatible with the loop requested on the LSR. If no facilities are available, the order will "fall-out" of the mechanized process. If facilities are available and the loop assignment is made, LFACS will then route the service order back to SOAC. Since the loop in these cases is LFACS-administered, SOAC would next route the order to Computer Systems For Main Frame Operation (COSMOS), which would assign a local loop to a tie pair cross-connect. COSMOS returns the order to SOAC.

SOAC next routes the order to the Network Services Database and to the TIRKS® System for design and issuance of the Work Order Records and Details (WORD) document.[9] This is done in order to provide the loop make-up or Design Layout Record (DLR) to the ALEC placing the order. The WORD is passed by TIRKS to the Work Force Administration (WFA) and the Network Services Data Base (NSDB). The NSDB matches/merges the SOAC order image with the WORD document from TIRKS to form a line record. The NSDB line record is used by WFA for dispatching and field work activities.

WFA dispatches the order to field personnel, and the work is performed from the design information pulled from WFA. If there is a coordinated disconnect order, which is worked from the COSMOS frame order, a WFA hand-off is issued for manual correlation of the field activities with the COSMOS frame order. It becomes critical that the ALEC have provided accurate information on the LSR. The ALEC must have properly identify their equipment in the central office in order for the BellSouth technician to connect the loop to the correct assignment of the ALEC equipment.

(BSRI 1.)

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[9] TIRKS is a registered trademark of Bell Communications Research, Inc.

D. TESTING OF UNBUNDLED LOOP PROCESSES

Testing is an important part of the provision and use of any telecommunications facility or service, particularly a new one. Another CLEC in Georgia, MFS Intelenet, has provided testimony before the Georgia Commission demonstrating that joint testing is critical to the unbundled loop process. According to the MFS witness, before there can be successful implementation, the LEC and CLEC must:

- Develop *joint procedures* for interconnection, unbundling, monitoring, and *testing*;
- Set up and *test* all interconnections, procedures, and electronic interfaces;

* * *

- Install and *test* unbundled loops and unbundled loop provisioning procedures;
- *Trial joint coordination* of unbundled loops and interim number portability for "live" customer accounts, within specified cut-over window;
- Develop and implement ordering and billing procedures.

(Direct Testimony of Loyall Meade, MFS Intelenet of Georgia, Before the Georgia Public Service Commission, Docket 6863-U, Feb. 14, 1997 ("Meade Testimony"), at 8 (emphasis added).)

MFS felt that joint testing is necessary to test the validity of the ordering and provisioning process prior to cutover of loops in any market. (Meade Testimony at 15.) The MFS witness described the need for joint testing, or pilot programs, as follows:

> There is usually some confusion or misinterpretation of unbundled loop service orders, internal processes which were thought to accommodate the loop provisioning often fail and critical dates are often not met. . . . Some might consider the pilots to be failures; they consume an inordinate amount of time and resources, and they often do not allow MFS to enter a market as soon as it would like. They are successful, however, in pointing out the difficulties and complexities in entering new markets. The pilots are excellent arenas to uncover procedural deficiencies, test new methods and provide

> hands-on experience for those who eventually have to do the real work.

(Meade Testimony at 16.) According to the MFS testimony, it will not attempt to offer unbundled loops to customers in any market until it has completed joint testing. (*Id.* at 15.) Accordingly, MFS established a joint testing pilot program with BellSouth. Initially, the MFS/BellSouth testing program was scheduled to commence in mid-November 1996 but "due to a series of delays involving wiring, equipment installation and testing, the pilot did not commence until the later part of January." (*Id.*) According to MFS, such delays are typical with such testing programs. (*Id.*)

Similar joint testing between ACSI and BellSouth was envisioned by the implementation clause, Section XVIII, which provided for a testing phase before full operational provisioning of unbundled loops. (SF 16.) This was especially important with respect to Columbus, Georgia, because (i) Columbus, Georgia was ACSI's first attempt at providing switched local exchange services (ARI 23)[10]; (ii) ACSI had "requested more unbundled loops from BellSouth in Georgia than any other CLEC" (SF 3); and (iii) "ACSI has not conducted unbundled loop testing with any other carriers" (ARI 23). Despite the importance of joint testing, BellSouth and ACSI never adopted an implementation schedule and joint testing was never undertaken. (SF 17; BSRI 8, 10; ARI 13, 23.)

Although BellSouth did not have the opportunity to conduct joint testing with ACSI, BellSouth conducted the following internal tests of its systems for ordering and provisioning unbundled loops:

- Service orders were issued in July 1996 through November 1996 to test the flow through of unbundled service orders. The first service order testing was done to test the Reuse Field Identifiers (FIDs) to ensure that the disconnect of single-line voice grade service (Plain Old Telephone Service or POTS) and the add (connection) of the unbundled loop would flow and result in the reuse of the existing working local loop assignments (cable/pair). We found

[10] As used herein, "ARI" refers, by number, to the responses by ACSI to the Interrogatories propounded by BellSouth.

that this process worked if the orders were coordinated. First, the order would be associated with the disconnect and the correct FID. Next, the add issued would be issued, also with the correct FID.

- The service order was logged via the SOAC and TIRKS Systems. The circuit was designed manually, with an Estimated Measured Loss (EML) of 8.0db. The WORD was issued to the downstream systems (WFA, NSDB) to see the results. All systems received the service order and WORD document and CDOC sketches were developed. The test was successful. This first test was issued via cable and pair at the end user with a T1 facility at the ALEC location.

- Additional service orders were issued for the different types of services that were scheduled for the first round of tests (2Wire loop start, 2Wire ground start, 2Wire reverse battery, Basic Rate ISDN, 56 kb/s, and 64 kb/s). The Voice loops were tested with Subscriber Loop Carrier (SLC) and cable and pairs at the end user and T0TIE at the ALEC location.

(BSRI 8.)

The BellSouth process for providing unbundled loops worked correctly in the test system. (BSRI 8.) The tests revealed some minor problems, however, which were addressed in the following manner:

> [BellSouth discovered that] the downstream systems needed to identify the differences between the unbundled services. The same class of service could not be used. New Class of Service USOCs were requested and received for the different types of UVL/UDL. Service orders were issued in the test systems to test the flow in the downstream systems to see if this indeed would be sufficient. This proved to be successful.
>
> Programmable Circuit Design System (PRO-CDS) models were requested, built and downloaded in all nine processors for the various UVL/UDL.

(BSRI 8.) In addition to these tests, BellSouth revised its unbundled loop processes based on its experience providing unbundled service in Florida. (BSRI 8.)

ACSI also claims that it conducted tests of their internal procedures and the BellSouth processes for supplying unbundled loops. (Cross Examination of Richard Robertson, ACSI Executive Vice President of Engineering and Operations, Consideration of BellSouth Telecommuni-

cations, Inc.'s Services Pursuant to Section 271 of the Telecommunications Act of 1996, Docket 6863-U (March 3, 1997) ("Robertson Cross"), at 1246.) ACSI has stated that these tests convinced it that its procedures, with slight modifications, were sufficient and the BellSouth processes were adequate. (Robertson Cross at 1245-46; ARI 13.)

ACSI began marketing and taking orders for its switched local exchange service in Columbus, Georgia, before it had conducted even a single test cutover of a telephone line. (*See* page 19, *infra.*) Moreover, ACSI publicly announced that it was launching its switched local exchange service before it had conducted any tests — its press release was issued the same day as it submitted its sole test order to BellSouth.[11]

After accumulating several orders, but before ordering the cutover of subscriber lines from BellSouth local exchange service to unbundled loops, ACSI claims to have conducted sixteen separate successful tests. (ARI 13; ACSI Reply, Renner Affidavit at ¶ 8.) ACSI has not specifically identified the nature of these tests or their results. All of these "tests" were conducted pursuant to a single order, however, PON I00042CMB. (ARI Exhibit A (stating that this order was comprised of *one* unbundled loop test and fifteen number portability test).) This order can hardly be characterized as a successful test of ACSI's ability to order loop cutovers in accordance with the Agreement and established procedures.

The test order, PON I00042CMB, involved two telephone lines at ACSI's offices in Columbus.

The order violated Section IV.D.2 of

[11] *See* News Release, *ACSI Launches Competitive Local Phone Service in Columbus, GA, Meeting Customer Demand for Choice*, <http://www.acsi.net/press/press46.html> (Nov. 13, 1996).

the Agreement because it did not provide sufficient time to permit the parties to agree on a cutover date at least 48 hours in advance of such due date. Moreover, the cover sheet associated with the order indicated that

In addition to these problems, ACSI's order indicated that it should be expedited, even though expedite procedures had not yet been established pursuant to Section IV.C.10. (Jackson Aff. at 3(i).) On November 15, BellSouth determined that

In response to BellSouth's inquiries regarding these problems, ACSI attempted to clarify the order on November 15 by

[12]

ACSI also provided incorrect frame assignment information and supplied CFA information, which indicated that ACSI was seeking access not UNEs. (*see* Jackson Aff. at 3(i).)

On November 20, when the frame due time for ACSI's order approached, BellSouth's technician called ACSI to coordinate the cutover. David McAdoo and Benny Mosier with ACSI

[12]

informed BellSouth that ACSI's dial tone was not ready and that the order should be placed on hold. Later that day ACSI informed BellSouth's LCSC that, even though they were experiencing translation problems, they were still planning to cut the order. Still later that day, when a BellSouth technician called ACSI, David at ACSI said they were still working on the switch and still hoped to cut the order. BellSouth was instructed to await a call from ACSI, but the call never arrived. (BSRI 17.)

On November 22, BellSouth received a supplement from ACSI changing the order due date to November 22 — the same day. Although BellSouth attempted to cut the order that evening, various problems arose which prevented the order from being completed until November 27. (BSRI 17.)

This somewhat lengthy chronology indicates that numerous problems arose in the course of the sole test order that ACSI placed before ordering the cutover of live customers lines to unbundled loops. ACSI was directly responsible for many of the problems: (1) ACSI did not attempt to negotiate cutover dates with BellSouth that complied with Section IV.D.2 of the Agreement; (2) ACSI requested expedited action on its orders despite the absence of contractually-required negotiated procedures; (3) (4) (5) (6) (7) ACSI provided incorrect frame information on its unbundled loop orders; (8) and (9) ACSI made numerous changes to the due date with less notice than provided for in the Agreement. (BSRI 17.)

Despite all of the problems ACSI encountered in its single test order,

On November 25, 1996, the very day ACSI decided to place only *two* customer orders per day until it had improved its experience level, ACSI nevertheless placed *three* orders

On November 27, the day the test order was finally completed, ACSI proceeded with its first three orders.

E. INITIAL ORDERS IN COLUMBUS, GEORGIA

It is uncontested that ACSI experienced some delays and service interruptions with regard to seven of the unbundled loop orders it placed during the first two weeks of the ordering process. Given the problems ACSI encountered in its sole "test order," its admitted lack of sufficient technical staff in Columbus to handle both loop cutovers and switch installation, and its lack of documented procedures,

Indeed, problems are particularly likely to occur at the time of the initial cutovers in any given area. (Meade Testimony at 12, 13-14.) In this regard, ACSI recently acknowledged that:

> I think both BellSouth and ACSI agree that the interfaces are very complex and that ACSI has had problems in provisioning services in Georgia and that BellSouth has addressed those issues. To be fair, I would not suggest that ACSI has not had problems in that process, as all new processes are.

(Direct Examination of Richard Robertson, ACSI Executive Vice President of Engineering and Operations, Consideration of BellSouth Telecommunications, Inc.'s Services Pursuant to Section 271 of the Telecommunications Act of 1996, Docket 6863-U (March 3, 1997) (Robertson Direct), at 1201.)

The first three orders placed by ACSI for actual customers were: Corporate Center, Jefferson Pilot, Mutual Life (PONs I00043CMB, I00044CMB, I00045CMB) (ARI 6, Exhibit A .) ACSI obtained these orders as early as September 1996 (ACSI 0296, 0306, 0311) and ACSI scheduled these customers to be cutover on November 27, 1996. (Complaint at ¶ 9; ARI Exhibit A.) Despite the length of time ACSI held these orders, ACSI did not send the orders to BellSouth until November 25, 1996, and made no attempt to negotiate an implementation schedule, or conduct joint testing, as contemplated by the Agreement during that time. (Jackson Aff. at ¶ 3(e); BST 00047, 00065, 00072; BSRI 17.) Moreover, ACSI requested that the orders be expedited, even though expedite procedures had not yet been established pursuant to Section IV.C.10 of the Agreement. (BST 00047, 00065, 00072.)

ACSI did not provide time to negotiate due dates as contemplated by Section IV.D.2; BellSouth nevertheless confirmed the cutover for Jefferson Pilot and Mutual Life on the same day it received the orders. (Complaint at ¶ 10; ACSI 0399.) These orders were completed successfully on the scheduled date. (ACSI 0405.) However, the Corporate Center cutover was not confirmed at that time; it was subsequently confirmed and completed on November 27. (ACSI 0399; BSRI 17; ARI Exhibit A.)

ACSI now claims that there were problems with the cutovers because they were not completed until hours after the scheduled completion time. (ARI 6, Exhibit A.) ACSI documents reveal, however, that the cutover of Mutual Life was delayed due, at least in part, to an ACSI switch problem. (BSRI 17 (no dial tone from ACSI switch).) With regard to Jefferson Pilot, Moreover, there was an assignment problem that delayed cutover. (Jackson Aff. at ¶ 3(h); ACSI 0407; BSRI 17.)

Although ACSI blames the aforementioned assignment problem on BellSouth (ACSI 0407), it appears that fault actually lies with ACSI. (Jackson Aff. at ¶ 3(h).) Specifically, BellSouth discovered a severe equipment problem attributable to ACSI — a mis-stenciled distribution frame (Jackson Aff. at ¶ 3(h); BSRI 19) — in December 1996. This problem impaired the ability of BellSouth to cross-connect ACSI's unbundled loops and created problems with most orders, including Corporate Center. (BSRI 17; *see* Jackson Aff. at ¶ 3(h).) ACSI's collocated frame in BellSouth's Columbus Main Central Office was improperly labeled as "Cable" and "Pair" instead of "T0TIE." ACSI's vendor responsible for installation and stenciling of the frame, which was

previously used equipment, had failed to re-stencil the frame for its new use. This made it impossible for BellSouth to find the correct ACSI facility termination for connection of ACSI's unbundled loops. When ACSI issued an order to BellSouth, the order specified the location on the frame at which BellSouth should connect the unbundled loop. Because the stenciling on the frame did not match the assignment information provided by ACSI, circuit continuity could not be established between BellSouth's unbundled loops and ACSI's facilities. (BSRI 19.) To correct this problem, BellSouth took the following steps:

> December 12, 1996 - BellSouth attempts to determine a provisioning problem with ACSI collocation in Columbus. After looking at several orders and talking over the phone to central office technician, BellSouth decides to send an employee to the Columbus central office to identify the problem.
>
> December 13, 1996 - A BellSouth employee arrives at the Columbus Central office and inspects the ACSI collocation arrangement. Upon inspection, BellSouth discovers that the frame termination was labeled as Cable and Pair instead of T0TIE. The central office and ACSI were guessing in an attempt to determine a common scheme. This common scheme was only working with pairs below 96. The frame block terminations were labeled as Cable 1-96, 101-196, 201-296 and 301-396. The central office technician tested the first and last channel on each shelf to determine whether the equipment was wired correctly to the frame. Yellow POST-IT® notes were left on the frame block terminations with the correct T0TIE designation so that the installation vendor could relabel the frame blocks. With these POST-IT® notes the central office technicians could also wire all future orders to the correct termination.
>
> December 14, 1996 - Various BellSouth employees participated in a conference call to process service orders and discuss collocation issues for ACSI at Columbus.
>
> December 16-19, 1996 - BellSouth developed drawings detailing the collocation arrangement and how to read the DLRs. These drawings were faxed to Pam Jones at ACSI. BellSouth then discussed with Pam how to associate the T0TIE carriers to the slot and port on the equipment. As a result of these discussions, BellSouth agreed to provide additional notes on the DLR to determine that T0TIE carrier systems have two channels and updates the program that generates the TIE carrier systems to include these notes. The Georgia Circuit

> Provisioning Group added these notes to the T0TIE carrier system DLRs and mailed them to ACSI.

(BSRI 19; Jackson Aff. at ¶ 3(k).) ACSI's stenciling error hindered BellSouth's ability to cutover unbundled loops. (Jackson Aff at ¶ 3(k).)[13]

F. BELLSOUTH ACTS TO PREVENT FUTURE PROBLEMS

Given the start-up glitches that occurred in late November 1996, BellSouth modified its procedures for receiving, processing, and installing orders for unbundled loops to take into account what it had learned from these problems. The modifications were as follows:

- In an attempt to coordinate the installation of the unbundled loop with the disconnection of the existing service and establishment of SPNP, BellSouth had placed the RRSO[14] on the order to disconnect the existing service, the order to establish the unbundled loop, and the order to establish the SPNP. In December 1996, BellSouth discovered that this process did not have the intended effect. Instead of facilitating coordination of the installation and disconnection, the placement of the RRSO on both orders resulted in the

[13] BellSouth subsequently found similar stenciling errors on ACSI's equipment in Louisville, Kentucky, Montgomery, Alabama, and Birmingham, Alabama. (BSRI 19.)

[14] RRSO is a term used to indicate that the existing loop should be reused.

elimination of the Frame Due Time (FDT) on the disconnect order when SOAC combined the two orders. Consequently, the order to disconnect existing service would be worked on the due date (usually early in the day) but would not be held until the FDT, when the unbundled loop was to be installed. Elimination of the RRSO from the associated SPNP order caused SOAC to retain the FDT on the disconnect order and resulted in the automatic release of the disconnect order at the FDT. Accordingly, BellSouth changed its service order writing procedures for coordinated installation of an unbundled loop and disconnection of existing service to eliminate the RRSO (an indicator to reuse the existing loop) from N-orders (orders to establish SPNP) associated with the unbundled loop. (BSRI 12.)

- BellSouth changed its service order writing procedures to show 9:00 PM in the FDT field on orders requiring coordination and to show the desired cutover time in the remarks section of the orders instead of in the FDT field. This change was made to prevent the automatic release of the disconnect order for existing service at the desired cutover time. This change provided flexibility for the manual coordination of cutovers without automatic service order processing. Without this change, the customer's existing service might be disconnected at the desired cutover time indicated in the FDT field even if any delays were encountered in the cutover process. (BSRI 12.)

- BellSouth corrected an error in LFACS. The error caused LFACS to fail to recognize that loop facilities on universal digital loop carriers could be reused in the provision of an unbundled loop. The effect of the correction was to eliminate delays resulting from manual assignment of loop facilities. (BSRI 12.)

- BellSouth enhanced its coordination of the installation of unbundled loops by assigning a project manager for coordination of ACSI's orders and by adopting the use of cutsheets, which collect all of the required data for efficiently processing cutovers. (BSRI 12.)

G. ACSI PROBLEMS IDENTIFIED AFTER INITIAL CUTOVERS

Presumably, these problems arose by virtue of this being ACSI's first attempt at providing switched local exchange services. In this regard, ACSI has recently acknowledged that it has problems because the process was so new and unfamiliar. (Direct Examination of Richard Robertson, ACSI Executive Vice President of Engineering and Operations, Consideration of BellSouth Telecommunications, Inc.'s Services Pursuant to Section 271 of the Telecommunications Act of 1996, Docket 6863-U (March 3, 1997) (Robertson Direct), at 1201.)

H. BELLSOUTH'S PROVISION OF UNBUNDLED LOOPS SINCE DECEMBER 1996

In recent testimony before the Georgia Commission, Richard Robertson, ACSI's Executive Vice President of Engineering and Operations stated that "BellSouth has been interested in addressing [cutover] problems and has been working hard to try to get them fixed and not have these problems." (Robertson Cross at 1216.) Importantly, however, Mr. Robertson characterized the potential for problems as follows:

> I'm not sure that we can avoid ever having problems, because even though the interconnection and long distance market is a pretty mature market now after some 12 years, there are still some problems that crop up. . . . So I don't think the problems will ever go away. It's so complex that opportunities for problems will always be there.

(Robertson Cross at 1217.) In this regard, since the resolution of the initial cutover problems, three ACSI customers have been disconnected in error: Country's Barbeque, Jefferson Pilot, and Columbus Tire. Each of these outages were corrected the same day. (ARI 10.)

Since December 1996, BellSouth has provided all of the unbundled loops ordered by ACSI in a prompt and accurate manner. (Robertson Cross at 1243 (stating that BellSouth has met all customer-desired due dates since December 23, 1996).) As of February 19, 1997, BellSouth had received orders from ACSI for 160 unbundled voice grade loops. As of that date, BellSouth has successfully provided 126 of those unbundled voice grade loops. The remaining 34 orders had not been filed because the scheduled due date had not yet arrived. (BellSouth's Answer at 2.) Finally, when asked by the Georgia Commission whether ACSI had any current complaint with BellSouth's efforts to prevent future problems, Mr. Robertson responded that it did not. (Robertson Cross at 1216).

CONCLUSIONS OF LAW

I. THE COMMISSION LACKS JURISDICTION TO ENTERTAIN ACSI'S COMPLAINT BECAUSE IT PERTAINS TO PURELY INTRASTATE LOCAL EXCHANGE FACILITIES

Under the Communications Act, the Commission is expressly denied jurisdiction with respect to purely intrastate common carrier facilities. The unbundled loops that are the subject of this proceeding are purely intrastate. BellSouth's provision of these loops is not pursuant to a tariff filed with the FCC; it is pursuant to a contract that has been reviewed and approved by the Georgia Commission and the regulatory commissions of the other states in which ACSI and BellSouth have business relations. Accordingly, as BellSouth shows herein, ACSI's complaint should be denied in its entirety.

The Communications Act expressly bars the Commission from exercising jurisdiction over intrastate common carrier facilities. Section 2(b) of the Communications Act (the "Act") provides, in relevant part:

> Nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . .

47 U.S.C. § 152(b). Moreover, the Act bars the Commission from exercising jurisdiction over state-regulated telephone exchange service and its associated facilities, even if such service is partially interstate. Section 221(b) of the Act provides, in relevant part:

> [N]othing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with . . . telephone exchange service, . . . even though a portion of such exchange service constitutes interstate or foreign communication, in any case where such matters are subject to regulation by a state commission or by local governmental authority.

47 U.S.C. § 221(b). Under these provisions, the Commission may not entertain ACSI's complaint.

A. Section 2(b) Denies the Commission Jurisdiction

The facilities at issue here — unbundled loops provided by BellSouth to ACSI — are wholly intrastate. In particular, the loops that are the subject of ACSI's complaint are located wholly within the state of Georgia, and more specifically, within the Columbus, Georgia local calling area. By definition, unbundled loops are essentially no more than a pair of wires running from a customer's premises to a distribution frame in the central office — in the Commission's words, "a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the network interface device at the customer premises." *Interconnection Order*, 11 F.C.C.R. at 15691. In the case of each loop covered by ACSI's complaint, both the customer premises and the central office are located in the state of Georgia, as are the transmission facilities connecting them. (Jackson Aff. at ¶ 5.) The loops at issue are, accordingly, physically intrastate. Moreover, the loops at issue, once unbundled and provided to ACSI, are not used by BellSouth to provide any interstate service or interstate access. Because the loops at issue are not being provided in combination with any other unbundled network elements, no switching is included, and likewise there is no connection to any interstate network and no association with any interstate communications. The loops, once unbundled, constitute purely intrastate facilities. They are, therefore, "facilities . . . for or in connection with intrastate communication service," 47 U.S.C. § 2(b), and as a result the Commission lacks jurisdiction to entertain ACSI's complaint.

B. Section 221(b) Denies the Commission Jurisdiction

BellSouth provides these loops because it is obligated by Section 251(c)(3) of the Act, 47 U.S.C. § 251(c), to unbundle the network elements that it uses in providing local telephone exchange service. They are, accordingly, "facilities . . . for or in connection with local telephone exchange service," 47 U.S.C. § 221(b). Moreover, these facilities are offered subject to regulation by the Georgia Commission. The Agreement under which they are provided was filed with the Georgia

Commission and approved by it, pursuant to regulatory jurisdiction vested in it by Section 252 of the Act, 47 U.S.C. § 252, and state law. Moreover, ACSI has expressly acknowledged that the Georgia Commission has regulatory jurisdiction over BellSouth's provision of these loops when it filed a complaint with the Georgia Commission on December 23, 1996. In paragraph 18 of its Georgia complaint, ACSI stated:

> The [Georgia] Commission has jurisdiction to hear this complaint pursuant to the Telecommunications and Competition Development Act of 1995 ("S.B. 137["]), O.C.G.A. §§ 46-5-160 *et seq.*, and Commission Rule 515-2-1-.04. Specifically, O.C.G.A. § 46-5-168(a) grants the Commission jurisdiction to implement the express provisions of S.B. 137. Further, the Commission has jurisdiction to resolve complaints regarding a local exchange company's service, O.C.G.A. § 46-5-168(b)(5), and jurisdiction to direct telecommunications companies to make investments and modifications necessary to enable portability. O.C.G.A. § 46-5-168(b)(10). The jurisdictional provisions of S.B. 137 also require that the Commission consider prevention of anticompetitive practices in any rulemaking under S.B. 137. O.C.G.A. § 46-5-168(d)(2).

(*See* BellSouth's Answer, Exhibit III.) Moreover, the Georgia Commission has asserted its jurisdiction over this very matter. (*See* BellSouth's Answer, Exhibit IV.) Accordingly, the provision of unbundled loops by BellSouth to ACSI constitutes the furnishing of "facilities . . . for or in connection with . . . telephone exchange service, . . . where such matters are subject to regulation by a state commission or by local governmental authority," 47 U.S.C. § 221(b), and as a result the Commission lacks jurisdiction to entertain ACSI's complaint.

C. Under *Louisiana PSC v. FCC*, the Commission Lacks Jurisdiction

In *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), the Supreme Court held that Section 2(b), "[b]y its terms, . . . fences off from FCC reach or regulation intrastate matters — indeed, including matters 'in connection with' intrastate services." 476 U.S. at 370. The Court stated:

> In sum, given the breadth of the language of [Section 2(b)], and the fact that it contains not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction ("[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service . . ."), we decline to accept the narrow view urged by respondents, and hold instead that it denies the FCC the power to preempt state regulation of depreciation for intrastate ratemaking purposes.

Id. at 373. The Court emphasized the limited nature of the Commission's authority:

> First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. Section [2(b)] constitutes, as we have explained above, a congressional *denial* of power to the FCC . . . .Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy. An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.

Id. at 374-75. In light of the Court's broad reading of Section 2(b) both as a rule of construction and as an independent limitation on FCC jurisdiction, it is readily apparent that the FCC lacks jurisdiction to entertain a Section 208(a) complaint alleging violations of Section 251, where the subject matter of the complaint is the provision of wholly intrastate unbundled loops.

First, Section 251 does not expressly override the terms of Section 2(b) with respect to unbundled loops. Indeed, it does the opposite — it acknowledges, by cross-referencing Section 252, that unbundled loops are to be provided pursuant to agreements that are subject to regulatory review by state commissions. *See* 47 U.S.C. § 251(c)(3). Congress made the deliberate decision to subject these agreements to state regulators' jurisdiction, unless those regulators decided not to exercise such jurisdiction. The same state regulators who approved a LEC's interconnection agreement have jurisdiction to consider whether the LEC has failed to comply with the terms of Section 251(c)(3)

with respect to unbundled loops in their state. For the FCC to assert the power to review complaints concerning carriers' performance under such agreements is precisely what the Supreme Court said in the *Louisiana PSC* case it cannot do: "An agency may not confer power upon itself." 476 U.S. at 374. Section 2(b) bars the Commission from conferring upon itself the power to determine a LEC's compliance with state-approved interconnection agreements.

Second, Section 208 does not give the Commission authority to entertain complaints concerning intrastate local telephone exchange facilities, such as unbundled loops. Section 208(a) authorizes the Commission to entertain complaints concerning "anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof . . . ." 47 U.S.C. § 208(a). Given the "rule of construction" contained in Section 2(b), nothing in Section 208(a) can be construed as authorizing the Commission to entertain complaints concerning wholly intrastate unbundled loops. Indeed, Section 2(b) expressly bars the Commission from asserting jurisdiction over complaints regarding loops that are wholly intrastate and not part of an interstate service. Accordingly, the Commission has in the past dismissed complaints concerning wholly intrastate services and facilities for lack of jurisdiction. *See, e.g., Indianapolis Telephone Company v. Indiana Bell Telephone Company*, 1 F.C.C.R. 228, 229-30 (Com. Car. Bur. 1986), *aff'd* 2 F.C.C.R. 2893 (1987).

D. The Complaint Should Be Dismissed

For the reasons discussed above, the Complaint must be dismissed. The Commission simply lacks jurisdiction over the provision of intrastate unbundled loops pursuant to a state-approved interconnection agreement. Moreover, the Complaint should be dismissed even if, *arguendo*, the Commission had some jurisdiction over the subject matter of the ACSI complaint concurrently with state regulators. This is because the Georgia Commission clearly does have jurisdiction to consider the complaint filed by ACSI about the same subject matter. Even if the FCC had concurrent

jurisdiction, it would be inappropriate for it to reach a decision on the same matter that is before the state regulators. The Georgia Commission has an interest in ensuring that interconnection agreements approved by it, and which affect facilities subject to its jurisdiction, comply with all applicable laws and regulations. Considerations of comity warrant dismissal of the Complaint.

In any event, given that ACSI chose to invoke the Georgia Commission's jurisdiction over its dispute with BellSouth concerning unbundled loops, ACSI should not be permitted to engage in forum-shopping by pursuing a similar complaint here. It would be contrary to the goals of administrative economy and preservation of administrative resources for this Commission to entertain the Complaint at a time when the same subject matter is being considered and addressed by the Georgia Commission at the behest of the very same complainant. It would also encourage such duplicative litigation and forum-shopping in the future.

ACSI should not be permitted to assert, simultaneously, similar causes of action and request similar remedies for the same subject matter in both state and federal administrative agencies.[15] Accordingly, the Commission should decline to exercise any concurrent jurisdiction it may have over this matter in the interest of conserving administrative resources and out of respect for the ongoing proceedings of the Georgia Commission.

II. CLAIM I OF THE COMPLAINT (BAD FAITH NEGOTIATION) SHOULD BE DISMISSED FOR FAILURE TO SHOW A *PRIMA FACIE* CASE

Assuming *arguendo* that the Commission does not dismiss ACSI's complaint for lack of jurisdiction, Claim I of the Complaint should be dismissed, because ACSI fails to show a *prima facie* case that BellSouth engaged in bad faith negotiation. In fact, Claim I is entirely bogus.

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[15] While ACSI has not sought damages in its complaint to the Georgia Commission, it has asked for the imposition of penalties. In any event, if ACSI were to prevail at the Georgia Commission, it could seek to recover damages through the arbitration process set forth in the Agreement. (Agreement, Section XXV.)

The Commission has observed that an agreement has been negotiated in "bad faith" when one party to the negotiations intentionally misleads or coerces the other party into reaching an agreement to which it would not otherwise have agreed. *Interconnection Order*, 11 F.C.C.R. at 15574. ACSI's claim is that BellSouth induced ACSI to enter into the Agreement by promising to deliver unbundled loops when it knew or should have know that it would not be able to do so. Neither the evidence ACSI has produced nor its answers to the Interrogatories contain any factual support for this claim.

In support of its claim, ACSI has identified five "representations that BellSouth was prepared to provide unbundled loops to ACSI," all of which are contained in the Agreement. (ARI 28.) ACSI has provided no evidence that BellSouth knew or should have known that any of these representations was false (or indeed that they were false); similarly, ACSI has provided no evidence that any of these statements was intentionally misleading on BellSouth's part, or had the effect of coercing ACSI into reaching an agreement to which it would not otherwise have agreed. The "representations" are as follows:

Section I, page 1, sixth recital:	"WHEREAS, the Parties agree that this Agreement shall be filed with the appropriate state commissions in compliance with Section 252 of the Telecommunications Act."
Section IV.A.2	"Without limitation, BellSouth agrees to provide ACSI access to all network elements identified in Attachment C hereto. Wherever technically feasible, interconnection shall be offered at the line and/or trunk side of each discrete network element. It is agreed that interconnection will be made available by BellSouth to ACSI at any technically feasible point. BellSouth must implement physical and logical interconnection points consistent with generally accepted industry standards."

Section IV.B.5	"BellSouth shall provide ACSI access to its unbundled loops at each of BellSouth's Wire Centers. In addition, if ACSI requests one or more loops serviced by Integrated Digital Loop Carrier or Remote Switching technology deployed as a loop concentrator, BellSouth shall, where available, move the requested loop(s) to a spare, existing physical loop. If, however, no spare physical loop is available, BellSouth shall within forty-eight (48) hours of ACSI's request notify ACSI of the lack of available facilities. ACSI may then, at its discretion, make a network element request for BellSouth to provide the unbundled loop through the demultiplexing of the integrated digitized loop(s)."
Section IV.B.9	"BellSouth will permit any customer to convert its bundled local service to an unbundled element or service and assign such unbundled element or service to ACSI, with no penalties, rollover, termination or conversion charges to the customer, except as specifically provided in Attachment C-2 hereto or pursuant to the terms of a specific customer service agreement (unless superseded by government action)."
Attachment C-2	"Unbundled Products and Services and New Services" [contains detailed description and pricing information for the various unbundled loop types under the "Unbundled Exchange Access Loop" service].

BellSouth did make those representations. ACSI has failed to supply any evidence, however, that BellSouth knew or should have known that the foregoing representations were false. ACSI has not submitted any such evidence *because those representations were not false*. BellSouth promised to unbundle its local loops and provide those local loops to ACSI. BellSouth has done just that.

BellSouth intended when it negotiated and entered into the Agreement that it would unbundle its local loops and provide unbundled loops to ACSI. It had engaged in extensive planning with respect to the implementation of unbundling, given that many states, including Georgia, had already adopted unbundling requirements, and the Telecommunications Act had included new Section 251(c)(3), which imposed an unbundling obligation on all ILECs. BellSouth had developed tentative procedures for unbundling, and it had prepared a draft manual setting forth the procedures

for doing so. It was in the process of finalizing plans for electronic interfaces for ordering unbundled network elements, including unbundled loops.

What BellSouth did *not* know for certain was whether its procedures for ordering and provisioning unbundled loops would work flawlessly from the start or would require refinement. While BellSouth knew, at the time it was negotiating the Agreement, that it would be able to deliver unbundled loops, it could not know at that time when it would be in a position to fully implement the Agreement. BellSouth had never sold unbundled loops before, and neither had almost any other LEC. BellSouth had extensive experience in providing services and facilities similar to unbundled loops in some respects, such as retail telephone exchange service and special access facilities. But unbundled loops were nevertheless different from these.

The provisioning of a new service or facility offering such as unbundled loops would necessarily require refinement and testing before full implementation. BellSouth recognized that there would be a learning curve involved, and that there would be difficulties to overcome as it moved toward implementing this new offering. That is why the Agreement did not obligate BellSouth to implement its provision of unbundled loops immediately. Instead, the Agreement specifically postponed the issue of when implementation would occur. Section XVIII of the Agreement, "Implementation of Agreement," states:

> The Parties agree that within 30 days of the execution of this Agreement they will adopt a schedule for the implementation of this Agreement. The schedule shall state with specificity, ordering, testing, and full operational time frames. The implementation shall be attached to this Agreement as an addendum and specifically incorporated herein by this reference.

The fact that testing is needed for the smooth implementation of a new service offering is an elementary fact of life in a complex technological business. A wide variety of systems and procedures designed for running an integrated monopoly telephone business had to be modified,

adapted, and coordinated for the unbundling of services and facilities. Bugs and glitches are to be expected during the ramp-up of the modified systems. That is what a period of testing — particularly joint testing with companies planning to purchase unbundled loops — is designed to address. Through testing, the bugs and glitches are identified and means are developed to eliminate or minimize them.

A recent filing by the Department of Justice emphasized the importance of testing, including both "internal testing" by the ILEC and "testing with other carriers," as unbundled loop implementation begins. Evaluation of the United States Department of Justice, *Application of SBC Communications Pursuant to Section 271 to Provide In-Region, InterLATA Services in the State of Oklahoma*, CC Docket 97-121, at 29 (filed May 16, 1997) ("DOJ Oklahoma Evaluation"). DOJ's expert witness explains:

> Many of the arrangements called for by the Act (such as loop unbundling) are unprecedented. Implementing such radical new arrangements often proves more difficult than expected. . . .[63]

[63] For example, I learned from Bell Atlantic in July 1996 that it had been working with MFS in Baltimore since February 1995 to implement loop unbundling and had encountered considerable difficulties despite both parties' attempts to work cooperatively.

Affidavit of Marius Schwartz at 61, ¶ 182 (May 14, 1997), Tab C Exhibit appended to DOJ Oklahoma Evaluation.

BellSouth's experience with other CLECs suggests that they recognize that start-up problems are likely to occur and need to be resolved through joint testing before cutting over live customers. This point was brought home by testimony before the Georgia Commission by a witness for MFS Intelenet, a CLEC like ACSI, who testified that joint testing is essential to minimize problems when unbundled loops are ultimately used to serve customers:

> There is usually some confusion or misinterpretation of unbundled loop service orders, internal processes which were thought to

> accommodate the loop provisioning often fail and critical dates are often not met. . . . Some might consider the pilots to be failures; they consume an inordinate amount of time and resources, and they often do not allow MFS to enter a market as soon as it would like. They are successful, however, in pointing out the difficulties and complexities in entering new markets. The pilots are excellent arenas to uncover procedural deficiencies, test new methods and provide hands-on experience for those who eventually have to do the real work.

(Meade Testimony at 15.)

Accordingly, when BellSouth entered into an Agreement that which explicitly provided for the subsequent negotiation of an implementation schedule calling for a period of testing before full implementation, BellSouth was not representing to ACSI that it was prepared *immediately*, without any joint testing, to provide trouble-free cutovers of live customers to unbundled loops. BellSouth knew that there would likely be problems to be overcome in a period of testing, and ACSI knew or should have known that too.[16] That is why the parties agreed to develop an implementation schedule.

ACSI has failed to provide any evidence supporting its allegation that BellSouth knew or should have known the falsity of its representations in the Agreement that it would be able to provide unbundled loops. Accordingly, it has failed to demonstrate a *prima facie* case that BellSouth engaged in bad faith negotiation. For that reason, Claim I of the Complaint should be dismissed.

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[16] ACSI was aware of the need for coordination and testing. ACSI's Executive Vice President/General Manager-Switched Services, Richard B. Robertson, was a principal representative for ACSI in the negotiations that resulted in the Interconnection Agreement, including Section XVIII. By virtue of his recent prior employment (through March 1996) as Marketing Vice President-Interconnection Services for BellSouth, and his long experience in the telecommunications industry, Mr. Robertson knew or should have known of the need for coordination, testing, and refinement of procedures before operational provision of a new service, function, or facility.

III. CLAIMS II (UNEQUAL INTERCONNECTION) AND III (FAILURE TO PROVIDE INTERCONNECTION IN ACCORDANCE WITH THE TERMS OF THE AGREEMENT) MUST BE DISMISSED

Assuming *arguendo* that the Commission does not dismiss ACSI's complaint for lack of jurisdiction, Claims II and III in the Complaint should be dismissed because these claims allege that BellSouth's provision of unbundled loops failed to comply with standards in Section 251 pertaining to interconnection, not UNEs. ACSI has made no factual allegations and has supplied no evidence concerning interconnection, only concerning UNEs. Accordingly, these claims must be dismissed for failure to state a claim.

Claims II and III in the Complaint allege that BellSouth's actions relating to the provision of unbundled loops to ACSI constitute violations provisions of 47 U.S.C. § 251(c)(2), which governs "interconnection" arrangements between competitive and incumbent local exchange carriers. The statute addresses interconnection arrangements and access to UNEs separately, however. The provision of UNEs is governed by Section 251(c)(3), not Section 251(c)(2).

In its August 1996 *Interconnection Order*, the Commission highlighted this distinction: "We conclude that the term 'interconnection' under section 251(c)(2) refers *only* to the physical linking of two *networks* for the *mutual exchange of traffic*." 11 F.C.C.R. at 15590 (emphasis added). Elsewhere in the decision, the Commission analyzed the text of Section 251(c) and emphasized the distinction between interconnection and UNEs:

> Specifically, section 251(c)(6) provides that incumbent LECs must provide "physical collocation of equipment necessary for interconnection or access to unbundled network elements." The use of the term "or" in this phrase means that interconnection is different from "access" to unbundled elements. The text of sections 251(c)(2) and (c)(3) leads to the same conclusion. Section 251(c)(2) requires that interconnection be provided for "the transmission and routing of telephone exchange service and exchange access." Section 251(c)(3), in contrast, requires the provision of access to unbundled elements to allow requesting carriers to provide "a telecommunications service." The term "telecommunications service" by definition includes a

> broader range of services than the terms "telephone exchange service and exchange access." Subsection (c)(3), therefore, allows unbundled elements to be used for a broader range of services than subsection (c)(2) allows for interconnection. If we were to conclude that "access" to unbundled elements under subsection (c)(3) could only be achieved by means of interconnection under subsection (c)(2), we would be limiting, in effect, the uses to which unbundled elements may be put, contrary to the plain language of section 251(c)(3) and standard canons of statutory construction.

11 F.C.C.R. at 15636 (footnotes omitted).

ACSI's Complaint contains no allegations concerning "interconnection" as that term is used in Section 251(c), only concerning unbundled loops. Congress established separate, different standards for interconnection and UNEs. The Agreement reflects this distinction. The Agreement contains separate sections dealing with UNEs and Interconnection. Section IV addresses "Access to Unbundled Network Elements," while Section V addresses "Local Traffic Interconnection Arrangements." While the Complaint alleges that "BellSouth has refused or failed to provide interconnection to ACSI pursuant to just and reasonable terms and conditions, or in accordance with the terms and conditions in the Interconnection Agreement" (Complaint at 12 (¶ 36)), ACSI failed to provide any factual support for its claim. It did not make any factual allegations or supply any evidence concerning BellSouth's interconnection practices and has not alleged any violation by BellSouth of the specific provisions of Section V, which are simply inapplicable to unbundled loops.

ACSI chooses to connect the unbundled loops to ACSI's switch, which, in turn, is interconnected with BellSouth's network. (*See* Complaint at 11 (¶ 30).) That fact, however, does not subject BellSouth's provision of unbundled loops to the statutory standards for interconnection. Telecommunications carriers may purchase unbundled loops for a variety of purposes. As a result, some unbundled loops will be connected to a switch that is interconnected, while others will not. The statutory standards governing the provision of unbundled loops do not vary depending upon the use to which the purchasing carrier puts them.

Like Congress (in the Telecommunications Act) and the FCC (in its *Interconnection Order*), the parties distinguished between unbundled loops and interconnection in their Agreement. In the absence of any factual support concerning BellSouth's interconnection practices, BellSouth cannot be claimed to be in violation of the interconnection obligations contained in the Agreement.

Accordingly, claims II and III must be dismissed for failure to state a claim.

IV. CLAIMS II (UNEQUAL INTERCONNECTION), III (FAILURE TO PROVIDE INTERCONNECTION IN ACCORDANCE WITH THE AGREEMENT) , AND IV (FAILURE TO PROVIDE UNBUNDLED LOOPS AS REQUIRED BY SECTION 251) MUST BE DISMISSED OR DENIED

Assuming *arguendo* that the Commission does not dismiss ACSI's complaint for lack of jurisdiction, Claims II, III, and IV of the Complaint should be dismissed because they fail to state a *prima facie* case with respect to BellSouth's provision of unbundled loops, or in the alternative denied on the ground that any difficulties ACSI has encountered resulted directly and foreseeably from ACSI's own acts. Simply put, ACSI began ordering cutovers of live customers instead of conducting joint testing that would have eliminated or minimized disruptions, despite the fact that ACSI knew or should have known that disruptions would occur.

ACSI does not make any factual allegation, because it cannot, that BellSouth has refused to provide unbundled loops to it. It claims, instead, that several of ACSI's customers experienced service outages and delays in connection with the cutovers from BellSouth's local exchange service to unbundled loops purchased by ACSI. These outages and delays were entirely foreseeable,

Even if the difficulties with the test order had been entirely BellSouth's fault, however, ACSI acted recklessly in deciding to cut over live customers without conducting further testing to iron out the problems. The sad fact is that ACSI made guinea pigs of its customers,

and used their telephone lines instead of its own to test the procedures for ordering and cutting over unbundled loops as well as tests of its own new business of providing local switched telephone service — knowing full well that these customers' livelihoods would likely be disrupted. ACSI now seeks to shift the blame for its own recklessness to BellSouth.

on November 13, ACSI took the first step to find out whether it could actually deliver what it had pre-sold. That same day, ACSI issued a press release announcing the start of its Columbus, Georgia switched local exchange operations, even though it had never cut over a single line and had only that day submitted its sole test order.[17]

A. ACSI's Test Order Demonstrated The Likelihood that Customers Would Experience Difficulties

ACSI submitted its November 13 test order, which involved the cutover of two telephone lines to its own Columbus, Georgia office. ACSI did not, however, submit this test order in compliance with the Agreement, which requires that the parties *negotiate* and agree to a cutover date 48 hours notice in advance of the desired due date for cutover.

As a result, the normal procedures were not followed.

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[17] *See* News Release, *ACSI Launches Competitive Local Phone Service in Columbus, GA, Meeting Customer Demand for Choice*, <http://www.acsi.net/press/press46.html> (Nov. 13, 1996).

The cutover date for the test order had to be rescheduled numerous times.

As a result of these many errors, the cutover that ACSI had originally hoped to complete on November 14 was not completed until late on November 27.

B. ACSI Ordered Live Customers' Lines Cut Over to Unbundled Loops Instead of Conducting Joint Testing to Resolve Difficulties

One might expect that the problems that ACSI had encountered with its *own* ability to order unbundled loops in the test order would have caused it to conduct additional testing — especially testing of the standard procedures for ordering, which had not been adequately tested because of the fact that the test order had been expedited. Certainly, the fact that ACSI had found it necessary to supplement the test order numerous times, repeatedly rescheduling the due date for the cutover, gave ACSI notice that further testing was necessary if lines were to be cut over smoothly.

ACSI did further testing, but it did it with customers' lines.

ACSI recognized that its first customers would be guinea pigs.

Moreover, ACSI had not yet documented the procedures for its personnel to follow when ordering unbundled network elements. (Jackson Aff. ¶ 3(a); ACSI 0699 *et seq.*)

ACSI placed three orders for the cutover of live customer lines on November 25, 1996

BellSouth was able to confirm the cutover for Jefferson Pilot and Mutual Life the day the orders were placed, but was unable to do so for Corporate Center. The following evening, less than 16 hours from the desired cutover time, BellSouth confirmed the Corporate Center order. ACSI elected to proceed with an expedited Corporate Center cutover. Unfortunately, that order could not be completed on an expedited basis. The Jefferson Pilot and Mutual Life cutovers were completed successfully on the scheduled date.

ACSI now claims that BellSouth failed to complete these two cutovers by the scheduled completion time (ARI 6, Exhibit A), but in fact these cutovers were delayed due to problems at the ACSI end

(BSRI 17; ACSI 0308, 0407; Jackson Aff. at ¶ 3(h).) The mis-stenciled distribution frame was not discovered as the source of the problem at the time — BellSouth identified the problem in December — and it impaired cutovers of numerous ACSI customer loops, including Corporate Center. (Jackson Aff. at ¶ 3(h); BSRI 19).

Accordingly, ACSI proceeded to continue with unbundled loop orders.

C. BellSouth Provided ACSI With Unbundled Loops Despite ACSI's Failure to Abide by the Agreement

ACSI claims that BellSouth failed to provide unbundled loops in accordance with the Agreement, and trumps that claim up into a violation of Section 251. In fact, it was ACSI that failed to comport with the Agreement, hampering BellSouth's ability to deliver unbundled loops. First, ACSI failed to engage in a reasonable amount of joint testing, as contemplated by the Agreement — indeed, it engaged in no joint testing. It simply ordered unbundled loops. Under Section XVIII of the Agreement, ACSI should have negotiated an implementation schedule with BellSouth that would have provided for testing before implementation of customer line cutovers. BellSouth was not under any contractual obligation to move to implementation without successful completion of a reasonable amount of testing.

In addition, ACSI did not follow the ordering procedures called for by the Agreement. ACSI asked for expedited handling of its test order and its first three customer cutover orders, and sought cutovers less than 48 hours after receiving firm order confirmation. The Agreement, however,

expressly requires that cutovers be established at least 48 hours in advance of the due date and it requires the negotiation of expediting procedures, which had not been done. Moreover, BellSouth did not have to process ACSI's test order when it was originally submitted, because

BellSouth could have refused to fulfill ACSI's orders because of ACSI's failure to establish a reasonable implementation schedule, its failure to follow the procedures set forth in the Agreement., and its failure Certainly, BellSouth was not under any contractual obligation to provide unbundled loops on short notice, without any testing of both parties' readiness to proceed, especially in the absence of

BellSouth attempted in good faith to satisfy ACSI's demands, even though it was not contractually obligated to do so. BellSouth had to get ACSI to submit corrections for incorrect ordering information on repeated occasions, had to deal with a mis-stenciled ACSI frame and ACSI switch problems, and had to endure ACSI's technical staffing difficulties. Despite these obstacles, BellSouth was able to provide ACSI with unbundled loop cutovers on the dates requested for two of the first three customer loop orders. The fact that these expedited installations — the first few unbundled loop cutovers in Georgia — took a bit longer to complete than ACSI had hoped, or resulted in some short-term outages, does not place BellSouth in violation of the Agreement. Under these circumstances, BellSouth was not in violation of any contractual duty, and cannot be found in violation of its obligation to provide unbundled loops in accordance with the Agreement. The fact that BellSouth attempted to provide service beyond that which it was contractually bound to provide does not give rise to a legitimate denial of service complaint, particularly when the complainant fails to demonstrates that BellSouth was solely at fault. *See Peoples Choice Network, Inc. v. AT&T*, DA 97-684 at ¶ 7 (CCB April 10, 1997).

D. The Minor, Short-Term Disruptions and Delays Encountered Do Not Violate the Agreement or the Act

More fundamentally, however, minor delays and disruptions encountered in the course of a LEC's provision of unbundled loops cannot be viewed as a violation of Section 251, giving rise to an FCC complaint process for every glitch in a cutover. The Commission has recognized that minor delays — lasting even for days — do not constitute a failure to provide service for purposes of Section 201(a). *America's Choice Communications, Inc. v. LCI International Telecom Corp.*, DA 96-2115 at ¶ 9, 5 Comm. Reg. (P&F) 1113, 1115 (FCIB, CCB 1996). Even alleged provisioning delays lasting as long as 135 days have been held not to constitute a denial of service. *Peoples Choice Network*, DA 97-684 at ¶ 10. If the Commission were to hold BellSouth liable for delays of a few minutes, hours, or even days in unbundled loop cutovers, the Commission would be overrun with complaints seeking damages for the most trivial delays or outages occurring routinely in the course of the thousands or millions of cutovers yet to come.

Moreover, in the instant case, delays in cutovers would not constitute a violation of the Agreement, even if BellSouth were wholly at fault (which is not the case). The Agreement does not prescribe a mandatory time period within which a cutover must occur. It provides general guidelines and prescribes the consequences for cutovers that exceed the standard times, while recognizing that circumstances may require more time than the standard. (*See* Agreement §§ IV.D.4-7.) In particular, Section IV.D.7 provides that "[I]f unusual or unexpected circumstances prolong or extend the time required to accomplish the coordinated cut-over, the Party responsible for such circumstances is responsible for the reasonable labor charges of the other Party." Under this standard, delay is no violation — it is fully addressed by the Agreement itself.

BellSouth submits that for an unbundled loop provisioning problem to rise to the level of a violation of Section 251, more must be involved than isolated short delays, outages, and disruptions,

particularly in the early days of unbundling, when all concerned are still learning how to cut over unbundled loops. Even if an interconnection agreement is unquestionably violated —not the case here — not every violation of the terms of the agreement can be viewed as a failure to provide interconnection or UNEs rising to the level of a violation of Section 251.[18]

If Sections 2(b) and 221(b) were no bar to Commission consideration of complaints regarding such matters, a cognizable violation of Section 251 would occur only if the carrier had so definitively failed to provide the interconnection or UNEs as to amount to a denial of service under the standard used to adjudge violations of Section 201. Just as not every delay in provisioning an interstate leased line states a *prima facie* case of refusal to provide service under Section 201, the Commission should make clear that minor delays, outages, and disruptions in providing UNEs or interconnection arrangements — even those arguably in violation of an interconnection agreement — do not constitute violations of Section 251.

V. THE COMPLAINT SHOULD BE DENIED BECAUSE OF ACSI'S LACK OF GOOD FAITH

ACSI's Complaint is simply an attempt to cover up the recklessness and incompetence of its decision to begin service as a switched local service provider, using new and untried unbundled loops, before it was ready for prime time. The Complaint seeks to point the finger at BellSouth after ACSI's "success" in starting up operations as a CLEC turned out to be a failure. The Commission should not permit its processes to be used by ACSI as a means for escaping blame for the consequences of its own conscious business decisions.

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[18] For example, BellSouth is obligated by the Section IV.E.2 of the Agreement to provide 24-hour maintenance support; failure to have a technician available for a short period due to staffing problems should not give rise to an FCC complaint.

On December 4, however, ACSI changed its tune,

ACSI's change in approach resulted in the filing of complaints at both the Georgia Commission and the FCC. More importantly, as DOJ's expert witness observed, the "difficulties [involved in unbundling] increase by an order of magnitude, however, when one side is recalcitrant; there is then endless scope for acrimony and mutual finger pointing, creating a regulatory morass." Affidavit of Marius Schwartz at 61, ¶ 182 (May 14, 1997), Tab C Exhibit appended to DOJ Oklahoma Evaluation. That is what has occurred here. ACSI, dissatisfied with its own performance, has pointed the finger at BellSouth in an attempt to evade responsibility for its decision to put its customers' livelihoods and its own reputation at risk. It gambled that it would be able to bring off the first CLEC start-up in Georgia successfully with little or no testing. Having lost, it must use all of the regulatory processes at its disposal to find a scapegoat.

The Commission should deny ACSI the benefits of its bad-faith tactics by denying its Complaint.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed in its entirety or, in the alternative, denied.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____
L. Andrew Tollin

By: _____
Michael Deuel Sullivan
Robert G. Kirk
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W., Suite 600
Washington, D.C. 20006-5289
Telephone: (202) 783-4141
Fax: (202) 833-2360

By: _____
R. Douglas Lackey
Michael A. Tanner
675 West Peachtree Street, N.E.
Suite 4300
Atlanta, GA 30375
Telephone: (404) 335-0764
Fax: (404) 614-4054

By: _____
William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, N.E.
Suite 1800
Atlanta, GA 30309-2641
Telephone: (404) 249-4445
Fax: (404) 249-5901

By: _____
David G. Frolio
1133 21st Street, N.W.
Washington, D.C. 20036
Telephone: (202) 463-4182
Fax: (202) 463-4195

Its Attorneys.

May 23, 1997.

Before the
Federal Communications Commission
Washington, D.C. 20554

File No. E-97-09

In the matter of

AMERICAN COMMUNICATIONS SERVICES, INC.,
Complainant,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,
Defendant.

APPENDIX FOR DEFENDANT BELLSOUTH TELECOMMUNICATIONS, INC.

R. DOUGLAS LACKEY
MICHAEL A. TANNER
675 West Peachtree Street, N.E.
Suite 4300
Atlanta, GA 30375
Telephone: (404) 335-0764
Fax: (404) 614-4054

L. ANDREW TOLLIN
MICHAEL DEUEL SULLIVAN
ROBERT G. KIRK
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W., Suite 600
Washington, D.C. 20006-5289
Telephone: (202) 783-4141
Fax: (202) 833-2360

WILLIAM B. BARFIELD
JIM O. LLEWELLYN
1155 Peachtree Street, N.E.
Suite 1800
Atlanta, GA 30309-2641
Telephone: (404) 249-4445
Fax: (404) 249-5901

DAVID G. FROLIO
1133 21st Street, N.W.
Washington, D.C. 20036
Telephone: (202) 463-4182
Fax: (202) 463-4195

Attorneys for BellSouth Telecommunications, Inc.

May 23, 1997

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Second Declaration of Martha G. Jackson, Director-Interconnection Obligations, BellSouth (May 23, 1997) - Redacted

Before the
FEDERAL COMMUNICATION COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AMERICAN COMMUNICATIONS SERVICES, INC.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. E-97-09
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
	)	
Defendant.	)	

Second Declaration of Martha G. Jackson

1. I, Martha G. Jackson, am employed by BellSouth Telecommunications, Inc., as Director–Interconnection Operations. From December 1, 1996, to February 15, 1997, I was employed by BellSouth Telecommunications, Inc., as Operations Assistant Vice President–Interconnection Staff. In that position, I was responsible for the provision of headquarters staff support for various interconnection operations, including interconnection with other local exchange carriers, including the Complainant.

2. I have worked in telephone network or operations since I was hired by Southern Bell Telephone & Telegraph Company (now BellSouth Telecommunications, Inc.) in 1974. From 1986 to 1989, I work on the network switched services support staff supporting switch translations for 1AESS and 5ESS switches, access trunking, and Carrier Identification Code activation. From 1989 to 1991, I was a manager on the Georgia Interfunctional Service Coordination team, which established critical dates for access and non-access designed special services. During that time, I also managed large projects for the fulfillment of Access Service Requests and Customer Contracts and had the responsibility for establishing critical dates based on service types and ensuring that service orders were issued and tracked through installation. In this position, I gained extensive experience in dealing with the EXACT system for the ordering of access services and with the complex business sales organization. From 1991 to 1992, I was a manager in the Special Service Center, where I was responsible for service management (both provisioning and maintenance) for the three largest interexchange carriers. From 1992 to 1996, I managed the Major Account Center, which consisted of more than twenty project managers who managed large installations of complex services for business customers. In this position, I worked with Service Orders, circuit design documents (DLRs), and the Work Force Administration (WFA) system and also managed a central office conversion group. From 1995 to 1996, I worked in Interconnection Services managing a project management group and also served as Director of

the Interexchange Carrier Service Center (ICSC) and Access Customer Advocacy Center (ACAC) for services provided to AT&T. In my current position of Director–Interconnection Operations, I work daily with BellSouth's Local Service Request process and provisioning and billing systems related to services and facilities provided to Competitive Local Exchange Carriers. Based on these job experiences, I am well qualified to analyze and interpret the documents produced by the Complainant and to assess their implications relative to the Complainant's operations.

3. I have carefully examined and analyzed the documents produced by the Complainant in discovery in this proceeding. Based on my experience in telephone operations and my examination of those documents, I have made the following observations:

a) ACSI's earliest documentation of its procedures for ordering and provisioning customer services using unbundled network elements [redacted]

b) Nevertheless, ACSI began taking orders from customers for services that would require unbundled network elements provided by BellSouth in Columbus, Georgia, [redacted]

c) [redacted]

d) [redacted]

e) [redacted]

f) [redacted]

g) [redacted]

h) [redacted]

[redacted]

i) [redacted] The Interconnection Agreement also states that BellSouth and ACSI will agree on a cut-over time at least 48 hours before that cut-over time (Section IV.D.2). ACSI's actions with respect to these first three orders completely disregarded these provisions of the Interconnection Agreement.

j) [redacted]

k) In BellSouth's Response to ACSI Interrogatory No. 19, BellSouth described a problem with ACSI's collocated frame in BellSouth's Columbus central office as follows:

> In addition to the ACSI failures or actions indicated in those responses and documents, the ACSI collocated frame termination in BellSouth's Columbus Main Central Office was labeled (stenciled) as "Cable" and "Pair" instead of "TOTIE." ACSI's vendor responsible for installation and stenciling of the frame, which was previously used equipment, had failed to restencil the frame for its new use. The effect of this failure was to make it impossible for BellSouth to find the correct ACSI facility termination for connection of ACSI's unbundled loops. In other words, when ACSI issued an order to BellSouth, the order specified the location on the frame at which BellSouth should connect the unbundled loop. The stenciling on the frame did not match the assignment information provided by ACSI. Thus, circuit continuity could not be established between BellSouth's unbundled loops and ACSI's facilities.

The following timeline prepared by BellSouth Specialist Brian Blanchard describes how BellSouth discovered this problem and the extraordinary steps that BellSouth took to help ACSI correct the problem:

December 12, 1996 - I was contacted by Ken Ainsworth to help determine a provisioning problem with ACSI collocation in Columbus. After looking at several orders and talking over the phone to central office technician, Ken asked me to visit the Columbus central office to determine what the actual problem was.

December 13, 1996 - I went to the Columbus Central office and inspected the ACSI collocation arrangement. The frame termination was labeled as Cable and Pair instead of T0TIE. The central office and ACSI were guessing trying to determine a common scheme. This common scheme only working with pairs below 96. The frame block terminations were labeled as Cable 1-96, 101-196, 201-296 and 301-396. The central office technician and I tested the first and last channel on each shelf to determine whether the equipment was wired correctly to the frame. I left yellow POST-IT® notes on the frame block terminations with the correct T0TIE designation so that the installation vendor could relabel the frame blocks. With these POST-IT® notes the central office technicians could also wire all future orders to the correct termination.

December 14, 1996 - I participated in a conference call to process service orders and discuss collocation issues for ACSI at Columbus. Determined that Ken Ainsworth and I would talk to Pam Jones at ACSI about the T0TIE assignments.

December 16-19, 1996 - I developed drawings detailing the collocation arrangement and how to read the DLRs. I faxed these drawings to Pam Jones and discussed how to associate the T0TIE carriers to the slot and port on the equipment. After these discussions, I agreed that BellSouth would provide additional notes on the DLR to determine that T0TIE carrier systems have two channels. I had the program that generates the TIE carrier systems updated to include these notes. The Georgia Circuit Provisioning Group added these notes to the T0TIE carrier system DLRs and

mailed them to ACSI. (See documents ## 00813-00817, to be produced on April 1.)

BellSouth has subsequently found similar stenciling errors on ACSI's equipment in Louisville, Kentucky, Montgomery, Alabama, and Birmingham, Alabama.

[redacted]. The incorrect stenciling of ACSI's frame was such a serious problem that it could have disrupted BellSouth's installation of any or all of the unbundled loops ordered by ACSI prior to the time that BellSouth identified the problem.

l) [redacted]. The results of these deficiencies included repeated supplementing of orders to correct errors or provide required information that ACSI should have provided when it first placed the order. BellSouth's personnel would have found such orders confusing and disruptive of BellSouth's processes. The likely effect of such orders would be errors or delays in processing the orders.

4. Based on the foregoing, I have concluded that in late November 1996 ACSI came under some unexplained pressure to put local service customers on its Columbus switch--even though it had been holding those customers' orders for several weeks. Apparently as a result of this pressure, ACSI chose to proceed with these customer cut-overs in spite of its knowledge that its internal processes and perhaps even its switch were not ready and to do so without joint testing with BellSouth of the installation of unbundled loops with associated SPNP. In my opinion as one with extensive experience in ordering and provisioning activities in the telephone industry, ACSI's ac-

tions described above were commercially unreasonable and created a significant potential for the disruption of their new customers' service.

5. I have examined BellSouth's network records of the unbundled loops ordered by ACSI through the end of February 1997 and have determined that both ends of all of those circuits are located in BellSouth's local calling area in Columbus, Georgia, and in the State of Georgia.

I, Martha G. Jackson, declare under penalty of perjury that the foregoing is true and correct.

Executed on May 23, 1997.

Martha G. Jackson

Martha G. Jackson

Declaration of W. Keith Milder, Director-Strategic Management, BellSouth (May 23, 1997) - Redacted

Before the
FEDERAL COMMUNICATION COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AMERICAN COMMUNICATIONS SERVICES, INC.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. E-97-09
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
	)	
Defendant.	)	

Declaration of W. Keith Milner

1. My name is W. Keith Milner. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375. I am Director–Strategic Management for BellSouth Telecommunications, Inc. ("BellSouth"). I have served in this role since February 1996 and have been involved with the management of certain issues related to local interconnection and unbundling.

2. I graduated from Fayetteville Technical Institute in Fayetteville, North Carolina, in 1970 with an Associate of Applied Science in Business Administration degree. I graduated with a Master of Business Administration Degree from Georgia State University in Atlanta, Georgia, in 1992.

3. My business career spans over 26 years and includes responsibilities in the areas of network planning, engineering, training, administration and operations. I have held positions of significant responsibility with a local exchange telephone company, a long distance company, and a research and development laboratory. I have extensive experience in all phases of telecommunications network planning, deployment and operation (including research and development) in both the domestic and international arenas.

4. I began my career with Southern Bell (now BellSouth) in 1970 as a Traffic Engineer for switches in North Carolina. My responsibilities included planning and switch engineering and providing network administrative staff support. In 1974, I was assigned to Southern Bell Company Headquarters in Atlanta, Georgia, where I provided technical support to network administration groups. I was also part of a team that implemented mechanized data collection and processing systems (Total Network Data System) used by Network personnel throughout Southern Bell. I joined Southern Bell's technical training organization where I developed and delivered technical training to managers in the Network Department. I was concurrently responsible for curriculum

planning for administration and network engineering job disciplines. In 1978, I joined Southern Bell's Engineering Department in Miami, Florida where I managed a group of management network design engineers. In 1981, I joined Southern Bell's Network Operations Department in Miami, Florida where I led an operations center responsible for installation and maintenance of central office equipment for special services, message trunking and digital carrier systems in large metropolitan switching centers in the South Florida Area. During that period, I also managed a group that provided switching system administration, service analysis and performance monitoring for a major portion of South Florida.

5. In 1982 I joined AT&T as part of its Divestiture Planning Team in Basking Ridge, New Jersey. I served as Technical Expert for switching network planning and engineering. This team developed and implemented intercompany contracts representing about $1 Billion per year in contract billing between AT&T and the Operating Companies. Upon Divestiture in 1984, I joined Bell Communications Research as a Member of Technical Staff and was responsible for systems engineering for digital switching systems (Lucent Technologies 5ESS and Nortel DMS-100). I developed computerized engineering and administration tools. I also developed and conducted load capacity and regression analyses to determine switch performance with various methods of load and computer memory management.

6. In 1986 I returned to BellSouth in Atlanta, Georgia, where I joined the Network Planning and Engineering Department. I developed and led the New Service Planning and Network Architecture Planning Group. This group was responsible for financial and technical evaluations as well as funding and deployment coordination. In 1993 I joined BellSouth International as Associate Director for Operations. In this role, I was responsible for business planning and implementation activities for national and international long distance markets. I was responsible for regulatory and interconnection planning activities in BellSouth's successful bid for a long distance license in Chile. I served as a key member of that implementation team. In 1994, I returned to BellSouth Telecommunications, Inc., as Director–Access Customer Advocacy Centers. In this role I directed the implementation and operation of three customer operations centers for key access customers (AT&T, MCI, and all Wireless Customers). I led a large team of managers and technicians that provided provisioning and maintenance of switched and special access services across a nine-state region.

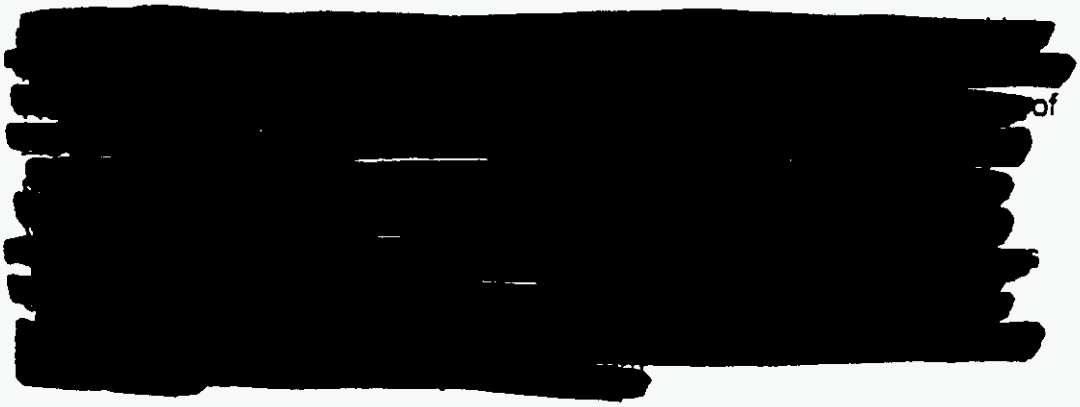
7. I have testified before numerous state Public Service Commissions on the technical capabilities of the switching and facilities network regarding the introduction of new service offerings, expanded calling areas, etc.

8. I have carefully examined and analyzed the documents produced by the Complainant in the course of discovery in this proceeding. Based on my experience in telephone network planning, administration and operations and my examination of those documents, I have reached the following conclusions regarding the sufficiency of

ACSI's internal operational procedures and the sufficiency of ACSI's human resources engaged in switch installation and customer service activities:

a) [redacted]

b) [redacted]

c) 

I, W. Keith Milner, declare under penalty of perjury that the foregoing is true and correct.

Executed on May 23, 1997.

W. Keith Milner

Relevant ACSI Documents - Sealed Material

Relevant BellSouth Documents - Sealed Material

ACSI Responses to Interrogatories of BellSouth Telecommunications, Inc. (March 28, 1997)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AMERICAN COMMUNICATIONS SERVICES, INC.	)	
Complainant	)	
	)	File No. E-97-09
v.	)	
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.	)	
Defendant	)	

ACSI'S RESPONSES TO INTERROGATORIES OF BELLSOUTH TELECOMMUNICATIONS, INC.

American Communications Services, Inc. ("ACSI"), by its attorneys and in accordance with the agreement between the parties contained in their March 12, 1997 Joint ing Concerning Extraordinary Discovery, hereby provides its objections and answers to the interrogatories served by BellSouth Telecommunications, Inc. ("BellSouth") on ASCI dated March 14, 1997.

GENERAL OBJECTIONS

ACSI hereby makes the following General Objections to each and every one of BellSouth's Interrogatories:

a. ACSI objects to BellSouth's Interrogatories to the extent that they seek (1) information or materials protected by privileges protecting attorney-client communications and/or the attorney work-product doctrine, (2) materials or information prepared in

anticipation of litigation, or (3) any information or materials subject to other applicable privileges. Any inadvertent production of any such information or documents shall not constitute a waiver of any applicable privilege for such information or documents or for any similar information or documents.

b. ACSI objects to BellSouth's Interrogatories to the extent that they seek to impose obligations on ACSI beyond those agreed to by the parties in the March 12, 1997 Joint Filing.

c. ACSI objects to BellSouth's Interrogatories to the extent that they request publicly available information or information that ACSI has provided already to BellSouth because such a request renders these Interrogatories onerous, oppressive, and unduly burdensome, and because the burden of identifying or obtaining such information is substantially the same, or less, for BellSouth as for ACSI.

d. ACSI objects to BellSouth's Interrogatories to the extent that they are vague, ambiguous and susceptible to more than one interpretation.

e. ACSI does not interpret the Interrogatories to require the production of copies of pleadings or correspondence between ACSI and BellSouth in this matter or in the proceeding before the Georgia Public Service Commission (Ga. PSC Docket No. 7212-U). To the extent such information is sought, ACSI objects on the grounds that such a request is unduly burdensome and that BellSouth already has the requested information.

f. ACSI objects to the Interrogatories to the extent that they are overly broad, irrelevant, burdensome or not reasonably calculated to lead to the production of relevant evidence in this case.

g. ACSI objects to these Interrogatories to the extent that they ask ACSI to provide information that was produced in response to one or more of BellSouth's Document Requests. ACSI will endeavor to refer BellSouth to such documents and/or information for all such Interrogatories.

h. ACSI objects to these Interrogatories to the extent that they seek information related to every unbundled loop ordered by ACSI from BellSouth. ACSI will respond to each Interrogatory to the extent that ACSI is aware that BellSouth failed to provide unbundled loops in accordance with the Interconnection Agreement and Section 251 of the Communications Act. Unbundled loops other than those that BellSouth has failed to properly provide are not in dispute in this proceeding. Therefore, to the extent an Interrogatory concerns customer unbundled loops that are not subject to dispute, the Interrogatory is irrelevant and unduly burdensome upon ACSI.

i. ACSI objects to BellSouth's Interrogatories to the extent that they seek to impose obligations upon ACSI beyond those imposed by the Commission's Rules, including but not limited to, BellSouth's request for a log of information withheld because of attorney-client privilege.

j. ACSI objects to BellSouth's Instruction (a) because it constitutes a separate Interrogatory or subpart to each of BellSouth's Interrogatories. BellSouth's numbered Interrogatories, while ostensibly thirty in number, are actually forty interrogatories (including subparts.) *See* response to Interrogatories Nos. 25-30. Instruction (a) constitutes an additional forty, bringing the total to eighty interrogatories (including subparts), far in excess of the thirty permitted by the Commission's Rules, without explicit Commission approval. 47 C.F.R. § 1.729.

RESPONSES TO SPECIFIC INTERROGATORIES

Interrogatory No. 1: **Identify (in PON order) all orders for unbundled loops (and, when ordered, SPNP) ACSI placed with BellSouth in Columbus, Georgia prior to January 7, 1997.**

Response:

In addition to ACSI's General Objections, ACSI objects to BellSouth's definition of "identify" as overbroad, burdensome and irrelevant in that, when applied to the Interrogatory, it asks for "the telephone numbers or other similar identifying numbers associated with the order," the "time, and means of its submission to BellSouth, the nature of the PON", and the "time, and means of submission to BellSouth of any supplements or changes to the order." ACSI also objects to Interrogatory No. 1 to the extent that it calls for information already within BellSouth's possession, custody or control. Subject to and without waiving the foregoing objections, ACSI refers BellSouth to the documents voluntarily provided by ACSI on March 17, 1997, for information responsive to this Interrogatory. ACSI further refers BellSouth to the chart appended hereto as Exhibit A.

Interrogatory No. 2: **State the original requested and any subsequently negotiated due date(s) and time(s) for cutover of each unbundled loop (and, where different, for SPNP implementation) identified in response to Interrogatory 1.**

Response:

In addition to ACSI's General Objections, ACSI objects to Interrogatory No. 2 to the extent that it calls for information already within BellSouth's possession, custody or control. Subject to and without waiving the foregoing objections, ACSI refers BellSouth to the documents voluntarily provided by ACSI on March 17, 1997, for information responsive to this Interrogatory. ACSI further refers BellSouth to the chart appended hereto as Exhibit A.

Interrogatory No. 3: **Describe the nature of, and reason for, each change or supplementation made by ACSI with respect to each unbundled loop order identified in response to Interrogatory 1.**

Response:

In addition to ACSI's General Objections, ACSI objects to BellSouth's definition of "describe" as applied to this Interrogatory as overbroad, burdensome, and irrelevant in that it requests a "description of all details" of each such "change" or "supplementation." The definition of "describe" is also vague and ambiguous: the phrases "the substance thereof, the dates of any matters included therein, and any requirements or results included therein" are unclear or are the subject of confusion, when applied to "changes" or "supplementations." ACSI also objects to Interrogatory No. 3 to the extent that it calls for information already within BellSouth's possession, custody or control. Subject to and without waiving these objections, ACSI refers BellSouth to the documents voluntarily provided by ACSI for

information responsive to this request. ACSI further refers BellSouth to the chart appended hereto as Exhibit A. The reasons for ACSI supplementations prior to November 22, 1996 were related to ACSI process issues. The reason for all ACSI supplementations after November 22, 1996, however, were BellSouth process issues, as described in ACSI's pleadings and discovery responses in this proceeding.

Interrogatory No. 4: **Describe all communications between ACSI and BellSouth concerning each unbundled loop identified in response to Interrogatory 1.**

Response:

In addition to ACSI's General Objections, ACSI objects to this interrogatory as overbroad, vague, burdensome, and irrelevant to the extent that it calls for a description of *all* communications between ACSI and BellSouth concerning the loops identified in response to Interrogatory No. 1. ACSI also objects to BellSouth's definition of "describe" as applied to this Interrogatory as overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such communications. The definition of "describe" is also vague and ambiguous: the phrases "the dates of any matters included therein, and any requirements or results included therein" are unclear or are the subject of confusion when applied to such "communications." ACSI further objects to this Interrogatory to the extent that, by definition, BellSouth employee(s) were parties to every communication at issue, and therefore BellSouth has information concerning these communications within its possession, custody, or control. Subject to and without waiving the foregoing objections, ACSI refers BellSouth to ACSI's responses to BellSouth's Document Requests Nos. 1, 2, 3, 5, and 6, which are incorporated herein by reference thereto. ACSI further states that numerous ACSI

employees had conversations with BellSouth employees throughout the process of ordering and provisioning the unbundled loops that are the subject of this proceeding. The principal ACSI employees include Brenda Renner, Nancy Murrah, Pamela Jones, Richard Robertson, William Stipe, and Terry Henson. In addition, several of the principal conference calls and conversations are detailed in ACSI's Complaint and Reply filed in this proceeding.

Interrogatory No. 5: **State the time and date of cutover of each unbundled loop (including, where ordered, SPNP implementation) identified in response to Interrogatory 1.**

Response:

In addition to ACSI's General Objections, ACSI objects to Interrogatory No. 5 to the extent that it calls for information already within BellSouth's possession, custody or control. Subject to and without waiving the foregoing objections, ACSI refers BellSouth to the documents voluntarily provided by ACSI on March 17, 1997, for information responsive to this request. ACSI further refers BellSouth to the chart appended hereto as Exhibit A.

Interrogatory No. 6: **Describe the coordination, if any, between ACSI and BellSouth concerning each unbundled loop cutover identified in response to Interrogatory 1.**

Response:

In addition to ACSI's General Objections, ACSI objects to BellSouth's definition of "describe" as overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such coordination. The definition of "describe" is also vague and ambiguous: the

phrases "the substance thereof. the dates of any matters included therein, and any requirements or results included therein" are unclear or are the subject of confusion when applied to "coordination." ACSI also objects to Interrogatory No. 6 to the extent that it calls for information already within BellSouth's possession, custody or control. Subject to and without waiving these objections, ACSI refers BellSouth to the documents voluntarily provided by ACSI on March 17, 1997, for information responsive to this Interrogatory, which reflect significant coordination with BellSouth on the issue of unbundled loops, as well as other interconnection issues. In addition ACSI refers BellSouth to the communications described in response to Interrogatory No. 4, and to the information provided in Exhibit A.

In general, the coordination on unbundling BellSouth loops began as early as June 7, 1996, prior to the signing of the Interconnection Agreement. A number of telephone conferences took place between June 7, 1996 and the time of the incidents that are the subject of the instant Complaint. Among the BellSouth personnel participating on a variety of issues were Vic Atherton, Gloria Calhoun, Sid Conn, Lynn Smith, Fred Monticelli, Bill French, Wade Johnson, Stephanie Reardon, Jane Rauleson, Jim Linthicum, Stephanie Cowart, Val Sapp and Ann Andrews.

As to the pattern of coordination with respect to the cutover of unbundled loops in late November and early December 1996, ACSI submitted, among others, Line Information Database ("LIDB") Service Order forms to BellSouth, Access Service Request ("ASR") forms, and Service Provider Number Portability ("SPNP") request forms. In total, five different types of forms were required to order unbundled loops. These forms were initially sent to BellSouth by facsimile, but certain aspects of the ordering process were later accomplished electronically through the BDS-Telis Data Entry Subsystem. Once the LIDB,

ASR, and SPNP forms are transmitted to BellSouth requesting the cutover of an unbundled loop on a date certain, BellSouth responds with a Firm Order Confirmation ("FOC"). Initially, BellSouth sent FOCs by regular mail; FOCs are now transmitted electronically by BellSouth. In the FOC, the parties agree to a time and date of cutover.

As described in ACSI's Complaint, coordination on the date of the cutover was essentially nonexistent for ACSI's initial three unbundled loops. On November 27, 1996, the date of the initial cutovers, ACSI's first three customers (Corporate Center, Jefferson Pilot, and Mutual Life) were disconnected from BellSouth service for periods of up to four hours a day. For two of these customers, Jefferson Pilot and Mutual Life, once the unbundled loops were cut over, the numbers were not ported to their new numbers, resulting in customers receiving an intercept message indicating the number was no longer in service. Once ACSI customers were disconnected from service, ACSI made a number of phone calls to BellSouth to attempt to determine why BellSouth's loop unbundling processes were not operating correctly and to rectify the situation. Eventually, ACSI's initial three customers were placed in ACSI service.

After the deficiencies in BellSouth's processes became apparent, ACSI requested that BellSouth place all future orders on hold on December 4, 1996. After December 4, 1996, three additional ACSI customers, Joseph Wiley, Jr., Esq., Cullen & Associates, and Carrie G. Chandler, which had since had unbundled loops cut over, were disconnected by BellSouth. Again, there was no coordination by BellSouth prior to disconnecting these customers. These three customers were not placed back into ACSI service until late December and early January.

A similar lack of coordination was evidenced by BellSouth when it summarily disconnected three additional customers that were in service with ACSI. BellSouth disconnected service to Country's Barbecue (at five separate locations), Columbus Tire, and Jefferson Pilot once their service had been established. ACSI received no advance notice of the disconnects, nor of the fact that ACSI loops were being worked on in any way by BellSouth. One of these customers which disconnected at five separate locations and five separate accounts, was explained by a BellSouth repair foreman at the repair center to ACSI's Terry Henson as a "disconnect in error." The other two customer disconnects have never been adequately explained by BellSouth. Two of these three customers have left ACSI service and returned to BellSouth service.

Interrogatory No. 7: ***Identify and describe all communications between ACSI personnel (including between personnel located in Georgia and in Maryland) concerning unbundled loops ordered from BellSouth in Columbus, Georgia.***

Response:

In addition to ACSI's General Objections, ACSI objects to the term "identify" as ambiguous and vague if meant to elicit information separate and apart from that elicited by the term "describe." ACSI also objects to this Interrogatory as overbroad, vague, burdensome, and irrelevant to the extent that it calls for a description of *all* communications between ACSI personnel concerning unbundled loops ordered from BellSouth in Columbus, Georgia. This would require ACSI to interview a number of employees regarding literally hundreds, even thousands, of oral communications. Further, ACSI objects to BellSouth's definition of "describe" as used in this Interrogatory as overbroad, burdensome, and

irrelevant in that it requests a "description of all details" of such communications. The definition of "describe" is also vague and ambiguous: the phrases "the dates of any matters included therein, and any requirements or results included therein" are unclear or are the subject of confusion when applied to such "communications." Subject to and without waiving the foregoing objections, ACSI refers BellSouth to the documents produced by ACSI in response to document requests and voluntarily on March 17, 1997, for information responsive to this Interrogatory. ACSI further refers BellSouth to ACSI's responses to BellSouth's Document Request Nos. 1, 2, 3, 5, and 6, which are incorporated herein by reference thereto.

Interrogatory No. 8: **Describe (including PON, nature and duration) all delays beyond the negotiated due date for completion, service outages, or disruptions associated with each cutover (including, where ordered, SPNP implementation) identified in response to Interrogatory 1.**

Response:

In addition to ACSI's General Objections, ACSI objects to the term "describe" as applied to this Interrogatory as overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such delays. The definition of "describe" is also vague and ambiguous: the phrases "the substance thereof, the dates of any matters included therein, and any requirements or results included therein" are unclear or are the subject of confusion when applied to "delays." Subject to and without waiving the foregoing objections, ACSI refers BellSouth to ACSI's response to Interrogatory No. 6, to ACSI's Complaint and Reply in the instant proceeding, and to the documents produced by ACSI on March 17, 1997, for

information responsive to this Interrogatory. In addition, ACSI refers BellSouth to the information in the appended Exhibit A. Finally, ACSI refers BellSouth to ACSI's response to Document Request No. 2, which is incorporated herein by reference thereto.

Interrogatory No. 9: **Identify and describe all customer complaints, including cancellations of service, relating to unbundled loops identified in response to Interrogatory 1.**

Response:

In addition to ACSI's General Objections, ACSI objects to the term "identify" as ambiguous and vague if meant to elicit information separate and apart from that elicited by the term "describe." Further, ACSI objects to BellSouth's definition of "describe" as applied to this Interrogatory as overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such customer complaints. The definition of "describe" is also vague and ambiguous: the phrases "the dates of any matters included therein, and any requirements or results included therein" are unclear or are the subject of confusion when applied to "customer complaints." The Interrogatory is also vague and burdensome in that it could be interpreted to require ACSI to provide information regarding *all* complaints made by its customers to ACSI or any other party. ACSI received numerous complaints from a number of customers. ACSI further objects to Interrogatory No. 9 as unduly burdensome to ACSI. The information sought by the Interrogatory relates to the nature and amount of ACSI's damages, even though the parties have agreed to defer those issues until after a determination of BellSouth's liability. *See* Joint Statement of Stipulated and Disputed Facts and Legal Issues, at 11 (filed March 14, 1997). It would be unduly burdensome to require ACSI to search for and "identify and describe all customer complaints" that relate to

unbundled loops before a determination of BellSouth's liability in this case. Subject to and without waiving the foregoing objections, ACSI provides the following general description of the complaints that inevitably flowed from the circumstances described by ACSI in its Complaint and Reply in this proceeding. All of the customers that were disconnected from service complained to ACSI and were extremely unhappy with the fact that they were disconnected, and several were furious. At least one customer, Jefferson Pilot, expressed the opinion that it did not matter whether the fault lay with BellSouth; what mattered was that his company was no longer receiving seamless service. Country's Barbeque fully recognized that BellSouth was at fault, but could not afford to fight ACSI's battles for ACSI. The customer emphasized that his business was dependent upon his telephone service. One customer, Country's Barbeque, was so furious that he drove across town to ACSI to complain. Of the six ACSI customers listed in Exhibit A, one is no longer purchasing ACSI service. Moreover, of the three customers that were disconnected after the cutover process was completed, two (Country's Barbecue, at *five* locations, and Jefferson Pilot) are no longer ACSI customers.

Interrogatory No. 10: **Identify and describe all disconnections of service by Bellsouth associated with the unbundled loops identified in response to Interrogatory 1, with the exception of disconnections of service that were ordered or that were performed as part of cutovers that were successfully completed.**

Response:

In addition to ACSI's General Objections, ACSI objects to the term "identify" as ambiguous and vague if meant to elicit information separate and apart from that elicited by

the term "describe." Further, ACSI objects to BellSouth's definition of "describe" as applied to this Interrogatory as overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such disconnections. The definition of "describe" is also vague and ambiguous: the phrase "the substance thereof, the dates of any matters included therein, and any requirements or results included therein" are unclear or are the subject of confusion when applied to "disconnections." Subject to and without waiving the foregoing general objections, at least three ACSI customers have been summarily and unexpectedly disconnected from service without notice to ACSI. These three disconnected customers were Country's Barbecue, Jefferson Pilot, and Columbus Tire. The disconnection to Country's Barbecue, a restaurant with five locations in Columbus, took place on Friday, February 21, 1997 at approximately 4:45 p.m., just prior to the dinner hour. Country Barbeque's owner is an active member of the Chamber of Commerce and a highly visible citizen of the Columbus, Georgia, community. Country Barbecue takes orders by phone, and relies upon phone orders to provide take-out service at the dinner hour. Service was disconnected for two hours at all five locations.

The disconnection by BellSouth of Jefferson Pilot took place on Friday, February 21, 1997, also in the evening. Jefferson Pilot receives facsimiles from its home office on Friday afternoon. This disconnection prevented Jefferson Pilot from receiving such facsimiles on Friday and over the weekend and significantly disrupted its business. The following week it decided to return to BellSouth service.

The disconnection of Columbus Tire took place on Monday, February 24, 1997 and, as with the other two disconnections, significantly disrupted its business. The customer's

service was disrupted in the late afternoon and was down for almost an hour and was restored only as a result of aggressive efforts on the part of ACSI employees.

Interrogatory No. 11: **Describe all communications between ACSI and parties other than ACSI, BellSouth, or attorneys for ACSI or BellSouth (including, but not limited to, MCI Telecommunications Corporation or any of its subsidiaries or affiliates) relating to the timing or nature of ACSI's provision of local exchange service utilizing unbundled loops (excluding communications with consumers relating to the marketing or provision of loops to such customers) from July 25, 1996 through January 6, 1997.**

Response:

In addition to ACSI's General Objections, ACSI objects to this Interrogatory as overbroad, vague, burdensome, and irrelevant to the extent that it calls for a description of *all* communications between ACSI and other parties relating to ACSI's provision of local exchange service using unbundled loops. Further, ACSI objects to this Interrogatory as overbroad, because there is no limitation as to the geographic location of ACSI's provision of service. ACSI also objects to this Interrogatory in that the term "describe" as applied to this Interrogatory is overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such communications. The definition of "describe" is also vague and ambiguous: the phrases "the dates of any matters included therein, and any requirements or results included therein" are unclear or are the subject of confusion when applied to "communications." Moreover, ACSI objects to the extent that this Interrogatory is repetitive of Interrogatory No. 9. Further, ACSI objects to this request as irrelevant and unlikely to lead to the discovery of relevant information because the information requested does not in

any way relate to BellSouth's performance in providing unbundled loops to ACSI and the consequences of its failure to provide those loops as required by the Act or the Interconnection Agreement.

Interrogatory No. 12: **Describe all documents providing ACSI or any of its officers, employees, or agents with financial incentives (e.g., stock options, bonuses, evaluation criteria, warrants, provisions in contracts with other common carriers) relating to the timing of initiation of local exchange service utilizing unbundled loops, including but not limited to unbundled loops in Columbus, Georgia.**

Response:

In addition to ACSI's General Objections, ACSI objects to this Interrogatory in that the term "describe" as applied to this Interrogatory is overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such documents. The definition of "describe" is also vague and ambiguous: the phrase "the dates of any matters included therein" is unclear or is the subject of confusion when applied to such "documents." Moreover, ACSI objects to this Interrogatory because the information requested is irrelevant and unlikely to lead to the discovery of relevant information because the information requested does not in any way relate to BellSouth's performance in providing unbundled loops to ACSI and the consequences of its failure to provide those loops as required by the Act or the Interconnection Agreement.

Interrogatory No. 13: **Identify and describe all communications relating to tests concerning the provision of unbundled loops (and associated SPNP) in Columbus, Georgia, both prior to the date of submission to BellSouth of the first order identified in response to Interrogatory 1 and subsequently thereto in connection with each such order, including any testing of remote call forwarding associated with individual unbundled loop cutovers for which SPNP was ordered.**

Response:

In addition to ACSI's General Objections, ACSI objects to the term "identify" as ambiguous and vague if meant to elicit information separate and apart from that elicited by the term "describe." Further, ACSI objects to BellSouth's definition of "describe" as applied to this Interrogatory as overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such "communications relating to testing." The definition of "describe" is also vague and ambiguous: the phrase "the dates of any matters included therein" is unclear or is the subject of confusion when applied to "communications relating to testing." ACSI employees made numerous phone calls in conducting the tests in question. To the extent this Interrogatory calls for a detailed description of each and every communication concerning the tests, it is overbroad, vague, and burdensome. Subject to and without waiving the foregoing objections, ACSI conducted a total of sixteen (16) tests for unbundled loops and SPNP. These tests were conducted by ordering service from ACSI's sales office. The PON number for these test orders was 100042. A description of these test orders is contained in Exhibit A. ACSI employees Nancy Murrah and Pamela Jones were responsible for conducting these tests. Both employees made a number of phone calls to BellSouth employees while conducting the tests in question. Both employees made BellSouth

employees (including Lynn Smith, Barbara Jean and Paula Murphy) fully aware that ACSI was conducting test orders in preparation for handling "live" customer orders.

Interrogatory No. 14: **Identify and describe all communications concerning the establishment of an implementation schedule, as set forth in Section XVIII of the Interconnection Agreement between ACSI and BellSouth, with respect to Columbus, Georgia.**

Response:

In addition to ACSI's General Objections, ACSI objects to the term "identify" as ambiguous and vague if meant to elicit information separate and apart from that elicited by the term "describe." Further, ACSI objects to BellSouth's definition of "describe" as overbroad, burdensome, and irrelevant in that it requests a "description of all details of such" communications. The implementation schedule was established over a period of several months as a concerted effort of numerous ACSI and BellSouth employees. To the extent this interrogatory calls for a detailed description of each and every communication by these persons concerning the establishment of the schedule, it is overbroad, vague, and burdensome. Subject to and without waiving the foregoing objections, ACSI refers BellSouth to the Declaration of Brenda Renner dated March 5, 1997, for information responsive to this Interrogatory.

Interrogatory No. 15: **Identify all persons involved directly or indirectly (including corporate management personnel responsible for ACSI's competitive local exchange carrier operations) in the negotiation on the July, 1996 Interconnection Agreement, and subsequent amendment dated October 17, 1996, between BellSouth and ACSI.**

Response:

In addition to ACSI's General Objections, ACSI objects to the term "identify" as used in this Interrogatory as overbroad, burdensome, and irrelevant to the extent that it seeks a person's home address and telephone number. ACSI also objects to Interrogatory No. 6 to the extent that it calls for information already within BellSouth's possession, custody or control. Moreover, ACSI objects to this Interrogatory because the information requested is irrelevant and unlikely to lead to the discovery of relevant information because the information requested does not in any way relate to BellSouth's performance in providing unbundled loops to ACSI and the consequences of its failure to provide those loops as required by the Act or the Interconnection Agreement. Subject to and without waiving the foregoing objections, the following were among the principal people involved with the negotiation of ACSI's Interconnection Agreement and the October 17, 1996 amendment thereto: Riley Murphy, Richard Robertson, James Falvey, and William Stipe, all employees of ACSI, with offices in ACSI's Annapolis Junction office, and Brad Mutschelknaus, of Kelley Drye and Warren LLP, ACSI's counsel as listed on the Complaint.

Interrogatory No. 16: **Identify all persons on behalf of ACSI to coordinate the cut-over of customers with BellSouth in Columbus, Georgia, and describe the duties of such personnel.**

Response:

In addition to ACSI's General Objections, ACSI objects to the term "identify" as used in this Interrogatory as overbroad, burdensome, and irrelevant to the extent that it seeks a person's home address and telephone number. Subject to and without waiving the foregoing objections, the principal ACSI employees responsible for coordinating the cutover of unbundled loops were located in Annapolis Junction, Maryland. Two personnel responsible for coordinating the cutover of unbundled loops are located in ACSI's Columbus, Georgia office: Craig Uptagrafft, Operations Manager, and Vincent Taylor, Switch Technician.

Interrogatory No. 17: **Describe all steps taken by ACSI to test the cutover of unbundled loops (and associated implementation of SPNP) in Columbus, Georgia, prior to the cutover of live loops, including identification of all persons involved in such tests, whether joint with BellSouth or unilateral, including but not limited to the sixteen tests mentioned in a declaration of Brenda Renner, the dates and nature of such tests, and the results of all such tests.**

Response:

In addition to ACSI's General Objections, ACSI objects to this Interrogatory in that the term "describe" as applied to this Interrogatory is overbroad, burdensome, and irrelevant in that it requests a "description of all details" of *all* such steps taken by ACSI to test the cutover of unbundled loops. The definition of "describe" is also vague and ambiguous: the phrases "the substance thereof, the dates of any matters included therein, and any

requirements or results included therein" are the subject of confusion when applied to "steps taken by ACSI to test the cutover of unbundled loops." Subject to and without waiving the foregoing objections, ACSI refers BellSouth to ACSI's response to Interrogatory No. 13 and Document Request No. 5, which are incorporated herein by reference thereto.

Interrogatory No. 18: **Describe all communications between ACSI and BellSouth in which ACSI provided BellSouth with commercially reasonable estimates of its future unbundled loop requirements in Columbus, Georgia.**

Response:

In addition to ACSI's General Objections, ACSI objects to this Interrogatory in that the term "describe" is overbroad, burdensome, and irrelevant as applied to this Interrogatory in that it requests a "description of all details" of such communications. The definition of "describe" is also vague and ambiguous: the phrases "the dates of any matters included therein, and any requirements or results included therein" are the subject of confusion when applied to such "communications." ACSI also objects to the term "commercially reasonable" as vague, making it impossible to provide the answer BellSouth seeks. The number of unbundled loop orders that BellSouth considers "commercially reasonable" has not been defined by BellSouth and is likely to differ than the number that ACSI might consider "commercially reasonable." ACSI is left to guess what BellSouth means. Further, ACSI objects to this Interrogatory because the information requested is in BellSouth's possession, custody, or control. Subject to and without waiving the foregoing objections, ACSI has indicated to BellSouth that it will be ordering significant volumes of unbundled loops in

Columbus, Georgia, as well as its other initial BellSouth markets, Montgomery and Birmingham, Alabama, and Louisville, Kentucky. To date, ACSI has no assurance that BellSouth can handle significant volumes of unbundled loop orders from ACSI at any location, not to mention the orders of other carriers.

Interrogatory No. 19: **Describe the circumstances in Columbus, Georgia on or about November 19, 1996, which led a local ACSI technician to represent to a BellSouth employee that ACSI would not be ready to turn up the unbundled loops ordered in PON #100042CMB and to state that ACSI was having major problems and ACSI's central office equipment was not yet wired.**

Response:

In addition to ACSI's General Objections, ACSI objects to this Interrogatory in that the term "describe" is overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such circumstances. The definition of "describe" is also vague and ambiguous: the phrases "the substance thereof, the dates of any matters included therein, and any requirements or results included therein" are unclear or are the subject of confusion when applied to "circumstances." ACSI also objects to Interrogatory No. 19 as vague and ambiguous because BellSouth identifies neither the ACSI technician nor the BellSouth employee allegedly involved. Subject to and without waiving the foregoing objections, ACSI states that it was not fully prepared to turn up unbundled loops prior to November 22, 1996. After that date, however, when every disconnect issue that is the subject of ACSI's Complaint took place, ACSI's processes and equipment were established and ready for service.

Interrogatory No. 20: **Describe all efforts and procedures followed by ACSI to ensure that implementation of SPNP associated with unbundled loop cutovers in Columbus, Georgia would occur at times that would minimize disruption to customers, including but not limited to the scheduling of cutovers at times of low switch utilization and at times when customers are unlikely to experience disruptions.**

Response:

In addition to ACSI's General Objections, ACSI objects to this Interrogatory in that the term "describe" is overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such "efforts and procedures." The definition of "describe" is also vague and ambiguous: the phrases "the dates of any matters included therein, and any requirements or results included therein" are unclear or are the subject of confusion when applied to "efforts and procedures." Subject to and without waiving the foregoing objections, ACSI ensured that SPNP cutover times would take place at times that would not inconvenience customers. ACSI was under the false impression that any inconvenience would be minimal because ACSI's Interconnection Agreement with BellSouth guarantees that the cutover will take place within a 30-minute window. Interconnection Agreement, art. IV(D.2, D.3). ACSI's impression was a false one because of its mistaken impression that BellSouth had developed unbundled loop cutover processes when, in fact, it had not. Accordingly, the only reason customers were disrupted at the appointed cutover times was because BellSouth processes were not fully developed and established.

Interrogatory No. 21: **For each unbundled loop identified in response to Interrogatory 1, by PON, describe any interstate telecommunications services or facilities, other than interexchange access, provided by ACSI as a telecommunications carrier by means of such loop.**

Response:

In addition to ACSI's General Objections, ACSI objects to this Interrogatory in that the term "describe" as applied to this Interrogatory is overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such interstate telecommunications services or facilities. The definition of "describe" is also vague and ambiguous: the phrases "the substance thereof, the dates of any matters included therein, and any requirements or results included therein" are the subject of confusion when applied to "interstate telecommunications services or facilities." Subject to and without waiving the foregoing objections, ACSI states that the unbundled loops identified in response to Interrogatory No. 1 may be used to provide the full variety of services that could be supported over the unbundled loop, including but not limited to, local exchange service, toll and interstate telephone services, internet access, information services, data services, facsimile services, and frame relay services.

Interrogatory No. 22: **For each unbundled loop identified in response to Interrogatory 1, by PON, describe any use of such unbundled loop for interconnection of ACSI's network to BellSouth's network.**

Response:

In addition to ACSI's General Objections, ACSI objects to this Interrogatory in that the term "describe" as applied to this Interrogatory is overbroad, burdensome, and irrelevant

in that it requests a "description of all details" of such "use." The definition of "describe" is also vague and ambiguous: the phrases "the substance thereof, the dates of any matters included therein, and any requirements or results included therein" are the subject of confusion when applied to "use." Subject to and without waiving the foregoing objections, ACSI states that in order to provide services to its customers using unbundled loops provided by BellSouth, interconnection to the unbundled loops and interconnection between the ACSI and BellSouth networks is necessary.

Interrogatory No. 23: **Describe all testing undertaken by ACSI, either unilaterally or *jointly*, prior to the cutover of live unbundled loops provided by an incumbent local exchange carrier other than BellSouth.**

Response:

In addition to ACSI's General Objections, ACSI objects to this Interrogatory in that the term "describe" as applied to this Interrogatory is overbroad, burdensome, and irrelevant in that it requests a "description of all details" of *all* such "testing." The definition of "describe" is also vague and ambiguous: the phrases "the substance thereof, the dates of any matters included therein, and any requirements or results included therein" are unclear or are the subject of confusion when applied to such "testing." Subject to and without waiving the foregoing objections, ACSI's first switched local exchange market was Columbus, Georgia. Accordingly, ACSI did not undertake any testing other than the 16 tests described in Exhibit A, its earlier Answers to BellSouth's Interrogatories, and in ACSI's pleadings in this proceeding. To date, ACSI has not conducted unbundled loop testing with other carriers.

ACSI expects to be conducting such tests with Southwestern Bell Telephone Company imminently, and will update its response accordingly.

Interrogatory No. 24: **To the extent not already provided in response to another interrogatory, identify and describe all documents concerning communications with BellSouth regarding unbundled loop and SPNP ordering procedures, cutovers, provisioning, outages, service disruptions, or delays, including but not limited to letters, memoranda and notes of meetings or conference calls.**

Response:

In addition to ACSI's General Objections, ACSI objects to the term "identify" as ambiguous and vague if meant to elicit information separate and apart from that elicited by the term "describe." Further, ACSI objects to BellSouth's definition of "describe" as applied to this Interrogatory as overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such "documents concerning communications." ACSI objects to this Interrogatory No. 24 to the extent it requests information already in BellSouth's custody, possession or control. Subject to and without waiving the foregoing objections, ACSI will produce documents responsive to this Interrogatory, subject to applicable objections, in response to BellSouth's Document Requests, including but not limited to, BellSouth Document Request No 6.

Interrogatory No. 25: **Identify and describe all documents (other than documents already on file on this proceeding) concerning ACSI's decision to proceed with complaints at the Georgia Public Service Commission and the FCC concerning BellSouth's provision of unbundled loops in Columbus, Georgia.**

Response:

BellSouth has exceeded the number of interrogatories (including subparts) allowed under the Commission's rules -- thirty -- without Commission approval. 47 C.F.R. § 1.729. At this point, BellSouth has propounded 31 interrogatories (including subparts). Therefore, ACSI objects to this Interrogatory as unauthorized by the Commission Rules. In addition to ACSI's General Objections, ACSI objects to the term "identify" as ambiguous and vague if meant to elicit information separate and apart from that elicited by the term "describe." Further, ACSI objects to BellSouth's definition of "describe" as used in this Interrogatory as overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such "documents." The definition of "describe" is also vague and ambiguous: the phrases "the dates of any matters included therein, and any requirements or results included therein" are the subject of confusion when applied to such "documents." Furthermore, ACSI objects to this Interrogatory because it is fully redundant of BellSouth Document Request No. 7, ACSI's objections to which are incorporated herein by reference.

Interrogatory No. 26: **Identify and describe in detail all training and related materials provided to ACSI personnel concerning the procedures for ordering unbundled loops and associated SPNP from BellSouth, including the names of all personnel trained and the date(s) of their training, and a statement of whether such persons were involved in ordering unbundled loops from BellSouth in Columbus, Georgia from November 1-31, 1996.**

Response:

BellSouth has exceeded the number of interrogatories (including subparts) allowed under the Commission's rules – thirty – without Commission approval. 47 C.F.R. § 1.729. At this point, BellSouth has propounded 34 interrogatories (including subparts). Therefore, ACSI objects to this Interrogatory as unauthorized by the Commission Rules. In addition to ACSI's General Objections, ACSI objects to the term "identify" as ambiguous and vague if meant to elicit information separate and apart from that elicited by the term "describe." Further, ACSI objects to BellSouth's definition of "describe" as overbroad, burdensome, and irrelevant as applied to this Interrogatory in that it requests a "description of all details" of such "training and related materials." The definition of "describe" is also vague and ambiguous: the phrases "the dates of any matters included therein, and any requirements or results included therein" are unclear or are the subject of confusion when applied to "all training and related materials." ACSI further objects to this interrogatory to the extent it requests information already in BellSouth's custody, possession or control. Subject to and without waiving the foregoing objections, ACSI will produce such documents, subject to applicable objections, in response to BellSouth document requests, including but not limited to BellSouth Document Request No. 8. ACSI further answers that it trained all of its personnel to perform their respective roles in the loop unbundling process. The training

process was an ongoing one, from the initiation of contacts with BellSouth to determine what BellSouth's processes were, to the extent they were in place, to the date of the first cutover. ACSI's employees have extensive experience in their respective areas, both at ACSI, and at other telecommunications and other companies, including BellSouth, Bell Atlantic, Southwestern Bell, AT&T, and MCI. Among the principal people involved in ACSI's portion of the loop unbundling process were Richard Robertson, Brenda Renner, Nancy Murrah, Pamela Jones, William Stipe, and Vincent Taylor.

Interrogatory No. 27: **Describe ACSI's reasons for not participating in any training programs offered by BellSouth to competitive local exchange carriers regarding the procedures for ordering unbundled loops.**

Response:

BellSouth has exceeded the number of interrogatories (including subparts) allowed under the Commission's rules – thirty – without Commission approval. 47 C.F.R. § 1.729. At this point, BellSouth has propounded 35 interrogatories (including subparts). Therefore, ACSI objects to this Interrogatory as unauthorized by the Commission Rules. In addition to ACSI's General Objections, ACSI objects to this Interrogatory in that the term "describe" as used in this Interrogatory is overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such "reasons for non-participation". The definition of "describe" is also vague and ambiguous: the phrases "the dates of any matters included therein, and any requirements or results included therein" are unclear or are the subject of confusion when applied to "reasons for non-participation." ACSI also objects to

Interrogatory No. 27 as lacking in foundation and argumentative. Subject to and without waiving the foregoing objections, ACSI has only been informed of *one* BellSouth training session to date, by letter dated February 17, 1997 and scheduled for April 1-3, 1997. ACSI responded promptly but was informed that there was no space in the training program. At least one ACSI employee has since been informed that space will be made available by removing a BellSouth technician. BellSouth's first training program that ACSI was informed of will take place approximately four months after ACSI ordered its first unbundled loop, indicative of the extent to which BellSouth's preparations for loop unbundling are behind the implementation schedule of ACSI. To the extent ACSI employees cannot attend this first session, they will register for future sessions.

Interrogatory No. 28: **Describe all representations made by BellSouth to ACSI in the course of the negotiation of the Interconnection Agreement regarding BellSouth's ability to provide unbundled loops at a particular time or location on which ACSI relied.**

Response:

BellSouth has exceeded the number of interrogatories (including subparts) allowed under the Commission's rules -- thirty -- without Commission approval. 47 C.F.R. § 1.729. At this point, BellSouth has propounded 36 interrogatories (including subparts). Therefore, ACSI objects to this Interrogatory as unauthorized by the Commission Rules. In addition to ACSI's General Objections, ACSI objects to this Interrogatory in that the term "describe" as used in this Interrogatory is overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such "representations." The definition of "describe" is also

vague and ambiguous: the phrase "any requirements or results included therein" is the subject of confusion when applied to such "representations." Subject to and without waiving the foregoing objections, ACSI states that the Interconnection Agreement, appended as Exhibit A to the Complaint and which embodies the results of the parties' negotiations (*see* Article XXX), contains multiple representations that BellSouth was prepared to provide unbundled loops to ACSI, including but not limited to, the sixth "Recital and Principle" on page 1; Section IV. A. 2; Section IV, B. 5; Section IV. B. 9; and Attachment C-2.

Interrogatory No. 29: **Identify and describe every different version of an ACSI document entitled "ACSI-Switched Services Daily Tracking Report" and the documents relied upon in preparing this report if not already identified and described in response to another interrogatory.**

Response:

BellSouth has exceeded the number of interrogatories (including subparts) allowed under the Commission's rules – thirty – without Commission approval. 47 C.F.R. § 1.729. At this point, BellSouth has propounded 38 interrogatories (including subparts). Therefore, ACSI objects to this Interrogatory as unauthorized by the Commission Rules. In addition to ACSI's General Objections, ACSI objects to the term "identify" as ambiguous and vague if meant to elicit information separate and apart from that elicited by the term "describe." Further, ACSI objects to BellSouth's definition of "describe" as used in this Interrogatory as overbroad, burdensome, and irrelevant in that it requests a "description of all details" of *every* such version of the report and documents relied upon in preparing it. ACSI also objects to this Interrogatory to the extent it requests information already in BellSouth's

custody, possession or control. Subject to and without waiving the foregoing objections, ACSI will produce such documents, subject to applicable objections, in response to BellSouth document requests, including, but not limited to, BellSouth Document Request No. 1.

Interrogatory No. 30: **To the extent any person identified in response to any of the foregoing interrogatories is no longer employed by ACSI, state the date on which such person such person ceased to be employed by ACSI and describe the reasons for such termination of employment.**

Response:

BellSouth has exceeded the number of interrogatories (including subparts) allowed under the Commission's rules -- thirty -- without Commission approval. 47 C.F.R. § 1.729. At this point, BellSouth has propounded 40 interrogatories (including subparts). Therefore, ACSI objects to this Interrogatory as unauthorized by the Commission Rules. In addition to ACSI's General Objections, ACSI objects to this Interrogatory in that the term "describe" as used in this Interrogatory is overbroad, burdensome, and irrelevant in that it requests a "description of all details" of such "reasons." The definition of "describe" is also vague and ambiguous: the phrases "the dates of any matters included therein, and any requirements or results included therein" are unclear or are the subject of confusion when applied to such "reasons." ACSI also objects to Interrogatory No. 30 as irrelevant. The Commission's Rules allow discovery only of non-privileged matter which is relevant to the pleadings, and specifically deny discovery of "information which is beyond the scope of permissible inquiry relating to the subject matter of the pleadings." *See, e.g.*, 47 C.F.R. § 1.729(a). There is no basis for believing that any of the information sought by this Interrogatory is at all related

to BellSouth's obligation to provide interconnection and unbundled loops to ACSI or to its performance in fulfilling those obligations. Subject to and without waiving the foregoing

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performance in fulfilling those obligations. Subject to and without waiving the foregoing objections, ACSI states that all of the ACSI employees listed in response to these Interrogatories are still employed by ACSI.

Respectfully submitted

AMERICAN COMMUNICATIONS SERVICES, INC.

By: _____

Brad E. Mutschelknaus
Edward A. Yorkgitis, Jr.
Steven A. Augustino
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W.,
Suite 500
Washington, D.C. 20036
202-955-9600

Riley M. Murphy
James C. Falvey
AMERICAN COMMUNICATIONS SERVICES, INC.
131 National Business Parkway
Suite 100
Annapolis Junction, MD 20701
301-617-4200

Its Attorneys

DATED: March 28, 1997

VERIFICATION

Brenda Renner, Vice President of Network and Service Administration, American Communications Services, Inc., hereby deposes and says that she has reviewed the foregoing answers to BellSouth's Interrogatories; that, the facts set forth therein, subject to inadvertent or undiscovered errors, are based on and necessarily limited by records and information still in existence, presently recollected and thus far discovered in the course of the preparation of these responses; that consequently the right is reserved to make any changes in the responses if it appears at any time that omissions or errors have been made therein or that more accurate information is available; that although she does not have personal knowledge of all facts contained in the foregoing answers, such responses are true to the best of her knowledge, information, and belief.

Brenda Renner

Brenda Renner

Subscribed and sworn to before me
this _____ day of March, 1997.

CERTIFICATE OF SERVICE

I do hereby certify that on this 28th day of March, 1997, true and correct copies of the foregoing ACSI's Objections to Interrogatories of BellSouth Telecommunications, Inc., were served via fax *and* hand delivery or overnight delivery to:

R. Douglas Lackey
Michael A. Tanner
675 Peachtree Street, NE
Suite 4300
Atlanta, Ga 30375
Fax: (404) 614-4054
Phone: (404) 335-0764

L. Andrew Tollin
Michael Deuel Sullivan
Robert G. Kirk
Wilkinson, Barker, Knauer & Quinn
1735 New York Avenue, NW, Suite 600
Washington, DC 20006-5289
Fax: (202) 833-2360
Phone: (202) 783-4141

William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, NE
Suite 1800
Atlanta, GA 30309-2641
Fax: (404) 249-5901
Phone: (404) 249-4445

David G. Frolio
Suite 900
1133 21st Street, NW
Washington, DC 20036
Fax: (202) 463-4195
Phone: (202) 463-4182

Patricia J. Goodson

GEORGIA UNBUNDLED LOOP COMPLAINT
Loop Customer Detail

Customer Name	PON	Initial LIDB Request Submitted	ASR Request Submitted	FOC Date and Time from BellSouth	Originally Requested Loop Cutover Due Date and Time	Originally Requested SPNP Due Date and Time	Date and Time of Cutover	Date and Time of SPNP Cutover	Duration Out of Service
ACSI[1]	I00042CMB	11/14/96	11/13/96	11/22/96 3:00 p.m.	11/18/96 3:00 p.m.	11/18/96 3:00 p.m.	11/22/96 3:00 p.m.	11/22/96 3:00 p.m.	Less than 1 hour
Corporate Center	I00043CMB	10/29/96	11/25/96	11/27/96 9:00 a.m.	11/27/96 9:00 a.m.	11/27/96 9:00 a.m.	1/7/97 9:00 a.m.	1/7/97 9:00 a.m.	24 hours on attempted but unsuccessful cutover on 11/28/96 Less than 1 hour 1/7/97
Jefferson Pilot	I00044CMB	11/19/96	11/20/96	11/27/96 2:00 p.m.	11/27/96 2:00 p.m.	11/27/96 2:00 p.m.	11/27/96 2:00 p.m. to 6:00 p.m.	11/27/96 2:00 p.m. to 6:00 p.m.	4 - 5 hours
Mutual Life	I00045CMB	11/19/96	11/25/96	11/27/96 11:00 a.m	11/27/96 11:00 a.m.	11/27/96 11:00 a.m	11/27/96 11:00 a.m. to 5:30 p.m.	11/27/96 11.00 a.m. to 5:30 p.m.	6 - 7 hours
Joseph Wiley, Jr., Esq.	I00047CMB I00048CMB	11/19/96	12/2/96	12/4/96 2:00 p.m.	12/4/96 2:00 p m.	12/4/96 2:00 p m.	1/3/96 2:00 p.m.	1/3/97 2:00 p.m.	Multiple disruptions on initial cutover on 12/4/96 and 12/5/96 Less than 1 hour 1/3/97
Cullen & Associates	I00049CMB	11/19/96	12/2/96	12/4/96 11:00 a.m.	12/4/96 11:00 a.m.	12/4/96 11:00 a.m.	12/23/96 11:00 a.m.	12/23/96 11:00 a.m.	Multiple disruption; initial cutover on 12/4/96. Less than 1 hour
Carrie G. Chandler	I00050CMB	11/19/96	12/2/96	12/5/96 9:00 a.m.	12/5/96 9.00 a.m.	12/5/96 9:00 a.m.	1/7/96 9:00 a.m.	1/7/97 9:00 a.m.	Multiple disruption; initial cutover on 12/5/96. Less than 1 hour

3/27/97

[1] ACSI's order was composed of one unbundled loop test and fifteen number portability tests

GEORGIA UNBUNDL LOOP COMPLAINT
Supplementations and Reasons

CUSTOMER NAME	PON	SUPPLEMENTATIONS		
ACSI	I00042CMB	Submitted 11/14; changed to 11/18.	Submitted 11/18/96; changed to 11/19/96.	Submitted 11/18/96 to change due date to 11/22; add NC/SECNCI codes and add customer telephone numbers.
Corporate Center	I00043CMB	Submitted 12/2/96; change to 12/20/96 and to add frame due time of 9:00 a.m.	Submitted 12/17/96; change to 1/7/97	
Jefferson Pilot	I00044CMB			
Mutual Life	I00045CMB	Supplemented to add frame due time: 11:00 a.m.		
Joseph Wiley, Jr., Esq.	I00047CMB	Supplemented to change to 12/5/96.	Supplemented to change to 12/18/96.	Supplemented to change to 1/3/97.
Cullen & Associates	I00049CMB	Supplemented to change to 12/23/96.		
Carrie G. Chandler	I00050CMB	Supplemented to change to 12/20/96.	Submitted 12/17/96; change to 1/7/97.	

3/27/97

BellSouth's Responses and Objections to ACSI's First Set of Interrogatories (March 28, 1997)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
AMERICAN COMMUNICATIONS SERVICES, INC.,	)	
Complainant,	)	File No. E-97-09
	)	
v.	)	
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
Defendant.	)	

RESPONSES AND OBJECTIONS TO ACSI'S FIRST SET OF INTERROGATORIES

BellSouth Telecommunications, Inc., ("BellSouth") hereby submits the following Responses and Objections to *ACSI's First Set of Interrogatories to BellSouth Telecommunications, Inc.*

GENERAL OBJECTIONS

1. BellSouth objects to ACSI's Interrogatories to the extent they would require the disclosure of information subject to the attorney-client privilege or work-product doctrine. Accordingly, BellSouth does not disclose any information subject to the aforementioned protections.

2. BellSouth objects to ACSI Instruction Number 5 which states that BellSouth should "furnish all information and responsive documents in the possession of BellSouth or in the possession of any director, officer, employee, agent, representative, or attorney of BellSouth." To the extent this instruction requires the production of documents, it is an inappropriate use of interrogatories. ACSI had the opportunity to submit ten document production requests to BellSouth and may not use interrogatories to request the additional production of documents. To the extent

this instruction requires the disclosure of information subject to the attorney-client privilege or work-product doctrine, BellSouth incorporates its first objection

RESPONSES

ACSI-1: Identify each activity that must be performed by BellSouth and, if applicable, the name and function of the BellSouth system used to perform the action, in order to receive, process, and install an order submitted by ACSI for an unbundled local loop.

Response:

ORDERING:

When BellSouth receives a Local Service Request (LSR) order at its Local Carrier Service Center (LCSC) via a facsimile message, the service representative will verify that the proper ordering information is contained on the LSR and will then input the order into the Exchange Access Control and Tracking (EXACT®) system. If the alternative local exchange company (ALEC) submits the order in electronic format through the EXACT system, the BellSouth service representative will review the LSR for accuracy prior to releasing the order to other BellSouth systems.

Once the information has been verified by the BellSouth service representative, the representative will release the LSR to the Service Order Communications System (SOCS). This system creates a service order from the information contained on the LSR. SOCS will then pass the order to Service Order Analysis and Control (SOAC). SOAC then routes the service orders to the appropriate provisioning and installation systems.

PROVISIONING:

The Loop Facility Assignment and Control System (LFACS) is the initial system to receive the service order. LFACS's function is to keep an inventory of available loops in a given cross-section of the BellSouth facility pool. LFACS will attempt to locate cable pairs (from the Main Distribution Frame in the central office to the customer premises) that are compatible with the loop requested on the LSR. If no facilities are available, the order will "fall-out" of the mechanized process. If facilities are available and the loop assignment is made, LFACS will then route the service order back to SOAC. Since the loop in these cases is LFACS-administered, SOAC would next route the order to Computer Systems For Main Frame Operation (COSMOS), which would assign a local loop to a tie pair cross-connect. COSMOS returns the order to SOAC.

SOAC next routes the order to the Network Services Database and to the TIRKS® System for design and issuance of the Work Order Records and Details (WORD) document.[1] This is done in order to provide the loop make-up or Design Layout Record (DLR) to the ALEC placing the order. The WORD is passed by TIRKS to the Work Force Administration (WFA) and the Network Services Data Base (NSDB). The NSDB matches/merges the SOAC order image with the WORD document from TIRKS to form a line record. The NSDB line record is used by WFA for dispatching and field work activities.

INSTALLATION:

WFA dispatches the order to field personnel, and the work is performed from the design information pulled from WFA. If there is a coordinated disconnect order, which is worked from the COSMOS frame order, a WFA hand-off is issued for manual correlation of the field activities with

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[1] TIRKS is a registered trademark of Bell Communications Research, Inc.

the COSMOS frame order. It becomes critical that the ALEC have provided accurate information on the LSR. The ALEC must have properly identify their equipment in the central office in order for the BellSouth technician to connect the loop to the correct assignment of the ALEC equipment

Response Provided by: Brian Blanchard, Jerry Latham, and Kenneth L. Ainsworth

ACSI-2 **As of July 25, 1996, identify each computer or other electronic system BellSouth had in place which was in any way intended to be used for the receipt, tracking, processing, or installation of unbundled loops ordered by telecommunications carriers such as ACSI, and state whether the system was fully prepared to perform as intended on that date. If you claim that a system was not fully operational, identify its status as of July 25, 1996 and state what activities needed to be performed to make the system fully operational.**

Response: See Response to ACSI-1. Each system has been identified in that Response. As of July 25, 1996, each of those systems was fully operational and fully prepared to perform as intended, except for correction of the problems identified in the Response to ACSI-12, below, and a minor database change in TIRKS and EXACT to recognize the NC/NCI (Network Channel/Network Channel Interface) codes for unbundled local loops connected to an ALEC's collocated equipment. That change was made between November 14 and November 19, 1996.

Response Provided by: Brian Blanchard and Kenneth L. Ainsworth

ACSI-3: **As of July 25, 1996, identify each manual or other non-electronic system BellSouth had in place which was in any way intended to be used for the receipt, tracking, processing, or installation of unbundled loops ordered by telecommunications carriers such as ACSI, and state whether the system was fully prepared to perform as intended on that date. If you claim that a system was not fully operational, identify its status as of July 25, 1996 and state what activities needed to be performed to make the system fully operational.**

Response: Any manual activities involved in the receipt, tracking, processing, and installation of unbundled loops are identified in the Response to ACSI-1. As of July 25, 1996, BellSouth was capable of performing these manual activities.

Response Provided by: Jerry Latham

ACSI-4: As of November 19, 1996, identify each computer or other electronic system BellSouth had in place which was in any way intended to be used for the receipt, tracking, processing, or installation of unbundled loops ordered by telecommunications carriers such as ACSI, and state whether the system was fully prepared to perform as intended on that date. If you claim that a system was not fully operational, identify its status as of November 19, 1996 and state what activities needed to be performed to make the system fully operational.

Response: The Response to ACSI-2 is applicable to this interrogatory.

Response Provided by: Jerry Latham

ACSI-5: As of November 19, 1996, identify each manual or other non-electronic system BellSouth had in place which was in any way intended to be used for the receipt, tracking, processing, or installation of unbundled loops ordered by telecommunications carriers such as ACSI, and state whether the system was fully prepared to perform as intended on that date. If you claim that a system was not fully operational, identify its status as of November 19, 1996 and state what activities needed to be performed to make the system fully operational.

Response: The Response to ACSI-3 is applicable to this interrogatory.

Response Provided by: Jerry Latham

ACSI-6 **Please provide the basis for your statement in paragraph 53 of the Answer that "BellSouth had the ability to provide unbundled loops at that time." Identify whether BellSouth had the ability to meet the standards set forth in Section IV of the Interconnection Agreement for the installation of unbundled loops, precisely how BellSouth could provide unbundled loops at the time referred to in the statement and identify what "time" is referred to in this statement.**

Response: When BellSouth negotiated the Interconnection Agreement with ACSI, BellSouth planned to utilize its existing special access service processes as the basis for ordering and provisioning unbundled loops. Minor modifications of the procedures and ordering documents were required to distinguish unbundled loops from special access service circuits so that unbundled loops could be ordered via EXACT, inventoried in TIRKS, and billed. Thus, BellSouth had the ability to meet the standards set forth in Section IV for the installation of unbundled loops at the time it negotiated the Interconnection Agreement

Response Provided by: Jerry Latham

ACSI-7: **Please provide the basis for your statement in paragraph 53 of the Answer that BellSouth "had not yet fully tested and refined the procedures to be used for ordering and providing them [unbundled loops]." Without limiting the scope of this request, your answer should at a minimum, identify what "procedures" were "to be used for ordering and providing" unbundled loops, what "time" is referred to by this statement and what testing had and had not been performed as of that time.**

Response: At the time BellSouth negotiated the Interconnection Agreement, BellSouth had not yet had an opportunity to test its procedures for coordinated disconnection of existing service and ordering and provisioning of unbundled loops and associated SPNP in conjunction with ACSI's processes for ordering unbundled loops and associated SPNP or with ACSI's processes for coordinating cutovers of customers from BellSouth to ACSI. Section XVIII of the Interconnection Agreement requires such joint testing as part of the schedule for implementation of the Interconnection Agreement. Such joint testing would, for example, have revealed the need to update the NC/NCI codes, as discussed in the Response to ACSI-2, since ACSI was the first ALEC to request that BellSouth connect unbundled loops to collocated equipment. Joint testing would also have revealed the stenciling errors on ACSI's collocated equipment in Columbus, as discussed in response to ACSI-19 and ACSI-20, as well as the problems discussed in the Response to ACSI-12.

The procedures to be used for ordering unbundled loops are described in the Response to ACSI-1, above. The procedures for ordering unbundled loops with associated SPNP are described in the Facilities-Based Ordering Guidelines provided by BellSouth in its document production on March 17. See BellSouth Documents ##00565 *et seq.*

Response Provided by: Martha Jackson. Brian Blanchard

ACSI-8: **With reference to the statements in paragraph 53 identified in the preceding two requests, identify what, if any, changes in BellSouth's abilities occurred between July 25, 1996 (or, if the statements refer to a different time, the time referred to in the statements) and November 19, 1996, and what, if any, additional "testing" and "refinement" BellSouth conducted or made between July 25, 1996 and November 19, 1996 to the "procedures to be used for ordering and providing" unbundled loops.**

Response: Although BellSouth did not have the opportunity to conduct joint testing with ASCI between July 25 and November 19, 1996, BellSouth conducted the following internal tests of its systems for ordering and provisioning unbundled loops:

- Service orders were issued in July 1996 through November 1996 to test the flow through of unbundled service orders. The first service order testing was done to test the Reuse Field Identifiers (FIDs) to ensure that the disconnect of single-line voice grade service (Plain Old Telephone Service or POTS) and the add (connection) of the unbundled loop would flow and result in the reuse of the existing working local loop assignments (cable/pair). We found that this process worked if the orders were coordinated. First, the order would be associated with the disconnect and the correct FID Next, the add issued would be issued, also with the correct FID

- The service order was logged via the SOAC and TIRKS Systems. The circuit was designed manually, with an Estimated Measured Loss (EML) of 8.0db. The WORD was issued to the downstream systems (WFA, NSDB) to see the results. All systems received the service order and WORD document and CDOC sketches were developed. The test was successful. This first test was issued via cable and pair at the end user with a T1 facility at the ALEC location.

- Additional service orders were issued for the different types of services that were scheduled for the first round of tests (2Wire loop start, 2Wire ground start, 2Wire reverse battery, Basic Rate ISDN, 56 kb/s, and 64 kb/s). The Voice loops were tested with Subscriber Loop Carrier (SLC) and cable and pairs at the end user and T0TIE at the ALEC location.

These tests were necessary to ensure that all Uiversal Service Ordering Codes (USOCs) were coded properly in the SOAC and TIRKS Systems. The same basic class of service for all types of Unbundled Voice Loop (UVL) and Unbundled Digital Loop (UDL) was used. The USOCs

represent the various circuits and what type of facility could work with these circuits and that the circuit would be assigned correctly from LFACs

This process worked correctly in the test system We found that the downstream systems needed to identify the differences between the unbundled services The same class of service could not be used. New Class of Service USOCs were requested and received for the different types of UVL/UDL. Service orders were issued in the test systems to test the flow in the downstream systems to see if this indeed would be sufficient. This proved to be successful.

Programmable Circuit Design System (PRO-CDS) models were requested, built and downloaded in all nine processors for the various UVL/UDL.

When an ALEC began requesting service in Florida, there were no T1 facilities, nor T0TIE (collocated) facilities. Most of the circuits requested went interoffice, and as a result interoffice facilities were assigned. This was not tested beforehand. We assumed that since it was POTS service the ALEC would be served from the same wire center as the end user. This was not the case.

When an EML is set in TIRKS it is hard coded to meet this objective. This was not a problem if the circuit was on cable and pair. The loss of the circuit (EML) would be whatever loss was in the local loop. But when interoffice facilities are added, TIRKS will try to meet the 8.0db EML set for unbundled services. This caused a problem.

The Circuit Provisioning Group (CPG) was contacted by the Transmission Engineer to make the interoffice facilities and SLC assignment plug-ins transparent to the ALEC. This caused the CPG to re-do all PRO-CDS designs. The problem was not readily identified, and when it was brought to our attention, we began the correction process. To handle this request, new function codes had to be created internally for every plug-in that could be used on these circuits. Included with the new function codes were also new levels. All circuits that had voice levels were affected: The coding has been completed, and all two-wire UVL PRO-CDS models have been updated.

There was one other problem. If the end user was served via SLC, POTS plug-ins should have been in place (as for an existing BellSouth customer). The WORD document indicated Special POTS (SPOTS) plug-ins. This created confusion because Plug-In Control System (PICS) tried to ship the plug-ins. POTS plug-ins should have been used and should have been in place Function codes did not exist for POTS plug-ins because POTS plug-ins were never used on a designed circuit (Bellcore usually creates function codes for designed services.) BellSouth had to create function codes for POTS plug-ins to ensure they would no longer be ordered via TIRKS/PICS. PRO-CDS models had to be updated and this too has been resolved.

Response Provided by: Sharron Smith

ACSI-9: **As of November 19, 1996, did BellSouth have the capability to provide unbundled loops and service provider number portability in accordance with the standards established in Section IV of the Interconnection Agreement? If you contend that BellSouth did not have the capability to provide unbundled loops at that time, identify each and every area in which you contend BellSouth lacked the capability and what was necessary for BellSouth to obtain that capability.**

Response: As of November 19, 1996, BellSouth had the capability to provide unbundled loops and Service Provider Number Portability (SPNP) in accordance with the standards set forth in the Interconnection Agreement. As stated in the Facilities-Based Ordering Guidelines (See BellSouth Documents ##00566, 00618, and 00627), these orders must be coordinated and must be provisioned in conjunction with each other. Coordination is, of necessity, a responsibility of both parties to the agreement (both the ALEC and BellSouth) Upon notification by the ALEC that an unbundled loop order is to be coordinated with the provision of SPNP, BellSouth will schedule the project work needed to ensure that the conversion of the customer from BellSouth to the ALEC is made in a timely and accurate manner.

Response Provided by: Martha Jackson, Jerry Latham

ACSI-10: **Identify each and every action BellSouth took in the first 30 days after July 25, 1996 to "adopt a schedule for the implementation of this Agreement" as referred to in Section XVIII of the Interconnection Agreement. For each action BellSouth took, your answer should, at a minimum, identify precisely what action was undertaken, the person(s) at BellSouth that took the action, the person(s) (if any) at ACSI that BellSouth contacted, the outcome of the action, and all persons at BellSouth with knowledge of the action taken.**

Response: During that period of time, BellSouth's practice was to respond to implementation activity initiated by ALECs. When an ALEC requested the adoption of an implementation schedule, BellSouth worked with the ALEC to develop such a schedule. If the ALEC did not request an implementation schedule, BellSouth did not initiate such activity. ACSI contacted numerous BellSouth employees during that period regarding various implementation matters, but never requested the adoption of a comprehensive implementation schedule. BellSouth's employees worked closely with ACSI regarding each of ACSI's inquiries during that period.

In addition to responding to the multitude of inquiries from ACSI regarding the implementation of various elements of the Interconnection Agreement, on August 22, 1996, Gloria Calhoun, Director - Strategic Planning of BellSouth, and Nancy Murrah of ACSI had a telephone conversation that resulted in BellSouth's providing to ACSI, via overnight mail, two copies of the Facilities-Based Ordering Guidelines. Ms. Calhoun also held a conference call on August 23, 1996, with Ms. Murrah to respond to questions concerning that document and to discuss generally the ordering procedures described in that document. The Facilities-Based Ordering Guidelines were updated in October 1996 and a copy was mailed to Paul Kingman of ACSI on October 31.

Also, on August 14, 1996, Jim Linthicum, Jane Raulerson, and Stephanie Cowart of BellSouth met with Michelle Gemke, Brenda Renner, and other ACSI employees to discuss traffic flows, billing and records exchange on traffic between BellSouth and ACSI, and traffic involving third parties, such as other local exchange carriers, wireless service providers, and interexchange carriers.

Response Provided by: Gloria Calhoun, Stephanie Cowart, Kathleen Massey, Wade Johnson, Pinky Reichert

ACSI-11: **Between July 25, 1996 and November 19, 1996, identify what requests, if any, BellSouth made for "any testing of the procedures for ordering unbundled loops" or "any testing of the technical aspects of unbundled loop cutovers" (see paragraph 62 of the Answer). If you contend that BellSouth made such a request, your answer should, at a minimum, identify which person(s) at BellSouth made the request, the person(s) at ACSI to whom the request was communicated, the manner in which the request was made (in person, by letter, etc.), and identify all documents which constitute, refer or relate to the request.**

Response: BellSouth's investigation has not disclosed any such requests.

Response Provided by: Ann Haymons

ACSI-12: **Please explain in detail what additions, deletions, improvements, changes, or other modifications BellSouth made since November 27, 1996 to its procedures (whether computer, electronic, manual or other non-electronic) for receiving, processing, and installing orders for unbundled loops placed by ACSI. For each addition, deletion, improvement, change or other modification BellSouth made, state when it was made, what was done, why it was done, and how the action affected the receipt, processing or installation of ACSI orders for unbundled loops.**

Response:

1. In December 1996, BellSouth changed its service order writing procedures for coordinated installation of an unbundled loop and disconnection of existing service to eliminate the RRSO (an indicator to reuse the existing loop) from N-orders (orders to establish SPNP) associated with the unbundled loop. Previously, in an attempt to coordinate the installation of the unbundled loop with the disconnection of the existing service and establishment of SPNP, BellSouth had placed the RRSO on the order to disconnect the existing service, the order to establish the unbundled loop, and the order to establish the SPNP. In December 1996, BellSouth discovered that this process did not have the intended effect. Instead of facilitating coordination of the installation and disconnection, the placement of the RRSO on both orders resulted in the elimination of the Frame Due Time (FDT) on the disconnect order when SOAC combined the two orders. Consequently, the order to disconnect existing service would be worked on the due date (usually early in the day) but would not be held until the FDT, when the unbundled loop was to be installed. Elimination of the RRSO from the associated SPNP order caused SOAC to retain the FDT on the disconnect order and resulted in the automatic release of the disconnect order at the FDT.

2. In December 1996, BellSouth changed its service order writing procedures to show 9:00 PM in the FDT field on orders requiring coordination and to show the desired cutover time in the remarks section of the orders instead of in the FDT field. This change was made to prevent the automatic release of the disconnect order for existing service at the desired cutover time. This change provided flexibility for the manual coordination of cutovers without automatic service order processing. Without this change, the customer's existing service might be disconnected at the desired cutover time indicated in the FDT field even if any delays were encountered in the cutover process.

3. In December 1996, BellSouth corrected an error in LFACS. The error caused LFACS to fail to recognize that loop facilities on universal digital loop carriers could be reused in the provision of an unbundled loop. The effect of the correction was to eliminate delays resulting from manual assignment of loop facilities.

4. In December 1996, BellSouth enhanced its coordination of the installation of unbundled loops by assigning a project manager for coordination of ACSI's orders and by adopting the use of cutsheets, which collect all of the required data for efficiently processing cutovers.

The foregoing modifications are the only modifications since November 27, 1996, that relate to the problems encountered in BellSouth's provision of unbundled loops to ACSI in Columbus, Georgia, in November and December 1996.

Response Provided by: Brian Blanchard, Ken Ainsworth

ACSI-13: **Please explain the meaning of each column on the document attached as Exhibit 6 to the Rebuttal testimony of Alphonso J. Varner. filed February 24, 1997 in Georgia PSC docket no. 6863-U, and identify all documents which form the basis for the information contained in that document. A copy of Varner Exhibit 6 is attached.**

Response:

"PON#" means Purchase Order Number - The purchase order number is provided by ACSI on its orders for service.

"Date Rec." means Date Order Received by BellSouth - The date the order is received is logged by the EXACT system or is printed by the facsimile machine.

"Requested Service/Order Numbers" - The service requested on the Order by ACSI and BellSouth's Order Numbers to related to the service requested. The BellSouth Order numbers are generated by BellSouth's systems (SOCS/SOAC). The remarks section of ACSI's Orders or the EXACT system would detail the service being ordered

"FDT" means Frame Due Time - The FDT was provided by ACSI on each of its Orders.

"FOC" means Firm Order Confirmation - The FOC was provided to ACSI upon release of an accurate Order into the BellSouth ordering systems.

"CDD" means Customer Due Date - The Customer Due Date was provided by ACSI on each of its Orders.

"Date Service Est." means Date Service Established - This date was provided by the BellSouth systems and central office technicians upon the completion of the service Order.

"OOS" means Out of Service - This is the amount of time between disconnection of the existing BellSouth service and the connection of the unbundled loop to ACSI.

"Pend." means Orders pending - The number of Orders which have been received by BellSouth from ACSI but have not been worked

"Comp." means Orders completed - The number of Orders that have been completed by BellSouth.

The documents which form the basis for information contained in the referenced document have already been produced, will be produced pursuant to ACSI's document production requests, or have been identified elsewhere in these interrogatories.

Response Provided by: Eddie Owens

ACSI-14: **With reference to paragraph 15 of the Answer, please explain in full the statement that "the service of several affected customers was disconnected due to a customer service representative's error." Without limiting the foregoing request, your answer should at a minimum identify which customers were affected by the alleged error, the duration of the service disconnection, the customer service representative that allegedly erred, the error that you allege occurred, and what actions BellSouth took to correct the alleged error.**

Response: The error identified by BellSouth with reference to any of the orders in question is more properly described as an error by an RCMAG (Recent Change Administration Group) clerk. On December 5, 1996, Paula Murphy, a Supervisor in BellSouth's LCSC, called the RCMAG unit to request that the unit put a hold on an order to disconnect the existing service of Joseph Wiley (PON # I00047CMB) to prevent the system from automatically releasing the order prior to the installation of the unbundled loop. When the FDT arrived, the RCMAG clerk who reviewed the order released the order in error. The clerk's supervisor discussed the error with the clerk to reinforce the clerk's understanding of BellSouth's procedures.

Response Provided by: Ken Ainsworth

ACSI-15: **Identify when BellSouth contends that it received ACSI service orders identified with Purchase Order Numbers ("PONs") I00042CMB, I00043CMB, I00044CMB, I00045CMB, I00047CMB, and identify all documents upon which BellSouth bases its claim concerning the date these orders were received.**

Response: The original and subsequent versions of these orders were received as stated below. The sources of this information are documents produced by BellSouth and are indicated by their stamped numbers.

PON I00042CMB

- Received in EXACT from BDS Tellis on 11/13/96 (Copies will be produced on April 1.)
- FAXED: 11/15/96 (BellSouth Documents ##00024, 00025, 00026)
- FAXED: 11/18/96 (BellSouth Documents ##00021, 00022, 00023)
- FAXED: 11/18/96 (BellSouth Documents ##00027, 00028, 00029, 00021, 00022, 00023, 00024, 00025, 00031, 00032, 00033, 00034)
- FAXED: 11/14/96 (BellSouth Documents ##00018)
- FAXED: 11/15/96 (BellSouth Documents ##00020)
- FAXED: 11/15/96 (BellSouth Documents ##00019)
- FAXED: 11/20/96 (BellSouth Documents ##00030)

PON I00043CMB

- FAXED: 11/25/96 (BellSouth Documents ##00041, 00042, 00043)
- FAXED: 11/25/96 (BellSouth Document #00044)
- FAXED: 11/25/96 (BellSouth Document #00044)
- FAXED: 12/02/96 (BellSouth Documents ##00047, 00048, 00049)
- FAXED: 12/02/96 (BellSouth Documents ##00050, 00051, 00052, 00053, 00054)

PON I00044CMB

- FAXED: 11/25/96 (BellSouth Documents ##00065, 00066, 00067, 00068)
- FAXED: 11/25/96 (BellSouth Document #00069)

PON I00045CMB

- FAXED: 11/25/97 (BellSouth Documents ##00071, 00072, 00073, 00074)
- FAXED: 11/25/96 (BellSouth Documents ##00075, 00076)
- FAXED: 11/25/96 (BellSouth Documents ##00077, 00078, 00079)
- FAXED: 11/25/96 (BellSouth Documents ##000080, 00081)

PON I00047CMB

- FAXED: 12/02/96 (BellSouth Documents ##00083, 00084, 00085)

- FAXED: 12/02/96 (BellSouth Document #00086)
- FAXED: 12/04/96 (BellSouth Document #00087)
- FAXED: 12/04/96 (BellSouth Documents #00088)
- FAXED MEMO: 12/5/96 (BellSouth Document #00171)
- FAXED: 12/11/97 (BellSouth Documents #00093, 00094, 00095)
- FAXED: 12/11/96 (BellSouth Document #00092)
- FAXED: 12/11/97 (BellSouth Documents #00093, 00094, 00095, 00096, 00097, 00098, 00099, 00100, 00101, 00102, 00105, 00106, 00107, 00108)

Response Provided by: Martha Jackson

ACSI-16: **Does BellSouth contend that it requested a due date for PONs I0042CMB, I00043CMB, I00044CMB, I00045CMB, or I00047CMB other than that requested by ACSI in those orders? If so, for each PON that you claim BellSouth requested a different due date, identify the due date requested by ACSI, the due date requested by BellSouth, the person(s) that requested a change in the due date, the manner in which the request was made, the person(s)at ACSI to whom the request was communicated, the date upon which BellSouth first attempted to install the loops ordered in the PON, and all documents which form the basis for your answers.**

Response: No.

Response Provided by: Martha Jackson

ASCI-17: **For PONs I00042CMB, I00043CMB, I00044CMB, I00045CMB, and I00047CMB, identify each date and time upon which BellSouth attempted to install the service requested by ACSI, what was done on each date and time, and the date and time upon which the service requested in the PON was established.**

Response: See BellSouth Documents ## 00001 *et seq.* produced on March 17 The information in those documents was extracted from BellSouth's Work Force Administration (WFA) log and its service order records. Information about some attempts to install these services may have been lost due to the cancellation and reissue of orders. The following is a verbatim of that information, which has been extracted from the WFA log and the service order records and collated to show the events in chronological order:

PON I00042CMB	ASR 9631800030	ORD CO15PPD4
11/13/96	1008	Order Received in EXACT
11/13/96	1621	A57 passed expedite to Pam Jones in GA ISC
11/15/96	1017	KS1 Angie called for status. Checked TIRKS, not designed. Checked WFA Log 11-14 FAB Ticket and first level escalation. Called Pam in GA ISC, advised second level escalation. Pam advised if not designed by 1100 will 3rd level. Advised Angie. She will call back.
11/15/96	1215	A57 called Pam Jones and she got Barbara in CPG on line and she advised she is unable to design. She got Linda Anderson on line who is the person that is going to design model and Linda advised that she is going to look and design as quickly as possible. There is a problem and they are not sure what it is but they have escalated to Mary Fagan.

11/15/96	1239	A01 Pam Jones called Advised circuit should have been installed yesterday Customer very upset Advised on Notes above Designing circuit now Will advise of DD when ICSC notifies ICSC Customer advised will refer to Connie Conley @ 1130 if not heard from anyone. Referred to Barbara Jones @ 1035 to get circuit installed today ICSC received ASR 0830 11/13/96
11/15/96	1241	A57 called Pam Jones, advised working on this PON and verified what CFA's are and they are correct and I also advised her that I don't show anything spare on 80001 but she says entire T0TIE should be spare.
11/15/96	1517	A57 Order is wrong, NC code should be LZ-Z and should be GA @ the other LCSC and I passed her to Barbara Gene Warren who educated Pam Jones on how to send her order and give her the correct TN and their fax number because they are no line I am going to cancel this PON.

PON I00042CMB	**ASR 9632000145**	**ORD COB96R02**
11/15/96	1638	Received order in EXACT.
11/15/96		Order input into SOCS with a Due Date of 11/18/96.
11/18/96	1207	Received order in WFA/C.
11/18/96	1403	Received Sup with corrected Tel. Nos. and change DD to 11/20/96. (Documentation SPNP request from Lisa Janders, ACSI.)
11/20/96	0909	6FS called IMP number and reached recording saying to leave a VMS which I did, requesting call back before 1500.
11/20/96	1243	6FS called IMP number again and reached David at ACSI who said he is at lunch and will call me back.

11/20/96	1304	6FS Per David McAdoo and Benny Mosier at ACSI. their dial tone is not ready yet and they want this put on hold
11/20/96	1531	6FS Barbara Gene. Manage is bus ofc spoke w/ACSI and they told her that this was still on for today. Said that have some translations problems and hope to resolve She said they will call me. I sure hope they give us time to coordinate.
11/20/96	1600	6FS called RCMAG to touch base to see if any special person dedicated to ALEC orders and talked to Bernice who said no there was-n't. She checked the CRO orders and said that they had already flowed through.
11/20/96	1605	6FS talked to Ann McMillon and Lloyd Mize. It would appear the customer has been out of service since 11/19 at 1619.
11/20/96	1606	6FS called David at ACSI and told him I needed to know what was going on. He said that the cross connect has been made at the SLC but Juan still working on their switch but they were real close to being ready. David said he can't change DD but that a Pam Jones could.
11/20/96	1628	6FS handed off ticket to C.O. indicating IC customer was ready to work item 1 and item 2. Please call Melba before cutting.
11/20/96	1701	6FS Barbara Gene called saying that IC [ACSI] wanted to cut this. Dropped ticket to C.O. and called WMC [Work Management Center] to load.
11/20/96	1702	6FS Frank Thomas called saying that this is not a Toll cut. It will be a cut on the Frame. He got Bobbi on line on frame and she said she worked this yesterday.
11/20/96	1705	6FS called David at ACSI who said they still have problems and are not ready on this but he is real close and will call me back.

11/20/96	1822	6FS has not received call back from ACSI
11/22/96	1008	Received Sup from Lisa Janders to change Due Date to 11/22/96 (Documentation SPNP request form.)
11/22/96	1829	6FS can't believe the IC called in here at 1645 to work on this. Anyway they did and I got into SMAS and pulled dial tone on both circuits. David called the new 243-0033 and 234-0034 numbers and they seem to be OK However when you call the old 653-7062 and 7064 you reach a recording saying they are being checked for trouble.
11/27/96	1135	6FS posted order complete

PON I00043CMB	**ASR 9633000086**	**ORD COD35914**
11/25/96	1148	Order received via ASR FAX with a DDD of 11/27/96.
11/25/96	1356	Received Sup from ACSI to add FDT of 0900.
11/26/96	1628	Order received into WFA/C.
11/27/96	1355	6DL contacted Craig, ACSI, who requested call prior to cut.
11/27/96	1725	6DL contacted Diane, ACSI, advised problem, agreed to cut Monday 12/2/96.
11/27/96	1812	6DL contacted by Margaret, RCMAG, advised was disconnected in error, put back in service.
12/2/96	1559	6DL attempted cut, had assignment problems in C.O., advised Terri Hinson, ACSI, that we were cutting back. Had new pairs assigned and not reused.
12/2/96	1809	Received Sup from Lisa Janders, ACSI to change DD to 12/20/96.
12/17/96	1154	Order Canceled per WFA Log.

PON I00043CMB	ASR 9633000086	ORD CO7P10V6
1/6/97	1523	Order received in WFA/C
1/6/97	1743	6FS did hand-off to C.O advising them of 0900 cut and to call into conference bridge
1/6/97	1825	6FS accessed TP and pulled dial tone from ACSI and ANAC'd [verified telephone number]. Number was 706-243-0035
1/6/97	1830	6FS was told about cut after 1700 and was not able to set this up with RCMAG. Will come in at 0800 and try to get someone set up to work with RCMAG Supervisor John Coleman.
1/6/97	1923	6FS Per Glen Miller, they want us to ANAC our existing svc. Get on caprs [cable pairs] and pull dial tone from our switch and verify.
1/6/97	1933	6FS It is after hours and Frame has gone for the day. I also have no way to put ticket into CCC or Frame to get this done since my only way of HDC is from the GAS order.
1/6/97	1934	6FS has Supervisor Bernice Ford on line in GA CCC trying to explain this to her.
1/6/97	2014	6FS Bernice called back and advised Mr. Spencer will go to C.O. but it will be 1 hour before he gets there.
1/6/97	2049	6FS Spencer called and verified that the existing number is on the existing capr.
1/7/97	0854	6FS contacted Vince with ACSI verified release for cut. Was advise OK to cut.
1/7/97	0911	6FS Vince advised physical cut complete. Can test to End User. RCF in progress.
1/7/97	0927	6FS RCF complete and test verified to End User Janice Hodge.

1/7/97	0941	6FS Vince advised post test complete Refused to accept. Did not want to do any post test verification
1/7/97	0958	6FS posted complete

PON I00044CMB	ASR 9633000120	ORD COCCTRK8
11/25/96	1257	Order received in EXACT with DD of 11/27/96 FDT of 1400.
11/25/96	1542	Order received in WFA/C.
11/27/96	0958	6FS is reviewing svc. [service] orders involved. This engineering did not use correct caprs on the order. I have input FAB ticket to correct this.
11/27/96	1132	6FS did hand-off to C.O. advising this is to be cut at 1400.
11/27/96	1212	6FS called C.O. and talked to Lewis who advised he has this wired.
11/27/96	1423	6FS and Charles on Frame began conversion. Discovered an assignment problem in RCMAG.
11/27/96	1457	6FS David McAdoo with ACSI on line.
11/27/96	1602	6FS contacted BellSouth Supervisor Ann McMillon who coordinated with Bernice in RCMAG to resolve discrepancy.
11/27/96	1611	6FS cut began.
11/27/97	1701	6FS Joe Craig in RCMAG advised RCF order is complete.
11/27/96	1714	6FS David McAdoo with ACSI accepted service.

PON I00045CMB	ASR 9633000133	ORD COBTKWX8
11/25/96	1257	Order received in EXACT with a DD 11/27/96
11/25/96	1358	Received Sup to add FDT 1100
11/25/96	1705	Order received in WFA/C
11/27/96	1220	6DL contacted Craig with ACSI We were not getting dial tone from his switch He will check translations and call back
11/27/96	1246	6DL was called by Craig with ACSI advised not call forwarding properly 706-320-9433.
11/27/96	1711	6DL contacted by Joe Craig advised that call forwarding problem resolved. Contacted Craig with ACSI and turned up for service.

PON I00047CMB	ASR 9633800084	ORD CODKFQ06
12/3/96	1844	Received order in EXACT with a DD of 12/4/96 FDT of 0900.
12/4/96	1027	Received Sup from Kelly Gallagher, ACSI to change DD to 12/5/97 FDT of 1400
12/5/96	0937	Received Sup fro Lisa Janders, ACSI to change DD to 12/12/96.
12/11/96	1347	Received Sup from Kelly Gallagher, ACSI to change DD to 12/18/96.
12/11/96	1916	Received Sup from ACSI to change DD to 1/3/97.
12/2196	1481	Received order in WFA/C.
12/31/96	1058	6DL contacted Blane at ACSI to verify DD for cut. Blane advised can't cut until DD.
12/31/96	1106	6DL Blane says we can call whenever ready to cut this.
12/31/96	1222	6DL Blane says OK to cut this at 1430 today.

12/31/96	1433	6DL Cut complete on Frame Numbers being ANAC'd
12/31/96	1440	6DL completed order to Blane
12/31/96	1441	6DL competed order in WFA/C

Following are definitions of acronyms and abbreviations used in the foregoing

A57, KS1, A01, 6FS, 6DL - Owner Code for Technicians working on, or commenting on ticket status.

ANAC - Automatic Number Announcement Circuit

ASR - Access Service Requirement

C.O. - Central Office

CCC - Hand-off should always be dispatch in with a center type of "ccc". (Such as GACCC)

CFA - Connection Facility Assignment

CPG - Circuit Provisioning Group.

CRO - Complete with Related Order

DD - Due date

DDD - Desired Due Date

FAB - Field Assistance Bureau, group responsible for Local Cable Pair maintenance and provisioning change coordination.

FDT - Frame Due Time. When order will be input to the switch translations.

GAS - Georgia Special Order

HDC - Status Narrative ("dispatched in")

ICSC - Interexchange Customer Service

ISC - InterSystems Coupling (TEAM).

LZ - Service Code for Unbundled Loop

NC - Network Channel

ORD - Order

PON - Purchase Order Number

RCF - Remote Call Forward

RCMAG - Recent Change Administrative Group

SPNP - Service Provider Number Portability

Sup. - Short for Supplementary change to an order.

T0TIE - DS0 Level Connection (1 channel)

TN - Telephone Number

TP - Test Point for Switched Maintenance Access System (SMAS).

VMS - Voice Mail System

Response Provided by: Kenneth L. Ainsworth

ACSI-18: **For PONs I00042CMB. I00043CMB. I00044CMB. I00045CMB. and I00047CMB, identify the date and time upon which BellSouth claims the installation was completed and all documents upon which you rely for this claim.**

Response: See Response to ACSI-17.

Response Provided by: Kenneth L. Ainsworth

ACSI 19: To the extent that final installation of any of the orders identified with PONs I00042CMB, I00043CMB, I00044CMB, I00045CMB, and I00047CMB was delayed, state each and every reason that BellSouth claims contributed to or caused the delay. To the extent your answer refers to an action allegedly taken or failed to be taken by ACSI, identify the action taken or failed to be taken, the ACSI employee (if any) that took or should have taken the action, the date and time the action occurred or should have occurred, and, in the case of an alleged failure to act, the date and time upon which the action allegedly did occur.

Response: See Responses to ACSI-12, ACSI-15 and ACSI-17, the documents referenced in the Responses to ACSI-15, ACSI-17, and BellSouth Documents ##00566-00704.

In addition to the ACSI failures or actions indicated in those responses and documents, the ACSI collocated frame termination in BellSouth's Columbus Main Central Office was labeled (stenciled) as "Cable" and "Pair" instead of "T0TIE." ACSI's vendor responsible for installation and stenciling of the frame, which was previously used equipment, had failed to restencil the frame for its new use. The effect of this failure to make it impossible for BellSouth to find the correct ACSI facility termination for connection of ACSI's unbundled loops. In other words, when ACSI issued an order to BellSouth, the order specified the location on the frame at which BellSouth should connect the unbundled loop. The stenciling on the frame did not match the assignment information provided by ACSI. Thus, circuit continuity could not be established between BellSouth's unbundled loops and ACSI's facilities.

The following timeline prepared by BellSouth Specialist Brian Blanchard describes how BellSouth discovered this problem and the extraordinary steps that BellSouth took to help ACSI correct the problem:

December 12, 1996 - I was contacted by Ken Ainsworth to help determine a provisioning problem with ACSI collocation in Columbus. After looking at several orders and talking over the phone to central office technician, Ken asked me to visit the Columbus central office to determine what the actual problem was.

December 13, 1996 - I went to the Columbus Central office and inspected the ACSI collocation arrangement. The frame termination was labeled as Cable and Pair instead of T0TIE. The central office and ACSI were guessing in an attempt to determine a common scheme. This common scheme was only working with pairs below 96. The frame block terminations were labeled as Cable 1-96, 101-196, 201-296 and 301-396. The central office technician and I tested the first and last channel on each shelf to determine whether the equipment was wired correctly to the frame. I left yellow POST-IT® notes on the frame block terminations with the correct T0TIE designation so that the installation vendor could relabel the frame blocks. With these POST-IT® notes the central office technicians could also wire all future orders to the correct termination.

December 14, 1996 - I participated in a conference call to process service orders and discuss collocation issues for ACSI at Columbus. Determined that Ken Ainsworth and I would talk to Pam Jones at ACSI about the T0TIE assignments.

December 16-19, 1996 - I developed drawings detailing the collocation arrangement and how to read the DLRs. I faxed these drawings to Pam Jones and discussed how to associate the T0TIE carriers to the slot and port on the equipment. After these discussions, I agreed that BellSouth would provide additional notes on the DLR to determine that T0TIE carrier systems have two channels. I had the program that generates the TIE carrier systems updated to include these notes. The Georgia Circuit Provisioning Group added these notes to the T0TIE carrier system DLRs and mailed them to ACSI. (See documents ## 00813-00817, to be produced on April 1.)

BellSouth has subsequently found similar stenciling errors on ACSI's equipment in Louisville, Kentucky, Montgomery, Alabama, and Birmingham, Alabama.

Response Provided by: Brian Blanchard and Ken Ainsworth

ACSI 20: Please identify all actions, if any, BellSouth took in response to PONs I00042CMB, I00043CMB, I00044CMB, I00045CMB, and I00047CMB, to coordinate with ACSI the cutover of these customers to ACSI unbundled loops. For each action BellSouth took, your answer should, at a minimum, identify precisely what action was undertaken, the person(s) at BellSouth that took the action, the person(s) (if any) at ACSI that BellSouth contacted, the outcome of the action, and all persons at BellSouth with knowledge of the action taken.

Response: See Response to ACSI-15, ACSI-17, and ACSI-19.

Response Provided by: Brian Blanchard, Ken Ainsworth, Eddie Owens, Martha Jackson

ACSI 21: **Please identify all routine reports BellSouth prepares or has prepared on its behalf which refer, identify or relate to the status of orders its receives for the installation, maintenance, or repair of unbundled loops provided by BellSouth, and identify all documents which are, refer to, include, or otherwise relate to any routine reports created during or referring to the period between November 1, 1996 and January 6, 1997.**

Response: BellSouth does not produce such routine reports, but has produced the report provided on March 17 as BellSouth Documents ## 00001 *et seq.*

Response Provided by: *Kenneth L. Ainsworth*

ACSI 22: **State the installation interval, as measured from the date upon which BellSouth receives the order to the date of customer delivery, that BellSouth provides services to its own customers, as is referred to in Section IV.D.1 of the Interconnection Agreement, and identify all documents which measure, report, or refer to this interval (including without limitation, all documents upon which BellSouth relies in responding to this interrogatory). If the installation intervals vary for different types of orders, identify each order type and state the installation interval for each.**

Response: Installation intervals for exchange services provided to BellSouth's business and residential customers are individually determined based on factors such as the availability of facilities, access to customers' premises and equipment rooms, conduit, electrical power or ground, space on backboards or equipment racks, and work force at the time the order is received. Installation intervals for private line and special access services are based on Customer Desired Due Date, subject to the same factors.

Response Provided by: Kenneth L. Ainsworth

ACSI 23: State the installation and service intervals that BellSouth provides for network elements for use by itself, its affiliates or its own retail customers as is referred to in Section IV.E.3 of the Interconnection Agreement, and identify all documents which measure, report, or refer to these intervals (including without limitation, all documents which BellSouth relies in responding to this interrogatory). If the installation and service intervals vary, identify each different category and state the installation and service intervals for each.

Response: BellSouth has not established installation and service intervals for the provisioning of individual network components used to provide exchange or exchange access services for use by itself, its affiliates, or its retail customers.

Response Provided by: Kenneth L. Ainsworth

ACSI 24: **State each measurement of the service quality of leased network elements when BellSouth uses those elements for its own purposes and identify all documents which measure, report, or refer to each measurement (including without limitation all documents upon which BellSouth relies in answering this interrogatory). If your answer varies by element, identify each different category and provide measurements for each.**

Response: BellSouth does not understand what is meant by "leased network elements" in this context.

Response Provided by: Kenneth L. Ainsworth

ACSI 25: **State how the installation intervals, service intervals, and service quality, as referred to in Sections IV.D.1, IV.E.1, and IV.E.3 of the Interconnection Agreement, compare to that which BellSouth provided to ACSI before January 6, 1997 and identify all documents which measure, report, or refer to BellSouth's performance with respect to ACSI.**

Response: See BellSouth Documents # 00001 *et seq.* At all times before and since January 6, 1997, BellSouth's objective has been to provide network elements on the due dates requested by ACSI, subject to the factors described in the Response to ACSI-22 and to provide a level of quality equivalent to that provided to BellSouth's retail customers. Information provided in response to previous interrogatories demonstrates the extent to which BellSouth has met or failed to meet these objectives.

Response Provided by: Joan Bryant

ACSI 26: **Summarize what BellSouth contends its Executive Vice President, Ann Andrews, said to ACSI on December 4, 1996 conference call with regard to the question of whether BellSouth would provide basic provisioning functions (such as order status, jeopardize against due dates, etc.) equivalent to what BellSouth provides to special access customers and identify all documents (including without limitation notes and recorded documents) which record, summarize, refer, or relate to Ms. Andrews' statements on the December 4, 1996 conference call.**

Response: BellSouth has found no evidence to indicate that Ann Andrews participated in a conference call with ACSI on December 4, 1996. Documents provided to ACSI on March 17 (BellSouth Documents ##00718-00722, 00755-00757) are hand-written notes of a conference call with ACSI on December 4, 1996. These notes were taken by two different BellSouth employees and do not list Ann Andrews attending this call.

Response Provided by: Paula Murphy, Roger McElroy

The foregoing statements of fact in response to the ACSI interrogatories and the identification of persons responsible for supplying such statements of fact are supported by the Declaration of Alphonso J. Varner appended hereto.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

R. Douglas Lackey
Michael A. Tanner
675 West Peachtree Street, N.E.
Suite 4300
Atlanta, Georgia 30375
Telephone: (404) 335-0764
Fax: (404) 614-4054

By: _____

L. Andrew Tollin
Michael Deuel Sullivan
WILKINSON, BARKER, KNAUER & QUINN
1735 New York Avenue, N.W., Suite 600
Washington, D.C. 20006-5289
Telephone: (202) 783-4141
Fax: (202) 833-2360

By: _____

William B. Barfield
Jim O. Llewellyn
1155 Peachtree Street, NE
Suite 1800
Atlanta, GA 30309-2641
Telephone: (404) 249-4445
Fax: (404) 249-5901

By: _____

David G. Frolio
1133 21st Street, NW
Washington, DC 20036
Telephone: (202) 463-4182
Fax: (202) 463-4195

Its Attorneys.

March 28, 1997

CERTIFICATE OF SERVICE

I, Robert G. Kirk, hereby certify that copies of the foregoing Responses and Objections to ACSI's First Set of Interrogatories have been served on the following persons by hand or overnight delivery service this 28th day of March 1997

Brad E. Mutschelknaus, Esquire
Steven A. Augustino, Esquire
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Riley M. Murphy, Esquire
James C. Falvey, Esquire
American Communications Services, Inc.
131 National Business Parkway, Suite 100
Annapolis Junction, MD 20701

Robert G. Kirk

Direct Testimony of Loyall Meade on Behalf of MFS Intelenet of Georgia, Inc. Before the Georgia Public Service Commission (February 14, 1997)

BEFORE THE
GEORGIA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	
Consideration of BellSouth	)	
Telecommunications, Inc.'s	)	Docket No. 6863-U
Entry Into InterLATA Services	)	
Pursuant to Section 271 of the	)	
Telecommunications Act of 1996	)	

DIRECT TESTIMONY OF LOYALL MEADE ON BEHALF OF MFS INTELENET OF GEORGIA, INC.

February 14, 1997

states, a separate certification process was required in Georgia to obtain authority as a competitive local exchange carrier (CLEC). In addition, unlike special access and private line service, local exchange service also requires the investment, installation, programming and testing of a switch.

Switch deployment requires extensive testing to ensure absolutely transparent operations with respect to call handling, end user features, function and service attributes, and industry standard interfaces and protocols. After a CLEC is certified and has installed a switch, it still must interconnect its facilities with the incumbent local exchange carrier in order to access the public switched network. To do so you must negotiate the terms of interconnection with the LEC.

8.Q. **PLEASE DESCRIBE THE INTERCONNECTION AGREEMENT NEGOTIATION PROCESS.**

A. As the Commission has come to learn, an interconnection agreement is a contract governing the universe of complex relationships between an LEC and a CLEC so that the two can provide seamless service to the customers of both carriers' networks. The Commission well knows from its 1996 Act interconnection arbitrations what comprises an interconnection agreement, but I will briefly outline the highlights.

- **Physical Interconnection Terms**: the number and location of points of interconnection, type of interface, standards and intervals related to deployment and upgrades of interconnection equipment;

- **Transport and Termination of Telephone Exchange Service Traffic:** Determination of specific trunk groups for various types of traffic (local, intraLATA toll, operator, information services);
- **Reciprocal compensation;**
- **Transport and Termination of Exchange Access Traffic:** Determination of specific trunk groups for traffic from MFS end users to IXCs via LEC tandem switches;
- **Access to Incumbent 9-1-1 Infrastructure;**
- **Access to Directory Assistance;**
- **Access to White Pages and Yellow Page Listings;**
- **Access to and Pricing of Unbundled Loops and Other Elements:** Provisioning intervals, ordering processes, cut-over procedures, specification of loop types, etc.;
- **Collocation Arrangements;**
- **Number Portability:** Implementation of Interim Number Portability ("INP") via Remote Call Forwarding ("RCF"), Direct Inward Dial ("DID"), pass-through of terminating compensation of INP traffic; and
- **Access to, and Billing of, Third Party Traffic**

A LEC and a CLEC either agree to terms, or they arbitrate before the Commission pursuant to the 1996 Act, or a combination of both. Whatever route the negotiations take, the interconnection agreement ultimately is filed with the Commission and approved.

In MFS' case, it initiated negotiations with BellSouth prior to the enactment of the 1996 Act. It took a full year from the initiation of the negotiations until an interconnection agreement covering a number of issues was signed. Even then critical economic issues remained for the Commission to decide through the arbitration process. In particular, the rate for unbundled loops was arbitrated by this Commission. Even today the loop rates established are only interim rates.

9.Q. **PLEASE BRIEFLY DESCRIBE THE CO-CARRIER IMPLEMENTATION PROCESS.**

A. Implementation of co-carrier arrangements with the LEC generally involves many, many details. What follows is simply an outline of the types of issues a co-carrier must resolve:

- Develop joint procedures for interconnection, unbundling, monitoring, and testing;
- Set up and test all interconnections, procedures, and electronic interfaces;
- Meet with each municipal or county 911 authority to coordinate 911 integration;
- Install and test unbundled loops and unbundled loop provisioning procedures;
- Trial joint coordination of unbundled loop and interim number portability for "live" customer accounts, within specified cut-over window.
- Develop and implement ordering and billing procedures.
- Request and obtain NXX codes and list in LERG.

These steps may take from days to months to accomplish and many of these steps can only be initiated after other steps have been accomplished. As a new entrant it is absolutely

While establishing billing procedures is obviously complex, the Commission should realize that decisions and agreements on who gets billed for what and who pays for what must be addressed for a large number of different types of calls.

As you can see, much has to be accomplished before even one customer can be served. Not to overstate the point, but it requires emphasis, unless MFS and the LEC get the process working correctly, we will be out of the marketplace before we even start.

11.Q. **WHAT ARE SOME OF THE PITFALLS OF LOCAL COMPETITION IMPLEMENTATION?**

A. There are many pitfalls. There are a host of provisioning and operational issues through which a LEC, like BST, can impede development of local competition through delay. I am not suggesting that this is even intentional, it is simply the nature of the arrangement. However, because of the complexity of the arrangements, it is frequently difficult to determine where "fault" lies. For your purposes today, however, "fault" is not the issue. As long as the problems persist local competition cannot take root.

12.Q. **HAS MFS EXPERIENCED ANY OF THESE PROBLEMS IN IMPLEMENTING LOCAL COMPETITION?**

A Yes. MFS is currently operating as a co-carrier or is in the detailed implementation stage with all of the RBOCs. Each one has its own requirements for ordering and provisioning procedures, such as specific order forms and interfaces (manual, mechanical, electronic), any of which may have a specific software database platform. Moreover, nomenclature and terminology can differ not only between MFS and the LECs, but also among the LECs themselves. This lack of standardization results in delays in orders being accepted,

confirmed and processed. MFS has had these difficulties occur in virtually all markets for the provisioning of both interconnection trunking and unbundled loops.

In addition, MFS has experienced problems in some markets due to the LEC's lack of procedures. For example, we have had LECs connect an unbundled loop customer for MFS, only to disconnect the customer several days later, because it issued a disconnect order as part of its loop conversion procedure, after the loop was installed.

13.Q. **HAS MFS EXPERIENCED ANY OF THESE PROBLEMS IN IMPLEMENTING LOCAL COMPETITION IN GEORGIA?**

A. MFS has not yet provided service using unbundled loops in Georgia, so it is too early to tell whether certain of the specific issues which have arisen elsewhere will develop in Georgia. Nonetheless, MFS has already experienced a number of problems in implementing local competition in Georgia. Some of these problems illustrate the importance of the "back room" process. An example of the need for operational support systems is MFS' problems obtaining customer service records ("CSRs") from BST on a timely basis. CSRs indicate which services the customer purchases from its current carrier. MFS needs CSRs so that it can convert customers from a bundle of BST services to a similar bundle of MFS services. MFS had been receiving CSRs from BST in a matter of two days after we requested them; after a few weeks, however, the CSRs were taking 5-8 days, or more, to obtain, even with persistent follow-up. After MFS escalated the issue within BellSouth, a BellSouth project manager was assigned to ensure that CSR requests are turned around quickly, and I believe that the interval is now back down to an acceptable window of 48 hours. Clearly, BST had been either inadequately staffing or processing these requests for CSRs, or both.

The current lack of standardization of order forms, interfaces, and demarcation points of responsibility impede the ability to implement local services in a timely and effective manner. In addition, since BST had no need previously to provide these arrangements to others, there is a near total lack of intracompany procedures. These issues have hampered markedly MFS' ability to provide a local exchange service that is competitive with the service the LEC provides and in other markets have damaged MFS' relationships with its customers. Where there have been service problems, the customer naturally blames MFS, as its local exchange carrier, even though the root of the problem may lie with the LEC.

14.Q. **HAS MFS EXPERIENCED PROBLEMS WITH THE PROVISION OF LOCAL SERVICE USING UNBUNDLED LOOPS?**

A. MFS' experience in other states with the process of converting customers' service from bundled access lines to unbundled loops for use by MFS has revealed a number of problems demonstrating the complexities involved. The conversion process requires careful coordination by the LEC and MFS technicians to meet installation dates promised to customers and to avoid unnecessary or prolonged service down times. Unfortunately, MFS has suffered the consequences of a lack of coordination on the part of personnel in the provisioning of unbundled loops and the cutover of customers to MFS' service. When there are problem conversions, there is a significant risk that a customer will lose confidence in MFS and switch back to the LEC.

An example of a coordination problem which has serious negative implications for MFS involves scheduling the actual conversion. For customer convenience, MFS will often schedule a cutover for businesses after normal business hours and will agree to pay the

overtime rate for the technician so that the customer will not be out of service during business hours. If the technician misses the scheduled appointment, the whole point of the early scheduling procedure -- to ensure that the customer does not lose service during business hours -- is lost. Unfortunately, our experience has been that it is not an unusual occurrence for the scheduled conversion to be delayed for some period of time.

15.Q. **WHAT OTHER CUSTOMER CONVERSION PROBLEMS HAS MFS EXPERIENCED?**

A. In addition to these types of coordination cutover problems, MFS has experienced conversion problems even when it converts a customer in the resale environment. In this situation, no physical change need be made to convert the customer. There is no cross connect, no disconnect. The only change, in effect, is a change to the billing information. MFS, as a reseller, becomes the customer of record for LEC billing purposes. This is clearly the simplest form of customer conversion. Despite that fact, MFS has experienced conversion problems even in that context. Customers seeking to convert to MFS have been disconnected and even when this is discovered have not been promptly reconnected. This problem may result from inadequacies in the LEC internal cutover notification or ordering procedures.

Local competition cannot work until OSS systems are in place so that LEC to CLEC conversions are as simple as a PIC change for long distance service. Until that happens, it will be almost impossible for significant local competition to develop.

16.Q. **WHAT EFFORTS IS MFS CURRENTLY UNDERTAKING TO ORDER UNBUNDLED BST LOOPS?**

A. At present, MFS and BST are conducting an unbundled loop pilot program. The purpose of this pilot program is to test the validity of the ordering and provisioning process as it relates to unbundled loops. MFS has conducted these pilots in every new market in which we have rolled out local service.

The pilot consists of a series of orders for new unbundled loops and the conversion of existing LEC bundled services to unbundled services in a controlled environment. This allows both MFS and the LEC to cooperatively test their methods, procedures and interfaces in an atmosphere which does not affect live end users. The pilot continues through a series of ordering, maintenance and repair scenarios and concludes with the disconnect of the unbundled services.

When MFS orders an unbundled loop, the loop is disconnected from the LEC equipment in the CO and cross connected to MFS' IDLC. In order for us to access unbundled loops, we must first install an IDLC in the LEC's central office. This equipment is wired to our existing equipment in the Central Office, which may be virtually or physically collocated, depending upon the unique circumstance of the central office.

Based upon a schedule mutually developed by MFS and BST, the Atlanta pilot was originally scheduled to begin in mid-November 1996. Due to a series of delays involving wiring, equipment installation and testing, the pilot did not commence until the latter part of January. Again this was not atypical of MFS' experience in other new markets. Both the local MFS personnel and their BST counterparts were new to the process of ordering,

provisioning and installing unbundled loops. Adding to the complexity of the pilot was the fact that the MFS equipment was installed in both a physical and virtual collocation mode, necessitating different rules and procedures in each case for both MFS and BST.

It is important to note that these significant delays occurred in a controlled environment set up specifically for testing. The problems occurred primarily due to difficulties surrounding the installation of equipment, wiring the equipment within the COs, and a general disparity in nomenclature between the two companies. As indicated, the cause for the delays even in a test environment are multiple.

Our experiences with the Atlanta pilot are not atypical of the challenges faced in other LEC markets. There is usually some confusion or misinterpretation of unbundled loop service orders, internal processes which were thought to accommodate the loop provisioning often fail and critical dates are often not met. In this case, the most significant delays occurred due to difficulties surrounding provisioning of cables and unbundled loops. One of the key problems has resulted from the nonstandardized nomenclature for identifying and ordering loops.

Some might consider the pilots to be failures; they consume an inordinate amount of time and resources, and they often do not allow MFS to enter a market as soon as it would like. They are successful, however, in pointing out the difficulties and complexities in entering new markets. The pilots are excellent arenas to uncover procedural deficiencies, test new methods and provide hands-on experience for those people who eventually have to do the real work. Admittedly they only scratch the surface of a very intricate and complex process

Direct Testimony of Richard Robertson Before the Georgia Public Service Commission (March 3, 1997)

BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

In the Matter of:	
CONSIDERATION OF BELLSOUTH TELECOMMUNICATIONS, INC.'S SERVICES PURSUANT TO SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996	Docket No. 6863-U

Room 177
244 Washington Street
Atlanta, Georgia

Monday, March 3, 1997

The above-entitled matter came on for hearing pursuant to adjournment at 9:02 a.m.

BEFORE:

ROBERT BAKER, Vice Chairman
ROBERT DURDEN, Commissioner

* * *

Before the
STATE OF GEORGIA
PUBLIC SERVICE COMMISSION

In Re: Consideration of BellSouth Telecommunications, Inc.'s Entry Into InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996	)))))	Docket No. 6863-U

DIRECT TESTIMONY OF RICHARD ROBERTSON

Q. **PLEASE STATE YOUR NAME, POSITION AND BUSINESS ADDRESS.**

A. My name is Richard Robertson. I am the Executive Vice President/General Manager – Switched Services of American Communications Services, Inc. ("ACSI"). My business address is 131 National Business Parkway, Suite 100, Annapolis Junction, Maryland 20701.

Q. **PLEASE DESCRIBE YOUR BUSINESS EXPERIENCE AND BACKGROUND.**

A. I joined ACSI in April 1996 to serve as Executive Vice President/~~General Manager – Switched Services~~ Engineering And Operations. Prior to joining ACSI, I worked for BellSouth for 16 years and, from 1991 to 1996, I directed marketing activities for its $4.0 billion network interconnection business. In that role, my responsibilities included negotiating interconnection agreements with competitive local exchange carriers ("CLECs"). I was responsible for development and implementation of BellSouth's advanced intelligent network ("AIN") services for the interconnection market and also formulated the company's plan for and entry into the customer premise equipment ("CPE") market in the mid-1980s. I have a bachelor's degree in electrical engineering from Virginia Tech and an MBA from the University of Virginia.

Q. **PLEASE BRIEFLY DESCRIBE THE OPERATIONS OF ACSI AND ITS OPERATING SUBSIDIARIES.**

A. ACSI is a provider of integrated local voice and data communications services to commercial customers primarily in mid-size metropolitan markets in the southern United States. The Company is a rapidly growing CLEC, supplying businesses with advanced telecommunications services through its digital SONET-based fiber optic local networks.

ACSI is a Delaware corporation that is traded publicly on the NASDAQ market under the symbol "ACNS". ACSI, through its operating subsidiaries, including American Communication Services of Columbus, Inc., already has constructed and is successfully operating networks and offering dedicated services in many states. At present, ACSI has 21 operational networks, including one in Columbus, Georgia, and an additional 15 networks under construction.

Q. **PLEASE DESCRIBE ACSI'S OPERATIONS IN GEORGIA.**

A. ACSI has constructed a digital SONET-based fiber optic network connecting the major commercial areas of Columbus, Georgia. ACSI received its authority to provide local telecommunications services in Georgia on June 21, 1996 in Docket No. 6496-U.

Q. **WHAT SERVICES DOES ACSI PROVIDE IN GEORGIA?**

A. ACSI currently provides, or is actively implementing plans to provide, a wide range of local telecommunications and data services, including dedicated and private line, high-speed data service solutions, including IP switching and managed services, local switched voice services, and Internet services.

Q. **HAS ACSI ENTERED INTO AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. ("BELLSOUTH") IN GEORGIA?**

A. Yes. ACSI and BellSouth finalized an interconnection agreement which provides for mutual traffic exchange and access to unbundled network elements, including unbundled loops, on July 25, 1996. This agreement was amended on October 17, 1996 to resolve the pricing issues that were the subject of arbitration in Docket No. 6854-U. The Georgia Public Service Commission ("Commission") approved the ACSI/BellSouth Interconnection Agreement ("ACSI Interconnection Agreement") on November 8, 1997. A copy of the agreement was provided by BellSouth in its testimony, Varner Exhibit 1, Attachment 3, Tab 2.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to present ACSI's response to BellSouth's Statement of Generally Available Terms and Conditions ("Statement") and BellSouth's apparent position that it will soon meet the requirements of the competitive checklist contained in Section 271(c)(2)(b) of the Communications Act of 1934, as amended (the "Act"). As a facilities-based provider of local exchange service to a small number of business customers in Columbus, Georgia, ACSI has critical first-hand experience in dealing with BellSouth in the local exchange market. ACSI's experience demonstrates that BellSouth still has great strides to make in opening the local market to competition before BellSouth's entry into in-region long distance service would be in the public interest. Based upon ACSI's experience, BellSouth's request to provide in-region interLATA service is premature. The Commission should withhold support, under its consulting role pursuant to Section 271 of the Act, for BellSouth's anticipated FCC application to provide in-region interLATA service until competition has developed and the necessary safeguards are in place to ensure that local competition will develop.

Q. AS A THRESHOLD MATTER, WHAT STANDARD SHOULD THE COMMISSION APPLY IN DETERMINING WHETHER BELLSOUTH HAS FULFILLED THE REQUIREMENTS OF SECTION 271 OF THE ACT?

A. The Commission should not endorse BellSouth's compliance with Section 271 of the Act for reentry into the long distance market until actual, effective, facilities-based competition exists in both the residential and business markets for local exchange services and exchange access services in the State of Georgia. This standard requires BellSouth not only to have entered into interconnection agreements but also to have implemented such agreements successfully. The public interest standard also requires that BellSouth not engage in activities that impede the development of local competition in Georgia. BellSouth cannot make this showing today.

Q. DO YOU BELIEVE THAT THE SO-CALLED TRACK B IS APPROPRIATE?

A. No, because numerous potential providers of facilities-based service have requested access and interconnection. Therefore, BellSouth's reentry into the interLATA market should proceed on Track A of Section 271 of the Act.

Q. DOES ACSI OPPOSE BELLSOUTH'S REENTRY INTO THE MARKET FOR IN-REGION INTERLATA SERVICES AT THIS TIME?

A. Yes, it does. BellSouth's reentry at this time could have devastating and irreversible effects on the development of competition in local markets. Competition in the markets for local exchange and exchange access services in Georgia, to the extent it exists, is still nascent. Only a few business customers receive facilities-based service from competitive providers. There is no facilities-based provider of service to residential customers. Indeed, in most parts of the state, competition does not exist at all. Furthermore, safeguards to ensure the development of competition do not exist.

The Commission should err on the side of caution in permitting BellSouth's entry into in-region long distance. Once Section 271 approval is granted, it will be impossible to revoke that approval without serious disruption to Georgia consumers. ACSI urges the Commission to consider carefully the fact that BellSouth has little incentive to cooperate with its potential competitors, including ACSI, other than its desire to reenter the long distance market. The ideal result for Georgia consumers is to maximize competition in both the local and long distance markets. This will only occur if competition is first permitted to develop in the local markets currently dominated by BellSouth, and then one additional competitor, BellSouth, is permitted to enter the long distance market.

BellSouth's focus on the benefits to consumers of increased long distance competition as the sole criteria of public interest is misplaced. There is no question that Georgia consumers will receive some benefit when BellSouth enters the in-region long distance market. The danger of premature entry, however, in the form of limiting local competition, greatly outweighs the minor detriment of merely delaying the addition of a sixth major long distance competitor. Therefore, until actual and effective competition exists in the residential and business markets for local exchange and exchange access services in most areas of the state, BellSouth's reentry into long distance is premature and contrary to the public interest. Accordingly, ACSI urges the Commission to withhold support for BellSouth's anticipated FCC application under Section 271 of the Act.

Q. ON WHAT GROUNDS DO YOU CLAIM THAT LOCAL COMPETITION HAS NOT YET DEVELOPED ADEQUATELY IN GEORGIA?

A. Only a few markets in Georgia have competitive access providers ("CAPs") or CLECs and, even in these markets, their networks are not geographically comprehensive. For

example, ACSI's current Georgia operations are limited to Columbus. ACSI's Columbus network is further limited to the central business district. Thus, even in Columbus, where we have a network, there are customers that do not yet have ready access to our facilities.

Q. WHY ARE CLEC NETWORKS LIMITED TO THOSE AREAS?

A. Network construction is a time-consuming, complex and expensive undertaking. Although ACSI is expanding its networks at a phenomenal pace, it cannot possibly replicate the BellSouth network in the short term. BellSouth built its ubiquitous local network over the course of a century with a monopoly revenue stream derived from ratepayer dollars, while CLECs have existed for only a few years and have been funded as competitive start-up enterprises.

Q. IS THE REACH OF ACSI'S SYSTEM LIMITED ONLY BY ITS NETWORK DEVELOPMENT?

A. No. In addition to being unable to service most geographic areas of the state due to a lack of network facilities, ACSI does not provide local services to residential customers in Georgia. Indeed, ACSI anticipates that it will not be able to provide local services to residential customers for the foreseeable future.

Q. IS ACSI TECHNICALLY UNABLE TO PROVIDE LOCAL SERVICES TO RESIDENTIAL CUSTOMERS IN GEORGIA?

A. No. From a business perspective, ACSI is unable to provide local service to residential customers largely because BellSouth's pricing policies have created a price squeeze that makes it economically infeasible to serve the residential market.

Q, WHAT IS IT ABOUT BELLSOUTH'S PRICING POLICIES THAT EFFECTIVELY PRECLUDES ACSI FROM PROVIDING LOCAL SERVICE TO RESIDENTIAL CUSTOMERS?

A. In order to serve residential customers with its own facilities, ACSI must purchase local loops and related facilities as unbundled network elements from BellSouth. While ACSI will be able to replace BellSouth's interoffice transport facilities, tandem switching, local switching and signaling over time, there is no economical substitute for the ubiquitous local loop constructed by BellSouth with a century-long monopoly revenue stream. The out-of-pocket cost to ACSI of purchasing these loops from BellSouth as unbundled network elements constitute a direct cost of service to ACSI. ACSI has additional costs that it must bear in order to provide end-to-end service to the end user. ACSI must be able to recover its loop and other costs in its retail pricing. ACSI must also offer service at rates competitive with BellSouth. Unfortunately, BellSouth has demanded a price for unbundled loops (and associated facilities) that exceeds the corresponding price charged by BellSouth for residential retail local exchange services.

Specifically, ACSI must pay the following for unbundled network elements: $17.00 for 2-wire loops, $0.30 for the cross connect, and $2.25 per loop for interim number portability. Thus, ACSI's total out-of-pocket cost to BellSouth per line is $19.55, even *before* ACSI pays for its own network and overhead. In comparison, BellSouth's retail price in Columbus is only $16.75. Obviously, *since the BellSouth unbundled price to ACSI exceeds BellSouth's residential retail prices*, ACSI --or any other competitive carrier -- has no prospect of providing service in the residential market at competitive rates.

Q. WHAT WOULD HAVE TO HAPPEN TO OPEN THE RESIDENTIAL MARKET IN GEORGIA TO LOCAL SERVICE?

A. BellSouth would have to lower its prices for unbundled loops substantially. ACSI believes that permanent cost-based rates are necessary in order to begin to analyze

facilities-based competition in the residential market. Once market participants have available cost-based residential loop rates -- which necessarily include deaveraged unbundled loop rates -- they can determine whether residential competition is economically feasible.

Q. **DO CONDITIONS EXIST THAT ALSO PREVENT YOU FROM COMPETING EFFECTIVELY IN THE BUSINESS MARKET?**

A. Yes. In addition to the limited reach of our network, which I discussed previously, we have experienced considerable difficulty in implementing the ACSI Interconnection Agreement.

Q. **WHAT PROBLEMS HAS ACSI EXPERIENCED?**

A. ACSI's efforts to make competitive alternatives available to Georgia consumers have been undermined by significant problems with the provisioning of unbundled loops which have delayed, or precluded altogether, ACSI's attempt to bring its services to market. This problem is sufficiently severe that ACSI has been forced to file two separate formal complaints against BellSouth, one before the Georgia Public Service Commission and one before the Federal Communications Commission, based on BellSouth's continuing failure to provision unbundled loops to ACSI on a timely basis pursuant to the terms of the ACSI Interconnection Agreement. These complaints are in addition to a complaint ACSI filed with the FCC based upon BellSouth's discriminatory application of non-recurring charges for access service rearrangements. Copies of these complaints are appended to my testimony as Exhibit No. ___ (ACSI-1), Exhibit No. ___ (ACSI-2), Exhibit No. ___ (ACSI-3).

The principal problem is the difficulty we have experienced in obtaining unbundled loops, provisioned on a timely basis. Our customers have experienced severe service disruptions as a result of BellSouth's inability to cut over unbundled

loops. This could potentially damage ACSI's reputation as a provider of high quality telecommunications services as well as its ability to market to new customers in Columbus, Georgia. Contrary to claims made by BellSouth, although ACSI is currently providing the highest quality service to its customers, ACSI's concerns have not yet been resolved by BellSouth.

Q. PLEASE DESCRIBE THE PROBLEMS THAT YOU HAVE EXPERIENCED IN BELLSOUTH'S PROVISIONING OF UNBUNDLED LOOPS.

In November and December 1996, ACSI submitted its initial orders for unbundled loops and BellSouth failed to comply with the installation standards required by Section IV.D of the ACSI Interconnection Agreement. Severe service disruptions resulted to local exchange customers that had selected ACSI as their carrier. This situation is more fully described in our attached complaints.

On November 19 and 20, 1996, ACSI placed its first three orders for unbundled loops in Columbus, Georgia, requesting cutover of the customers to ACSI on November 27, 1996. The cutover of these customers involved conversion of a single POTS line, the simplest possible cutover. Each of the three orders included an order for SPNP. ACSI submitted each of these orders in accordance with the process established in the ACSI Interconnection Agreement and BellSouth guidelines. These orders were confirmed by BellSouth on November 25 and 26, 1996. BellSouth's processing of these orders completely failed to comply with the cutover standards required by Section IV.D of the ACSI Interconnection Agreement.

In general, the processing of these orders was not coordinated between ACSI and BellSouth, as the ACSI Interconnection Agreement contemplated, because BellSouth *unilaterally* administered the cutover without contacting ACSI. Moreover, BellSouth failed to install properly the unbundled loops ACSI requested, and caused

severe disruptions in service to the local exchange customers that had selected ACSI as their carrier. Two of ACSI's initial three customers were disconnected entirely for several hours. No outgoing calls could be placed, and customers calling the number received an intercept message indicating that the number no longer was in service. Service was disconnected for these two customers for 4-5 hours each, or approximately 50 to 60 times longer than permitted under the ACSI Interconnection Agreement. Even after the improper disconnection was remedied and the intercept message was removed for these two customers, BellSouth failed to implement SPNP as ordered by ACSI, causing further delay and disruption to ACSI's first new customers. As a result, these customers could not receive any incoming calls on their lines. As to the third customer, his service was completely disconnected for the entire day of Wednesday, November 27, 1996.

Q. **HOW DID ACSI REACT?**

A. On December 3, ACSI held back orders to protect its reputation. But for BellSouth's provisioning problems, these orders would have been processed on a timely basis. For example, on December 23, 1996, ACSI received customer orders for 113 access lines. Assuming a five day turn around, these 113 access lines should have been cut over by December 28, 1996. In fact, BellSouth had cut over far fewer lines by that date.

Each day of delay in having unbundled loops installed jeopardized our ability to retain the customers we have, not to mention our ability to attract new customers. Moreover, BellSouth's failure to process our orders allowed BellSouth to retain customers that have signed up for ACSI service.

Q. **DOES THE ACSI INTERCONNECTION AGREEMENT INCLUDE REQUIREMENTS FOR THE PROVISIONING OF UNBUNDLED LOOPS?**

A. Yes. The ACSI Interconnection Agreement provides, among other things, that BellSouth will: (1) provide mechanized order processing procedures substantially similar to current procedures for the ordering of special access services (Section IV.C.2); (2) install unbundled network elements in a timeframe equivalent to that which BellSouth provides for its own local exchange services (Section IV.D.1); (3) establish a seamless customer cutover process in which ACSI and BellSouth will agree to a cutover time 48 hours in advance, the conversion will occur within a designated 30 minute window, and service to the customer will be interrupted for no longer than 5 minutes (Section IV.D.2, D.3, D.6); and (4) coordinate implementation of Service Provider Number Portability ("SPNP") to coincide with loop installation (Section IV.D.8.).

Q. **PLEASE COMMENT ON THE CHARACTERIZATION BY BELLSOUTH WITNESSES THAT THE LOOP PROVISIONING PROBLEMS IN COLUMBUS WERE PARTIALLY THE RESULT OF ACTIONS BY ACSI.**

A Several of BellSouth's claims regarding ACSI's role in the breakdown of BellSouth loop unbundling are simply incorrect. For example, BellSouth claims that ACSI did not give BellSouth 48 hours notice to order unbundled loops. BellSouth Witness Varner, Tr. At 135. In fact, when ordering loops, ACSI submitted a request to BellSouth, and received a Firm Order Confirmation from BellSouth that included a written date and time that the cutover would take place. The ACSI Interconnection Agreement (Section IV.D.2) requires that the parties agree on a cutover time 48 hours in advance of the cutover. This BellSouth Firm Order Confirmation constituted such an agreement. In any event, if BellSouth thought that it did not have an agreed upon cutover date and time, its order monitoring processes should have ensured that the cutover would not take place. Instead, because BellSouth did not have proper internal procedures, BellSouth simply cut off .

service in several instances without coordinating the cutover with ACSI at the time and date indicated on BellSouth's own Firm Order Confirmation.

BellSouth also claims that ACSI submitted unbundled loop orders with loop unbundling on one day, and service provider number portability on the next. BellSouth Witness Varner, Tr. At 149. ACSI does ~~not have any record of such orders but, again, this merely points up the fact that BellSouth's internal order monitoring processes were not in place. All unbundled loop orders are numerically correlated to their respective number portability orders. If in fact such an order was submitted, BellSouth systems should have picked up on this and rejected the order. Because such coordinated systems are not in place, BellSouth does not have the internal capability to identify discrepancies in orders, if any existed.~~ HAVE A RECORD OF AT LEAST ONE [redacted] SUCH ORDER AND IT WAS APPROPRIATELY PLACED IN THAT SEQUENCE.

Q. HOW DID BELLSOUTH'S PERFORMANCE IN PROVISIONING THESE UNBUNDLED LOOPS IMPACT ACSI'S MARKETING OF ITS SERVICES?

A. ACSI customers routinely ask questions about ACSI's ability to deliver service. While ACSI has been able to reassure customers and is signing up new customers in multiple markets every day, BellSouth's provisioning problems have not helped ACSI.

Q. IS THE PROBLEM RESOLVED AS BELLSOUTH HAS SUGGESTED?

A. No. BellSouth claims that it was completely caught up with ACSI loop orders by December 18, 1996. This statement ignores the key fact that ACSI was forced to postpone the placement of orders beginning on December 4, 1996 because it could not rely upon BellSouth's unbundling processes. While BellSouth may have been caught up with orders placed at that time, ACSI had a total of 113 access lines that customers had ordered from ACSI when ACSI filed its Georgia complaint on December 23, 1996. If BellSouth had the proper processes in place, these 113 access lines would have been cut over to ACSI a few days thereafter. Because of the downtime in December caused by

BellSouth, these lines could not be cut over until weeks later. While BellSouth's performance has improved and unbundled loops are now being installed, it remains far from satisfactory. The basic problem is that BellSouth still cannot -- or will not -- install loops for ACSI at the same intervals as they do for their own retail customers. In fact, BellSouth has yet to provide statistics to what those intervals are. Furthermore, BellSouth witness Mr. Varner denies that this is even the relevant standard. Varner, Exhibit 1.

Q. IS BELLSOUTH CURRENTLY PROVISIONING THE SMALL NUMBER OF LOOPS ORDERED BY ACSI?

A. Yes, but it unclear how, and whether BellSouth's procedures are reliable and capable of handling the increased volume of loops as ACSI and other CLECs increase their marketing efforts. Although BellSouth has processed certain new orders without incident in recent weeks, BellSouth's refusal to give adequate assurances that it will be able to comply with the provisioning standards set forth in the ACSI Interconnection Agreement makes it impossible for ACSI to be confident that BellSouth has a reliable system in place to unbundle the local loop. For example, in addition to further ACSI volume in Columbus, BellSouth must handle loop orders from Montgomery, Louisville, Birmingham, and 5 to 10 additional ACSI cities by year's end. BellSouth's regionalized ordering and provisioning systems must also handle significant volumes of loop orders from MFS, MCI, Intermedia and others. Before ACSI can effectively compete against BellSouth, it will have to be able to order and have installed a significant volume of unbundled loops on a reliable basis. To date, BellSouth has demonstrated no capability of handling high volumes of access lines. Indeed, ACSI has every indication that BellSouth still has not put systems into place for provisioning unbundled loops, given state and federal laws enacted in 1995 and 1996, that should

have been in place months ago. Moreover, ACSI has no reason to expect that BellSouth will be able to cut over scores of customers a day once ACSI's services establish even a modest foothold in Georgia and other BellSouth states.

Q. CAN ACSI COMPETE EFFECTIVELY IF BELLSOUTH'S STANDARD INSTALLATION INTERVALS EXCEED THOSE WHICH BELLSOUTH AVERAGES FOR ITS OWN CUSTOMERS?

A. No. Service quality is as or more important than price in the local market. If an ILEC, such as BellSouth, can guarantee quicker installation, either by longer standard intervals for CLECs or by expediting installation for its own customers, then CLEC service will be viewed as inferior. BellSouth will use such advantages to differentiate its product in the market. Notably, the problem is even worse when, as has been the case, ACSI is unable to meet promised delivery dates due to BellSouth's inability or unwillingness to perform under the ACSI Interconnection Agreement. The fact that BellSouth can embarrass its competitor in front of customers whenever it so chooses simply by dragging its feet is a very disturbing feature of the emerging market structure for competitive local exchange services. There is no significant, immediate, enforceable penalty in place today to act as a competitive safeguard when such incidents occur. I see no remedy for this inherently anticompetitive circumstance other than specified provisioning intervals and a strong enforcement role by regulatory authorities.

Q. HAVE YOU ASKED BELLSOUTH TO PROVIDE PARITY IN INSTALLATION INTERVALS?

A. Yes. ACSI has asked BellSouth to agree to specific installation intervals with prescribed penalties for failure to meet them. BellSouth has refused. BellSouth did agree, however, to a general standard which obligates it to provide installation services

at parity with enduser intervals. Unfortunately, to date, BellSouth has not honored that commitment.

Q. WHAT OTHER PROBLEMS HAVE YOU EXPERIENCED IN CONNECTION WITH LOOP INSTALLATION?

A. In order to compete effectively, it will be necessary for ACSI to have electronic bonding or interfaces with a number of key BellSouth operational support systems ("OSS"). The OSS used for electronic ordering and order tracking, as well as scheduling and monitoring of installation, repair and maintenance, are just a few critical examples of the types of OSS to which ACSI must have access to. ~~It is my understanding that BellSouth is obligated under the FCC's Order to provide access to such OSS systems by January 1, 1997. I also understand that BellSouth has taken the position that it has complied fully with the FCC's mandate that OSS be available by January 1, 1997. Our experience indicates, however, that BellSouth does not presently comply with the FCC's Order because BellSouth has yet to provide access to critical OSS for use in obtaining unbundled loops.~~

Q. DOES THE INTERCONNECTION AGREEMENT REQUIRE ACCESS TO OSS?

A. Yes, in Sections IV.C and IV.D of the ACSI Interconnection Agreement. Given the initial difficulties with BellSouth's loop provisioning, ACSI believes that BellSouth's electronic interfaces must be fully developed prior to BellSouth's entry into the in-region interLATA market.

Q. HOW DOES THAT AFFECT YOUR ABILITY TO COMPETE EFFECTIVELY WITH BELLSOUTH IN THE LOCAL MARKET?

A. At the present time, ACSI's volume is low. The current fax/manual ordering processes requiring ACSI to fill out five forms per loop are cumbersome. Moreover, in order to expand further, ACSI will have to increase its volume of orders exponentially in the

near future. Moreover, other large volume CLECs , such as MCI, Intermedia, and MFS, will soon be entering the local market. Electronic bonding to BellSouth's OSS is absolutely critical to support that growth. Without it, ACSI and other CLECs cannot hope to garner significant market share. Interexchange carriers ("IXCs"), for example, simply could not function if the ILECs refused to accept electronic submissions of changes in customers' selections of their primary interexchange carrier ("PIC"). The numbers are simply too great for manual processing.

Q. SHOULD WE ACCEPT BELLSOUTH'S WORD THAT THE NECESSARY SYSTEMS WILL BE INSTALLED AND THAT LCSC OFFICES IN BIRMINGHAM AND ATLANTA WILL BE ABLE TO HANDLE LARGE VOLUMES OF ORDERS?

A. No. While ACSI understands that BellSouth is making efforts to put systems in place, given BellSouth's initial performance, this Commission should wait to ensure that BellSouth systems are developed and working before permitting in-region interLATA competition.

Q. HAS THE FCC INDICATED THAT ELECTRONIC INTERFACES WILL BE SCRUTINIZED IN THE SECTION 271 APPROVAL PROCESS?

A. Yes. FCC Chairman Reed Hundt has indicated that this issue is relevant to the FCC's decision-making process. TR. Daily, Vol. 3, No. 30, February 13, 1997.

Q. YOU TESTIFIED EARLIER THAT BELLSOUTH ALSO IS ENGAGING IN ACTIVITIES THAT ARE IMPEDING ACSI'S ABILITY TO COMPETE EFFECTIVELY IN THE MARKET FOR LOCAL SERVICES. CAN YOU EXPLAIN?

A. We have seen an emerging pattern of BellSouth activities seemingly intended to lock-in existing BellSouth local customers and prevent new entrants from freely competing for

their business. For example, BellSouth has been signing up business customers to multi-year contracts before opening its local markets. These customers will not be available for CLEC competition.

BellSouth has established an extremely troubling program that appears intended to effectively lock CLECs out of major office buildings, office parks, shopping centers and other similar locales. Specifically, BellSouth is enticing property management companies to enter *exclusive* arrangements with BellSouth under which the property managers are paid handsomely for promoting BellSouth's services to tenants of the property, and for refusing to establish similar promotional agreements with CLECs. BellSouth provided a copy of its Letter Agreement for Property Management Services in response to a hearing request, a copy of which is attached to my testimony marked Exhibit No. ___ (ACSI-4).

Under the terms of BellSouth's standard form Property Management Services Agreement, BellSouth obtains access -- free-of-charge -- to building entrance conduits, equipment room space and riser/horizontal conduits for placement of BellSouth equipment and other telecommunications facilities needed to serve building tenants. The property manager also commits to designate BellSouth as the local telecommunications "provider of choice" to building tenants and to promote BellSouth as such. Many building tenants may not understand that they could choose to order service from a CLEC competitor. In return, BellSouth agrees to establish a "Credit Fund" which the property manager can use itself or distribute to tenants. The Credit Fund is usable to pay for selected BellSouth services (*i.e.*, seminars, non-recurring installation charges, etc.).

This program has at least two anticompetitive effects, largely attributable to the fact that this arrangement is expressly an *exclusive* one. First, since BellSouth is given

"free" (no cash payment) access to the building conduit and riser, BellSouth is given an inherent cost advantage in obtaining use of these essential bottleneck facilities. Second, since the property manager must agree to promote BellSouth services exclusively in order to be compensated, BellSouth has created an incentive for property managers to refuse to cooperate with ACSI and other CLECs in promoting services to building tenants.

The property manager is a critical gatekeeper in obtaining access to business end users, and BellSouth has conspired with them in these instances to prevent ACSI from obtaining unfettered access to building tenants. Interestingly, BellSouth argued strenuously a few years ago that regulators must prevent shared tenant service ("STS") providers from impeding their access to end users in STS-controlled office buildings -- now, BellSouth itself is engaging in the same activity about which it protested so vociferously.

Q. DO YOU HAVE OTHER EXAMPLES OF ANTICOMPETITIVE CONDUCT ON THE PART OF BELLSOUTH?

A. Yes. BellSouth has been aggressively promoting the use of customer-specific Contract Service Arrangements ("CSAs") where it competes with ACSI for the business of a specific business customer. While there is nothing inherently wrong with CSAs, ACSI does not believe that, given the other competitive advantages of BellSouth in the switched services market, that BellSouth should be permitted to lock in customers to long term contracts at this time. ACSI is principally concerned that BellSouth could engage in pricing below cost.

Q. DO YOU HAVE MORE EXAMPLES OF BELLSOUTH'S ANTICOMPETITIVE ACTIVITY?

A. Yes. For example, BellSouth has been requiring sales agents to sell BellSouth local services *exclusively*. Indeed, BellSouth's sales agency agreements routinely prevent sales agents from selling CLEC services for a year *after* their BellSouth contract is terminated. Thus, if a sales agent wishes to market ACSI's services, the agent must terminate his or her BellSouth representation and then forego selling ACSI services for at least one year to satisfy the non-compete provisions of BellSouth's exclusive agency agreement. Clearly, this deprives ACSI of access to an important sales channel. BellSouth provided a copies of its Authorized Sales Representative Agreements in response to a hearing request, a copy of which is attached to my testimony marked Exhibit No. ___ (ACSI-5).

Q. IN ADDITION TO THESE EXAMPLES OF ANTICOMPETITIVE CONDUCT ENCOUNTERED IN THE END-USER MARKET, HAVE YOU HAD SIMILAR PROBLEMS WHEN COMPETING WITH BELLSOUTH FOR CARRIER BUSINESS?

A. Absolutely, particularly with reference to BellSouth's application of nonrecurring reconfiguration charges ("RNRCs") to access channel termination ("ACTL") moves. In fact, in February 1996, ACSI filed a Formal Complaint with the FCC with reference to the grossly excessive RNRCs that BellSouth imposed on IXCs, attempting to make an ACTL move to ACSI.

ACTL moves are required whenever an IXC agrees to switch all or part of its direct trunked access transport services on a given route from the BellSouth network to the network services offered by CLECs, such as ACSI. ILECs typically require the payment of RNRCs to accomplish such ACTL moves. Unfortunately, BellSouth's RNRC's are applied inconsistently and have effectively shut ACSI and all other CAPs, out of the customer facility market in BellSouth territory.

In ACSI's experience, BellSouth has applied the RNRCs for ACTL moves in a grossly anticompetitive fashion to prevent IXCs from switching to ACSI transport services. As we explained in our Formal Complaint, which is appended hereto as Exhibit C, the charges imposed on IXCs are not reasonably related to the direct costs incurred by BellSouth in making the ACTL move. Indeed, they are inconsistent with the tariff rates included in BellSouth's interstate access tariff. Even more troubling, the RNRCs imposed by BellSouth for IXC access network reconfigurations to connect to ACSI services routinely far exceed the reconfiguration charges imposed by BellSouth when an IXC orders reconfigurations from one BellSouth service to another.

This circumstance presents prospective customers with three unsavory choices: (1) not to reconfigure; (2) to reconfigure with BellSouth so as to avoid or minimize the excessive RNRCs; or (3) to move to ACSI and pay the RNRC costs or force ACSI to absorb such costs. The only way for ACSI to make a reasonable bid for the business of a potential access customer, therefore, often is to offer to pay for the significant and unreasonable reconfiguration costs imposed by BellSouth. Unfortunately, this is almost always infeasible. As a result, ACSI's efforts to convince otherwise ready, willing and able access customers to switch from BellSouth transport services have been stymied.

Q. **CAN YOU OFFER ANY SPECIFIC EXAMPLES OF WHEN BELLSOUTH'S RNRCS HAVE BEEN A PROBLEM?**

A. Yes. As outlined in the attached complaint (Exhibit No. ___ (ACSI-3)), in one instance, an IXC agreed to move thirteen (13) DS3 circuits from BellSouth to ACSI. ACSI proceeded to prepare for the reconfiguration, including the purchase of OC12 equipment to accommodate the rollover. However, as a result of BellSouth's excessive RNRCs, ACSI lost this five-year contract worth an expected $500,000 in revenues.

Q. **WHAT IS THE RELATIONSHIP BETWEEN THE PROBLEMS ACSI HAS EXPERIENCED AND BELLSOUTH'S DESIRE TO REENTER THE MARKET FOR INTERLATA SERVICES?**

A. BellSouth's interest in obtaining permission to reenter the interLATA services market constitutes the principal incentive BellSouth has to interconnect with local competitors and to correct anticompetitive abuses. Even before BellSouth has obtained its interLATA approvals, it has proven unable to resist engaging in a variety of anticompetitive activities. Once it has obtained interLATA clearance, and particularly if competitive safeguards are not developed, there will be little left to constrain BellSouth's anticompetitive tendencies. Once BellSouth has passed through the turnstyle and has been authorized to reenter the market for interLATA services, it will be nearly impossible to retract this authority. Thus, it is absolutely imperative to ensure that BellSouth has fully complied with all of the requirements of Section 271 of the Act, and that BellSouth is not hindering the development of a competitive local market, before this Commission should support BellSouth's FCC application for in-region interLATA service. The provision of unbundled loops and number portability are two items on the fourteen-point competitive checklist of Section 271 of the Act. Regardless of the terms of BellSouth's Statement of Generally Available Terms and Conditions ("SGATC"), ACSI's complaints before this Commission and the FCC demonstrate that BellSouth has not met these items. BellSouth should be denied reentry into the in-region interLATA market on this basis alone. Furthermore, BellSouth's anticompetitive behavior demonstrates that it is not in the public interest for BellSouth to be allowed to reenter the interLATA market until it has implemented actual competition in its local markets.

Q. **SHOULD THE COMMISSION APPROVE BELLSOUTH'S SGATC?**

A. The SGATC makes services available to CLECs. It should only be permitted to go into effect, however, with the explicit caveat that it does not meet the 14-point checklist.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes, it does.

three and then number respectively.

(The documents referred to were marked for identification as ACSI Exhibit Nos. 3 through 7.)

BY MR. DOWDY:

Q Mr. Robertson, do you have a summary of your testimony?

A I do.

Q Would you give that at this time?

A Sure will. We feel this is a pretty simple issue -- or at least from our perspective. We are interested in the development in local competition. We are not interested in the interLATA market. That's not of us. One of the things that we need is to make sure BellSouth supports the local competition when it is not in their best interest after they receive interLATA relief. I think both BellSouth and ACSI agree that the interfaces are very complex and that ACSI has had problems in provisioning services in Georgia and that BellSouth has addressed those issues. To be fair I would not suggest that ACSI has not had problems in that process, as all new processes are. But the issue is how we assure that any future problems that we have are addressed.

Currently BellSouth has an interest in getting

customer?

A Yes. And for calling out, he didn't have any dial tone.

Q Okay, so your customer couldn't make outgoing calls and wasn't receiving the incoming calls.

A Right. So we got that corrected quickly. One of the things was the hunt group had changed, it was hunting from the bottom instead of the top, which was really probably good news because we found it quickly instead of later on.

Q [redacted] able to provide its local services?

A [redacted] to get [redacted].

Q [redacted] prevent [redacted]?

A [redacted] My only concern is the future. They have a significant amount of motivation to do that now. All I want to do is just make sure that we have some mechanism in the future to make them as interested in doing it then as they are now.

A Well, four to five hours, yes.

Q Okay. Since that time -- well, let's say since you filed the complaint on December 23rd, have there been any severe service disruptions of that nature?

A I guess --

Q That you're aware of?

A I guess it depends on what you consider severe. It seems to me that we can -- when we take a customer and they have 18 lines at six different locations and put them down for a relatively short period of time, 30 minutes -- around 30 minutes, I'm not specific on the time, and have their whole business shut down for that period of time during what would be considered their busy hour and deny them service, that seems like a pretty severe interruption, yes.

Q Okay. Let me ask it this way. Since December 23rd, we arrive at customer-desired due dates. BellSouth and ACSI arrives at a customer-desired due date, correct, with regard to each unbundled loop order?

A Right.

Q Since December 23rd, to your knowledge, has BellSouth failed to meet any customer-desired due date on any order for unbundled loops?

A Not that I'm aware of. Of course, you are aware of the fact that after we had the problems early on, we fed

Just suffice it to say, the -- paragraph 18, does it read -- and that's entitled Implementation of Agreement, is that correct?

A Yes.

Q And basically does that contemplate that the parties, within 30 days, are to sit down with each other and agree on a schedule for implementation agreement that would include ordering, testing and full operational time frames?

A That's correct.

Q And to your knowledge, did that occur?

A It did.

Q It did?

A Yes.

Q Was there an implementation schedule worked out?

A I know that there were at least eight different meetings, conference calls and face-to-face meetings working out those schedules. And I was not involved in any of those but I assume that they were done to the satisfaction of both BellSouth and ACSI.

Q Was there any testing done with regard to the provisioning of unbundled loops?

A Yes, there was. We sent some test orders through and they worked.

Q When was that?

A Before we entered the orders.

Q What, the November 15 to 20 time frame?
A Yes, right.
Q Okay.
A And I assume that BellSouth also tested their processes and did testing of unbundled loops and those type things to make sure it went through their process. That's where we had the problems.
Q How many test orders, to your knowledge, were there -- were run through?
A I think there were 16 orders that included unbundled loop and remote call-forwarding. I think most of them are RCF or SPNP, I guess is what it's -- service provider number portability.
Q There were 16 orders?
A Sixteen orders total.
Q And do you know when, of your own knowledge, when those test orders were --
A They were done prior to us giving you live traffic.
Q In this Kentucky article it mentions, in the third column, that the ACSI marketers have been preselling the service for about 30 days and had 400 lines sold.
Did -- do you know if ACSI did any preselling of the service in Columbus?
A Yes, they did.

CERTIFICATE OF SERVICE

I, Robert G. Kirk, hereby certify that public copies of the foregoing "Opening Brief for Defendant" and Appendix have been served on the following persons by hand delivery or by overnight delivery service this 2nd day of June 1997.

John B. Muleta, Chief
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W., Room 6008
Washington, D.C. 20554

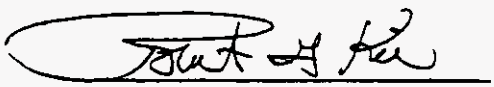
John B. Adams, Esquire
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W., Room 6114
Washington, D.C. 20554

Kurt A. Schroeder, Chief
Formal Complaints and Investigations Branch
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W., Room 6010
Washington, D.C. 20554

Brad E. Mutschelknaus, Esquire
Steven A. Augustino, Esquire
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036

Gerald Chakerian, Esquire
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W., Room 6310-C
Washington, D.C. 20554

Riley M. Murphy, Esquire
James C. Falvey, Esquire
American Communications Services, Inc.
131 National Business Parkway, Suite 100
Annapolis Junction, MD 20701



Robert G. Kirk