BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
COMPLAINT OF INTERMEDIA COMMUNICATIONS INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. TO ENFORCE THE RECIPROCAL COMPENSATION REQUIREMENT OF THE PARTIES' INTERCONNECTION AGREEMENT	)	Docket No. 00-00280

PREFILED DIRECT TESTIMONY OF JULIA STROW ON BEHALF OF INTERMEDIA COMMUNICATIONS INC.

January 4, 2001

Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS AND POSITION FOR THE RECORD?

A. My name is Julia Strow. I am presently employed as Vice President of Regulatory and Industry Relations with Cbeyond Communications at 320 Interstate North Parkway, Suite 300, Atlanta, Georgia 30339.

Q. WERE YOU EVER EMPLOYED BY INTERMEDIA COMMUNICATIONS INC.?

A. Yes. I was employed by Intermedia from April, 1996 until January, 2000. My position was Assistant Vice President of Industry Policy. I was responsible, among other matters, for development of regulatory policy and negotiation of interconnection agreements. My responsibilities included communications with representatives of BellSouth Telecommunications, Inc., including discussions related to the State of Tennessee.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. Although I am no longer employed by Intermedia, I am providing testimony as to Intermedia's rationale for signing of the Multiple Tandem Access ("MTA") Amendment.

Q. PLEASE DESCRIBE INTERMEDIA'S CONTRACT WITH BELLSOUTH CONCERNING LOCAL TRAFFIC.

A. On or about July 1, 1996, Intermedia signed an Interconnection Agreement with BellSouth pursuant to Section 252 of the Telecommunications Act of 1996. This Agreement provides that Intermedia and BellSouth will reciprocally compensate each other for the transport and termination of traffic originated on the network of the other within the same local calling area according to the terms and conditions set forth in the Interconnection Agreement. The Interconnection Agreement sets forth a composite local interconnection rate of $0.019540 per minute of use for DS1 tandem switching. The

provisions of the Interconnection Agreement controlling the treatment of local traffic are attached to Intermedia's complaint in this proceeding. The entire Interconnection Agreement was filed by the parties on July 17, 1996, and was approved by the Authority in Docket No. 96-01161 on December 3, 1996

Q. HAS RECIPROCAL COMPENSATION FOR ISP TRAFFIC BEEN IMPORTANT TO INTERMEDIA?

A. In the history of relations between incumbents and competing local providers, there has been no greater point of conflict than the dispute over reciprocal compensation for ISP traffic. It is difficult to overstate the tension between the incumbents and the competitors on this issue. This issue was particularly important to Intermedia in 1998 because of the increasing amounts of ISP traffic that Intermedia was terminating for BellSouth's customers.

Q. HAS BELLSOUTH FULFILLED ITS OBLIGATION UNDER THE INTERCONNECTION AGREEMENT TO PAY INTERMEDA RECIPROCAL COMPENSATION FOR TERMINATING TRAFFIC TO ISPS?

A. No. It is my understanding that BellSouth has made only partial payments to Intermedia since March 1999 and has specifically excluded payment for the termination of traffic to ISPs.

Q. HAS BELLSOUTH PAID RECIPROCAL COMPENSATION TO INTERMEDIA AT THE CORRECT RATE?

A. No. It is my understanding that BellSouth has raised two additional issues that it believes entitles it to withhold partial payment. Those issues are (1) the MTA Amendment and (2) the tandem switching rate. My testimony addresses the MTA Amendment.

Q. WHAT IS THE MTA AMENDMENT?

A. The MTA Amendment modifies Intermedia's Interconnection Agreement with BellSouth for the purpose of making available, at Intermedia's request, a network architecture called "multiple tandem access." This architecture is typically deployed in order to minimize the number of trunk groups needed to complete traffic in metropolitan areas. It is also useful to alleviate conditions of persistent traffic congestion.

Q. HOW DID THE MTA AMENDMENT COME ABOUT?

A. In the spring of 1998, Intermedia's customers were experiencing traffic blockage in the Atlanta area. Upon inquiring as to what was needed to resolve this issue, Bill Morrison, who is Intermedia's account manager for BellSouth, advised me that MTA was needed. I was also told by Mr. Morrison that in order for BellSouth to provide MTA service to Intermedia, Intermedia's Interconnection Agreement would need to be amended.

Q. WHAT HAPPENED NEXT?

A. At my request, Stuart Hudnall of BellSouth forwarded to me the MTA Amendment for review and signature. A copy of Mr. Hudnall's June 4, 1998 memorandum forwarding the MTA Amendment is attached hereto and incorporated herin by reference as **Strow Exhibit 1**.

Q. WHAT IS THE BACKGROUND OF THE REFERENCE IN MR. HUDNALL'S MEMORANDUM TO A "REQUEST" FOR THE MTA AMENDMENT?

A. Mr. Morrison said on the telephone that Intermedia would need to request the MTA Amendment for BellSouth to provide it, so I requested the Amendment verbally.

Q. WHO DRAFTED THE MTA AMENDMENT?

A. BellSouth drafted the proposed amendment language.

Q. DID INTERMEDIA EXECUTE THE MTA AMENDMENT?

A. Yes.

Q. DID INTERMEDIA MAKE ANY CHANGES TO THE AMENDMENT?

A. No. Intermedia signed the Amendment in June, 1998 without making any changes.

Q. WHAT DOES THE MTA AMENDMENT PROVIDE?

A. This Amendment provides that BellSouth will, upon request, provide the MTA architecture to Intermedia. The rates for MTA are set forth in Attachment A to the amendment. A signed copy of the MTA Amendment is attached hereto as and incorporated herein by reference as **Strow Exhibit 2.**

Q. DID INTERMEDIA REQUEST MTA IN TENNESSEE?

A. No. No such request was made while I was employed by Intermedia and, as far as I know, MTA has not been requested or provided in Tennessee.

Q. DID BELLSOUTH INDICATE IN ANY WAY THAT THE MTA AMENDMENT HAD THE ADDITIONAL EFFECT OF CHANGING RECIPROCAL COMPENSATION RATES EVEN WHEN MTA WAS NOT REQUESTED OR PROVISIONED?

A. No. When I reviewed the MTA Amendment, I understood that Amendment as providing charges for the MTA architecture, not changing rates for reciprocal compensation.

Q. HOW DOES BELLSOUTH REFER TO THIS AMENDMENT IN ITS

TRANSMITTAL LETTER AND PETITION FOR APPROVAL OF THE AMENDMENT FILED WITH THE TENNESSEE REGULATORY AUTHORITY?

A. The transmittal letter and Petition for Approval of the Amendment dated August 3, 1998 is attached hereto and incorporated herein by reference as **Strow Exhibit 3**. The petition, in part, states:

> The parties have negotiated an Amendment to the Agreement amending provisions pertaining to Multiple Tandem Access, otherwise referred to as Single Point of Interconnection. A copy of the Amendment is attached hereto and incorporated herein by reference.

The transmittal letter and Petition say nothing about this Amendment independently changing rates for reciprocal compensation.

Q. IF BELLSOUTH HAD TOLD INTERMEDIA THAT IT WANTED TO REDUCE ITS RECIPROCAL COMPENSATION RATE BY MORE THAN HALF IN TENNESSEE, REGARDLESS OF WHETHER MTA WAS REQUESTED AND PROVISIONED IN TENNESSEE, WOULD INTERMEDIA HAVE ACCEPTED SUCH A PROPOSAL?

A. No. If BellSouth had made such a proposal, Intermedia would have rejected it immediately.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

Docket No. 00-00280
Strow Direct Exhibit 1
January 4, 2001

June 4, 1998

TO: Ms. Julia Strow

FROM: Stu Hudnall

SUBJECT: Multiple Tandem Access Amendment

Attached per your request is an original, signed copy of the Multiple Tandem Access agreement for Intermedia. I have sent a copy to Bill Morrison for his information and use in allowing orders to flow.

Further in reference to the amendment, I also sent an e-mail to Tammy about the rate for the Florida End Office Switching element, which had been questioned by someone at Intermedia. Our copy of the Florida order shows the rate as $.0175. If you have something that indicates that the commission changed that rate from the original order, let us know.

I enjoyed our meeting on Tuesday and will be working with Tammy in getting all of the "action items" handled expeditiously and will be talking with Mary Jo about our latest changes and proposals. Right now, I believe that June 29 would be a better day for me, and Mary Jo if she decides to come, for our next meeting. So, if you can reserve that day for me/us, I would appreciate it.

I will send an electronic copy of the agreement, along with all our comments, in the next week or so. In the meantime, call me if you have any questions about the agreement or amendment.

Sincerely,

SH

Manager - Interconnection Services

Attachment

Docket No. 00-00280
Strow Direct Exhibit 2
January 4, 2001

AMENDMENT
TO
MASTER INTERCONNECTION AGREEMENT BETWEEN
INTERMEDIA COMMUNICATIONS, INC. and
BELLSOUTH TELECOMMUNICATIONS, INC.
DATED JULY 1, 1996

Pursuant to this Agreement (the "Amendment"), Intermedia Communications, Inc. ("ICI") and BellSouth Telecommunications, Inc. ("BellSouth") hereinafter referred to collectively as the "Parties" hereby agree to amend that certain Master Interconnection Agreement between the Parties effective July 1, 1996 ("Interconnection Agreement").

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, ICI and BellSouth hereby covenant and agree as follows:

1. The Parties agree that BellSouth will, upon request, provide, and ICI will accept and pay for, Multiple Tandem Access, otherwise referred to as Single Point of Interconnection, as defined in 2. following:

2. This arrangement provides for ordering interconnection to a single access tandem, or, at a minimum, less than all access tandems within the LATA for ICI's terminating local and intraLATA toll traffic and BellSouth's terminating local and intraLATA toll traffic along with transit traffic to and from other ALECs, Interexchange Carriers, Independent Companies and Wireless Carriers. This arrangement can be ordered in one way trunks and/or two way trunks or Super Group. One restriction to this arrangement is that all of ICI's NXXs must be associated with these access tandems; otherwise, ICI must interconnect to each tandem where an NXX is "homed" for transit traffic switched to and from an Interexchange Carrier.

3. The Parties agree to bill Local traffic at the elemental rates specified in Attachment A.

4. This amendment will result in reciprocal compensation being paid between the Parties based on the elemental rates specified in Attachment A.

5. The Parties agree that all of the other provisions of the Interconnection Agreement, dated July 1, 1996, shall remain in full force and effect.

6. The Parties further agree that either or both of the Parties is authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996.

IN WITNESS WHEREOF, the Parties hereto have caused this Amendment to be executed by their respective duly authorized representatives on the date indicated below.

Intermedia Communications, Inc.	**BellSouth Telecommunications, Inc.**
Signature	Signature
Name	Jerry D. Hendrix Name
Title	Director-Interconnection Services Title
Date	6/3/98 Date

ATTACHMENT A

Multiple Tandem Access shall be available according to the following rates for local usage:

1. Each Party's local usage will be determined by the application of its reported Percent Local Usage ("PLU") to its intrastate terminating minutes of use as set forth in Paragraph 1.D. in ICI's February 24, 1997, Amendment to its Interconnection Agreement.

2. The Parties agree to bill Local traffic at the elemental rates specified below:

ELEMENT	AL	FL	GA	KY	LA
Local Switching					
End Office Switching, per MOU	$0.0017	$0.0175	$0.0016333	$0.002562	$0.0021
End Office Switching, add'l MOU[1]	NA	$0.005	NA	NA	NA
End Office Interoffice Trunk Port - Shared, MOU	NA	NA	NA	NA	$0.0002
Tandem Switching, per MOU	$0.0015	$0.00029	$0.0006757	$0.001096	$0.0008
Tandem Interoffice Trunk Port - Shared	NA	NA	NA	NA	$0.0003
Tandem Intermediary Charge, per MOU[2]	$0.0015	NA	NA	$0.001096	NA
Local Transport					
Shared, per mile, per MOU	$0.00004	$0.000012	$0.000008	$0.0000049	$0.0000083
Facility Termination, per MOU	$0.00036	$0.0005	$0.0004152	$0.000426	$0.00047

ELEMENT	MS	NC	SC	TN
Local Switching				
End Office Switching, per MOU	$0.00221	$0.0040	$0.00221	$0.0019
End Office Switching, add'l MOU[1]	NA	NA	NA	NA
End Office Interoffice Trunk Port - Shared, MOU	NA	NA	NA	NA
Tandem Switching, per MOU	$0.003172	$0.0015	$0.003172	$0.000676
Tandem Interoffice Trunk Port - Shared	NA	NA	NA	NA
Tandem Intermediary Charge, per MOU[2]	NA	NA	NA	NA
Local Transport				
Shared, per mile, per MOU	$0.000012	$0.00004	$0.000012	$0.00004
Facility Termination, per MOU	$0.00036	$0.00036	$0.00036	$0.00036

(1) This rate element is for use in those states with a different rate for additional minutes of use.

(2) This charge is applicable only to intermediary traffic and is applied in addition to applicable switching and/or interconnection charges.

Docket No. 00-00280
Strow Direct Exhibit 3
January 4, 2001

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

615 214-6301
Fax 615 214-7406

Guy M. Hicks
General Counsel

August 3, 1998

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re: Approval of the Amendment to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996.
Docket No. 96-01161

Dear Mr. Waddell:

Pursuant to Section 252(e) of the Telecommunications Act of 1996, Intermedia Communications, Inc. and BellSouth Telecommunications, Inc. are hereby submitting to the Tennessee Regulatory Authority the original and thirteen copies of the attached Petition for Approval of the Amendment to the Interconnection Agreement dated July 1, 1996.

Sincerely yours,

INTERMEDIA COMMUNICATIONS, INC.

BY: _____
Patrick K. Wiggins
Wiggins & Villacorta
501 E. Tennessee St., Suite B
P.O. Drawer 1657
Tallahassee, FL 32302
(904) 222-1534
Attorney for ICI

BELLSOUTH TELECOMMUNICATIONS, INC.

BY: _____
Guy M. Hicks
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300
Attorney for BellSouth

126607

August 3, 1998

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re: Approval of the Amendment to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996.
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Sincerely yours,

INTERMEDIA COMMUNICATIONS, INC.

BY: Patrick K. Wiggins

Patrick K. Wiggins
Wiggins & Villacorta
501 E. Tennessee St., Suite B
P.O. Drawer 1657
Tallahassee, FL 32302
(904) 222-1534
Attorney for ICI

BELLSOUTH TELECOMMUNICATIONS, INC.

BY: _____

Guy M. Hicks
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300
Attorney for BellSouth

126607

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In re: *Approval of the Amendment to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*

Docket No. 96-01161

PETITION FOR APPROVAL OF THE AMENDMENT TO THE INTERCONNECTION AGREEMENT NEGOTIATED BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND INTERMEDIA COMMUNICATIONS, INC. PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996

COME NOW, Intermedia Communications, Inc. ("ICI") and BellSouth Telecommunications, Inc., ("BellSouth"), and file this request for approval of the Amendment to the Interconnection Agreement dated July 1, 1996 (the "Amendment") negotiated between the two companies pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, (the "Act"). In support of their request, ICI and BellSouth state the following:

1. ICI and BellSouth have successfully negotiated an agreement for interconnection of their networks, the unbundling of specific network elements offered by BellSouth and the resale of BellSouth's telecommunications services to ICI. The Interconnection Agreement was approved by the Tennessee Regulatory Authority ("TRA") by Order dated April 29, 1997.

2. The parties have negotiated an Amendment to the Agreement amending provisions pertaining to Multiple Tandem Access, otherwise referred to as Single Point of Interconnection. A copy of the Amendment is attached hereto and incorporated herein by reference.

3. Pursuant to Section 252(e) of the Telecommunications Act of 1996, ICI and BellSouth are submitting their Amendment to the TRA for its consideration and approval.

4. In accordance with Section 252(e) of the Act, the TRA is charged with approving or rejecting the negotiated Amendment between BellSouth and ICI within 90 days of its submission. The Act provides that the TRA may only reject such an agreement if it finds that the agreement or any portion of the agreement discriminates against a telecommunications carrier not a party to the agreement or the

implementation of the agreement or any portion of the agreement is not consistent with the public interest, convenience and necessity.

5. ICI and BellSouth aver that the Amendment is consistent with the standards for approval.

6. Pursuant to Section 252(i) of the Act, BellSouth shall make the Agreement available upon the same terms and conditions contained therein.

ICI and BellSouth respectfully request that the TRA approve the Amendment negotiated between the parties.

This 3rd day of August, 1998.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By:_____

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301
Attorney for BellSouth

INTERMEDIA COMMUNICATIONS, INC.

By:_____

Patrick K. Wiggins
Wiggins & Villacorta
501 E. Tennessee St., Suite B
P.O. Drawer 1657
Tallahassee, FL 32302
(850) 385-6007
Attorney for ICI

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6. Pursuant to Section 252(i) of the Act, BellSouth shall make the Agreement available upon the same terms and conditions contained therein.

ICI and BellSouth respectfully request that the TRA approve the Amendment negotiated between the parties.

This 3rd day of August, 1998.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By:_____

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301
Attorney for BellSouth

INTERMEDIA COMMUNICATIONS, INC.

By: Patrick K. Wiggins

Patrick K. Wiggins
Wiggins & Villacorta
501 E. Tennessee St., Suite B
P.O. Drawer 1657
Tallahassee, FL 32302
(850) 385-6007
Attorney for ICI

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
COMPLAINT OF INTERMEDIA COMMUNICATIONS INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. TO ENFORCE THE RECIPROCAL COMPENSATION REQUIREMENT OF THE PARTIES' INTERCONNECTION AGREEMENT	)	Docket No. 00-00280

PREFILED DIRECT TESTIMONY OF EDWARD L. THOMAS ON BEHALF OF INTERMEDIA COMMUNICATIONS INC.

January 4, 2001

Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS, TITLE, AND THE NATURE OF YOUR POSITION WITH INTERMEDIA COMMUNICATIONS INC. ("INTERMEDIA").

A. My name is Edward L. Thomas. I am employed by Intermedia as Senior Director-Voice Planning and Deployment. My business address is 3625 Queen Palm Drive, Tampa, Florida 33619. I am responsible for engineering the moves, adds, and changes of the telecommunications switching requirements within the Intermedia voice network. This includes ordering and placing central office equipment, ordering and placing circuit groups between various exchanges, network capacity management and network traffic management. I have worked in the telecommunications industry for thirty-five years. Before employment with Intermedia, I worked for GTE for twenty-nine years in several management capacities.

I have attended Kent State University and Wooster (Ohio) College, and completed numerous technical training courses and seminars.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS PROCEEDING?

A. I am appearing before the Authority as a technical witness to present evidence describing the telecommunications networks that Intermedia deploys in the State of Tennessee. My testimony will support Intermedia's position that the rates that Intermedia bills BellSouth for reciprocal compensation are the correct rates, consistent with the Intermedia/BellSouth Interconnection Agreement.

Q. HOW DOES AN INTERCONNECTING CARRIER, SUCH AS INTERMEDIA, TYPICALLY ESTABLISH INTERCONNECTION WITH AN INCUMBENT LOCAL EXCHANGE CARRIER ("ILEC"), SUCH AS BELLSOUTH?

A. When Intermedia and BellSouth interconnect their networks, they establish different methods of transporting traffic between their networks, depending on the kind of traffic it is. For the transport of intrastate and interstate long distance calls, Intermedia purchases two-way Feature Group D trunks between its switches and the BellSouth access tandems that carry the traffic to or from interexchange carriers. Intermedia purchases these "FGD trunks" from BellSouth out of BellSouth's tariffs.

Local service is transported differently between the Intermedia and BellSouth networks. Under the Intermedia/BellSouth Interconnection agreement, and consistent with standard industry practice, three types of transport facilities, or "trunks" are established between Intermedia and BellSouth. For local traffic originating on Intermedia's network, and bound for end users on BellSouth's network, Intermedia establishes one way trunks between its switch and BellSouth's central office, which is typically an access or local tandem, although it may also be an end office. Intermedia may build its own facility or purchase a BellSouth transport unbundled network element to establish this connection, but in most cases, it purchases a transport trunk from BellSouth out of a BellSouth tariff. Conversely, for local traffic originating on BellSouth's network, and bound for end users on Intermedia's network, BellSouth has the obligation to establish its own trunks between its switch and Intermedia's switch.

Finally, for a few kinds of traffic, such as 800 traffic and transit traffic (which is traffic that originates from or terminates to a third carrier, and merely passes through the Intermedia or BellSouth network), Intermedia and BellSouth establish two-way trunks between their switches. These trunks are typically required by BellSouth, and BellSouth and Intermedia share the cost of providing these facilities.

Q. ARE THERE DIFFERENT TYPES OF NETWORK CONFIGURATIONS THAT AN INTERCONNECTING CARRIER, SUCH AS INTERMEDIA, CAN USE TO ESTABLISH INTERCONNECTION TO AN ILEC's TANDEM SWITCHES?

A. Yes. There are two network architectures commonly deployed to establish interconnection with an ILEC's tandem switches. These enable interconnecting carriers to deliver traffic originating on their networks to end users served by ILEC end offices subtending tandem switches and to terminate traffic on their networks originated by those same ILEC end users.

The first of these network architectures is called "Single Tandem Access" or "STA." In this architecture, the interconnecting carriers build or lease a trunk line directly to every ILEC access tandem throughout the area that the competitive carrier serves. From each of these tandems, the ILEC takes the competitive carrier's traffic and delivers it to the end users that are served out of those access tandem offices. This architecture is called Single Tandem Access because the CLEC is obligated to trunk out to every single access tandem, and the CLEC's traffic is routed through only one ILEC access tandem before it is delivered to the ILEC's end office, and ultimately to the customer served out of that end office.

The second of these is called "Multiple Tandem Access" or "MTA." It is sometimes referred to as "Single Point of Interconnection." In this architecture, CLECs and other interconnecting carriers are only required to build or lease a trunk to one ILEC access tandem in a LATA. From there, the ILEC takes the CLEC's traffic, and transports it to other access tandems, as necessary to deliver the traffic to the ILEC's end users. This arrangement is called Multiple Tandem Access because it eliminates the need for a CLEC

to trunk to every single access tandem, and because the ILEC will route the CLEC's traffic through multiple access tandems before delivering it to end users.

Q. AS AN INTERCONNECTING CARRIER, WHAT INTERCONNECTION ARCHITECTURE IS INTERMEDIA'S PREFERENCE?

A. It is Intermedia's preference to direct trunk to all of the ILEC's tandem offices that is, to use the Single Tandem Access model. In fact, in many cases, Intermedia goes beyond this and establishes direct trunks to ILEC end offices, if enough traffic flows to those offices. Intermedia prefers this kind of architecture because it is more efficient.

Q. PLEASE DESCRIBE THE NETWORK ARCHITECTURE THAT INTERMEDIA USES TO INTERCONNECT WITH BELLSOUTH'S NETWORK IN TENNESSEE.

A. Intermedia is interconnected with BellSouth's networks in Memphis and Nashville, which are the two Tennessee cities where Intermedia has deployed its switches. Intermedia uses Single Tandem Architecture in all its interconnection arrangements in Tennessee, that is, Intermedia is direct trunked to every BellSouth access tandem in the areas where Intermedia provides service. These interconnection arrangements are illustrated schematically in **Proprietary Exhibit Thomas 1.**

Q. PLEASE DESCRIBE INTERMEDIA'S INTERCONNECTION ARRANGEMENTS IN MEMPHIS.

A. Intermedia trades local traffic with BellSouth in one local tandem in Memphis and has provided its own direct trunks to carry its local traffic to that office. Intermedia has also established two way trunks to carry transit traffic in that office. In addition, Intermedia has established FGD trunks directly to every access tandem where it trades access traffic

with BellSouth. As of May 1998, Intermedia was direct-trunked to five BellSouth access tandems in Memphis and Intermedia has maintained that configuration through today. At all times, Intermedia direct trunked to every BellSouth access and local tandem where Intermedia provided service. As a result, at no time did Intermedia's network architecture require BellSouth to carry Intermedia's traffic across multiple tandems.

Q. PLEASE DESCRIBE INTERMEDIA'S INTERCONNECTION ARRANGEMENTS IN NASHVILLE.

A. Intermedia trades local traffic with BellSouth in two local tandems in Nashville, and has provided its own direct trunks to carry its local traffic to those two offices. Intermedia has also established two way trunks to carry transit traffic those offices. In addition, Intermedia has established FGD trunks directly to every access tandem where it trades access traffic with BellSouth. As of May 1998, Intermedia was direct-trunked to four BellSouth access tandems in Nashville. By June 2000, Intermedia was trunked out to an additional BellSouth access tandem. At all times, Intermedia direct trunked to every BellSouth access and local tandem where Intermedia provided service. As a result, at no time did Intermedia's network architecture require BellSouth to carry Intermedia's traffic across multiple tandems.

Q. DOES INTERMEDIA USE MULTIPLE TANDEM ACCESS ANYWHERE IN TENNESSEE?

A. No.

Q. HAS INTERMEDIA EVER REQUESTED OR SUBMITTED AN ORDER FOR MTA IN TENNESSEE?

A. No.

Q. FROM AN OPERATIONS PERSPECTIVE, WHAT IS THE MTA AMENDMENT?

A. The MTA Amendment is a contractual vehicle making MTA available to Intermedia under certain terms and conditions. The MTA issue was not addressed in the parties' 1996 interconnection agreement, nor in the July 1997 amendments that followed it. As time passed, BellSouth began experiencing acute congestion problems in Georgia that it apparently determined would require resolution by means of MTA, while recognizing that it did not have a contractual basis for deployment. Thus, the MTA Amendment sets forth the terms and conditions under which Intermedia may elect deployment of MTA to alleviate traffic congestion. It first requires Intermedia to request MTA and then BellSouth to provide MTA in response to the request. I refer to numbered paragraph 1 of the Amendment. The rates set out in Attachment A of the Amendment accordingly are put in place, jurisdiction by jurisdiction, only upon Intermedia's request for MTA in a particular jurisdiction, BellSouth's provisioning of MTA in that jurisdiction, and Intermedia's acceptance of MTA in that jurisdiction.

Q: PLEASE DESCRIBE INTERMEDIA'S OPERATIONS AND GEOGRAPHIC COVERAGE IN TENNESSEE.

A: Intermedia has two (2) Nortel DMS-500 switches deployed in Tennessee, one in Memphis and one in Nashville. These switches provide service to a sizeable number of customers in a widely dispersed area in and around Memphis and Nashville.

Q: DOES INTERMEDIA BELIEVE THAT IT IS ENTITLED TO RECEIVE RECIPROCAL COMPENSATION AT THE COMPOSITE TANDEM INTERCONNECTION RATE BECAUSE OF THE GEOGRAPHIC COVERAGE OF ITS SWITCHES?

A: Yes. Intermedia's position is that it is entitled to reciprocal compensation at BellSouth's tandem interconnection rate if Intermedia's switch serves a geographic area comparable to the area served by a BellSouth tandem. Intermedia's switches do serve areas comparable to the area served by a BellSouth tandem.

While I am not a lawyer, I understand that this position required by Section 51.711(a)(3) of the Federal Communications Authority's ("FCC") rules, which states that the incumbent local exchange carrier's tandem interconnection rate is the appropriate rate to employ where a competing local carrier's switch "serves a geographic area comparable to the area served by the incumbent LEC's tandem switch."

Q: WHAT STANDARD SHOULD THIS AUTHORITY APPLY IN DETERMINING WHETHER INTERMEDIA SHOULD BE ENTITLED TO THE TANDEM INTERCONNECTION RATE?

A: This Authority should apply one - and only one - criterion: geographic coverage. This criterion is explicitly set forth in Rule 51.711(a)(3) of the FCC's regulations. Rule 51.711(a)(3) states:

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

The language of the rule could not be any more plain. It says what it says: if the competing carrier's switch serves a geographic area comparable to that served by the ILEC's tandem, then the CLEC must be compensated at the tandem interconnection rate.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
COMPLAINT OF INTERMEDIA COMMUNICATIONS INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC. TO ENFORCE THE RECIPROCAL COMPENSATION REQUIREMENT OF THE PARTIES' INTERCONNECTION AGREEMENT	)	Docket No. 00-00280

PREFILED DIRECT TESTIMONY OF J. CARL JACKSON JR. ON BEHALF OF INTERMEDIA COMMUNICATIONS INC.

January 4, 2001

Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS, TITLE, AND BUSINESS AFFILIATION.

A. My name is J. Carl Jackson Jr. . My business address is 360 Interstate North Parkway, Atlanta, Georgia 30339. I am Senior Director – Industry Policy for Intermedia Communications Inc. ("Intermedia").

Q. WHAT ARE YOUR RESPONSIBILITIES IN THAT POSITION?

A. My responsibilities include regulatory policy administration, including the negotiation of interconnection agreements with incumbent local exchange companies throughout the country. In addition, I serve a company policy witness on issues affecting Intermedia's business.

Q. PLEASE SUMMARIZE YOUR BACKGROUND AND EXPERIENCE.

A. I graduated from Georgia State University with a Bachelor of Arts degree in 1978. I completed BellSouth's "Strategic Professional Development Program" in 1996. This is a year-long program developed by and taught at Georgia Tech and University of Alabama, Birmingham, for selected high-potential BellSouth managers. I have more than 21 years of experience in the telecommunications industry, 18 of them with BellSouth. I began my career at BellSouth (Southern Bell) as a Business Office Supervisor in 1978, and worked my way up to positions of increasing responsibility, including Manager, Regulatory; Product Manager, Emergency Services; and Product Manager, Long Distance. I left BellSouth to work for Intermedia as Director, Local Exchange Service. In 1997, I joined ICG, another competitive local exchange carrier ("CLEC"), as Senior Director, Regulatory. In August 1999, I re-joined Intermedia as Senior Director, Industry Policy.

Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THIS AUTHORITY?

A. Yes, I testified before the Authority in Docket 99-00948 on September 19, 2000.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY BEFORE THIS AUTHORITY?

A. I am appearing before this Authority as a policy witness to present Intermedia's positions with respect to the definition of "local traffic" for the purposes of the parties obligations under its Interconnection Agreement and Section 251(b)(5) of the Act. I wish to make clear that I do not claim to be an economist, an engineer, or a lawyer, and I am not testifying in this proceeding as such.

Q. WERE YOU PERSONALLY INVOLVED IN THE NEGOTIATION OF THE INTERCONNECTION AGREEMENT WHICH IS THE SUBJECT OF THIS COMPLAINT?

A. No, I was not but I have been involved in the negotiation of subsequent BellSouth Interconnection Agreements.

Q. PLEASE SUMMARIZE YOUR TESTIMONY.

A. As will be shown in my testimony, the Communications Act of 1934, as amended (the "Communications Act"), and federal and state decisions interpreting same, mandate that BellSouth provide, among other things, reciprocal compensation for the exchange of local traffic, including ISP traffic, at the tandem interconnection rate. Consequently, this Authority should rule in favor of Intermedia on its Complaint against BellSouth.

Q. PLEASE DESCRIBE INTERMEDIA.

A. Since 1987 Intermedia has been transforming complex communications technologies into integrated, easy-to-use voice and data solutions. As one of the nation's largest and fastest

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

Intermedia's full range of services has been embraced by many customers nationwide. Among its award-winning services and technologies Intermedia leads as:

- the fourth largest IXC provider of frame relay nationwide;
- the largest Class-A shared tenant services provider;
- a top-five tier one ISP; and
- a top-five interconnect company.

These capabilities allow Intermedia to provide its customers with cutting-edge communications solutions, coupled with a personalized approach to customer service. Intermedia complements this approach with a truly unique business strategy that anticipates convergence of technologies, leverages access across existing technologies and adds value by controlling the network intelligence, rather than just transporting data. This strategy is propelling Intermedia into the next generation of communication technologies.

In Tennessee, Intermedia has hundreds of customer accounts and access line equivalents. Intermedia has made substantial network investments in the State. This investment includes the deployment of the following switches:

- Two (2) Northern Telecom DMS-500 voice switches located in Nashville and Memphis.
- Five (5) Frame Relay switches located in Chattanooga, Knoxville, and Memphis.

- Two (2) ATM switches located in Memphis and Nashville.

In addition, Intermedia has two (2) active collocation arrangements in Memphis.

Issue 1: ***Should calls to Internet Service Providers (ISPs") be treated as local calls for the payment of reciprocal compensation under the parties' Interconnection Agreement upon which this complaint is based?***

Q. WHAT IS INTERMEDIA'S POSITION WITH RESPECT TO THE DEFINITION OF "LOCAL TRAFFIC" IN THE PARTIES' AGREEMENT?

A. Intermedia's position is that the definition of local traffic should include traffic that originates from or is carried to an Internet Service Provider ("ISP"). Sections 251(b)(5), 251(c)(2) and 252(d)(2) of the Communications Act establish the obligation of incumbent local exchange carriers ("ILECs") to interconnect with competitive carriers and to provide reciprocal compensation for the exchange of traffic. The Communications Act defines the interconnection obligations of ILECs in very broad terms and does not exclude local calls to ISPs from interconnection and reciprocal compensation arrangements.

Q. DOES BELLSOUTH AGREE WITH INTERMEDIA'S POSITION AS TO THE DEFINITION OF LOCAL TRAFFIC?

A. No. BellSouth's position is that the Interconnection Agreement between Intermedia and BellSouth does not obligate BellSouth to pay reciprocal compensation for ISP-bound traffic. If BellSouth's position is adopted, Intermedia would be in a position of carrying BellSouth's customer's calls to their eventual destination *gratis*.

Q. ARE YOU FAMILIAR WITH THE RECENT RULING BY THE U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT CONCERNING THE FCC'S *ISP DECLARATORY RULING*?

A. Yes, I am. In that appellate proceeding (*see Bell Atlantic Cos. V. FCC* (Nos. 99-1094 *et al.*)), the FCC's *ISP Declaratory Ruling* (*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation*, CC Docket Nos. 96-98 and 99-68, Declaratory ruling and Notice of Proposed Rulemaking (rel. Feb. 26, 1999)) was appealed from two directions. First, the ILECs challenged the FCC's determination that ISP-bound traffic could qualify for reciprocal compensation under interconnection agreements. Second, numerous CLECs and their industry associations challenged the FCC's decision that ISP-bound traffic is not "local" and therefore does not qualify for reciprocal compensation under Section 251(b)(5) of the Communications Act. The D.C. Circuit Court only addressed the arguments raised by the CLECs. Because it vacated the FCC's decision, the Court saw no need to address the arguments raised by the ILECs.

The Court vacated and remanded the FCC's decision for lack of "reasoned decision-making." In deciding whether ISP-bound traffic is "local," the FCC looked at whether such traffic is jurisdictionally interstate or intrastate. The FCC applied the so-called "end-to-end" analysis, and found that most ISP-bound traffic is jurisdictionally interstate because the termination points of Internet traffic are usually located in a different state or country from the end-user subscriber. The Court did not reject the "end-to-end" analysis for purposes of establishing jurisdiction, but held that this analysis has no relevance to the question of whether ISP-bound traffic is "local" for reciprocal compensation purposes. Put another way, according to the Court, even if ISP-bound traffic is considered to be jurisdictionally interstate, the call from the end-user subscriber to the ISP still could be "local" traffic and thereby qualify for reciprocal compensation under Section 251(b)(5) of the Communications Act. The Court did not decide whether ISP-bound traffic is in fact "local" traffic, but instead remanded the matter for further consideration by the FCC.

Q. DOES THIS DECISION CUT AGAINST CLECs SEEKING RECIPROCAL COMPENSATION FOR ISP TRAFFIC?

A. Not at all. If anything, it helps them. As I explained above, the Court confirmed that the *jurisdictional* nature of the traffic is irrelevant to reciprocal compensation under Section 252(b)(5) of the Communications Act. In other words, even if ISP-bound calls are *jurisdictionally* interstate, they could still be subject to reciprocal compensation under Section 252(b)(5) of the Communications Act.

Q. HAS ANY STATE OF FEDERAL COURT RULED ON RECIPROCAL COMPENSATION FOR ISP TRAFFIC SUBSEQUENT TO THE D.C. CIRCUIT'S REMAND OF THE FCC'S *ISP DECLARATORY RULING*?

A. Yes. On March 30, 2000, the U.S. Court of Appeals for the Fifth Circuit issued its decision in *Southwestern Bell Tel. Co. v. Public Util. Comm. of Texas* (No. 98-50787), in which it affirmed the decisions of the Texas Public Utility Commission and the district court below that dial-up calls to ISPs are, for purposes of reciprocal compensation, local calls. Notably, the Court stated that even if the FCC, on remand from the Court of Appeals for the D.C. Circuit, concludes that ISP dial-up calls are jurisdictionally interstate, its analysis regarding the jurisdiction of a state commission to deem such calls "local" for reciprocal compensation purposes will not be affected.

Q. HOW DO YOU INTERPRET THIS DECISION?

A. I interpret it to mean that state commissions continue to have jurisdiction to mandate reciprocal compensation for the transport and termination of ISP traffic.

Q. WHY SHOULD BELLSOUTH BE REQUIRED TO PAY RECIPROCAL COMPENSATION FOR CALLS FROM ITS CUSTOMERS TO AN ISP SERVED BY INTERMEDIA, AND VICE VERSA?

A. Compensating Intermedia (and for that matter, BellSouth) is sensible because Intermedia is providing a valuable service to BellSouth and its customers by helping BellSouth complete calls placed by BellSouth end-users to ISPs served by Intermedia. BellSouth cannot reach the ISPs served by Intermedia directly, but must hand off the call to Intermedia at the point where the parties have interconnected, leaving Intermedia to carry the call the rest of the way over its own local network to the ISP. Because Intermedia is providing a service to BellSouth in helping to complete these calls, BellSouth must compensate Intermedia in the same manner as it does for every other seven-digit dialed call placed by a BellSouth customer that is handed off for delivery to one of Intermedia's customers. If such compensation is not paid by BellSouth to Intermedia, Intermedia would be forced to terminate service to its customers or provide service to BellSouth for free. Such an outcome would be patently unfair to Intermedia, and would violate the letter of the law. I should note that this compensation is reciprocal, *i.e.*, BellSouth has been compensated by Intermedia for the transport and termination of calls originated by Intermedia's subscribers destined to BellSouth's ISP customers.

Q. HAS THIS AUTHORITY ADDRESSED THE ISSUE OF RECIPROCAL COMPENSATION FOR ISP TRAFFIC?

A. Yes, it has. In 1998, in Docket No. 98-00118, the Authority explicitly found that ISP traffic is local traffic and should be subject to reciprocal compensation. More recently, in Docket No. 99-00797, the Authority was asked to arbitrate the appropriate definition of "local traffic" for purposes of BellSouth's and Time Warner's reciprocal compensation

obligations under Section 251(b)(5) of the Communications Act. The Authority resolved this issue in favor of Time Warner, ruling that "reciprocal compensation is an appropriate interim rate method to be used to recover the cost associated with the delivery of ISP-bound traffic pending completion of the FCC's rulemaking with regard to this traffic." The Authority reached the same conclusion in resolving similar issues in BellSouth's arbitrations with DeltaCom and NEXTLINK.

This Authority consistently has held, both before and after the FCC's *ISP Declaratory Ruling*, that reciprocal compensation is required for ISP-bound calls --both when interpreting existing interconnection agreements and when arbitrating new ones. There is no reason why this Authority should depart from its well-reasoned policy.

Q. IS THERE ANY REASON WHY THIS AUTHORITY SHOULD DEPART FROM ITS PRIOR RULINGS ON ISP RECIPROCAL COMPENSATION?

A. None whatsoever. The Authority should continue to consider ISP-bound traffic as local traffic for purposes of compensation because a contrary decision would result in a class of calls for which no compensation is provided to the competitive local exchange carrier. This result is inconsistent with the carefully-drawn compensation scheme articulated in the Communications Act, which contemplates that carriers will receive compensation for the use of their respective networks through either access charges or reciprocal compensation. Since Intermedia does not receive access charges for transporting and terminating BellSouth-originated calls to Intermedia's ISP customers, it simply makes sense that reciprocal compensation should apply.

A ruling that ISP traffic is not subject to reciprocal compensation could have a detrimental effect on local competition. Without compensation for the carriage of local ISP traffic,

CLECs will find that the cost of offering Internet service becomes increasingly prohibitive. This will have the perverse effect of fewer carriers providing Internet service and a dramatic increase in the cost of Internet service to customers. Finally, compelling CLECs to provide service to BellSouth free of charge (in essence subsidizing BellSouth's operations) would have negative financial and other anticompetitive effects on the CLECs, and would violate applicable law.

Issue 2: ***Should Intermedia be compensated for end office, tandem, and transport elements for purposes of reciprocal compensation?***

Q. WHAT IS INTERMEDIA'S POSITION WITH RESPECT TO THE FOREGOING ISSUE?

A. Intermedia's position is that it is entitled to compensation at BellSouth's tandem interconnection rate if Intermedia's switch serves a geographic area comparable to the area served by BellSouth's tandems. This position is fully supported by Section 51.711(a)(3) of the FCC's rules, which states that the ILEC's tandem interconnection rate is the appropriate rate to employ where a CLEC's switch "serves a geographic area comparable to the area served by the incumbent LEC's tandem switch."

Q. WHAT IS BELLSOUTH'S POSITION ON THIS ISSUE?

A. BellSouth apparently considers that, if (due to differences in the way the Parties' networks are configured) Intermedia's switch is not actually utilized in precisely the same manner as BellSouth's tandems, Intermedia should not be compensated for its use at the tandem rate. If I understand this position correctly, BellSouth contends that it makes no difference whether Intermedia's switch serves a geographic area comparable to that served by BellSouth's tandem switch: either it is used in the precise same manner as BellSouth's tandems switches are used, or it is not.

Q. WHAT STANDARD SHOULD THIS AUTHORITY APPLY IN DETERMINING WHETHER INTERMEDIA SHOULD BE ENTITLED TO THE TANDEM INTERCONNECTION RATE?

A. This Authority should apply one — and only one — criterion: geographic coverage. This criterion is explicitly set forth in Rule 51.711(a)(3) of the FCC's regulations. Rule 51.711(a)(3) states:

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

The language of the rule could not be any more plain. It says what it says: if the competing carrier's switch serves a geographic area comparable to that served by the ILEC's tandem, then the CLEC must be compensated at the tandem interconnection rate.

Q. WHAT IS THE APPROPRIATE COMPARISON TO MAKE FOR PURPOSES OF DETERMINING WHETHER INTERMEDIA'S SWITCH SERVICE AREAS ARE "COMPARABLE" TO THAT OF BELLSOUTH'S TANDEM?

A. The relevant comparison in each case is *not* Intermedia's switch service area versus the switch service areas for *some or all of* BellSouth's tandems, but rather simply *one* BellSouth tandem. This is consistent with both the language of FCC Rule 51.711(a)(3) and with federal case law. *See, e.g., US West Communications, Inc. v. Minn. Pub. Util. Comm'n,* 55 F. Supp. 2d 968 (D. Minn. 1999). It also makes sense. Each ILEC tandem switch is entitled to compensation as a tandem, so if a CLEC's switch is regarded to be a tandem "by proxy" for purposes of compensation, it should not have to be compared to more than one ILEC tandem switch.

Q. BELLSOUTH APPEARS TO CONTEND THAT, UNLESS INTERMEDIA'S SWITCH ALSO HAS THE FUNCTIONALITY OF AN ILEC TANDEM SWITCH, INTERMEDIA IS NOT ENTITLED TO RECIPROCAL COMPENSATION AT THE TANDEM INTERCONNECTION RATE. DO YOU AGREE WITH THIS ASSERTION?

A. No, I do not. First of all, as I explained above, nowhere in the applicable FCC rules does it state that "functional equivalency" is a relevant criterion. Second, it would be inappropriate to expect that Intermedia would deploy outdated network architecture so that it could qualify for the higher tandem rate. BellSouth expects Intermedia to mimic its network topology, but mimicking its topology would simply result in inefficiencies. Intermedia has deployed sophisticated, multipurpose switches that may not look like the "traditional" tandem switches deployed by BellSouth in its outdated legacy network, but they most certainly serve many functions. Depriving Intermedia of reciprocal compensation at the tandem level would penalize Intermedia for taking advantage of advanced, state-of-the-art technology, and would send the wrong signal to the competitive local exchange market that deploying innovative technology is a liability.

Q. HOW MANY VOICE SWITCHES DOES INTERMEDIA HAVE IN TENNESSEE

A. Intermedia has two (2) Nortel DMS-500 voice switches deployed in Memphis and Nashville.

Q. WHAT ARE DMS-500 SWITCHES?

A. The easiest way to explain it is to quote directly from Nortel's (the switch manufacturer) product description:

> *The DMS-500 Local and Long Distance Switch is a DMS Supernode application that combines local services of the DMS-100 switch, toll and operator services of the DMS-100/200 Traffic Operator Position System (TOPS), and long distance services of the DMS-250 switch. In addition to*

the trunk connections supported by the DMS-250, the DMS-500 delivers all line types currently supported by the DMS-100 system for residential and business applications.

The DMS-500 is a total solution with one of the industry's most application-rich portfolios of carrier services loaded with major capabilities that are market-ready today. These include local services, long distance services, call center services, operator services, and data services. . . .

Elsewhere in its product descriptions, Nortel states further:

The DMS-500 Local and Long Distance Switch is a DMS SuperNode system application that combines the local/tandem services of the DMS-100/200 switch, the operator services of the DMS-100/200 Traffic Operator Position system (TOPS), and the long distance services of the DMS-250 switch.

As Nortel describes them, Intermedia's DMS-500 switches are multifunctional switches that can be used for a variety of purposes. I have attached to this testimony as ***Jackson Exhibit 1*** materials describing Intermedia's DMS-500 switches.

Q. PLEASE DESCRIBE INTERMEDIA'S NETWORK TOPOLOGY IN TENNESSEE.

A. Intermedia's DMS-500 switches in Memphis and Nashville are interconnected, via a combination of one-way and two-way trunks, with BellSouth's three tandems in Nashville and Memphis. Intermedia's DMS-250 switches are connected to several of BellSouth's access tandems via two-way Feature Group D trunk groups.

Q. PLEASE DESCRIBE INTERMEDIA'S LOCAL CALLING AREAS IN TENNESSEE.

A. Through its facilities, Intermedia currently provides service to major parts of Tennessee, including Nashville and Memphis.

Q. WHY IS INTERMEDIA ENTITLED TO TANDEM COMPENSATION?

A. Intermedia is entitled to receive reciprocal compensation at the higher composite tandem rate. As I have discussed, Intermedia has deployed several sophisticated, multifunctional switches in Tennessee that serve customers in geographic areas that are comparable to those served by BellSouth's tandem switches. The advent of fiber optic technologies and multifunctional switching platforms have allowed Intermedia to serve large geographic areas with fewer switches than would have been required under the old technology.

For example, Intermedia has a multiplicity of trunk groups to BellSouth tandem offices in Memphis and Nashville. The net result is to give Intermedia a local footprint that resembles or mirrors BellSouth's footprints. Accordingly, Intermedia's switches serve geographic areas which are comparable to those served by BellSouth's tandem switches.

Q. DOES INTERMEDIA MEET BELLSOUTH'S PURPORTED "FUNCTIONAL EQUIVALENCY" TEST?

A. Yes. Although Intermedia is not required to meet the purported "functional equivalency" test, as more fully explained above, Intermedia's multifunctional switches do exhibit tandem capabilities. Intermedia's switching platforms meet the definition and perform the same functions identified within the Local Exchange Routing Guide for tandem offices and for Class 4/5 switches. Among other things, for example, Intermedia's switches perform aggregation and transmission of traffic from multiple remote locations. Intermedia's switching platform transfers traffic among discrete network nodes that exist in the Intermedia network for purposes of serving groups of customers in exactly the same fashion that BellSouth's tandem switch distributes traffic. Consequently, even assuming *arguendo* that the functional equivalency test applies, Intermedia fully meets that criterion.

Q. HAVE OTHER JURISDICTIONS FOUND THAT COMPETING CARRIERS ARE ENTITLED TO RECIPROCAL COMPENSATION AT THE TANDEM INTERCONNECTION RATE BASED PRINCIPALLY ON A SHOWING OF GEOGRAPHIC COMPARABILITY?

A. Yes, I know of several. In Massachusetts, for example, the Massachusetts Department of Telecommunications and Energy ("MA DTE") last year concluded that the applicable reciprocal compensation rate between Bell Atlantic-Massachusetts and a competing carrier is the tandem rate (*see Petition of MediaOne Telecommunications of Massachusetts, Inc. and New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts, Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement*, D.T.E. 99-42/43, 99-52 (rel. Aug. 25, 1999)):

> *Regarding the parties' dispute on the appropriate rate to be paid for reciprocal compensation, the Department addressed this issue in its Consolidated Arbitrations, Phase 4 Order. In that Order, the Department stated that "the appropriate rate for the carrier other than the [ILEC] is the [ILEC's] tandem interconnection rate." Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-94-Phase 4, at 70, (1996), ("Consolidation Arbitrations"), citing 47 C.F.R. § 51.711(a)(3). The parties have presented us with no reason to deviate from this position. Therefore, the reciprocal compensation rate to be paid between the parties is the tandem rate.*

Notably, in *Consolidated Arbitrations* referenced by the MA DTE above, the MA DTE based its decision principally upon the competing carriers' demonstration that their switches cover a geographic area comparable to that served by Nynex (now Bell Atlantic-Massachusetts). A copy of this decision is attached hereto and incorporated herein by reference as **Jackson Exhibit 2**.

The Alabama Public Service Commission ("AL PSC") also late last year required BellSouth to compensate ICG at the tandem rate based on the FCC's geographic

comparability rule, explicitly dismissing BellSouth's attempt to engraft the "functional equivalency" test. In particular, in the *ICG Order* (*see Petition by ICG Telecom Group, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 27069, Final Order on Arbitration (Nov. 11, 1999)), the AL PSC concurred with the decision of the Arbitration panel which found that functional equivalency is not a requirement of FCC Rule 51.711. A copy of this decision is attached hereto and incorporated herein by reference as **Jackson Exhibit 3**.

More recently, the North Carolina Utilities Commission (the "NCUC") found in favor of ITC DeltaCom on this issue, unequivocally rejecting BellSouth's argument that ITC DeltaCom must meet the purported functional equivalency test:

> *After careful and extensive review of the FCC's Rule 51.711 and the attendant decision in Paragraph 1090, the Commission believes that the language in the FCC's Order clearly contemplates that exact duplication of the ILEC's network architecture is not necessary in order for the CLP [i.e., CLEC] to be eligible to receive reciprocal compensation at the tandem switching rate. Further, we believe that the language in the FCC's Order treats geographic coverage as a proxy for equivalent functionality, and that the concept of equivalent functionality is included within the requirement that the equipment utilized by both parties covers the same basic geographic area. We further believe that the Rule and the Order language are not, for this reason, in conflict in the manner described by BellSouth and the Public Staff.*

In the Matter of Petition by ITC DeltaCom Communications, Inc. For Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1009, Docket No. P-500, Sub 10, Recommended Arbitration Order (rel. Apr. 20, 2000). A copy of this decision is attached hereto and incorporated herein by reference as ***Jackson Exhibit 4***. Intermedia submits that the NCUC's well-reasoned analysis provides the most reasonable and logical interpretation of Rule 51.711.

Q. HAS ANY STATE COMMISSION RULED IN FAVOR OF INTERMEDIA ON THIS ISSUE?

A. Yes. As the Authority may be aware, BellSouth also filed petitions for arbitration against Intermedia in five other BellSouth states, including Georgia, Florida, Louisiana, Alabama, and North Carolina. The Georgia Public Service Commission and the North Carolina Utilities Commission recently have ruled in favor of Intermedia on the issue of tandem interconnection. Significantly, the NCUC based its holding on Intermedia's showing that "its switches cover a comparable geographic area to that covered by BellSouth's switches," thereby rejecting BellSouth's position that Intermedia should also demonstrate tandem functionality. A copy of this decision is attached hereto and incorporated by reference as **Jackson Exhibit 5**. I note the evidence provided by Intermedia in both the Georgia and North Carolina arbitration proceedings are, in material respects, substantially similar to that which has been submitted in this proceeding.

Q. WHY IS IT IMPORTANT THAT INTERMEDIA BE COMPENSATED AT THE TANDEM INTERCONNECTION RATE?

A. The answer is simple: Intermedia incurs costs when terminating calls that are originated by BellSouth. The generally accepted policy of "cost-causation" dictates that Intermedia be compensated for the costs incurred by it on behalf of BellSouth. Because Intermedia's switches serve geographic areas that are comparable to those served by BellSouth's tandem switches, Intermedia appropriately should be compensated at the tandem interconnection rate.

Q. WHAT WOULD BE THE EFFECT OF DENYING INTERMEDIA RECIPROCAL COMPENSATION AT THE TANDEM RATE?

A. Although I do not profess to be an economist, it would seem to me that denying Intermedia full reciprocal compensation at the tandem level would force Intermedia to absorb some of the costs incurred in terminating BellSouth-originated calls. This is not only unfair from a policy standpoint, but it is also inconsistent with this Authority's policy of encouraging competition in the telephone exchange market. If competing carriers were denied the opportunity to recover their costs—as would be the case here if the Authority were to mandate reciprocal compensation at the "elemental" end office rate—it would only discourage or disincentivize the innovative and entrepreneurial competing carriers that have deployed state-of-the-art facilities in the State from further investing in their networks. The ultimate result, of course, could be the reversion to pre-1996 when the citizens of Tennessee had little, if any, choice of local carriers.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes. I would like to reserve the right, however, to amend or modify my testimony, as appropriate.

Docket No. 00-00280
Jackson Direct Exhibit 1
January 4, 2001

Information:
Document Library • Features & Benefits • FAQs •

Products:
DMS SuperNode • Data Manager SPM •

Solutions:
Local Exchange • Carriers Inter Exchange • Carriers Competitive Access • Providers

Purchasing Information

Contact DMS-500 •

Service & Support:
Product Support • Training • User Group •

Related Info:
Local Number • Portability DMS-500 Conversions • Accessing the • Local Loop Global Professional • Services - For Service Providers Enterprise Edge • for CLEC

DMS-500

Local and Long Distance Switch

The DMS-500 Local and Long Distance Switch is a DMS SuperNode application that combines local services of the DMS-100 switch, toll and operator services of the DMS-100/200 Traffic Operator Position System (TOPS), and long distance services of the DMS-250 switch. In addition to the trunk connections supported by the DMS-250, the DMS-500 delivers all line types currently supported by the DMS-100 system for residential and business applications.

The DMS-500 is a total solution with one of the industry's most application-rich portfolios of carrier services loaded with major capabilities that are market-ready today. These include local services, long distance services, call center services, operator services, and data services. And, as part of the Nortel Networks Succession Solutions plan, the DMS-500 is uniquely positioned for the evolution to data-centric communications.

- **Benefits**

  - Ability to quickly generate new revenue through new services, new markets, and new end-to-end telephony offerings
  - Fully functional local/long distance switch enabling revenues to be generated on both sides of the switching business
  - Maximum market flexibility for service providers:
    - selling or reselling long distance services
    - operating with or without operator services
    - offering business and residential line services
  - Cost and operational efficiencies gained in combining DMS-100/200 and DMS-250 services:
    - reducing front-end hardware requirements
    - reducing office site and environmental requirements
    - centralizing operations, administration, maintenance, and provisioning (OAM&P)
  - Expanded pre- and post-sales service support to build a network, train the staff, and operate the network, if needed
  - Multi-vendor network operability ensured with the DMS-500 SuperNode system's open architecture

Information:
Document Library • Features & Benefits • FAQs •

Products:
DMS SuperNode • Data Manager SPM •

Solutions:
Local Exchange Carriers • Inter Exchange Carriers • Competitive Access Providers •

Purchasing Information

Contact DMS-500 •

Service & Support:
Product Support • Training • User Group •

Related Info:
Local Number Portability • DMS-500 Conversions • Accessing the Local Loop •

DMS-500

Conversions

Converting an existing DMS-100 or DMS-250 switch to a DMS-500 enables service providers to offer Class Five through Class One end-office and toll applications. The DMS-500 - teamed with the Nortel Networks S/DMS AccessNode - gives service providers the power to choose how to access their residential and business customers.

DMS-500 Switching System - The Platform for New, Full-Service Providers

Nortel Networks DMS-500 Local and Long Distance Switching System provides a cost-effective vehicle to satisfy the evolving demands of the telecommunication marketplace. With one switching platform, service providers are able to offer local services such as Centrex, CLASS, ISDN, and ACD; long-distance services such as basic long distance, N00/NXX number services, calling card, virtual private networking, operator, and AIN services. The DMS-500's flexibility in integrating and increasing functionality gives service providers the competitive advantage they need to succeed.

The ease of converting an existing DMS-100 or DMS-250 switch to a DMS-500 reflects a true commitment to meet the demands of service providers and to optimize their network investment. More importantly, it underscores Nortel Networks desire for the continued success of its customers by preparing them for the challenges of today and those of tomorrow.

Conversion of a DMS-100 or a DMS-250 to a DMS-500

- **DMS-100/200 to DMS-500**
  An existing DMS-100/200 switch is converted to a DMS-500 system with the addition of new operating software and physical trunk facilities that support long-distance services, all while maintaining current services. For switches with BCS34 or earlier software, Nortel Networks first converts the DMS-100/200 switch to BCS36 capabilities, and then uses a One Night Process (ONP) to add the remaining capabilities of the DMS-500 feature set.
- **DMS-250 to DMS-500**
  DMS-250 conversion is as straightforward as the DMS-100/200 conversion. A DMS-250 is converted by adding new operating software, physical line facilities to support local access services, and interworking trunks for local-to-long distance switching. Current DMS-250 services are maintained during the conversion process. If necessary DMS-250 switch capabilities are first converted to BCS36 and then, using the ONP, to full DMS-500 status.

DMS-500

FAQs

Q: Can my company upgrade our current DMS-100 switch to a DMS-500?
A: Yes, it is possible and easy to convert your DMS-100 switch to a DMS-500. All that is involved is adding some trunking and software, which can be loaded via Nortel Networks One Night Process.

Q: Is this a new switch or a version of Nortel Networks existing DMS SuperNode systems?
A: We believe the DMS-500 is an exciting new breed of product. It integrates the interexchange functionality of the DMS-250 with the feature-rich local exchange services from the DMS-100. It is particularly ideal for start-up applications found in the emerging CLEC telephony market.

Q: How is this product different from your current DMS-100 or DMS-250 systems?
A: The DMS-500 integrates the functionality of our premier local and long distance central office switches. This is ideally sized to meet the needs of the exploding list of emerging telephony providers.

Q: What does the DMS-500 come equipped with as a standard offering in terms of features? What is optional?
A: This product comes with a base software offering that is made up of the base DMS-250 and DMS-100 software offerings including SS7, Business and Residential POTs, IXC trunking and routing, ANI, Authcode, Account code screening and validation. Optional features include Centrex, ACD, CLASS, AIN, TCAP SCP database interface for network applications, 700/800/900 number services, and MCDN networking services.

Q: Is the DMS-500 available in various versions?
A: The DMS-500 is designed to address small to even large applications. It can utilize the SuperNode or SuperNode SE to provide room for growth.

Q: Can the DMS-500 system be configured with just local lines or long distance trunks? If so, how does pricing/capabilities compare to the existing DMS-100 or DMS-250 systems?
A: The DMS-500 has the flexibility to be configured to meet your needs. In situations where the interest is in exclusively long distance or local services, the DMS-500 would be priced comparable to an appropriately sized DMS-100 or DMS-250.

AT A GLANCE

DMS-500 System Advantage

Local/long distance switch cost-effectively opens the door to lucrative new markets

the advantage

DMS-500

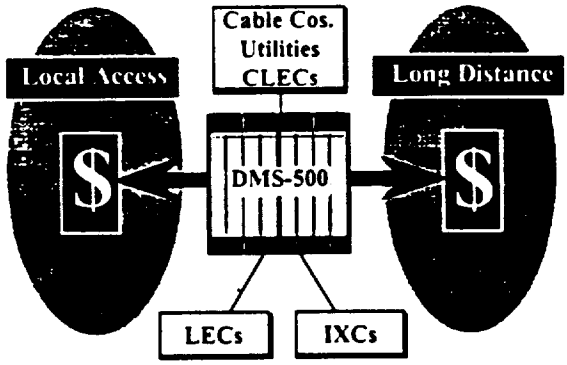
- ❑ ***Revenue Opportunities***
  Cost-effective way to penetrate new markets
- ❑ ***Flexibility***
  Versatile platform to accommodate network needs
- ❑ ***Differentiation***
  Range of capabilities to suit niche or mass markets
- ❑ ***Scalability***
  Modular design to allow for future expansion
- ❑ ***Interoperability***
  Standards compliance for interworking with array of equipment types
- ❑ ***Efficiencies***
  Combined platform that reduces footprint, equipment requirements

As service providers face the challenges of deregulation-inspired competition, they are also anticipating new opportunities with their own entry into untested markets and growing subscriber demand for quick, reliable access to advanced services.

Whether an incumbent in the local or long-distance marketplace or an entrepreneurial service provider, the key to a successful multimarket business strategy is a versatile switching platform that can cost-effectively deliver a range of services and applications to a variety of subscriber types. Nortel's (Northern Telecom's) DMS-500 switching system fulfills these requirements with all the reliability and robustness represented by the Nortel brand. Around the world, switches in the DMS family supply more than 100 million digital lines and 35 million digital trunks—making Nortel a leader in the global movement to fully digital networks.

The DMS-500 Local and Long Distance Switch is a DMS SuperNode switch application that combines the local and long distance services provided by other switches in the DMS family.

In the local marketplace, the DMS-500 system allows the service provider to offer everything from narrowband residential services to custom packages of highly sophisticated business features. Long-distance functionality gives the provider access to a market expected to bring gross revenues of $80 billion in 1997. For full integration of services, the provider can offer local/long distance packages, yielding the twin benefits of service efficiency and subscriber convenience.



LEC. Local Exchange Carrier
IXC. Interexchange Carrier
CLEC. Competitive Local Exchange Carrier

A DMS-500 system can be deployed as a new installation or as an upgrade to an existing DMS-100, DMS-100/200, or DMS-250 switch. Regardless of the deployment scenario, the investment can quickly pay dividends in the form of revenue gains, additional market share, and improved competitive positioning.

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Key Benefits of DMS-500 Switching System

- ## *Ability to Quickly Generate New Revenue*

  The DMS-500 switch is an excellent, cost-effective way to establish a point of presence in markets previously out of reach. Initial product investments can help to broaden revenue streams when an existing DMS system is migrated to a platform that directly supports local, business, operator, and long distance services.

- ## *Maximum Service Provider Flexibility*

  Service providers can develop a highly flexible market entry or expansion strategy as an interexchange carrier (IXC) selling or reselling long distance services, a local exchange carrier (LEC) toll office with or without operator services, or an LEC end office offering business and residential line services.

- ## *Service Development and Differentiation*

  With its full range of service capabilities—from narrowband residential and business features to wideband data switching and Intelligent Network applications—the DMS-500 allows network providers to develop, package, and sell unique new services and service bundles to specific niche or mass customer markets.

- ## *Scalable Architecture*

  The DMS-500 switch uses a modular, scalable design that can meet a wide range of line and trunk size requirements, enabling network providers to enter the local/long distance market by deploying an economically sized DMS-500 switch today and adding advanced capabilities later as service needs expand.

- ## *Local/Long Distance Network Interoperability*

  The DMS-500 system provides a fully functional, standards-compliant technology for both local and long distance services on a switching platform that interworks with a wide variety of vendor-supplied network switching and transmission equipment.

- ## *Cost and Operational Efficiencies*

  By combining both local and long distance services and functions, the DMS-500 switch reduces front-end hardware requirements, conserves office and environmental space, and simplifies the centralization of operations, administration, maintenance, and provisioning functions.

About This Document

This document is a product overview for network planners, engineers, and marketers who need information about the DMS-500 systems—Nortel's multimarket switching platform. It has been designed to complement—not replace—more detailed Nortel technical documents.

Contents

For More Information

For more detailed information, contact your Nortel account representative or call 1-800-4 NORTEL (1-800-466-7835) or 1-506-674-5470.

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1

The DMS-500 Solution

the advantage

The DMS-500 system supports a wide range of lucrative applications that embrace local and long distance markets

As competition stiffens in the deregulated telecommunications marketplace, the service provider faces increasing pressure from business subscribers desiring to gain an advantage in their own markets. In addition to enhanced services such as Virtual Private Networking and Dialable Wideband Service, these subscribers are seeking a new business relationship with the provider centered on a commitment to creative solutions and customer service.

Deregulation also entails the dissolution of traditional market boundaries: interexchange carriers (IXCs) are moving into local services, local exchange carriers (LECs) are moving into long distance markets, and cable companies and competitive LECs (CLECs) are seeking to establish services that address both markets. To flourish in this climate, the service provider must be responsive to the subscriber—creating custom packages and otherwise differentiating its service offerings from the rest of an increasingly crowded field (see Figure 1).

Nortel's DMS-500 platform supports a comprehensive range of revenue-producing, value-added network applications embracing the local and long distance markets as well as operator services. The DMS-500 enables local service providers to extend long-distance services to their subscriber base and to new customers. Likewise, long-distance providers can offer local exchange services from the DMS-500 while retaining access to their traditional national markets.

Market Opportunities

The flexible DMS-500 system enables the service provider to tailor a cross-market business plan according to individual requirements. With the onset of deregulation, the bundling of local and long distance services has drawn particular interest among subscribers who would prefer the convenience of dealing with a single provider. This section includes descriptions of the local and long distance markets and the services that can be offered in each on the DMS-500 system.

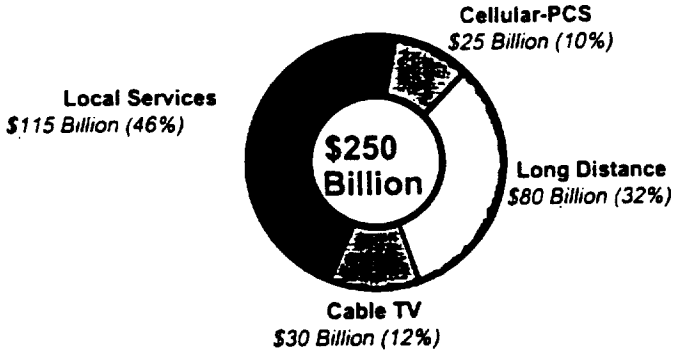


Figure 1. U.S. Telecom Markets—Estimated Revenues for 1997

Local Markets

The feature-rich DMS-500 system allows service providers to offer unique service blends and customized packages to local exchange subscribers, who are expected to generate annual revenues of $115 billion by the end of 1997. The versatile platform allows local service providers to focus on specific niches or mass markets using DMS local services highlighted below.

- ***Meridian Digital Centrex (MDC)***—Nortel's flexible voice and data business services include more than 400 features, which can be packaged to fit the needs of individual subscribers. Among the key MDC features are:
  - — *Voice Features* help ensure call coverage, improve call handling, and make the placing and handling of calls more convenient.
  - — *Tailored Centrex* eases provisioning of and modifications to MDC services.
  - — *Data Services* include Datapath Switched 56, DataSPAN fast packet, ISDN features compliant with National ISDN 2/3 standards, and the multirate-on-demand Dialable Wideband Service.
  - — *Call Center Services* ease the handling of large volumes of incoming calls.
  - — *Billing and Tracking Services* include Station Message Detail Recording to help businesses track their communications costs.
- ***Residential Enhanced Services***—Nortel's portfolio of powerful, productivity-enhancing features for residential and small business subscribers includes the following:
  - — *Custom Calling Services* such as Call Forward, Call Waiting, Three-Way Calling, and Speed Dialing.
  - — *Other Enhanced Services* such as Call Transfer, Teen Service, Call Forward Remote Activation, Call Forward of Call Waiting, Warm Line, Call Hold, and Subscriber Activated Call Blocking.
  - — *CLASS Features* such as Calling Number and Name Display, Calling Name and Number Display Blocking, Call Trace, Screen List Editing, Automatic Call Blocking, and Automatic Recall.
  - — *Centrex to the Home (Hometrex)* offers a subset of MDC features for home use.
  - — *Analog Display Services Interface (ADSI)* such as Call Waiting Display and Call Waiting Display with Disposition.
- ***ISDN Services***—The popularity of Internet surfing and telecomuting are fueling the demand for ISDN, which offers digital clarity plus faster connections than most analog modems. An ISDN Basic Rate Interface (BRI) line features 2B+D connectivity, with each B channel rated at 64 kbps. ISDN Primary Rate Interface (PRI) uses trunk connections to link digital PBXs, host computers, and LANs to central office switches, with 23 channels at 64 kbps for voice or data and one message channel at 64 kbps.

Long Distance Markets

Long distance functionality available through the DMS-500 platform and highlighted below allows the service provider to secure a share of this lucrative market, which is expected to generate total annual revenues of more than $80 billion by the end of 1997.

- ***Information Database Services***—These databases contain subscriber calling and called party information to assist interexchange call processing and Intelligent Network applications.
  - — *700 Number Services*–number translations for customer service numbers dealing with information about and assistance with network features.
  - — *800 Number Services*–number translations for toll-free calls across local calling area boundaries.
  - — *900 Number Services*–number translations used for opinion polls across a wide calling area or to provide special information services.
  - — *Account Codes*–validation numbers for fraud protection and charging calls to user projects, departments, or special accounts.
  - — *Authorization Codes*–validation numbers used to identify subscribers, bill calls, prevent unauthorized network access, and perform similar functions.
  - — *Calling Cards*–giving subscribers access to any carrier.
- ***Call Validation and Trunk Routing***—DMS-500 software can validate user access to long distance services in ways other than those listed above, and then route calls according to those received and interpreted parameters.
  - — *Call Routing*–provides call validation, routing, and feature selection based on calling number, class of service, digits received over Feature Group D trunks, or the time, day, and date.
  - — *Equal Access Trunks*–allow equal access routing to long distance carriers over Feature Group D trunks using either multifrequency or CCS7 signaling.
  - — *CCS7 Release Link Trunks*–provide initial CCS7-based trunk connections so that enhanced service providers, such as banks, can collect the information needed to complete a service call, release the CCS7 trunk connection, and bridge the call over standard trunks.
- ***Enterprise Network Services***—These services offer businesses cost-effective and efficient telecommunications between private facilities in different calling areas.
  - — *Dedicated Access Lines (DALs)*–non-switched DS-1 trunk facilities for private wide area network (WAN) data communications.
  - — *Meridian Switched Network (MSN)*–for MDC subscribers, direct dialing for non-local intra-business calls.
  - — *Virtual Access to Private Networks (VAPN)*–direct dialing between two separate private networks, effectively bypassing the public network and avoiding additional access charges.

- ***Data and Video Services***—Interexchange data and video switching is growing at an increasing pace as businesses expand operations and require sophisticated communications technologies to keep them competitive.
  - — *Switched 56-kbps Service*–data exchange and videoconferencing for nationwide multipoint data and/or video connections.
  - — *Dialable Wideband Service (DWS)*–on-demand, easily tracked connections of variable bandwidth—such as that required in videoconferencing—over public facilities.
  - — *ISDN Primary Rate Interface (PRI)*–highly reliable and flexible trunking facilities for traffic aggregation to Wide Area Telephone Service (WATS), DWS, and other services; enterprise-based hybrid network switching; and compatible interfaces with interexchange networks that use CCS7.
  - — *Integrated Echo Cancellation*–integration of voice and data within the network without the expense of external echo cancellers.
  - — *Bearer Capability Routing*–routing based on the contents of user service information within PRI or CCS7 messages.
- ***Multiple Dialing Plans***—The flexible DMS-500 software can recognize, process, and route different signaling protocols and multiple dialing plans.
  - — *Full 10-Digit Routing*–provides 10-digit routing to the station level.
  - — *7-Digit On-Network Routing*–facilitates VPN services by allowing private-to-private, private-to-public, and public-to-private network 7-digit dialing.
  - — *User Partitioning*–allows multiple private users to share trunk facilities.
  - — *Private and Public Speed Dialing*–allows abbreviated dialing for long distance calls.
  - — *Hotline Number Dialing*–an emergency number service that allows the user to connect to a dedicated number without dialing it.
  - — *Automatic Number Identification via DTMF Trunks*–facilitates calling line identification to call centers not yet using ISDN PRI trunks.
  - — *International Direct Distance Dialing (IDDD)*–allows direct dialing by the subscriber to international numbers.
- ***Virtual Private Networking***—This Intelligent Network-based service enables service providers to establish intra-business communication links across service boundaries without using external databases or costly private facilities.

Operator Services

Nortel was the first to automate alternate billing and directory assistance call completion and the first to use speech recognition to automate directory assistance. The DMS-500 provides end-to-end operator services: from position, to switch, to database applications, to audio processors. Nortel developed the first operator workstation that could perform both toll services and directory assistance. Nortel's 17,000 operator workstations in North America account for 95 of every 100 operators.

2

DMS-500 Overview

the advantage

DMS-500 software loads include a comprehensive set of features, but service providers pay only for features that are actually used

The DMS-500 Local and Long Distance Switch is a DMS SuperNode switch application combining the local services of the DMS-100 switch toll and operator services of the DMS-100/200 Traffic Operator Position System (TOPS); and long distance services of the DMS-250 switch.

The core of the DMS-500 system—called the DMS SuperNode—uses a powerful, flexible architecture built around the latest commercially available microprocessing technology. The DMS SuperNode system can serve every switching application across the public network, offering a range of local and long distance services to businesses and residences worldwide.

The single switching platform of the DMS-500 system allows service providers to become full-service providers to their existing subscribers and to offer a full range of services to new subscribers. Having two major business applications on a single platform sharply reduces the cost of ownership—including such expenses as training, maintenance, facilities, space, and power—and accelerates introduction of local and long distance features to the market.

Nortel, which provides 70 percent of all digital centrex service lines in the U.S, has a record of reliability, innovation, and customer service that stands at the forefront of the industry. Nortel's DMS systems serve more central offices in the United States than switches made by any other vendor. Around the world, DMS switching systems supply more than 115 million digital lines and 35 million digital trunks.

DMS-500 Software—Full Spectrum of Features

The DMS-500 software load includes a comprehensive set of features by combining the line side service of the DMS-100/200 software and the interexchange features of the DMS-250 software into a single load. Each load is delivered with full feature availability, but the service provider pays only for those features actually deployed. Features can be deployed as demand warrants without the necessity of changing the software load, greatly reducing the risk of service-affecting network problems. The service provider also has the option of trialing a feature for a specified period without charge.

Configuration and Capacity

The DMS-500 system can be configured to meet the specific business requirements of each service provider. Carriers have the option of deploying either long distance or local services initially, and then converting to provide both services at a later date. In situations where the network provides long distance or local service exclusively, the cost of the DMS-500 would be comparable to an appropriately sized DMS-100 or DMS-250 system. If other

types of services are required in the future, the existing switch can easily be upgraded by adding the associated peripheral modules and the service circuits.

Capacity Thresholds—DMS-500 Lines, Trunks

The following capacity thresholds apply to DMS-500 lines and trunks:

- CCS for lines is 6.
- CCS for user trunks is 28.8.
- CCS for Interworking Trunks (IWT) is 28.8.
- Average call holding time (ACHT) is 180 seconds.

The maximum supportable number of lines and user (non-IWT) trunks for the DMS-500, given the particular call model's requirements for line and trunk percentages, is shown in Table A for the DMS SuperNode Series 60 and Series 70 Extended Memory (EM) BRISC processors. The required number of IWTs, given the percentage of calls that use IWTs in the particular Call Model, is also provided. (Note: Blocking in the line-side peripherals—where concentration is likely to occur—was not taken into account in Table A calculations. A call blocked in the peripherals may or may not be seen as an origination in the Computing Module. Trunks are not concentrated, and trunks for TOPS positions are not covered in the table.)

Table A: Interworking Trunks (IWT)
Requirements and Maximum Supportable Lines and Trunks

	Default Call Model	Number of Lines	Number of Trunks	Number of IWT DS-0 Ports Reqd.
Series 60	High 100	77,049	28,537	4238
	High 100 TOPS	*	*	*
	High 250	26,879	41,066	4436
	100/250 Even	49,189	31,579	7604
Series 70 EM	High 100	122,278	45,288	7076
	High 100 TOPS	*	*	*
	High 250	42,466	64,878	7374
	100/250 Even	77,836	49,972	13,236

* Not supported

DMS SuperNode SE Line and Trunk Capacity

The DMS SuperNode SE is a reduced-size version of the DMS SuperNode that combines the DMS-Core processing engine, the DMS-Bus high-speed messaging component, the Enhanced Network (ENET) non-blocking switching matrix, and the Link Peripheral Processor (LPP) into a single, compact cabinet.

The size and the configuration of the enhanced switching network (i.e., ENET), and not the capacity of the processor, determine the difference in the number of configurable network ports (lines and trunks) that can be supported by the DMS SuperNode and DMS SuperNode SE platforms.

Remote Access Vehicles

The DMS-500 system supports all remote access vehicles currently available for the DMS-100. Switch remotes include the Remote Switching Center (RSC), the RSC-S, the Remote Line Concentrating Module (RLCM), and the Outside Plant Module (OPM). Digital loop carriers that are supported include Nortel's AccessNode and DMS-1 Urban as well as other vendors' TR-303 and TR-08 compliant access vehicles. A direct digital interface to low-end access vehicles (such as D4 channel banks) is currently under development.

OAM

Operations, administration, and maintenance (OAM) is handled by the same Maintenance and Administration Position (MAP) terminals used today on the DMS-100 200 and DMS-250. All operational measurements, log utility reports, and various maintenance reports available for these systems are also available for the DMS-500 system. To facilitate database file management, an Ethernet Transmission Control Protocol/Internet Protocol (TCP/IP) interface permits manual transfer of billing records and other files into and out of the DMS-500 switch.

Conversion of DMS System to DMS-500

A DMS-100, DMS-100/200, or DMS-250 meeting call mix and application requirements can easily be upgraded to a DMS-500. After the reconfiguration of the switch hardware, new software is loaded through Nortel's One Night Process (ONP), which requires no service interruption. Additional trunks, lines, and other facilities may be needed as demand for services grows.

DMS-500 vs. Competitors' Platforms

The following attributes of the DMS-500 are ***not*** found in platforms manufactured by some Nortel competitors:

- Features allowing the DMS-500 system to serve as a full-service central office and interexchange platform (rather than a central office switch with "access tandem toll" capabilities)
- Availability of centrex services regardless of whether Integrated Services Digital Network (ISDN) is also available
- Feature transparency across the network
- Integrated call center capabilities (rather than external Automatic Call Distribution (ACD) that is dependent on ISDN)
- Multinode reorigination for calling card applications
- Availability of Release Link Trunk (RLT) through Common Channel Signaling No. 7 (CCS7) or ISDN (a great advantage for access to enhanced service providers [ESPs] and service nodes in the Advanced Intelligent Network [AIN])

In addition, the following DMS-500 features enable a smooth migration to external databases:

- Flexible dialing plans
- Virtual private networking capabilities
- Authorization codes
- Account codes
- Personal identification numbers (PINs)
- User-friendly prompt tones
- Call branding capability
- Easy-to-use billing formats
- Integrated 800/900 functionality
- Calling card services

the advantage

Nortel offers a complete approach to network planning and building, from business case development to network operations

3

The Nortel Advantage

Support Services

Nortel offers its customers a total network solution by helping them build, operate, and market telecommunications services as well as by providing contracted turnkey operations. Nortel's veteran network planning organization has worked with new market entrants for over 15 years. This expertise is made available through Nortel's Support Services organization, which offers optional, as-needed services to complement a network provider's core staff and internal resources. With our knowledge of the carrier network business and our proven ability to deliver state-of-the-art communications solutions, Nortel can offer a comprehensive approach to network building.

Among the broad range of optional services that Nortel makes available are:

Business Planning
Any level of service, from business plan development to tactical assistance in implementing sales strategies in a target market.

Network Design and Services Development
Analysis and design of local or global networks to meet business requirements, better integrate new services into an exiting network, and more—using sophisticated planning and modeling tools.

Engineering Services
Design for up-to-date networks that meet current needs and enable cost-effective future growth . . . plus in-service engineering that fine tunes the switch for maximum efficiency in call processing, facility use, and equipment capacity.

Operations and Maintenance
A choice of different support levels, including the following: (1) complete switch maintenance and management; (2) on-site technicians to help during a critical network rollout period; (3) remote coverage during evenings and weekends; or (4) emergency assistance.

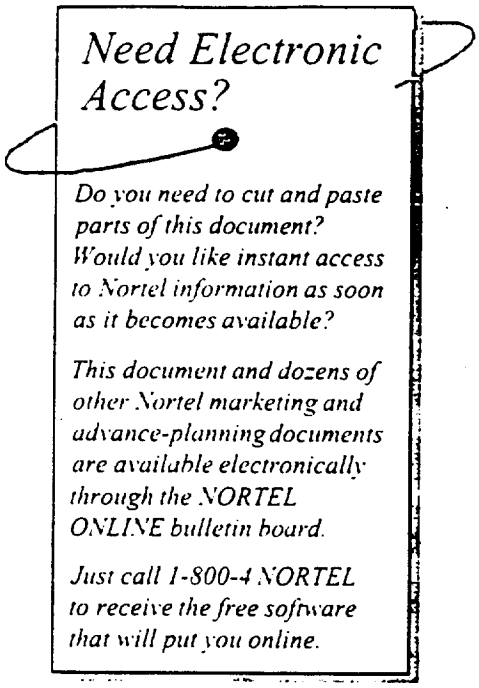
By taking advantage of Nortel expertise in these areas, service providers can quickly enter new local and long distance markets with a differentiating set of services and capabilities. Finally, Nortel can assist with creative financing options that minimize start-up costs and risks, letting providers focus their resources on aggressive market entry strategies.

The Nortel Difference—Competitive Networks

Nortel has worked with more than 150 carriers in North America—including the top industry players—to help them build successful businesses in their markets. More than 400 Nortel switches are now providing 8 million ports around the globe, making Nortel a preferred supplier of local and long distance switch solutions.

Much of North America's telecommunications infrastructure was designed and built by Nortel. Nortel deployed the first fully digital switches more than two decades ago, and we have teamed with network providers worldwide to deliver more than 110 million lines of digital switching in over 90 countries. To achieve this position, Nortel has established close working relationships with each carrier. Our customers tell us what they want, and, in turn, we offer them products and services that can help to fuel their business plans for rapid revenue expansion and market share growth.

Top carriers have chosen Nortel and the DMS family of switches to be their main resource in North America. Now, as these carriers enter the lucrative global marketplace, they are choosing Nortel and the DMS portfolio to form the backbone of their international business expansion.



Information:
Features & Benefits •

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DMS SuperNode •
Data Manager
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Solutions:
Local Exchange •
Carriers
Inter Exchange •
Carriers
Competitive Access •
Providers

Purchasing Information

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Service & Support:
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Training •
User Group •

Related Info:
Local Number •
Portability
Accessing the •
Local Loop

DMS-500

A Long Distance Switch Solution for Local Exchange Carriers

As deregulation opens previously secure telephone networks to greater competition, the network providers who succeed will be responsive to changing market conditions and possess a combination of market savvy and enhanced technological agility. To move quickly into the long distance phone business, local exchange carriers (LECs) can now turn to the DMS-500 Local and Long Distance Switch.

DMS-500 Switching System
The DMS-500 Local and Long Distance Switch is a DMS SuperNode system application that combines the local/tandem services of the DMS-100/200 switch, the operator services of the DMS-100/200 Traffic Operator Position System (TOPS), and the long distance services of the DMS-250 switch. The DMS-500 system - purchased as a new switch or converted from a DMS-100/200 system - allows LECs to enter the lucrative long distance market today and provide full, custom service solutions to their subscribers.

Features and Services
The DMS-500 system offers a flexible and cost-effective way for local carriers to use one switching platform to establish a single point of presence in, and provide revenue-generating services to, both local and long distance markets.

- Local Revenue Services
The DMS-500 switch supports both residential and business service needs with the telecommunications industry's broadest range of station features, including:

- Custom Calling Call Waiting, Three-Way Calling, Call Forwarding features
- Custom Local Area Signaling Service (CLASS) Calling Number Delivery, Calling Name Delivery, Automatic Callback, Automatic Recall, Screening List Editing features
- Meridian Digital Centrex (MDC) the industry's most extensive business services portfolio, including S/DMS BusinessExpress, our advanced services offering for small businesses and enterprise networks
- National ISDN Basic Rate Interface (BRI) and Primary Rate Interface (PRI) Services
- DMS-100 Meridian Automatic Call Distribution (ACD)
- Bellcore Automatic Message Accounting (AMA) format, Centrex Station Message Detail Recording (SMDR)

- E800 Database access
- Operator Services access with DMS-100/200 TOPS capabilities
- Analog Display Services Interface (ADSI)
- Speech Recognition Services
- ADAS, AABS, AIN 0.1, etc.

- Long Distance Revenue Services
The DMS-500 switch supports a full complement of inter-exchange dialing plans and revenue-generating services, including:

- Dialing Plans and Database Services 800/900 Number Service, Wide Area Telephone Service (WATS), International Direct Distance Dialing (IDDD), Authorization Codes, Calling Cards, Account Codes, and Personal Identification Numbers (PINs)
- Enterprise Networking (Voice and Data) Meridian Switched Network, Dedicated Access Lines (DALs), Virtual Private Network (VPN)
- Long Distance Data Switching Services (Data and Video) ISDN PRI Service, Switched 56 Calling, Dialable Wideband Service (DWS)
- DMS-250 Call Detail Recording (CDR)
- AIN 0.2 NetworkBuilder, etc.

Software and Feature Capabilities
The DMS-500 switch combines mature, field-proven DMS-100/200 and DMS-250 capabilities into one software load for a comprehensive set of services on one switching platform. The current software load - NCS10 - combines the NA0010 features of the DMS-100/200 and the UCS10 features of the DMS-250.

Benefits
The advantages of the DMS-500 switch and the partnership with Nortel Networks can help LECs counter the anticipated decrease in local access fees brought on by deregulation, squarely meet the competition moving into local markets, and maximize revenue potential across the board by developing, packaging, and marketing new local, toll, and long distance services.

The following attributes of the DMS-500 switch benefit LECs in a variety of ways, from market strategy to network planning to service delivery.

- **Ability to Quickly Generate New Revenue**
  The DMS-500 switch is a cost-effective way to open service pathways beyond the local arena and establish a point of presence in markets previously out of reach. Initial product investments can help to broaden revenue streams when an existing DMS-250 system is migrated to a platform that directly supports local access services.
- **Maximum Service Provider Flexibility**
  Service providers can develop a highly flexible market entry or expansion strategy as an IXC selling or reselling long distance services, a LEC toll office with or without operator services, or a LEC end office offering business and residential line services-and do it today.
- **Service Development and Differentiation**
  With its full range of service capabilities - from narrowband residential and business features to wideband data switching and Intelligent Network applications - the DMS-500 allows network providers to develop, package, and sell unique new services and

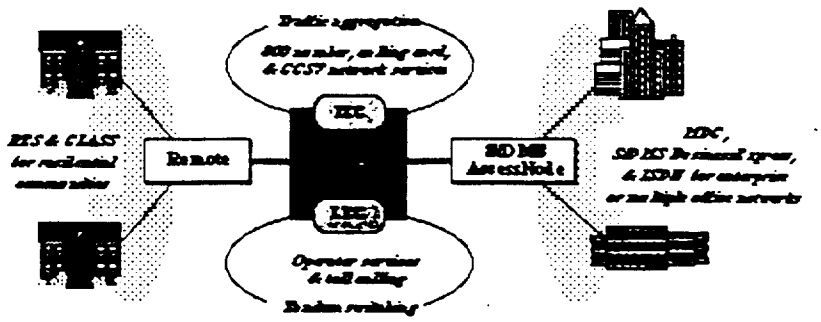
service bundles to specific niche or mass customer markets.

- **Scalable Architecture**
  The DMS-500 switch uses a modular, scalable design that can meet a wide range of line and trunk size requirements, enabling network providers to enter the local-long distance market by deploying an economically sized DMS-500 switch today and adding advanced capabilities later as service needs expand.
- **Local and Long Distance Network Interoperability**
  The DMS-500 system provides a fully functional, standards-compliant technology for both local and long distance services on a switching platform that inter-works with a wide variety of vendor-supplied network switching and transmissions equipment.
- **Cost and Operational Efficiencies**
  Combined DMS-100/200 and DMS-250 services and functions provide the following cost and operational efficiencies in a reduced-size, cost-effective footprint:
  - reduced front-end hardware requirements and subsequent expenditures
  - reduced office site and environmental requirements, such as installation space; power; cabling; peripheral modules; and heating, ventilation, and air conditioning (HVAC)
  - centralized operations, administration, maintenance, and provisioning (OAM&P) with DMS-100/200 and DMS-250 functions supported by a unified DMS Maintenance and Administration Position (MAP)

Network Applications
The technology of the DMS-500 system offers a distinct advantage to network providers competing in today's challenging telecommunications markets. By getting closer to the end user, an IXC or new LEC becomes a direct service provider instead of offering services indirectly. Because the DMS-500 system is designed for maximum switching versatility, it can deliver a wide range of local and long distance services tailored to the unique needs of any network or subscriber market.

In a deregulated environment, the DMS-500 switch can serve as a Class 4/5 access tandem switch using the following typical connections:

- subscriber line connections through remote switching platforms to provide custom calling and CLASS features to residential subscribers
- subscriber line connections through S/DMS AccessNodes (or other DMS remote access vehicles) to provide Centrex-based advanced voice and data services to a variety of businesses or business locations
- trunk connections to a LEC central office to provide toll center, billing, and operator-based services
- trunk connections to an IXC to provide traffic aggregation for long distance voice transport together with CCS7-based signaling trunks for Intelligent Network applications



Line connections to the DMS-500 switch include all line types currently supported by the DMS-100 system for residential and business applications, from Plain Old Telephone Service (POTS) analog lines to ISDN BRI digital lines.

Line interfaces on the DMS-500 switch comply with LATA Switching System Generic Requirements (LSSGR) and other published Bellcore Technical References (TRs) for Class 5 end offices and Class 4/5 access tandem offices delivering line services in the local loop.

Trunk connections to the DMS-500 switch include all trunk types currently supported by the DMS-100/200 and DMS-250 systems for interswitch, interoffice, and interexchange communications, such as:

- Feature Group A, B, C, and D*
- Intermachine Trunk (IMT)*
- Dedicated Access Line (DAL)
- ISDN PRI
- Centralized AMA (CAMA)
- Integrated Business Network (IBN)*
- Inter-Toll (IT)*
- Access to Carrier (ATC)*

*Note: Feature Group D, IMT, IBN, IT, and ATC trunks support both multifrequency (MF) and CCS7 signaling.

Trunk interfaces on the DMS-500 system comply with Bellcore and American National Standards Institute (ANSI) requirements defining T1 CCS7 for inter-LATA transport services.

Converting a DMS-100/200 System
A DMS-100/200 switch is converted to a DMS-500 switch with the simple addition of physical trunk facilities and new software, all while maintaining current services. For switches with BCS34 or earlier software, Nortel Networks first converts the DMS-100/200 system to BCS35 or BCS36 capabilities, and then uses a One Night Process (ONP) to add the remaining capabilities of the DMS-500 feature set.

Hardware Requirements
The DMS-500 system is based on a mature switching technology that uses the same hardware architecture of front-end and network elements found on today's DMS family of switches. This shared architecture makes the process of converting a DMS-100/200 system into a DMS-500 system as

simple as adding DMS-250 operating software, together with the necessary peripheral equipment for line side access.

Whether a DMS-100/200 switch at an established site is converted to a DMS-500 switch, or a DMS-500 switch is purchased for a new site installation, the following hardware is required.

DMS SuperNode or DMS SuperNode SE with:

- BRISC Series 60 Processor
- 96-Meg Memory Cards
- Enhanced Network (ENET), required for initial switch installations only
- Extended Peripheral Module Plus (XPM+)-based peripherals
- Link Peripheral Processor (LPP) with 8-Meg CCS7 Link Interface Units (LIU7s) (NTEX22BA/BB)
- Message Switch and Local Message Switch processor upgrades to NT9X13DD cards

Information:
Document Library • Benefits • Tech Specs •

Products:
DMS SuperNode • Data Manager SPM •

Solutions:
Services Portfolio •

Purchasing Information

Contact DMS-250 •

Service & Support:
User Group •

Related Info:
Succession • Global Professional Services - For Service Providers •

DMS-250

The DMS-250 is a high-capacity long-distance tandem switching system for interexchange carriers of all sizes. Through the advanced DMS SuperNode processing architecture, state-of-the-art hardware, optimized system software, and maximum processing capacity, the DMS-250 provides high-speed message handling capacity to meet the most demanding voice and data communications needs of today's long distance users.

The DMS-250 is part of the Nortel Networks Succession Solutions converged voice/data network. This carrier-grade packet data system can be configured to handle from 480 to more than 100,000 trunks; offers enhanced operation, administration, maintenance, and provisioning (OAM&P) capabilities; offers N00, virtual private networking, calling card, AIN, wholesale capabilities, dialable wideband services; and supports a variety of custom features including speed calling, conference calling, and access to the carrier's operator.

• Benefits

- Increased revenue with the delivery of powerful long-distance services
- Reduced training and maintenance costs and the need for spare equipment by using common, modular software and hardware technology
- Advanced OAM&P capabilities allow rapid introduction of new services
- Evolutionary path to Nortel Networks Succession Solutions

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DMS-250

Benefits

- **Accelerated Delivery of New Features**

  With a redesigned, modular software architecture, it is easier than ever to create new capabilities and enhance existing ones.

- **Easy Growth to Match Market Needs**

  The modular, scalable system architecture of the DMS-250 system allows network providers to add processing capacity, memory capacity, trunk capacity, and services as they are needed. For example, a DMS-250 system can easily grow from a relatively small configuration to 100,000 ports though incremental additions. Enhanced processors, additonal switching matrices, peripherals, and trunk cards can be added without redesigning the system or interrupting service.

- **Protected Investment**

  DMS family switching systems - from local to international systems - all operate on a common hardware base platform. That means that the carrier's investment is protected even as the business takes new directions and the network changes. It also means uncommon flexibility. For example, add software to a DMS-250 system and you have a DMS-250/300 system, capable of handling domestic and international long distance services. Or with the addition of software and certain DMS-100 hardware elements, a DMS-250 switch becomes a DMS-500 switch-capable of providing local and long distance service from a single platform.

- **Compatibility in the Multi-Vendor Network**

  With an open architecture that embraces industry standards, the DMS-250 system functions effectively in today's multi-vendor network. The system is fully compatible with industry-standard telecommunications protocols, including Common Channel Signaling System No. 7 (CCS7), Integrated Services Digital Network (ISDN) and Bellcore's Advanced Intelligent Networking (AIN).

- **Industry-Leading Reliability**

  The DMS-250 system offers the robust performance expected of public carrier systems. Crucial system components, such as the core processing module, are duplicated - "hot" standby units are ready to automatically take over operations if necessary. With a solid record of performance worldwide, the DMS-250 system has

earned recognition from industry journals for superior hardware and software quality and is known as "best in class" in terms of hardware- or software-related outages.

Docket No. 00-00280
Jackson Direct Exhibit 2
January 4, 2001

August 25, 1999

D.T.E. 99-42/43, 99-52

Petitions of MediaOne Telecommunications of Massachusetts, Inc. and New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for arbitration, pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement.

and

Petition of Greater Media Telephone, Inc. for arbitration, pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts.

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Petitioner

TABLE OF CONTENTS

I. INTRODUCTION

This arbitration proceeding is held pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 252 ("Act"). The proceeding is a consolidated arbitration between MediaOne Telecommunications of Massachusetts, Inc. ("MediaOne") and New England Telephone and Telegraph Company d/b/a/ Bell Atlantic-Massachusetts ("Bell Atlantic"). A portion of the proceeding (as described below) has been consolidated with D.T.E. 99-52, an arbitration between Greater Media Telephone, Inc. ("Greater Media") and Bell Atlantic, in order to address similar issues.

Bell Atlantic is an incumbent local exchange carrier ("ILEC"), as defined by the Act, within the Commonwealth of Massachusetts. MediaOne and Greater Media are both facilities-based[1] competitive local exchange carriers ("CLECs"). MediaOne has been offering residential local exchange service to customers in eastern Massachusetts since September 1998, under a negotiated interconnection agreement approved by the Department on December 2, 1998.[2] Greater Media is arbitrating its initial interconnection agreement with Bell Atlantic and is not currently providing telecommunications services. Greater Media is in the process of completing its network design, and plans to provide local exchange and other telecommunications services, initially in the Worcester area.

II. PROCEDURAL HISTORY

On April 22, 1999, both MediaOne and Bell Atlantic filed Petitions for Arbitration pursuant to Section 252(b) of the Act.[3] The MediaOne petition was docketed as D.T.E. 99-42 and the Bell

Atlantic petition was docketed as D.T.E. 99-43. The Arbitrator[4] consolidated the two Petitions for Arbitration ("MediaOne/Bell Atlantic Arbitration") on May 6, 1999. On May 17, 1999, MediaOne and Bell Atlantic filed Responses to the Initial Petitions ("Responses"). On May 27, 1999, the Department held a procedural conference and technical session.

On June 4, 1999, Greater Media[5] filed a Motion for Partial Consolidation of Arbitration proposing that the Department consolidate six issues included in the Greater Media arbitration petition with the MediaOne/Bell Atlantic Arbitration. The six issues are: (1) Rate Demarcation Point Definition, (2) Interpretation and Construction, (3) Geographic Relevance, (4) Physical Architecture, (5) Trunk Group Connections and Ordering, and (6) Network Interface Device. On June 9, 1999, the Arbitrator granted Greater Media's Motion for Partial Consolidation stating that the issues involved common questions of law and fact. The Arbitrator also accepted a request by the parties that should a consolidated issue be resolved between MediaOne and Bell Atlantic (but not Greater Media), that issue would continue to be investigated, and decided, in the Greater Media Arbitration. Since the consolidation ruling, Bell Atlantic and MediaOne have resolved the Rate Demarcation Point and the Network Interface Device issues.

On June 18, 1999, the parties submitted prefiled direct testimony, and on June 24, 1999, rebuttal testimony was filed. On June 28, June 29, and July 8, 1999, the Department conducted arbitration hearings at its offices. In support of its proposal, MediaOne presented the testimony of David Kowolenko, its director of telecommunications, regarding interconnection and performance standards, incentives for local number portability ("LNP"), and certain trunk forecasting issues; and the testimony of Gerry Coe, its service interconnection manager, regarding transit traffic. Bell Atlantic presented Jeffrey A. Masoner, Bell-Atlantic's vice-president, interconnection services (adopting the prefiled testimony of John E. Howard); Donald E. Albert, its network services director of competitive local exchange carrier implementation; Alice Shocket, a Bell Atlantic senior analyst, interconnection services, on the issues of interconnection, transit service, and porting metrics; and Ken Garbarino, its director of operations regulatory requirements, on the issue of porting standards and remedies. Greater Media presented the testimony of Dr. Francis R. Collins, president of CCL Corporation, who addressed interconnection and physical architecture issues, and trunk group ordering. The parties also filed Position Statements which addressed issues generally not discussed in testimony.

The parties submitted initial briefs on July 16, 1999, including proposed findings of fact and conclusions of law, and reply briefs on July 22, 1999. The record consists of 17 exhibits, 52 record request responses, and responses to all discovery requests filed in this proceeding.[6]

III. OUTSTANDING PROCEDURAL ISSUES

A. MediaOne Motion for Interlocutory Order

On June 10, 1999, MediaOne filed with the Department a Motion for Interlocutory Order ("Motion"). In its Motion, MediaOne requested that the Department issue an interlocutory order resolving a dispute between itself and Bell Atlantic regarding the relationship between the interconnection agreement that is the subject of this arbitration, and Bell Atlantic's Interconnection Tariff No. 17.[7] On June 18, 1999, Bell Atlantic filed an Opposition to MediaOne's Motion. Also on June 18, 1999, Greater Media filed a "Position Statement on the Issue of Interpretation and Construction of Proposed Interconnection Agreement in Light of MediaOne's Motion" ("Position Statement").

The Arbitrator issued a Ruling on MediaOne's Motion on July 30, 1999 ("Ruling"). In her Ruling, the Arbitrator reaffirmed the Department's rule of interpretation as stated in Resale Tariff, D.T.E. 98-15, at 13 (Phase I) (1998) ("Resale Tariff"), and applied it to govern the relationship between the interconnection agreements which are the subject of this arbitration and tariffs approved or to be filed by the parties (Ruling at 5). The Arbitrator outlined the rules regarding this relationship as follows: (1) the interconnection agreement entered into by the parties generally controls the relationship of the parties; (2) the parties have the ability to choose to incorporate terms of a tariff, and that choice should be specified in the interconnection agreement; (3) the parties may elect to purchase services under tariff that are not otherwise in an interconnection agreement; (4) in the event of a conflict between provisions of a tariff and the interconnection agreement, the interconnection agreement controls; and (5) where the Department orders a local exchange carrier ("LEC") to include certain terms in a tariff, either through an arbitration proceeding or other proceeding, Department-ordered provisions control (id.).

B. Motions for Clarification of Arbitrator's Ruling

MediaOne, Greater Media, and Bell Atlantic each filed, on August 4, 1999, motions for clarification with respect to various components of the Ruling.[8] MediaOne seeks clarification as to whether the first sentence of Bell Atlantic's proposed Section 2.2 should be included in the interconnection agreement (MediaOne Motion for Clarification at 2). Although the Ruling did not explicitly provide that this first sentence[9] should not be included in the interconnection agreement, MediaOne argues that it does not comport with the Ruling and, therefore, seeks clarification on this matter (id.). Moreover, MediaOne requests the Department to determine that MediaOne's proposed first sentence for Section 2.2 is in fact consistent with the Ruling and should be included in the interconnection agreement (id. at 2-3).

MediaOne also requests clarification of the Arbitrator's ruling that the terms and conditions of an interconnection agreement will be superseded when the Department orders a LEC to include certain terms in a tariff, either through an arbitration proceeding or other proceeding. MediaOne contends that this ruling may have the effect of violating its due process rights by denying it adequate notice of an investigation that would substantially and specifically affect it (id. at 3). Consequently, MediaOne requests that the Department define more fully the scope and intent of this portion of the Ruling (id.).

In its motion for clarification, Greater Media argues that it is unclear whether the Arbitrator intended to resolve Greater Media's dispute with Bell Atlantic about the language governing the interpretation and construction of their interconnection agreement (Greater Media Motion for Clarification at 3). Greater Media asserts that the Ruling did not specifically address Greater Media's proposed interconnection agreement language for Section 2.2, which it argues is consistent with the Ruling, and that it would be erroneous to treat the Ruling as resolving the issue (id. at 3-4). With respect to the Ruling's determination that Department-ordered provisions supersede conflicting interconnection agreement provisions, Greater Media seeks clarification that an "other proceeding" does not include the Department's review of a tariff filed by Bell Atlantic without a prior order of the Department either (1) requiring such a filing or (2) requiring the specific terms and conditions included by Bell Atlantic in such a tariff filing (id. at 4). Lastly, Greater Media argues that even after the guidance contained in the Ruling, ambiguities exist in Bell Atlantic's proposed Section 2.2 language and that Greater Media's proposed language is clear and should be adopted (id. at 5).

Bell Atlantic seeks to clarify the effect of the Ruling on Bell Atlantic's proposed language in Sections

2.2 and 20 (Bell Atlantic Motion for Clarification at 2). Furthermore, Bell Atlantic requests clarification of the status of incorporating the relevant tariff provisions into the MediaOne interconnection agreement and the "open" issues requiring Department resolution in this Order (id.). Bell Atlantic argues that in the Ruling, the Arbitrator implies that other than the removal of the language providing the specific prevails over the general, the remainder of that section and all of Section 20 are acceptable[10] (id. at 3). Finally, Bell Atlantic argues that if the three sections cited by MediaOne as open (i.e., Sections 11.7, 11.9, and 19) remain unresolved, the Department should adopt Bell Atlantic's proposed language for those sections (id. at 3-4).[11]

C. Standard of Review

Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous as to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1989). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas & Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

D. Analysis and Findings

The Department grants in part and denies in part the motions for clarification. We agree that in certain respects the Ruling is ambiguous, creating doubt as to the Ruling's meaning and the Department's intent. To clarify, we reiterate our finding, set forth in our Resale Tariff Order, that the Act established a preference for negotiated, as opposed to arbitrated, agreements. See Resale Tariff, at 13-14. In that Order, we determined that a benefit of this preference is that subsequently adopted resale tariffs may not supersede the negotiated terms and conditions of an existing resale agreement unless the parties mutually agree otherwise. Id. at 14. We found that arbitrated terms and conditions should be treated differently: "Where parties have sought [an arbitration], the Department-arbitrated provisions in the tariff shall supersede corresponding provisions in the existing resale agreements between those parties," and "any future Department-arbitrated changes to the resale discount will govern and supersede existing interconnection agreements." Id.

While the subject matter of the Resale Tariff Order concerned resale exclusively, we find that the policy set forth in that Order is sound and applicable to the interconnection matters covered by Tariff No. 17. Department-arbitrated provisions included in a tariff, resale or otherwise, shall supersede corresponding arbitrated provisions in interconnection agreements between those parties. See Resale Tariff at 14. However, we further clarify that the Department in certain circumstances may explicitly direct that a tariff provision supercede negotiated provisions on the same subject matter (see, Collocation Order, D.T.E. 98-58 (1999)). This does not mean that a negotiated provision in MediaOne's interconnection agreement, for example, would be superseded by a corresponding provision from a subsequent Department arbitration of a different carrier's interconnection agreement. We decline to incorporate Greater Media's suggested language with respect to what is an "other proceeding," as contained in the Ruling (see Greater Media Motion for Clarification at 4). Our Order makes clear that the Department-ordered provisions contained in Department-approved tariffs shall supersede corresponding arbitrated provisions in interconnection agreements, and that there may be circumstances where the Department explicitly requires that a tariff provision supercede negotiated provisions on the same subject matter.

The Arbitrator directed the parties, which the Department determines to include Greater Media in addition to MediaOne and Bell Atlantic, to incorporate language in their interconnection agreements that comports with the Ruling. Specifically, the Arbitrator determined that the following Bell Atlantic proposed phrase in Section 2.2 should not be included: "the specific shall prevail over the more general" (Ruling at 5). In its motion for clarification, Bell Atlantic agreed to delete that phrase from both its MediaOne and Greater Media interconnection agreements (Bell Atlantic Motion for Clarification at 3). However, Bell Atlantic, MediaOne, and Greater Media remain unclear about which party's proposed language for Section 2.2 should be approved by the Department (id. at 3; MediaOne Motion for Clarification at 2-3; Greater Media Motion for Clarification at 3-5).

MediaOne argues that the first sentence of Bell Atlantic's proposed Section 2.2 should be deleted and replaced with the first sentence of MediaOne's proposal filed on June 8, 1999 (MediaOne Motion for Clarification at 2). We agree with MediaOne that Bell Atlantic's first sentence, provided above in footnote 9, involves a general incorporation by reference, and is inconsistent with the specific incorporation favored by the Department in this instance. Therefore, that wording does not comport with the Ruling and shall be removed from Section 2.2 (see id.). MediaOne's proposed first sentence for Section 2.2, "The Agreement governs the provisions of all services or facilities provided hereunder unless the Parties have specifically referenced an applicable provision of their Tariff in this Agreement, in which case the referenced Tariff provision applies," accurately reflects the Department's policy that tariffs do not supersede the corresponding negotiated rates, terms, and conditions of interconnection agreements unless the parties mutually agree that the tariff does so or may do so (see id.; Resale Tariff at 14). Therefore, the first sentence of Section 2.2 of the MediaOne/Bell Atlantic interconnection agreement shall use MediaOne's proposed sentence, referred to above.

But for disputing Bell Atlantic's proposed first sentence in Section 2.2, MediaOne does not argue against incorporating the remainder of Bell Atlantic's proposal, as amended by the Ruling (see MediaOne Motion for Clarification at 2-3). However, the Department finds that the rest of Section 2.2 should also reflect Department policy, clarified above, with respect to terms and conditions of Department-approved tariffs superseding corresponding arbitrated terms and conditions of interconnection agreements. Therefore, we approve the following language for Section 2.2, which other than the new first and last sentences, Bell Atlantic proposed in exhibit B of its Petition:

The Agreement governs the provisions of all services or facilities provided hereunder unless the Parties have specifically referenced an applicable provision of their Tariff in this Agreement, in which case the referenced Tariff provision applies. Subject to the terms set forth in Section 20 regarding rates and charges, if any provision of this Agreement and an applicable tariff cannot be reasonably construed or interpreted to avoid conflict, the provision contained in this Agreement shall prevail.

If any provision contained in this main body of the Agreement and any Schedule or Exhibit hereto cannot be reasonably construed or interpreted to avoid conflict, the provision contained in the main body of the Agreement shall prevail. The fact that a condition, right, obligation, or other term appears in this Agreement but not in any such Tariff or in such Tariff but not in this Agreement, shall not be interpreted as, or be deemed grounds for finding, a conflict for purposes of this Section 2. Terms and conditions of Department-approved tariffs (which are derived from a Department arbitration or other

proceeding) shall supersede corresponding arbitrated terms and conditions of this Agreement. Terms and conditions of Department-approved tariffs (which are derived from a Department arbitration or other proceeding) shall supersede corresponding negotiated terms and conditions of this Agreement upon explicit direction of the Department.

As mentioned above, the Department confirms in this Order that the Arbitrator's

finding - - that Bell Atlantic's proposed phrase, "the specific shall prevail over the more general," should not be included in the interconnection agreement - - applies to both MediaOne's and Greater Media's interconnection agreements. Greater Media argues that the Department should adopt Greater Media's proposed Section 2.2 and not Bell Atlantic's version (as amended by the Ruling) (Greater Media Motion for Clarification at 3-4). Greater Media's Section 2.2 language provides that the rates and charges set forth in Exhibit A to the agreement are subject to the continuing jurisdiction of the Department and may be modified if ordered or authorized by the Department (see Greater Media Position Statement at 13). Its proposal contains language that the parties agree to expeditiously modify any such ordered or authorized rate or charge (id.). We note that Greater Media's proposal was similar to that initially proposed by MediaOne in its petition, but that MediaOne later modified its language, bringing it closer to that which we adopted above.

In its motion for clarification, Greater Media implicitly argues that the Department must adopt its language because it is "consistent with the statement in the [Ruling] that the parties should incorporate language into their interconnection agreements which comports with the [Ruling]" whereas Bell Atlantic's proposal is inconsistent (see Greater Media Motion for Clarification at 3-4). We find that the Section 2.2 language we approve today for the MediaOne/Bell Atlantic interconnection agreement is consistent with both the Ruling and the clarification of that ruling provided in this Order. While we do not decide that Greater Media's proposal is inconsistent with the Ruling, we do find that the new MediaOne/Bell Atlantic Section 2.2 is a more accurate representation of Department policy.

We note that Greater Media's proposal for Section 2.2, contained in its June 18, 1999 Position Statement, differs from the version it filed with its petition on May 10, 1999. Moreover, in its Position Statement, Greater Media requests that we use identical language for Sections 2.2 and 20. Again, we note that its proposed language for Section 20, contained in its Position Statement and which is not the subject of MediaOne's Motion, differs from its proposed language for Section 20 contained in its petition. We find that Greater Media's proposed language for Section 2.2 contained in its Position Statement is more appropriate for discussion on Section 20 because it applies specifically to "rates and charges." Section 2.2 concerns the interpretation and construction of the entire interconnection agreement, not just rates and charges therein. Moreover, we decline to address the substance of Greater Media's proposed Section 20 in this context (i.e., granting the motions for clarification) because that section was not the subject of MediaOne's Motion (see MediaOne Motion for Clarification at 1). In sum, we direct Greater Media and Bell Atlantic to include language identical to that which we approved above for Section 2.2 of their interconnection agreement.

According to Bell Atlantic, the last issue we must address in our clarification of the Ruling is what effect the Ruling has on Section 20 of the interconnection agreement (see Bell Atlantic Motion for Clarification at 3-4). Again, we decline to provide such clarification in this context. As noted by Bell Atlantic in its motion for clarification, Department precedent provides that it will "grant clarification

of previously issued orders when an order is silent as to the disposition of a specific issue requiring determination in the order . . ." (citation omitted). MediaOne's Motion requested an interlocutory order only on Section 2.2 (see MediaOne Motion for Clarification at 1). Since the Arbitrator was not asked in her initial Ruling to render a determination on Section 20 cited by Bell Atlantic in its motion for clarification, we find it inappropriate to address this matter here. Therefore, this part of Bell Atlantic's and Greater Media's motion for clarification is denied.

B. MediaOne Motion to Strike

1. MediaOne's Motion to Strike

On July 30, 1999, MediaOne filed a Motion to Strike the affidavit of Donald E. Albert ("Motion to Strike"). The affidavit, which was appended to Bell Atlantic's reply brief, addressed Bell Atlantic's costs of establishing a mid-span fiber meet[12] interconnection.[13] MediaOne requests that the Department strike the affidavit because the affidavit purports to present statements of fact that are not on the record and have not been subject to cross-examination or rebuttal (Motion to Strike at 2). MediaOne asserts that Bell Atlantic submitted the affidavit without notice to the parties, without a motion, and without good cause shown, ignoring the Department's procedures and rules governing admission of evidence and the ground rules of this arbitration (id.). MediaOne argues that if the affidavit is admitted into evidence, MediaOne will be prejudiced by its admission and be denied its rights to due process (id.).

2. Bell Atlantic's Opposition

On August 2, 1999, Bell Atlantic filed its Opposition to MediaOne's Motion to Strike the affidavit of Donald E. Albert ("Opposition"). In its Opposition, Bell Atlantic argues that MediaOne wrongly proposes to strike Mr. Albert's affidavit, and maintains that MediaOne's argument to prohibit the inclusion of the cost data as evidence is without merit and must be dismissed (Opposition at 2). Bell Atlantic contends that Mr. Albert's affidavit was in direct response to MediaOne's new "compromise" proposal presented for the first time in MediaOne's Initial Brief, filed after the record was closed (id.).

Bell Atlantic asserts that it must be allowed to respond to MediaOne's new proposal, since the proposal contains cost consequences for Bell Atlantic in its interconnection arrangement with MediaOne and in possible interconnection arrangements with other CLECs (id.). Bell Atlantic claims that the new proposal conflicts with the earlier testimony of MediaOne's witness, and that this conflict would have significant consequences for Bell Atlantic (id., citing Bell Atlantic Reply Brief at 10-12). Bell Atlantic insists that denying Bell Atlantic the opportunity to address this conflict, by presenting the facts in Mr. Albert's affidavit, is "patently unfair" (id. at 3).

Bell Atlantic maintains that MediaOne's new proposal is another attempt on MediaOne's part to impose it own notion of an interconnection arrangement on Bell Atlantic (id.). Bell Atlantic asserts that, under the new proposal, it would incur significant transportation cost to carry traffic to MediaOne's interconnection points, which could average a ten mile distance from Bell Atlantic tandem offices (id. at 3-4, citing Bell Atlantic Reply Brief at 10). Bell Atlantic refers to Mr. Albert's testimony regarding the total additional equipment cost of $1.5 million for MediaOne's demand for mid-span meet interconnection arrangements and contends that this cost could be multiplied many times if other CLECs demand the same mid-span interconnection arrangements (id. at 4).

Bell Atlantic maintains that MediaOne's demand for solely mid-span meet interconnection

arrangements is actually a retreat to MediaOne's original position, which Bell Atlantic did not respond to, because, during the proceeding, MediaOne's representations no longer included this demand (id.). Bell Atlantic argues that MediaOne cannot bring forth its new compromise proposal for mid-span interconnection arrangements at such a late date and request that Bell Atlantic be denied its response to the proposal without unduly prejudicing Bell Atlantic (id. at 4-5).

3. Analysis and Findings

Throughout this proceeding, the Department encouraged the parties to negotiate to resolve their differences. The Department has in the past noted that the Act evinces a preference for negotiated agreements. Resale Tariff Order at 13 (Phase I) (1998). We support the parties efforts at resolving as many of the terms and conditions of their agreement themselves as they can (see Section V.I., infra). To the extent that the parties were able to resolve certain issues, this effort was successful, and we do not review the parties' resolution in this proceeding. However, to the extent that parties were unable to resolve certain issues, the Department is required to make a determination on the unresolved issues. 47 U.S.C. § 252(b)(4).

Those determinations must be based on record evidence in this proceeding. Where a party shifted positions in this proceeding after the record had closed, it ran the risk that there would be no record evidence to support its new position, and therefore the Department might have no evidence on which to base a finding in its favor. Here, the parties continued to negotiate after the close of hearings, and on some issues, changed position after the close of the record.

Bell Atlantic states that it filed its affidavit is in response to MediaOne's "new" proposal included for the first time in its brief (Opposition at 2). According to Bell Atlantic, this new proposal included the following provisions: (1) MediaOne's proposal to establish mid-span meets at each Bell Atlantic tandem; (2) MediaOne's proposal to use mid-span meet as its sole interconnection arrangement; and (3) MediaOne's proposal to establish mid-span meets at an average of 10 miles from each tandem. Finally, Bell Atlantic also contends that MediaOne's proposal conflicts with the testimony of MediaOne's witness (Opposition at 2-4).

Regarding whether these provisions are first presented on brief, MediaOne indicated in its Petition that it intended to interconnect via mid-span meets or entrance facilities (MediaOne Petition at 18). The parties had discussed the "footprint" proposal prior to briefing (Exh. MediaOne-3, at 5). Thus, MediaOne's proposal to establish mid-span meets at each tandem did not appear for the first time on brief. However, with respect to the distance from the tandem, both MediaOne and Bell Atlantic proposed a specific maximum mileage for the distance from the tandem switch for a mid-span meet arrangement in their briefs (see MediaOne Brief at 15; Bell Atlantic Brief at 28). At the time of the hearings, MediaOne's proposal was to locate its mid-span meet within Bell Atlantic's tandem serving area (Exh. MediaOne-3, at 5). Thus, the specific mileage proposals are new on brief. Regarding the last point, MediaOne had testified that it would want the mid-span meet as close as possible to the tandem office to be able to control as much as its network as possible (Tr. 2, at 283). However, MediaOne's witness did not specify a distance at that time.

Bell Atlantic attempted to put evidence into the record, after it closed, on the cost of the electronics and equipment needed for a "typical" mid-span meet arrangement (Bell Atlantic Reply Brief at Affidavit of Donald E. Albert). However, we cannot tell if this submittal bases its cost estimates on the distance of a mid-span meet from the tandem office. The affidavit simply identifies the costs as those of a "typical" mid-span meet. Therefore, the affidavit addresses the issue of the cost to Bell

Atlantic of MediaOne's proposal to establish mid-span meets in the footprint of Bell Atlantic tandem serving areas, which was the subject of cross examination at the hearings. As such, Bell Atlantic's affidavit responded to the subject of mid-span meets that was discussed at the hearings, and not to new information presented by MediaOne for the first time on brief.

There is no evidence on the record regarding specific distances from the tandem switch for the mid-span meet arrangements. There is no evidence on the record quantifying the cost of a mid-span meet. On the record before us, we cannot determine whether Bell Atlantic's quarter mile distance, or MediaOne's average ten mile proposal is reasonable. Both proposals are unsupported by the record.

To the extent that any party argued a new position on brief that was unsupported by evidence taken in this proceeding, the Department may not accept those positions. To the extent that a party attempted to introduce new evidence on brief, that purported evidence is stricken from the record, in compliance with the Department's procedural rules, prior decisions, and the Ground Rules in this arbitration.(14)

Accordingly, the Motion to Strike of MediaOne is granted. Where applicable, we note in the Order parties' positions that were made after the close of the record and which are not supported by evidence.

IV. STANDARD OF REVIEW

Section 252(c) of the Act sets out the standards for arbitrations by state commissions. 47 U.S.C. § 252(c). Section 252(c) states, in relevant part, that a state commission shall

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications Commission ("FCC")] pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to [section 252 (d).]

Section 251(c)(2) of the Act defines the obligations for ILECs to interconnect with other carriers. Each ILEC has the duty

to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network -- (A) for the transmission and routing of telephone exchange service and exchange access; (B) at any technically feasible point within the carrier's network; (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of [section 251] and section 252.

Furthermore, § 252(e)(3) provides that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including

requiring compliance with intrastate telecommunications service quality standards and requirements."

V. UNRESOLVED ISSUES

A. Statement Regarding Compliance with Section 251 of the Act

1. Introduction

The parties disagree whether to include wording indicating that the terms of the interconnection agreement satisfy Bell Atlantic's obligations to provide interconnection under § 251 of the Act. The language proposed by Bell Atlantic is as follows:

Whereas Sections 251 and 252 of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 have specific requirements for interconnection, unbundled Network Elements and resale service and the Parties intend that this Agreement meet these requirements.

2. Positions of the Parties

a. MediaOne

MediaOne gives several reasons why it cannot agree, at the time that it signs its interconnection agreement, that the terms of the interconnection agreement will satisfy Bell Atlantic's obligations under the Act (MediaOne Brief at 8). First, MediaOne argues that it is not MediaOne's obligation to make that determination, but the obligation of the Department and the FCC (id.). Second, it is impossible for MediaOne to determine at the time of signing the interconnection agreement whether Bell Atlantic's performance will in fact comply with § 251 (id.). Third, MediaOne asserts that Bell Atlantic has taken positions in the negotiations which MediaOne contends are not in compliance with the Act (id.). Fourth, MediaOne cites FCC regulations which prohibit demands that a party attest that its obligations under the Act are being satisfied by the interconnection agreement (id. at 9, citing 47 C.F.R. § 51.301(c)(2)).

b. Bell Atlantic

Bell Atlantic explains that the purpose of its proposed section on compliance with § 251 obligations, which it states is standard language for its interconnection agreements, is to recognize the parties' obligations to provide services in compliance with the Act (Bell Atlantic Brief at 12). Bell Atlantic complains that it is disingenuous for MediaOne to assert its rights under the Act, and then to refuse to acknowledge that the specific arrangements which it is insisting upon satisfy Bell Atlantic's obligations under the Act (id. at 13). Finally, Bell Atlantic argues that MediaOne's position fails to recognize the fact that a fully executed and implemented interconnection agreement would, by definition, meet § 251 requirements (id. at 13-14).

3. Analysis and Findings

MediaOne is correct that one of the Department's obligations under the Act, when reviewing a final interconnection agreement, is to make a determination that the interconnection agreement meets the

requirements of § 251 of the Act. See 47 U.S.C. § 252(c)(1). In addition, the FCC regulations cited by MediaOne, and not addressed by Bell Atlantic, make it clear that "demanding that a requesting telecommunications carrier attest that an agreement complies with all provisions of the Act, federal regulations, or state law" is a violation of the duty of an ILEC to negotiate in good faith. 47 C.F.R. § 51.301(c)(2). See also NYNEX/MFS Intelenet Interconnection Agreement, D.P.U. 96-72, at 18 (1996). In D.P.U. 96-72, the Department stated that "[a]lthough the Department does not believe that approval of [a similar provision to that at issue here] in any way predetermines the issue of [Bell Atlantic's] satisfaction of its obligations under Sections 251 and 271, such approval may give the impression of a Department finding on the issue." Granted, Bell Atlantic's proposed provision does not require that MediaOne attest that the interconnection agreement complies with *all* provisions of the Act. However, it does suggest that MediaOne in a lesser way acknowledges that the agreement meets the requirements of Section 251. Therefore, the language regarding compliance with Section 251 shall be removed from the interconnection agreement.

B. Interconnection and Physical Architecture

1. Points of Interconnection/Geographic Relevance/Physical Architecture

a. Introduction

In order for customers of two different local exchange carriers to call each other, the network facilities of the carriers need to be interconnected. The FCC has defined interconnection under § 251 (c)(2) of the Act as the physical linking of two networks for the mutual exchange of traffic. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996) ("Local Competition Order") at ¶ 176. The carriers must physically interconnect at a location where they hand off traffic to one another, and also must designate a point on their respective networks where each assumes responsibility for transport and termination of traffic from the other carrier. The Act requires the carriers to establish reciprocal compensation arrangements for the transport and termination of local traffic. 47 U.S.C. § 251(b)(5).

The parties disagree on several fundamental issues concerning how to interconnect their respective networks. These issues (and the corresponding sections in the proposed interconnection agreement) are: Points of Interconnection (Section 4.2.3), Geographic Relevance (Section 4.2.4), and Physical Architecture (Sections 4.3.1, 4.3.5, 4.3.9). The Department will address these sections together, since each relates to the parties' positions on interconnection issues and pertains to the other sections. Combining these sections results in a more coherent discussion and analysis.

Certain definitions are important to this discussion of interconnection issues. Bell Atlantic's interconnection agreements revolve around the concepts of Points of Interconnection ("POI") and Interconnection Points ("IP"). Bell Atlantic defines the POI as the physical point or points on local exchange carriers networks at which those networks interconnect (Bell Atlantic Brief at 16-17).[15] By contrast, according to Bell Atlantic, the IP is a specific point designated by each carrier on its respective network from which the terminating carrier provides the transport (and termination) to complete a local call (Bell Atlantic Brief at 17; Exh. BA-MA-7, at 5). In Bell Atlantic's proposal, reciprocal compensation charges are based and applied upon the designation of the IP (Exh. BA-MA-7, at 5). Bell Atlantic explains that POIs and IPs may be the same point; however, this is not always the case as illustrated by MediaOne's mid-span meet IP in Lawrence, Massachusetts (Exh. BA-MA-7, at 6).

In MediaOne's network, its current POI is its mid-span fiber meet near Bell Atlantic's Lawrence tandem switch (Exh. MediaOne-3, at 4). MediaOne also designates its IP as the same point as the POI under this arrangement (Exh. MediaOne-3, at 4). However, Bell Atlantic's IPs for the exchange of local traffic are located either at the end office[16] or at the access tandem[17] serving that particular end office (Exh. BA-MA-7, at 5). Bell Atlantic would define the POI between its network and MediaOne's network as the mid-span meet in Lawrence and its IP as either the Lawrence Tandem or the relevant Bell Atlantic end office that is connected to and serviced by that tandem (Tr. 2, at 235-236).

Greater Media plans to designate its POI and IP as the same point on its network, at either its proposed switch in Worcester, or at a mid-span meet (Greater Media Brief at 18).

The parties' positions on interconnection issues focus primarily on (1) the specific method of interconnection, (2) the number of interconnection points MediaOne and Greater Media will establish, and (3) the locations of the IPs. Below, we first describe Bell Atlantic's interconnection proposals for MediaOne and Greater Media. We then describe interconnection proposals made by MediaOne and Greater Media to Bell Atlantic. After describing the parties' critiques of each other's proposals, we analyze and resolve the open issues.

b. Bell Atlantic Proposals

The basis of Bell Atlantic's interconnection proposal is the proposition that the parties should exchange local traffic with each other within a reasonable geographic proximity to the terminating end user customer, defined by Bell Atlantic as a "geographically relevant point" (Bell Atlantic Brief at 15). According to Bell Atlantic, each party would be responsible for the transport to and from the geographically relevant point, and once traffic is delivered to an IP, reciprocal compensation charges would apply (id. at 15, 18).

i. MediaOne

Bell Atlantic's proposal to MediaOne includes the following provisions: 1) both Parties mutually agree on the establishment of mid-span arrangement(s) within a twelve month transition period from the execution of the new interconnection agreement[18] (Bell Atlantic Brief at 29; Tr. 2, at 344); 2) the mid-span arrangements will be located at or near each Bell Atlantic tandem[19] (Bell Atlantic Brief at 29; Tr. 2, 332); 3) during the twelve month transition period, Bell Atlantic would provide transport [20] at no charge from MediaOne's existing mid-span arrangement in Lawrence to all other relevant Bell Atlantic IPs (Bell Atlantic Brief at 29; Tr. 2, at 332); 4) Bell Atlantic would limit the traffic volumes eligible for free transport during the twelve month transition period (Bell Atlantic Brief at 29; Tr. 2, at 332); 5) once the volume of traffic delivered by MediaOne for termination to a specific Bell Atlantic end office exceeds a threshold of one DS-1,[21] MediaOne would provision direct trunks on the mid-span meet facilities to that end office and bypass the tandem switch[22] (Bell Atlantic Brief at 29; Tr. 2, at 365-366); 6) both parties would apply an equal and symmetrical reciprocal compensation rate of $.008 per minute of use (Bell Atlantic Brief at 29; Exh. BA-MA-8, at 6); and 7) Bell Atlantic would provide mid-span meet arrangements as a method of interconnection as long as the location and terms of the mid-span meet are mutually agreed upon by the parties (Exh. BA-MA-7, at 15).

ii. Greater Media

Bell Atlantic's proposal to Greater Media is almost identical to the one approved by the Department in the Cablevision Lightpath, Inc. ("CLI")/Bell Atlantic interconnection agreement[23] (Bell Atlantic Brief at 31). This interconnection agreement includes the following provisions: 1) Bell Atlantic's IP would be the terminating Bell Atlantic end office serving that Bell Atlantic customer (id. at 31); 2) the Greater Media IP would be the Greater Media Collocation site(s) established at or near each Bell Atlantic tandem(s)[24] (id. at 32; Tr. 2, at 332); 3) Greater Media would establish an initial IP at a collocation[25] site at the Bell Atlantic tandem in that LATA (Bell Atlantic Brief at 32); 4) Bell Atlantic would provide to Greater Media, at no additional charge, for an interim period, transport from the Bell Atlantic tandem IP to the other Bell Atlantic tandems in the LATA[26] (id. at 32; Tr. 2, at 332); 5) after the earlier of 24 months[27] following initial exchange of traffic to the other Bell Atlantic tandems, or ii) the date by which the volume of Greater Media traffic serving other end offices connected to other Bell Atlantic tandems exceeds a DS1 facility,[28] Greater Media will have two options. Greater Media could either compensate Bell Atlantic for the transport from the initial Bell Atlantic IP to other Bell Atlantic tandem IPs in the LATA, or Greater Media could establish an IP at the other Bell Atlantic tandem IP (Bell Atlantic Brief at 32-33; Tr. 2, at 366).

c. MediaOne Proposal

MediaOne's proposal to Bell Atlantic contains the following provisions: 1) it will establish additional IPs in the "footprint"[29] of each Bell Atlantic tandem within one year from the effective date of the new interconnection agreement (MediaOne Brief at 11; Exh. MediaOne-3, at 5); 2) MediaOne will establish mid-span meets at its IPs located within the "footprint" of each of Bell Atlantic's six tandems (MediaOne Brief at 15; Exh. MediaOne-3, at 5-6; Tr. 2, at 278); 3) if it is unable to agree with Bell Atlantic on the location of a mid-span meet, MediaOne would have the right to select the precise location of the additional IPs (MediaOne Brief at 15; Exh. MediaOne-3, at 6); 4) during the twelve-month transition period to establish the additional IPs, Bell Atlantic would not charge MediaOne for transport between MediaOne's POI in Lawrence and Bell Atlantic's IPs for all trunks currently in place (MediaOne Brief at 13; Tr. 2, at 297-298); 5) transport charges would apply for any incremental trunks added during this period (MediaOne Brief at 13); 6) a direct trunk group volume threshold of three DS-1s worth of traffic would apply before MediaOne would be responsible to build out a direct trunk connection to a Bell Atlantic end office (MediaOne Brief at 13; Exh. MediaOne-3, at 11); 7) the blended[30] reciprocal compensation rate of $.008 would apply for all Bell Atlantic originated traffic that would be terminated by MediaOne instead of the higher tandem rate of $.021, [31] if Bell Atlantic adopts MediaOne's ten mile proposal; otherwise, the tandem rate would apply (MediaOne Brief at 13; Tr. 2, at 271); and 7) the parties would agree to undertake commercially reasonable efforts and be bound by a time frame to establish additional IPs (MediaOne Brief at 13).

d. Greater Media Proposal

Greater Media proposes to define its IP as the point closest to the Bell Atlantic customers to which it is directing calls where Greater Media interconnects with Bell Atlantic (Exh. GMT-2, at 7). Greater Media's proposal to Bell Atlantic includes the following: 1) Greater Media will designate its POIs and IPs with Bell Atlantic as the same location where Greater Media has a switch or remote switching module, which may be at the Worcester Tandem location or at a mid-span meet (Greater Media Brief

at 5; Exh. GMT-2, at 8; Tr. 2, at 206, 209); 2) Greater Media would not be required to establish more than one IP/POI in each LATA -- eliminating from Section 4.2.2.1 the phrase "in each NPA" would accomplish this point (Greater Media Brief at 5; Exh. GMT-2, at 8); and 2) Greater Media would eliminate Bell Atlantic's entire proposed section on geographic relevance (Greater Media Brief at 5). Greater Media also proposes that when it expands to western Massachusetts, it will add an IP in the Western LATA (Exh. GMT-2, at 8).

Greater Media would modify Bell Atlantic's proposal, which incorporates terms from the CLI/Bell Atlantic interconnection agreement, by eliminating the requirement that it interconnect through collocation at the Bell Atlantic tandem (Greater Media Brief at 5). Greater Media proposes that it be permitted to interconnect at any technically feasible point, including, but not limited to, mid-span meet arrangements (id. at 5).

e. Positions of the Parties

i. Bell Atlantic

Bell Atlantic contends that its proposals to both MediaOne and Greater Media are in full compliance with the requirements of the Act and the FCC's Local Competition Order[32] (Bell Atlantic Brief at 15). Bell Atlantic's proposal provides that when either CLEC assigns telephone numbers representing a geographic area and rate center,[33] the CLECs should permit Bell Atlantic to deliver its traffic to each CLEC within a reasonable geographic proximity to the area represented by the CLEC customers' telephone numbers (id. at 19). Bell Atlantic claims that it is reasonable to assume that if the CLEC has active telephone numbers in a Bell Atlantic rate center to which calls are terminating, the CLEC also has or leases facilities in that geographic area (id. at 20). Bell Atlantic argues that if the CLEC imposes a network architecture that does not provide for geographically relevant IPs, the additional transport costs to haul the CLEC's traffic to all of Bell Atlantic's tandems from a single IP would be substantial (id. at 20, 25). Furthermore, Bell Atlantic maintains that such transport costs were not considered in developing the existing reciprocal compensation rates (id. at 25; Bell Atlantic Reply Brief at 13 n.7).

Bell Atlantic contends that MediaOne's footprint proposal, which would allow MediaOne to locate its mid-span meet IPs anywhere within the serving area of the tandem, is too broad (Bell Atlantic Brief at 26). Under MediaOne's footprint proposal, Bell Atlantic maintains that MediaOne would still be able to locate its IPs in locations that have little or no relation to where its customers originate or terminate calls, thereby shifting substantial transport costs to Bell Atlantic (id. at 27). Further, Bell Atlantic maintains that the FCC has found that, in the case of new market entrants requesting interconnection with the ILEC, it is reasonable to require each party to bear a reasonable portion of the economic costs of that arrangement and that state commissions are in a better position to determine the appropriate distance an incumbent LEC should be required to build out facilities for meet point arrangements (Bell Atlantic Reply Brief at 9, citing Local Competition Order at ¶ 553).

Bell Atlantic contends that the FCC, by requiring that a "requesting carrier that wishes a 'technically feasible' but expensive interconnection would ... be required to bear the cost of that interconnection, including a reasonable profit", recognizes that CLECs cannot locate their IPs at arbitrary points (id. at 8, citing Local Competition Order at ¶ 199). Bell Atlantic argues that its geographic relevance proposal is consistent with this requirement (id.). Bell Atlantic states that the 12-month transition period would be acceptable to it as long as MediaOne agreed to a reasonable traffic volume limitation during the 12-month period (Bell Atlantic Brief at 26).

Lastly, Bell Atlantic contends that MediaOne's attempt to impose both the type of interconnection arrangement and the location of that arrangement on Bell Atlantic is unreasonable and unacceptable (id. at 27). Bell Atlantic insists it is not refusing to provide a meet point interconnection, but it is requesting that a mid-span arrangement be mutually selected by the parties and agreed to in writing (id. at 35-36). Bell Atlantic argues that the mutual agreement of the location of the mid-span meet is important because it allows Bell Atlantic to manage and control its network costs (id. at 27). Bell Atlantic claims that a mid-span meet should take into consideration where Bell Atlantic has fiber available because the ILEC is not required to construct facilities regardless of the cost or location (Bell Atlantic Reply Brief at 11). Moreover, Bell Atlantic insists that MediaOne's efforts to preclude Bell Atlantic from even furnishing its own facilities and collocating at MediaOne's end office switch are unreasonable (Bell Atlantic Brief at 36).

Bell Atlantic maintains that Greater Media's proposal to establish only a single switch as its POI and IP would force Bell Atlantic to incur extensive additional transport costs to deliver local traffic from every exchange in the LATA to Greater Media (Bell Atlantic Reply Brief at 14). Bell Atlantic argues that such a result would be inefficient and unfair (id.).

Bell Atlantic responds to Greater Media's contention that it would need to make major capital investment in switching equipment if it had to comply with the geographic relevance provision proposed by Bell Atlantic by noting that Greater Media is only required to provide a hand-off of traffic to Bell Atlantic at a geographically relevant IP[34] (id. at 7).

Bell Atlantic contends that its proposal to Greater Media, which contains almost identical terms as the interconnection arrangement in the CLI/Bell Atlantic Agreement, addresses Greater Media's concerns as a new market entrant (Bell Atlantic Brief at 31, 33). Bell Atlantic claims that its proposed interconnection arrangement allows Greater Media to avoid increased capital costs until its customer base warrants additional capital investment by not requiring it to establish multiple IPs in a LATA (id. at 33). Bell Atlantic explains that allowing a CLEC to establish its IP close to but not at a geographically relevant point is a significant compromise because Bell Atlantic would incur added costs to transport calls to Greater Media's initial IP (id.). Bell Atlantic claims that the proposal allows the parties to share transport costs and is reasonable (Bell Atlantic Reply Brief at 14).

Bell Atlantic claims that Greater Media's concern about sharing of transport costs would be resolved by Greater Media collocating at a single Bell Atlantic tandem in the LATA initially (Bell Atlantic Brief at 33). Greater Media would only provide transport to and from its collocation site at the Bell Atlantic tandem, Bell Atlantic purports, while Bell Atlantic would provide most of the transport until Greater Media expands its network to other local calling areas (id.).

Lastly, Bell Atlantic argues that Greater Media's request to insert language in section 4.3.1 of the agreement that would not limit Greater Media's interconnection possibilities exclusively to collocation, has already been agreed to by the parties and included in Section 4.4[35] (id. at 34). Bell Atlantic insists that while Greater Media has already agreed in one section of the agreement (Section 4.4) to negotiate alternative interconnection arrangements with Bell Atlantic, it should not be allowed to confuse another section of the agreement (Section 4.3.1) by seeking additional interconnection options other than those already negotiated in that section (id. at 34-35).

ii. MediaOne

Although MediaOne contends that the Act does not require it to establish additional IPs within Bell Atlantic's tandem serving areas, MediaOne is willing to undertake this "expensive" task to address Bell Atlantic's concerns about excess transport costs (MediaOne Brief at 14). MediaOne maintains that the FCC has found that a requesting carrier may chose any method of technically feasible interconnection and that meet point arrangements (its preferred method of interconnection) are, in general, technically feasible (MediaOne Brief at 10). MediaOne states that the FCC has also found that an incumbent LEC's interconnection obligations may require it to build out its facilities to accommodate these meet point arrangements (MediaOne Brief at 10, citing Local Competition Order at ¶ 553). In addition, MediaOne points out that the FCC has specifically stated that "CLECs should be allowed to choose 'the most efficient points at which to exchange traffic with the incumbent LECs', thereby lowering' the competing carriers' costs' of transport and termination of traffic" (MediaOne Brief at 11, citing Local Competition Order at ¶ 172). MediaOne notes that nowhere in the FCC's discussions of the incumbent LECs' interconnection obligations does it require CLECs to establish multiple interconnection points (MediaOne Brief at 10). Based upon these FCC statements, MediaOne argues that it is reasonable and not unduly expensive to require Bell Atlantic to interconnect via mid-span fiber meet and to pay for half the build-out expense (i.e., the portion of the fiber construction costs from the tandem to the mid-span meet IP) for each new mid-span meet IP (MediaOne Brief at 15).

MediaOne claims that although the FCC has stated that if a carrier requests a technically feasible, but expensive interconnection, that carrier would be required to "bear the cost of that interconnection, plus a reasonable profit", this qualification would not apply to MediaOne's proposal (MediaOne Brief at 10). MediaOne explains that the reason for the additional interconnection costs associated with establishing the supplementary mid-span meets at Bell Atlantic's tandems is to address Bell Atlantic's concerns about transport costs associated with MediaOne's original proposal[36] (MediaOne Brief at 10).

MediaOne argues that it should ultimately have the final decision on the location of its IP if the parties cannot agree (MediaOne Brief at 11; Tr. 2, at 296). However, MediaOne states that it intends to establish an iterative, collaborative process to decide upon the best location for any mid-span meet IPs (Tr. 2, at 294-296). MediaOne explains that it needs to have some certainty that, if the parties cannot agree to a particular location within a reasonable time frame, MediaOne can make the decision to support and proceed with its business initiatives (MediaOne Brief at 11). Moreover, MediaOne states that Bell Atlantic's objection to the meet point location is based only on issues of technical feasibility which violates Bell Atlantic's obligation to interconnect with MediaOne at any technically feasible point (MediaOne Brief at 11-12).

iii. Greater Media

Greater Media argues that Bell Atlantic has improperly tried to force Greater Media to establish IPs in each NPA in each LATA in which Greater Media has customers (Greater Media Brief at 18). Greater Media claims that the permissible points of interconnection should be, as the Act and the FCC provide, at any technically feasible point in the network, including mid-span meets, remote switching modules or remote network nodes[37](Greater Media Brief at 17). Greater Media contends that if these interconnection points are not made available, Greater Media would be forced to emulate Bell Atlantic's network through costly construction of additional IPs and /or leasing arrangements (i.e., leasing facilities from Bell Atlantic, a third party, or collocating) (Greater Media Brief at 18).[38] Likewise, Bell Atlantic's proposal under Section 4.2.2.1, requiring Greater Media to designate at least

one IP in each area code in each LATA in which it has customers, would also be burdensome and further require Greater Media to replicate Bell Atlantic's network architecture (Greater Media Proposed Findings of Fact and Conclusions of Law at 9).

In addition, Greater Media states that it "opposes the inclusion of Bell Atlantic's geographic relevance provision" (Greater Media Brief at 19). Greater Media indicates that initially it only plans to serve the 21 communities in the Worcester area ("Worcester Cluster"), that receive cable television service from its affiliate Greater Media Cable (Greater Media Brief at 19). Greater Media maintains that although this area would not conform exactly to Bell Atlantic's "geographically relevant" proposal, it is not that much larger and does not justify construction of additional switching investment (Exh. GMT-2, at 5, 8). Greater Media argues that establishing these additional IPs would constitute an economic barrier to market entry for Greater Media and an obstacle to vigorous competition (Greater Media Brief at 3-4). Greater Media states that even though Bell Atlantic has modified its original position and would allow Greater Media to designate a remote switching module as a Greater Media-IP[39], Greater Media states that Bell Atlantic's language on establishing multiple IPs in the LATA is too restrictive (Greater Media Brief at 18).

Greater Media asserts that while Bell Atlantic's compromise proposal, based upon language included in the CLI/Bell Atlantic interconnection agreement, is an improvement over Bell Atlantic's original proposal, it is still unfavorable in comparison to Greater Media's original position for two reasons (Greater Media Brief at 22-23). First, Greater Media claims that it would incur the expense and delay of collocating at Bell Atlantic's tandem offices in each LATA[40] (Greater Media Brief at 23). Greater Media claims that collocating at Bell Atlantic tandem offices requires Greater Media to incur substantial nonrecurring and recurring costs and provisional delays (Greater Media Brief at 4). Greater Media also states that Bell Atlantic's collocation requirement is not reciprocal in that Bell Atlantic would not have to collocate at Greater Media's switch and, thus, also incur collocation costs (Greater Media Brief at 5). Second, Greater Media states that it would be required to pay all the costs of transport between its switches and the Bell Atlantic tandems (Greater Media Brief at 4).

Finally, Greater Media argues that the reciprocal compensation scheme of § 251(b)(5) does not presuppose that CLECs will have the same network architecture as ILECs (Greater Media Reply Brief at 9). According to Greater Media, if an inequity exists because of these different network architectures as asserted by Bell Atlantic, they should be addressed through the costing of the reciprocal compensation rates under § 252(d)(1) (id.). Greater Media notes that the "expensive interconnection" referenced in the Local Competition Order at ¶ 199 when a CLEC requests a specific method of interconnection that causes the ILEC to incur additional costs in order to effectuate interconnection with that CLEC, in which case the CLEC pay for the costs associated with interconnection based upon just and reasonable rates (id. at 10).

f. Analysis and Findings

Our analysis of the points of interconnection, geographic relevance, and physical architecture issues will proceed as follows. First, we consider Bell Atlantic's obligation to provide technically feasible interconnection. Second, we analyze Bell Atlantic's proposal that the CLECs establish additional IPs, or pay for Bell Atlantic's transport costs. Third, we address Bell Atlantic's obligation to provide the CLECs with a reasonable accommodation of interconnection and the effect of that obligation on mid-span meet build out costs. Finally, we consider the appropriate reciprocal compensation rate to be paid by the parties.

i. Bell Atlantic's obligation to provide technically feasible interconnection

Section 251 (c)(2)(b) of the Act states that it is the duty of each incumbent local exchange carrier "to provide for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network -- (2) at any technically feasible point within the carrier's network." 47 U.S.C. § 251(c)(2).

The FCC elaborated on the Act's language regarding technical feasibility by stating that "the Act does not permit [ILECs] to deny interconnection or access to unbundled elements for any reason other than a showing that it is not technically feasible." Local Competition Order at ¶ 206. "We conclude that, under sections 251(c)(2) and 251(c)(3), any requesting carrier may choose any method of technically feasible interconnection or access to unbundled elements at a particular point. Section 251(c)92) imposes an interconnection duty at any technically feasible point; it does not limit that duty to a specific method of interconnection or access to unbundled elements." Id. at ¶ 549. See also ¶ 550.

In its Local Competition Order, the FCC found that the term technically feasible refers solely to technical and operational concerns rather than economic, space, or site limitations. Id. at ¶ 198. The definition of "technical feasibility" states that "a determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, ..." 47 C.F.R. § 51.5. The FCC found that "the 1996 Act bars consideration of costs in determining a 'technically feasible' point of interconnection or access." Local Competition Order at ¶ 199.

Regarding proof of technical feasibility, the FCC stated that pre-existing interconnection or access at a particular point evidences the technical feasibility of interconnection or access at substantially similar points. Id. at ¶ 198. The FCC's interconnection rules state that "[an ILEC] that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible". 47 C.F.R. § 51.305 (e); see also Local Competition Order at ¶ 198, 205, 554.

Therefore, consistent with the requirements of the Act and the FCC's guidelines, the Department finds as a threshold matter that Bell Atlantic must provide MediaOne and Greater Media with requested interconnection unless Bell Atlantic can prove to the Department that the requested interconnection is not technically feasible.

MediaOne is requesting a mid-span meet arrangement as its preferred method of interconnection. Greater Media has not chosen a particular method of interconnection, but it has requested the ability to choose among several options, including mid-span meet, and interconnection at remote network nodes and remote switching modules. Bell Atlantic does not argue that a mid-span meet arrangement is not technically feasible, but raises questions about the cost of mid-span meet interconnection. However, the FCC has indicated that meet point arrangements[41] are technically feasible, and also indicated that cost is not a factor to be considered when determining technical feasibility. Local Competition Order at ¶¶ 199, 553. In the Local Competition Order, the FCC observed "other methods of technically feasible interconnection ... such as meet point interconnection, ... must be available to new entrants upon request. ... we believe such arrangements are technically feasible." Id. at ¶ 553. Therefore, the Department finds that because a mid-span meet arrangement is technically feasible, Bell Atlantic must provide this method of interconnection to MediaOne and Greater Media. Bell

Atlantic cannot condition this type of interconnection, as it claims, on the mutual agreement of the parties, or on the availability of facilities. See Id. at ¶ 199.

Regarding Greater Media's request that we require Bell Atlantic to allow it to interconnect at remote network nodes and remote switching modules, the Department approves Greater Media's requested language that Greater Media may specify methods of interconnection at any of Bell Atlantic's IPs, and any other technically feasible interconnection point. However, we cannot make a determination on the record before us whether interconnection at remote network nodes and remote switching modules is technically feasible. The FCC did not make a finding on these particular methods of interconnection, so such a determination must by made by the Department if the parties do not agree. Once Greater Media is operating, it may request its preferred method of interconnection from Bell Atlantic. Should Bell Atlantic deny the requested interconnection method, Bell Atlantic would be required to prove to us at that time that Greater Media's request is not technically feasible. Therefore, a determination of technical feasibility would be made at that time.

ii. Additional IPs and Transport Costs

Bell Atlantic argues that the FCC has stated that "the requesting carrier must bear the cost of the interconnection" and therefore Bell Atlantic should not have to pay for transport costs between its IPs (at the end office or tandem locations) and the IPs designated by MediaOne (its mid-span meet in Lawrence) and Greater Media (possibly a mid-span meet). In support of its position, Bell Atlantic maintains that MediaOne or Greater Media must either (1) establish IPs near Bell Atlantic's IPs, or (2) bear the cost of transport to their respective IPs.

Regarding Bell Atlantic's request that the Department approve its proposal to require MediaOne and Greater Media to provide IPs at or near each of Bell Atlantic's tandems, neither the Act nor the FCC's rules requires MediaOne or any CLEC to interconnect at multiple points within a LATA to satisfy an incumbent's preference for geographically relevant interconnection points. See Id. at ¶¶ 198-199.

Therefore, we find that a CLEC may designate a single IP for interconnection with an incumbent even though that CLEC may be serving a large geographic area that encompasses multiple ILEC tandems and end offices.[42] There is no requirement or even preference under federal law that a CLEC replicate or in a lesser way mirror an ILEC's network. Indeed, the Act created a preference for CLECs to design and engineer in the most efficient way possible, which Congress envisioned could be markedly different than the ILECs networks. Id. at ¶ 172. We find that MediaOne's existing mid-span meet IP in Lawrence satisfies its obligation under federal law for interconnecting with Bell Atlantic.[43] In addition, Greater Media's proposal to establish one IP per LATA also satisfies its interconnection obligation.

Regarding Bell Atlantic's argument that if MediaOne and Greater Media do not establish "geographically relevant" IPs, they would be obligated to pay Bell Atlantic's transport costs,[44] Bell Atlantic has pointed to nothing in the Act or FCC rules requiring CLECs to pay the transport costs that Bell Atlantic will incur to haul its traffic between Bell Atlantic's IP and the meet point. The FCC envisioned both carriers paying their share of the transport costs to haul traffic to the meet point under the interconnection rules. Bell Atlantic's cite to the FCC's language regarding "expensive interconnection" is not on point because the FCC there was referring to interconnection costs -- not transport costs.[45]

Bell Atlantic is correct that "to the extent [ILECs] incur costs to provide interconnection or access under sections 251(c)(2) or 251(c)(3), [ILECs] may recover such costs from requesting carriers." Local Competition Order at ¶ 200. However, ¶ 200 refers to the cost of establishing and maintaining an interconnection arrangement for a CLEC, not to transport costs. Transport and termination costs within a local service area are covered by the reciprocal compensation rates under § 252(d)(2). Local Compensation Order at ¶ 1034. Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges. Id. at ¶ 1035.

iii. Bell Atlantic's obligation to make a reasonable accommodation for interconnection and the effect of that obligation on mid-span meet build out costs

The FCC has stated that ILECs must make a reasonable accommodation for interconnection. Local Competition Order at ¶ 202. "We further conclude that the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to [ILEC] facilities to the extent necessary to accommodate interconnection ..." Id. at ¶ 198.

That is, use of the term "feasible" implies that interconnecting or providing access to a LEC network element may be feasible at a particular point even if such interconnection or access requires a novel use of, or some modification to, [ILEC] equipment ... Congress intended to obligate the [ILEC] to accommodate the new entrant's network architecture ... Consistent with that intent, the [ILEC] must accept the novel use of, and modification to, its network facilities to accommodate the interconnector or to provide access to unbundled elements.

Id. at ¶ 202.

Furthermore, the FCC's definition of "technically feasible" states that "the fact that an [ILEC] must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible." 47 C.F.R. § 51.5. Therefore, Bell Atlantic must make a reasonable accommodation for interconnection, which may include some modifications to its facilities.

The FCC has specific rules for accommodation of interconnection in the meet point arrangement context. Bell Atlantic is required to make "some" buildout or a "limited" buildout of facilities as a reasonable accommodation for interconnection. The FCC has stated "although the creation of meet point arrangements may require some build out of facilities by the [ILEC], we believe such arrangements are within the scope of the obligations imposed by sections 251(c)(2) and 251(c)(3) ... the limited build-out of facilities from that point may then constitute an accommodation of interconnection. In a meet point arrangement, each party pays its portion of the costs to build out the facilities to the meet point." Local Competition Order at ¶ 553. The FCC based this position on the following reasoning: "In this situation, the [ILEC] and the new entrant are co-carriers and each gains value from the interconnection arrangement." Id.

What constitutes a reasonable accommodation is based, at least in part, on the distance of the build out. The FCC stated "[r]egarding the distance from an [ILEC's] premises that an incumbent should be

required to build out facilities for meet point arrangements, we believe that the parties and state commissions are in a better position than the [FCC] to determine the appropriate distance that would constitute the required reasonable accommodation of interconnection." Id. at ¶ 553.

Therefore the Department must determine whether a particular build out distance constitutes a reasonable accommodation of interconnection. The record in this matter indicates that the expenses of a mid-span meet build out will likely vary from project to project (IR-BA-M1-1-5). Until the Department has a record of a particular build out and the associated costs, we cannot make the determination whether those costs constitute a reasonable accommodation of interconnection and must therefore be borne by Bell Atlantic. At such time as the parties establish a new mid-span meet, and to the extent they are unable to agree on cost sharing, the parties may come before the Department with the actual figures for a particular build out. At that time, the Department would determine whether a particular build out constitutes a "reasonable accommodation of interconnection."

iv. Reciprocal Compensation Rate

Regarding the parties' dispute on the appropriate rate to be paid for reciprocal compensation, the Department addressed this issue in its Consolidated Arbitrations, Phase 4 Order. In that Order, the Department stated that "the appropriate rate for the carrier other than the [ILEC] is the [ILEC's] tandem interconnection rate." Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-94-Phase 4, at 70, (1996), ("Consolidated Arbitrations"), citing 47 C.F.R. § 51.711(a)(3). The parties have presented us with no reason to deviate from this position.(46) Therefore, the reciprocal compensation rate to be paid between the parties is the tandem rate. The other remaining issue - direct trunking - is discussed in Section V.C.3., supra.

2. Interconnection Activation Dates

a. Introduction

MediaOne and Bell Atlantic disagree on the appropriate interconnection activation date for IPs when MediaOne expands its services into a new LATA. The interconnection activation date is the date when a CLEC may begin exchanging traffic between its network and Bell Atlantic's network.

b. Positions of the Parties

i. MediaOne

MediaOne contends that Bell Atlantic must agree to commit to establish firm interconnection activation dates for IPs in each LATA (MediaOne Brief at 16). MediaOne agrees with Bell Atlantic that standard intervals should apply for the purchase of interconnection facilities and collocation (id., citing Exh. M-4, at 2-3). However, if the interconnection is by mid-span meet, MediaOne proposes interconnection activation dates no sooner than 60 days and no later than 120 days, after receipt by Bell Atlantic of a trunk order (id.). MediaOne contends that it needs the deadline to ensure that Bell Atlantic will follow through on its commitment to implement MediaOne's network configuration plan (id.). Without such a time commitment, MediaOne contends that it will be unable to implement any plan to expand its services and service territory within a particular time frame (id., citing Tr. 2, at 316; Exh. M-4, at 3). MediaOne argues that while not all details of a mid-span meet arrangement can be identified in advance, the parties can still agree on a general time frame (id.). Finally, MediaOne

argues that Bell Atlantic's proposal on activation dates violates its obligation to provide interconnection on terms and conditions that are just and reasonable (id.).

ii. Bell Atlantic

Rather than agree on a specific time interval in the agreement, Bell Atlantic proposes that MediaOne and Bell Atlantic agree on an activation date within ten business days from the date Bell Atlantic receives MediaOne's transport orders (facilities orders and routing information) for interconnection in a new LATA (Bell Atlantic Brief at 40-41, citing Exh. BA-MA-7, at 16). Bell Atlantic contends that that activation date should be no earlier than 60 days after Bell Atlantic receives the necessary information (id. at 40). Bell Atlantic states that this is consistent with language contained in approved interconnection agreements (id.). Bell Atlantic argues that a firm date to complete all interconnection orders is not feasible because it ignores the fact that activation will be determined by the method of interconnection selected and Bell Atlantic's overall interconnection activity at the time MediaOne submits its facilities orders and routing information to Bell Atlantic (id.). Bell Atlantic also contends that interconnection activations are affected by standard provisioning intervals for interconnection facilities and collocation, and are also contingent on the availability of facilities (id. at 40-41). Finally, Bell Atlantic contends that a decision by MediaOne to purchase transport facilities from a third party could also affect the timing of interconnection activation (id.).

c. Analysis and Findings

We agree with MediaOne that its ability to make its service expansion plans is hindered by Bell Atlantic's refusal to establish, in the interconnection agreement, an overall date certain by which MediaOne can expect the interconnection process to be complete. Unless a CLEC knows with certainty when its interconnection with Bell Atlantic will be operational, it cannot finalize sales and marketing, and operational support planning, which are critical components to any business plan.

We recognize that certain facilities provisioning and collocation are governed by timetables established under the Department's wholesale performance standards. See Consolidated Arbitrations, Phase 3-B (1998). However, Bell Atlantic's proposed language would give Bell Atlantic too much discretion over the timing of mid-span meet interconnections, by not requiring a deadline for activating MediaOne's trunks. We believe MediaOne's proposed language better balances the parties' interests, in that it gives MediaOne a date certain for activation while giving Bell Atlantic flexibility to complete the activation on any date within a period between 60 to 120 days after receipt of an error-free trunk order. Therefore, we find that the interconnection activation date for a mid-span meet arrangement shall be no sooner than 60 days, and no later than 120 days, after receipt of the associated trunk order. The 120 days should be ample time for the parties to work out the various technical and other issues. In addition, with four months advance notice, Bell Atlantic should be able to plan properly for the availability of facilities for mid-span meets.[47] If MediaOne decides to purchase transport facilities from a third party, MediaOne shall use reasonable efforts to ensure that the third-party provider does not unreasonably delay Bell Atlantic's efforts to complete the interconnection by the deadline.

3. Collocation at MediaOne Site

a. Introduction

The issue in dispute is whether MediaOne is required under the Act to provide collocation at

MediaOne's facilities for Bell Atlantic to interconnect with MediaOne.

b. Positions of the Parties

i. MediaOne

MediaOne argues that as a CLEC, it has no obligation under § 251(c) of the Act to provide Bell Atlantic with collocation at its facilities (MediaOne Reply Brief at 7). MediaOne contends that Bell Atlantic can interconnect with MediaOne through an entrance facility leased from MediaOne or a mid-span meet arrangement (MediaOne Brief at 17). In addition, MediaOne argues that CLECs have the obligation under § 251(a) of the Act to interconnect with other carriers directly or indirectly without any specific interconnection method defined, and this obligation is met by providing the above-mentioned methods of interconnection (MediaOne Reply Brief at 7).

ii. Bell Atlantic

Bell Atlantic contends that MediaOne should be required to allow Bell Atlantic to collocate at MediaOne's facilities so that Bell Atlantic may terminate traffic to MediaOne using Bell Atlantic's own facilities (Bell Atlantic Brief at 37-38). Bell Atlantic argues that in the absence of the option to collocate, Bell Atlantic is forced to build a mid-span meet arrangement or to purchase transport from MediaOne (id.). Bell Atlantic claims that its inability to collocate at MediaOne's facilities hinders efficient interconnection by Bell Atlantic (id.). In addition, Bell Atlantic maintains that MediaOne is not fulfilling its broad obligations under Section 251(a) of the Act, which places a duty on all carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers" (Bell Atlantic Reply Brief at 17, citing 47 U.S.C. § 251(a)).

c. Analysis and Findings

MediaOne has a general duty as a telecommunications carrier under §251(a) of the Act to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. 47 U.S.C. § 251(a). However, the specific obligation to provide collocation applies only to ILECs, such as Bell Atlantic, not to MediaOne. 47 U.S.C. § 251(c)(6).[48] Therefore, we conclude that MediaOne is not required by the Act to offer Bell Atlantic collocation at its facilities.

However, as we noted earlier, § 252(e)(3) provides that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards and requirements." Therefore, we do have authority under state law to consider whether to require MediaOne to offer collocation to Bell Atlantic, but we will not do so because such a requirement would conflict with MediaOne's right to interconnect with Bell Atlantic at any technically feasible location its chooses.

C. Transmission and Routing of Telephone Exchange Service Traffic

1. Monitoring of Trunk Traffic/Prevention of Blocking

a. Introduction

Currently, Bell Atlantic establishes one-way trunk groups from its network to a CLEC network;

CLECs also establish one-way trunks from their networks to Bell Atlantic's network (RR-DTE-22). Both the CLECs and Bell Atlantic are responsible for monitoring their respective one-way trunk groups for blocking[49] (id.). Bell Atlantic provides trunk group connections at either a DS-1 or DS-3 level (RR-DTE-20). When a DS-1 trunk facility becomes blocked during the busy hour, the parties disagree about whether they must commit to (1) a notification requirement for trunk blocking, and (2) a specific period for remedying trunk blocking on trunk groups between Bell Atlantic and MediaOne.

b. Positions of the Parties

i. MediaOne

MediaOne proposes that both parties notify one another within seven days after a party determines that the Common Channel Signaling ("CCS") busy hour equivalent[50] of a DS-1 has been exceeded in a trunk group (MediaOne Brief at 19). In addition, MediaOne proposes that the parties also commit to remedying the problem by adding trunks or establishing new direct trunk groups within 15 days after trunk blocking to reduce the blocking of calls between the two networks (id.). MediaOne argues that 15 days is a reasonable period of time to remedy a blocking situation, balancing the costs to correct the blocking situation with the inconvenience to the customers of both parties (id.). According to MediaOne, it is imposing a reasonable requirement, on both itself and on Bell Atlantic, to ensure that the public is not adversely affected by blocking for a long period of time (id. at 19-20). MediaOne also argues that the trunk provisioning metrics in Bell Atlantic's performance standards, as established in the Consolidated Arbitrations, do not apply here because they were not established to address the specific issues of trunk requests associated with a blocking situation, but to address trunk requests made in the regular course of business and to ensure the parity of provisioning required by the Act (id. at 20).

ii. Bell Atlantic

Bell Atlantic argues that MediaOne's proposed notification requirements for trunk blocking are unreasonable and have no factual basis (Bell Atlantic Reply Brief at 18). In addition, Bell Atlantic asserts that the 15-day interval proposed by MediaOne is too short because it does not account for the different courses of corrective action upon which the parties might decide (e.g., augment an existing trunk group, build a new trunk group, install additional transport facilities, add switching capacity) and, at any rate, is not appropriate for any of those actions (id. at 19).

In describing its trunk monitoring process, Bell Atlantic states that it collects trunking data and analyzes them on a monthly basis (RR-DTE-22). Bell Atlantic asserts that its proposal, described below, addresses MediaOne's timing issues, including a 15-day notice provision, and balances the need for maintaining adequate trunking with the availability of underlying trunk facilities (Bell Atlantic Reply Brief at 18-19).

Bell Atlantic proposes to monitor its final trunk groups carrying traffic to the CLECs based on actual traffic data and to analyze the data, after each monthly reporting period, to determine if final trunk groups are exceeding their engineered blocking design (id. at 19). Bell Atlantic proposes to investigate the causes for trunk groups that exceed their engineered blocking design (id.). When it determines trunk capacity relief is required, it will contact MediaOne within 15 business days after the end of the month to initiate trunk group additions or the creation of new end office trunk groups (id.). Bell Atlantic argues that its proposal to notify MediaOne within 15 days after the end of the month and to negotiate a suitable course of corrective action is reasonable and appropriate (id.).

Bell Atlantic argues that MediaOne's proposal expands the current standards for trunk provisioning, as set forth in the Consolidated Arbitrations, by adding new language (Bell Atlantic Brief at 46). According to Bell Atlantic, MediaOne's proposal differs significantly from the current standard trunk installation interval of 18 business days applicable to long distance carriers and CLECs for an addition to an existing trunk group of 192 or fewer trunks (id.). All other trunk activity is based on negotiated intervals (id.). Bell Atlantic states that the current trunk installation intervals should apply to MediaOne (id.).

c. Analysis and Findings

As an initial matter, we note that both parties recognize their obligation to monitor, engineer, and maintain their dedicated trunk groups for delivering traffic from their network to the other carrier. Moreover, the carriers agree that they are responsible for ordering additional trunk capacity to prevent trunk blocking on their respective networks when traffic on either carrier's network exceeds a certain level. However, the parties disagree on how quickly a carrier should notify the other carrier about blocking and respond to trunk provisioning requests.

As noted by MediaOne, the Department's existing performance standards relate only to provisioning new trunks under normal circumstances and do not address the more urgent situation of network blocking. See Consolidated Arbitrations, Phase 3-B (1998). Bell Atlantic's proposal, summarized above, addresses the process for augmenting final trunk groups, but does not provide a specific time period for corrective action after blocking occurs on the carrier's network. Blocking is an issue that goes beyond the normal competitive concerns of carriers; it may have serious customer service impacts. Therefore, the Department finds that we must establish specific time intervals for interconnection trunk provisioning in a blocking situation in order to minimize any inconvenience to the public resulting from blocking.

When traffic on a carrier's network exceeds the blocking threshold (i.e., the CCS busy hour equivalent of a DS-1) and that carrier can remedy the blocking itself, we direct the carrier to provision additional trunks within fifteen days of when the problem first develops (i.e., when the blocking threshold is exceeded). The carrier is also required to notify the other carrier of the blocking occurrence and corrective action when the new trunks are installed and made operational.

In situations where the remedy requires that new trunks be provisioned by one carrier to another, we believe Bell Atlantic's proposal is inadequate. Under that proposal, Bell Atlantic would gather and analyze data on blocking on its network on a monthly basis, with the analysis being completed at the end of each month. This part of the process, we find, is reasonable.(51) However, after determining blocking, Bell Atlantic would have 15 days to notify MediaOne of the problem and begin negotiating a solution. Bell Atlantic should not need 15 days to notify MediaOne and begin working on fixing the problem. Notification and preliminary discussions with MediaOne should occur immediately (i.e., within two business days after the last day of the month). Moreover, the current 18-day trunk provision interval is inadequate for these types of more urgent situations. Reflecting the increased urgency of a blocking situation, Bell Atlantic should provision additional trunks and correct the blocking situation within 15 days of discovering the problem (i.e., within 15 days of completing its monthly analysis). The two-day notification deadline is subsumed within the 15-day provisioning interval. Since Bell Atlantic's ability to meet the 15-day deadline may be affected, to some extent, by MediaOne's cooperation, we direct MediaOne to assist Bell Atlantic in the process.(52)

2. Access to Call-Related Database through Commercial SS7[53] Provider

a. Introduction

The FCC observed in its Local Competition Order that "[a]ccess to signaling systems continues to be a critical element to providing competing local exchange and exchange access service," and therefore LECs should provide nondiscriminatory access on an unbundled basis to signaling systems to CLECs. Local Competition Order at ¶¶ 482, 479. The FCC found that access to call-related databases [54] is crucial to CLECs' entry into the local exchange market and concluded that "ILECs should provide nondiscriminatory access on an unbundled basis to their call-related databases for the purpose of switch query and database response through SS7 network." Id. at ¶ 484. The parties disagree whether Bell Atlantic has an obligation to provide access to call-related databases at a parity level when MediaOne chooses to use a commercial third-party SS7 provider, instead of directly interconnecting their own Common Channel Signaling facilities to Bell Atlantic.[55]

b. Positions of the Parties

i. MediaOne

MediaOne argues that Bell Atlantic has an obligation under the Act to provide CLECs with access and updates to call-related databases at parity to what Bell Atlantic provides to itself (MediaOne Brief at 21). MediaOne proposes wording that would allow either party to use a commercial SS7 provider and permit that party to gain access "to the same databases as would have been accessible if [that party] had connected directly to the other Party's CCS network" (MediaOne Petition at Attachment 2, Template, Section 17.0). MediaOne acknowledges that it is the commercial SS7 provider that dictates the service MediaOne receives, not Bell Atlantic, but that Bell Atlantic does, nonetheless, have control over the type of access it provides to the third party, and when it makes the access available (MediaOne Brief at 21).

ii. Bell Atlantic

Bell Atlantic argues that it can provide CLECs with access to its call-related databases and associated signaling necessary for the routing and completion of CLEC traffic at parity only for CLECs that (1) interconnect with Bell Atlantic's own Common Channel Interoffice Signaling facilities, and (2) establish an interconnection agreement with Bell Atlantic or purchase out of Bell Atlantic's tariffs (Bell Atlantic Reply Brief at 20-21). Bell Atlantic contends that if MediaOne chooses to access Bell Atlantic's database through a commercial third-party SS7 provider, Bell Atlantic cannot guarantee access at a parity level (Bell Atlantic Brief at 50).

Bell Atlantic argues that under MediaOne's proposal, Bell Atlantic would become a "middle man," as Bell Atlantic would have a business relationship with MediaOne under its interconnection agreement and a separate business relationship with the SS7 provider under a separate contract or tariff (RR-DTE-11; IR DTE-BA-1-9). As a "middle man," Bell Atlantic contends that it cannot be responsible for the quality of service that MediaOne receives from the SS7 provider (Bell Atlantic Reply Brief at 21). Bell Atlantic also claims that due to third-party interconnection agreements, the speed of the interconnection arrangement, and the performance level of the SS7 provider's network, Bell Atlantic cannot dictate to the third-party provider the level of service it is providing to MediaOne (id.).

Furthermore, Bell Atlantic argues that it has no obligation under the Act to provide a CLEC with access to its databases on a parity basis if the CLEC employs a third-party SS7 provider (id.).

c. Analysis and Findings

For the reasons cited below, we find that Bell Atlantic's obligation to provide access to databases at parity does not change even if MediaOne chooses to use a third-party provider. First, the Act requires ILECs to provide requesting carriers "nondiscriminatory access to databases and associated signaling necessary for call routing and completion" as a checklist item for receiving approval to provide in-region interLATA services under Section 271. 47 U.S.C.

§ 271(c)(2)(B)(i). Nowhere in the Act, the FCC's rules, or relevant court precedent, do we find that this requirement is conditioned upon the CLEC using the ILEC as the provider, rather than a third party commercial provider.

Second, MediaOne is free to contract with a different SS7 provider rather than interconnecting its own Common Channel Interoffice Signaling facilities to Bell Atlantic. We agree with MediaOne that Bell Atlantic does not have control over the level of service MediaOne's vendor provides to MediaOne. However, Bell Atlantic certainly has control over the quality of service it provides to MediaOne's vendor.[56] That service quality must be at parity to what Bell Atlantic provides to itself. 47 U.S.C. § 251(c)(2)(C). Finally, although Bell Atlantic raises technical arguments about why it cannot provide parity to MediaOne unless MediaOne interconnects with Bell Atlantic and takes Bell Atlantic's SS7 service, there is no record evidence to support those claims. Therefore, we find that Bell Atlantic is obligated to provide access to call-related databases to MediaOne's commercial SS7 provider at parity to what Bell Atlantic provides itself.[57]

3. Direct Trunking Threshold Level[58]

a. Introduction

Bell Atlantic argues that the capacity of its tandem switches is beginning to exhaust. Bell Atlantic contends that the exhaust is caused by an unrestricted volume of CLEC local traffic delivered to Bell Atlantic end offices through Bell Atlantic's tandem switches[59] (which are not designed for such purpose but rather for switching excess traffic from direct end office trunks). In order to prevent further tandem capacity exhaust, Bell Atlantic proposes that there should be a limit on the amount of traffic between Bell Atlantic's end offices and CLECs switches. Further, Bell Atlantic maintains that CLECs should be required to establish direct trunks between Bell Atlantic's end offices and CLECs' end offices once traffic volumes reach a threshold level. The parties disagree on the appropriate direct trunking threshold and the period of time over which traffic volumes should be measured to determine whether the threshold level has been met.

b. Positions of the Parties

i. MediaOne

MediaOne argues that as a new carrier experiencing substantial traffic fluctuations, it requires a higher direct trunking threshold level to take into consideration these fluxuations and therefore proposes to establish direct trunking to Bell Atlantic's end office once MediaOne's traffic volume

reaches the equivalent of three DS-1s, as measured over three consecutive months (MediaOne Proposed Findings of Fact and Conclusions of Law at 3). MediaOne argues that Bell Atlantic's network design principles, that recommend direct trunking when traffic reaches the DS1 level, don't apply to MediaOne (MediaOne Reply Brief at 9). MediaOne argues that Bell Atlantic's witness acknowledged during hearings that it would be reasonable to set a period of time instead of one point in time for measuring traffic volumes to establish this threshold (MediaOne Reply Brief at 10; Tr. 2, at 349). On a related issue, MediaOne requests that Bell Atlantic's transport and termination bundled rate for direct trunks be unbundled since MediaOne will not be buying transport from Bell Atlantic when it establishes direct trunking (MediaOne Brief at 12).

In response to Bell Atlantic's claims that the exhaust of Bell Atlantic's tandem switches is due to an increase in CLEC traffic routed over them, MediaOne provides two reasons why Bell Atlantic's analysis is wrong (MediaOne Reply Brief at 10-11). First, MediaOne argues that the data show an increase in the number of trunks over a 14 month-period but do not reflect the total percentage of trunks that are attributable to CLEC traffic (id.). MediaOne claims that it cannot compare CLEC-trunk demand with total trunk demand over Bell Atlantic's tandem switches from the data that Bell Atlantic has provided (id. at 11). Second, MediaOne argues that the data do not show why the three DS-1 level is "excessive" (id. at 11). According to MediaOne, its proposal of a three DS-1 threshold, for three consecutive months, addresses both Bell Atlantic's concern about excessive levels of traffic through its tandem and MediaOne's concern about ensuring that it has enough trunks to meet its planning and growth needs (id. at 11).

ii. Greater Media

While Greater Media also argues that Bell Atlantic's one DS-1 direct trunking threshold is unreasonable, Greater Media contends that a DS-3 threshold, which represents 672 simultaneous calls, or, in the alternative, a level of 15 DS-1s, which represents 360 simultaneous calls is appropriate (Greater Media Brief at 26-27). In addition, Greater Media claims that Bell Atlantic's argument that a DS-1 level is consistent with its internal network design rules has not been supported by any written evidence (id. at 27). Furthermore, Greater Media believes that Bell Atlantic has not shown why Greater Media's proposal would be detrimental to Bell Atlantic's network (id.). Greater Media argues that Bell Atlantic's revised position to require end office direct trunking when Greater Media experiences a DS-1 level of traffic for three consecutive months is arbitrary (Greater Media Reply Brief at 12). Greater Media claims that "it would be equally appropriate for the Department to average the three year term of the proposed interconnection agreement with three months and afford Greater Media a period of 19½ months of consecutive traffic at DS-1 level" (id.).

iii. Bell Atlantic

Bell Atlantic argues that if the traffic volume between a Bell Atlantic end office and a

CLEC's switch exceeds a DS-1 threshold level, the CLEC should be required to build direct trunking to Bell Atlantic's end office (Bell Atlantic Brief at 47). First, Bell Atlantic claims, "[t]andem switches are generally engineered to switch overflow traffic from direct end office high usage trunk groups. They are not engineered or designed to handle the major portion of local traffic that is carried over the Public Switched Network" (Exh. BA-MA-3, at 9; Bell Atlantic Brief at 47). Second, Bell Atlantic maintains that the DS-1 threshold has been used for more than ten years as the threshold for Bell Atlantic's own network to establish direct end office trunks in order to maximize efficiency (Tr. 1, at 40; Exh. BA-MA-3, at 10; Bell Atlantic Brief at 47).

Bell Atlantic claims that the need for a DS-1 threshold is shown by the 59 percent increase in tandem trunks for CLECs to Bell Atlantic's tandems from April 27, 1998 through June 25, 1999 (RR-DTE-3; Bell Atlantic Brief at 47). According to Bell Atlantic, routing excessive volumes of traffic through Bell Atlantic's tandem switch instead of relying on direct trunking between end offices results in additional tandem switching and trunking capacity, thereby causing Bell Atlantic unnecessary costs and network inefficiency (Bell Atlantic Brief at 48).

c. Analysis and Findings

As an initial matter, Bell Atlantic's evidence that CLECs have created the tandem exhaust problem is inconclusive, but Bell Atlantic has persuaded us that CLECs are a significant contributing factor. Bell Atlantic presented evidence of its recent addition of two new access tandems in 1999 as proof that a tandem exhaust problem exists.[(60)] During hearings, Bell Atlantic stated that the exhaust problem at its access tandems is attributed to a combination of demand for actual trunk termination, the circuits that are physically terminated on the tandems, and the calls that are placed over those trunks (Tr. 1, at 19). Bell Atlantic provided evidence that over 66,000 trunks, or 59 percent, of the increase in tandem trunks from April 1998 through June 1999, was attributable to CLEC trunking requirements[(61)] (RR-DTE-3). Bell Atlantic did not provide evidence on the other element of tandem exhaust: the volume of CLEC calls routed through the tandem to another CLEC, as measured by the ratio of CLEC tandem transit minutes of use to total tandem minutes of use. Moreover, Bell Atlantic's witness testified that the increase in trunk terminations had a larger effect on its current tandem exhaust problem than increased traffic volume (Tr. 1, at 20). Therefore, we conclude that CLEC trunk terminations were a significant factor in the current tandem exhaust situation, though certainly not the only factor. Because of other potential causes of tandem exhaust, it is not clear whether Bell Atlantic's proposal to limit CLEC use of its tandems will correct the tandem exhaust problem.

In addition, we are reluctant to rely on Bell Atlantic's economic break point study as proof of the appropriate threshold for direct trunking. Bell Atlantic claims that although its analysis of the break-even point for direct trunking was completed roughly 10 years ago, the analysis is still applicable because current technology has influenced the tradeoff between direct trunking costs and tandem switching costs making it more economical for Bell Atlantic to establish direct trunks when traffic is less than one DS-1.

Consequently, we find that some limit on the amount of traffic that a CLEC may route through a tandem switch is appropriate to address the exhaust of those tandems. However, the DS-1 standard, which represents 24 simultaneous calls, would penalize new entrants that experience traffic fluctuations during the early stages of their development. We agree with MediaOne that a level of three DS-1s, which represents 72 simultaneous calls, is a more reasonable cap for MediaOne and Greater Media. We think that the three DS-1 standard will significantly improve Bell Atlantic's tandem exhaust situation. We reject Greater Media's DS-3 or 15 DS-1 thresholds (which represent 672 and 360 simultaneous calls, respectively) because under either standard Bell Atlantic's tandem could be severely burdened with significant levels of traffic, not just from MediaOne and Greater Media but also other CLECs,[(62)] before direct trunking would be required.

In addition, the Department finds that to account for fluctuations in traffic volumes for new carriers, the three DS-1 standard should apply when the carriers' traffic exceeds the level for three consecutive months. Indeed, Bell Atlantic's own witness recognized the importance of a period of time, rather than a single point in time, to measure traffic volumes to account for fluctuations in new carrier

traffic (MediaOne Reply Brief at 10; Tr. 2, at 349). We believe that three consecutive months will serve as an appropriate period for evening out fluctuations.

4. Reciprocal Compensation Applicability

a. Introduction

In MCI WorldCom, D.T.E. 97-116-C (1999), the Department found that Bell Atlantic was no longer required to pay reciprocal compensation to CLECs for Internet Service Provider ("ISP")-bound traffic. See also In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Declaratory Ruling (rel. Feb. 26, 1999) ("Internet Traffic Order"); Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, Notice of Proposed Rulemaking (rel. Feb. 26, 1999) ("NPRM"). In addition, the Department found that if traffic sent by one LEC to another exceeds a 2:1 terminating-to-originating traffic ratio, the excess is presumed to be ISP traffic. The Department concluded that "Bell Atlantic-Massachusetts shall not be required to make reciprocal compensation payments, in excess of the 2:1 traffic ratio, beginning with any payments made or to be made after (and including payments undisbursed as of) February 26, 1999." D.T.E. 97-116-C at 41. The parties to this arbitration dispute two issues concerning our MCI WorldCom Order: (1) whether they may audit each other's traffic to determine if it is ISP-bound traffic, even though the traffic imbalance is less than 2:1; and (2) whether, if such an audit is conducted, reciprocal compensation is due for traffic found to be ISP-bound traffic.

b. Position of the Parties

i. MediaOne

MediaOne argues that the Department's Order in D.T.E. 97-116-C concluded that unless the traffic imbalance ratio between two parties exceeds a terminating-to-originating traffic ratio of 2:1, the traffic should not be regarded as ISP-bound traffic and reciprocal compensation should apply (MediaOne Brief at 18-19). MediaOne contends that there is no need to conduct a traffic study when the traffic imbalance ratio is below 2:1 (id.). But, according to MediaOne, the parties may audit traffic once the traffic imbalance reaches the 2:1 ratio to identify whether any portion of the traffic in excess of 2:1 ratio is ISP-bound traffic (id.).

ii. Bell Atlantic

Bell Atlantic claims that the Department's MCI WorldCom Order allows it to conduct a traffic study to identify ISP-bound traffic regardless of whether the 2:1 imbalance exists (Bell Atlantic Reply Brief at 17-18). Bell Atlantic further contends that if that study reveals that certain traffic is ISP-bound, Bell Atlantic should not have to pay reciprocal compensation for that traffic (id. at 18).

c. Analysis and Findings

As noted above, we found in MCI WorldCom that Bell Atlantic was required to pay reciprocal compensation for traffic where a CLEC's terminating-to-originating traffic ratio was less than 2:1. The Department, however, was very clear in MCI WorldCom that Bell Atlantic was not required to make payments in excess of the 2:1 ratio unless CLECs could rebut the presumption that such traffic was not ISP-bound traffic. D.T.E. 97-116-C at 28, n.31 ("this 2:1 proxy is rather like a rebuttable presumption, allowing any carrier to demonstrate adduce [sic] evidence in negotiations, or ultimately

arbitration, that its terminating traffic is not ISP-bound, even if it is in excess of the 2:1 proxy"). Although not stated explicitly, the Order also created a corresponding rebuttable presumption that CLEC traffic is local traffic if the CLEC's traffic imbalance is less than 2:1. If Bell Atlantic is able to rebut that presumption, it does not have to pay reciprocal compensation for traffic that is shown to be ISP-bound. It is reasonable to allow Bell Atlantic, if it so chooses, to conduct an audit of CLEC traffic to make such a determination.

D. Tandem Transit Service

1. Introduction

Tandem transit service is a service provided by Bell Atlantic to CLECs who do not directly interconnect with one another but whose facilities do connect to the same Bell Atlantic tandem switch (MediaOne Brief at 21). The service allows CLECs to terminate traffic on each others' networks without directly interconnecting with each other; instead the CLECs only have to interconnect at the same tandem location with Bell Atlantic (Bell Atlantic Brief at 53). Tandem transit service would allow a facilities-based CLEC more rapid entry into the local exchange market and minimizes overall interconnection costs. This service does not involve the origination or termination of traffic to a Bell Atlantic customer (Bell Atlantic Brief at 53). Bell Atlantic currently applies a transit charge to the originating CLEC for Bell Atlantic's cost of switching these calls to the terminating CLEC in addition to any other charges assessed by the terminating carrier to Bell Atlantic for terminating the calls (id.).

Under Bell Atlantic's proposal to MediaOne, it will route transit traffic from MediaOne to the terminating CLEC via Bell Atlantic's tandem provided that both CLECs are connected to the same Bell Atlantic tandem and the level of terminating traffic between those carriers does not exceed one DS1 trunk capacity (Bell Atlantic Brief at 53). When traffic exceeds one DS1 on average for three consecutive months, MediaOne would be required to establish direct end office trunk groups with minor overflow going through the tandem (Bell Atlantic Brief at 53). Bell Atlantic states that MediaOne would have up to 180 days to negotiate an interconnection agreement with the CLEC to which it sends transit traffic (id. at 53-54). If an agreement is not reached in that time frame, Bell Atlantic would have the right to block traffic between MediaOne and that CLEC (MediaOne Proposed Findings of Fact and Conclusions of Law at 8).

2. Positions of the Parties

- MediaOne

MediaOne maintains that although the Act does not expressly address tandem transit traffic, Bell Atlantic's refusal to transit CLEC-to-CLEC traffic through tandem switches would impliedly violate Section 251(c)(2) of the Act (MediaOne Brief at 23-24). Moreover, MediaOne claims that the FCC's rules implementing the "pick and choose" provision under Section 252(i) of the Act[63] would apply, and MediaOne could elect to use the tandem transit provision in the Bell Atlantic/AT&T interconnection agreement (MediaOne Brief at 26). MediaOne notes that none of the three exceptions established by the FCC to using the pick-and-choose provision would apply here (MediaOne Brief at 26). Specifically, the third exception, which allows an ILEC to make a particular interconnection available "for a reasonable period of time" after state commission approval would not pertain to MediaOne (MediaOne Brief at 27). MediaOne states that Bell Atlantic signed the AT&T agreement only 15 months ago and has also entered into agreements that did not contain a restriction on tandem transit as late as December 1998 (MediaOne Brief at 27). MediaOne contends that it will exercise its

right to incorporate the tandem transit traffic provision of the AT&T agreement in its agreement, if the Department does not approve MediaOne's proposal on tandem transit traffic (MediaOne Brief at 31).

According to MediaOne, Bell Atlantic's proposed DS-1 trunk limitation on tandem transit service applies to only one of the 49 interconnection agreements Bell Atlantic currently has in place(64) (MediaOne Brief at 22). MediaOne argues that while Bell Atlantic has presented evidence illustrating that it engineers its network in Massachusetts in accordance with the DS1 trunk standard it has proposed for tandem transit traffic, Bell Atlantic has not presented evidence that that standard is appropriate for any CLEC, in general, or for MediaOne's network in particular (MediaOne Proposed Findings of Fact and Conclusions of Law at 8).

MediaOne explains that its proposal provides for the following: (1) MediaOne will begin the process of implementing direct trunks to another CLEC once it originates a volume of traffic to that CLEC sufficient to fill three DS-1 circuits for three consecutive months; (2) the proposal will take effect twelve months after the effective date of the interconnection agreement; (3) Bell Atlantic must provide MediaOne with the necessary information to identify the CLECs with whom MediaOne exchanges traffic and the volumes of that traffic(65) (MediaOne Proposed Findings of Fact and Conclusions of Law at 8). According to MediaOne, since nothing in the Act requires CLECs to negotiate interconnection agreements, MediaOne cannot agree to a specific time line for negotiating interconnection with other CLECs once the three DS-1 threshold is met (MediaOne Brief at 30).

MediaOne states that it appreciates the problem Bell Atlantic is trying to resolve by limiting the volume of traffic transiting its tandems. MediaOne contends that its compromise provision gives Bell Atlantic a meaningful opportunity to limit the amount of CLEC-to-CLEC traffic routed through its tandem switches while maintaining MediaOne's ability to plan its network in a reasonable fashion (MediaOne Brief at 31).

b. Bell Atlantic

Bell Atlantic claims that tandem transit service is a voluntary offering, tendered on a transitional basis, to assist start-up CLECs in completing calls in the short-term until they are able to complete their own interconnection arrangements with other CLECs (Bell Atlantic Brief at 54). Bell Atlantic argues that it is under no legal obligation under the Act or the FCC rules to provide this service (id.). Bell Atlantic states that Section 251(c)(2) of the Act requires that Bell Atlantic, as an incumbent, must provide interconnection with its network "for the facilities and equipment of any requesting telecommunications carrier" (id.). Bell Atlantic explains that because the FCC defined the term "interconnection" under this section specifically as "the physical linking of two networks for the mutual exchange of traffic," the requirement would not apply to transit service which does not involve the mutual exchange of traffic between Bell Atlantic and any CLEC, including MediaOne (id. at 55).

In addition, Bell Atlantic argues that transit service is not available for the "pick and choose" provision under Section 252(i) of the Act because that provision only allows a carrier to pick and choose services, network elements and interconnection as required under Section 251 of the Act, and that tandem transit service is not required by the Act (Bell Atlantic Reply Brief at 22). Moreover, Bell Atlantic argues that a carrier's right under the "pick and choose" section of the Act is not unlimited; an individual interconnection, service or network element may only be available for a reasonable period of time after the approved agreement is available for public inspection (id. at 22-23). Bell

Atlantic argues that the AT&T agreement was approved on May 18, 1998, and the reasonable period of time for making the provisions available for adoption by other carriers may have expired (id.). Bell Atlantic also claims that if the "pick and choose" rule were to apply to transit service, MediaOne would be required to take all integrally-related sections of the interconnection agreement (Bell Atlantic Reply Brief at 23 n.11).

According to Bell Atlantic, its proposed DS-1 trunk limitation only requires CLECs to establish direct trunks when Bell Atlantic believes it is economically efficient to do so (i.e., when calling volumes exceed a DS1 of trunk capacity) (Bell Atlantic Brief at 56). Bell Atlantic explains that its tandem transit restriction is designed to ensure that non-Bell Atlantic traffic originating from CLECs does not cause network congestion or exhaust Bell Atlantic's tandems (id.). Bell Atlantic claims that evidence of tandem exhaustion is illustrated by its need to increase trunk capacity by adding two new tandems in 1999 (id.). Bell Atlantic argues that when a DS1 threshold of transit traffic, on average, is met for three consecutive months, CLECs should be required to establish direct, end office trunk group connections between the two CLECs, with only minor overflow going through the tandems (id. at 57). Lastly, Bell Atlantic contends that adopting a DS-1 threshold would maximize trunking efficiency, reduce tandem network costs, and be consistent with Bell Atlantic's longstanding "economic breakpoint" for network engineering design standards[66] (id.). Bell Atlantic insists that the three DS1 threshold recommended by MediaOne would overburden its tandem switches, especially if applied to all CLECs and would be costly and inefficient (Bell Atlantic Reply Brief at 23).

Concerning reciprocal compensation agreements, Bell Atlantic claims that MediaOne would force Bell Atlantic into a "middle man" role and would not permit Bell Atlantic to recover from MediaOne any charges assessed by a terminating carrier (Bell Atlantic Brief at 55). Bell Atlantic claims that if MediaOne and another CLEC have not agreed upon a mutually acceptable billing arrangement, Bell Atlantic should not be required to continue to route transit traffic (id.). Bell Atlantic insists that requiring MediaOne to reach a reciprocal local traffic exchange arrangement with other CLECs in a 180-day period is reasonable in light of the 160-day period required under the Act for negotiating an interconnection agreement (id. at 55-56).

Regarding MediaOne's request that Bell Atlantic identify the CLECs with which MediaOne exchanges traffic, according to Bell Atlantic, it is unable to give MediaOne the requested SS7 originating point codes,[67] which identify CLECs with whom MediaOne exchanges traffic, because those codes are lost during tandem transit service; Bell Atlantic does not - and cannot - retain that data (id. at 58). Moreover, Bell Atlantic argues that MediaOne does not need the originating point codes for billing purposes because Bell Atlantic bills the originating CLEC and then remits payment to MediaOne (id.).

3. Analysis and Finding

a. Bell Atlantic's obligation to provide tandem transit service

Neither the Act nor the FCC's rules specifically address tandem transit traffic, and the parties are unable to cite any precedent on point from other jurisdictions. Thus, the issue of whether Bell Atlantic has an obligation to provide tandem transit service appears to be an issue of first impression.

Both parties point to Section 251(c)(2) as support for their positions. That Section states that ILECs have:

[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network ... for the transmission and routing of telephone exchange service ....

The FCC defined the term "interconnection" under this section as "the physical linking of two networks for the mutual exchange of traffic." Local Competition Order at ¶ 176. Bell Atlantic contends that this definition proves that Section 251(c)(2) does not apply to its tandem transit service since tandem transit service does not involve the mutual exchange of traffic between Bell Atlantic and any CLEC. However, we conclude that the above definition is not dispositive of the question, because it does not indicate whether such traffic exchange must include an ILEC as one of the exchanging parties.

The Act is silent on this issue, and the FCC definition provides limited guidance on this point. In Section 251(c), Congress manifested an intent to promote local exchange competition by imposing obligations on incumbent carriers to provide access to their networks to new entrants (for a fee) so that entrants could provide telecommunications services without having to duplicate the incumbent's ubiquitous network. See e.g., § 251(c)(2)(B) (duty to allow interconnection at any technically feasible point); § 251(c)(3) (duty to provide access to network elements); § 251(c)(6) (duty to provide collocation for interconnection or access to unbundled network elements). In light of the above, we find that Section 251(c)(2) requires, not just permits, Bell Atlantic to make available to new entrants its network for the purpose of allowing new entrants to exchange traffic with other CLECs without having to interconnect with each and every CLEC.[68], [69]

However, Bell Atlantic's obligation is not absolute. Bell Atlantic should not be required to provide this service indefinitely for a given CLEC. Tandem transit service should, generally speaking, only be made available as a transition service until a CLEC sufficiently expands its business as demonstrated by increased levels of traffic (see discussion supra), to warrant direct interconnection to other CLECs. At that time, CLECs should cease using Bell Atlantic's transit service and establish direct trunks to those CLECs with which it originates or terminates substantial traffic.

b. MediaOne's obligation to establish reciprocal local traffic exchange arrangements

Before discussing what level of traffic justifies direct trunking, we must first address two related issues: (1) Bell Atlantic's requirement that CLECs using Bell Atlantic's tandem transit service must enter into reciprocal local traffic exchange arrangements with other CLECs within 180 days of first using the service or Bell Atlantic may terminate the transit arrangement; and (2) MediaOne's request for information to identify CLECs with whom it must establish reciprocal local traffic exchange arrangements. We find Bell Atlantic's proposal to terminate transit arrangements unilaterally to be unreasonable. While we are sensitive to Bell Atlantic's argument about serving as a "middle man" for compensation for CLECs exchanging traffic, Bell Atlantic should not have the ability to avoid its interconnection obligation based on a CLEC's inability to establish reciprocal compensation

agreements in a timely manner. Therefore, the Department directs the parties to negotiate additional reasonable incentives (e.g., increased charges) that may be applied to MediaOne if it has not established a reciprocal compensation agreement with other carriers within 180-days of the start of tandem transit service.

Second, we accept Bell Atlantic's evidence that it is not possible at this time for Bell Atlantic to provide originating point code information to MediaOne. However, Bell Atlantic testified that it does retain billing information (Tr. 1, at 167). We accept MediaOne's request for information from Bell Atlantic to identify the CLECs with whom it exchanges traffic.

c. Appropriate threshold for direct trunking

The parties disagree as to the appropriate threshold for direct trunking. MediaOne proposes a three DS1 threshold; Bell Atlantic proposes a threshold of one DS1.

As an initial matter, we have found that Bell Atlantic's evidence that CLECs have created the tandem exhaust problem is inconclusive, but Bell Atlantic has persuaded us that CLECs are a significant contributing factor (see Section V.C.3., above). We concluded that CLEC trunk terminations were a significant factor in the current tandem exhaust situation, though certainly not the only factor. Because of other potential causes of tandem exhaust, it is not clear whether Bell Atlantic's proposal to limit CLEC use of its tandems will correct the tandem exhaust problem.

In addition, we are reluctant to rely on Bell Atlantic's economic break point study as proof of the appropriate threshold for direct trunking. Bell Atlantic claims that although its analysis of the break-even point for direct trunking was completed roughly 10 years ago, the analysis is still applicable because current technology made it more economical for Bell Atlantic to establish direct trunks when traffic is less than one DS-1 (Tr. 1, at 76).

However, there are several weaknesses with Bell Atlantic's use of this study. First, this study was completed over 10 years ago and we cannot determine if the assumptions used are current because Bell Atlantic states that the study is not available (IR-MediaOne-BA-2-10).[70] This study was based on assumptions derived from NYNEX's network and associated calling volumes, and would not have taken into account differences between NYNEX's more mature network and the network of a start-up CLEC with varying calling volumes. Second, while technology may have made it more economical to establish direct trunks at a lower calling volume threshold, the costs this study is predicated upon involve trunking costs from a Bell Atlantic end office to another Bell Atlantic end office. Direct trunking costs from one CLEC switch to another CLEC switch may differ significantly from Bell Atlantic's costs because of the difference in distance between CLEC switches compared to the distance between Bell Atlantic end-office switches. Other potential differences include additional and higher costs for obtaining necessary rights-of-way as well as potential lack of available facilities that might not have existed at the time the study was completed. Therefore, we find that applying the economic break point study based on NYNEX's network to all CLECs is not appropriate.

MediaOne presented evidence regarding the burden it would face if the Department adopted Bell Atlantic's DS-1 proposal. MediaOne described the steps involved in establishing direct trunking with another CLEC to support its argument that the three DS-1 level is more appropriate. Before establishing direct trunks to another CLEC, MediaOne must: (1) monitor traffic volumes before concluding a significant volume of traffic exists between its network and another CLECs; (2) sign an interconnection agreement with that CLEC (complicated by the fact that the other CLEC may not be

required under its contract with Bell Atlantic to establish direct trunking with other CLECs); and (3) arrange for the facilities between its network and the other CLEC's network, which may not be readily available (Tr. 1, at 106-109).

The Department has determined, above, that Bell Atlantic has an obligation to provide tandem transit service until such time as MediaOne generates a level of traffic that warrants migration to direct interconnection with other CLECs. Bell Atlantic proposes to impose restrictions on this obligation by limiting MediaOne's traffic over the tandem transit service to one DS-1 level of volume. However, Bell Atlantic's support for this limitation is flawed, and we decline to accept it. MediaOne, on the other hand, has presented support for its contention that the restriction proposed by Bell Atlantic would have an adverse effect on it. In light of the burdensome nature of Bell Atlantic's proposed limitation, we find that Bell Atlantic has not sufficiently justified its proposed tandem traffic limitation, and we reject it. Accordingly, we accept MediaOne's proposed three DS-1 limitation on tandem transit traffic.

d. Appropriate time period to establish direct trunking

Although we agree with MediaOne's proposed three DS-1 standard, we reject its proposed timeline for establishing direct trunks with CLECs once the traffic threshold is attained. MediaOne proposes the following: 1) an initial 12-month waiting period to allow traffic to stabilize; 2) once traffic remains above the threshold level for three consecutive months at the end of the initial 12-month stabilization period, then MediaOne would be required to establish an interconnection agreement with the CLEC; and (3) once MediaOne establishes an interconnection agreement with the CLEC, it would have time to build and activate the trunks (MediaOne Brief at 29-30). Assuming MediaOne needed six months to establish an interconnection agreement with the CLEC, this process could take more than two years from when traffic volumes initially exceed the three DS-1 threshold. We find that period to be excessive and unresponsive to the need for MediaOne to move this CLEC-to-CLEC traffic from Bell Atlantic's network to the CLECs' networks. The Department recognizes that MediaOne's traffic patterns will vary during the start-up phase in its development. However, six months should be adequate for MediaOne to determine whether the traffic volumes are stable or whether they continue to vary significantly. We agree that three consecutive months worth of traffic should be used in order to rule out anomalous months. If, at the end of the initial six-month stabilization period, traffic volumes have exceeded the threshold for three consecutive months, MediaOne would be required to begin planning for building direct trunks, including starting to negotiate an interconnection agreement. There are no federal deadlines for negotiating CLEC-to-CLEC interconnection agreements. We believe six months is more than adequate for negotiation of these agreements, which gives MediaOne longer than the 160-day negotiation period allowed under the Act for ILEC/CLEC interconnection agreements. Lastly, the Department agrees with MediaOne that it should be allowed time to establish direct trunks so as to provide for adequate time for planning and implementation. However, MediaOne's six month proposal is not supported by the record. However, Bell Atlantic's witness testified that Bell Atlantic's standard interval to establish brand new trunk groups is 60 days (Tr. 1, at 82). Therefore, we find that MediaOne shall have 60 days beginning from the effective date of an interconnection agreement with another CLEC to establish direct trunks.

E. Network Maintenance and Management Standards

1. Outage Repair Standard

a. Introduction

Section 9.5 of the Agreement addresses the appropriate procedures that the parties follow in the event of a service outage or issuance of a trouble report.[71] While the parties agree on most aspects of this process, they disagree on two points: (1) whether there should be specific deadlines for correcting outages and other service problems raised in trouble reports; and (2) whether the parties should exchange "escalation" lists (i.e., lists that indicate which employees at each company are responsible for fixing service problems, including those more senior (either in title or responsibility) employees to whom a carrier could "escalate" matters if the problem has not been corrected in a timely fashion).

b. Positions of the Parties

i. MediaOne

MediaOne proposes that each party provide the other with time frames and escalation lists in the event of an outage or trouble, and plan and coordinate repair procedures (RR-DTE-23). MediaOne states that this requirement is not burdensome to either party but provides the other with necessary information to ensure that troubles and outages are efficiently resolved (id.). MediaOne argues that Bell Atlantic's CLEC Handbook[72] does not provide the necessary level of detail to ensure that troubles are handled in a timely and coordinated fashion (id.).

ii. Bell Atlantic

Bell Atlantic argues that the parties should follow Bell Atlantic's standard procedures for isolating and clearing the outage or trouble, as described in the CLEC Handbook, and that the parties may agree to modify those procedures periodically based on experience with comparable interconnection agreements with other carriers (Bell Atlantic Brief at 59-60). Bell Atlantic notes that although these standard procedures do not include time frames, the CLEC Handbook does state that UNE trouble reports for CLECs are placed in the same work queues as Bell Atlantic's trouble reports, and priorities are set based on service impact and type of service, without regard to the carrier (IR-MediaOne-BA-2-27). Bell Atlantic argues that inclusion of wording requiring the parties' exchange of escalation lists is unwarranted since it is already provided for in Bell Atlantic's CLEC Handbook (Bell Atlantic Brief at 60).

c. Analysis and Findings

Bell Atlantic's standard procedures for isolating and clearing troubles, as set forth in its CLEC Handbook, describe the roles and responsibilities of Bell Atlantic and CLECs; information on how to use Bell Atlantic's repair system and electronic interface to enter trouble reports; the process from the diagnosis of a trouble to its repair; and, when necessary, the coordination of activities between Bell Atlantic and CLECs. CLEC Handbook, Vol. III, § 8.0 Trouble Administration. MediaOne claims that the CLEC handbook does not provide the necessary detail to ensure that troubles are handled in a timely and coordinated fashion. We disagree and find that the referenced Bell Atlantic standard procedures in the CLEC Handbook provide detailed information needed in the event of an outage or trouble.

We also disagree with MediaOne's suggestion that the parties share time frames and escalation lists. If Bell Atlantic was forced to set specific time frames for repairs with MediaOne that are different

than those guaranteed to other CLECs, Bell Atlantic may be forced to favor MediaOne and MediaOne's customers over its own or other CLECs' customers. MediaOne's proposal goes beyond what is necessary to ensure parity. In addition, we believe that MediaOne has the ability to assess incident-based payments[73] to Bell Atlantic, as defined in Bell Atlantic's performance standards compliance filing, and these payments give Bell Atlantic the appropriate incentive to ensure that MediaOne's customers receive service at parity with service Bell Atlantic provides to itself, and that troubles are resolved in a timely manner. In summary, we find that Bell Atlantic's "first-in, first-out" procedure for repair is fair. Finally, because escalation lists are provided in the CLEC handbook, we conclude that MediaOne's proposal to add wording requiring the parties to exchange escalation lists is unnecessary.

F. Joint Network Configuration and Management Standards

1. Scope of the Joint Grooming Process

a. Introduction

The joint grooming process is designed to enable parties to assemble the appropriate technical experts to determine jointly the most efficient interconnection architecture and point of interconnection based on forecasted and actual traffic patterns, existing facilities, the location of interconnection points, and scheduling concerns of a particular interconnection agreement (see Bell Atlantic Brief at 61). The parties disagree whether the existing joint grooming process and plan should be incorporated into the new interconnection agreement, and amended as necessary, or whether the parties should develop a new joint grooming process and plan.

b. Positions of the Parties

i. MediaOne

MediaOne asserts that it currently has a joint grooming process in place with Bell Atlantic as part of its existing interconnection agreement, which was cooperatively developed by the parties (MediaOne Brief at 31). MediaOne proposes that the current joint grooming process and plan remain in place and be amended, as necessary, for any inconsistencies between the former process and the new interconnection agreement (id.). MediaOne maintains that it is concerned that important rules at the heart of the entire interconnection agreement contained in the joint grooming process would not be in place at the commencement of the new interconnection agreement if a new process has to be developed (id.). In response to Bell Atlantic's concerns that the existing joint grooming process may be inconsistent with the new interconnection agreement, MediaOne suggests the inclusion of wording in the interconnection agreement providing that in the event of a conflict between the existing plan and the terms of the new interconnection agreement, the terms of the new interconnection agreement prevail (id.).

ii. Bell Atlantic

Bell Atlantic maintains that a joint grooming process is an interactive, not static, process that should materially change as conditions warrant (e.g., as traffic volumes increase, traffic patterns change, capacity is reached, or the need to interconnect at additional interconnection points arises) (Bell Atlantic Brief at 61). According to Bell Atlantic, the existing joint grooming process that was developed under the parties' first interconnection agreement contains provisions that are either

duplicative or inconsistent with the proposed interconnection agreement

(RR-DTE-7). In addition, using the existing plan as the starting point in developing a new plan would mean that either party could use the current provisions to try and undercut the provisions of the new interconnection agreement (id.). Bell Atlantic states that though both parties may agree to use some language from the existing plan in the course of developing the new joint grooming process, both parties should start from a blank piece of paper and build a plan based upon the terms and conditions established by the new interconnection agreement (id.).

c. Analysis and Findings

We agree with MediaOne that the joint grooming plan establishes rules for development and growth of the network that will change over the term of the interconnection agreement. In order to provide the parties with rules relating to this growth and development, a joint grooming plan should be in place when the parties begin to operate under the new interconnection agreement (see MediaOne's Proposed Findings of Fact and Conclusions of Law at 9-10). Bell Atlantic has not provided a deadline by which a new joint grooming process will be in place, nor has it indicated what rules will govern in the interim.

We share MediaOne's concern that if the parties adopt Bell Atlantic's proposal, there would be no plan in place once they begin operating under the new interconnection agreement. Consequently, we agree that the existing plan should remain in effect, to the extent that it does not conflict with any provisions of the new interconnection agreement. The existing plan can be updated as the parties agree is necessary, and replaced when a new plan is developed. In order to address Bell Atlantic's concern, we direct the parties to include language providing that in the event of a conflict between the old joint grooming plan and the terms of the new interconnection agreement, the terms of the new interconnection agreement prevail.

2. Forecasting Requirements for Trunk Provisioning

a. Introduction

Forecasting for trunk provisioning by MediaOne allows Bell Atlantic to plan and prepare adequately for demand for trunks that deliver traffic from Bell Atlantic to MediaOne.[74] The parties disagree on several provisions relating to trunk forecasting. Specifically, the parties disagree when MediaOne's first trunk forecast should be required and whether Bell Atlantic can condition provisioning of trunks on its capacity constraints and the proven accuracy of MediaOne's forecasts in the past. The parties also disagree whether MediaOne should be required to provide Bell Atlantic with additional demand management forecasts relating to UNEs by wire center[75], interconnection, and resale products. In addition, Bell Atlantic proposes to disconnect "underutilized" trunks after a certain period of time. The parties also dispute how long Bell Atlantic may monitor its trunk group usage before disconnecting "underutilized" trunks.

b. Positions of the Parties

i. MediaOne

MediaOne proposes that it will provide its initial forecasting for trunks covering a two-year period, to be updated as needed but no less frequently than quarterly, within 120 days from the effective date of

the interconnection agreement, instead of 90 days as proposed by Bell Atlantic (MediaOne Brief at 32). MediaOne does not believe that 90 days is a reasonable period given the network reconfiguration involved in implementing Bell Atlantic's IP proposal (id.). MediaOne argues that while it can provide forecasts for both inbound and outbound traffic based on reasonable engineering criteria, the forecasts should be taken only as an estimate, and their inaccuracy should not be used against MediaOne (Exh. MediaOne-4, at 6). Additionally, MediaOne disagrees with Bell Atlantic's attempt to condition the provisioning of trunks on capacity constraints because it contends Bell Atlantic has an obligation under the Act to provide interconnection unless it is technically infeasible (MediaOne Proposed Findings of Fact and Conclusions of Law at 10).

As to additional forecast requirements, MediaOne claims that its forecasts will provide the information necessary for Bell Atlantic to plan trunk group availability, and argues that demand forecasts by wire center of UNEs, interconnection, and resale products proposed by Bell Atlantic are neither reasonable nor necessary (MediaOne Brief at 32). In particular, MediaOne argues that it would not be able to provide UNE forecasts by wire center with any type of accuracy (id. at 32-33).

MediaOne also argues that Bell Atlantic should wait 180 days to review the utilization levels of trunk groups that Bell Atlantic provisions to MediaOne based on MediaOne's forecasts before disconnecting underutilized trunks (id. at 34). MediaOne's witness testified that within a 30-day period, a trunk group can go from 25 percent to 80 percent utilization and that the 90-day period does not consider the type of traffic fluctuation that MediaOne faces as a new carrier (Exh. MediaOne-4, at 7). In addition, MediaOne states that prior to disconnecting trunks, MediaOne should have the opportunity to explain the need to keep the trunk groups (MediaOne Brief at 34). MediaOne agrees that after the initial 180 day period, it should be financially responsible for any trunk group in excess of four DS-1s that Bell Atlantic determines is underutilized, and also liable for disconnected trunks retroactive to the start date of the 180 day period (MediaOne Proposed Findings of Fact and Conclusions of Law at 11).

ii. Bell Atlantic

Bell Atlantic states that its provisioning proposal is a standard requirement (Bell Atlantic Brief at 63). Bell Atlantic argues that MediaOne should provide an initial traffic forecast covering a two-year period within 90 days of the effective date of the interconnection agreement (id. at 62). Bell Atlantic's proposal conditions trunk provisioning on several factors: (1) that such forecast is based on reasonable engineering criteria, (2) there are no capacity constraints, and (3) MediaOne's previous forecasts have proven to be reliable and accurate (Bell Atlantic Proposed Interconnection Agreement Section 10.4.1; Bell Atlantic Brief at 63). Bell Atlantic claims that in order to prepare for the demand that MediaOne will generate, MediaOne should provide a demand management forecast that includes, but is not limited to, the expected needs for service volumes by wire center for UNEs, interconnection and resale products (Bell Atlantic Brief 66-67).

Bell Atlantic proposes to monitor traffic on each trunk group for a period of 90 days; at the end of that period, Bell Atlantic could disconnect trunks if they were not warranted by the actual traffic volume experienced. After the initial 90 days, regardless of whether the trunks were adequately utilized,[76] up to four DS-1s would be maintained at Bell Atlantic's expense, and MediaOne would be held financially responsible for the excess DS-1s (Bell Atlantic Brief at

64-65). Bell Atlantic states that MediaOne would have the option to maintain those underutilized trunks but MediaOne would be financially responsible (Bell Atlantic Proposed Findings of Fact and

Conclusions of Law at 14). Bell Atlantic argues that MediaOne could, at any time during the 90-day period, request Bell Atlantic to disconnect the excess facilities to avoid further charges (id. at 65). Furthermore, Bell Atlantic proposes that any time after the 90-day period, if MediaOne requests Bell Atlantic to disconnect trunks, MediaOne would be financially responsible for the disconnected trunks retroactive to the start of the 90-day period through the date such trunks are disconnected (id. at 64-65).

Bell Atlantic argues that MediaOne's counterproposal of a 180-day period is too long and is unsubstantiated because MediaOne is not a new company without experience but, rather, has been providing telecommunications services in Massachusetts for more than one year (Bell Atlantic Reply Brief at 25).

c. Analysis and Findings

We find that MediaOne's request for 120 instead of 90 days to produce an initial forecast covering a two-year period has merit. Given the possible adoption of MediaOne's compromise proposal to establish additional IPs, it is reasonable to allow MediaOne the additional 30 days to produce an initial forecast that would reflect this network configuration. Regarding the conditions on trunk provisioning proposed by Bell Atlantic, the Act permits exemptions to ILEC interconnection obligations only when the ILEC demonstrates technical infeasibility. Local Competition Order at ¶199. Because of the Act's narrow exemption, we need only examine whether Bell Atlantic's proposed conditions meet this "technical infeasibility" test. While we agree with Bell Atlantic that it will initially rely on MediaOne for MediaOne's forecasts for inbound and outbound traffic, we are not convinced that this desire for accuracy of MediaOne's forecasts is a sufficient reason for limiting Bell Atlantic's obligation to provide interconnection. We conclude that MediaOne's proposal of providing Bell Atlantic with traffic forecasts based on reasonable engineering criteria, to be updated no less than quarterly, should assure Bell Atlantic that MediaOne's forecasts remain reasonably current. Therefore, Bell Atlantic cannot condition the provisioning of trunks on the proven accuracy of MediaOne's past forecasts.

We also find that, in general, Bell Atlantic may not condition trunk provisioning on capacity constraints. As long as MediaOne and other CLECs provide reasonably accurate forecasts, Bell Atlantic should be able to plan adequately for additional capacity. However, if Bell Atlantic can demonstrate to the Department that MediaOne's forecasts are substantially inaccurate over a sustained period of time, Bell Atlantic may petition the Department for relief. Bell Atlantic will have the burden of demonstrating that such relief is warranted.

Regarding the question of whether MediaOne is required to provide Bell Atlantic with its forecast on interconnection-related products by wire center, we find that such additional forecasting detail should be provided. CLECs cannot have it both ways. If they do not want to be held to the accuracy of their forecasts, then Bell Atlantic must have some additional mechanism on which to base its capacity planning. On its face, such additional information would appear to be useful in further determining for what additional facilities Bell Atlantic may need to prepare. Although MediaOne argues that it cannot provide this information, we do not find that claim to be credible. Such information is crucial for any CLEC in developing a business plan.

We find merit in MediaOne's argument that it is a new carrier facing an unpredictable growth pattern and as such, Bell Atlantic should wait 180 days to review the utilization level of trunk groups by MediaOne. MediaOne has been providing service for only about one year. Until MediaOne becomes

more established and experiences more consistent growth patterns, we find that 180 days is appropriate.

Lastly, MediaOne has requested that it be given the opportunity to substantiate its continued need to keep trunks that Bell Atlantic has identified as underutilized. We find this request to be reasonable. Bell Atlantic's definition of underutilization is arbitrary, and MediaOne should be given the opportunity to demonstrate why MediaOne believes that the trunks are necessary in the future, before Bell Atlantic disconnects those trunks.

G. Unbundled Access

1. Extent of Obligation to Provide UNEs

a. Introduction

In response to a remand decision from the United States Supreme Court, the FCC is reconsidering its list of seven UNEs that ILECs must offer to CLECs. In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket Nos. 96-98, 95-185, Second Further Notice of Proposed Rulemaking, April 8, 1999. As a result of that decision, Bell Atlantic may no longer be required under federal law to provide certain UNEs that it is provisioning to Massachusetts CLECs. In that event, the parties disagree whether Bell Atlantic should be able to immediately discontinue provisioning of such UNEs.

b. Positions of the Parties

i. Bell Atlantic

Bell Atlantic argues that its proposed language, allowing Bell Atlantic to discontinue any UNE it may no longer be required to provide once the FCC remand proceeding is concluded, is reasonable (Bell Atlantic Brief at 69). Bell Atlantic contends that MediaOne seeks to require Bell Atlantic to continue to provide the UNEs identified in the interconnection agreement even if the FCC no longer requires Bell Atlantic to do so (id.).[77]

ii. MediaOne

MediaOne argues that Bell Atlantic must provide a reasonable transition period in the event that it is no longer obligated to provide certain UNEs (MediaOne Brief at 35). MediaOne contends that the parties must await a final decision on the issue and then modify the interconnection agreement to be consistent with the change in law (id.). According to MediaOne, this process ensures that customers will not be affected negatively by the change because MediaOne will have the opportunity to arrange for the alternative provision of any UNEs that may no longer be provided by Bell Atlantic, and comports with the public interest (id.). MediaOne also maintains that Bell Atlantic's proposal would adversely affect MediaOne's ability to retain customers, which is contrary to the intent and spirit of the Act (id.).

c. Analysis and Findings

We find Bell Atlantic's proposal to unilaterally discontinue provisioning UNEs, without notice and a transition period, to be patently unreasonable. First, a change in law may involve interpretation of the

extent and impact of the change, and the parties certainly may disagree on the applicability of a change. One need only to look at the debate surrounding the provision and combination of UNEs to get a sense of the level of disagreement possible under the Act and court opinions interpreting the Act.(78) Second, the Department has a responsibility under the Act to ensure that interconnection agreements meet the requirements of § 251 of the Act. 47 U.S.C. § 252(c)(1). This responsibility includes changes to interconnection agreements, especially when those changes may materially affect service under the agreement. Bell Atlantic's interpretation of a change of law and the resulting impact on the provision of service under an interconnection agreement is subject to the Department's jurisdiction. Id.

Furthermore, in the changing environment of telecommunications, it is likely that this provision will be evoked, and customers may be affected negatively while the parties battle over their differences. In its filings on this subject, Bell Atlantic does not address the potential effect on customers (but see Section V.L.2., infra where Bell Atlantic proposes a 30-day notice period for changes in law that affect its services). The Department may enforce requirements of state law, including compliance with intrastate telecommunications service quality standards or requirements. 47 U.S.C. § 252(e)(3); see G.L. c. 159, § 16. No party disputes the Department's authority to review Bell Atlantic's provision of service, including service provided pursuant to an interconnection agreement, to determine whether service quality is affected. Furthermore, it is reasonable to allow affected CLECs an opportunity to make alternative arrangements in the event Bell Atlantic will no longer provide certain UNEs under the interconnection agreement.

Accordingly, the Department finds that MediaOne's proposal, which requires the parties to negotiate modifications to interconnection agreements and submit such changes to the Department for approval, is reasonable and in the public interest.(79) Until the changes are approved, Bell Atlantic is required to continue its provision of the affected UNEs. The parties shall include language in their interconnection agreement to reflect this finding.(80) We recognize Bell Atlantic's concern that its obligation to provide UNEs no longer mandated by law may continue indefinitely if the parties are unable to agree on application of a change in law. However, we note that the Bell Atlantic may invoke the Dispute Resolution provision in the interconnection agreement, and if it desires, seek appropriate relief from the Department. Bell Atlantic will have the burden of showing that MediaOne is not negotiating the change of law in good faith.(81)

2. Bona Fide Request Applicability/Available Network Elements

a. Introduction

The bona fide request ("BFR") process is a procedure whereby one party may request access to a UNE not identified in the interconnection agreement. The BFR process is set forth in Exhibit B of the interconnection agreement and includes procedures for Bell Atlantic to analyze and consider requests for UNEs "not already available." The parties disagree when a UNE should be considered "not already available" under the BFR process, the meaning of the FCC's "pick-and-choose" rule,(82) and how this FCC rule affects the BFR process.

b. Positions of the Parties

i. MediaOne

MediaOne argues that the BFR mechanism would only apply if a particular UNE were "not already available" anywhere in Bell Atlantic's operating territory, and therefore could not be obtained by the "pick and choose" rule (MediaOne Brief at 36). MediaOne asserts that the phrase "not already available" means that the UNE is not already provided anywhere in Bell Atlantic's operating territory, and Bell Atlantic has not been ordered by the FCC or a state commission to provide that UNE (IR-DTE-MediaOne-6). MediaOne argues that its position is consistent with the FCC's pick-and-choose rule, which states that an ILEC shall make available without unreasonable delay any interconnection service or network element arrangement contained in any agreement to which it is a party (MediaOne Brief at 36, citing 47 C.F.R. § 51.809).

ii. Bell Atlantic

Bell Atlantic argues that the purpose of establishing a BFR process is to provide for UNEs not already covered by the interconnection agreement between MediaOne and Bell Atlantic (Bell Atlantic Brief at 70). According to Bell Atlantic, which UNEs are available may vary depending on the requesting CLEC, the CLEC's network, or the provisioning or use for that UNE (Bell Atlantic Brief at 70; RR-DTE-24). Bell Atlantic argues that the fact that a CLEC may have ordered a UNE elsewhere does not mean that this UNE is readily available under the terms, conditions and rates established for provisioning to MediaOne (Bell Atlantic Brief at 71).

Bell Atlantic argues that MediaOne's assertion that the sole basis for providing a UNE is whether that UNE is available elsewhere in Bell Atlantic's region overlooks numerous factors that bear on the technical feasibility and cost of providing a UNE that has not been made generally available in a particular state (id.). Bell Atlantic contends that such factors include: (1) whether the element is a standard component of the Bell Atlantic network in the relevant jurisdiction; (2) whether MediaOne is requesting the element to the same specifications, and in the same context, as in another jurisdiction; (3) whether the same work efforts or business processes are needed or can be used under the operations systems and processes in that jurisdiction to make the requested element available in the new jurisdiction; and (4) whether the same cost factors and rates apply in the new jurisdiction (id.). Bell Atlantic adds that the BFR process allows Bell Atlantic to consider these factors, and includes a dispute mechanism should MediaOne disagree with Bell Atlantic's determinations (id. at 71-72).

Bell Atlantic contends that MediaOne's position contradicts FCC rules (id. at 72). According to Bell Atlantic, the "pick and choose" rule does not address the provision of UNEs ordered by the FCC or a state commission, but only addresses UNEs that are provided under an interconnection agreement approved under § 252 of the Act, regardless of whether Bell Atlantic was ordered to provide that UNE (id.).

Bell Atlantic maintains that even if it provides a particular UNE to one CLEC, the BFR process may be "permissible and appropriate" to evaluate whether or how Bell Atlantic would provide that UNE to a second CLEC because there may be different technical feasibility and cost considerations associated with providing that UNE to a second CLEC (id.). Bell Atlantic asserts that the FCC has recognized that such considerations may apply and has specifically provided that the "pick-and-choose" rule would not apply if an ILEC demonstrates to the state commission that different costs apply or technical infeasibility exists with respect to providing that UNE to a second CLEC (id.). Bell Atlantic

argues that the BFR process provides a method for evaluating such considerations and, in any event, individual UNEs made available through the "pick-and-choose" rule are only available for a reasonable period of time under 47 C.F.R. § 51.809(c) (Bell Atlantic Brief at 72; RR-DTE-24).

Bell Atlantic concludes that MediaOne is unreasonable in its demand that Bell Atlantic be required to offer any element on the basis of its availability in another state, outside the framework of the standard BFR process (Bell Atlantic Brief at 73). Lastly, Bell Atlantic argues that if the UNE that is the subject of the BFR is technically feasible, the BFR process is flexible enough to ensure that the particular UNE is provided in a timely fashion (RR-DTE-24).

c. Analysis and Findings

The initial issue the Department must resolve is under what circumstances the BFR process applies and how MediaOne accesses UNEs that are not addressed in the interconnection agreement. MediaOne argues that it would access UNEs through the BFR mechanism only if the particular UNE were "not already available" anywhere in Bell Atlantic's operating territory. In support of its position, MediaOne argues that the FCC's "pick-and-choose" rule enables it to request and, with certain limitations, receive any UNE offered by Bell Atlantic in any state within Bell Atlantic's territory. Bell Atlantic argues for a narrower interpretation of the "pick-and-choose" rule and for a more expansive view of the applicability of the BFR process. We agree, to some extent, with both parties.

MediaOne is correct in noting that the FCC's "pick-and-choose" rule, which was reinstated by the Supreme Court in AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999), provides that "[a]n [ILEC] shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement." 47 C.F.R. § 51.809(a) (emphasis added). In its Local Competition Order, the FCC explained that requesting carriers have the ability to choose among individual provisions contained in publicly-filed interconnection agreements and that a requesting carrier should be permitted to obtain its statutory rights on an expedited basis. Local Competition Order at ¶¶ 1310, 1321.

The Department can find no provision in the Act or in the FCC's rules or orders limiting the availability of the "pick-and-choose" rule only to UNEs contained in Department-approved interconnection agreements. Subject to the conditions imposed by the FCC in 47 C.F.R. § 51.809(b) and (c), the Department finds that Bell Atlantic shall provide to MediaOne in Massachusetts, and to any other requesting CLEC, pursuant to the "pick-and-choose" rule, the UNEs that Bell Atlantic[83] makes available in any of its state-approved interconnection agreements, without regard to which state commission approved the interconnection agreement.

Bell Atlantic is correct that it may demonstrate to the Department that it cannot provide the requested UNE at the same cost as it does to a CLEC with which it has an approved interconnection agreement, or that the provision of this UNE to MediaOne is not technically feasible. However, the Department finds that this showing by Bell Atlantic is to be made within the context of the "pick-and-choose" rule, not the BFR process. It is our view that the BFR process applies to the UNEs that are not the subject of any state-approved interconnection agreement and that are, thus, "not already available."

H. Local Number Portability

1. Introduction

The Act defines number portability as the ability of end-user customers to change local service providers and retain their telephone number while remaining at the same location. See

47 U.S.C. § 153(30).

2. Description of the Porting Process

Provisioning LNP requires certain activities of both the customer's current provider ("porting provider") and the customer's new provider (Exh. MediaOne-3, at 14). The LNP process begins when the new provider receives an order for service from a new customer and immediately sends a local service request ("LSR") to the porting provider (id.). Once the porting provider receives the LSR, it 1) generates its own E911 record to ensure the ALI database[84] is properly updated and 2) sends a firm order confirmation ("FOC") back to the new service provider within 24 hours receipt of the LSR (id. at 15). Once the new provider receives the FOC from the porting provider, it will 1) create the appropriate translations[85] in its switch; and 2) requests that the porting provider install a "ten-digit trigger" in its switch[86] (id.). Twenty-four hours before the porting due date, the porting provider must release the telephone number in Number Portability Administration Center ("NPAC") and install the ten-digit trigger (id. at 16). The new service provider must update the translations in its switch to include the newly ported number before 11.59 p.m. on the porting day; the ten-digit-trigger will only forward a ported number until this time. A ten-digit trigger ensures that the customer will be able to receive calls during the porting process by forcing the switch to launch a database query whenever the number is dialed (id.). If the number has not been ported, the porting provider's switch will route the call as if the customer is still receiving service from its current provider (id.). Once the porting is complete, a call sent to the porting provider's switch will be forwarded to the new carrier's switch for completion (id.). The porting provider removes its switch translations at 11:59 p.m. on the actual porting due date (id.). On the day after the porting due date, the porting provider "unlocks" the E911 record which enables the new provider to update the ALI record to reflect the new service provider.

3. Need for Performance Standards and Remedies

a. Positions of the Parties

i. MediaOne

MediaOne asserts that there is a compelling reason to adopt porting performance standards for MediaOne (MediaOne Brief at 37). MediaOne argues that the rationale for establishing porting standards and remedies in this arbitration is based on the stated rationale for adopting performance standards in the Consolidated Arbitrations,[87] and seeks to extend this rationale to the porting process (MediaOne Reply Brief at 15). MediaOne maintains that the Department stated that it would consider changes to the established performance standards if parties could show a compelling reason why such changes are necessary (MediaOne Brief at 37). MediaOne asserts that although it was not a party to the Consolidated Arbitrations, and is not seeking to add a porting standard to the Consolidated Arbitrations list of performance standards, it can nonetheless demonstrate that a compelling reason exists to adopt such a standard in its interconnection agreement with Bell Atlantic

(id. at 37-38).

According to MediaOne, the absence of standards for the porting process is critical for MediaOne, noting that the Department did not review or address in the Consolidated Arbitrations any activities associated with the number porting process for a carrier like MediaOne that does not purchase resale services or unbundled loops from Bell Atlantic (id. at 37). MediaOne describes the detrimental effects that failed ports have on customers by stating that when a port is not done properly, the customer either has no dial tone or cannot receive calls from others (id. at 38). Besides negatively affecting customers' service, failed ports also damage MediaOne's reputation, especially where one of the first experiences a new MediaOne customer has is with the porting process (id.). MediaOne cites to actual experience with number porting problems and the negative affect those problems had on its marketing abilities (see Exh. MediaOne-3, at 16-17; IR-BA-M1-11).

ii. Bell Atlantic

Bell Atlantic makes two arguments against establishing number porting standards. First, Bell Atlantic states that the FCC is the regulatory body with jurisdiction over number portability issues. However, Bell Atlantic also states that it would comply with Department orders on this issue (Bell Atlantic Brief at 74). Second, Bell Atlantic highlights its current number porting performance success rate, which it states is in excess of 99 percent on-time performance, based on current porting procedures (id. at 75). In light of its current performance, Bell Atlantic maintains that it is unfair and unreasonable to assume that the only way to ensure that Bell Atlantic continues to maintain that level of performance is to impose performance standards and penalties (id. at 75-76). Bell Atlantic states that it already provides the Department with more than 400 performance measurements, and there is no basis for adding to that list (id.).

b. Analysis and Findings

In the Consolidated Arbitrations, the Department established a method to evaluate whether more or fewer performance measures are necessary than those established in the Consolidated Arbitrations. The Department stated that

"[i]f, after at least six months of experience, there is an indication that more or fewer measures are necessary to support the parity standard, ... parties may petition the Department to that effect. However, the Department will only consider changes to the standards adopted here if parties can show [a] compelling reason why such changes are necessary."

Phase 3-B Order at 34. We also stated that the specific monetary remedies provided in the interconnection agreements established in that proceeding should not be the sole damage remedy available, and that there may be instances where other damages (e.g., consequential damages) may be appropriate. Id. at 22.

There are many performance standards that have been established under the Consolidated Arbitrations proceeding. However, that is not a sufficient reason to refrain from establishing additional standards where necessary. MediaOne is correct when it states that number porting standards were not considered when performance standards were established, and MediaOne has made a compelling case that these standards are appropriate here given the adverse affect on MediaOne and its customer for failed number ports. If Bell Atlantic maintains its current high level of porting performance, as it states it will, these additional performance standards will not adversely affect it.

Bell Atlantic has indicated that it is not opposed to negotiating performance standards for number porting, and has made a proposal for those standards. We now turn to each of the parties' proposals for appropriate standards and remedies for number porting.

4. Standards to be Established for Local Number Portability (Performance Criteria)

a. Introduction

Several of the performance measures discussed by the parties have been resolved.[88]

However, the parties disagree on (1) whether to establish a measurement for E911[89] unlock, and (2) whether to track Local Subscription Management System ("LSMS")[90] downtime and LNP trouble resolution.

b. Positions of the Parties

i. Bell Atlantic

Bell Atlantic has proposed a method to measure a successful port (Bell Atlantic Brief at 76). Bell Atlantic favors a measurement to determine whether service was transitioned from one provider to the other without service interruption, referred to as "Percent on Time - LNP" (id. at 81). Bell Atlantic explains that in applying the "Percent On Time - LNP" metric, an LNP order would be considered on time if a 10 digit trigger is in place before the porting due date and the removal of the telephone number translations (i.e., the retail disconnect) is completed on or after 11:59 p.m. of the porting date (Bell Atlantic Brief at 82). Orders disconnected early are considered "not met" (id.). Bell Atlantic testified that this proposed "Percent On Time - LNP" measurement has been adopted in New York as part of the collaborative process and could be established as a metric in Massachusetts in October 1999 (id.).

Bell Atlantic argues that MediaOne's proposal to measure interim steps in the porting process is not an appropriate reflection of the LNP process (id. at 76). Specifically, Bell Atlantic contends that the interim steps proposed by MediaOne do not, for the most part, affect customers, and would require Bell Atlantic to track intermediate steps not currently captured by the system as designed (id.).[91]

Regarding the E911 unlock metric, Bell Atlantic maintains that the post-provisioning activity to unlock the E911 records associated with a customer's line do not affect the customer's service during the porting process (id. at 81). Bell Atlantic explains that the E911 unlocking transaction does not remove the customer information from the E911 database (Bell Atlantic Reply Brief at 29).

Bell Atlantic opposes MediaOne's proposal for tracking LNP trouble resolution and LSMS downtime, stating that these metrics are not relevant to Bell Atlantic's performance for MediaOne (Bell Atlantic Brief at 86). Bell Atlantic asserts that the LSMS deployed by Bell Atlantic's network conforms to industry-defined requirements, that the LSMS may be inoperative for reasons beyond Bell Atlantic's control, and that LSMS downtime will not affect either MediaOne transactions nor its customers (id.).

Finally, regarding the proposal that Bell Atlantic check with the NPAC prior to switch translations removal, Bell Atlantic claims that its procedure that removes switch translations at 11:59 p.m. on the order date is an efficient process that gives a CLEC all day to complete customer work before translations removal (Bell Atlantic Reply Brief at 28). According to Bell Atlantic, it is MediaOne's responsibility to notify Bell Atlantic of any service changes prior to this time (id. at 29).

ii. MediaOne

MediaOne argues that the parties disagree (1) whether the new provider should check with the NPAC prior to removing switch translations, and (2) when the new provider should unlock the E911 record (MediaOne Brief at 41).[92]

Regarding switch translations removal, MediaOne maintains that the company from which a number is ported should check with NPAC prior to removing switch translations as a way to ensure that switch translations are not removed (causing customer disconnects) in certain situations (id. at 41). MediaOne states that it does not recommend measurement or imposition of penalties for this activity (id.). According to MediaOne, its proposal for performance standards is necessary to ensure that disconnects are minimized and that reconnects take place in a timely manner (id. at 42).

Regarding E911 unlocking, MediaOne proposes that the porting provider unlock the E911 record on the due date, as opposed to Bell Atlantic's current practice to unlock the E911 record on the day after the due date (id.).[93]

MediaOne maintains that its proposal is consistent with the National Emergency Number Association ("NENA") standards associated with unlocking and migrating E911 records during the porting process (id.). MediaOne states that Bell Atlantic's current procedure causes MediaOne to be unable to migrate the E911 record until two days after the due date of the port (id. at 43). MediaOne explained the negative consequences that could result from this delay. According to MediaOne, in the event that the database (which provides customer location) is inoperative during a number port, emergency personnel would not have the correct service provider name needed to verify the correct address of the person contacting E911 (id.). MediaOne states that a similar problem could occur, if law enforcement officials needed to place a tap on a line (id.).

Finally, MediaOne indicates that, because Bell Atlantic is in the process of developing the database system, reporting of the E911 record unlocks could be added to the system without significant extra work on the part of Bell Atlantic (id. at 44).

c. Analysis and Findings

Regarding MediaOne proposal that the old carrier check with NPAC prior to removing a translation and disconnecting the porting customer, Bell Atlantic's current process of disconnecting a customer at 11:59 p.m. is generating a 98 percent success rate by MediaOne's data.[94]

This current process is successful, and we see no reason to change it. If a customer decides at 11:58 p.m. on the scheduled date of the port that he does not wish to change providers, he does so at his own risk. Therefore, we decline to require that provider check with NPAC prior to removing switch translations.

Regarding the proposal that the E911 record be unlocked on the same date as the completion of the switch translations, in light of our finding above, it would be impossible for this to happen when translations are removed at one minute before the end of the day. We understand that the current industry standard requires an unlock on the same day as the switch translation work (Tr. 1, at 182-183). However, we are persuaded by Bell Atlantic testimony that NENA is reevaluating the timing between the old provider's completion of work, and the new provider's completion of installation work (Tr. 3, at 185).

We also note that MediaOne presented testimony on possible problems with the current E911 unlock process, but no evidence of any actual problems experienced by customers. Bell Atlantic has explained that customers may still reach E911 during the porting process (assuming there is no improper disconnect), and that the instances where incorrect provider information could affect a customer are rare. There is insufficient evidence for us to change the current process in order to allow the porting provider to unlock the E911 record on the same day as the port.[95]

5. Appropriate Threshold

a. Introduction

The parties disagree on the appropriate threshold for imposing penalties on an underperforming porting provider.

b. Positions of the Parties

i. Bell Atlantic

Bell Atlantic proposes that its "Percent On Time - LNP" metric should incorporate a minimum 90 percent standard (Bell Atlantic Brief at 81). Bell Atlantic argues that the same 90 percent metric established for UNE ordering in the Consolidated Arbitrations is applicable for LNP porting because of the similarities in the ordering processes (Bell Atlantic Reply Brief at 30). Bell Atlantic contends that, although its current performance level with MediaOne is approximately 98 percent,[96]

this level is too high to set as a performance metric because it reflects limited experience (two months) with just one CLEC (MediaOne) (id.). Bell Atlantic relates that the comparable LNP measurement is being developed in New York has a 95 percent standard (id.).

Bell Atlantic states that it based its recommended 90 percent "Percent On Time - LNP" on several factors (Tr. 3, at 465). Specifically, the 90 percent standard was based on Bell Atlantic's history for missed installation appointments because Bell Atlantic did not have a history of LNP completions for a basis, and on the complexity of the LNP process (id.). In general, Bell Atlantic explains that its proposed standard is based on its "judgment and experience in the business" (id.).

ii. MediaOne

MediaOne proposes a quarterly average performance standard of 98 percent on time[97] (MediaOne Brief at 45). MediaOne argues that this standard relates to Bell Atlantic's current performance, reflects a level of performance which does not adversely affect the new provider, and reflects a level of performance that assures consumers that they can change providers without unnecessary inconvenience (id. at 45). MediaOne cites the "devastating effect" on MediaOne's operations and ability to market its services that Bell Atlantic's proposed 90 percent standard would have (id. at 47). MediaOne further argues that the fact that the Department established a 90 percent standard for another measure in the Consolidated Arbitrations is irrelevant for a standard for a different activity (LNP performance) for which Bell Atlantic's current performance is higher (id. 46-47).

MediaOne states that its proposal for a 98 percent standard was based on current performance and its business judgment about a penalty that Bell Atlantic would consider more than the cost of doing business (Tr. 3, at 410).

c. Analysis and Findings

As noted above, the current porting process is successful. Bell Atlantic has a 98 percent success rate for number porting. We do not want to change the process, but provide incentives for Bell Atlantic to keep up its high level of performance. Currently, Bell Atlantic has dedicated a representative for MediaOne to resolve problems in a timely manner. MediaOne's witness testified that Bell Atlantic indicated that this contact person will remain (Tr. 3, at 406). However, we share MediaOne's concern that as porting requests increase, this specialized manual intervention may not be able to address LNP on a large scale. The results could be increased porting failures, and more customers out of service. The automation Bell Atlantic is developing in New York should help when applied to Massachusetts, but we believe additional incentives are useful.

MediaOne has convinced us that the 90 percent standard is too low a threshold for LNP performance. A failure rate exceeding ten percent puts too many customers out of service during the porting process, and adversely affects operations for both companies (MediaOne Brief at 46-47). A rate of 90 percent also is not reflective of current levels, and allows Bell Atlantic to provide service at a much lower level than it provides now. Conversely, maintaining a 98 percent success rate for a sustained period may unduly burden the porting provider (Tr. 3, at 468, 473-474). Therefore, we find that the 95 percent on time standard, as adopted through a collaborative process in New York, addresses the parties' need for a high level of successful porting without unduly burdening the porting provider.

6. Appropriate Penalties

a. Introduction

The parties disagree on the appropriate penalties for substandard number porting.

b. Positions of the Parties

i. Bell Atlantic

Bell Atlantic opposes MediaOne's proposed two-tiered penalty scheme, and instead proposes a sliding scale scheme based on a 90 percent "Percent On Time - LNP" standard (Bell Atlantic Brief at 83). Bell Atlantic states that MediaOne's penalties amount to a double penalty, and would require changes to the existing LNP process (Bell Atlantic Reply Brief at 30).

Bell Atlantic argues that, in practice, MediaOne's proposed "Customer Compensation" credit to be paid to MediaOne each day a customer remains without dialtone or cannot receive incoming calls would require extensive investigation to

determine the responsible party for each event (Bell Atlantic Brief at 83). Bell Atlantic argues that this "Customer Compensation" credit is not comparable to the incident-based credit established by the Department in the Consolidated Arbitrations because these credits apply 24 hours after the installation appointment is missed or the customer is out of service, and are based on a sliding scale (Bell Atlantic Reply Brief at 31). In addition, Bell Atlantic criticizes MediaOne's "Performance Credit" proposal as requiring Bell Atlantic to pay penalties even if the LNP was completed on time and without service interruption (for example, late installation of a 10-digit trigger or a late E911 unlock) (Bell Atlantic Brief at 84).

Bell Atlantic proposes a performance credit based on the credit calculation for percent missed UNE installation appointments from the Consolidated Arbitrations (id. at 86). The credit provides a sliding scale, which is based on the number of lines affected as well as the degree to which Bell Atlantic's performance is below the performance standard[98]

(id.). Bell Atlantic contends that its proposal would achieve the results of timeliness because it creates a performance mechanism based on a standard three business-day interval for LNP orders (Exh. BA-MA-1, at 38).

ii. MediaOne

MediaOne proposes to establish a two-tiered penalty mechanism for failed number ports. First, MediaOne proposes a "Customer Credit" of $25 for each day the customer is without dialtone for at least two hours (Exh. MediaOne-3, at 23). The purpose of the "Customer Credit" is to compensate the customer for the inconvenience of the failed port, and to provide the porting provider an incentive to work to restore a customer's service (MediaOne Brief at 49-50). MediaOne maintains that the "Customer Credit" is consistent with the establishment of incident-based credits in the Consolidated Arbitrations (id.).

Second, MediaOne proposes a "Performance Credit" which would consist of a $2000 penalty for each percentage point (or fraction thereof) by which the porting provider's quarterly average falls below the standard[99] (98 percent recommended by MediaOne) (Exh. MediaOne-3, at 23-24).

MediaOne argues that its proposed "Performance Penalties" and "Customer Credits" are needed to provide Bell Atlantic with incentives for meeting and sustaining performance standards, and address the issue of the need of disconnected customers to be provided with service again in a timely manner (MediaOne Brief at 48). MediaOne cites the principles employed by the Department when establishing performance standards and remedies in the Consolidated Arbitrations (id.). However, MediaOne distinguishes the standards and remedies adopted there, stating that Bell Atlantic's proposal is based on a different proceeding and for different measurements than this arbitration (id.). Further, MediaOne notes that, unlike the Consolidated Arbitrations, MediaOne has agreed to give up the UNE standards in return for the adoption of porting standards and remedies, and MediaOne has proposed to be bound by the porting standards and remedies (id.). MediaOne urges the Department to reject the performance remedies established in the Consolidated Arbitrations, and establish a higher remedy amount (id. at 49).

Moreover, MediaOne contends that Bell Atlantic's proposed penalties are not high enough to serve as a true incentive for ensuring adequate performance (id.). MediaOne counters Bell Atlantic's argument that imposing the "Customer Credit" would involve extensive investigation to determine the party responsible for a customer's lack of service, by stating that a simple review of the porting record would identify the responsible party (MediaOne Reply Brief at 16).

c. Analysis and Findings

In the Consolidated Arbitrations, the Department outlined its principles for performance standards and remedies. In our Phase 3-B Order, we stated that the performance remedies established there should provide Bell Atlantic with a monetary incentive to ensure good service, as well as supply a certain, timely payment to carriers for possible damages incurred as a result of substandard service. Phase 3-B Order at 22. We added that the amounts should be sufficiently high that they are not viewed by Bell Atlantic merely as a cost of doing business that Bell Atlantic feels comfortable paying to prevent competitors from making inroads into the local service market. Id.

We find that a greater incentive for adequate service is appropriate where the effect of a failure may be greater. In addition, MediaOne has persuaded us that Bell Atlantic's proposed remedy may be too low to provide adequate incentive to Bell Atlantic to maintain a high level of successful ports. Therefore, we find that MediaOne's proposed penalties would provide an appropriate level of incentive to Bell Atlantic to conduct successful number ports. We note that if Bell Atlantic

sustains its current level of service, the financial effect of adopting MediaOne's proposal should be minimal.

I. Dialing Parity

1. Introduction

On August 8, 1996, the FCC adopted rules implementing the dialing parity[100] requirements of the Act for LECs, including Bell Operating Companies ("BOCs"), such as Bell Atlantic. See In re Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 19392, at ¶ 62 (1996). In NYNEX ILP, D.P.U. 96-106 (1997) and D.P.U./D.T.E. 96-106-A (1998), the Department implemented the FCC's dialing parity rules concerning Bell Atlantic. Then in ILP for Non-BOC LECs, D.T.E. 98-9 (1999), the Department established dialing parity requirements for CLECs and other Massachusetts ILECs. The parties disagree whether to include in the interconnection agreement a provision requiring them to comply not only with the dialing parity requirements of the Act and of the FCC, but also the Department's requirements.

2. Positions of the Parties

a. MediaOne

MediaOne argues that the parties should agree to comply with any dialing parity requirements set forth by the Department as well as those set forth in the Act (MediaOne Petition at 48).

b. Bell Atlantic

Bell Atlantic claims that it will comply with the dialing parity requirements set forth in the Act (Bell Atlantic Brief at 87). Bell Atlantic argues that compliance with any applicable Department orders or rulings is assumed, and therefore it is unnecessary to refer in the interconnection agreement to any dialing parity rules established by the Department (id.).

3. Analysis and Findings

Bell Atlantic cannot dispute its obligation to comply with dialing parity requirements established by the Department, in addition to those imposed by the Act and the FCC, 47 U.S.C. § 251(b)(3). We do not understand why Bell Atlantic would refuse MediaOne's request to reference compliance with the Department's ILP rules in the agreement, when it references similar Department compliance obligations in other sections of the interconnection agreement (see Proposed Interconnection Agreement, § 28.8.5). We, therefore, agree with MediaOne and direct the parties to include a provision in the interconnection agreement that makes explicit their compliance with the Department's dialing parity requirements.

Finally, as guidance for Bell Atlantic and CLECs in subsequent negotiations, we note our displeasure that such a minor, and easily resolved, issue as this was put before us for determination. At a time when the Department's resources are being severely taxed with much more important matters, we can ill afford to devote time to such insignificant disputes.

J. Coordinated Service Arrangements

1. Coordinated Repair Calls and Business Procedures

a. Introduction

The interconnection agreement addresses mutual obligations when a customer, intending to call his or her carrier for repairs, product information, or customer service assistance, mistakenly calls the other carrier. With respect to misdirected repair calls, the parties agree to provide the correct carrier's telephone number to the customer who mistakenly called the wrong carrier, and that "neither party shall make disparaging remarks about the other party" during such calls (Bell Atlantic Reply Brief at 31-33). However, they disagree on whether employees in such situations should be prohibited from marketing their company's products and services, and whether the prohibition against disparaging comments should apply to all employees, not just repair personnel.

b. Positions of the Parties

i. MediaOne

MediaOne proposes that the parties agree that they will not use misdirected repair calls as the basis for internal referrals or to market their services (MediaOne Brief at 50). MediaOne states that using misdirected repair calls to market services is clearly contrary to the spirit of the Act, constitutes anticompetitive marketing, and is also an unreasonable practice that should not be allowed pursuant to G.L. c. 159, § 16 (MediaOne Brief at 52; MediaOne Proposed Findings of Fact and Conclusions of Law at 17). MediaOne argues that Bell Atlantic proposes to comply with "applicable law" on the marketing of services without setting forth an explanation of the "applicable law" (RR-DTE-25). In addition, MediaOne argues that there should be a prohibition in these situations against disparaging remarks about the other company's products and services (MediaOne Brief at 54-55). MediaOne maintains that this provision should apply to all company personnel (MediaOne Proposed Findings of Fact and Conclusions of Law at 17).

ii. Bell Atlantic

Bell Atlantic argues that the prohibition against marketing of services during misdirected calls is adequately addressed in language directing the parties to comply with applicable law and, thus, further change is not required (Bell Atlantic Reply Brief at 31). Bell Atlantic contends that carriers are not prohibited by the Act or FCC rules from making internal referrals or from marketing their services in these types of situations (IR-MediaOne-BA-2-35). Bell Atlantic also argues that a provision prohibiting the marketing of services is also unnecessary since Bell Atlantic will comply with applicable law as noted elsewhere in the interconnection agreement (see Bell Atlantic's Proposed Findings of Facts and Conclusions of Law at 19). Bell Atlantic argues that MediaOne's proposed language is too restrictive and would require all Bell Atlantic personnel to refer misdirected callers without any further contact (Bell Atlantic Reply Brief at 33). Finally, Bell Atlantic contends that MediaOne's proposal to prohibit disparaging remarks under the Business Procedures section is redundant because that language is already included in the Coordinated Repair Calls section (Bell Atlantic Brief at 95).

c. Analysis and Findings

Neither party cites to any federal requirements addressing this issue and we are not aware of any. Thus, the Department, under its authority under G.L. c. 159, §§ 12 and 16, may prescribe its own requirements. In the emerging stages of local exchange competition, we believe it is important to establish a rule that prevents Bell Atlantic from using misdirected telephone calls as the basis for internal referrals or for marketing its services. Bell Atlantic's responsibility as an incumbent network provider should not be used to its advantage in the competitive retail market place. The Department, in the intraLATA toll competition context, has previously found a need to place limits on Bell Atlantic's ability to take advantage of its longstanding monopoly relationship with customers to unfairly market its services (see NYNEX ILP, D.P.U. 96-106, at 37-38 (1997)). We see an analogous situation here. Accordingly, we find that the parties shall include specific wording in the agreement that prevents them from using misdirected repair calls as the basis for internal referrals or to solicit end-users to market services. In addition, we find that the parties shall also include language that prevents all of their employees, not just repair personnel, from making disparaging comments about the other company and its product and services in these types of situations.

2. Customer Proprietary Network Information Audits

a. Introduction

Section 222(c) of the Communications Act of 1934 prohibits (with some exceptions[101]

) disclosure by telecommunications carriers of confidential Customer Proprietary Network Information ("CPNI") of individual customers.[102]

47 U.S.C. § 222(c). The parties disagree about whether Bell Atlantic should be allowed to monitor or audit MediaOne's access to and use and/or disclosure of CPNI.[103]

b. Positions of the Parties

i. Bell Atlantic

Bell Atlantic proposes the following language in the interconnection agreement; "[it] shall have the right to monitor and/or audit MediaOne's access to and use and/or disclosure of [CPNI] that is made available by Bell Atlantic to MediaOne pursuant to this Agreement to ascertain whether MediaOne is complying with the requirements of Applicable Law and this Agreement with regard to such access, use, and/or disclosure" (Bell Atlantic Brief at 89-90). Bell Atlantic argues that it should be allowed to monitor and/or audit in order to be able to take precautions to protect that data and that safeguarding that information is in the public interest (Bell Atlantic Brief at 90; Bell Atlantic Reply Brief 32).

ii. MediaOne

MediaOne opposes Bell Atlantic's proposal that Bell Atlantic be permitted to monitor or to audit MediaOne's access to and use and/or disclosure of Bell Atlantic's CPNI (MediaOne Brief at 52.). MediaOne argues that "Bell Atlantic is not the CPNI policeman, and [Bell Atlantic] has no obligation (or right) to monitor other carriers' use of CPNI" (id.). According to MediaOne, should a violation of the use of CPNI ever occur, it would be the customer who would request damages for the violation (id.).

c. Analysis and Findings

Section 222 does not contain a provision that permits (or requires) carriers to audit the use and/or disclosure of CPNI by another carrier. We are not inclined to create such a rule here. There is no evidence that MediaOne, or any other CLEC, would improperly use or disclose CPNI in violation of Section 222. Therefore, we find in favor of MediaOne. The interconnection agreement shall not include a provision allowing Bell Atlantic to audit MediaOne's use of CPNI. If Bell Atlantic has reason to believe the CPNI is being misused by any CLEC, Bell Atlantic may bring that concern to the Department's attention for possible further action.

3. Unauthorized Carrier Changes and Customer Authorization

a. Introduction

The Parties disagree about whether they should reference in their interconnection agreement only existing state and federal rules on the unauthorized change of a customer's telecommunications service provider (i.e., slamming), or create additional remedies.

b. Positions of the Parties

i. MediaOne

MediaOne proposes that the parties agree to follow both the FCC's and the Department's rules on slamming (MediaOne Brief at 51). MediaOne notes that the FCC has developed rules on this issue,[104]

that Massachusetts enacted anti-slamming legislation,[105]

and that the Department recently proposed rules to implement the state law[106] (Exh. MediaOne-5, at 9). MediaOne argues that Bell Atlantic has proposed to include remedies in addition to those provided by law, and that the federal and state remedies are adequate and sufficient (MediaOne Brief at 51).

ii. Bell Atlantic

Bell Atlantic claims that the Unauthorized Carrier Changes Section of Bell Atlantic's proposed interconnection agreement is reasonable because it does not preclude other rights available under law in addition to those required under the applicable slamming rules (Bell Atlantic Brief at 90). In addition, Bell Atlantic creates an additional remedy whereby the party that makes an unauthorized change (i.e., slams a customer) would be liable to the other party for certain damages (id. at 90-91). According to Bell Atlantic, MediaOne inaccurately characterizes Bell Atlantic's proposed slamming language as expanding rights and remedies (Bell Atlantic Reply Brief at 31). Bell Atlantic argues that its proposal merely acknowledges that, in addition to the specific penalties contained in the applicable state and federal slamming laws, other remedies may exist which could be invoked in the event of a slamming violation (id. at 31-32).

c. Analysis and Findings

The Massachusetts' new slamming law, which went into effect December 10, 1998, provides procedures for investigation, determination, and remedies for slamming. G. L. c. 93, §§ 108-113. In particular, Section 112 provides for penalties to be assessed against violating companies, and compensation for slammed customers and their original carriers. G. L. c. 93, § 112. In addition, federal and state laws and regulations provide for carrier-to-carrier remedies. The Department finds that it would be inappropriate for Bell Atlantic to create additional remedies in this interconnection agreement. See Implementation of the Subscriber Carrier Selection Change Provisions of the Telecommunication Act of 1996, CC Docket No. 94-129 (1998); G. L. c. 93, §§ 108-113. Bell Atlantic has not proven why the existing requirements are inadequate to meet its needs. We find that the existing slamming law, FCC regulations, and pending Department regulations provide for adequate remedies; Bell Atlantic's additional language is not needed.

K. Directory Services Arrangements

1. Operator Services and Directory Assistance Transport

a. Introduction

Bell Atlantic provides Operator Services ("OS") through five switch locations dispersed throughout Massachusetts and Directory Assistance ("DA") through nine switch locations serving the Eastern Massachusetts LATA only. Operator services include call completion services such as credit card, collect, and bill-to-third-number calls, and busy line verification/interruption. Intercept services, which provide a telephone number once a line has changed or been disconnected, are also covered under Operator services. Directory Assistance includes Directory Assistance Call Completion services.

The parties' dispute which carrier has the obligation to provide the necessary trunking and transport to and from these OS/DA switches. Bell Atlantic identifies the relevant OS/DA IPs in Schedule 4.2, and will include this information in Schedule 4.1 of the Interconnection Agreement (RR-DTE-10).

b. Positions of the Parties

i. MediaOne

MediaOne maintains that its obligations to provide transport to and from OS and DA switch locations should be the same as its obligations to provide transport for other types of traffic as set forth in Section 4.2 (Interconnection Point Section) of the interconnection agreement (MediaOne Brief at 52). As in the Interconnection Points section, where each carrier would deliver local traffic originated by its customer to the IP or POI of the other carrier and that other carrier would pay for the transport of the call to its customer, MediaOne proposes to pay for a portion of the transport, up to the OS/DA switch locations, and Bell Atlantic would be required to pay to transport the traffic back to the relevant MediaOne's IP. MediaOne claims that since it will be providing a geographically relevant IP within the footprint[107]

of each of Bell Atlantic's tandems, MediaOne has reasonably addressed Bell Atlantic's transport concerns regarding establishing only one IP and requiring Bell Atlantic to pay for transport costs to haul all types of traffic to this IP (MediaOne Brief at 52-53).

ii. Bell Atlantic

Bell Atlantic proposes that MediaOne should be responsible for arranging at its own expense the trunking and other facilities required to transport to and from Bell Atlantic's designated DA and OS switch locations[108] (Bell Atlantic Brief at 91). Bell Atlantic argues that MediaOne's designation of only one IP for eastern Massachusetts would force Bell Atlantic to haul traffic to this single IP and incur considerable transport costs (Bell Atlantic Brief at 91-92). Bell Atlantic also contends that the UNE rates for DA and OS do not include transport costs to deliver the OS/DA messages to MediaOne's IP (Bell Atlantic Reply Brief at 32). Lastly, Bell Atlantic argues that MediaOne's proposal to link the OS and DA transport issue to the interconnection issues in Section 4.2 (on geographic relevance) is unreasonable (Bell Atlantic Brief at 92-93).

c. Analysis and Finding

The Department finds that if MediaOne elects to purchase the OS and DA UNEs, it is reasonable to require MediaOne to pay the transport costs to and from Bell Atlantic's OS and DA switch IPs. While MediaOne's footprint proposal does provide additional IPs that may be located closer to Bell Atlantic's OS/DA IPs, Bell Atlantic's interconnection obligations with MediaOne should not be confused with Bell Atlantic's obligation to provide MediaOne access to a UNE, namely OS and DA. MediaOne's purchase of the OS/DA UNE involves only MediaOne's customers, whereas interconnection between MediaOne and Bell Atlantic's networks is for the exchange of traffic between Bell Atlantic's and MediaOne's customers. In the Local Competition Order, the FCC states that it requires that an incumbent LEC to provide access to operator service and directory assistance where technically feasible. Local Competition Order at ¶¶ 534-540. Providing access to a particular UNE does not necessitate Bell Atlantic paying a portion of the CLEC's transport costs for access to that UNE. If MediaOne elects to purchase the OS and DA UNE, it will be providing its customers access to this service. Thus, it should pay both legs of the transportation costs to obtain this service. MediaOne's proposal that Bell Atlantic be required to pay for the return leg of transport for OS and DA is unreasonable.

The proposed rates for OS and DA UNE's are reflected in Bell Atlantic's Tariff 17. Those rates are based on the FCC's Total Element Long-Run Incremental Cost ("TELRIC") method for pricing UNEs, and do not contain a cost component for transport from the Os and DA IPs to MediaOne's IP (see Miscellaneous TELRIC study attachment B).

L. Contractual Issues

1. Termination of Agreement

a. Introduction

The parties disagree about their respective obligations upon expiration of the interconnection agreement. MediaOne argues that the parties should continue operating under the expired interconnection agreement. Bell Atlantic contends that after a certain period of time, service arrangements made available under the interconnection agreement should be provided pursuant to standard or tariffed interconnection terms and conditions until execution of a new interconnection agreement.

b. Positions of the Parties

i. Bell Atlantic

Bell Atlantic proposes that, when the parties' interconnection agreement expires, and either party requests renegotiation of the interconnection agreement, the parties will continue to operate under the terms of the expired agreement for a maximum of nine months while the parties renegotiate a new agreement (Bell Atlantic Brief at 92). If a new interconnection agreement is not negotiated within nine months, the service arrangements made available under the interconnection agreement would be provided under (1) generally available standard interconnection terms and conditions, (2) tariff terms and conditions, or (3) the terms of the expired interconnection agreement on a month-to-month basis, if none of the above is available (id. at 92-93). Bell Atlantic explains that it would give 30-days notice before terminating the provision of any service under the expired interconnection agreement (Bell Atlantic Reply Brief at 33).

Bell Atlantic asserts that it is in the interest of both parties to promptly reach a new interconnection agreement, and its proposal provides the opportunity to renegotiate, and the incentive to reach a new agreement (Bell Atlantic Brief at 93). This new interconnection agreement would properly reflect the bargained-for exchange of provisions representing the resolution of a complex variety of issues between the parties (id.). According to Bell Atlantic, it is important that reasonable limitations be placed on the continuing effectiveness of the prior interconnection agreement in order to facilitate the efficient and successful negotiation of a new interconnection agreement (id.). Bell Atlantic asserts that the Department-approved standard terms and conditions are a readily-available and reasonable substitute offering all the components of an interconnection agreement (id. at 94).

ii. MediaOne

MediaOne argues that the parties' obligations under the interconnection agreement should remain in full force and effect

pending the execution of a new interconnection agreement (MediaOne Brief at 53). In describing the potential impact of Bell Atlantic's proposal on MediaOne and its customers, MediaOne contends that implementing an interim set of terms and conditions between the parties as proposed by Bell Atlantic could "wreak havoc" on the interconnection operations between the parties (id. at 54). According to MediaOne, Bell Atlantic would need to determine what changes MediaOne should expect in Bell Atlantic's interconnection provisions, and to notify MediaOne of those changes (id.).[109] Second, MediaOne maintains that there could be operational, engineering or provisioning changes that MediaOne may be required to implement immediately during this interim period under different terms and conditions, which might drastically affect MediaOne's ability to continue marketing and providing service (id.). Third, MediaOne argues that there could be changes to customer services that must be addressed with customers (id.). MediaOne concludes that Bell Atlantic's proposal ignores the complex practices and procedures involved with interconnection between the parties, and Bell Atlantic's interim proposal would adversely affect both MediaOne and its customers (id.).

MediaOne contends that Bell Atlantic's proposal eliminates MediaOne's ability to freely negotiate a new interconnection agreement because MediaOne must either agree to Bell Atlantic's various proposals for a new agreement, or be penalized for failure to agree by having its current agreement terminated and an entirely new set of terms, conditions and rates imposed on it until the new interconnection agreement is resolved (id. at 53). In addition, MediaOne notes that there may be factors outside of its control, such as a Bell Atlantic appeal of a timely arbitration decision, that affect its ability to execute a new agreement (id. at 54).

c. Analysis and Findings

The parties agree that the interconnection relationship as defined by the interconnection agreement is a complex arrangement (see MediaOne Brief at 54; Bell Atlantic Brief at 93). In this arbitration, in addition to the time spent negotiating and resolving a wide variety of issues, the parties have devoted significant time to developing, refining and presenting their positions on many of the aspects of their relationship to be defined in the interconnection agreement. MediaOne has persuaded us that wholesale changes in that relationship, such as terminating the arrangement as defined in the interconnection agreement and imposing a different arrangement defined by generally available terms and conditions, has the potential to affect substantially the way the parties interconnect and, ultimately, the service provided to customers. Bell Atlantic does not address this point, other than to say that its generally available terms and conditions are a "reasonable" substitute for negotiated and arbitrated terms and conditions.

We agree with Bell Atlantic, however, that there must be a mechanism in place that reasonably limits the length of time the parties may continue to operate under an expired interconnection agreement. Such a mechanism already exists. Under the Act, parties that cannot agree on interconnection terms, conditions and rates may petition the state commission to arbitrate any open issue. See 47 U.S.C. § 252(b). In addition, a state commission must conclude its resolution of any unresolved issue within a specific period of time, at most no longer than 165 days. See 47 U.S.C. § 252(b)(4)(C). Therefore, if Bell Atlantic is concerned that its negotiations with MediaOne for a new interconnection agreement will not produce results in a reasonable period of time, it may, in accordance with the provisions of the Act, petition the Department for arbitration.

Accordingly, we find that Bell Atlantic's proposal to impose standard terms and conditions upon MediaOne after nine months of renegotiating a new interconnection agreement is unnecessary. Bell Atlantic's proposal is therefore denied.

2. Compliance with Laws

a. Introduction

The parties disagree whether in the event of a change of law that relieves Bell Atlantic of any of its obligations relating to services provided pursuant to this interconnection agreement

(1) Bell Atlantic may cease providing the affected services upon 30-days notice, or (2) the parties must negotiate modification of the interconnection agreement and submit the modification to the Department for approval.

b. Positions of the Parties

i. MediaOne

MediaOne asserts that the parties should agree to meet and modify the interconnection agreement to be consistent with any further change in law (MediaOne Brief at 55). MediaOne predicts a negative effect on customers if the parties immediately change their provision of services based on their interpretation of any change in law (id.). According to MediaOne, it may need to negotiate and implement an alternative agreement to cover services no longer provided by Bell Atlantic (id. at 56). MediaOne argues that its proposal would preserve the Department's ability to review and approve interconnection agreement changes (MediaOne Proposed Findings of Fact and Conclusions of Law at 18).

ii. Bell Atlantic

Bell Atlantic proposes to include a provision in the interconnection agreement that provides that "if, as result of any decision, order or determination of any judicial or regulatory authority ... it is determined that [Bell Atlantic] is not required to furnish any service, facility or arrangement, or to provide any benefit [that is required to be provided] to MediaOne [under the interconnection agreement], then Bell Atlantic may discontinue the provision of such service, facility, arrangement or benefit" (Bell Atlantic Brief at 95-96). First, Bell Atlantic objects to MediaOne's insistence that absent a final decision affecting Bell Atlantic's obligations, Bell Atlantic should not be relieved of its obligations (id.). Bell Atlantic argues that absent an order that legally stays the applicability of a regulatory or court decision affecting either party's obligations, the fact that an order is subject to further appeal rights does not alter an order's fundamental legal enforceability (pending the result of an appeal) (id. at 96). Second, differentiating between a typical commercial contract and an interconnection agreement entered into pursuant to the Act, Bell Atlantic argues that MediaOne's proposal would impose requirements on Bell Atlantic that exceed the applicable law (Bell Atlantic Response at 36). Third, in response to MediaOne's concern regarding immediate changes in service, Bell Atlantic would give MediaOne 30-days prior written notice before discontinuing any service due to a change in law (Bell Atlantic Brief at 96-97). Fourth, Bell Atlantic argues that MediaOne's proposal does not include a date certain for discontinuation of its provision of services when those services are no longer mandated by law (Bell Atlantic Reply Brief at 34).

c. Analysis and Findings

This issue is closely related to the "Extent of Obligation to Provide UNEs" issue that we decided in Section V.G., above. For the same reasons as stated in the earlier section, we find that Bell Atlantic's proposal to terminate the provision of certain services upon 30-days notice in the event of a change of law is unreasonable. The parties shall comply with the directives stated in Section V.G.

M. Billing and Payment Dispute Amounts

1. Introduction

Section 28.8 of the Agreement governs the parties rights and responsibilities with respect to billing, payment and collection for services rendered by one carrier to the other. Although in agreement on many of the provisions of this Section, the parties contest four specific issues: whether (1) the payment due date should take into account when a bill is received; (2) one party may escrow amounts in dispute only after providing a billing inquiry response to the other party; (3) the billing dispute resolution period should be 60 or 90 days; and (4) a party can discount disputed bills held in escrow that are later determined to be in error.

2. Positions of the Parties

a. MediaOne

To protect itself from incurring penalties for late payments because Bell Atlantic did not issue its billing statements on time, MediaOne proposes that "the bills are due on the later of thirty days from the date of the statement or twenty days from the date of receipt of the statement" (MediaOne Brief at 56). MediaOne states that it has experienced significant delays and found Bell Atlantic to be unresponsive to billing issues (Exh. MediaOne-5, at 55). For example, MediaOne claims that certain billing issues are still unresolved after four months of working with Bell Atlantic (id.).

In order to provide Bell Atlantic with the incentive to produce accurate bills and respond promptly to billing inquiries from MediaOne, MediaOne proposes to put disputed billed amounts into an interest-bearing escrow account, if Bell Atlantic agrees to respond to billing inquiries within a reasonable period of time (MediaOne Brief at 56). MediaOne

suggests two days is a reasonable period of time (id.).[110]

In addition, MediaOne argues that it would agree to Bell Atlantic's proposed 60-day period for dispute resolution of billing matters if Bell Atlantic agrees to tie the escrow obligation to a reasonable response time for MediaOne's billing inquiries (MediaOne Reply Brief at 17).

As an alternative to tying a reasonable response time for billing inquiries with an escrow obligation, MediaOne proposes that "Bell Atlantic be subject to penalties if its bills are determined to be more than 30 % in error; the penalty would be equal to 5% of the total accurate

amount" (MediaOne's Proposed Findings of Facts and Conclusions of Law at 18).

b. Bell Atlantic

Bell Atlantic maintains that its escrow requirement is a standard provision (Bell Atlantic Brief at 97).[111]

Bell Atlantic contends that MediaOne's proposal of requesting two days as a reasonable time to respond to billing inquiries is too rigid (id. at 98; Bell Atlantic Reply Brief at 34). Bell Atlantic contends that the proposed two day response time "fails to consider the nature and complexity of the claim, investigation of billing issues, including the collection of necessary supporting documentation" (Bell Atlantic Reply Brief at 34). In addition, Bell Atlantic argues that MediaOne's proposed 90-day dispute resolution period is too long and that Bell Atlantic's proposed 60-day period is standard (id.). Finally, Bell Atlantic contends that MediaOne's proposal to impose severe penalties on disputed bill amounts is inappropriate (Bell Atlantic Brief at 99).

3. Analysis and Findings

First, we find that MediaOne's proposal that payment be due on the later of thirty days from the date of the billing statement or twenty days from the date of receipt of the statement is reasonable. MediaOne should not be disadvantaged because of Bell Atlantic's failure to send a bill out within the regular time frame or for third-party errors relating to the receipt of mail.

Second, we find that MediaOne's proposal to put all disputed bill amounts into an interest-bearing escrow account, as long as Bell Atlantic agrees to respond to billing inquiries within two days, is a creative way to ensure more accurate bills and a timely response to billing inquiries. However, we think the two-day turnaround time is too short to address those billing disputes that are complex and require detailed investigation, and more time may be required. We find that ten business days is more reasonable.[112]

N. Grant of License and Indemnification

1. Introduction

MediaOne and Bell Atlantic disagree on whether the interconnection agreement should reflect that an implied limited license to use Bell Atlantic's facilities arising from the interconnection agreement. In addition, the parties disagree as to whether they should indemnify each other for any third party claims that the use of the service, facilities, or equipment pursuant to the agreement infringes a copyright, trademark, patent or trade secret of a third party.

Section 28.13.1 of Bell Atlantic's proposal states, in pertinent part, that:

Nothing in this Agreement shall be construed as the grant of a license with respect to any patent, copyright, trademark, trade name, trade secret or any other proprietary or intellectual property now or hereafter owned, controlled or licensable by either Party. Neither Party may use any patent, copyrightable materials,

trademark, trade name, trade secret or other intellectual property right of the other Party except in accordance with the terms of a separate license agreement between the Parties granting such rights.

2. Positions of the Parties

a. MediaOne

MediaOne contends that the interconnection agreement gives rise to an implied license to use Bell Atlantic's facilities, equipment, and services and this implied license necessarily includes a limited license to any underlying intellectual property rights required for the use of the facilities (MediaOne Brief at 57).

According to MediaOne, it is therefore reasonable to include an indemnification in the event that such use is claimed to infringe the intellectual property rights of a third party (id.). MediaOne claims that a party offering use of its facilities and charging for such use, should also be required to stand behind their offering in the form of an indemnity (id.). MediaOne argues that the party providing the services, facilities and equipment (and charging a fee therefore) is in the best position to provide such indemnity because it has control over, and knowledge about the services, facilities and equipment (id.). MediaOne asserts that Bell Atlantic can best assume the risk of infringement, take appropriate measures to avoid the risk (e.g., by modifying the service, facilities or equipment) and allocate the risk among users of the services, facilities and equipments (e.g., in the form of fees) (id. at 57-58).

b. Bell Atlantic

Bell Atlantic contends that the interconnection agreement does not create a grant of license of any kind (Bell Atlantic Brief at 100). Since no licensing rights are created, according to Bell Atlantic, it is not necessary for the parties to defend, indemnify or hold harmless one another regarding infringement claims (id.). Bell Atlantic claims that MediaOne's proposal contradicts Bell Atlantic's longstanding tariffs on such matters (id.). To the extent that an implied license is assumed by MediaOne, Bell Atlantic would include language that would expressly deny that any license, express or implied, is granted under the Agreement (Bell Atlantic Reply Brief at 35).

3. Analysis and Findings

On the basis of representations made by the parties that the issue of implied license and indemnification was settled, the Department did not question the parties on this matter.[113]

Only after the Department received briefs from the parties did it realize that the parties did not, in fact, reach agreement on this section, Section 28.13, of the interconnection agreement. Consequently, the Department must decide this issue on the basis of the scant information contained in MediaOne's Petition, Bell Atlantic's Response, and the briefs filed in this proceeding. Bell Atlantic argues that MediaOne's position (that the agreement should reflect the existence of an implied license for use of Bell Atlantic's intellectual property rights and a corresponding indemnification clause) contradicts its longstanding tariffs on such matters but does not provide us with any citation to those tariffs. Likewise, MediaOne cites no Department precedent or other authority for its position.

Bell Atlantic's Department-approved access services tariff contains the following provision:

No license under patents (other than the limited license to use) is granted by [Bell Atlantic] or shall be implied or arise by estoppel, with respect to any service offered under this tariff. [Bell Atlantic] will defend the customer against claims of patent infringement arising solely from the use by the customer of services offered under this tariff and will indemnify such customer for any damages awarded based solely on such claims.

DTE MA No. 15 at 2.3.2.G.

On the basis of such language, it appears to the Department that at least one of Bell Atlantic's tariffs expressly provides

for a limited license to use Bell Atlantic's patents. Moreover, Bell Atlantic clearly agreed in Tariff No. 15 to indemnify the customers (IXCs) against patent infringement claims arising from the customer's use of Bell Atlantic's services. This appears to undermine Bell Atlantic's contention that its tariffs do not include an implied license. We recognize, however, that the issues surrounding Bell Atlantic's the provision of access services may differ from those which are the subject before us in this proceeding. Therefore, without further elaboration from the parties on this issue, we are reluctant to direct Bell Atlantic and MediaOne to license their intellectual property, absent a separate intellectual property licensing agreement granting the parties such rights. Accordingly, we decline to accept MediaOne's proposed language.

Since we do not find that an implied limited license to use a party's intellectual property exists in the interconnection agreement, we also agree with Bell Atlantic that it is unnecessary for the parties to indemnify each other from third party infringement claims. The Department notes that Bell Atlantic has proposed language identical to that contained in its access tariff for its Tariff No. 17, which encompasses, among other things, collocation and interconnection. However, the Tariff No. 17 is still under review (D.T.E. 98-57). Should the Department adopt Bell Atlantic's liability proposal in Tariff No. 17, which differs from the language proposed by Bell Atlantic for the interconnection agreement that we adopt today, the parties would be required to comply with the licensing and indemnification language contained in Tariff No. 17, if approved.

Finally, under the FCC's pick-and-choose rules[114] MediaOne may request that Bell Atlantic make available to MediaOne the intellectual property provision contained in Bell Atlantic's Department-approved interconnection agreement with MCImetro Access Transmission Services, Inc. ("MCIm"). This provision, contained Section 12 of the agreement, reads as follows:

12.1 Any intellectual property which originates from or is developed by a Party shall remain in the exclusive ownership of that Party. Except for a limited license to use a Party's patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property right now or hereunder owned, controlled or licensable by a Party, is granted to the other Party or shall be implied or arise by estoppel.

12.2 BA shall indemnify MCIm with respect to MCIm's use, pursuant to the terms of this Agreement, of intellectual property associated with any new BA network equipment or software acquisitions. BA warrants that it will not enter into any licensing agreements with respect to new BA network equipment or software acquisitions that contain provisions that would disqualify MCIm from using or interconnecting with such network equipment or software pursuant to the terms of this Agreement. BA also warrants that it has not and will not intentionally modify any existing licensing agreements for existing network equipment or software in order to disqualify MCIm from using or interconnecting with such network equipment or software pursuant to the terms of this Agreement. To the extent that the providers of equipment or software in BA's network provide BA with indemnities covering intellectual property liabilities and those indemnities allow a flow through of protection to third parties, BA shall flow those indemnity provisions through to MCIm. BA will inform MCIm of any pending or threatened intellectual property claims relating to BA's network of which BA is aware and will update that notification periodically as needed, so that MCIm receives maximum notice of any intellectual property risks it might want to address. Notwithstanding any part of this Section 12, MCIm retains the right to pursue legal remedies against BA if BA is at fault in causing intellectual property liability to MCIm.

12.2.1 For purposes of Section 12.2, BA's obligation to indemnify shall include the obligation to indemnify and hold MCIm harmless from and against any loss, cost, expense or liability arising out of a claim that MCIm's use, pursuant to the terms of this Agreement, of such new BA network equipment or software infringes the intellectual property rights of a third party. Moreover, should any such network equipment or software or any portion thereof provided by BA hereunder become, or, in BA's reasonable opinion, be likely to become, the subject of a claim of infringement, or should MCIm's use thereof be finally enjoined, BA shall, at its immediate expense and at its choice:

12.2.1.1 Procure for MCIm the right to continue using such material; or

12.2.1.2 Replace or modify such material to make it non-fringing provided such replacement or modification is functionally equivalent.

O. Audits

1. Introduction

The parties' proposed interconnection agreement contains a number of provisions that allow the parties to conduct audits of each other concerning specific issues, but does not contain a general provision that allows auditing of the other party's overall compliance with terms and conditions of the interconnection agreement. MediaOne seeks such a provision.

2. Positions of the Parties

a. MediaOne

To ensure Bell Atlantic's compliance with the terms of the Agreement, MediaOne argues the parties should be allowed a general audit of each other, once a year (MediaOne Brief at 58). MediaOne states that the parties would be required to give each other 30-days notice prior to commencement of the audit and would bear the cost of their respective audits (id.). MediaOne argues that without a general audit, there is no way to know whether the other party is complying the with terms of the agreement (id.). MediaOne asserts that the dispute resolution provision is only useful when a party knows there is a compliance problem (id.).[113]

b. Bell Atlantic

Bell Atlantic opposes adding a provision that would allow MediaOne to conduct an annual yearly audit of Bell Atlantic's compliance with the interconnection agreement (Bell Atlantic Brief at 102). First, Bell Atlantic notes that the proposed interconnection agreement already contains audit provisions for those sections, such as the reciprocal compensation, meet-point billing, and CPNI [114] sections, where the parties have identified a specific need for an audit (id.). Second, Bell Atlantic claims the interconnection agreement contains a dispute resolution mechanism, which includes a right to petition the Department for an audit (id. at 103; Bell Atlantic Reply Brief at 35).

3. Analysis and Findings

We find that Bell Atlantic's proposal is reasonable. Broad audit rights to examine a party's general compliance with the terms of the interconnection agreement do not appear to be necessary at this time. As noted by Bell Atlantic, audit provisions already exist for those issues where audits are necessary and appropriate, and we encourage the parties to take advantage of those existing audit provisions. If MediaOne believes that additional specific audit provisions are necessary, it should negotiate such provisions with Bell Atlantic. Finally, if MediaOne can demonstrate credible evidence of a sustained pattern of noncompliance, the Department may reconsider its finding here and grant MediaOne general audit rights.

VI. ORDER

Accordingly, after hearing and due consideration, it is

ORDERED: That the issues under consideration in this arbitration be determined as set forth in this Order; and it is

FURTHER ORDERED: That MediaOne and Bell Atlantic incorporate these determinations into a final interconnection agreement, setting forth both the negotiated and arbitrated terms and conditions, to be filed with the Department pursuant to Section 252(e)(1) within 21 days from the date of this Order.

FURTHER ORDERED: That Greater Media and Bell Atlantic incorporate these determinations into a final interconnection agreement, setting forth both the negotiated and arbitrated terms and conditions, to be filed with the Department pursuant to Section 252(e)(1) after completion of the balance of their separate arbitration.

By Order of the Department,

_____

Janet Gail Besser, Chair

_____

James Connelly, Commissioner

_____

W. Robert Keating, Commissioner

_____

Paul B. Vasington, Commissioner

_____

Eugene J. Sullivan, Jr., Commissioner

1. The carriers' networks comprise (or will comprise in Greater Media's situation) a combination of cable plant and telecommunications facilities, including switching equipment.

2. That term of that interconnection agreement expired on April 18, 1998, but pursuant to Section 21, Term and Termination, of the expired interconnection agreement, the parties continue to operate under the agreement until a new agreement is in place.

3. Section 252(b) of the Act permits a carrier to petition a state commission to arbitrate any issue left unresolved after voluntary negotiations between the carriers have occurred. 47 U.S.C. § 252(b)(1).

4. The Commission designated Department Hearing Officer Joan Foster Evans as the Arbitrator.

5. Greater Media filed a Petition for Arbitration of an interconnection agreement with Bell Atlantic on May 10, 1999.

6. The parties agreed that all discovery responses submitted in this proceeding would be entered as evidence. Those responses are referred to in this Order by their information request designations.

7. Bell Atlantic filed Tariff No. 17 with the Department on April 2, 1999, and filed additional tariff provisions on May 28, June 11, and August 13, 1999. See D.T.E. 98-57 ("Tariff 17 Proceeding"). The Department suspended the tariff for investigation until November 2, 1999. Bell Atlantic Tariffs Nos. 14 and 17, D.T.E. 98-57 (May 18, 1999). This matter is still pending before the Department.

8. Although Bell Atlantic labeled its motion "Appeal and Motion for Clarification of Arbitrator Ruling," we find only a request for clarification contained in this filing, and not an appeal of the Ruling.

9. The first sentence of Bell Atlantic's proposed Section 2.2 reads as follows: "Each party hereby incorporates by reference those provisions of its tariff that govern the provision of any services or facilities provided hereunder."

10. The Department notes that the Arbitrator specifically directed the parties to incorporate language into their interconnection agreements that comports with the Ruling (Ruling at 5).

11. Subsequently, the Department was informed by the parties that Sections 11.7, 11.9, and 19 were resolved and, therefore, are negotiated Sections of the interconnection agreement. The rule clarified here applies to these negotiated provisions.

12. A mid-span fiber meet is an interconnection architecture whereby two carriers' transmission facilities meet at a mutually agreed upon point of interconnection with the POI in the middle of a fiber ring. Each party builds half a fiber ring and purchases and maintains all the fiber and electronics for its half of the ring (Bell Atlantic Brief at 2; Bell Atlantic Response to Petition at 9).

13. In the affidavit, Mr. Albert testified regarding the equipment that Bell Atlantic would need to install to establish a mid-span meet interconnection arrangement, and the estimated installed cost for one such "typical" arrangement.

14. The Department set forth its policy on late-filed exhibits in Boston Gas Company, D.P.U. 88-67, Phase II at 7 (1989), stating: "A party's presentation of extra-record evidence to the fact-finder long after the record has closed and after all briefs have been filed is an unacceptable tactic, potentially prejudicial to the rights of other parties even when the evidence is ultimately excluded. Facts or allegations of facts, once learned, cannot readily be unlearned . . . . In the future, once the record in a docket has closed, proper procedure will require that a party seeking to offer a late-filed exhibit or testimony move to reopen the record to introduce new evidence. (An exception is the Department's practice to permit updating of routine information already provided on the record -- for example, the most recent property tax bills -- or to permit filing responses to outstanding record requests.) The motion should state the subject or issue that the proffered exhibit or testimony would address. Only if such a motion were granted by the hearing officer, would it then be proper to present the exhibit or testimony itself."

15. Depending on the interconnection option selected by the carriers, they may share a POI (i.e., a shared mid-span fiber meet) or they may establish a POI at the other carrier's network (i.e., a collocation site) (Exh. BA-MA-7, at 6).

16. An end office is a Bell Atlantic switching facility that exclusively serves customers in a specific geographic location corresponding to a specific NXX exchange code. The first three digits in a seven digit telephone number is the NXX exchange code. Generally speaking, all calls to and from customers are routed by the particular end office that is designated for that specific exchange code. Bell Atlantic has 286 end offices in Massachusetts.

17. A Bell Atlantic tandem office (or tandem switch) either connects trunks to and from (1) a Bell Atlantic end office and another tandem or (2) CLEC and/or interexchange carrier ("IXC") switches to a Bell Atlantic tandem. Bell Atlantic has six tandem switches serving Eastern Massachusetts. The tandem switches are located in Lawrence, two in Cambridge, Framingham, Worcester, and Brockton.

18. On brief, Bell Atlantic proposed that during the twelve month transition period, the parties would execute a Memorandum of Understanding ("MOU") within three months of MediaOne's request to establish a mid-span IP and the mid-span IP would be implemented within six months of executing an MOU unless certain problems arise (Bell Atlantic Brief at 29). This proposal does not appear on the record. To the extent that Bell Atlantic's position is not supported on the record, the Department will not accept it.

19. On brief, Bell Atlantic proposes that the mid span meet arrangement will be located within one quarter mile of each Bell Atlantic tandem (Bell Atlantic Brief at 29). This proposal does not appear on the record. To the extent that Bell Atlantic's position is not supported on the record, the Department will not accept it.

20. Transport is a service whereby one carrier hauls traffic over its network for another carrier.

21. Digital Signal Level 1 ("DS1") refers to the speed at which a T-1 circuit will run. A T-1 is a single telephone circuit that carries up to 24 voice or data communications.

22. See Section V.C.3. for our discussion on direct trunking from MediaOne's IP to a Bell Atlantic end office.

23. The Department approved the BA/CLI negotiated interconnection agreement on September 10, 1998, effective December 2, 1998.

24. At the hearing, Bell Atlantic's witness stated that under its proposal to both MediaOne and Greater Media, Greater Media could establish an IP at or near the Bell Atlantic tandem location (Tr. 2, at 332).

25. Collocation is an arrangement whereby one LEC resides and connects its equipment in the end office of another LEC, for purposes of obtaining interconnection and/or access to unbundled network elements ("UNEs").

26. LATA refers to a Local Access and Transport Area. The Act defines a LATA as "a continuous geographic area '(A) established before February 8, 1996, by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a Bell operating company after February 8, 1996, and approved by the [FCC]." 47 U.S.C. § 153 (25). Massachusetts has two LATAs: a Western LATA that corresponds to the area served by the 413 area code; and an Eastern LATA that corresponds to the area served by the 617/508/978/781 area codes.

27. The CLI/Bell Atlantic interconnection agreement provides for an 18 month period.

28. The CLI/Bell Atlantic interconnection agreement provides for a DS-3 threshold. A DS-3 circuit will carry up to 672 voice or data communications.

29. MediaOne argues that its "footprint" proposal would establish MediaOne IPs at each Bell Atlantic tandem within an average of 10 miles from each tandem location (MediaOne Brief at 15). As stated earlier, MediaOne's position on mileage was first introduced on brief. To the extent that MediaOne's position is not supported on the record, the Department may not accept it. MediaOne testified that it is already in the process of establishing another IP in Brockton (Tr. 2, at 289-290).

30. Bell Atlantic states that the existing reciprocal compensation rate of $.008 per minute of use is a blended end office and tandem reciprocal compensation rate that takes into account the balance of traffic delivered by MediaOne to a Bell Atlantic tandem or end office and Bell Atlantic's delivery of its traffic to MediaOne's end office switches (Exh. BA-MA-8, at 6; IR MediaOne-BA-2-5; Bell Atlantic Brief at 29).

31. MediaOne states that it has the right to receive tandem termination rates ($.021) as supported by both federal and state law and initially included this rate in its tandem footprint proposal (MediaOne Brief at 11, 14). However, MediaOne has modified its position on tandem termination rates and has agreed to use Bell Atlantic's proposed reciprocal compensation rate of $.008 if Bell Atlantic agrees to other elements of its compromise proposal (MediaOne Reply Brief at 6).

32. In the Local Competition Order, the FCC implemented the key provisions of the Act concerning, among other things, interconnection, access to UNEs, and pricing.

33. Rate centers are geographic areas (usually corresponding closely to end offices) that Bell Atlantic uses to determine distance-sensitive pricing. Bell Atlantic has 261 rate centers in the Eastern LATA.

34. Bell Atlantic states that each party should (1) be responsible for the transport to and from the geographically relevant point by providing its own transport, (2) compensating the other party for transport, (3) purchasing transport from a third party, or (4) negotiating a mid-span meet or other facility sharing arrangement, such as collocation (Bell Atlantic Brief at 15).

35. Section 4.4 (Alternative Interconnection Arrangements) provides for alternative interconnection arrangements, including mid-span meets, upon mutual agreement of the parties (Bell Atlantic Brief at 34).

36. MediaOne originally proposed one IP at its existing mid-span meet IP in Lawrence. This original IP would eventually be supplemented by an additional mid-span meet IP in Brockton that is in progress (Tr. 2, at 263-264).

37. A remote switching module is switching equipment that is physically remote from a host switch (e.g., an end office switch). The remote switch provides some switching capability but the rest of the switching capability, including operating and call processing functions, resides in the host switch. A network node is the building that contains a remote switching module.

38. Greater Media also objects to Bell Atlantic's proposal to pay Greater Media less than full reciprocal compensation fees when Bell Atlantic transports calls originated by its customers to Greater Media's one IP (Greater Media Brief at 3).

39. Bell Atlantic states that Greater Media has incorrectly assumed that Bell Atlantic would agree to use Remote Switching modules for interconnection points (Bell Atlantic Reply Brief at 15)

40. Bell Atlantic proposes that Greater Media would not have to deploy an additional IP per tandem serving area until the earlier of 24 months from the first exchange of traffic to another tandem serving area or 6,000,000 minutes of use per month of traffic in that other tandem serving area (Greater Media Brief at 22-23; Bell Atlantic Brief at 32).

41. The FCC includes mid-span meet arrangements in its discussion of meet point arrangements. Local Competition Order at ¶ 553.

42. Bell Atlantic argues that if MediaOne and Greater Media are allowed to establish a single IP, they could assign telephone numbers to customers without regard to the customer's location, and require Bell Atlantic to provide toll free transport for those calls (Bell Atlantic Brief at 25). For the reasons discussed below, such costs, if they are in fact real, are addressed by reciprocal compensation rates.

43. The Department notes that MediaOne has chosen to offer an alternative interconnection arrangement to Bell Atlantic. This compromise proposal would have MediaOne establish additional IPs at Bell Atlantic tandems in the Eastern LATA (MediaOne's "footprint" proposal). While we have determined that Bell Atlantic cannot force MediaOne to establish additional IPs in the LATA, MediaOne may nonetheless decide to negotiate a compromise with Bell Atlantic. We would encourage such negotiations in that they may result in an overall more efficient interconnection of the two networks.

44. We note that the record, including citation to relevant FCC precedent, on the transport costs issue was not well developed by the parties.

45. "Of course, a requesting carrier that wishes a "technically feasible" but expensive interconnection would, pursuant to

section 252(d)(1) [pricing standards for interconnection and network elements charges - standards for state determinations for the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2)] be required to bear the cost of that interconnection, including a reasonable profit." Local Competition Order at ¶ 199. See also section VII ("concluding that requesting carriers must pay [ILECs] the cost of interconnection and unbundling"). Id. at ¶ 199, n. 426.

46. Bell Atlantic has not shown with record evidence that the current reciprocal compensation rates do not appropriately compensate it for transport and termination related to the mid-span meet form of interconnection.

47. The Department recognizes that there may be exceptional circumstances that prevent Bell Atlantic from meeting this deadline, including delays caused by third-party vendors. Therefore, we will allow Bell Atlantic to petition the Department for relief in appropriate circumstances. We note that our reasoning here applies to establishment of each IP, not only those in a new LATA.

48. In addition, contrary to Bell Atlantic's suggestion that the FCC's rules impose reciprocal terms and conditions on ILECs and CLECs, the FCC in the Local Competition Order stated that § 251(c)(2) does not impose on non-incumbent LECs the duty to provide interconnection. Local Competition Order at ¶ 220.

49. Blocking is a condition in a network when, due to heavy traffic, all trunk circuits are busy, or a switching path is unavailable. The Information Age Dictionary, at 31. From a customer standpoint, blocking can result is delays in completing calls and, in more extreme cases, an inability to complete calls. Trunks are engineered or designed to be free of blocking for all but a small number of calls.

50. A busy-hold equivalent exists when there are twenty-four simultaneous voice or data calls (i.e., DS-1) during the busy hour.

51. If either carrier becomes aware of blocking through other means, the 15 day interval described below applies from the date the carrier became aware of the blocking.

52. If MediaOne's cooperation is lacking, Bell Atlantic should bring this matter to the attention of the Department, to be handled informally with the assistance of the Telecommunications Division.

53. "Signaling systems facilitate the routing of telephone calls between switches. Most ILECs employ signaling networks that are physically separate from their voice networks, and these "out-of-band" signaling networks [also known as Common Channel Interoffice Signaling] simultaneously carry signaling messages for multiple calls. In general, most LECs' signaling networks adhere to a Bellcore standard Signaling System 7 ("SS7") protocol." Local Competition Order at ¶ 455.

54. "Call-related databases are those SS7 databases used for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." Local Competition Order at ¶ 484 n. 1126.

55. The FCC states that "[c]ompetitors should be able to interconnect their own switches to the incumbent LEC's signaling system in any technically feasible manner." Local Competition Order at ¶ 483 n.1125.

56. In this case, MediaOne is hiring the SS7 provider and MediaOne's agreement with that provider controls. Any other agreement Bell Atlantic has with the SS7 provider does not apply.

57. The level of service that MediaOne's commercial SS7 provider provides to MediaOne is not covered by this finding.

58. This issue is a consolidated issue with Greater Media.

59. Bell Atlantic's witness testified that Bell Atlantic's tandems are designed to route roughly 90 percent of local calls directly between end offices. Only approximately ten percent of local calls go through the tandem switch (Tr. 1, at 48).

60. Bell Atlantic added a new tandem switch in Newton supplementing the two Cambridge tandem switches and will add another switch in Brockton to supplement the existing Brockton tandem switch (Tr. 1, at 16; Bell Atlantic Brief at 56).

61. However, only 40,000 of the 66,000 trunks were CLEC-dedicated tandem interconnection trunks that could potentially be used for tandem transit traffic.

62. Other CLECs could elect this provision of the Petitioners' interconnection agreements through the "pick and choose" rule of Section 252(i).

63. Section 252(i) states that "[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. § 252(i).

64. The Bell Atlantic/Metromedia Fiber Network Interconnection Agreement, which was executed on April 19, 1999 and approved by the Department on May 29, 1999, provides for the DS-1 limitation on Tandem Transit Service (RR-MediaOne-1).

65. MediaOne proposes six months beginning on the effective date of an interconnection agreement between MediaOne and the other CLEC to establish direct trunks to that CLEC (MediaOne Proposed Findings of Fact and Conclusions of Law at 8). This proposal was submitted on brief and does not appear on the record. To the extent that MediaOne's position is not supported by evidence on the record, the Department may not accept it.

66. Bell Atlantic's "economic breakpoint" is based on its network engineering design standards that indicate the threshold (i.e., one DS-1 trunk) when Bell Atlantic believes it is economically efficient to establish a direct trunk group connection from one end office to another instead of routing the calls from the end office through the Bell Atlantic tandem (Tr. 1, at 76-78).

67. SS7 originating point codes are 9-digit numbers sent by an originating CLEC's switch to a Bell Atlantic tandem switch; point codes are initiated by a CLEC's customer calling a MediaOne customer (Exh. BA-MA-3, at 6). The point codes identify the CLEC's network by this switch (id.). The SS7 point codes sent by the originating CLEC switch are lost once Bell Atlantic performs tandem transit switching because the Bell Atlantic tandem switch would have to send its own separate SS7 message to MediaOne, identifying the Bell Atlantic switch (id.). However, Bell Atlantic does record billing information that would identify the originating CLECs (Tr. 1, at 166-167).

68. We also note that requiring a CLEC to establish direct trunks to other CLECs prematurely, before traffic volumes warrant this investment, may constitute an economic barrier to market entry.

69. Because we find that Bell Atlantic is obligated, pursuant to Section 251(c)(2) of the Act, to make tandem transit service available to CLECs, we do not need to address MediaOne's "pick and choose" argument.

70. Bell Atlantic's witness stated that the study could not be located, but that he was able to testify about the contents of the study from personal knowledge (Tr. 1, at 87-88).

71. A trouble report is the means by which CLECs report to Bell Atlantic problems with provisioning, and maintenance and repair of Bell Atlantic UNEs and resale services.

72. The CLEC Handbook is a set of guidelines put together by Bell Atlantic to inform CLECs on following areas: getting started, technical specifications and business rules.

73. Incident and performance payments are designed to ensure that parity is achieved. Performance payments provide an incentive for Bell Atlantic to achieve general levels of parity, and incident payments help to ensure that CLEC customers receive service parity. See Phase 3-B Order at 25.

74. These are trunks from Bell Atlantic to MediaOne that carry calls that terminate to MediaOne customers.

75. A wire center is a building housing one or more end office switches.

76. Bell Atlantic regards a trunk group as underutilized if "at the end of the 90 day period the ratio of 'trunks

required' (based on actual traffic usage) versus 'trunks in service' is less than 60 percent" (RR-DTE-17).

77. In its reply brief, Bell Atlantic included a new proposal to provide a transition period for MediaOne in the event that an FCC order or change in other applicable law eliminates Bell Atlantic's obligations (Bell Atlantic Reply Brief at 26). Because this proposal is not supported by record evidence, we cannot accept it.

78. As the Supreme Court has noted, even the Act itself is "not a model of clarity. It is in many important respects a model of ambiguity or indeed self-contradiction." AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999).

79. But see MCI WorldCom, D.T.E. 97-116-B, at 24-25 (1999) (Department found that a just-released FCC decision relieved Bell Atlantic of its obligation to pay reciprocal compensation for ISP-bound traffic). This arbitration can be distinguished from the MCI WorldCom ruling because, in the former, Bell Atlantic was required to petition the Department for authority to change its operations in response to a change in law.

80. The Department has approved such language in AT&T/Bell Atlantic Interconnection Agreement, D.T.E. 98-35 (1998); MCImetro Access Transmission Services/Bell Atlantic Interconnection Agreement, D.T.E. 98-104 (1998) (see RR-DTE-31).

81. Bell Atlantic has not explained the purpose of its proposed 40 percent premium, and we decline to impose this burden on CLECs while they negotiate modifications to their interconnection agreement in response to a change to the provisions of UNEs.

82. This "pick-and-choose" rule is set forth in 47 C.F.R. § 51.809.

83. Bell Atlantic, as used here, indicates the company that signs the interconnection agreement with MediaOne. For example, if the agreement is signed by "New England Telephone and Telegraph Company," then the "pick-and-choose" rule applies only to provisions in any other agreements signed by "New England Telephone and Telegraph Company," including such agreements from Maine, New Hampshire, Rhode Island, and Vermont.

84. The automatic line identification ("ALI") database ensures that 911 calls placed from the service will carry the appropriate identification information to the Public Safety Answering Point (Exh. MediaOne-3, at 14).

85. Switch translations refers to the computer programming changes Bell Atlantic must perform in the switch when making changes to a customer's service.

86. A ten digit trigger is a switch translation installed by the porting provider that ensures that the customer will be able to receive calls from the porting provider's customers (Exh. MediaOne-3, at 15).

87. [87] Specifically, MediaOne contends that in the absence of normal commercial incentives to maintain high levels of service quality to its customers (which, in this case, are also its competitors) the Department established performance standards to provide Bell Atlantic with the incentives to conform to the interconnection requirements of the Act (MediaOne Reply Brief at 15, citing Consolidated Arbitrations - Phase 3-B at 22).

88. Bell Atlantic argues that one measurement proposed by MediaOne, consisting of a 24 hour turn around time for issuance of a service order confirmation or FOC, has been established in the Consolidated Arbitrations (Bell Atlantic Brief at 77-78). The FOC metric measures the components of the ordering process, as well as a local service request (id. at 78). Bell Atlantic presented testimony that processing a porting order is analogous to the UNE ordering process, and therefore, it is reasonable to use the same metrics adopted by the Department (id.). MediaOne agrees that there is no reason to duplicate FOC standards and measurements, and will accept the FOC metric as established in the Consolidated Arbitrations based on the understanding that LNP orders will be included in Bell Atlantic's performance reports and payments (MediaOne Brief at 41). The FOC metric states that FOCs should be returned within 24 hours from receipt of an error-free local service request (id.).

Bell Atlantic contends that another three measurements, the 10-digit trigger, switch translation removal, and E911 unlock,

essentially evaluate a single result, the overall successful completion of the porting process (Bell Atlantic Brief at 79). MediaOne has agreed to adopt the "Percent On Time - LNP" metric, where it incorporates measurement and remedies for timely installation of the 10-digit trigger, and the switch translation removal activities (MediaOne Brief at 40-41). Therefore, only the E911 unlock measurement is still in dispute.

89. This metric would measure when the porting provider "unlocks" the E911 record, which allows the new provider to update the database that contains E911 information (Exh. MediaOne-3, at 16). Updating the E911 database is referred to as "migrating" the E911 record (id.).

90. "LSMS" is an administrative database that downloads ported telephone routing data to the system that processes LNP queries (Bell Atlantic Brief at 86).

91. Bell Atlantic argues that it is proposing the "Percent On Time - LNP" metric in exchange for the elimination of Bell Atlantic's existing performance standards for unbundled loops (Bell Atlantic Brief at 81). In essence, MediaOne would be trading LNP standards for unbundled loop standards. MediaOne states that it will not be ordering unbundled loops from Bell Atlantic (Tr. 3, at 488). The Department did not establish the Performance Standards in the Consolidated Arbitrations in order for the parties to trade these items. Bell Atlantic will be required to meet the Performance Standards for unbundled loops under this interconnection agreement in the event that MediaOne orders such loops from Bell Atlantic.

92. MediaOne recommends (1) that the interconnection agreement should require Bell Atlantic to report LSMS downtime and the amount of time the system works properly, because when the LSMS is not operating, certain routing information is not communicated and a customer cannot receive calls; and (2) that the interconnection agreement should require Bell Atlantic to provide the number of LNP-related trouble tickets where the originator of the trouble is a CLEC (Exh. MediaOne-3, at 24). MediaOne did not brief these two issues.

93. MediaOne argues, in the alternative, that the Department should require Bell Atlantic to indemnify MediaOne for any damages occurring as a result of the delay in migrating the E911 record (MediaOne Brief at 43).

94. Bell Atlantic's witness testified that it experienced an increase in performance and decrease in complaints when it changed its procedure to remove switch translations at 11:59 p.m. (Tr. 1 at, 181-182).

95. The Department notes that New York has not adopted a process similar to MediaOne's E911 proposal (see RR-DTE-4).

96. Bell Atlantic indicates that the current porting success rate of approximately 98 percent does not include E911 unlocks or FOC performance (Bell Atlantic Brief at 79).

97. MediaOne clarifies that this proposal is for an average of 98 percent per quarter, and does not require Bell Atlantic to maintain a 98 percent standard at all times (MediaOne Brief

at 45).

98. Performance credits would begin for results below 90 percent. Credits per affected line range from $10 to $50 based on a sliding scale of one percent to ten percent below the performance standard (Bell Atlantic Brief at 85).

99. The provider must port at least 100 numbers to be liable for the "Performance Credit" (Exh. MediaOne-3, at 23).

100. Dialing parity, also know as intraLATA presubscription ("ILP"), allows telephone customers to access the long-distance carrier of their choice without having to dial an access code or 800 telephone number.

101. See Section 222(c)(2) providing that "[a] telecommunications carrier shall disclose customer proprietary network information, upon affirmative written request by the customer, to any person designated by the customer".

102. Section 222(f)(1) of the Act defines CPNI as "(A) information that relates to the "quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer" of a carrier, and that is made available to the carrier by the customer solely because of the carrier-customer relationship; and (B) information

contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier." 47 U.S.C.

§ 222(f)(1).

103. In its initial pleadings, Bell Atlantic disagreed about whether the rights and obligations under § 222 were mutual. However, in its reply brief, Bell Atlantic stated that it would agree to MediaOne's mutuality provision (Bell Atlantic Reply Brief at 32).

104. Implementation of the Subscriber Carrier Selection Change Provisions of the Telecommunication Act of 1996, CC Docket No. 94-129 (1998).

105. G. L. c. 93, §§ 108-113.

106. Order Instituting Rulemaking, D.T.E. 99-18 (June 10, 1998).

107. MediaOne's footprint proposal would establish IPs at each BA tandem (MediaOne Brief at 15). However, as previously discussed, the Department is not relying on this MediaOne proposal.

108. Bell Atlantic specifies, in Schedule 4.1, its IP for OS and DA traffic (RR-DTE-10).

109. MediaOne argues that identifying the differences between the approved agreement and the tariff would be both time consuming and subject to dispute (MediaOne Brief at 54).

110. In its brief, MediaOne proposed five days (MediaOne Proposed Findings of Fact and Conclusions of Law at 19). Because that proposal is not supported by record evidence, we cannot accept it.

111. [111] Bell Atlantic's proposal reads, in its entirety, "If any portion of an amount due to a Party (the "Billing Party") under this Agreement is subject to a bona fide dispute between the Parties, the Party billed (the "Non-Paying Party") shall within thirty (30) days of its receipt of the invoice containing such disputed amount give notice to the Billing Party of the amounts it disputes ("Disputed Amounts") and include in such notice the specific details and reasons for disputing each item. The Non-Paying Party shall pay when due

(i) all undisputed amounts to the Billing Party and (ii) all Disputed Amounts into an interest bearing escrow account with a third party escrow agent mutually agreed upon by the Parties" (Bell Atlantic Brief at 97; Bell Atlantic Petition Exhibit B, Section 28.8).

112. Since we provide MediaOne the relief it seeks regarding a reasonable response time for billing inquiries, we will hold MediaOne to its offer to accept a 60-day period for dispute resolution of billing matters. In addition, we need not address MediaOne's proposal for discounting disputed bills held in escrow that are later determined to be in error, since that proposal was submitted as an alternative to its proposal for expedited response to billing inquiries.

113. At the hearing on July 8, 1999, the Arbitrator asked whether the "grant of license and indemnification section" remained open. Bell Atlantic's witness responded, "That was agreed . . . [o]n July 6th." The Arbitrator replied, "Then I will not ask a question about that" (Tr. 3, at 505-506).

114. A summary of these rules is provided above, under Section G.2., Bona Fide Request Applicability.

115. In its initial brief, MediaOne proposed a compromise to Bell Atlantic, that the party requesting the audit would have to demonstrate, and the Department would have to find, "good cause " for such an audit (id.). Because this proposal was made after the evidentiary record closed and is not supported by record evidence, we will not accept it.

116. In Section V.J.2, supra, we rejected Bell Atlantic's proposal for an audit of MediaOne's use of CPNI.

Docket No. 00-00280
Jackson Direct Exhibit 3
January 4, 2001

Alabama Public Service Commission Orders

In the Matter of:	) **DOCKET 27069**
Petition by ICG Telecom Group, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	)
	)
	)
	)
	)
	)
	)

FINAL ORDER ON ARBITRATION

BY THE COMMISSION:

HEARD : Wednesday August 11, 1999, Commission Hearing Room 904, RSA Union Building, 100 North Union Street, Montgomery, Alabama

BEFORE: The Honorable John A. Garner- Arbitration Facilitator, Mr. David House - Arbitrator, and Jimmy B. Pool, Esq.- Arbitrator

APPEARANCES:

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I. INTRODUCTION/BACKGROUND

This arbitration proceeding is pending before the Alabama Public Service Commission (the "Commission") pursuant to Section 252(b) of the Telecommunications Act of 1996 (the "Act"). This proceeding was initiated by ICG Telecom Group, Inc.'s ("ICG") filing of a *Verified Petition For*

Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. ("BellSouth") *Pursuant to Section 252(b) of the Telecommunications Act of 1996* (the "Petition") on May 27, 1999. In said Petition, ICG requested that the Commission arbitrate certain terms and conditions with respect to an interconnection agreement between itself as the petitioning party, and BellSouth. On June 21, 1999, BellSouth filed its *Verified Response to ICG's Petition For Arbitration* (the "Response").

In accordance with the Commission's Telephone Rule T-26(C), the Commissioners appointed The Honorable John A. Garner, Administrative Law Judge, as Arbitration Facilitator, and Mr. David House, Public Utilities Auditor III, and Jimmy B. Pool, Esq. as Arbitrators in this Matter (collectively the "Arbitration Panel" or "Panel").

On July 1, 1999, ICG and BellSouth submitted a Joint Motion to Establish a Procedural Schedule. Through a Procedural Ruling issued on July 16, 1999, the Arbitration Panel set forth a discovery schedule, established a Status Conference to be held on July 23, 1999, and ordered the Arbitration hearing to begin on August 9, 1999. On July 8, 1999, a discovery conference was held during which oral presentations concerning outstanding discovery disputes were heard. An Oral Ruling resolving the outstanding discovery disputes was entered on July 9, 1999. The findings rendered in the July 9, 1999 Oral Ruling were ratified by a written ruling issued on July 16, 1999.

On July 23. 1999 the Status Conference was held as scheduled. In an effort to reduce the number of controverted issues, the parties engaged in informal mediation

immediately following the Status Conference. The mediation was conducted by Ms. Judy McLean, Director of the Commission's Advisory Division.

By agreement of the Arbitration Panel and the parties, the Arbitration hearing was continued until August 11, 1999, to permit the continuation of an informal Mediation session conducted by Ms. McLean. As a result of the mediation efforts of Ms. McLean, and the parties. the list of Issues requiring arbitration was reduced from twenty-six (26) to five (5). At the outset of the Arbitration hearing. ICG and BellSouth submitted to the Arbitration Panel a *Statement of Partial Settlement* in which the parties informed the Panel that they had resolved all but the following Issues:

1. Until the FCC adopts a rule with prospective application, should dial-up calls to Internet service providers (ISPs) be treated as if they were local calls for purposes of reciprocal compensation?

2. For purposes of reciprocal compensation, should ICG be compensated for end office, tandem and transport elements of termination where ICG's switch serves a geographic area comparable to the area served by BellSouth's tandem switch?

3. Should BellSouth be required to commit to provisioning the requisite network buildout and necessary support when ICG agrees to enter into a binding forecast of its traffic requirements in a specified period?

4. Should BellSouth be required to provide the "Enhanced Extended Link" as a UNE combination (EEL)?

5. Should volume and term discounts be available for UNEs?

At the August 11, 1999 hearing, ICG offered the testimony of Michael Starkey, President of the telecommunications consulting firm of Quantitative Solutions, Inc.; Philip Jenkins, ICG's Senior Director - Engineering and Operations for the Southeast Region; Bruce Holdridge, Vice President of Government Affairs for ICG Communications, Inc.; and Cindy Schonhaut, Executive Vice President for Government and Corporate Affairs for ICG Communications, Inc. BellSouth offered the testimony of Alphonso Varner, the company's Senior Director for State Regulatory.

At the conclusion of the August 11, 1999 hearing, the parties indicated a preference to submit post-Arbitration hearing briefs. In order to accommodate the filing of those briefs, the parties orally agreed on the record at the August 11, 1999 proceeding to jointly extend the statutory deadline for the Commission's decision in this matter as set forth at 47 U.S.C. §252(b)(4)(C). Both parties submitted simultaneous post-Arbitration hearing briefs.

The Arbitration Panel issued its Arbitration Panel Recommendation and Proposed Order Regarding Interconnection Agreement (the Arbitration Panel's Recommendation) on October 13, 1999. The Arbitration Panel's Recommendation set forth recommendations for the resolution of the issues set forth in the Petition and Response which remained open.

Pursuant to the Commission's Telephone Rule T-26, the Arbitration Panel's Recommendation was served on the parties to the Arbitration as well as all parties on the Commission's Telecommunications service list. Although Telephone Rule T-26(I)(2) allows interested parties who were not parties to the Arbitration to file comments concerning the Arbitration Panel's Recommendation within 10 days, and allows the parties to the Arbitration to submit replies to those comments and any exceptions to the Arbitration Panel's Recommendations in a subsequent 10 day period, the Arbitration Panel accompanied the service of its Recommendation with a Procedural Ruling requiring initial comments to be submitted no later than October 22, 1999. The Procedural Ruling required that reply comments/exceptions by the parties be filed no later than October 28, 1999. As set forth in the Procedural Ruling, the modification of the comment cycles was necessary to accommodate the rendering of a decision by the Commission in this matter at the November 1, 1999 meeting of the Commission.

The Commission received comments from the following interested non-parties: GTE South, Incorporated (GTE); e.spire Communications, Inc. (e.spire); AT&T Communications of the South Central States, Inc. (AT&T); Sprint Communications Company, L.P. (Sprint); a joint filing by Hyperion Communications, Inc./KMC Telecom, Inc.; and a joint filing from MCI WorldCom, Inc./ITC DeltaCom Telecommunications, Inc. In addition, BellSouth and ICG each submitted reply comments/exceptions. The Commission also received a recommendation concerning the findings, conclusions and recommendations of the Arbitration Panel from the Commission's Advisory Division.

After careful consideration of the entire record in this matter including the post-Arbitration hearing briefs filed by the parties, the Arbitration Panel's Recommendation, the comments of the parties and interested non-parties, and the recommendation of the Advisory Division, we render the findings and conclusions set forth below. Due to the fact that we largely concur with the findings, conclusions and recommendations of the Arbitration Panel, we have for the most part adopted the Arbitration Panel's Recommendation as our final Order in this cause. Our specific findings and conclusions as to each

issue are, however, specifically set forth.

II. FINDINGS AND CONCLUSIONS

ISSUE NO. 1: UNTIL THE FCC ADOPTS A RULE WITH PROSPECTIVE APPLICATION, SHOULD DIAL-UP CALLS TO INTERNET SERVICE PROVIDERS ("ISPs") BE TREATED AS IF THEY WERE LOCAL CALLS FOR PURPOSES OF RECIPROCAL COMPENSATION (PETITION ISSUES 1 AND 8).

The ICG Position

ICG argues that while the FCC found in its *Declaratory Ruling and Notice of Proposed Rulemaking in CC Docket 96-98*, released on February 26, 1999 (the FCC's *"ISP Declaratory Ruling"*), that ISP traffic is mostly interstate in nature, the FCC stated that, until a federal rule is adopted concerning inter-carrier compensation for ISP-bound calls, state commissions have the authority in an arbitration to conclude that reciprocal compensation is an appropriate compensation mechanism. Notwithstanding the jurisdictional nature of ISP-bound calls, ICG argues that the Commission has the authority to set a rate for this traffic by virtue of its 47 U.S.C. §252 authority over interconnection agreements which extends to both intrastate and interstate matters.

ICG points out that the FCC has treated ISP-bound traffic as local for purposes of interstate access charges and in fact stated in the *ISP Declaratory Ruling* that this treatment would suggest that reciprocal compensation is due for such traffic. According to ICG, the FCC has made it clear that the question regarding ISP traffic is not whether compensation will be provided, but what rate of compensation is appropriate.

ICG maintains further that public policy supports payment of reciprocal compensation for ISP-bound traffic. ICG notes that ISPs are an important market segment for competing local exchange carriers ("CLECs") and a segment of the local exchange market that is well on its way toward effective competition. ICG represents that an elimination of its ability to recover its costs for transport and delivery of BellSouth-originated calls to ICG-served ISPs will negatively affect the development of local competition. Starkey, Tr. pp. 53-54.

ICG argues that requiring carriers to pay reciprocal compensation for the transport and delivery of ISP-bound calls is economically efficient. According to ICG, BellSouth should be economically indifferent as to whether BellSouth incurs the transport and delivery costs directly or through a reciprocal compensation arrangement with ICG because BellSouth's rates for transport and delivery are based upon BellSouth's underlying costs. Starkey, Tr. pp. 59-60.

ICG alleges that BellSouth's recommendation for addressing ISP traffic pending adoption of a federal rule is unreasonable. Specifically, ICG asserts that BellSouth's proposal that carriers track ISP traffic and retroactively apply whatever rate is ultimately adopted by the FCC would deprive ICG of compensation for services it provides now, thereby ignoring the time value of money. Schonhaut, Tr. p. 315.

ICG further asserts that there is no guarantee as to when the FCC will adopt a federal rule governing inter-carrier compensation for ISP-bound traffic. ICG contends that the FCC has indeed indicated that it may leave this issue to the states to decide. ICG further stresses that there is the possibility, if not the likelihood, that the FCC rule will be prospective in a way that permanently deprives ICG of

compensation for traffic carried in the interim between this Commission's ruling and the FCC's ruling. Schonhaut, Tr. p. 311.

The BellSouth Position

According to BellSouth, the FCC's February 26, 1999 *ISP Declaratory Ruling* affirmed that the FCC has, and will, retain jurisdiction over ISP-bound traffic. BellSouth maintains that the FCC has now conclusively established that ISP-bound traffic is non-local interstate traffic due to the fact that most calls to ISPs terminate at distant exchanges in other states as opposed to local exchanges. Since the 47 U.S.C. §251(b)(5) obligation to pay reciprocal compensation has been interpreted by the FCC to apply only to traffic that originates and terminates within the local exchange, BellSouth concludes that interstate ISP traffic is not subject to reciprocal compensation. Given that conclusion, BellSouth urges that there is no basis for requiring a compensation mechanism for ISP-bound traffic in an arbitration conducted pursuant to 47 U.S.C. §252 since that section of the Act only gives state commissions jurisdiction over areas within the scope of 47 U.S.C. §251. Varner, Tr. p. 397.

BellSouth further argues that while the FCC's *ISP Declaratory Ruling* appears to give states authority to create an interim compensation mechanism pending adoption of a federal rule governing that subject, the interim authority granted states by the FCC is being challenged in court. If this challenge is successful, BellSouth contends that the Commission could find that it does not have even interim authority to implement a compensation mechanism for ISP traffic. BellSouth accordingly urges that it would be a wasted effort for the Commission to undertake the establishment of an interim compensation mechanism for ISP traffic under such circumstances. Even if the Commission's interim authority to impose an interim ISP compensation mechanism withstands challenge, BellSouth points out that it will only be valid until the FCC adopts a federal rule.

BellSouth further argues that the Commission should not require reciprocal compensation for ISP-bound traffic under any circumstances because ISP-bound traffic is interstate "access" traffic which is not subject to reciprocal compensation. BellSouth accordingly contends that a portion of the rates that ISPs pay ICG for their monthly business service should be shared with BellSouth as "access" revenues. Varner Tr. p. 421-422.

If, in spite of the aforementioned arguments, the Commission determines that it has jurisdiction to implement an interim inter-carrier compensation mechanism and that such a mechanism is warranted for ISP-bound traffic, BellSouth urges the implementation of the mechanism proposed by BellSouth witness Varner. Tr. pp. 395-396. The mechanism proposed by Mr. Varner would require the parties to track ISP-bound calls originating on their respective networks on a going-forward basis and to abide by any final and non-appealable FCC ruling on the issue of inter-carrier compensation for ISP calls. Any inter-carrier compensation mechanism established by the FCC would apply retroactively from the date of the interconnection agreement entered between ICG and BellSouth. The parties would be required to "true up" any compensation due for ISP-bound calls based on the FCC's final, non-appealable ruling.

The Arbitration Panel's Discussion of Issue No. 1

The fact that both ICG and BellSouth devoted the major portion of their respective post-Arbitration hearing briefs to a discussion of the treatment of ISP-bound traffic is demonstrative of the critical importance of this issue to each party. The issue is also of critical importance to the Commission given its potential impact on the development of competition in this state. The decision reached on

ISP-bound traffic in this proceeding will have a broad impact on the issue in Alabama generally because this case will establish precedence concerning future treatment of ISP-bound traffic.

Our analysis concerning this issue logically begins with an assessment of our jurisdictional authority concerning compensation for ISP-bound traffic in light of the FCC's February 26, 1999 *ISP Declaratory Ruling*. BellSouth is correct in pointing out that the FCC, in that ruling, concluded that ISP-Bound traffic is jurisdictionally mixed and appears to be largely interstate. BellSouth is also correct in noting that the FCC concluded that since ISP traffic is jurisdictionally non-local interstate traffic, the reciprocal compensation obligations of 47 U.S.C. §251(b)(5) do not cover inter-carrier compensation for ISP-bound traffic. From that, however, BellSouth improperly concludes that state commissions do not have authority to address reciprocal compensation for ISP-bound calls in 47 U.S.C. §252 arbitration proceedings since that section of the Act only gives state Commissions jurisdiction over areas within the scope of 47 U.S.C. §251. What BellSouth casually and improperly discounts is the fact that the FCC specifically recognized the authority of state Commissions under 47 U.S.C. §252 to determine inter-carrier compensation for ISP-bound traffic and to impose reciprocal compensation obligations in arbitration proceedings in the absence of a federal rule to the contrary.

By way of background, the FCC specifically recognized in its *ISP Declaratory Ruling* that while ISP-bound traffic is jurisdictionally interstate, the FCC will continue, as it has in the past, to discharge its interstate regulatory obligations regarding ISP-bound traffic by treating that traffic as though it is local. The FCC also specifically recognized that in light of its continued policy of exempting ISP-bound traffic from the imposition of access charges, it has created something of an inter-carrier compensation void for ISP-bound traffic by finding in the *ISP Declaratory Ruling* that such traffic is largely interstate and, therefore, not subject to the reciprocal compensation obligations of 47 U.S.C. §251(b)(5). Given that void, the FCC recognized that the establishment of a rule governing inter-carrier compensation for ISP-bound traffic would serve the public interest. The FCC concluded, however, that the record it had before it in the *ISP Declaratory Ruling* proceeding was insufficient for the adoption of such a rule. The FCC accordingly issued a Notice of Proposed Rulemaking concerning the promulgation of such an inter-carrier compensation rule for ISP-bound traffic.

For purposes of this arbitration, it is important to note that the FCC specifically held that prior to the establishment of a federal rule governing inter-carrier compensation for ISP-bound traffic, state Commission's could determine in arbitration proceedings that reciprocal compensation should be paid for ISP-bound traffic. In arriving at that conclusion in its *ISP Declaratory Ruling*, the FCC reasoned that:

> "Section 252 imposes upon state commissions the statutory duty to approve voluntarily-negotiated interconnection agreements and to arbitrate interconnection disputes. As we observed in the *Local Competition Order*, state commission authority over interconnection agreements pursuant to §252 "extends to both interstate and intrastate matters." Thus, the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the Section 251/252 negotiation and arbitration process. However, any such arbitration must be consistent with governing federal law. While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." *Id. at & 25.*

* * *

> "As we stated previously, the Commission currently has no rule addressing the specific issue of inter-carrier compensation for ISP-bound traffic. In the absence of a federal rule, state Commission's that have had to fulfill their statutory obligation under §252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state Commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law. A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding--or a subsequent state Commission decision that those obligations encompass ISP-bound traffic--does not conflict with any Commission rule regarding ISP-bound traffic." *Id. at & 26.*

We note that this Commission has previously had occasion to consider the FCC's *ISP Declaratory Ruling* and its impact on the Commission's jurisdiction concerning ISP-bound traffic. In an Order entered on March 4, 1999 in Docket 26619, the Commission held that it had jurisdiction to determine the reciprocal compensation obligations of the parties to the agreements under review in that proceeding concerning ISP-bound traffic. The Commission further found that the exercise of that jurisdiction was totally consistent with the FCC's *ISP Declaratory Ruling.* Similarly, in an Order on Reconsideration entered in that same proceeding on June 21, 1999, the Commission specifically noted the FCC's recognition at & 24 and & 26 of its *ISP Declaratory Ruling*

that state Commission's have wide latitude to decide the issue of payment for ISP-bound traffic pursuant to existing interconnection agreements or through arbitrations.

We also note that some 16 other state commissions have addressed the issue of whether reciprocal compensation should apply to ISP-bound traffic since the FCC issued its *ISP Delcaratory Ruling.* Of those 16 state commission's that have rendered decisions on the merits of the applicability of reciprocal compensation to ISP-bound traffic, 15 have upheld the application of reciprocal compensation to such traffic. Three additional states have decided to withhold the issuance of a final ruling concerning inter-carrier compensation for ISP-bound traffic until the FCC further addresses the issue. To date, only one state has expressly declined to require reciprocal compensation for ISP-bound traffic.

In addition to the aforementioned state commission's, all four of the federal courts that have issued decisions addressing appeals of state commission decisions requiring reciprocal compensation for ISP-bound traffic after the release of the FCC's *ISP Declaratory Ruling* have upheld the determinations of the applicable state commissions. The four courts include the United States Court of Appeals for the Seventh Circuit and three district courts. including the Federal District Court for the Middle District of Alabama.

The opinion of the Seventh Circuit upholding a decision of the Illinois Commerce Commission which required the payment of reciprocal compensation for ISP-bound traffic pursuant to existing

interconnection agreements is particularly enlightening. Specifically, the Seventh Circuit Court stated that "[The] FCC could not have made clearer its willingness--at least until the time a [FCC] rule is promulgated--to let state Commissions make the call. We see no violation of the Act in giving such deference to state Commissions; in fact the Act specifically provides state Commissions with an important role to play in the field of interconnection agreements".

Although the Seventh Circuit's opinion in *Illinois Bell* involved the review of an Illinois Commerce Commission decision interpreting existing interconnection agreements, we see little or no distinction in the applicability of the Seventh Circuit's reasoning to post-*ISP Declaratory Ruling* arbitration proceedings conducted pursuant to 47 U.S.C. §252. It is apparent that the FCC envisioned state action concerning the applicability of inter-carrier compensation for ISP-bound traffic in such arbitrations pending the promulgation of a federal rule and even thereafter. In fact, the FCC specifically noted at & 30 of the *ISP Declaratory Ruling* the following:

> "We tentatively conclude that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Act. Resolution of failures to reach agreement on inter-carrier compensation for interstate ISP-bound traffic then would occur through arbitrations conducted by state Commissions, which are appealable to federal district courts." *Id.*

Having determined that the Commission has the appropriate jurisdiction to address the issue of inter-carrier compensation of ISP-bound traffic and to in fact require that such compensation be paid in the form of reciprocal compensation, our analysis now turns to an assessment of whether it is prudent to exercise that jurisdiction at this juncture. BellSouth urges that since the FCC'S *ISP Declaratory Ruling* is currently subject to a court challenge, states could find that they do not have the authority to create even an interim compensation arrangement. BellSouth further asserts that even if the states do have the authority, such authority is valid only until the FCC completes its rulemaking on the subject. Therefore, any effort devoted by this Commission to establishing interim compensation arrangements for ISP-bound traffic would likely be wasted effort. Varner, Tr. p. 394. For the reasons set forth in more detail below, we reject BellSouth's arguments in favor of inaction.

It is apparent from our analysis thus far that the FCC envisioned and, in fact encouraged, continued state action concerning the determination of inter-carrier compensation for ISP-bound traffic. The mere fact that the FCC's *ISP Declaratory Ruling* is currently subject to a legal challenge does not in and of itself render the determinations of the FCC in that ruling void. To be sure, the determinations made by the FCC in the *ISP Declaratory Ruling* represent controlling federal law on the issue until such time as a court of competent jurisdiction determines otherwise. The Commission, therefore, has a duty and responsibility to exercise the authority it currently has, at least until such time as a federal rule is implemented.

One of the major factors which dictates immediate action on the issue of inter-carrier compensation for ISP-bound traffic is the fact that the FCC has indicated that any federal rule governing that issue which is ultimately promulgated in the future, will have prospective application only. It accordingly appears that if the Commission does not take action to require compensation for calls to ISPs, ICG will never be compensated for the calls it delivers to ISPs during the interim period between the approval of an interconnection agreement between ICG and BellSouth and the time the FCC adopts a federal rule governing that subject. Schonhaut, Tr. p. 311. This problem will only be exacerbated if

the FCC does not act quickly to implement a federal inter-carrier compensation rule governing ISP-bound traffic. As noted by ICG witness Schonhaut, it took the FCC almost 2 years (20 months) to respond to the June, 1997 request for clarification that led to the issuance of its *ISP Declaratory Ruling* in February of 1999. *Id.*

In light of the concerns set forth immediately above, we do not find merit in BellSouth's fall-back proposition that the parties simply track ISP-bound traffic until such time as the FCC promulgates its federal rule and apply any compensation mechanism adopted by the FCC retroactively. As discussed in more detail below, it is undeniable that ICG will incur costs in terminating traffic to its ISP customers which originates from BellSouth customers. It would be entirely inconsistent with the competitive principles underlying the Act not to provide ICG with some mechanism to recover those costs as they are incurred. The immediate need for such a mechanism is only heightened given the delay which may well transpire before a federal rule is finally promulgated by the FCC for prospective application. The Commission's failure to implement such a mechanism in the interconnection agreement between ICG and BellSouth at this juncture would likely preclude ICG from competing for ISP customers and ultimately from competing for other types of customers as well. Starkey, Tr. pp. 53-54.

Having arrived at the conclusion that the Commission has the jurisdiction to establish inter-carrier compensation for ISP-bound traffic (including reciprocal compensation) and that said jurisdiction should be exercised in this arbitration proceeding, the question now becomes what type of inter-carrier compensation is most appropriate for ISP-bound traffic. Our analysis of that inquiry turns or further consideration of the FCC's *ISP Declaratory Ruing* and the concept of cost recovery. More particularly, our analysis centers on a determination of the costs ICG incurs in terminating traffic that is originated on BellSouth's network and terminates to ISP end user customers of ICG, as well as the recovery of those costs.

ICG asserts that the costs it incurs in delivering a call bound for an ISP customer do not differ from those generated by calls bound for other types of ICG customers. In fact, ICG argues that ISP-bound calls are functionally identical to local voice calls which are subject to reciprocal compensation. According to ICG witness, Starkey, a "ten minute call originated on the BellSouth network and directed to the ICG network travels exactly the same path, requires the use of exactly the same facilities and generates exactly the same level of costs regardless of whether that call is dialed to an ICG local residential customer or to an ISP provider. Tr. p. 56. ICG asserts that it is, therefore, irrelevant that once the call reaches the ISP it continues on to its ultimate destination of an Internet web site.

While ICG incurs no costs for the component of the call not on its network, it is the portion of the call that is carried on ICG's facilities that is relevant. According to ICG, that segment of the call is identical to any local call in terms of how ICG's network is used. ICG, therefore, asserts that there is no basis for treating ISP-bound calls differently than calls to any other local exchange customer when the costs to deliver the calls made to the residential customer and the ISP customer are identical. ICG asserts that if the Commission does not require reciprocal compensation for ISP-bound calls, ICG will not receive any compensation for calls to ISPs and will be unable to recover its costs of delivering calls to ISP customers on behalf of end users served by BellSouth. Schonhaut, Tr. p. 307.

ICG further argues that reciprocal compensation for ISP-bound traffic is economically efficient and should be required in this arbitration. More particularly, ICG asserts that reciprocal compensation is cost based and imposes the costs of delivering traffic on the cost causer--the carrier whose subscriber

initiates the call. ICG, therefore, maintains that in an efficiently functioning market, BellSouth should be economically indifferent as to whether it incurs the cost to deliver an ISP-bound call on its own network or whether it incurs that cost through a reciprocal compensation rate paid to ICG.

In support of its economic indifference theory, ICG argues that calls which originate on the BellSouth network and are delivered to a BellSouth-served ISP, and calls that are originate on the BellSouth network and terminate to ICG-served ISPs travel very similar paths. According to ICG, the only difference will be that when the ISP is an ICG customer, ICG performs the switching function to deliver the call to the ISP. In such a scenario, BellSouth avoids the switching costs and ICG incurs them. ICG asserts that if BellSouth has accurately established its terminating reciprocal compensation rate based on its own costs of delivering the call, BellSouth should be economically indifferent to whether a call that originates on its network is delivered to a BellSouth customer or to an ICG customer. In the first instance, BellSouth will incur the

cost of delivering the call via its own switch. In the second, BellSouth will incur that cost via a cost-based rate paid to ICG for delivering the call. Starkey, Tr. pp. 59-60.

In addition to the legal arguments previously discussed, BellSouth counters the ICG arguments in favor of reciprocal compensation as an appropriate inter-carrier compensation mechanism with a strained claim that the Commission should not require reciprocal compensation for ISP-bound traffic because such traffic is interstate "access" traffic for which reciprocal compensation does not apply. Varner, Tr. p. 401.

The premise of BellSouth's "access" traffic argument is that ISP-bound traffic should be treated as "access" traffic for which the revenues generated must be shared between the local exchange carriers involved in originating and terminating the traffic. Under BellSouth's proposal, the LEC serving-and therefore billing-the ISP would treat the ISP's payments for business services purchased out of the serving carriers local exchange tariff as "access" revenue and share it with the other carrier. Varner, Tr. pp. 421-422.

In evaluating the appropriateness of requiring reciprocal compensation as the appropriate inter-carrier compensation mechanism for ISP-bound traffic in this proceeding, we find BellSouth "access" traffic arguments to be misplaced and totally contrary to prevailing regulatory mandates. The FCC has repeatedly emphasized that it has since 1983 treated ISP-bound traffic as though it were local and continues to do so. The FCC's *ISP Declaratory Ruling* is in fact replete with references to this continued practice:

> "Although the Commission has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services, since 1983 it has exempted ESPs from the payment of certain interstate access charges. Pursuant to this exemption, ESPs are treated as end users for purposes of assessing access charges, and the Commission permits ESPs to purchase their links to the public switched telephone network (PSTN) through intrastate business tariffs rather than through interstate access tariffs. Thus, ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections to the local exchange company's central offices. In addition, incumbent LEC expenses and revenues associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes. ESPs also pay the special access surcharge when purchasing special access lines under the same conditions as those applicable

to end users. In the *Access Charge Reform Order* the Commission decided to maintain the existing price and structure pursuant to which ESPs are treated as end users for the purpose of applying access charges. Thus the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local." *Id.* at & 5.

* * *

"As explained above, under the ESP exemption LECs may not impose access charges on ISPs; therefore, there are no access revenues for interconnecting carriers to share. Moreover the Commission has directed states to treat ISP traffic as if it were local by permitting ISPs to purchase their PSTN links through local business tariffs." *Id.* at & 9.

* * *

"Our determination that at least a substantial portion of dial-up ISP-bound traffic is interstate does not, however, alter the current ESP exemption. ESPs, including ISPs, continue to be entitled to purchase their PSTN links through intrastate (local) tariffs rather than through interstate access tariffs." *Id.* at & 20.

* * *

"The Commission's treatment of ESP traffic dates from 1983 when the Commission first adopted a different access regime for ESPs. Since then, the Commission has maintained the ESP exemption pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs. As such, the Commission discharged its interstate regulatory obligations through the application of local business tariffs. Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local. In addition, incumbent LECs have characterized expenses and revenues associated with ISP-bound traffic as intrastate for separations purposes." *Id.* at & 23.

It is abundantly clear from the above references that ISPs purchase monthly local exchange service much like any other local exchange customer. As local exchange customers, ISPs do not pay access charges and neither ICG nor BellSouth can force ISPs to pay switched access charges for access to their networks. Thus, there are no access revenues for interconnecting carriers to share. Clearly, ISP-bound traffic is not subject to an access charge regulatory framework but rather is treated as local exchange traffic for regulatory purposes.

Having rejected BellSouth's "access" traffic arguments, we find merit in ICG's arguments regarding the similarities between local exchange traffic and ISP-bound traffic. In fact, we are persuaded that calls over local exchange carrier (LEC) facilities to ISPs appear functionally equivalent to local voice calls which are subject to reciprocal compensation. Since the same network facilities and functions are utilized to complete both types of calls, it is axiomatic that the costs to deliver them are identical. We find that those identical costs dictate that the rates associated with recovering those costs should also be identical. We accordingly find that reciprocal compensation should apply to ISP-bound traffic

just as it does to local voice traffic.

We are also persuaded that reciprocal compensation is economically efficient because it is cost based and imposes the cost of delivering traffic on the carrier whose subscriber causes the cost by initiating the call. We further believe that reciprocal compensation based on the elemental rates of transport, end office, and tandem switching adopted on August 25, 1998 in our *UNE Pricing Docket* and equaling $.00351 per minute is the most reasonable and appropriate interim inter-carrier compensation mechanism we can require. The adoption of such a rate ensures that BellSouth will incur the same costs as it would if the calls in question were delivered to a BellSouth-served ISP.

We further believe that adopting a TELRIC-based compensation mechanism is more likely to be consistent with the federal rule which will ultimately be adopted by the FCC. Such a mechanism certainly appears to be consistent with the FCC's traditional treatment of ISP-bound traffic and ISPs generally. It further appears that such an interim mechanism is consistent with the provisions of the FCC's *ISP Declaratory Ruling* as set forth above. Perhaps most importantly, however, the interim inter-carrier compensation mechanism required herein appears to be the most reasonable means of ensuring that ISP-bound traffic does not become a class of traffic for which there is no mechanism of cost recovery.

The Conclusion of the Arbitration Panel as to Issue No. 1

Based on the foregoing discussion, the Arbitration Panel concluded that, pending the adoption of a federal rule by the FCC, dial-up calls to ISPs should be subject to reciprocal compensation. The Panel further found that the reciprocal compensation rate for such traffic should be based on the elemental rates of transport, end office and tandem switching adopted in the Commission's *UNE Pricing Docket Docket* and equaling $.00351 per minute. The Arbitration Panel specifically rejected the BellSouth position that the parties track ISP traffic pending the establishment of a federal rule and retroactively apply any mechanism ultimately adopted by the FCC to such traffic.

The Findings and Conclusions of the Commission as to Issue No. 1

We concur with the Arbitration Panel's conclusion that pending the adoption of a federal rule by the FCC, dial-up calls to ISPs should be subject to reciprocal compensation. We further concur with the reasoning relied upon by the Arbitration Panel in reaching that recommendation. It is, however, the belief of the Commission that the public interest would be best served by requiring that the interim inter-carrier compensation required herein be subject to retroactive "true-up" once the FCC issues its final federal rule governing inter-carrier compensation for ISP-bound calls and said rule becomes effective. More specifically, we adopt the recommendation of the Advisory Division that the compensation herein ordered for ISP-bound traffic be retroactively "trued-up" to the level of inter-carrier compensation ultimately adopted by the FCC.

In order to prepare for the eventuality of a "true-up" of the interim inter-carrier compensation ordered herein for ISP-bound traffic, we hereby instruct the parties to track all ISP-bound calls and their duration effective immediately upon the approval and implementation of the interconnection agreement which will result from this Arbitration. Once the FCC issues its anticipated federal rule governing inter-carrier compensation for ISP-bound traffic and said rule becomes effective, that rule will prospectively govern the compensation to be paid by the parties to this proceeding for ISP-bound traffic. Similarly, the compensation ordered to be paid in this proceeding for ISP-bound traffic will be retroactively "trued-up" to the FCC mechanism from the effective date of the interconnection

agreement that results from this Arbitration. If through that retroactive "true-up" process any funds are found to be owing by one party to the other, the party owing such funds shall submit them to the opposite party within thirty (30) days of the completion of the "true-up" process.

IT IS SO ORDERED BY THE COMMISSION.

ISSUE NO. 2: FOR PURPOSES OF RECIPROCAL COMPENSATION SHOULD ICG BE COMPENSATED FOR END OFFICE, TANDEM AND TRANSPORT ELEMENTS OF TERMINATION WHERE ICG's SWITCH SERVES A GEOGRAPHIC AREA COMPARABLE TO THE AREA SERVED BY BELLSOUTH's TANDEM SWITCH (PETITION ISSUE 7).

The ICG Position

According to ICG, FCC Rule 51.711 requires that where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent local exchange carrier ("ILEC"), the appropriate rate for the interconnecting carrier's additional cost is the incumbent's tandem interconnection rate. To be eligible for this rate, the FCC requires only that the interconnecting carrier's switch serve the same geographical area as the incumbent's switch. ICG asserts that the record indicates that this is the case for ICG's switch in Alabama. Starkey, Tr. pp. 72, 102 Moreover, ICG maintains that its switch performs the same functionality as the BellSouth tandem switch. In fact, ICG contends that its Lucent 5ESS switching platform meets the definition and performs the same functions identified in the Local Exchange Routing Guide ("LERG") for a tandem office and for a Class 4/5 switch.

The BellSouth Position

BellSouth's position regarding this issue is that if a call is not handled by a switch on tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth accordingly maintains that it will pay the tandem

interconnection rate if ICG's switch is identified in the LERG as a tandem. Varner, Tr. p. 413.

A tandem switch connects trunks and is an intermediate connection between an originating telephone call location and the final destination of the call. If ICG's switch is an end office switch, it is handling calls that originate or terminate to customers served by that local switch and is not a tandem switch. According to BellSouth, ICG is thus seeking compensation for equipment it does not own and functionality it does not provide.

BellSouth also asserts that the evidence in the record does not support ICG's position that it provides the transport elements. BellSouth maintains that the Act does not contemplate that the compensation for transporting and terminating local traffic should be symmetrical when one party does not actually provide the network facility for which it seeks compensation. BellSouth accordingly urges the Commission to deny ICG's request for tandem switching compensation when tandem switching is not performed.

The Arbitration Panel's Discussion of Issue No. 2

The FCC's Rule 51.711 expressly states that where the interconnecting carrier's switch serves a

geographic area comparable to that served by the ILEC's tandem switch, the appropriate interconnection rate for the interconnecting carrier is the tandem interconnection rate. We find nothing in the record to controvert ICG's claim that its switch is geographically comparable to BellSouth's tandem switch. BellSouth does not in fact argue the issue of geographic comparability, but instead argues distinctions in functional equivalency which are not requirements of the aforementioned FCC Rule. Varner, Tr. pp. 413-415. Even if FCC Rule 51.711 is read to include functional equivalency requirements as BellSouth seems to suggest, we find that ICG has demonstrated the requisite functional equivalency by introducing evidence

that its Lucent 5ESS switch meets the definition of a tandem switch in the Local Exchange Routing Guide. Starkey, Tr. pp. 105-108.

The Conclusion of the Arbitration Panel as to Issue No. 2

Based on the foregoing discussion, the Arbitration Panel concluded that ICG's switch serves an area geographically comparable to that served by BellSouth's tandem switch and provides functionality comparable to that provided by BellSouth's tandem switch. The Arbitration Panel therefore concluded that ICG is entitled to reciprocal compensation at the tandem interconnection rate which is comprised of (1) tandem switching; (2) transport between the BellSouth tandem and its end office switches and (3) end office switching. The established TELRIC-based rates for these elements equals $.00351 per minute pursuant to the Commission's *UNE Pricing Docket.*

The Findings and Conclusions of the Commission as to Issue No. 2

The Commission concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

IT IS SO ORDERED BY THE COMMISSION.

ISSUE NO. 3: SHOULD BELLSOUTH BE REQUIRED TO COMMIT TO PROVISIONING THE REQUISITE NETWORK BUILDOUT AND NECESSARY SUPPORT WHEN ICG AGREES TO ENTER INTO A BINDING FORECAST OF ITS TRAFFIC REQUIREMENTS IN A SPECIFIED PERIOD (PETITION ISSUE 11).

The ICG Position

ICG points out that it relies on BellSouth end office trunks to deliver traffic to ICG's switch. These trunks are usually BellSouth's responsibility to provision and administer. ICG provides BellSouth with quarterly traffic forecasts to assist BellSouth in planning for facilities to handle traffic between their networks. BellSouth is under no obligation to add more end office trunks even though ICG's forecasts may indicate that additional trunking is necessary. Jenkins, Tr. pp. 235-236. ICG wants the option of requiring BellSouth to provision additional end office trunks dictated by ICG's forecast. In exchange, ICG will agree to pay BellSouth for any trunks which are not fully utilized as indicated by the forecast. i.e., a take or pay agreement.

ICG maintains that under its proposal, BellSouth will not assume any risk for additional trunks that are underutilized. ICG in fact asserts that it will assume all of the risk. If this provision is ordered by the Arbitration Panel, ICG expects to use it sparingly.

ICG asserts that BellSouth has agreed to a binding forecast mechanism on at least two prior occasions in Alabama. ICG further maintains that BellSouth's revised Statement of Generally Available Terms and Conditions ("SGAT") filed with the Commission in September 1998 contains a binding forecast provision which largely mirrors the arrangement ICG requests. Also, in the interconnection agreement between BellSouth and KMC Telecom II, BellSouth agreed to a binding forecast provision similar to that requested by ICG.

The BellSouth Position

BellSouth asserts that although it is continuing to analyze the possibility of providing binding forecasts and has not foreclosed the idea, BellSouth can not be ordered to agree to binding forecasts because there is no requirement that it do so pursuant to 47 U.S.C. §251. Varner, Tr. p. 416. BellSouth accordingly argues that pursuant to 47 U.S.C. §252(c), binding forecasts are not properly subject to arbitration. According to BellSouth, the binding forecast provision of BellSouth's September 1998 SGAT provides that neither party is required to enter into a binding forecast.

The Arbitration Panel's Discussion of Issue No. 3

The threshold question regarding this issue is whether the Commission has jurisdiction to require a binding forecast provision in a 47 U.S.C. §252 arbitration as requested by ICG. BellSouth is correct in pointing out that there is not a specific provision of 47 U.S.C. §251 which requires ILECs to enter binding forecasts. The relevant inquiry, however, is not whether there is any direct referenee to binding forecast in 47 U.S.C. §251, but whether requiring binding forecasts is consistent with

the general interconnection obligations of ILECs as set forth in that section of the Act. As noted below, we believe the answer to that inquiry is yes.

Pursuant to 47 U.S.C. §251(c)(2)(C), incumbent LECs are required to provide interconnection with requesting carriers that is at least equal in quality to that provided by the local exchange carrier to itself. ICG's binding forecast proposal clearly relates to interconnection and is designed to ensure that such interconnection is provided to ICG on a non-discriminatory basis. ICG's proposal, therefore, falls well within the parameters of 47 U.S.C. §251 and the Commission's authority pursuant to that section.

We note that BellSouth normally has the financial responsibility for the facilities which ICG seeks to make subject to binding forecasts. Under the proposal put forth by ICG, however, ICG will be required to pick up all or part of the cost for those facilities by either (1) paying BellSouth one-twelfth of the tariffed price for the forecasted plant, as a binding forecast fee, if the binding forecast trunks are used; or (2) paying BellSouth one-hundred-percent of the tariffed price for the forecasted plant if the trunks are not used. Jenkins, Tr. pp. 234-236. Clearly, ICG's proposal protects BellSouth from assuming unreasonable or unnecessary risk. We accordingly find that ICG's proposal is a just and reasonable basis for the parties to negotiate the details of a binding forecast arrangement.

The Conclusion of the Arbitration Panel as to Issue No. 3

Based on the foregoing, the Arbitration Panel concluded that it, and therefore the Commission, had jurisdiction under the provisions of 47 U.S.C. §§251 and 252 to require BellSouth to include a binding forecast provision in its interconnection agreement with ICG. The Arbitration Panel

accordingly found that BellSouth should be required to include in its interconnection agreement with ICG a provision which requires the parties to negotiate in good faith the specific terms and conditions of binding forecasts.

The Findings and Conclusions of the Commission as to Issue No. 3

The Commission concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

IT IS SO ORDERED BY THE COMMISSION.

ISSUE NO. 4: SHOULD BELLSOUTH BE REQUIRED TO PROVIDE THE "ENHANCED EXTENDED LINK" (EEL) AS A UNE COMBINATION (PETITION ISSUE 4).

The ICG Position

ICG asserts that the provisioning of EELs as UNEs at the DS-0 and DS-1 level will act to extend the range of ICG's ability to serve customers, thus permitting ICG to bring the benefits of competition to a much broader base of Alabama businesses and customers than ICG is currently able to serve. ICG asserts that the FCC's Rule 51.315(b) makes clear that if BellSouth currently combines loop and transport, BellSouth must make loop and transport available as a UNE combination at UNE prices.

ICG asserts that the FCC's September 15, 1999 *News Release*, issued in FCC Docket 99-238, makes clear that the Commission has the authority to require BellSouth to combine the loop and transport UNEs comprising the EEL under 47 U.S.C. §251. Even to the extent that the EEL is not an existing combination within BellSouth's network, ICG asserts that the Commission should require BellSouth to make the EEL available to ICG and other competitors. ICG maintains that the Commission has the authority under 47 U.S.C. §251 (c)(3) of the Act to order such UNE combinations. ICG urges the Commission to use its authority to require BellSouth to provide EELs. ICG maintains that the EEL is an efficient mechanism for bringing the benefits of competition to Alabama because it will allow ICG and other CLECs to serve customers without having to be collocated in a particular customer's serving central office.

ICG also argues that the EEL should be offered at the TELRIC-based UNE prices established by the Commission. According to ICG, the total price charged by BellSouth for the EEL should be the sum of (1) the TELRIC rate for an unbundled loop; (2) the TELRIC rate for a cross-connect of appropriate capacity; and (3) the TELRIC rate for unbundled interoffice dedicated transport. BellSouth should not be permitted to impose any charge for combining the individual elements.

ICG contends that the Commission has already awarded the EEL to ITC^DeltaCom Communications, Inc. in its interconnection agreement with BellSouth. ICG requires the same service in order to compete.

The BellSouth Position

BellSouth argues that the EEL is nothing more than a combination of three separate UNE's which replicates private line and/or special access services. Varner, Tr. p. 393. BellSouth further argues that at the time of the August 11, 1999 hearing, there was no FCC rule requiring BellSouth to provide

such a UNE combination and that BellSouth should not, therefore, be ordered to provide such a combination of UNEs in this proceeding. Varner, Tr. p. 376.

Absent an FCC order, however, BellSouth will, on a voluntary basis, provide EELs through "Professional Services Agreements." BellSouth asserts that since those offers are separate and apart from any obligations under 47 U.S.C. §§251 and 252, there is no requirement that the EEL be provided at TELRIC rates. Therefore, the EEL is offered at prices approximating retail.

The Arbitration Panel's Discussion of Issue No. 4

The combination of UNEs has been one of the more contentious issues arising from the passage of the Act and the rules originally promulgated by the FCC to implement the requirements of the Act. The rules governing UNE combinations originally promulgated by the FCC in its *Local Competition Order* have their genesis in 47 U.S.C. §251(c)(3) which imposes on incumbent LECs:

> "[T]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this Section and §252. 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."

Pursuant to the above provisions, the FCC adopted its Rule 51.315(b) which prohibits incumbent LECs from separating UNEs combined in their networks. The FCC also adopted its Rule 51.315(c)–(f) which requires incumbent LECs to combine previously uncombined elements

The FCC reasoned that the only way to give meaning to the requirement that incumbent LECs "shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements" was to interpret it as compelling the incumbent LECs to do the combining for the benefit of the requesting carriers. The FCC rejected the concept of requiring the requesting carrier to do the combining itself as impossible because it found that "new entrants lacked the facilities and information about the incumbent's network necessary" to do the combining. The FCC, therefore, reasoned that "we do not believe it is possible that Congress, having created the opportunity to enter the local telephone markets through the use of unbundled elements, intended to undermine that opportunity by imposing technical obligations on requesting carriers that they might not be able to readily meet."

FCC Rules 51.315(b) and 51.315(c)-(f) were subsequently vacated by the United States Court of Appeals for the Eighth Circuit which found that 47 U.S.C. §251(c)(3) could not be read to levy a duty on incumbent LECs to do the actual combining of elements. The Eighth Circuit's decision regarding FCC Rule 51.315(b) was, however, reversed by the United States Supreme Court. In reversing the Eighth Circuit, the Supreme Court held that the FCC's interpretation of §251(c)(3) was "entirely rational, finding its basis in §251(c)(3)'s nondiscrimination requirement." According to the Supreme Court, Rule 51.315(b) was designed to prevent incumbent LECs from imposing "wasteful costs" on requesting carriers and that it was "well within the bounds of the reasonable for the [FCC] to opt in favor of ensuring against an anti-competitive practice."

Although the Supreme Court's ruling clearly validated FCC Rule 51.315(b) and the Eighth Circuit subsequently reinstated that Rule, there remained some uncertainty regarding the impact of the rule due to the Supreme Court's decision to vacate the FCC's Rule 51.319 on the grounds that the FCC had not adequately considered the "necessary" and "impair" standards of 47 U.S.C. §251(d)(2) in establishing its Rule 319 list of UNEs. FCC Rule 51.319 establishes the network elements that must be provided on an unbundled basis and, therefore, cannot be "uncombined" pursuant to Rule 51.315 (b) if they are already combined in the ILEC's network.

In its *News Release* issued on September 15, 1999, the FCC summarized a yet to be released order addressing the reestablishment of the Rule 319 list of UNEs. The FCC specifically noted therein that "[p]ursuant to §51.315(b) of the Commission's Rules, incumbent LECs are required to provide access to combinations of loop, multiplexing/concentrating equipment and dedicated transport" – the components of the EEL- if they are currently combined."

Based on the foregoing, the Commission can and should require BellSouth to provision the EEL at the DS-O and DS-1 levels where it currently combines those loops with transport within its network. Reinstated FCC Rule 51.315(b) mandates such a result given the FCC's specific statements concerning the EEL in its efforts to reinstate the Rule 51.319 list of UNEs. Such a result is entirely consistent with controlling law and the principles of efficient competition.

Even though the FCC's Rule 51.315(c)-(f) requiring ILECs to combine previously uncombined elements remains vacated at present, we nonetheless find that BellSouth must, for a reasonable cost-based fee, combine the UNEs comprising the EEL for ICG in situations where those elements currently are not combined in the BellSouth network. We find support for this proposition not only from the Supreme Court's discussion of the FCC's reasoning which undergirded the reinstatement of FCC Rule 51.315(b) in *AT&T Corp.*, but also from the Act generally at 47 U.S.C. §252.

In reinstating FCC Rule 51.315(b), the Supreme Court placed great emphasis on the FCC's reliance on 47 U.S.C. §251(c)(3) and the FCC's pro-competitive logic in general. Had FCC Rule 51.315(c)-(f) been before the Supreme Court in *AT&T Corp.*, we are quite sure that the Supreme Court's logic in reinstating FCC Rule 51.315(b) would have clearly dictated reinstatement of Rule 51.315(c)-(f). Such a result would be logical because the same nondiscrimination requirement that undergirds Rule 51.315(b)'s requirement that combined elements not be separated also underlies the requirement that the incumbent LECs must combine elements for requesting carriers which is codified in FCC Rule 51.315 (c)-(f). Thus, in light of the Supreme Court's decision in *AT&T Corp.*, there is ample authority for the proposition that under 47 U.S.C. §251(c)(3), incumbent LECs can be required to combine UNEs for requesting carriers.

Regardless of the current status of FCC Rule 51.315(c)-(f), the Commission has independent authority pursuant to 47 U.S.C. §252 to order EEL combinations on its own. More particularly, 47 U.S.C. §252(c)(1) states that "[i]n resolving by arbitration ... any open issues and imposing conditions on the parties to the agreement, a state commission shall ... ensure that such resolution and conditions meet the requirements of §251, including the regulations prescribed by the [FCC] pursuant to §251." It is important to note that while the FCC's implementing regulations are included among the factors that state commissions must consider in implementing 47 U.S.C. §251, the Act plainly contemplates that the state's authority under 47 U.S.C. §251 is not restricted to applying the FCC's rules. To the contrary, states are free to act as they see fit to give substance to 47 U.S.C. §251 so long as they are not in conflict with the FCC's rules.

We arrived at the conclusion that the EEL must be provided to ICG by BellSouth even in situations where the elements comprising the EEL are not currently combined in the BellSouth network only after carefully undertaking the "necessary" and "impair" analysis embraced by the Supreme Court in *AT&T Corp.* Among other things, we considered the alternative methods and/or facilities available to ICG for the provisioning of the functions that could be achieved by the EEL in circumstances where the network elements comprising the EEL are not presently combined in the BellSouth network. As part of that analysis, we assessed whether in those circumstances ICG has alternative methods of providing the functionality achieved by the EEL without the imposition of undue financial burden or a degradation of service.

From the foregoing analysis, we determined that the EEL is the only efficient mechanism currently available to ICG for bringing the benefits of competition to Alabama businesses and consumers because it will allow ICG to serve customers without having to be collocated in the BellSouth Central Office serving that particular customer. Widespread availability of the EEL will thus enable ICG to serve, and bring the benefits of competition, to a much broader base of Alabama end users than it is currently able to. The EEL is necessary to provide service, particularly in less dense residential areas where collocation is not feasible. In such instances, the unavailability of the EEL would certainly "impair" ICG's ability to provide service because there is no other source for this access.

Further, if the EEL is made available only in circumstances where the UNEs comprising it are already combined in the BellSouth network, ICG will be forced to incur the unnecessary and duplicative costs associated with collocating in the BellSouth Central Offices where ICG has customers and BellSouth does not currently combine the elements comprising the EEL. Such a scenario is cost prohibitive and requires ICG to unnecessarily duplicate the public switched telephone network through widespread collocation. Holdridge, Tr. p 277 We find such a result unacceptable and counterproductive to the development of competition in this state. We accordingly hold that BellSouth must make the EEL available to ICG even in situations where the elements comprising the EEL are not currently combined in the BellSouth network.

The Conclusion of the Arbitration Panel as to Issue No. 4

Based on the foregoing discussion, the Arbitration Panel found BellSouth's arguments that the EEL should be provided outside the context of the Act and at prices approximating retail services meritless. The Arbitration Panel majority further found that the EEL must be made available to ICG by BellSouth regardless of whether the elements comprising the EEL are currently combined in the BellSouth network. In all cases, the Arbitration Panel found that EEL should be provided by BellSouth at the TELRIC-based UNE prices established by the Commission in the *UNE Pricing Docket*, and at the DS-O and DS-1 levels. Specifically, the Arbitration Panel concluded that the total price charged by BellSouth for the EEL should be precisely the sum of the Commission established TELRIC rates for: (1) an unbundled loop; (2) a cross-connect of appropriate capacity; and (3) unbundled interoffice dedicated transport.

The Arbitration Panel noted that BellSouth should not be permitted to impose any charge for combining the individual elements set forth above where they are already combined in the BellSouth network. However, the Arbitration Panel concluded that BellSouth should be entitled to the impose a reasonable, cost-based fee for combining the elements which comprise the EEL in situations where those elements are not currently combined in the BellSouth network. The Arbitration Panel recommended that the parties be required to submit cost studies establishing such a fee such as soon

as possible, but no later than sixty (60) days following the Order of the Commission adopting the Arbitration Panel's recommendation in that regard. The Arbitration Panel noted that the Commission should act expeditiously on the establishment of such a combination fee or "glue charge." Until the establishment of such a fee by the Commission or an agreement among the parties concerning such a fee, the Arbitration Panel held that BellSouth should not be required to combine the elements comprising the EEL where those elements are not currently combined in the BellSouth network.

The Findings and Conclusions of the Commission as to Issue No. 4

We fully concur with the findings and conclusions of the Arbitration Panel with regard to the provision of the EEL by BellSouth when the elements comprising the EEL are already combined in BellSouth's network. The FCC's long-awaited order regarding UNEs was released on November 5, 1999. As anticipated, the FCC's *UNE Order* prohibits incumbent LECs such as BellSouth from separating loop and transport elements where they are currently combined. We accordingly hold that based on the FCC's *UNE Order* and the reasoning relied on by the Arbitration Panel, BellSouth must provide the EEL to ICG in situations where the elements comprising the EEL are currently combined in the BellSouth network.

The provision of the EEL by BellSouth in situations where it is currently combined in the BellSouth network shall be in accordance with the parameters established by the FCC in its November 5, 1999 *UNE Order*. Further, the EEL shall be provided at the TELRIC-based UNE prices established by the Commission in the *UNE Pricing Docket* and at the DS-0 and DS-1 levels. Specifically, the total price charged by BellSouth for the EEL shall be precisely the sum of the Commission-established TELRIC rates for: (1) an unbundled loop; (2) a cross connect of appropriate capacity; and (3) unbundled interoffice dedicated transport.

With regard to the provision of the EEL in circumstances where the elements comprising it are not already combined in the BellSouth network, the Commission majority, consisting of Commission President Sullivan and Commissioner Cook, does not concur with the findings and conclusions of the Arbitration Panel. To the contrary, the Commission majority adopts the recommendation of the Advisory Division and finds that it would be unwise to require an incumbent LEC such as BellSouth to combine network elements that are not currently combined in its network since that issue is still pending before the Eighth Circuit. BellSouth is not, therefore, required to provide the combination of loop, multiplexing/concentrating equipment, and dedicated transport where those elements are not currently combined in the BellSouth network. However, in the event that the Eighth Circuit subsequently determines that incumbent LECs must indeed combine UNEs, including the loop, multiplexing/concentrating equipment, and dedicated transport where they are not currently combined in the incumbent LEC's network, the Commission majority finds that BellSouth must, from the effective date of such a requirement, combine UNEs for ICG in a manner consistent with any such requirement so implemented.

It should be noted that Commissioner Wallace dissented from the Commission majority and voted to accept the Arbitration Panel majority's recommendation that BellSouth be required to combine the elements comprising the EEL even in instances where those elements are not currently combined in the BellSouth network. Commissioner Wallace does, however, concur with the notion that BellSouth must be required to provide the EEL where it is not currently combined in the BellSouth network in the event that the Eighth Circuit subsequently determines that ILECs such as BellSouth must do so.

IT IS SO ORDERED BY THE COMMISSION.

ISSUE NO. 5: SHOULD VOLUME AND TERM DISCOUNTS BE AVAILABLE FOR UNEs (PETITION ISSUE NO. 6).

The ICG Position

ICG asserts that when it commits to purchase a large volume of UNE's, BellSouth benefits because it is able to use its facilities more efficiently, and its costs per UNE go down. ICG represents that when BellSouth refuses to pass on any of those benefits to ICG, not only does ICG not gain the benefits of economy that is has generated for BellSouth through its volume purchases, it faces a more efficient

BellSouth in the marketplace wherein BellSouth can offer lower prices to its retail customers. Starkey, Tr. p. 120.

ICG further contends that when ICG and BellSouth agree to provision UNEs over long terms, BellSouth benefits through little or no volatility of demand, and therefore, experiences little or no risk. According to ICG the result is that BellSouth can more efficiently utilize its resources and decrease the likelihood of stranded investment. *Id.*

ICG asserts that BellSouth should pass the above described saving and/or economies on to ICG. ICG contends that it is within the authority of the Commission to require BellSouth to do so.

The BellSouth Position

BellSouth argues that neither the Act nor any FCC order or rule requires volume and term discount pricing for UNEs. Varner, Tr. p. 412. BellSouth also maintains that the UNE recurring rates that ICG will pay are cost-based in accordance with the requirements of §252(d) and are derived using least-cost, forward looking technology consistent with the FCC's rules. Furthermore, BellSouth argues that its non-recurring rates already reflect any economies involved when multiple UNEs are ordered and provisioned at the same time. *Id.*

BellSouth additionally contends that the TELRIC-based prices for UNEs set by the Commission already incorporate the savings inherent in volume and term purchases because they are calculated on future plant utilization and network costs, not current utilization and network costs. BellSouth also asserts that its obligations to provide statewide average loop prices precludes its ability to pass through savings associated with volume purchases in a particular locality. BellSouth maintains that the basis upon which ICG seeks volume and term discounts would require the Commission to rethink the pricing methodology adopted in its *UNE Pricing Docket*. According to BellSouth, the cost methodology employed by the Commission in that proceeding is compliant with the provisions of the Act and the rules of the FCC. BellSouth, therefore,

concludes that there is no reason to reconsider the cost methodology employed by the Commission in that proceeding.

The Arbitration Panel's Discussion of Issue No. 5

We conclude that the Commission clearly has jurisdiction to require volume and term discounts for UNEs pursuant to 47 U.S.C. §252. In particular, 47 U.S.C. §252(d)(1) dictates that prices for UNEs shall be established on the basis of cost and in a non-discriminatory manner.

While we concur with the basic premise of ICG's argument that UNE prices must reflect cost savings attributable to UNE volume and term purchases, we note that there are various methods of achieving this result. The Panel finds that the method which will most benefit overall competition in Alabama is to consider any cost savings from increased UNE purchase volumes in establishing overall UNE rates. This is the method that would most ensure that smaller CLECs are not disadvantaged.

We note at this juncture that the Commission previously determined UNE prices generically in its *UNE Pricing Docket*. We, therefore, conclude that arguments concerning cost savings from increased UNE purchase volumes and extended term commitments must be addressed generically in the context of that previously established Docket. We, therefore, recommend that ICG petition the Commission for reconsideration of the previous findings entered in the *UNE Pricing Docket* if it feels that the existing UNE prices do not generically incorporate cost savings resulting from increased UNE purchase volumes and term commitments.

The Conclusion of the Arbitration Panel as to Issue No. 5

Based on the foregoing, the Arbitration Panel concluded that any cost savings resulting from increased UNE purchase volumes and extended term commitments must be addressed generically in the context of the Commission's *UNE Pricing Docket*. The Arbitration Panel, therefore, recommend that ICG Petition the Commission for reconsideration of the previous findings entered in the *UNE Pricing*

Docket if it feels that the UNE prices established therein do not generically incorporate cost savings resulting from increased UNE purchase volumes and term commitments.

The Findings and Conclusions of the Commission as to Issue No. 5

The Commission concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

IT IS SO ORDERED BY THE COMMISSION.

IT IS FURTHER ORDERED BY THE COMMISSION, That jurisdiction in this cause is hereby retained for the issuance of any further order or orders as may appear to be just and reasonable in the premises.

IT IS FURTHER ORDERED, That this Order shall be efective as of the date hereof.

DONE at Montgomery, Alabama this 10th day of November, 1999.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan, President

Jan Cook, Commissioner

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr., Secretary

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Docket No. 00-00280
Jackson Direct Exhibit 4
January 4, 2001

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-500, SUB 10

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition by ITC^DeltaCom Communications, Inc. For Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	)) RECOMMENDED) ARBITRATION ORDER)

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on October 18-20, 1999

BEFORE: Commissioner Sam J. Ervin, IV, Presiding, and Commissioners Judy Hunt and William R. Pittman

APPEARANCES:

FOR ITC^DELTACOM COMMUNICATIONS, INC.:

Charles C. Meeker and Henry C. Campen, Jr., Parker, Poe, Adams & Bernstein, L.L.P., First Union Capitol Center, Suite 1400, 150 Fayetteville Street Mall, Raleigh, North Carolina 27602-0389

Nanette S. Edwards - Senior Manager and Regulatory Attorney, 700 Boulevard South, Suite 101, Huntsville, Alabama 35802

David I. Adelman, Sutherland, Asbill & Brennan, L.L.P., 999 Peachtree Street, NE, Atlanta, Georgia 30309-3996

FOR BELLSOUTH TELECOMMUNICATIONS, INC.:

Edward L. Rankin, III, General Counsel - North Carolina, BellSouth Telecommunications, Inc., Post Office Box 30188, Charlotte, North Carolina 28230

Thomas B. Alexander, General Attorney and Bennett L. Ross, General Attorney, BellSouth Telecommunications, Inc., 675 West Peachtree Street, Suite 4300, Atlanta, Georgia 30375-0001

FOR THE USING AND CONSUMING PUBLIC:

Lucy E. Edmondson, Staff Attorney, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: This arbitration proceeding is pending before the North Carolina Utilities Commission pursuant to Section 252(b) of the Telecommunications Act of 1996 (TA96 or the Act) and Section 62-110(f1) of the North Carolina General Statutes. On June 14, 1999, ITC^DeltaCom Communications, Inc. (DeltaCom) filed a Petition for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. (BellSouth) in this docket which initiated this proceeding. By its Petition, DeltaCom requested that the Commission arbitrate certain terms and conditions with respect to interconnection between itself as the petitioning party and BellSouth.

The purpose of this arbitration proceeding is for the Commission to resolve the issues set forth in the Petition and Responses. 47 U.S.C.A. Section 252(b)(4)(C). Under the Act, the Commission shall ensure that its arbitration decision meets the requirements of Section 251 and any valid Federal Communications Commission (FCC) regulations pursuant to Section 252. Additionally, the Commission shall establish rates according to the provisions in 47 U.S.C.A. Section 252(d) for interconnection, services or network elements, and shall provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C.A. Section 252(c).

Pursuant to Section 252 of TA96, the FCC issued its First Report and Order in CC Docket Numbers 96-98 and 95-185 on August 8, 1996 (Interconnection Order). The Interconnection Order adopted a forward-looking incremental costing methodology for pricing unbundled network elements (UNEs) which an incumbent local exchange company (ILEC) must sell new entrants, adopted certain pricing methodologies for calculating wholesale rates on resold telephone service, and provided proxy rates for State Commissions that did not have appropriate costing studies for UNEs or wholesale service. Several parties, including this Commission, appealed the Interconnection Order and on October 15, 1996, the United States Court of Appeals for the Eighth Circuit issued a stay of the FCC's pricing provisions and its "pick and choose" rule pending the outcome of the appeals.

The July 18, 1997 ruling of the Eighth Circuit, as amended on rehearing October 14, 1997, was largely in favor of state regulatory commissions and local phone companies and adverse to the FCC and potential competitors, primarily long distance carriers. The Eight Circuit held that 47 U.S.C.A. Sections 251 and 252 "authorize the state commissions to determine the prices an incumbent LEC may charge for fulfilling its duties under the Act." The Court of Appeals also vacated the FCC's "pick and choose rule." Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997).

On January 25, 1999, the United States Supreme Court entered its Opinion in AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721 (1999). The Supreme Court held, in pertinent part, that (1) the FCC has jurisdiction under Sections 251 and 252 of the Act to design a pricing methodology and adopt pricing rules; (2) the FCC's rules governing unbundled access are, with the exception of Rule 319, consistent with the Act; (3) it was proper for the FCC in Rule 319 to include operator services and directory assistance, operational support systems, and vertical switching functions such as caller I.D., call forwarding, and call waiting within the features and services that must be provided by competitors; (4) the FCC did not adequately consider the Section 251(d)(2) "necessary and impair" standards when it gave requesting carriers blanket access to network elements in Rule 319; (5) the FCC reasonably omitted a facilities-ownership requirement on requesting carriers; (6) FCC Rule 315 (b), which forbids ILECs to separate already-combined network elements before leasing them to competitors, reasonably interprets Section 251(c)(3) of the Act, which establishes the duty to provide access to network elements on nondiscriminatory rates, terms, and conditions and in a manner that allows requesting carriers to combine such elements; and (7) FCC Rule 809 (the "pick and choose" rule), which tracks the pertinent language in Section 252(i) of the Act almost exactly, is not only a

reasonable interpretation of the Act, it is the most readily apparent. The Supreme Court remanded the cases back to the Eighth Circuit Court of Appeals for proceedings consistent with its opinion.

On June 10, 1999, the Eighth Circuit Court of Appeals entered an Order on remand in response to the Supreme Court's decision which, in pertinent part, reinstated FCC Rules 501-515, 601-611, and 701-717 (the pricing rules), Rule 809 (the "pick and choose" rule), and Rule 315(b) (ILECs shall not separate requested network elements which are currently combined). The Eighth Circuit also vacated FCC Rule 319 (specific unbundling requirements). The Court set a schedule for briefing and oral argument of those issues which it did not address in its initial opinion because of its ruling on the jurisdictional issues. The Court also requested the parties to address whether it should take any further action with respect to FCC Rules 315(c) - (f) regarding unbundling requirements. Iowa Utilities Board v. FCC, F.3d (Order Filed June 10, 1999).

By Order dated June 29, 1999, the Commission set this matter for hearing on October 18, 1999.

On July 9, 1999, BellSouth filed its prefiled direct testimony as well as its Response to DeltaCom's Petition for Arbitration.

On July 26, 1999, DeltaCom prefiled its rebuttal testimony.

On September 27, 1999, the Public Staff of the North Carolina Utilities Commission filed a Notice of Intervention in this proceeding.

On October 1, 1999, BellSouth filed a Motion to Resolve Issues. In its Motion, BellSouth requested that certain arbitration issues concerning UNEs and collocation be transferred to Docket No. P-100, Sub 133d, the Commission's generic UNE docket, and Docket No. P-100, Sub 133j, the Commission's generic collocation docket. On October 8, 1999, DeltaCom filed its Opposition to BellSouth's Motion to Resolve Issues.

On October 11, 1999, the Commission issued its Order Concerning UNEs and Collocation Issues. The Commission deferred nine issues from the arbitration proceeding which concerned UNEs or collocation.

On October 13, 1999, DeltaCom filed a Motion for Clarification and to Defer Issues in which DeltaCom asked the Commission: (1) to clarify that its existing Interconnection Agreement with BellSouth will remain in effect until all issues deferred to the generic dockets have been decided and (2) to defer consideration of the issues relating to the reciprocal compensation associated with Internet Service Providers (ISPs) pending the Commission's decision in the ICG Telecom Group, Inc. (ICG) arbitration docket, Docket No. P-582, Sub 6. Specifically, DeltaCom was concerned with the 449 extended loops in service serving current customers in North Carolina and the status of the extended loops regarding additional customers.

On October 14, 1999, BellSouth prefiled redacted testimony.

On October 15, 1999, the Public Staff filed its Reply to DeltaCom's Motion for Clarification and to Defer Issues. With respect to the deferral of issues, the Public Staff supported the request of DeltaCom, saying that it is clearly in the public interest that there is no service disruption for DeltaCom customers receiving service via extended loops during the pendency of these issues. With respect to the deferral of a hearing concerning reciprocal compensation issues until a decision is

issued in the pending arbitration between BellSouth and ICG, the Public Staff supported deferral of the reciprocal compensation issues to a generic proceeding.

On October 15, 1999, BellSouth filed its Response to DeltaCom's Motion. BellSouth argued that DeltaCom's Motion regarding continued operation under the existing Interconnection Agreement should be denied as unnecessary, and it stated that it did not oppose DeltaCom's Motion to defer consideration of issues related to inter-carrier reciprocal compensation as long as such consideration occurs within the context of a general proceeding as requested by BellSouth, and not within the pending ICG arbitration.

By Order dated October 15, 1999, the Commission concluded that good cause existed to defer consideration of issues in this docket relating to reciprocal compensation. The Commission reserved the question of deferring the reciprocal compensation issue pending the issuance of an Order in the ICG/BellSouth arbitration docket or pending the conclusion of a generic docket such as that proposed by BellSouth. The Commission further concluded that a decision regarding DeltaCom's Motion concerning continued operation under the existing Interconnection Agreement should be deferred pending further argument and clarification from the Parties at the beginning of the hearing scheduled for October 18, 1999.

This matter came on for hearing as scheduled on October 18, 1999. At the beginning of the hearing, the Commission Panel heard oral arguments for reconsideration of its decision to defer consideration of the reciprocal compensation issues. The Commission concluded that it would hear evidence on the issue of reciprocal compensation in the hearing. The Commission Panel also heard arguments from BellSouth and DeltaCom concerning DeltaCom's Motion to hold its existing Interconnection Agreement in effect pending implementation of a further agreement. The arguments concerned BellSouth's provision of extended loops to existing and prospective customers.

Following the preliminary oral argument, the hearing commenced. DeltaCom offered the direct and rebuttal testimony of Christopher J. Rozycki, Director of Regulatory Affairs for DeltaCom; the direct and rebuttal testimony of Michael Thomas, Director - Information Services for DeltaCom; and the direct and rebuttal testimony of Thomas Hyde, Senior Manager - Industry Relations for DeltaCom. The direct testimony of Don J. Wood was entered into the record by stipulation. BellSouth offered the direct testimony of Dr. William E. Taylor, Senior Vice President of National Economic Research Associates, Inc.; the direct testimony of Alphonso J. Varner, Senior Director - Regulatory Policy and Planning for BellSouth; the direct testimony of Ronald M. Pate, Director - Interconnection Services for BellSouth; the direct testimony of David P. Scollard, Manager - Wholesale Billing for BellSouth Billing, Inc., a subsidiary of BellSouth; and the direct testimony of W. Keith Milner, Senior Director - Interconnection Services for BellSouth.

In response to the oral argument held on October 18, 1999, the Commission entered an Order on October 19, 1999, requesting that BellSouth and DeltaCom each make a filing by October 22, 1999, setting forth: (1) a concise restatement of their arguments, (2) citations and text of relevant sections of the existing Interconnection Agreement, (3) the substance of the terms of the oral agreement between the Parties concerning continuation of service referred to at the October 18, 1999 oral argument, (4) the rates applicable to the extended loops and collocation service and authority therefor, and (5) each party's "bottom line" concerning the terms and conditions under which a continuation of service as to extended loops to new and existing customers would be effected.

On October 21, 1999, the Commission issued its Post-Hearing Order wherein the Commission

instructed the Parties to consult with each other to arrive at a common list of remaining disputed issues consistently numbered and identified. The Commission further requested the Parties to prepare a post-hearing matrix to be submitted at the same time as Proposed Orders and Briefs.

DeltaCom and BellSouth both submitted their filings on October 22, 1999 in compliance with the Commission's October 19, 1999 Order. DeltaCom's "bottom line" position was that the Interconnection Agreement provided for continuation of extended loop service for new customers in North Carolina until the Commission ruled on this issue in the generic docket. BellSouth's "bottom line" position was that it is under no obligation under either the Agreement or the FCC rules to combine unbundled elements with BellSouth's retail services. BellSouth argued that the extended loops were provided to DeltaCom in error by BellSouth employees unfamiliar with the terms of the Agreement. To avoid a complete disruption of DeltaCom's service, however, BellSouth reached an oral agreement with DeltaCom by which BellSouth would continue to provision these extended loops until such time as DeltaCom could establish collocation arrangements in the affected central offices. Until these collocation arrangements are completed, BellSouth also agreed to accept orders from DeltaCom for extended loops to serve new customers, but only for those central offices with existing extended loops and for which collocation requests had been submitted. Further, under the oral agreement, BellSouth will not process any requests for DeltaCom for extended loops involving other central offices.

On November 2, 1999, the Commission entered an Order Concerning Continuation of Service. Through this Order, the Commission provided an interim solution to the dispute of the status of new and existing DeltaCom customers with regard to extended loops. Pursuant to the Order, existing DeltaCom customers who are receiving or have received extended loop service shall be able to receive extended loop service out of central offices already providing service by extended loops. New customers shall be able to receive extended loop service out of central offices already providing service by extended loops. DeltaCom has no obligation to initiate or continue the collocation process at this time in those central offices already providing service to DeltaCom customers by extended loops. BellSouth is under no obligation to provide extended loop service to new customers out of central offices which provide no extended loops service to DeltaCom customers. DeltaCom has the option of converting any extended loop arrangement at central offices where some service is provided to DeltaCom customers via extended loops to a collocation arrangement. The interim solution, which applies only to extended loop arrangements, is subject to prospective revision and change based upon the Commission's generic consideration of issues related to extended loops in Docket No. P-100, Sub 133d.

On December 1, 1999, BellSouth and DeltaCom provided their Notification of Resolved and Unresolved Issues for Purposes for Arbitration.

On December 2, 1999, BellSouth filed a Motion for Reconsideration of the Commission's November 2, 1999 Order concerning continuation of service.

On December 6, 1999, BellSouth and DeltaCom filed their Proposed Orders and Briefs. On that same day, the Public Staff filed its Proposed Order.

On December 13, 1999, DeltaCom filed its Response to BellSouth's Motion for Reconsideration concerning continuation of service.

On December 16, 1999, the Commission issued its Order Denying Motion for Reconsideration.

On December 20, 1999, DeltaCom filed its Motion for Leave to File a Supplemental Brief. DeltaCom stated in its Motion that the Public Staff, in its Proposed Order, raised two issues concerning the tandem switch rate which DeltaCom had not anticipated would be raised. DeltaCom argued that it had not previously briefed the issues and needed to brief the issues now.

On December 21, 1999, BellSouth filed its Response to DeltaCom's Motion. On December 23, 1999, the Public Staff filed its Response to DeltaCom's Motion.

By Order dated December 29, 1999, the Commission allowed Supplemental Briefs.

On December 29, 1999, DeltaCom filed its Supplemental Brief. On January 5, 2000, BellSouth filed its Supplemental Brief.

On January 5, 2000, the Public Staff filed its Response to DeltaCom's Supplemental Brief.

By Order dated January 20, 2000, the Commission required DeltaCom and BellSouth to submit as late-filed exhibits certain information concerning the issue of whether DeltaCom's switches serve a comparable geographic area to BellSouth's tandem switches.

On February 21, 2000, DeltaCom and BellSouth made separate filings in compliance with the Commission's January 20, 2000 Order.

By Order dated February 29, 2000, the Commission sought additional information as late-filed exhibits concerning the tandem switching issue in addition to the maps already provided.

On March 7, 2000, DeltaCom filed its late-filed exhibits in response to the Commission's February 29, 2000 Order. On March 14, 2000, BellSouth filed its Response to DeltaCom's March 7, 2000 late-filed exhibits.

A glossary of the acronyms referenced in this Order is attached hereto as Appendix A.

WHEREUPON, based upon a careful consideration of the entire record in this arbitration proceeding, the Commission now makes the following

FINDINGS OF FACT

1. It is more appropriate to consider DeltaCom's proposed performance measurements and performance guarantees in the generic docket (Docket No. P-100, Sub 133k) established to address such issues. Further, the Commission concludes that it is appropriate for the Parties to include BellSouth's most recent Service Quality Measures (SQMs) in their Interconnection Agreement on an interim basis until a Final Order is issued by the Commission in the generic Docket No. P-100, Sub 133k, concerning performance measurements and enforcement mechanisms.

2. BellSouth is not required at this time to map Electronic Data Interchange (EDI) to the Direct Order Entry (DOE) system for all commonly ordered services requested by DeltaCom on behalf of its retail customers. However, the Commission is concerned about the lack of parity demonstrated in this proceeding and expects BellSouth to take appropriate action within a reasonable time frame to ensure that parity is reached in the instances noted in this proceeding. Finally, it is not

appropriate to include any additional language in the Interconnection Agreement setting out BellSouth's obligation for providing UNEs and Operations Support Systems (OSS).

3. The appropriate reciprocal compensation rate for local traffic is the sum of the permanent rates for the individual network elements actually used to handle the call as established in Docket No. P-100, Sub 133d. The overall rate, including tandem switching, is approximately $.003 per minute. Further, dial-up ISP traffic should be subject to an interim inter-carrier compensation mechanism and the relevant rates should mirror those used for reciprocal compensation for local traffic. Such rates shall be subject to true-up at such time as the Commission has ruled pursuant to the FCC's anticipated order on the subject.

4. For reciprocal compensation purposes, DeltaCom should be compensated at BellSouth's tandem interconnection rate.

5. The Parties should incorporate into their new Interconnection Agreement the existing local interconnection arrangements pertaining to the following matters until or unless the Parties reach agreement otherwise: (1) definition of local traffic, (2) reconfiguration charges for new installations at existing points of interconnection, (3) payment of nonrecurring charges as a result of network redesigns/reconfigurations initiated by BellSouth, (4) trunking options available to the Parties, (5) the routing of traffic by the least costly method, (6) cross-connection charges applicable in a collocation arrangement at the BellSouth wire center, (7) the loading and testing of NXX codes, and (8) the delivery of traffic between DeltaCom, BellSouth, and a third party. The Commission declines to include any proposed provisions, in this regard, that are not contained in the current local interconnection arrangements. However, the Commission encourages BellSouth and DeltaCom to continue to negotiate on the matter of binding forecasts.

6. It is reasonable and appropriate to adopt BellSouth's proposed language providing that the party requesting an audit should be responsible for paying for the audit; however, a party overstating Percent Local Usage (PLU) or Percent Interstate Usage (PIU) by 20% or more shall pay for the cost of the audit.

7. The Commission declines to require the inclusion of language obligating the losing party to an enforcement proceeding or proceeding for breach of the Interconnection Agreement to pay the cost of the litigation.

8. The Commission declines to require the insertion of a tax liability provision in the Interconnection Agreement but encourages the Parties to continue negotiations on this issue.

9. The Commission declines to require the inclusion of a provision establishing compensation for a material breach of contract in the Interconnection Agreement.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

MATRIX ISSUE NO. 1(a): Should BellSouth be required to comply with the performance measures and guarantees for pre-ordering/ordering, resale and UNEs, provisioning, maintenance, interim number portability and local number portability, collocation, coordinated conversions, and the bona fide request process as set forth fully in Attachment 10 of Exhibit A to DeltaCom's Petition?

POSITIONS OF PARTIES

DELTACOM: Yes. DeltaCom argued that although the Commission has recently established a generic docket concerning performance measures and guarantees, DeltaCom believes that interim measures should be adopted in this arbitration because it may be some time before a final order is issued in the generic docket. DeltaCom argued that nothing in TA96 gives the Commission authority to preclude certain issues from arbitration simply because those issues affect more than one carrier or because those issues may be considered at a later date. DeltaCom maintained that TA96 specifically mandates that all issues be resolved. DeltaCom argued that this Federal mandate is particularly important in this instance where inadequate service by BellSouth will cause DeltaCom to lose customers and likely damage DeltaCom's reputation. DeltaCom posited that performance measures and guarantees are essential for three primary reasons: (1) BellSouth has competitive and financial incentives to block entry of DeltaCom into the North Carolina market; (2) as the owner of the local loop, BellSouth has the means to limit DeltaCom's ability to provide quality service; and (3) seeking redress through the regulatory complaint procedure or through the courts would be wasteful and ineffective in a competitive environment. DeltaCom stated that performance measures and guarantees are necessary and in the public interest because such provisions would create meaningful incentives for BellSouth to perform. DeltaCom stated that it proposes a three-tier set of performance measures and guarantees. The first tier calls for the waiver of nonrecurring charges when BellSouth fails to provide the ordered service in a timely fashion. The second tier of guarantees is triggered when BellSouth fails to meet a measurement in two out of three months during a quarter. Where such a "Specified Performance Breach" occurs, BellSouth is required to provide compensation of $25,000. The third level of DeltaCom's proposed performance guarantees is triggered only in the cases of extreme and extraordinary nonperformance, where BellSouth fails to meet a single measure five times during a six-month period. For those extreme cases, BellSouth must pay $100,000 for each default, for each day the default continues. Also, DeltaCom is recommending that the second- and third-tier guarantees, if assessed, be paid to a public interest fund. DeltaCom concluded that although the generic docket will provide consistent guidance in this area on a state-wide basis, the Commission should be concerned that several months may elapse before a final order is issued in the generic docket. Therefore, DeltaCom recommended that the Commission find that the performance measures and guarantees contained in Exhibit A at Attachment 10 be in place until the Commission issues a final and nonappealable order in the generic proceeding.

BELLSOUTH: No. BellSouth maintained that despite having made numerous requests early during the negotiations, BellSouth did not receive a copy of Attachment 10 from DeltaCom until the day after the negotiations ended. BellSouth stated that it does not believe that the so-called performance measures and performance guarantees in Attachment 10 to the Petition are appropriate. BellSouth stated that the Parties do not dispute the importance of or need for performance measurements in their Interconnection Agreement, only which performance measures should be included. BellSouth argued that it has offered in its negotiations with DeltaCom comprehensive performance measures that will ensure that BellSouth provides DeltaCom with nondiscriminatory access consistent with the requirements of TA96 and FCC orders and rules known as BellSouth's SQMs. BellSouth further noted that the Commission issued a November 4, 1999 Order establishing a generic docket to address performance measurements and enforcement mechanisms and that docket may be the more appropriate place for a decision regarding this issue. BellSouth recommended that the Commission require the Parties to incorporate BellSouth's SQMs into their Interconnection Agreement as may be subsequently modified consistent with future decisions by the Commission in its recently established generic docket to address performance measurements and enforcement mechanisms. With respect to performance guarantees, BellSouth argued that DeltaCom's proposed performance guarantees constitute financial penalties, which the Commission lacks the statutory or jurisdictional authority

under state law to unilaterally award without a hearing and absent BellSouth's prior consent. BellSouth recommended that the Commission specifically decline to adopt any of the performance guarantees offered by DeltaCom, but note that the subject of appropriate enforcement mechanisms will be taken up in Docket No. P-100, Sub 133k.

PUBLIC STAFF: No. The Public Staff stated that on November 4, 1999, the Commission established a generic docket, Docket No. P-100, Sub 133k, for the consideration of performance measures and enforcement mechanisms. The Public Staff maintained that the issues of performance measures and an enforcement mechanism are more appropriate for consideration in that docket. The Public Staff argued that consideration in a generic docket would lead to a uniform decision which would apply to all competing local providers (CLPs) and ILECs operating in North Carolina. The Public Staff recommended that the Commission deny any request by DeltaCom that it establish performance measures and an enforcement mechanism in this case on an interim basis and defer the issue to the generic proceeding since it would be of greater benefit to decide this issue on an industry-wide basis rather than to consider individual cases and make decisions in a piecemeal fashion.

DISCUSSION

The Commission notes that by Order dated November 4, 1999, the Commission established a generic docket to consider performance measurements and enforcement mechanisms which stemmed from the BellSouth/ICG arbitration proceeding (Docket No. P-582, Sub 6). In its Order, the Commission requested the industry, the Public Staff, the Attorney General, and other interested parties to form a Task Force. The Commission notes that, after being granted extensions of time, the Task Force is to file a report with the Commission by not later than May 3, 2000, which outlines specific issues agreed to by the Task Force as well as any issues on which the Task Force is unable to reach agreement. The Commission believes that it would be more appropriate for DeltaCom to actively participate on the Task Force established to address these issues on a statewide level rather than adopting DeltaCom's proposed set of performance measurements in this docket. Further, the Commission believes that BellSouth's proposal to include BellSouth's SQMs on an interim basis until an Order is issued in the generic proceeding in the Interconnection Agreement is a reasonable and appropriate recommendation. However, the Commission's decision is not intended to preclude the Parties from negotiating guarantees as referenced by BellSouth witness Varner during cross-examination by DeltaCom (See Transcript Volume 3, Page 117).

CONCLUSIONS

The Commission concludes that it is more appropriate to consider DeltaCom's proposed performance measurements and performance guarantees in the generic docket established to address such issues. Further, the Commission concludes that it is appropriate for the Parties to include BellSouth's most recent SQMs in their Interconnection Agreement on an interim basis until a Final Order is issued by the Commission in the generic Docket No. P-100, Sub 133k, concerning performance measurements and enforcement mechanisms.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

MATRIX ISSUE NO. 2: Is BellSouth providing services including OSS and UNEs to DeltaCom at parity with that which it provides to itself?

POSITIONS OF PARTIES

DELTACOM: No. DeltaCom argued that its access to OSS must be at parity with BellSouth's access. DeltaCom maintained that its evidence showed that for a customer desiring to switch from BellSouth to DeltaCom and add several commonly ordered services, DeltaCom submits the order for the customer to BellSouth electronically through EDI. DeltaCom stated that by design, such order falls out when it reaches BellSouth and that when the same order is placed by BellSouth to provide the same services with BellSouth as the retail service provider, the order is processed electronically. DeltaCom argued that this example reflects the underlying problem of BellSouth's failure to map EDI to the DOE system. DeltaCom maintained that BellSouth's systems must provide access to OSS for DeltaCom at least equal to that enjoyed by BellSouth. DeltaCom stated that both companies initially enter orders manually - DeltaCom through EDI and BellSouth through DOE - but it is only DeltaCom's orders that must be re-entered by BellSouth personnel. DeltaCom stated that its orders fall out while BellSouth's orders do not. DeltaCom maintained that it is technically feasible for BellSouth to map EDI to DOE and avoid this problem and that the Commission should require BellSouth to do so. DeltaCom recommended that the Commission find that the intent of the parity requirement is that the service really be equal and, therefore, BellSouth should map fully between the EDI and DOE systems for all commonly ordered services requested by DeltaCom on behalf of its retail customers.

BELLSOUTH: Yes. BellSouth stated that it denies that it does not offer OSS and UNEs to DeltaCom at parity. BellSouth stated that it has offered to include language in the Interconnection Agreement consistent with TA96 and the FCC's rules regarding parity of services. BellSouth maintained that TA96 does not require BellSouth to provide DeltaCom with service at levels greater than BellSouth provides to its own end users. BellSouth argued that it is not clear what relief DeltaCom is seeking under this issue that is not already subsumed under other issues. BellSouth stated that FCC Rule 51.311 specifically provides: "The quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an ILEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the ILEC provides to itself." Therefore, BellSouth stated that it is already obligated, by TA96 and the FCC's rules, to provide DeltaCom and any other CLP nondiscriminatory access to telecommunications services, UNEs, and interconnection. BellSouth noted that it currently provides CLPs with nondiscriminatory electronic interfaces to access BellSouth's OSS including: the Local Exchange Navigation System (LENS) and the Telecommunications Access Gateway (TAG) for pre-ordering, ordering, and provisioning; EDI for ordering and provisioning; Trouble Analysis and Facilities Interface (TAFI) for maintenance and repair; Electronic Communications Trouble Administration (ECTA) for maintenance and repair; and Optional Daily Usage File (ODUF), Enhanced Optional Daily Usage File, and Access Optional Daily Usage File for billing. BellSouth asserted that it also offers CLPs manual interfaces to its OSS. BellSouth maintained that these interfaces allow CLPs to perform pre-ordering, ordering, provisioning, maintenance and repair, and billing functions for resale service in substantially the same time and manner as BellSouth does for itself, and, in the case of UNEs, provide a reasonable competitor with a meaningful opportunity to compete, which is all that is required. Further, BellSouth stated that although DeltaCom complains that more than 50% of its orders submitted electronically "fall out" for manual handling, that complaint must be put in proper perspective. BellSouth stated that it would be unfair to attribute every "fall out" to BellSouth and that obviously DeltaCom is having difficulty submitting complete and accurate orders. Also, BellSouth maintained that DeltaCom markets complex business services to its customers and such orders are designed to fall out for manual handling using the same processes that BellSouth uses to handle the same orders for its retail customers. BellSouth noted that its witness Pate testified that "[t]his 'fall out' has nothing to do with any supposed inadequacies in BellSouth's systems, but results from the fact

that the requested services are complex." BellSouth also pointed out that witness Pate testified that the manual processes are in compliance with TA96 and the FCC's Rules. In conclusion, BellSouth recommended that the Commission conclude that from the record evidence BellSouth is providing parity of service, as required by TA96 and the FCC's rules, to DeltaCom with respect to access to BellSouth's OSS and to the provision of UNEs. BellSouth recommended that the Commission decline to grant DeltaCom any relief with respect to this issue.

PUBLIC STAFF: Yes. The Public Staff argued that the FCC and the Act effectively set out BellSouth's obligations for providing UNEs and OSS and that, therefore, no further language on this issue is necessary for inclusion in an arbitrated Interconnection Agreement. The Public Staff maintained that BellSouth is not required to give CLPs the same access it has to its OSS, but functionally equivalent access. The Public Staff further stated that it is not satisfied that the language suggested by either party, DeltaCom's "parity equal to or greater in quality" or BellSouth's "meaningful opportunity to compete," completely captures the essence of the Act or the FCC Rules. The Public Staff opined that DeltaCom's requested language could be seen as an invitation to further muddy the waters and that the language appears to raise the standard above that required by the FCC. The Public Staff recommended that the Commission not include additional language in the Interconnection Agreement setting out BellSouth's obligations for providing UNEs and OSS.

DISCUSSION

The Commission agrees with BellSouth that it is not clear from the record what relief DeltaCom is seeking under this issue that is not already subsumed under other issues. First, based on the Proposed Orders and Briefs of BellSouth and the Public Staff, it appears that DeltaCom is requesting that the language "parity equal to or greater in quality" be included in the Interconnection Agreement while BellSouth has suggested the language "meaningful opportunity to compete." DeltaCom requested in its Proposed Order that the Commission require BellSouth to map EDI to the DOE system for all commonly ordered services requested by DeltaCom on behalf of its retail customers.

The Commission notes that BellSouth has stated that it has offered to include language in the Interconnection Agreement consistent with TA96 and the FCC's Rules regarding parity of services. The Commission further notes that it agrees with BellSouth that TA96 does not require BellSouth to provide DeltaCom with service at levels greater than BellSouth provides to its own end users and that the FCC's language refers to service "at least equal in quality to" that which BellSouth provides to itself. Therefore, the Commission does not find it appropriate to include any additional language in the Interconnection Agreement setting out BellSouth's obligations for providing UNEs and OSS.

Additionally, the Commission notes that DeltaCom has requested that the Commission require BellSouth to map EDI to the DOE system for all commonly ordered services requested by DeltaCom on behalf of its retail customers. DeltaCom uses EDI to enter orders while BellSouth uses DOE to enter orders. DeltaCom maintained that by design, orders entered into EDI fall out when they reach BellSouth and that when the same order is placed by BellSouth to provide the same services with BellSouth as the retail service provider, the order is processed electronically. Therefore, DeltaCom maintained, BellSouth's systems are not providing access at least equal to that enjoyed by BellSouth in compliance with TA96 and the FCC. BellSouth asserted that it would be unfair to attribute every "fall out" to BellSouth and that obviously DeltaCom is having difficulty submitting complete and accurate orders. Also, BellSouth maintained that DeltaCom markets complex business services to its customers and such orders are designed to fall out for manual handling using the same processes that BellSouth uses to handle the same orders for its retail customers.

The Commission does not believe parity is obtained through BellSouth's OSS when DeltaCom's orders submitted through EDI fall out when they reach BellSouth for manual handling as evidenced in this record. Nevertheless, the Commission does not find it appropriate at this time to require BellSouth to map EDI to DOE as requested by DeltaCom. The Commission is concerned about the lack of parity demonstrated in this proceeding and expects BellSouth to take appropriate action within a reasonable time frame to ensure that parity is reached in the instances noted in this proceeding. However, the Commission is not inclined at this time to dictate specifically what action BellSouth should take to correct this lack of parity.

CONCLUSIONS

The Commission concludes that BellSouth should not be required to map EDI to the DOE system at this time for all commonly ordered services requested by DeltaCom on behalf of its retail customers. However, the Commission is concerned about the lack of parity demonstrated in this proceeding and expects BellSouth to take appropriate action within a reasonable time frame to ensure that parity is reached in the instances noted in this proceeding. Finally, the Commission concludes that it is not appropriate to include any additional language in the Interconnection Agreement setting out BellSouth's obligation for providing UNEs and OSS.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

MATRIX ISSUE NO. 3: What should be the rate for reciprocal compensation? Should BellSouth be required to pay reciprocal compensation to DeltaCom for all calls that are properly routed over local trunks, including calls to ISPs?

POSITIONS OF PARTIES

DELTACOM: Yes, reciprocal compensation should be paid. Calls to ISPs are the same as calls to local customers and cause the same costs. As a result, reciprocal compensation should be paid for these calls. DeltaCom has proposed a compromise reciprocal compensation rate of $.0045 per minute pending final ruling by the FCC. This rate is approximately one-half the rate in the Parties' current Interconnection Agreement.

BELLSOUTH: With respect to the first issue, the appropriate rate for reciprocal compensation is the sum of the individual network elements that are actually used to handle the call such as transport or switching. The rates for each of these network elements have previously been established by the Commission in its generic UNE cost proceeding.

With respect to the second issue, calls to ISPs, even if routed over local interconnection trunks, are not subject to TA96's requirement of reciprocal compensation. The FCC's recent Declaratory Ruling in CC Docket Nos. 96-98 and 99-68, released on February 26, 1999, confirmed unequivocally that the FCC had, will retain, and will exercise jurisdiction over ISP traffic because it is interstate in nature, not local. Under the provisions of TA96 and the FCC's Orders and Rules, only local traffic is subject to the reciprocal compensation requirements. Thus, reciprocal compensation is clearly not applicable to ISP-bound traffic. In addition to being contrary to the law, treating ISP-bound traffic as local for reciprocal compensation purposes is contrary to sound public policy.

PUBLIC STAFF: The appropriate rates for reciprocal compensation are the interim UNE rates,

subject to true-up upon issuance of final rates in Docket No. P-100, Sub 133d. The same rates should apply to ISP-bound traffic as an interim inter-carrier compensation mechanism.

DISCUSSION

This issue includes two parts. The first is the appropriate reciprocal compensation rate for local traffic generally. The second is whether there should be an interim inter-carrier compensation mechanism rate applied to dial-up ISP calls and, if so, at what rate.

With respect to the first part, the Commission agrees with BellSouth and the Public Staff that the appropriate reciprocal compensation rate for local traffic is the sum of the individual network elements actually used to handle the call.See footnote 1 These rates were set by Order dated March 13, 2000, in Docket No. P-100, Sub 133d.

With respect to the second part, the Commission concurs with the Public Staff that dial-up ISP traffic should be subject to an interim inter-carrier compensation mechanism and that the relevant rates should mirror those used for reciprocal compensation for local traffic. This matter has been exhaustively treated in the Commission's Recommended Arbitration Order in Docket No. P-582, Sub 6 (ICG/BellSouth Arbitration), and subsequent rulings related to that docket. There is no need to repeat that discussion here since no new evidence has been introduced for the Commission to reconsider its prior ruling. The Commission believes that the decision in that docket, on this matter, should apply to subsequent arbitrations, including a true-up once the Commission has ruled pursuant to the FCC's anticipated order on the subject.

CONCLUSIONS

The Commission concludes that the appropriate reciprocal compensation rate for local traffic is the sum of the permanent rates for the individual network elements actually used to handle the call as established in Docket No. P-100, Sub 133d. The overall rate, including tandem switching, is approximately $.003See footnote 2 per minute.

It is further concluded that dial-up ISP traffic should be subject to an interim inter-carrier compensation mechanism and that the relevant rates should mirror those used for reciprocal compensation for local traffic. Such rates shall be subject to true-up at such time as the Commission has ruled pursuant to the FCC's anticipated Order on the subject.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 4

MATRIX ISSUE NO. 3: Should reciprocal compensation include the tandem switching function?

POSITIONS OF PARTIES

DELTACOM: Yes. As in the ICG arbitration, DeltaCom's compensation should include end-office, tandem, and transport elements of termination where its switches serve a geographic area similar to the area served by BellSouth's tandem switches.

BELLSOUTH: No. It is BellSouth's position that, consistent with FCC Rules and industry standards, DeltaCom does not qualify for tandem switching and common transport because its network design does not perform these functions. If a call is not handled by a switch on a tandem basis, it is not

appropriate to pay reciprocal compensation for the tandem switching function.

PUBLIC STAFF: No. DeltaCom is not entitled to compensation for tandem switching because it has failed to prove that its switches provide the same functions as BellSouth's tandem switches and serve the same geographic areas.

DISCUSSION

DeltaCom witness Rozycki testified that if BellSouth wishes to charge DeltaCom for transport, end-office switching, and tandem switching on its terms, then DeltaCom should be able to charge BellSouth for the same elements. Witness Rozycki further testified that DeltaCom has designed a network where its switches perform the same functions as the BellSouth end-office and tandem switches. DeltaCom uses multifunction switches which serve large geographic areas in a manner similar to BellSouth's tandem switches, and represent precisely the situation contemplated in Section 51.711(a)(3).

In its Proposed Order, DeltaCom again contended that its compensation should include end-office, tandem, and transport elements of termination where such switches serve a geographic area similar to the area served by BellSouth's tandem switch. DeltaCom stated that, in view of the interim rate proposed by DeltaCom, detailed discussion of this issue is not required in the Commission Order, and that the rationale of the ICG/BellSouth Recommended Arbitration Order applies here as well.

BellSouth witness Varner testified that if a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth will pay the tandem interconnection rate only if DeltaCom's switch is identified in the Local Exchange Routing Guide (LERG) as a tandem. Witness Varner explained that a tandem switch connects one trunk to another trunk and is an intermediate switch or connection between an originating call location and the final destination of the call. An end-office switch connects a line to a trunk enabling the subscriber to originate or terminate a call. If DeltaCom's switch is an end-office switch, then it is handling calls that originate from or terminate to customers served by that local switch, and thus BellSouth argued that DeltaCom's switch is not providing the tandem function. It is BellSouth's opinion that DeltaCom is seeking to be compensated for the cost of equipment it does not own and for functionality it does not provide.

In its Proposed Order, BellSouth argued that the FCC has identified two requirements that a CLP such as DeltaCom must meet in order to be compensated at the tandem interconnection rate: (1) DeltaCom's network must perform functions similar to those performed by BellSouth's tandem switch; and (2) DeltaCom's switch must serve a geographic area comparable to BellSouth's. BellSouth argued that DeltaCom cannot meet either of these requirements. BellSouth maintained that while DeltaCom's switch may be capable of performing tandem switching functions when connected to end-office switches, DeltaCom has presented no evidence in this record that proves that DeltaCom's switches perform such functions. BellSouth argued that, for example, there is not any evidence in this record that: (1) DeltaCom interconnects end-offices or performs trunk-to-trunk switching; (2) DeltaCom switches BellSouth's traffic to another DeltaCom switch; or (3) DeltaCom's switch provides other centralization functions, namely call recording, routing of calls to operator services, and signaling conversion for other switches, as BellSouth's tandem switches do and as is required by the FCC's Rules.

BellSouth further argued in its Proposed Order that even assuming DeltaCom's switch performs the same functions as BellSouth's tandem switch (which is not the case), there is no evidence in the record that DeltaCom's switch serves a geographic area comparable to BellSouth's. DeltaCom did not identify where the customers it serves in North Carolina are located -- information that would be essential to support a finding that DeltaCom's switch serves a comparable geographic area.

The Public Staff stated in its Proposed Order that under FCC Rule 51.711, DeltaCom failed to meet its burden of proof by showing that its switches performed similar functions to and served a comparable geographic area as BellSouth's tandem switches. The Public Staff contended that DeltaCom presented a "paucity of evidence" on this issue in this case. Other than DeltaCom witness Rozycki's testimony that DeltaCom's switches performed similar functions to and served a comparable geographic area as BellSouth's tandem switches, in the Public Staff's opinion there appears to be no further showing from DeltaCom as to details of these switches which DeltaCom contends should be treated as tandem switches.

The Public Staff cautioned in its Proposed Order that the FCC has set a high standard of proof on this issue and that it is infeasible, impracticable, and subjective for the Commission to determine whether one geographic area is comparable to another and whether one switch performs similar functions as another. Given the large number of wire centers in the state, there are innumerable permutations and combinations with which the Commission could be presented. The Public Staff opined that rendering a judgment on such issues would demand a substantial amount of Commission time, resources, and technical expertise.

On December 20, 1999, DeltaCom filed a Motion for Leave to File a Supplemental Brief regarding issues concerning the tandem switch rate. An Order Allowing Supplemental Briefs was issued on December 29, 1999.

In its Supplemental Brief, filed December 29, 1999, DeltaCom stated that the Public Staff has misinterpreted Rule 51.711 in a manner which, if adopted by this Commission, would impose a burden of proof on DeltaCom which has no legal basis, and which could result in an improper finding on a crucial issue in this docket. DeltaCom argued that the plain language of FCC Rule 51.711(a)(3) controls this issue. DeltaCom maintained that the Rule does not discuss functional equivalency, nor does it limit the type of switches used by non-ILECs that are entitled to the ILEC's tandem interconnection rate. DeltaCom stated that the Commission is required to adhere to the language of Rule 51.711.

DeltaCom further stated in its Supplemental Brief that the Public Staff erred when it asserted that DeltaCom had the burden of demonstrating that its switches performed similar functions to BellSouth's switches. DeltaCom stated that FCC Rule 51.711(a)(3) makes no mention of tandem functionality, nor does it imply that CLP switches must be functionally equivalent to ILEC tandem switches. If anything, the FCC's language implies an understanding that CLP network design and switch placement could vastly differ from traditional ILEC network design. DeltaCom argued that Rule 51.711 was crafted to ensure that CLPs were not financially penalized or discouraged from designing networks differently than that designed by the incumbent.

DeltaCom also argued in its Supplemental Brief that its testimony reflects that its local switch in North Carolina _ located in Greensboro _ serves the entire state of North Carolina, a geographic area "comparable" to the area served by BellSouth's tandem switches. DeltaCom stated that it has on file

with this Commission a price list which states the geographic area by exchange available to its facilities-based customers served by its North Carolina switch, and the price list shows that DeltaCom serves 73 exchanges located throughout North Carolina from its switch in Greensboro. DeltaCom argued that this arrangement is an example of the types of radically different network designs envisioned in FCC Rule 51.711(a)(3), and also demonstrates why the FCC made no reference to the switches performing "similar functions." DeltaCom argued that its network is fundamentally different from that of BellSouth. Rule 51.711(a)(3) requires only that the Commission consider whether a "comparable" geographic area is served _ there simply is no functionality comparison to be made.

DeltaCom contended in its Supplemental Brief that BellSouth did not meet the burden of demonstrating that DeltaCom's switch does not serve such a geographical area, indeed, it is undisputed that DeltaCom's switch in Greensboro serves the entire State of North Carolina. DeltaCom maintained that BellSouth's argument that DeltaCom does not identify its switch in the LERG specifically as a tandem switch is of no legal consequence, because identification of a switch as a tandem in the LERG is not a requirement of FCC Rule 51.711(a)(3). (In a footnote, DeltaCom indicated the tandem function performed by DeltaCom's switch is a local tandem function with the access tandem function performed by a different switch. DeltaCom indicated that it is in the process of listing its North Carolina switch as a local tandem switch in the LERG.)

DeltaCom further contended that the language of Rule 51.711(a)(3) demonstrates that DeltaCom's switch does not have to serve as a tandem. DeltaCom argued that the Rule refers to "the switch of a carrier other than an ILEC" serving a comparable geographic area to the area served by "the ILEC's tandem switch." If the FCC intended to require non-ILECs to have tandem switches in order to be entitled to an ILEC's tandem interconnection rate, it would have said so. DeltaCom stated its argument is validated by the fact that the FCC specifies the ILEC switch as a "tandem," but uses the broad, unqualified word "switch" when referring to non-ILECs' equipment.

BellSouth stated in its Supplemental Brief that it agrees that Rule 51.711(a)(3) controls this issue. However, BellSouth maintained that the Rule cannot be read in a vacuum, but must be read in the broader context of TA96 and the FCC's Order adopting the Rule, both of which fully support the Public Staff's analysis of DeltaCom's burden of proof on the tandem switching issue.

BellSouth further contended in its Supplemental Brief that the FCC directed state commissions to consider two factors in determining whether a CLP should receive the same reciprocal compensation rate as would be the case if traffic were transported and terminated via the incumbent's tandem switch. First, the FCC directed state commissions to "consider whether new technologies (e.g., fiber ring or wireless network) performed functions similar to those performed by an ILEC's tandem switch and thus whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the ILEC's tandem switch." Second, in addition to the functionality comparison, the FCC instructed state commissions to consider whether the new entrant's switch serves a geographic area comparable to that served by the ILEC's tandem switch, in which case the appropriate proxy for the new carrier's costs is the incumbent's tandem interconnection rate.

BellSouth stated in its Supplemental Brief that the Public Staff's conclusion that DeltaCom failed to satisfy its burden of proof on the tandem switching issue is abundantly correct, particularly given that the record evidence from DeltaCom on the tandem switching issue consisted of slightly more than one page of prefiled testimony in addition to witness Rozycki's responses to four questions from the Public Staff on the issue at the hearing. BellSouth argued that DeltaCom's latest filing

should not obscure the inescapable truth that it failed to produce any evidence upon which this Commission could find in DeltaCom's favor on the tandem switching issue.

BellSouth contended in its Supplemental Brief that if the Commission were to conclude that DeltaCom was only required to prove that its switch serves a comparable geographic area to BellSouth's tandem switch (which BellSouth does not believe is the appropriate test), DeltaCom utterly failed to satisfy this burden of proof as well. BellSouth further contended that DeltaCom does not and cannot point to a single shred of evidence in this record that establishes what geographic area its Greensboro switch currently serves and whether that area is comparable to the geographic area served by BellSouth's tandem switch. BellSouth stated that neither DeltaCom's tariffs nor its network map were entered into evidence. Furthermore, BellSouth asserted that even if considered by the Commission, neither DeltaCom's tariffs nor its network map demonstrate what geographic area DeltaCom's switch actually serves in North Carolina. BellSouth maintained that the issue is whether DeltaCom's Greensboro switch "serves" a comparable geographic area, not whether its switch is technically capable of serving a particular geographic area. *See* 47 C.F.R. Paragraph 51.711(a)(3); *see also MCI Telecommunications Corp. (MCI) v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc.*, 1999 U.S. Dist. LEXIS 11418 (N.D. Ill. June 22, 1999).

BellSouth stated that the evidence in this record (or lack thereof) on the question of whether DeltaCom's switch serves a comparable geographic area is similar to the record evidence confronted by the federal district court in *MCI v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc.* In that case, MCI argued that it should be compensated at the tandem rate for its switch in Bensonville, Illinois. The Illinois Commerce Commission (ICC) rejected MCI's argument, finding that MCI had failed to provide sufficient evidence to support a conclusion that it was entitled to the tandem interconnection rate.

The Public Staff, in its Response to DeltaCom's Supplemental Brief, stated that DeltaCom failed to demonstrate that its switch performs tandem functions in terminating a call delivered to it by a local exchange company (LEC). The Public Staff argued that the determination of whether DeltaCom's switch performs the tandem functionality on calls delivered to it by BellSouth is central to the Commission's decision as to whether DeltaCom should be compensated for the tandem switching and transport elements. The Public Staff argued that even if it could be construed that DeltaCom's switch serves an area comparable to that served by BellSouth's tandem switch, that determination, standing alone, is insufficient to qualify DeltaCom to receive compensation for the tandem switching and transport elements.

The Public Staff further stated in its Response to DeltaCom's Supplemental Brief that it is clear in reading Paragraph 1090 of the FCC's First Report and Order as a whole, and as an indication of the FCC's intent in promulgating Section 51.711 of its Rules, that the functionality of the interconnecting carrier's network must be considered for the purpose of determining whether the carrier should be compensated for tandem switching. The Public Staff maintained that in Paragraph 1090, the FCC makes it clear that states may establish transport and termination rates which vary according to whether the traffic is routed through a tandem switch or directly to the end office switch. However, the Public Staff opined that the FCC specifically directs the states to consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an ILEC's tandem switch. The Public Staff stated that if the only requirement were that the interconnecting carrier's switch serve an area comparable to the LEC's tandem switch, any consideration of the new technologies would be completely irrelevant.

The Public Staff stated that if the Commission were to adopt DeltaCom's position that the rule should be read in isolation without any consideration of Paragraph 1090, then a CLP with a switch serving a geographic area comparable to that served by the LEC's tandem would be entitled only to reciprocal compensation for tandem switching and for no other functions such as end-office switching or transport. The Public Staff stated that it did not believe this is the result that was intended by the FCC or desired by DeltaCom. The Public Staff stated that a major theme of TA96 is that rates should be cost-based, and this is the principle underlying the FCC Rule. The Public Staff maintained that it is unreasonable to conclude that a switch that performs no tandem functions should be compensated as if it did, merely because it serves a comparable geographic area. According to the Public Staff, the functionality of the switch is a key element which cannot be overlooked.

The Public Staff submitted that a diagram handed out by DeltaCom as an exhibit to its counsel's opening statement to show the geographic coverage of DeltaCom's network, and the unsupported assertions of its witness Rozycki as to geographic coverage and functionality, do not rise to the level necessary to support DeltaCom's position on this issue.

In conclusion, in its Response to DeltaCom's Supplemental Brief, the Public Staff submitted that to qualify for reciprocal compensation for tandem switching and transport, the CLP must show that its network performs the same functions as the incumbent LEC's tandem switch in terminating calls directed to it by the interconnecting LEC and that the CLP's switch serves a comparable geographic area. The Public Staff further submitted that DeltaCom has not met its burden of proof on either of these two elements.

On February 21, 2000, in response to Commission Order, DeltaCom filed a map of its switch coverage in North Carolina vs. BellSouth's local tandems which depicted that DeltaCom's Greensboro switch covers the Greensboro, Raleigh, and Asheville Local Access and Transport Areas (LATAs), and its Columbia, South Carolina switch covers the Charlotte LATA. DeltaCom also filed a list of DeltaCom's collocations in BellSouth central offices in North Carolina, and a list of Common Language Location Identifier (CLLI) Codes for BellSouth central offices served by BellSouth local tandems. BellSouth filed LATA tandem serving area maps for its Asheville LATA Tandem, Asheville LATA Local Tandem, Charlotte LATA Tandem, Charlotte LATA Local Tandem, Greensboro LATA Tandem, Greensboro LATA Local Tandem, Raleigh LATA Tandem, Raleigh LATA Local Tandem, Wilmington LATA Tandem, and Wilmington LATA Local Tandem.

On March 7, 2000, in response to Commission Order dated February 29, 2000, DeltaCom filed a description of its switches and network architecture in North Carolina. DeltaCom described its network architecture as "super switches," and stated that these super switches perform many functions similar to the BellSouth end office and local tandem switches as well as also performing long distance or interexchange switching and access tandem switching functions. DeltaCom further stated that its "super switches" switch originating and terminating local traffic, sending the traffic to or receiving it from Traffic Concentration Nodes (TCNs) in the DeltaCom network. For local calls, the TCN gathers or concentrates originating local traffic in an area, and sends that traffic to the DeltaCom switch, thus performing a function similar to a BellSouth end office subtending a BellSouth tandem.

DeltaCom also filed four Exhibits as support. Exhibit 1 illustrated DeltaCom's North Carolina network, showing 17 Points of Presence (POPs). Exhibit 2 illustrated examples of North Carolina local calls that DeltaCom's Greensboro, North Carolina and Columbia, South Carolina switches handle today. DeltaCom contended that together, Exhibits 1 and 2 demonstrated that with the advent

of fiber optic transport facilities and the enormous switching capacity available in today's switching platforms, the economics of the switch/transport tradeoff have changed. DeltaCom argued that competing local exchange companies (CLECs) today are able to perform many of the same functions with a single switch that may be performed by at least two switches in the BellSouth network.

In Exhibit 3, DeltaCom provided their number of customers and location. In Exhibit 4, DeltaCom illustrated a small sample of the calling to DeltaCom customers in Charlotte, originated by customers of BellSouth and other North Carolina LECs.

In its Response to DeltaCom's Exhibits filed on March 7, 2000, BellSouth contended that DeltaCom has failed to demonstrate that it incurs any "additional costs" beyond its end office switching function that would justify BellSouth paying DeltaCom the tandem interconnection rate. BellSouth further contended that the technology and concentration nodes referred to by DeltaCom as TCNs are used to multiplex traffic, not to switch traffic. Therefore, BellSouth stated that contrary to DeltaCom's claim, TCNs are simply multiplexing nodes on DeltaCom's transport facilities, not traffic switching points. According to BellSouth, DeltaCom's equipment provides long (or extended) loops, but does not perform a switching function.

BellSouth summarized its opposition as follows:

1. SONET loop concentration nodes are not switches, nor do they perform functions even similar to an end office switch.
2. While DeltaCom attempts to define the loops between the DeltaCom end user and the DeltaCom switch as trunks on "common transport" facilities, these facilities are nothing more than long loops.
3. To the extent that DeltaCom utilizes SONET technology and loop concentration nodes for its loops, either short or long, such costs are prohibited by the FCC from being recovered in reciprocal compensation for local traffic.
4. Contrary to DeltaCom's claims, the DeltaCom switch performs only end office loop-to-trunk port switching and does not perform local tandem switching functions.

The Commission concluded, in *Petition of ICG Telecom Group, Inc. for Arbitration of its Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. P-582, Sub 6, that ICG had met its burden of proof in regard to both geographic coverage and similar functionality. That decision, based primarily on the testimony of ICG witness Starkey, was upheld and reaffirmed in the Commission's Order Ruling on Objections, Request for Clarification, Reconsideration, and Composite Agreement issued March 1, 2000. In the same Order, the Commission concluded that although it chose not to make a decision in the ICG case on the principal difference in the positions of the parties - whether FCC Rule 51.711 prevails or if the attendant discussion in Paragraph 1090 of the FCC Order should also be considered - parties arbitrating this issue in future proceedings should file maps and provide substantial testimony in the record including information as to location of actual customersSee footnote 3, description of equipment and associated technology, and other relevant information.

After careful and extensive review of the FCC's Rule 51.711 and the attendant discussion in Paragraph 1090, the Commission believes that the language in the FCC's Order clearly contemplates that exact duplication of the ILEC's network architecture is not necessary in order for the CLP to be eligible to receive reciprocal compensation at the tandem switching rate. Further, we believe that the language in the FCC's Order treats geographic coverage as a proxy for equivalent functionality, and

that the concept of equivalent functionality is included within the requirement that the equipment utilized by both parties covers the same basic geographic area. We further believe that the Rule and the Order language are not, for this reason, in conflict in the manner described by BellSouth and the Public Staff.

Based on the information filed by DeltaCom including the map and the description of its network, the Commission believes that DeltaCom has met its burden of proof that its switches cover a comparable area to that covered by BellSouth's switches and that, for reciprocal compensation purposes, DeltaCom is entitled to compensation at BellSouth's tandem interconnection rate.

CONCLUSIONS

The Commission concludes that, for reciprocal compensation purposes, DeltaCom should be compensated at BellSouth's tandem interconnection rate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

MATRIX ISSUE NO. 5: Should the Parties continue operating under existing local interconnection arrangements?

POSITIONS OF PARTIES

DELTACOM: Yes. The Parties' existing Interconnection Agreement addresses each of the following topics, and the existing language in this regard should remain in place. Specifically, the current Interconnection Agreement language concerning cross-connect fees, reconfiguration charges, network redesign, NXX translation, the definitions of the terms "local traffic" and "trunking options", and the parameters establishing routing of originating traffic and each party's exchange of transit traffic should remain.

BELLSOUTH: BellSouth does not understand this issue and needs clarification from DeltaCom. The fact that DeltaCom has filed for arbitration with BellSouth and listed some 73 issues, many of which contain multiple questions, belies DeltaCom's request to maintain its existing arrangements with BellSouth. Additionally, DeltaCom proposed a new Interconnection Agreement attached as Exhibit A to the Petition rather than relying upon the existing Agreement. BellSouth has negotiated with DeltaCom in good faith and will continue to do so in an effort to reach a new Interconnection Agreement. This issue is not appropriate for arbitration.

PUBLIC STAFF: Yes. The Parties should continue to operate under the existing local interconnection arrangements until or unless the Parties reach agreement otherwise. The Commission should decline to include any proposed provisions not contained in the current local interconnection arrangements.

DISCUSSION

In addressing this issue, DeltaCom witness Hyde testified that at the time of the filing of DeltaCom's Petition, BellSouth was reviewing DeltaCom's proposed language. Thus, in order to preserve these issues, witness Hyde generically requested the same interconnection language that is in the current Interconnection Agreement as part of Issue 5. Witness Hyde testified that DeltaCom listed each section of the proposed language that it provided to BellSouth that it understood as open and

under review as an unresolved issue in DeltaCom's Exhibit B matrix attached to its Petition.

In its Post-Hearing Brief, DeltaCom addressed this issue by dividing it into four subtopics which were included in DeltaCom's Exhibit B matrix, among others. DeltaCom stated that the existing Interconnection Agreement addresses, at least in part, each of the subtopics with the exception of binding forecasts. DeltaCom noted that the Parties have been able to negotiate all the other provisions concerning local interconnection with the exception of the following four subtopics: **(a)** "Should the current Interconnection Agreement language continue regarding cross-connect fees, reconfiguration charges, or network redesigns and NXX translations?"; **(b)** "What should be the definition of the terms 'local traffic' and 'trunking options'?"; **(c)** "What parameters should be established to govern routing DeltaCom's originating traffic and each party's exchange of transit traffic?"; and **(d)** "Should the Parties implement a procedure for binding forecasts?"

In regard to DeltaCom's subtopics a, b, and c, DeltaCom noted that the Parties had been unable to negotiate any alternative arrangements. Thus, DeltaCom proposed that the language which is in the existing Interconnection Agreement relating to these subtopics should remain in place. DeltaCom noted that BellSouth agreed to the language that is in the existing Agreement and that this Commission approved that Agreement approximately two years ago as compliant with the Act and consistent with the public interest as required by Section 252(e)(2)(A) of the Act. DeltaCom stated that the terms and conditions in the previously approved Interconnection Agreement have enabled DeltaCom to enter the North Carolina local exchange market and have encouraged DeltaCom to make significant investments in facilities in North Carolina. DeltaCom believes that the current language related to DeltaCom's subtopics a, b, and c should be renewed and incorporated into the Interconnection Agreement resulting from this proceeding. DeltaCom argued that BellSouth has not provided any evidence that these requirements are no longer appropriate for the Interconnection Agreement between the Parties and the Parties have been unable to negotiate any alternative arrangements. Thus, absent a compelling reason to remove the existing language related to these subtopics a, b, and c, DeltaCom argued that the existing related language should remain in the Agreement.

BellSouth witness Varner testified that BellSouth's position on this issue is that negotiations take place in order to incorporate new language and terms into an Interconnection Agreement based upon new situations, governing law, processes, and technologies. Furthermore, witness Varner stated that this is not an arbitrable issue due to the fact that there is no contract language attached to this issue. Witness Varner noted that as stated in DeltaCom's position on this issue, the current arrangement has worked well for the past two years. However, DeltaCom's supporting testimony and petition seem to infer otherwise. Further, witness Varner testified that in order to ensure that DeltaCom and BellSouth have the most beneficial agreement for both Parties, new negotiations need to take place.

In its Proposed Order, BellSouth stated that for reasons that are not readily apparent, DeltaCom is asking this Commission to decide that DeltaCom should be permitted to operate under certain terms of its expired local Interconnection Agreement, while at the same time asking this Commission to arbitrate numerous disputes concerning proposed terms for a new Interconnection Agreement. Furthermore, BellSouth argued that DeltaCom attempted to expand the scope of this issue after the Petition for Arbitration was filed, by seeking to add an issue concerning binding forecasts and other newly raised matters. BellSouth objects to DeltaCom being permitted to do so. BellSouth noted that under the Act, DeltaCom is required to state the unresolved issues in its Petition. It is BellSouth's position that DeltaCom is attempting to expand those issues and it should not be allowed to do so.

In its Proposed Order, the Public Staff noted that Exhibit B to the Petition for Arbitration contains 19 particular references to DeltaCom's proposed Interconnection Agreement which pertain to this issue. The Public Staff noted that the record contains little substantive information on this issue. However, the Public Staff pointed out that if the current local interconnection arrangements cease and no substitute exists, service disruptions may well occur. Thus, the Public Staff stated that it is necessary to continue the current arrangements unless the Parties have reached agreement otherwise. Further, the Public Staff also stated that if the provision is not included in the current local interconnection arrangements, then the Commission should decline to order the inclusion of the proposed language.

The Commission disagrees with BellSouth's assertion that this is not an arbitrable issue because no contract language was attached. DeltaCom filed its Petition for Arbitration on June 14, 1999, and attached three exhibits to its Petition as follows: Exhibit A-Proposed Interconnection Agreement, Exhibit B-Matrix of Unresolved Issues, and Exhibit C-Verification. In its Exhibit B attached to the Petition, DeltaCom raised 19 items under this issue and specifically cited where the proposed related language was set forth in its proposed Interconnection Agreement. Based on DeltaCom's Proposed Order, it now appears that 10 of these items have been negotiated and that nine items remain unresolved. These nine items relate to the following matters: (1) definition of local traffic, (2) reconfiguration charges for new installations at existing points of interconnection, (3) payment of nonrecurring charges as a result of network redesigns/reconfigurations initiated by BellSouth, (4) trunking options available to the Parties, (5) the routing of traffic by the least costly method, (6) cross-connection charges applicable in a collocation arrangement at the BellSouth wire center, (7) the loading and testing of NXX codes, (8) the delivery of traffic between DeltaCom, BellSouth, and a third party, and (9) binding forecasts with liquidated damages. Of these nine items, all but one which relates to binding forecasts, have existing provisions that are in the current local interconnection arrangements.

The Commission agrees with the Public Staff that if the current local interconnection arrangements cease and no substitute exists, service disruptions may well occur. That, of course, is an undesired outcome. The local interconnection arrangements outline how the Parties exchange and account for different traffic. Accordingly, the Commission believes that in order to avoid service disruptions, it is appropriate to require the Parties to incorporate into their new Interconnection Agreement their current local interconnection arrangements as they relate to the foregoing items, excluding binding forecasts, unless they negotiate other mutually acceptable provisions.

In regard to the implementation of a procedure for binding forecasts, DeltaCom urged the Commission to direct BellSouth to form a binding forecast capability that gives DeltaCom the assurance of having available facilities when needed and as forecasted. DeltaCom noted that with binding forecasts, BellSouth can build out its network without fearing that it will not be able to recoup its investments. DeltaCom stated its willingness to be bound by its forecasts. DeltaCom is willing to pay an underutilization charge for any trunks that are constructed by BellSouth for DeltaCom as a result of a binding forecast. Furthermore, DeltaCom stated that binding forecasts and the requirement that suppliers be made whole where purchasers over-forecast needs are procedures that have worked and continue to work well in the interexchange industry, and should be applied to the local exchange industry.

DeltaCom stated that it has been negotiating this matter of binding forecasts with BellSouth for almost a year. DeltaCom stated that it was approached by the BellSouth account team to implement

binding forecasts on the assumption by at least some at BellSouth that binding forecasts had been agreed to and were needed to efficiently govern the relationship between the companies. DeltaCom stated that it is perplexed by BellSouth's refusal to agree to binding forecasts because of the benefits such a program will provide to BellSouth. Further, DeltaCom noted that BellSouth has not clearly opposed binding forecasts and still seems to be analyzing the issue. DeltaCom believes that binding forecasts should be implemented as one means to facilitate orderly and efficient local competition. It is DeltaCom's position that through the forecasts, BellSouth will be assisted in knowing what facilities need to be constructed and will not be harmed since DeltaCom will be required to pay an underutilization fee on any trunks that are not put into service.

BellSouth witness Varner testified that although not required under the Act or by FCC Rules, BellSouth is currently analyzing the possibility of providing a service whereby BellSouth commits to provisioning the necessary network buildout and support when a CLP agrees to enter into a binding forecast of its traffic requirements. Further, witness Varner testified that while BellSouth has not yet completed the analysis needed to determine if this is a feasible offering, BellSouth is willing to discuss the specifics of such an arrangement with DeltaCom.

In its Proposed Order, BellSouth argued that the Commission should deny DeltaCom's request for binding forecasts. BellSouth stated that Section 251 of the Act does not impose a duty nor an obligation on the part of an incumbent to enter into binding forecasts, which makes this issue inappropriate for arbitration. Further, BellSouth argued that DeltaCom's proposal for binding forecasts is ill-defined and administratively unworkable. Although DeltaCom would be willing to compensate BellSouth if DeltaCom fails to meet its forecast, the specifics of how this compensation would work are not spelled out in DeltaCom's proposal. Additionally, DeltaCom's proposal may make it difficult for BellSouth to serve other carriers that may require trunking capacity that has been reserved for DeltaCom pursuant to a binding forecast. For example, under DeltaCom's proposal, BellSouth would be prohibited from allowing other carriers to take advantage of these existing trunks, even though DeltaCom is not using, and may never use the trunks.

The Commission believes that it should decline to decide at this time whether the Act mandates a binding forecast requirement of the sort requested by DeltaCom, consistent with the Commission Recommended Arbitration Order in Docket No. P-582, Sub 6, involving ICG and BellSouth. However, the Commission does note that DeltaCom's request for this type of requirement does not appear to be inappropriate. In fact, such a provision can be found in BellSouth's Revised Statement of Generally Available Terms (SGAT). The Commission also agrees with the Public Staff that since this provision for binding forecasts is not included in the current local interconnection arrangements, then the Commission should decline to order the inclusion of the proposed language. However, BellSouth witness Varner testified that BellSouth was still analyzing this proposal and that BellSouth was willing to discuss the specifics of such an arrangement with DeltaCom. Accordingly, the Commission encourages BellSouth and DeltaCom to continue to negotiate on the matter of binding forecasts.

CONCLUSIONS

The Commission concludes that the Parties should incorporate into their new Interconnection Agreement the existing local interconnection arrangements pertaining to the following matters until or unless the Parties reach agreement otherwise: (1) definition of local traffic, (2) reconfiguration charges for new installations at existing points of interconnection, (3) payment of nonrecurring charges as a result of network redesigns/reconfigurations initiated by BellSouth, (4) trunking options available to the Parties, (5) the routing of traffic by the least costly method, (6) cross-connection

charges applicable in a collocation arrangement at the BellSouth wire center, (7) the loading and testing of NXX codes, and (8) the delivery of traffic between DeltaCom, BellSouth, and a third party. The Commission declines to include any proposed provisions, in this regard, that are not contained in the current local interconnection arrangements. However, the Commission encourages BellSouth and DeltaCom to continue to negotiate on the matter of binding forecasts.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

MATRIX ISSUE NO. 7(b)(iv): Who pays for the audit?

POSITIONS OF PARTIES

DELTACOM: DeltaCom argued that the party requesting the audit should pay for it. DeltaCom stated that this approach is simple and avoids any dispute as to who ultimately is responsible for the expense of the audit.

BELLSOUTH: BellSouth maintained that the issue is relatively straightforward: should one carrier that inaccurately reports information to a significant extent to another carrier be required to pay for the costs of the audit that uncovers the inaccurate information. BellSouth stated that it agrees that the party requesting an audit should be responsible for the costs of the audit, except that BellSouth would add that if the audit reveals that either party is found to have overstated the PLU or PIU by 20% or more, then that party should be required to reimburse the other party for the costs of the audit. Therefore, if a BellSouth-requested audit reveals that DeltaCom has overstated PLU/PIU percentages by 20% or more, DeltaCom should pay for the audit; otherwise, BellSouth would be required to do so. BellSouth maintained that this is a fair and reasonable provision for the protection of both Parties. BellSouth maintained that DeltaCom's argument that "each Party should pay for their own audits regardless of the outcome otherwise it would constitute a 'penalty'" is inconsistent with basic principles of cost causation. BellSouth further stated that paying the costs of an audit is not akin to a "penalty" as DeltaCom argued, since BellSouth would only be entitled to recover its actual costs incurred in conducting the audit, not fines or punitive damages. BellSouth argued that including such a provision in the Interconnection Agreement is reasonable and would create an incentive for DeltaCom to report accurately PLU/PIU information in the first place. Therefore, BellSouth recommended that the Commission conclude that it is reasonable to require the inclusion of a provision for audit rights in the Interconnection Agreement such that if one party is found to have overstated the PLU/PIU percentages by 20% or more, then that party should be required to pay for the entire audit.

PUBLIC STAFF: The Public Staff maintained that both Parties agree that, generally, the party requesting an audit should pay for it. The Public Staff further stated that one reason a party would request an audit is if it believed that reports provided by the other party were inaccurate or overstated. The Public Staff argued that should this belief be borne out by the audit, it is equitable that the party in error should pay the costs of the audit. The Public Staff maintained that including such language in the Interconnection Agreement encourages the Parties to deal with each other honestly and to ensure that information provided to each other is accurate. The Public Staff, therefore, recommended that the Commission accept BellSouth's proposed language providing that each party bears the cost of an audit; however, a party overstating PLU/PIU by 20% or more will bear the other party's audit costs.

DISCUSSION

The Commission notes that the Parties agree that the party requesting an audit should be responsible for paying for the audit. In addition, the Commission believes that it is reasonable and appropriate to adopt the additional language proposed by BellSouth that if an audit reveals that a party reported PLU/PIU in error and overstated such percentages by 20% or more, the party in error should pay for the cost of the audit. The Commission agrees with BellSouth and the Public Staff that inclusion of such language would encourage the Parties to deal with each other honestly and provide accurate information to each other.

CONCLUSIONS

The Commission concludes that it is reasonable and appropriate to adopt BellSouth's proposed language providing that the party requesting an audit should be responsible for paying for the audit; however, a party overstating PLU/PIU by 20% or more shall pay for the cost of the audit.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

MATRIX ISSUE NO. 8(b): Should the losing party to an enforcement proceeding or proceeding for breach of the Interconnection Agreement be required to pay the costs of such litigation?

POSITIONS OF PARTIES

DELTACOM: Yes. The losing party should pay the costs of such proceeding and litigation. Such a provision will deter frivolous claims, and encourage both Parties to resolve disputes informally. The Parties' present Interconnection Agreement contains this provision.

BELLSOUTH: No. BellSouth believes that the inclusion of a "loser pays" provision would have a chilling effect on both Parties to the extent that even meritorious claims may not be filed. TA96 is barely three years old and clearly represents an evolving area of rules and regulation. It is inevitable that complaints will be brought by various parties seeking clarification as issues emerge. Often times there is no clear "winner" or "loser," thus further complicating the use of a "loser pays" clause. A negative provision like "loser pays" should not be included in the agreement.

PUBLIC STAFF: No. It is not within the Commission's province to order the payment of attorney's fees and other costs by one party to another. While such a provision might indeed reduce litigation and encourage settlement and fair play, there is a real danger of even more controversy erupting as to whether a party can unequivocally be denominated as a winner.

DISCUSSION

DeltaCom witness Rozycki testified that a provision in the contract as to whether the losing party to an enforcement proceeding or a proceeding for breach of the Interconnection Agreement should be required to pay the costs of litigation would not encourage "forum shopping." First, DeltaCom stated that the proposed language is in the Parties' existing Interconnection Agreement so BellSouth has agreed to this language previously. Second, according to DeltaCom, the purpose of this provision is to encourage Parties to meet their commitments under this Agreement. Witness Rozycki further testified that he believed this provision actually encourages Parties to settle rather than face a negative decision. The Interconnection Agreement between DeltaCom and BellSouth which was previously approved contains a "loser pays" provision. DeltaCom simply seeks to continue that

provision for two more years.

BellSouth witness Varner testified that it is inevitable that complaints will be brought by various parties seeking clarification as issues emerge. Often times there is no clear "winner" or "loser," thus further complicating the use of a "loser pays" clause. BellSouth stated that a negative provision like "loser pays" should not be included in the Agreement. Witness Varner further testified that BellSouth will agree to appropriate language regarding jurisdictional issues that would allow the Parties to seek damages under the Agreement from the courts since that would be a matter outside the Commission's jurisdiction. It is BellSouth's position that the Parties should determine at the time they enter the Interconnection Agreement where disputes will be resolved. BellSouth asserted that this is standard contract language and for good reason. It gives certainty as to how and where disputes will be resolved and it helps prevent the potential for "forum shopping" as well as the potential for inconsistent decisions under the Agreement.

The Public Staff recommended that the Commission encourage the Parties to continue negotiation of this issue and to consider seeking redress in another forum.

The Commission concurs with the Public Staff that it is not appropriate to require the inclusion of language obligating the losing party to an enforcement proceeding or proceeding for breach of the Interconnection Agreement to pay the cost of the litigation.

CONCLUSIONS

The Commission declines to require the inclusion of language obligating the losing party to an enforcement proceeding or proceeding for breach of the Interconnection Agreement to pay the cost of the litigation.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

MATRIX ISSUE NO. 8(e): Whether language covering tax liability should be included in the Interconnection Agreement and, if so, whether that language should simply state that each party is responsible for its tax liability?

POSITIONS OF PARTIES

DELTACOM: No. A statement concerning tax liability need not be included. DeltaCom has proposed a compromise, supplying tax language acceptable to it to BellSouth which was less verbose and more understandable. BellSouth has not responded. In any event, the Agreement needs no provision relating to tax liability, which is an issue between the respective Parties and the relevant taxing authorities. DeltaCom noted that BellSouth had not put forward its suggested language into the record.

BELLSOUTH: Yes. BellSouth has proposed language for the Interconnection Agreement based upon BellSouth's experiences with tax matters and liability issues in connection with the Parties' obligations under interconnection agreements. A variety of taxes are imposed upon telecommunications carriers, both directly and indirectly (collected from end-users and other carriers). As would be expected, problems and disputes over the application and validity of these taxes will and do occur. The Interconnection Agreement should clearly define the respective rights and duties for each party in the handling of such tax issues so that they can be resolved fairly and

quickly.

PUBLIC STAFF: No. Each party should be responsible for its own tax liability outside the Interconnection Agreement. However, if the Parties desire a provision on tax liability in the Agreement, such a provision should simply state that each party shall be responsible for its own tax liability.

DISCUSSION

The Commission believes that, while it may be desirable as a business practice to have provisions in a contractual agreement which spell out tax liability, the Commission should not itself impose such a provision, absent mutual agreement by the Parties. In his rebuttal testimony, DeltaCom witness Rozycki agreed with BellSouth that the Interconnection Agreement should clearly define the Parties' rights and duties in handling tax issues. The Parties did not agree, however, on the specific language to be included in the Agreement. While DeltaCom in negotiations proposed no language on taxes, witness Rozycki, in his direct testimony, did suggest language. The Commission believes that the Parties should continue their negotiations on this issue and arrive at a mutually agreeable provision, even if it is one that simply states that each party shall be responsible for its own tax liability.

CONCLUSIONS

The Commission declines to require the insertion of a tax liability provision in the Interconnection Agreement but encourages the Parties to continue negotiations on this issue.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

MATRIX ISSUE NO. 8(f): Should BellSouth be required to compensate DeltaCom for breach of material terms of the contract?

POSITIONS OF PARTIES

DELTACOM: Yes. There should be a provision establishing liability for a material breach of contract.

BELLSOUTH: The issue of penalties or liquidated damages is not an appropriate subject of arbitration. The Commission lacks the statutory or jurisdictional authority to award or order monetary damages or financial penalties. Even if a penalty or liquidated damage award could be arbitrated, it is completely unnecessary. State law and Commission complaint procedures are available, and are more than sufficient, to address or remedy any breach of contract situation should it occur. Furthermore, nothing in TA96 nor in any order of the FCC requires the inclusion of a liquidated damages provision in an Interconnection Agreement.

PUBLIC STAFF: The Commission should decline to include a provision in the Interconnection Agreement that requires either party to compensate the other party for the breach of material terms of the contract.

DISCUSSION

The Commission concurs with the Public Staff that the Commission should decline to include a provision establishing compensation for a material breach of contract. Further, the Commission notes that the Parties presented Section 11 - Resolution of Disputes in Part A of Exhibit A - Interconnection Agreement Between DeltaCom and BellSouth filed with DeltaCom's June 14, 1999 Petition for Arbitration.

CONCLUSIONS

The Commission declines to require the inclusion of a provision establishing compensation for a material breach of contract in the Interconnection Agreement. The Parties are referred to Section 11 of the Parties' Interconnection Agreement.

IT IS, THEREFORE, ORDERED as follows:

1. That BellSouth and DeltaCom shall prepare and file a Composite Agreement in conformity with the conclusions of this Order not later than June 5, 2000. Such Composite Agreement shall be in the form specified in paragraph 4 of Appendix A in the Commission's August 19, 1996 Order in Docket Nos. P-140, Sub 50, and P-100, Sub 133, concerning arbitration procedure (Arbitration Procedure Order).

2. That, not later than May 22, 2000, a party to the arbitration may file objections to this Order consistent with paragraph 3 of the Arbitration Procedure Order.

3. That, not later than May 22, 2000, any interested person not a party to this proceeding may file comments concerning this Order consistent with paragraphs 5 and 6, as applicable, of the Arbitration Procedure Order.

4. That, with respect to objections or comments filed pursuant to decretal paragraphs 2 or 3 above, the party or interested person shall provide with its objections or comments an executive summary of no greater than one and one-half pages single-spaced or three pages double-spaced containing a clear and concise statement of all material objections or comments. The Commission will not consider the objections or comments of a party or person who has not submitted such executive summary or whose executive summary is not in substantial compliance with the requirements above.

5. That parties or interested persons submitting Composite Agreements, objections or comments shall also file those Composite Agreements, objections or comments, including the executive summary required in decretal paragraph 4 above, on an MS-DOS formatted 3.5-inch computer diskette containing noncompressed files created or saved in WordPerfect format.

ISSUED BY ORDER OF THE COMMISSION.

This the 20th day of April, 2000.

NORTH CAROLINA UTILITIES COMMISSION
Cynthia S. Trinks, Deputy Clerk

bc041900.01

APPENDIX A

GLOSSARY OF ACRONYMS

Docket No. P-500, Sub 10

Act	Telecommunications Act of 1996
BellSouth	BellSouth Telecommunications, Inc.
CLLI	Common Language Location Identifier
CLP	Competing Local Provider
CLEC	Competing Local Exchange Company (Carrier)
Commission	North Carolina Utilities Commission
DeltaCom	ITC^DeltaCom Communications, Inc
DOE	

Docket No. 00-00280
Jackson Direct Exhibit 5
January 4, 2001

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1178

In the Matter of Petition of BellSouth Telecommunications, Inc. for Arbitration of Interconnection Agreement with Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	)	ORDER RULING ON OBJECTIONS, REQUEST FOR RECONSIDERATION, AND COMPOSITE AGREEMENT

BEFORE: Commissioner San J. Ervin, IV, Presiding, and Commissioners William R. Pittman and Robert V. Owens, Jr.

BY THE COMMISSION: On June 13, 2000, the Commission issued a Recommended Arbitration Order (RAO) in this docket. Finding of Fact No. 2 of that Order states: "For reciprocal compensation purposes, [Intermedia Communications Inc.] Intermedia should be compensated at [BellSouth Telecommunications, Inc.'s] BellSouth's tandem interconnection rate.

On July 13, 2000, BellSouth filed its Objection and Request for Reconsideration concerning the Commission's decision regarding the application of the tandem rate to reciprocal compensation. BellSouth stated that reconsideration is warranted because the Commission's determination is legally, and factually flawed.

On July 21, 2000, Intermedia filed its Response in Opposition to BellSouth's Objection and Request for Reconsideration. Intermedia pointed out that BellSouth's arguments as to the tandem switch rate have previously been rejected by the Commission and that BellSouth has not presented a single reason that the Commission's determinations in the RAO as to the tandem switch rate should be revisited. Intermedia requested that the Commission reject BellSouth's Objection and Request for Reconsideration.

Discussion and Commission conclusions regarding the issue raised by BellSouth's in its Objections and Request for Reconsideration follow:

FINDING OF FACT NO. 2 - (MATRIX ISSUE NO. 3): Should Intermedia be compensated for end office, tandem, and transport elements, for purposes of reciprocal compensation?

INITIAL COMMISSION DECISION

The Commission concluded that, for reciprocal compensation purposes, Intermedia should be compensated at BellSouth's tandem interconnection rate.

COMMENTS/OBJECTIONS

BELLSOUTH: On July 13, 2000, BellSouth filed Objection and Request for Reconsideration of the Commission's Recommended Arbitration Order (RAO) dated June 13, 2000. Specifically, BellSouth objected to the Commission's determination that Intermedia should be compensated at BellSouth's tandem interconnection rate. BellSouth stated that reconsideration is warranted because the Commission's determination is legally and factually flawed, and that the evidence in the record does not support the award of the tandem interconnection rate to Intermedia.

In its argument that the Commission's decision is legally flawed, BellSouth stated that Intermedia's evidence supports only the notion that its switches may be capable of performing tandem switching functions. BellSouth argued that no serious argument can be made that Intermedia's two switches in Charlotte and Raleigh actually perform functions similar to those performed by BellSouth's tandem switch. While Intermedia's switches may be capable of performing tandem switching functions when connected to end office switches, capability is not the test. BellSouth stated that Intermedia did not present any credible evidence to support a conclusion that the Intermedia switches actually perform functions similar to BellSouth's tandem switch. BellSouth further stated that the information submitted by Intermedia regarding the manufacturer's specifications of the switches only spoke to the capability of the switch, not its actual performance.

BellSouth argued that the Commission's analysis that "the concept of equivalent functionality is included within the requirement that the equipment utilized by both Parties covers the same basic geographic area," cannot be squared with the plain language of the FCC's discussion of Rule 51.711. The courts have expressly held that equivalent functionality and geographic comparability are two separate requirements that must be satisfied.

In support of its arguments, BellSouth cited three Court cases: *U.S. West Communications, Inc. v. Minnesota Public Utilities Commission (U.S. West v. Minnesota PUC),*, 55 F. S.p. d. 968, 977 (D. Minn. 1999); *MCI Telecommunications Corp. v. Michigan Bell Telephone Co. (MCI v. Michigan Bell),* 79 F. Spp.. d. 768, 790 (E.D. Mich. 1999); and, *MCI Telecommunications Corp. v. Illinois Bell Telephone Company d/b/a Ameritech Illinois, Inc. (MCI v. Ameritech),* No. 97c2225, 1999 U.S. dist. Lexis 111488 (N.D. Ill.), June 22, 1999.

BellSouth also referred to and quoted extensively from portions of the Proposed Order of the Public Staff which supported BellSouth's position as to the issue of actually performing tandem switching functions as opposed to having the capability of performing these functions.

In its argument that the Commission's determination is factually flawed, BellSouth stated that there is no credible evidence in the record that Intermedia's switches serve a geographic area comparable to BellSouth's tandem switch.

BellSouth stated that, as it had previously pointed out, Intermedia inappropriately labeled its collocation sites as end-office switches, and artificially inflated the number of end users. BellSouth noted that Intermedia only has three collocation sites for the Raleigh LATA and two for the Charlotte LATA, which clearly indicates only the capability to serve a limited number of customers in a very small geographic service area. Moreover, depicting rate centers to be served in the future does nothing to support the requirement that customers are currently being served by Intermedia. BellSouth submitted that the information relied upon by the Commission in making its determination was flawed and insufficient.

BellSouth noted that the Public Staff and the Florida Public Service Commission Staff (in the same BellSouth-Intermedia arbitration in Florida) concurred with BellSouth as to this issue.

INTERMEDIA: On July 21, 2000, Intermedia filed its Response in Opposition to BellSouth's Objection and Request for Reconsideration. Intermedia pointed out that BellSouth's arguments as to the tandem switch rate have previously been rejected by the Commission and BellSouth has not presented a single reason that the Commission's determinations in the RAO as to the tandem switch rate should be revisited. Intermedia requested that the Commission reject BellSouth's Objection and Request for Reconsideration.

Intermedia stated that FCC Rule 51.711(a)(3) and Paragraph 1090 of the FCC's First Report and Order demonstrate that a competing local provider must establish that the facilities are geographically comparable to the incumbent's facilities in order to receive the tandem interconnection rate for purposes of reciprocal compensation. Paragraph 1090 also shows that new technology such as Intermedia's Nortel DMS 500 switches, while not constituting an identical network to the incumbent LEC's network, can achieve such comparability by showing "geographic coverage" and "similar functionality."

Intermedia pointed out that the Commission followed this same approach to geographic comparability in both the ICG and DeltaCom arbitrations. (*ICG Telecom Group, Inc. For Arbitration of its Interconnection Agreement with BellSouth Telecommunications, Inc.*(ICG), Docket No. P-582, Sub 6; *Petition by ITC^DeltaCom*

Communications, Inc. (DeltaCom), *For Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. P-500, Sub 10.)

Intermedia contended that BellSouth's reliance on a recommendation from another jurisdiction is not persuasive. Intermedia stated that the opinion of the Commission Staff in Florida, where an arbitration between Intermedia and BellSouth is pending, has not yet been ruled on by the Florida Public Service Commission, and BellSouth's emphasis on a non-binding opinion demonstrates the futility it faces with regard to objecting to the panel's conclusion on the tandem switching issue. Furthermore, Intermedia pointed out that resolution of the tandem switching issue requires factual determinations which may be specific to a particular state, and the recommendation of Florida's Commission Staff may not apply as well in North Carolina.

Intermedia noted the July 5, 2000 decision in the corresponding Georgia Intermedia/BellSouth arbitration, in which the Georgia Public Service Commission issued a ruling adopting its staff's recommendation that Intermedia is entitled to the tandem interconnection rate in Georgia. Intermedia pointed out that Intermedia utilizes the same switch (Nortel DMS-500 Switch) in Georgia as it does in North Carolina. Intermedia submitted that the Georgia Public Service Commission made the factual determination that Intermedia's network was geographically comparable to BellSouth's network, and that the Georgia Commission's decision is more persuasive than an opinion from the Florida staff.

DISCUSSION

In the RAO in this proceeding, the Commission stated that the pertinent authority governing the issue of reciprocal compensation for tandem switching is found in FCC Rule 51.711(a)(3) and Paragraph 1090 of the FCC's First Report and Order.

Rule 51.711(a)(3):

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

Paragraph 1090 of the First report and Order:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end office switch. In such event,

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

Based on its understanding and interpretation of the FCC's Rule 711.11 and Paragraph 1090, the Commission found, based on the evidence submitted by Intermedia, that Intermedia had met its burden of proof that its switches cover a comparable geographic area to that covered by BellSouth's switches, and that, for reciprocal compensation purposes, Intermedia was entitled to compensation at BellSouth's tandem interconnection rate.

In addition to its decision in the RAO in this docket, the Commission has concluded in two previous arbitrations, ICG/BellSouth (Docket P-582, Sub 6) and DeltaCom/BellSouth (Docket P-590, Sub 10), that both companies had met their burden of proof in regard to this issue, and were entitled to BellSouth's tandem switching rate for reciprocal compensation purposes.

In the DeltaCom RAO, the Commission discussed more extensively its belief that the language in the FCC's Rule 51.711 and the attendant discussion in Paragraph 1090 clearly contemplate that exact duplication of the ILEC's network architecture is not necessary in order for the competing local provider (CLP) to be eligible to receive reciprocal compensation at the tandem switching rate. The Commission also indicated that it believes that the language in the FCC's Order treats geographic coverage as a proxy for equivalent functionality, and that the concept of equivalent functionality is included within the requirement that the equipment utilized by both parties covers the same basic geographic area.

The Commission expanded this reasoning further in its Order Ruling on Objections, Request for Reconsideration, and Composite Agreement in the DeltaCom arbitration decision by stating: "The literal language of FCC Rule 51.711 states that the Commission should rely on geographic coverage as the sole basis for determining this issue. The only way to reconcile the language of FCC Rule 51.711 with Paragraph 1090 of the First Report and Order is to adopt the approach taken by the Commission in the RAO in the DeltaCom case, which treats comparable geographic coverage as a proxy for equivalent functionality. This approach reconciles FCC Rule 51.711 and Paragraph 1090 in a manner which rests upon a reasonable construction of both. Any other approach necessarily assumes that there is an inconsistency between FCC Rule 51.711 and Paragraph 1090, a result which

the Commission is loath to reach. Furthermore, the adoption of the argument advanced by BellSouth and the Public Staff would, of necessity, require a CLP to duplicate the network architecture utilized by the incumbent, an outcome which is expressly rejected in Paragraph 1090. Finally, adoption of the argument that the CLP's switch must actually be serving customers in the relevant geographic area instead of being capable of serving them makes the availability of the tandem switching rate contingent upon the level of market penetration achieved by the CLP, an outcome which finds no support in either Rule 51.711 or Paragraph 1090."

The Commission concluded in the RAO that Intermedia had met its burden of proof that its switches cover a comparable geographic area to that covered by BellSouth's switches, and that, for reciprocal compensation purposes, Intermedia is entitled to compensation at BellSouth's tandem interconnection rate. Further, as the Commission pointed out in the DeltaCom Order Ruling on Objections, Request for Reconsideration, and Composite Agreement, it does not agree that FCC Rule 51.711(a) in its entirety can be interpreted as creating a two-pronged test involving both equivalent functionality and geographical serving area as separate prerequisites for obtaining the tandem switching rate.

In any event, the Commission believes that, regardless of the proper interpretation of the FCC's Rule and Paragraph 1090 of the First Report and Order, Intermedia has met both the functionality and geographic coverage tests claimed by BellSouth. As pointed out in the RAO, with respect to the issue of geographic comparability, Intermedia submitted information which included a list of its customers by location; a listing of the company's collocations; and county maps depicting current and future rate centers in and around the two cities. With respect to the functionality issue, Intermedia submitted information from the manufacturer of its two North Carolina switches concerning the technology inherent in the switches used by Intermedia. Intermedia also included diagrams and narratives describing the trunk topology of its two North Carolina switches and call diagrams depicting the functions performed by its switches. In addition, Intermedia witness Jackson testified that "The [Intermedia switches perform the functions of a tandem, such as remote traffic aggregation, and the functions of end office switches, such as providing dial tone. Due to this different network design concept, Intermedia's single switches have to perform all of the relevant functions, including the function BellSouth assigns to its tandem switches."

The three court cases cited by BellSouth in support of its views are the same three court cases cited by BellSouth in the DeltaCom proceeding. In the DeltaCom Order, the Commission expressed doubts about the generic value of these cases as they involved specific fact situations peculiar to those cases. The Commission remains unconvinced that the court cases cited by BellSouth are particularly persuasive of its arguments in the Intermedia case. The Commission has serious doubts about the generic applicability of these decisions for the same reasons set forth in the ITC^DeltaCom Order.

As stated in the DeltaCom Order, the Commission reiterates its advice to any party in this docket wishing to pursue this issue to seek a Declaratory Ruling from the FCC.

CONCLUSIONS

The Commission concludes that Intermedia has clearly met its burden of proof that its switches provide equivalent functionality through their geographic coverage and that, by doing so, Intermedia is entitled to compensation at BellSouth's's tandem interconnection rate.

In addition, the Commission concludes that, if there is a two-part test for both geographic coverage and functional equivalence, Intermedia meets both prongs of such a test. Thus, the Commission finds it appropriate to deny BellSouth's Objection and Request for Reconsideration and affirms its RAO in this regard.

IT IS, THEREFORE, ORDERED as follows:

1. That the Commission hereby denies BellSouth's Objection and Request for Reconsideration and affirms Finding of Fact No. 2 of its RAO in this docket.

2. That the Commission will entertain no further comments, objections, or unresolved issues with respect to issues previously addressed in this arbitration proceeding.

ISSUED BY ORDER OF THE COMMISSION.

This the 6th day of September, 2000.

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen

Geneva S. Thigpen, Chief Clerk

je0906.01

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1178

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition of BellSouth Telecommunications, Inc. For Arbitration of Interconnection Agreement with Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	))))	RECOMMENDED ARBITRATION ORDER

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, on February 23, 2000.

BEFORE: Commissioner Sam J. Ervin, IV, Presiding, and Commissioners William R. Pittman and Robert V. Owens, Jr.

APPEARANCES:

FOR BELLSOUTH TELECOMMUNICATIONS, INC.:

Edward L. Rankin, III, General Counsel - North Carolina, BellSouth Telecommunications, Inc., Post Office Box 30188, Charlotte, North Carolina 28230

A. Langley Kitchings, General Attorney, BellSouth Telecommunications, Inc., 675 West Peachtree Street, Suite 4300, Atlanta, Georgia 30375-0001

FOR INTERMEDIA COMMUNICATIONS, INC.:

Henry C. Campen, Jr. and Layth S. Elhassani, Parker, Poe, Adams & Bernstein, L.L.P., First Union Capitol Center, Suite 1400, 150 Fayetteville Street Mall, Raleigh, North Carolina 27602-0389

Jonathan E. Canis and Ronald J. Jarvis, Kelley, Drye & Warren, L.L.P., 1200 19th Street, N.W., Suite 500, Washington, D.C. 20036

FOR THE USING AND CONSUMING PUBLIC:

Lucy E. Edmondson and Kendrick C. Fentress, Staff Attorneys, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4326

BY THE COMMISSION: This arbitration proceeding is pending before the North Carolina Utilities Commission pursuant to Section 252(b) of the Telecommunications Act of 1996 (TA96 or the Act) and Section 62-110(f1) of the North Carolina General Statutes. On December 7, 1999, BellSouth Telecommunications, Inc. (BellSouth) filed a Petition for Arbitration of Interconnection Agreement with Intermedia Communications, Inc. (Intermedia) in this docket which initiated this proceeding. By its Petition, BellSouth requested that the Commission arbitrate certain terms and conditions with respect to interconnection between itself as the petitioning party and Intermedia.

The purpose of this arbitration proceeding is for the Commission to resolve the issues set forth in the Petition and Responses. 47 U.S.C.A. Section 252(b)(4)(C). Under the Act, the Commission shall ensure that its arbitration decision meets the requirements of Section 251 and any valid Federal Communications Commission (FCC) regulations pursuant to Section 252. Additionally, the Commission shall establish rates according to the provisions in 47 U.S.C.A. Section 252(d) for interconnection, services or network elements, and shall provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C.A. Section 252(c).

Pursuant to Section 252 of TA96, the FCC issued its First Report and Order in CC Docket Numbers 96-98 and 95-185 on August 8, 1996 (Interconnection Order). The Interconnection Order adopted a forward-looking incremental costing methodology for pricing unbundled network elements (UNEs) which an incumbent local exchange company (ILEC) must sell new entrants, adopted certain pricing methodologies for calculating wholesale rates on resold telephone service, and provided proxy rates for State Commissions that did not have appropriate costing studies for UNEs or wholesale service. Several parties, including this Commission, appealed the Interconnection Order and on October 15, 1996, the United States Court of Appeals for the Eighth Circuit issued a stay of the FCC's pricing provisions and its "pick and choose" rule pending the outcome of the appeals.

The July 18, 1997 ruling of the Eighth Circuit, as amended on rehearing October 14, 1997, was largely in favor of state regulatory commissions and local phone companies and adverse to the FCC and potential competitors, primarily long distance carriers. The Eight Circuit held that 47 U.S.C.A. Sections 251 and 252 "authorize the state commissions to determine the prices an incumbent LEC may charge for fulfilling its duties under the Act." The Court of Appeals also vacated the FCC's "pick and choose rule." Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997).

On January 25, 1999, the United States Supreme Court entered its Opinion in AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721 (1999). The Supreme Court held, in pertinent part, that (1) the FCC has jurisdiction under Sections 251 and 252 of the Act to design a pricing methodology and adopt pricing rules; (2) the FCC's rules governing unbundled access are, with the exception of Rule 319, consistent with the Act; (3) it was proper for

the FCC in Rule 319 to include operator services and directory assistance, operational support systems, and vertical switching functions such as caller I.D., call forwarding, and call waiting within the features and services that must be provided by competitors; (4) the FCC did not adequately consider the Section 251(d)(2) "necessary and impair" standards when it gave requesting carriers blanket access to network elements in Rule 319; (5) the FCC reasonably omitted a facilities-ownership requirement on requesting carriers; (6) FCC Rule 315(b), which forbids ILECs to separate already-combined network elements before leasing them to competitors, reasonably interprets Section 251(c)(3) of the Act, which establishes the duty to provide access to network elements on nondiscriminatory rates, terms, and conditions and in a manner that allows requesting carriers to combine such elements; and (7) FCC Rule 809 (the "pick and choose" rule), which tracks the pertinent language in Section 252(i) of the Act almost exactly, is not only a reasonable interpretation of the Act, it is the most readily apparent. The Supreme Court remanded the cases back to the Eighth Circuit Court of Appeals for proceedings consistent with its opinion.

On June 10, 1999, the Eighth Circuit Court of Appeals entered an Order on remand in response to the Supreme Court's decision which, in pertinent part, reinstated FCC Rules 501-515, 601-611, and 701-717 (the pricing rules), Rule 809 (the "pick and choose" rule), and Rule 315(b) (ILECs shall not separate requested network elements which are currently combined). The Eighth Circuit also vacated FCC Rule 319 (specific unbundling requirements). The Court set a schedule for briefing and oral argument of those issues which it did not address in its initial opinion because of its ruling on the jurisdictional issues. The Court also requested the parties to address whether it should take any further action with respect to FCC Rules 315(c) - (f) regarding unbundling requirements. Iowa Utilities Board v. FCC, ___ F.3d ___ (Order Filed June 10, 1999).

On December 7, 1999, concurrent with filing its Petition for Arbitration, BellSouth filed the testimony of Alphonso J. Varner and W. Keith Milner.

On January 3, 2000, Intermedia filed an Answer and New Matter along with an Issues Matrix in response to BellSouth's Petition for Arbitration. Intermedia also filed the affidavit and testimony of J. Carl Jackson, Jr.

On January 7, 2000, BellSouth filed a Motion for Extension of Time to file its rebuttal testimony. Intermedia filed in opposition of BellSouth's Motion for Extension of Time in part on January 11, 2000, on the ground that BellSouth had prior notice of the new matters raised in Intermedia's Answer and New Matter. On January 12, 2000, the Commission issued an Order Allowing Extension of Time to File Rebuttal Testimony.

On January 12, 2000, the Commission issued an Order Setting Hearing in the matter for Wednesday, February 23, 2000.

On January 13, 2000, BellSouth filed a Motion seeking to resolve certain issues in the arbitration by addressing them in generic proceedings already pending before the Commission. Specifically, BellSouth sought to resolve issues concerning the definition of and/or rates for collocation and certain network capabilities that Intermedia wanted BellSouth to unbundle. On January 20, 2000, Intermedia filed a Motion in Opposition to BellSouth's Motion to Resolve Issues. On February 1, 2000, the Commission issued an Order Granting Motion to Resolve Issues which provided that the issues identified by BellSouth as pertaining to generic dockets on the issues of UNE rates, collocation, and performance measures should be considered in Docket Nos. P-100, Sub 133d, P-100, Sub 133j, and P-100, Sub 133k, respectively.

Also, on January 13, 2000, BellSouth filed the affidavit of Patrick C. Finlen.

On January 31, 2000, BellSouth filed the rebuttal testimony and exhibits of David A. Coon, D. Daonne Caldwell, W. Keith Milner, and Alphonso J. Varner. BellSouth also filed under seal Exhibit AJV-3, Exhibit DDC-1, and three CD-ROMs.

On February 9, 2000, BellSouth filed revised Caldwell Exhibit DDC-2 and revised Varner Exhibit AJV-1.

On February 9, 2000, the Public Staff filed its Notice of Intervention in the docket.

On February 17, 2000, Intermedia and BellSouth filed their Witness Lists and Estimated Cross-Examination Times.

On February 17, 2000, BellSouth filed revised Caldwell Exhibit DDC-1 and Varner Exhibit AJV-1.

On February 17, 2000, Intermedia filed a Motion for Acceptance of Late Filed Exhibits concerning the issue of reciprocal compensation for Intermedia's switch as a tandem switch.

On February 18, 2000, BellSouth filed a Supplemental Motion to Resolve Issues. With this Motion, BellSouth sought to supplement BellSouth's prior Motion to Resolve Issues. Specifically, BellSouth omitted an issue, Issue 18, from its previous Motion to have certain issues considered in the generic UNE docket. Intermedia did not oppose this Motion as long as the Commission would consider the issue in Docket No. P-100, Sub 133d.

Also, on February 18, 2000, Intermedia filed a Motion for Acceptance of Supplemental Testimony of J. Carl Jackson, Jr., his Supplemental Testimony and Exhibits.

On February 21, 2000, the Public Staff filed its Estimated Cross-Examination Times. Also on that day, BellSouth and Intermedia filed a revised Joint Issues Matrix.

On February 22, 2000, BellSouth filed its proprietary CD ROMs.

On February 22, 2000, BellSouth filed the rebuttal testimony and exhibits of Alphonso J. Varner.

This matter came on for hearing on February 23, 2000. Pursuant to a request from the Parties, the hearing was continued until 2:30 p.m. At the commencement of the hearing, all the issues had been deferred, withdrawn, or settled, except Issues 2(a), 3, 18, 22, 31, 32, 33, 37, 38, and 45. The Commission then heard the Parties' Motion to decide Issue 2(a), which pertains to the definition of local traffic for purposes of the Parties' reciprocal compensation obligations under Section 251 (b)(5) of the Act on the record without further testimony. The Parties requested that the Commission take administrative notice of the records of the ICG Telecom Group, Inc./BellSouth, ITC^DeltaCom/BellSouth and Time Warner Telecom of North Carolina, L.P./ BellSouth arbitrations in Docket Nos. P-582, Sub 6, P-500, Sub 10, and P-472, Sub 15, respectively. That Motion also asked that the Parties be allowed to brief the issue further. The Commission allowed the Motion.

The Commission also allowed BellSouth's February 18, 2000, Motion to Defer an Additional Issue, Issue 18, to a generic proceeding.

BellSouth presented the testimony of Alphonso J. Varner, (Direct, Rebuttal, and Supplemental Rebuttal). Intermedia presented the testimony of J. Carl Jackson, Jr. (Direct and Supplemental Direct). The rebuttal testimony of D. Daonne Caldwell was entered into the record by stipulation.

On February 25, 2000, BellSouth and Intermedia filed a Corrected Motion Regarding Inter-Carrier Compensation.

On February 29, 2000, the Commission issued an Order Seeking Late-Filed Exhibits pertaining to Issue 3, whether Intermedia should be compensated for end office, tandem and transport elements for purposes of reciprocal compensation. This Order requested that Intermedia submit on or before March 6, 2000: (1) a description of the relevant switches and associated technology necessary to provide service; (2) the number and location of customers, if available; and (3) any other information relevant to the Company's capability and intent to serve. In response, Intermedia submitted supplemental exhibits on March 6, 2000. On March 10, 2000, BellSouth filed a Reply to Intermedia's exhibits.

On March 1, 2000, BellSouth filed the redacted direct and rebuttal testimony of Alphonso J. Varner. BellSouth also withdrew Exhibit AJV-4, the direct and rebuttal testimony of W. Keith Milner, and the rebuttal testimony and exhibits of David A. Coon.

On March 3, 2000, Intermedia filed the redacted and revised testimony of J. Carl Jackson, Jr.

On March 6, 2000, Intermedia filed its confidential Supplemental Exhibits concerning issue 3.

On March 10, 2000, BellSouth filed its Reply to Intermedia's March 6, 2000 Supplemental Exhibits.

On May 2, 2000, BellSouth filed a Notice that Matrix Issue No. 45 had been resolved by the Parties.

A glossary of the acronyms referenced in this Order is attached hereto as Appendix A.

WHEREUPON, based upon a careful consideration of the entire record in this arbitration proceeding, the Commission now makes the following

FINDINGS OF FACT

1. Dial-up Internet Service Provider (ISP) traffic is subject to an interim intercarrier compensation mechanism at the same rate and in the same manner as reciprocal compensation for local traffic. Such rate should be subject to true-up at such time as the Commission has ruled pursuant to the FCC's subsequent Order on the subject.

2. For reciprocal compensation purposes, Intermedia should be compensated at BellSouth's tandem interconnection rate.

3. It is appropriate to adopt BellSouth's proposed language and proposed rates for interoffice transport for inclusion in the Interconnection Agreement, but allow for a true-up of the rates if the Commission adopts different permanent prices for interoffice transport in Phase I of its generic UNE proceeding in Docket No. P-100, Sub 133d.

4. The Commission declines to adopt the definitions for IntraLATA Toll Traffic proposed by either BellSouth or by Intermedia. The Parties are encouraged to continue to negotiate an appropriate definition that would be consistent with the Commission's conclusions set forth in Finding of Fact No. 7.

5. The definition of "switched access traffic" as proposed by Intermedia should be included in the Agreement. The Commission declines to require a definition of switched access traffic that specifically includes Internet Protocol (IP) telephony at this time.

6. The Commission finds it appropriate to adopt Intermedia's proposed language concerning lost switched access revenues due to lost or damaged billing data, but declines to require the inclusion of a clause requiring liability for lost switched access revenues resulting from lost or damaged billing data. Therefore, the last three sentences of Intermedia's proposed language which reference lost revenues or a liability cap of $10,000, should be excluded from the Agreement.

7. Reciprocal compensation should be paid for the local portion of framed packet data transported within a Virtual Circuit (VC) that originates and terminates within a Local Access and Transport Area (LATA). BellSouth and Intermedia are directed to propose a mechanism to provide for such compensation. Such proposal should be a joint proposal, if possible, and should include a description of and basis for the proposal. The proposal(s) should take into consideration that, while intraLATA frame relay circuits can be considered local for the purposes of physical installation and interconnection, the traffic occurring over the facilities can and probably will be local and intraLATA toll.

8. When there are no VCs on a frame relay interconnection facility when it is billed, the Parties should deem the Percent Local Circuit Use (PLCU) to be zero.

9. Matrix Issue No. 45 ("Should the Interconnection Agreement specifically state that the Agreement does not address or alter either Party's provision of Exchange Access Frame Relay Service or InterLATA Frame Relay Service?") has been resolved by the Parties and it has been withdrawn from this arbitration.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

MATRIX ISSUE NO. 2(a): Should the definition of "Local Traffic" for the purposes of the Parties' reciprocal compensation obligations under Section 251(b)(5) of TA96 include ISP traffic?

POSITIONS OF PARTIES

BELLSOUTH: No. The FCC's Declaratory Ruling, confirmed unequivocally that the FCC has, will retain, and will exercise jurisdiction over ISP traffic. In short, the FCC determined that ISP traffic is interstate traffic, not local traffic. Under the provisions of the Act and FCC Rules, only local traffic is subject to reciprocal compensation obligations. Thus, reciprocal compensation is not applicable to ISP-bound traffic. However, BellSouth recognizes that the Commission has established an intercarrier compensation mechanism

by its decisions in Docket Nos. P-582, Sub 6 and P-472, Sub 15 and has agreed to incorporate that mechanism into the Parties' Interconnection Agreement in this docket.

INTERMEDIA: Yes. The definition of local traffic should include traffic that originates from or is carried to an Enhanced Service Provider (ESP) or ISP. This issue was arbitrated in the ICG Telecom Group, Inc. (ICG) Arbitration, and the FCC has not made any changes which should alter the Commission's conclusion there. In addition, the FCC's Declaratory Ruling was recently (March 24, 2000) vacated by the United States Court of Appeals for the District of Columbia Circuit (D. C. Circuit), and therefore BellSouth may no longer rely upon the Declaratory Ruling to support its position that ISP traffic is jurisdictionally interstate. Until the FCC adopts a rule of prospective application, reciprocal compensation is appropriate for calls originated by BellSouth's end users to ISPs served by Intermedia. Without payment of reciprocal compensation, Intermedia will not receive compensation at all until the FCC adopts a prospective compensation rule at some indefinite point in the future.

PUBLIC STAFF: Yes. The law and rules governing this hotly disputed issue are confusing and often contradictory. Section 251(b)(5) of TA96 requires that interconnecting parties "establish telecommunications." 47 CFR § 51.701(a) restricts reciprocal compensation to "local telecommunications traffic." The FCC determined that the calls were nonlocal, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 14, FCC Rcd 3689, 3690 (¶ 1) (1999). Despite this determination, the FCC stated that parties may voluntarily negotiate reciprocal compensation in their interconnection agreements, and that state commissions may find that reciprocal compensation for calls to ISPs is appropriate. Id. at 3703-05 (¶¶ 24-25).

On March 24, 2000, the D.C. Circuit vacated this ruling and remanded it to the FCC in Bell Atlantic Companies v. FCC, ___F.3d____, 2000 WL 273383 (D.C. Cir. March 24, 2000). If the FCC determines calls to ISPs are intrastate, then the Commission's jurisdiction over this issue should not be affected. However, even if the FCC deems such calls to be interstate, it is not a foregone conclusion that such a ruling would supersede a state commission's authority over arbitration of interconnection agreements. See also, Southwester Bell Telephone Co. v. Public Utility Commission of Texas, _____F.3d ___, 2000 WL 332062, n. 2 (5th Cir. March 30, 2000).

This Commission first considered the issue of whether calls to ISPs were subject to reciprocal compensation in Docket No. P-55, Sub 1027. The Commission determined that the Interconnection Agreement between US LEC of North Carolina, Inc. (US LEC) and BellSouth did not distinguish calls to ISPs from other local traffic. The Commission also determined that a call terminates when delivered to the local exchange number of the ISP.

Since that ruling, BellSouth has been a party to arbitration in three Interconnection Agreements and has asked the Commission in each proceeding to determine that calls to ISPs are not local traffic subject to reciprocal compensation. The Commission has issued Orders in each docket determining that calls to ISPs, for the purpose of reciprocal compensation, are local traffic. BellSouth has not presented adequate justification in this case for the Commission to depart from its previous rulings on this issue. As such, the Parties are due reciprocal compensation for calls to ISP customers.

DISCUSSION

Students of the reciprocal compensation issue will recall that the Commission first considered the issue of whether calls to ISPs were subject to such compensation in Docket No. P-55, Sub 1027, where the Commission determined that such traffic was local. Subsequently, the FCC on February 26, 1999, issued its Declaratory Ruling finding such traffic to be interstate. However, the FCC stated that the parties could voluntarily negotiate reciprocal compensation for such calls in their interconnection agreements and state commissions could find reciprocal compensation for calls to ISPs to be appropriate. The FCC also stated that it would issue a subsequent Order to provide guidance as to the implementation of its Declaratory Ruling.

This Commission in subsequent arbitrations has provided for reciprocal compensation for ISP traffic at the same rate as that for local traffic generally – i.e., at the sum of certain UNE rates. However, out of deference to the FCC's ruling, the Commission has characterized this as an "interim intercarrier compensation mechanism," rather than categorizing the traffic as "local" (or as "nonlocal," for that matter). Moreover, the Commission has also provided that the rate applicable to ISP traffic will be subject to true-up at such time as the Commission has implemented the FCC's premised subsequent ruling. This true-up does not apply to local traffic subject to reciprocal compensation, generally.

Into this rather complicated mix has come the ruling by the D.C. Circuit on March 24, 2000, where the Court found the reasoning applicable to the "one-call theory" in the FCC's Declaratory Ruling inadequate, vacated the Order, and sent the matter back to the FCC for further consideration.

In the short term, it would certainly appear that the D.C. Circuit ruling undercuts those who maintain that ISP traffic is not local. In the longer term, however, the matter is less clear. Should the FCC be able to fortify and explicate its Declaratory Ruling better, it may very well ultimately prevail – and things will be on the same track they were before the March 24, 2000, D.C. Circuit ruling.

So, in view of these considerations, how should the Commission proceed? There are really only two practical alternatives. One would be to stay the course in line with its

previous decision – that is, an ISP rate for intercarrier compensation that is identical to the general reciprocal compensation rate but subject to eventual true-up. The other would be to consider ISP traffic to be explicitly local and have it subject to the general reciprocal compensation rate, but not subject to eventual true-up but, at most, to prospective adjustment depending on how the issue sorts itself out on the federal level.

The Commission concludes that this first alternative, an ISP rate for intercarrier compensation that is identical to the general reciprocal compensation rate but subject to eventual true-up, is preferable for several reasons. First, in this docket, BellSouth has already agreed to incorporate the original mechanism decided upon in previous arbitrations into this one. These filings were received after the March 24, 2000, D.C. Circuit decision, but BellSouth has chosen not to make an issue of it. Second, to change the ruling would probably require revisiting previous cases. Third, there is no pressing practical reason to revisit the issue in light of the March 24, 2000, D.C. Circuit decision. The implementation of a true-up is a contingent event. It will only happen at such time as the FCC has issued its follow-up ruling and this Commission has acted upon it. If the FCC is unable to have its Declaratory Ruling sustained, then obviously there will be no follow-up ruling and, hence, no true-up. If, on the other hand, the FCC prevails, there will be a mechanism already in place to provide for the true-up.

CONCLUSIONS

The Commission concludes that dial-up ISP traffic is subject to an interim intercarrier compensation mechanism at the same rate and in the same manner as reciprocal compensation for local traffic. Such rate should be subject to true-up at such time as the Commission has ruled pursuant to the FCC's subsequent Order on the subject.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 2

MATRIX ISSUE NO. 3: Should Intermedia be compensated for end office, tandem, and transport elements, for purposes of reciprocal compensation?

POSITIONS OF PARTIES

BELLSOUTH: No. If a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth will pay the tandem interconnection rate only if Intermedia's switches are actually performing the local tandem switching functions and providing the same geographic coverage. Intermedia is seeking to be compensated for the cost of equipment it does not own and for functionality it does not provide. Therefore, Intermedia's request for tandem switching compensation when tandem switching is not performed should be denied.

INTERMEDIA: Yes. FCC Rule 51.711(a)(3) requires that where the interconnecting carrier's switch serves a geographic area comparable to that served by the ILEC's tandem switch, the interconnecting carrier is entitled to receive compensation at the tandem interconnection rate. Consequently, BellSouth should be required to pay reciprocal compensation to Intermedia for end office, tandem, and transport elements. Intermedia's switches in the Charlotte and Raleigh metropolitan areas serve areas geographically comparable to those served by BellSouth's tandem switches in those areas.

PUBLIC STAFF: No. Intermedia has failed to show that its switches provide tandem switching functions when terminating calls from BellSouth's end users and has failed to show that its switches provide service to areas comparable to those served by BellSouth's local tandem switches.

DISCUSSION

BellSouth explained that a tandem switch connects one trunk to another trunk and is an intermediate switch or connection between the switch where a telephone call originates and the switch which terminates the call. BellSouth maintained that an end-office switch is connected to a telephone subscriber and allows the call to be originated or terminated. BellSouth stated that if Intermedia's switch is an end-office switch, then it is handling calls that originate from or terminate to customers served by that local switch, and thus Intermedia's switch is not providing a tandem function.

BellSouth argued that although this Commission has considered this issue before in the BellSouth/ICG arbitration, and concluded that ICG was entitled to the tandem switching rate, that case involved different facts than those produced here. BellSouth contended that in this proceeding Intermedia could not tell this Commission where its customers are located. As such, BellSouth believes that there is no showing that Intermedia's switches serve geographic areas comparable to BellSouth's. In BellSouth's opinion, the evidence in the record does not support Intermedia's contention that its switches provide the transport element. Further, it is BellSouth's position that the Act does not contemplate that compensation for transporting and terminating local traffic should be symmetrical when one party does not actually use the network facility for which it seeks compensation. Thus, BellSouth opined that Intermedia is not entitled to tandem switching compensation when tandem switching is not performed.

Intermedia witness Jackson stated that Intermedia's switches in the Charlotte and Raleigh metropolitan areas serve geographic areas comparable to those served by BellSouth's tandem switches in those areas. Intermedia asserted that its network design is entirely different than BellSouth's. Intermedia explained that instead of using a multiplicity of switches to cover an area, Intermedia uses a single switch to cover the same area. With respect to the Raleigh LATA, witness Jackson testified that Intermedia serves areas of both GTE South Incorporated's (GTE's) and Sprint Communications Company,

L.P.'s (Sprint's) territory which are not served by BellSouth. Witness Jackson testified that while Intermedia does not have a ubiquitous network like that of BellSouth, Intermedia could purchase, lease, or build facilities to serve its customers.

In response to the Commission's February 29, 2000 Order, Intermedia submitted additional information on March 6, 2000, concerning its service area and the functionality of its switches. With respect to the issue of geographic comparability, Intermedia submitted a list of its customers by location and type of service; a listing of the Company's collocations, including collocations in GTE offices; a snapshot of incoming traffic from Raleigh and Charlotte exchange areas; county maps depicting current and future rate centers in and around Raleigh and Charlotte; and Company promotional materials. Intermedia contended that the customer information it submitted shows a sizeable number of customers in a widely dispersed area in and around both Charlotte and Raleigh. Further, Intermedia contended that the snapshot of incoming traffic it submitted shows incoming calls from a large number of exchanges in and around both cities, and that the rate center maps and promotional materials also demonstrate a capability and intent to serve a large geographical area.

With respect to the functionality issue, Intermedia submitted information from the manufacturer of its two North Carolina switches which describes the technology inherent in the switches used by Intermedia. Intermedia also included diagrams and narratives describing the trunk topology of its two North Carolina switches and call diagrams depicting the functions performed by its switches. Intermedia witness Jackson testified that "The [Intermedia] switches perform the functions of a tandem, such as remote traffic aggregation, and the functions of end offices switches, such as providing dial tone. Due to this different network design concept, Intermedia's single switches have to perform all of the relevant functions, including the function BellSouth assigns to its tandem switches." Intermedia contended that the materials from the manufacturer of Intermedia's switches demonstrate that the Nortel DMS 500 switch employed by Intermedia performs both end office and tandem switching functions. Intermedia asserted that the diagrams submitted by Intermedia support witness Jackson's testimony that the Intermedia switch performs the traffic aggregation function of a BellSouth tandem switch.

BellSouth did not file objections to Intermedia's Exhibits filed March 6, 2000, nor did BellSouth seek an evidentiary hearing. On March 10, 2000, BellSouth filed a reply to Intermedia's exhibits filed on March 6, 2000. BellSouth stated that Intermedia had failed to demonstrate that it incurs any functional costs that would justify BellSouth paying Intermedia the tandem interconnection rate. BellSouth refuted Intermedia's Exhibits, point by point, and argued that nothing in the submitted material indicates that Intermedia's local switches perform tandem functions in terminating local traffic. BellSouth also contended that Intermedia does not provide tandem switching of local traffic between BellSouth and GTE switches, that Intermedia has inappropriately labeled Intermedia's collocation sites as Intermedia end-office switches, that Intermedia inflated its number of end users by

repeating the same customer numerous times by listing each individual service to which the customer subscribes, and that Intermedia has only three collocation sites for the Raleigh LATA and two collocation sites for all of the Charlotte LATA, indicating a very limited number of customers for a very small geographic area.

The additional information filed by Intermedia on March 6, 2000, in response to the Commission's February 29, 2000 Order seeking late-filed exhibits, and BellSouth's response of March 10, 2000, to Intermedia's exhibits are hereby allowed in evidence in this proceeding as late-filed exhibits.

The Public Staff contended that although Intermedia provided information in its March 6, 2000 filing which demonstrates that Intermedia's switches have the capability of functioning as tandem switches, the issue before the Commission is whether Intermedia's switches, in terminating traffic from BellSouth's customers to Intermedia's end users, not merely have the capability of performing, but actually perform, tandem switching functions.

The Public Staff further contended that based upon the information provided by Intermedia in its March 6, 2000 filing, Intermedia does not have switches in the ILEC's end offices where it collocates. Since traffic can be switched only through the use of a switch, the Public Staff questioned how Intermedia can claim that it performs switching functions at its collocation facilities. The Public Staff stated that there is insufficient evidence in the record to support a finding that Intermedia may be providing tandem switching functions.

The Public Staff stated that Intermedia has not shown, for the calls in question, that either its switch in Charlotte or its switch in Raleigh performs the basic switch trunk function of connecting trunks to trunks. The Public Staff believes that since the record fails to support Intermedia's claim that its switches perform a trunk-to-trunk switching function for these calls, the Commission should conclude that they do not operate as local tandem switches and Intermedia is not entitled to receive tandem switching compensation for those calls. It is the Public Staff's opinion that performance of the tandem switching function in terminating calls is a necessary, but not sufficient, condition alone to qualify those calls for tandem switching compensation.

The Public Staff argued that, contrary to Intermedia's contentions, whether the switches are capable of serving an area comparable to those served by BellSouth's local tandems is not determinative of this issue. The Public Staff conceded that any end office with sufficient line capacity is capable of serving a huge area, certainly as large as the areas served by BellSouth's tandems, although perhaps inefficiently. The Public Staff stated that the capacity to serve a large area clearly does not make each large capacity end-office switch a tandem switch and that this view comports with the language of the FCC's Rule 51.711(a)(3) and the explanatory language of Paragraph 1090.

The Public Staff argued that it is necessary that the areas served by Intermedia's switches be comparable to the areas served by BellSouth's tandems, in order for traffic delivered to Intermedia for termination to be eligible for tandem switching compensation. The Public Staff remarked that each Intermedia switch could actually serve a third of the geographic area of North Carolina. However, the Public Staff argued that if the tandem switching function is not actually performed by those switches in terminating traffic from BellSouth to Intermedia's customers, Intermedia should not be compensated for tandem switching.

The Public Staff claimed that there is ample evidence in the record to discern whether Intermedia's switches serve comparable areas to BellSouth's local tandem switches. The Public Staff stated that according to the maps filed with BellSouth witness Varner's Supplemental Rebuttal testimony, BellSouth's local tandem switches in the Raleigh LATA serve numerous wire centers. According to the Public Staff, Intermedia's March 6, 2000 filing, made on a confidential basis, indicates that its switch in Raleigh serves only a few of the areas that are served by either of the BellSouth local tandem switches in the Raleigh LATA. Additionally, the Public Staff noted that Intermedia's Charlotte switch serves only a few of the areas that are served by either of BellSouth's local tandem switches in the Charlotte LATA.

Further, the Public Staff contended that Intermedia did not present any evidence regarding new technologies analogous to those suggested by the FCC which would qualify the traffic terminated to those switches as being eligible for tandem compensation.

All Parties appear to agree that Intermedia should receive reciprocal compensation for end-office switching, tandem switching, and common transport if it provides such functions. The Parties also concur that Intermedia provides end-office switching and common transport. The Parties, however, disagree on whether Intermedia should receive reciprocal compensation for tandem switching.

The pertinent authority governing the issue of reciprocal compensation for tandem switching is found in FCC Rule 51.711(a)(3) and Paragraph 1090 of the FCC's First Report and Order.

Rule 51.711(a)(3) states:

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

Paragraph 1090 of the First Report and Order states:

> We find that the "additional costs" incurred by a LEC when transporting and terminating a call that originated on a competing carrier's network are likely to vary depending on whether tandem switching is involved. We, therefore, conclude that states may establish transport and termination rates in the arbitration process that vary according to whether the traffic is routed through a tandem switch or directly to the end office switch. In such event, states shall also consider whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch. Where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the interconnecting carrier's additional costs is the LEC tandem interconnection rate.

The Commission concluded, in *Petition of ICG Telecom Group, Inc. for Arbitration of its Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. P-582, Sub 6, that ICG had met its burden of proof in regard to both geographic coverage and similar functionality.

The Commission concluded in *Petition by ITC^DeltaCom Communications, Inc. (DeltaCom) for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. P-500, Sub 10, that DeltaCom had met its burden of proof that its switches cover comparable areas to that covered by BellSouth's switches and that, for reciprocal compensation purposes, DeltaCom is entitled to compensation at BellSouth's tandem interconnection rate. In the DeltaCom Order, the Commission discussed more extensively its belief that the language in the FCC's Rule 51.711 and the attendant discussion in Paragraph 1090 clearly contemplate that exact duplication of the ILEC's network architecture is not necessary in order for the competing local provider (CLP) to be eligible to receive reciprocal compensation at the tandem switching rate. The Commission also indicated that it believes that the language in the FCC's Order treats geographic coverage as a proxy for equivalent functionality, and that the concept of equivalent functionality is included within the requirement that the equipment utilized by both Parties covers the same basic geographic area.

Based on the exhibits filed by Intermedia on March 6, 2000, including the maps, the description of Intermedia's Nortel DMS 500 switches and associated technology, and the

current listing of Intermedia's customers in North Carolina by location and type of service, the Commission believes that Intermedia has met its burden of proof that its switches cover a comparable geographic area to that covered by BellSouth's switches, and that, for reciprocal compensation purposes, Intermedia is entitled to compensation at BellSouth's tandem interconnection rate.

CONCLUSIONS

The Commission concludes that, for reciprocal compensation purposes, Intermedia should be compensated at BellSouth's tandem interconnection rate.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 3

MATRIX ISSUE NO. 22: Should BellSouth be required to provide nondiscriminatory access to interoffice transmission facilities, including dark fiber, DS1, DS3 and OCn levels, and shared transport, in accordance with, and as defined in, the FCC's UNE Remand Order and should BellSouth's proposed rates be subject to true-up?

POSITIONS OF PARTIES

BELLSOUTH: No. BellSouth agreed that it is required to provide nondiscriminatory access to interoffice transmission facilities and has proposed language which it believes is consistent with Section 51.319(d) of the FCC's Rules promulgated by its UNE Remand Order and with Intermedia's proposed language. BellSouth further believes that the rates it proposed for interoffice transmission facilities are Total Element Long Run Incremental Cost (TELRIC)-based and should not be subject to true-up if later modified by the Commission.

INTERMEDIA: Yes. Intermedia believes that under the FCC's UNE Remand Order, interoffice transport must be provided to CLPs at TELRIC rates. Intermedia argued that the rates proposed by BellSouth should be adopted as interim rates subject to true-up when the Commission establishes permanent rates in Docket No. P-100, Sub 133d.

PUBLIC STAFF: Yes. The Public Staff recommended that the Commission adopt BellSouth's proposed language regarding this issue. The Public Staff further recommended that the Commission approve BellSouth's proposed rates for inclusion in this Agreement, but that the rates be subject to true-up after the Commission establishes rates in the Docket No. P-100, Sub 133d proceeding.

DISCUSSION

The Parties do not dispute that BellSouth must provide unbundled access to interoffice transport at TELRIC-based rates. The Parties do dispute whether the

BellSouth-proposed TELRIC rates should be subject to true-up after the Commission sets permanent prices in Docket No. P-100, Sub 133d for interoffice transport.

BellSouth argued in its Proposed Order that it has agreed to provide nondiscriminatory access to interoffice facilities in accordance with the FCC's UNE Remand Order and that BellSouth has, in fact, proposed the following language to Intermedia, which BellSouth believes is consistent with Section 51.319(d) of the FCC's Rules promulgated by its UNE Remand Order:

> "BellSouth shall provide nondiscriminatory access, in accordance with FCC Rule 51.311 and Section 251(c)(3) of the Act, to interoffice transmission facilities on an unbundled basis to Intermedia for the provision of a telecommunications service at the rates set forth in this Attachment.
>
> Interoffice transmission facility network elements include:
>
> A) Dedicated transport, defined as BellSouth's transmission facilities, including all technically feasible capacity-related services including, but not limited to, DS1, DS3 and OCn levels, dedicated to a particular customer or carrier, that provide telecommunications between wire centers or switches owned by BellSouth, or between wire centers and switches owned by BellSouth and Intermedia;
> B) Dark Fiber transport, defined as BellSouth's optical transmission facilities without attached multiplexing, aggregation, or other electronics; and
> C) Shared transport, defined as transmission facilities shared by more than one carrier, including BellSouth, between end office switches, between end office switches and tandem switches, and between tandem switches, in BellSouth's network.
>
> BellSouth shall:
>
> A) Provide Intermedia exclusive use of interoffice transmission facilities dedicated to a particular customer or carrier, or shared use of the features, functions, and capabilities of

interoffice transmission facilities shared by more than one customer or carrier;
B) Provide all technically feasible transmission facilities, features, functions, and capabilities that Intermedia could use to provide telecommunications services;
C) Permit, to the extent technically feasible, Intermedia to connect such interoffice facilities to equipment designated by Intermedia, including but not limited to, Intermedia's collocated facilities; and
D) Permit, to the extent technically feasible, Intermedia to obtain the functionality provided by BellSouth's digital cross-connect systems in the same manner that BellSouth provides such functionality to interexchange carriers."

BellSouth argued in its Proposed Order that Intermedia does not oppose BellSouth's proposed rates and that Intermedia witness Jackson on cross-examination admitted that Intermedia is **not** contesting that BellSouth's proposed rates are, in fact, TELRIC-based. BellSouth stated in its Proposed Order that the only issue Intermedia now contests is whether those rates should be subject to a true-up. As BellSouth witness Varner stated on cross-examination, "The basic point of contention is whether or not these rates, once the Commission approves rates in this arbitration, whether those rates will be subject to true-up or not. We don't agree that those rates would be subject to true-up. That's the issue that's before the Commission." BellSouth argued in its Proposed Order that since its proposed rates are TELRIC-based and are not interim rates, the Commission should not true-up the rates.

Intermedia witness Jackson stated in cross-examination that, "It's my understanding that obviously we believe those ought to be on a TELRIC-based rate schedule or cost basis. I think our point on that is that in the interim until those rates are approved that we're looking for -- if we use those rates, that we would like to have a true-up at the end of that period of time, if should this Commission decide that those rates are well over priced or to your advantage if they were way underpriced. So I think the true-up was the issue from our standpoint at this time." Intermedia commented in its Proposed Order that the Commission has consistently held that interim rates are subject to true-up upon adoption of permanent rates. Intermedia noted that as recently as March 30, 2000, in the Order Setting Procedural Schedules in Docket No. P-100, Sub 133d, the Commission announced that it would adopt interim line sharing rates, subject to true-up upon adoption of permanent rates. Intermedia also stated in its Proposed Order that the Commission's March 13, 2000 Order Adopting Permanent UNE Rates in Docket No. P-100, Sub 133d is another example of the Commission ordering the true-up of interim rates once permanent

rates are established. Intermedia recommended in its Proposed Order that the Commission adopt the rates proposed by BellSouth for interoffice transmission, subject to true-up once the Commission adopts permanent rates in Docket No. P-100, Sub 133d.

The Public Staff stated in its Proposed Order that BellSouth's proposed language on this issue is substantially similar to Intermedia's proposed language in the Agreement. However, the Public Staff stated that BellSouth's proposed language refers to rates for interoffice facilities that are to be included in the Agreement while Intermedia's proposed language does not. The Public Staff stated that in this arbitration, BellSouth has proposed rates for dedicated transport, dark fiber, and shared transport for inclusion in the Agreement for interoffice facilities as shown in BellSouth witness Varner's Exhibit AJV-1. According to the Public Staff, the Parties agree that BellSouth has an obligation under the law to provide Intermedia access to interoffice transmission facilities at TELRIC-based prices, but Intermedia objects to BellSouth's proposed inclusion of rates in the Agreement if those rates are not subject to true-up. The Public Staff stated that BellSouth is seeking the Commission's approval of its proposed rates for interoffice facilities on a permanent basis in this arbitration. The Public Staff stated that BellSouth witness Varner testified that if the Commission approved different rates in its Docket No. P-100, Sub 133d proceeding, then BellSouth and Intermedia could amend their Interconnection Agreement to reflect the rate changes from that time forward. The Public Staff recommended that the Commission adopt BellSouth's proposed language and proposed rates for inclusion in the Agreement, but allow for a true-up of the rates after the Commission establishes rates in the Docket No. P-100, Sub 133d proceeding.

The Commission notes that in its March 30, 2000 Order Setting Procedural Schedules in the UNE docket, the Commission concluded that interoffice transmission facilities including dedicated transport, dark fiber, and shared transport would be considered in Phase I of the Commission's generic UNE proceeding. The Commission also notes that in said Order, the Commission concluded that there was not enough evidence at that point in time for the Commission to know which, if any, of the proposed new UNEs would ultimately be determined to be, in fact, UNEs. Therefore, the Commission found it appropriate to deny requests for the Commission to establish interim rates for any new UNEs, with the exception of line sharing.

In this arbitration docket, the Parties agree that BellSouth must provide unbundled access to interoffice transport at TELRIC-based rates. Therefore, the Commission believes that it is reasonable and appropriate for the interoffice transport rates agreed to by the Parties in this arbitration proceeding to be considered interim and subject to true-up if the Commission adopts different permanent prices for interoffice transport in its generic UNE proceeding. The Commission finds it appropriate to accept the recommendation of Intermedia and the Public Staff by adopting BellSouth's proposed language and proposed rates for interoffice transport for inclusion in the Interconnection Agreement, but allowing

for a true-up of the rates if the Commission adopts different permanent prices for interoffice transport in Phase I of its generic UNE proceeding in Docket No. P-100, Sub 133d.

CONCLUSIONS

The Commission concludes that it is appropriate to adopt BellSouth's proposed language and proposed rates for interoffice transport for inclusion in the Interconnection Agreement, but allow for a true-up of the rates if the Commission adopts different permanent prices for interoffice transport in Phase I of its generic UNE proceeding in Docket No. P-100, Sub 133d.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 4

MATRIX ISSUE NO. 31: For purposes of compensation, how should IntraLATA Toll Traffic be defined?

POSITIONS OF PARTIES

BELLSOUTH: IntraLATA Toll Traffic should be defined as any telephone call that is not local or switched access per the Parties' Agreement.

INTERMEDIA: IntraLATA Toll Traffic should be defined broadly, to include not merely the use of one type of equipment, such as analog circuit switches, but should also encompass nonlocal traffic that is carried over facilities that employ new technologies, such as data or frame relay traffic over packet switching equipment. The Act makes no distinction between voice and data traffic. In the FCC's Advanced Services Order in CC Docket No. 98-147, the FCC clearly states that "for purposes of determining the interconnection obligation of carriers, the Act does not draw a regulatory distinction between voice and data services." (Paragraph 47). ILECs have the same obligations to competing carriers with respect to data traffic, including frame relay traffic, as they do for voice traffic.

PUBLIC STAFF: The definitions propounded by both BellSouth and Intermedia are insufficient in themselves in determining whether they include or exclude frame relay traffic. Both definitions lack specificity and clarity. Due to an insufficient record, the Public Staff recommends that the Commission not adopt either Party's proposal.

DISCUSSION

BellSouth's proposed language for inclusion in the Interconnection Agreement is as follows:

> **IntraLATA Toll Traffic is defined as any telephone call that is not local or switched access per this Agreement.** (Proposed Interconnection Agreement, Attachment 3, §6.7.1).

In the Proposed Interconnection Agreement, Attachment 3, Section 6 deals with interconnection compensation. On cross-examination, witness Varner testified that a "telephone call" is defined as "a basic voice connection between two customers". Therefore, under BellSouth's definition, only voice traffic would be considered as intraLATA toll traffic. Witness Varner testified that BellSouth defines intraLATA toll traffic in this manner to exclude data services, such as frame relay, from this definition. Further, witness Varner stated that what is considered as local and toll for frame relay is stated in the part of the Agreement that deals with frame relay.

In the Proposed Interconnection Agreement, Attachment 3, Section 6.7.2, the Parties have agreed that they will compensate each other for intraLATA toll traffic originated by one Party and terminated on the other Party's network. Consequently, as stated in BellSouth's Proposed Order, the effect of adopting BellSouth's proposed language would be to exclude nonvoice intraLATA traffic from reciprocal compensation obligations. Further discussion on BellSouth's proposal that frame relay traffic be excluded from the requirements of reciprocal compensation is, subsequently, provided in the Evidence and Conclusions for Finding of Fact No. 7 — Matrix Issue No. 37.

Intermedia's proposed language for inclusion in the Interconnection Agreement is as follows:

> **IntraLATA Toll Traffic is defined as all basic intraLATA message services calls other than Local Traffic.** (Proposed Interconnection Agreement, Attachment 3, §6.7.1).

In its Post-Hearing Brief, Intermedia stated that BellSouth seeks to define intraLATA toll traffic in a manner that specifically excludes messaging or data, and only includes voice traffic. Intermedia argued that the law makes no distinction between voice and data for interconnection purposes. Intermedia witness Jackson testified that Intermedia's definition would ensure that toll traffic cannot be limited to traffic that uses one type of equipment, such as analog circuit switches, but will include nonlocal traffic carried over facilities that employ new technologies, such as packet switching. In support of its position, Intermedia relies upon the FCC's August 7, 1998, Advanced Services Order in Docket No. 98-147, which states in pertinent part:

> We agree with ALTS that the interconnection obligations of section 251 of the Act apply equally to facilities and equipment used to provide data transport functionality and voice functionality. . . . For purposes of determining the interconnection obligation of carriers, the Act does not draw a regulatory distinction between voice and data services. In particular, the Commission drew no such distinction in the *Local Competition Order*, when it required incumbent LECs to offer interconnection with competitors for the transmission and routing of telephone exchange and exchange access traffic. Thus, the interconnection obligations of incumbent LECs apply to packet-switched as well as circuit-switched services. . . . We therefore grant the ALTS request that we declare that the interconnection obligations of sections 251(a) and 251(c)(2) apply to incumbents' packet-switched telecommunications networks and the telecommunications services offered over them. (Paragraphs 46, 47, and 48).

During cross-examination, BellSouth witness Varner acknowledged that BellSouth had previously made the argument to the FCC that Congress did not intend for Section 251 to apply to new technology that was deployed after 1996. The FCC rejected BellSouth's argument in the Advanced Services Order. Specifically, in the Advanced Services Order, the FCC states:

> We reject BellSouth's argument that Congress intended that section 251(c) not apply to new technology not yet deployed in 1996. Nothing in the statute or legislative history indicates that it was intended to apply only to existing technology. Moreover, Congress was well aware of the Internet and packet-switched services in 1996, and the statutory terms do not include any exemption for those services. (Paragraph 49).

Nevertheless, witness Varner contended that while the parts of Section 251 dealing with interconnection do apply to voice and data services, other parts of Section 251 do not apply to advanced services, such as the unbundling requirements of Section 251. Witness Varner further opined that reciprocal compensation is different than interconnection.

Intermedia believes that the FCC made it clear that intraLATA toll traffic includes both voice and data traffic, and that no legal distinction can be made between them. In its Proposed Order, Intermedia stated that the Act and the FCC's Advanced Services Order provide no basis for a distinction between voice and data traffic. Thus, Intermedia contended that Intermedia's proposed definition is appropriate as it includes data messaging in the category of intraLATA toll traffic, and does not distinguish between voice and data traffic.

The Public Staff stated that it is unclear from the evidence what the importance is of including or excluding frame relay traffic in the definition of intraLATA toll traffic. The

Public Staff asserted that BellSouth has not explained the need for excluding frame relay traffic from the definition, nor has Intermedia attempted to explain why frame relay traffic should be included. The Public Staff concluded that the definitions propounded by both BellSouth and Intermedia are insufficient in themselves to determine whether they include or exclude frame relay traffic. Due to an insufficient record, the Public Staff recommended that the Commission not adopt either Party's proposed definition.

The basic difference between the positions of BellSouth and Intermedia on this issue appears to center on whether frame relay traffic is included or excluded in the definition of intraLATA toll traffic for purposes of compensation. The Commission agrees with the Public Staff that neither Party has adequately explained why their respective proposed definition for intraLATA toll traffic is appropriate. Furthermore, neither Party's proposed definition is sufficiently clear in its composition to determine whether it includes or excludes frame relay traffic. Consequently, neither Party's proposed definition should be adopted.

CONCLUSIONS

The Commission declines to adopt either the definition proposed by BellSouth or by Intermedia. Furthermore, due to an insufficient record, the Commission declines to develop an alternative definition. Instead, the Commission encourages the Parties to continue to negotiate an appropriate definition that would be consistent with the Commission's conclusions set forth in the Evidence and Conclusions for Finding of Fact No. 7.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5

MATRIX ISSUE NO. 32: How should "Switched Access Traffic" be defined?

POSITIONS OF PARTIES

BELLSOUTH: Switched Access Traffic should be defined in accordance with BellSouth's access tariff and should include IP telephony.

INTERMEDIA: Switched Access Traffic should be defined as telephone calls requiring local transmission or switching services for the purpose of the origination or termination of Telephone Toll Service, including Feature Groups A, B, and D, 800/888 access, and 900 access (and their successors or similar Switched Exchange Access Services).

PUBLIC STAFF: The Commission should not object to an agreement by BellSouth and Intermedia to specifically define switched access traffic in the Agreement as it has been specified in BellSouth's Access Tariff. Further, the Commission should decline to require a definition of switched access traffic that specifically includes IP telephony.

DISCUSSION

BellSouth witness Varner stated that because switched access traffic is already defined in BellSouth's Access Tariff, there is no need for an additional definition in the Interconnection Agreement. Because Intermedia insisted upon such a definition, however, BellSouth proposed the following language:

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

Witness Varner, under cross-examination, stated that there is nothing in this local Interconnection Agreement that discusses, determines, or affects the way in which BellSouth engages in a joint provision of access service so it is really a definition without a purpose. However, he stated that BellSouth would be willing to put the same definition of switched access traffic that is in the tariff into the Agreement.

Witness Varner explained that it is important to include IP telephony in the definition to avoid confusion. Due to the increasing use of IP technology mixed with traditional analog and digital technology to transport long distance telephone calls, BellSouth believes that it is important to specify that such traffic is switched access traffic rather than local traffic.

Intermedia witness Jackson testified that the essential difference between the Parties is that Intermedia believes that "switched access traffic" should be defined in the Parties' agreement. Intermedia argued that BellSouth's tariff language changes from time to time, and referring to its tariff allows BellSouth to define this crucial term any way it wishes, perhaps in ways that Intermedia may consider adverse.

In addition, Intermedia stated that it does not believe that it is appropriate for BellSouth to attempt unilaterally to assign a regulatory status to "IP Telephony." In its Post-Hearing Brief, Intermedia stated that the treatment of IP telephony should not be determined on a piecemeal basis, from state to state, agreement to agreement, but should await a determination from the FCC.

The Public Staff stated that it does not think the Commission should object to an arrangement by BellSouth and Intermedia to specifically define switched access traffic in the Agreement as it has been specified in BellSouth's Access Tariff. The Public Staff stated that even though it does not necessarily disagree with BellSouth's position that toll calls completed using the technology embodied in IP telephony should be treated similarly to other toll traffic with respect to switched access, the Commission should decline to require a definition of switched access traffic that specifically includes IP telephony. The Public Staff maintained that this issue is best addressed in a setting in which all

interexchange carriers (IXCs) and other affected carriers have notice and in which the procedures for determining billable minutes are fully explored.

On April 27, 2000, upon the request of the Commission Staff, BellSouth filed a letter with attached tariff pages which provided a description of Switched Access Service and associated Feature Groups as defined in BellSouth's intrastate Access Services Tariff. This letter with attached tariff pages is hereby allowed in evidence in this proceeding as a late-filed exhibit.

Also, on April 27, 2000, Intermedia filed a letter in response to BellSouth's filing which stated that the Access Services Tariff which BellSouth cited did not include a definition of switched access traffic, and, therefore, the only clear option is Intermedia's suggested language for the definition of switched access traffic. This letter is hereby allowed in evidence in this proceeding as a late-filed exhibit.

There is only a fine distinction between switched access ***traffic*** and switched access ***service***. Generally, switched access service is ordered from the tariff and switched access traffic is what one sends over the switched access service. The tariff pages submitted by BellSouth are clearly to provide "switched access service." Even though it is unclear from the record what the importance is of having a definition of switched access traffic contained in the Parties' local Interconnection Agreement, the definition offered by Intermedia would seem to be more appropriate since it appears to list the same services as those listed in BellSouth's intrastate Access Tariff under its Switched Access Service Section.

Both Intermedia and the Public Staff expressed reservations about whether IP telephony should be included in a definition of switched access traffic in this proceeding. Intermedia was of the opinion that such a definition should await a determination from the FCC; the Public Staff believes that the Commission should decline to require such a definition until the issue is more fully addressed in a setting involving all affected parties. The Commission believes that due to the considerable uncertainty as to how this type of telephony should be defined, the Commission should decline to require a definition of switched access traffic that specifically includes IP telephony at this time.

CONCLUSIONS

The Commission concludes that the definition of "switched access traffic" as proposed by Intermedia should be included in the Agreement. Further, the Commission declines to require a definition of switched access traffic that specifically includes IP telephony at this time.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6

MATRIX ISSUE NO. 33: Should BellSouth and Intermedia be liable to each other for lost switched access revenues due to lost or damaged billing data?

POSITIONS OF PARTIES

BELLSOUTH: No and if yes, then no cap. BellSouth argued that since this issue deals with switched access revenues, it is not appropriate for arbitration under Section 252 of TA96. BellSouth stated that Interconnection Agreements arbitrated under Section 252 should govern local interconnection terms and conditions, not switched access issues. However, BellSouth is willing to accept Intermedia's proposed language with one exception: BellSouth does not wish to place a cap on the liabilities of the Parties.

INTERMEDIA: Yes. Intermedia maintained that the Parties' Interconnection Agreement should provide that each Party is liable to the other for lost or damaged billing data. Intermedia argued that the Parties' liability should be capped at $10,000 per episode.

PUBLIC STAFF: No. The Public Staff argued that because the Parties must negotiate and settle this issue should it arise, there is already a mechanism in place to resolve disputes. The Public Staff stated that there is not a need for a liability cap as proposed by Intermedia.

DISCUSSION

The only area of contention between the Parties concerning this issue is whether there should or should not be a cap on the liabilities of the Parties. As Intermedia described in its Brief, BellSouth and Intermedia provide services jointly to third parties, and as a result, each Party must be responsible for the maintenance of billing records that will allow the other Party to obtain any revenues due to it for providing that service. Intermedia further explained that occasionally, mistakes in compiling this billing information occur and that Intermedia originally proposed that the Parties be mutually liable for lost or damaged billing data, however, that liability should be limited by a cap. Intermedia stated in its Brief that BellSouth has refused to limit liability. Intermedia concluded in its Brief that this issue is an area ripe for disagreement that could escalate into an issue before the Commission and that putting a liability cap of $10,000 per episode on lost or damaged billing data is prudent in these circumstances.

BellSouth witness Varner stated in his rebuttal testimony that BellSouth has advised Intermedia that it is agreeable to Intermedia's proposed language, except that BellSouth does not wish to place a cap on the liabilities of the Parties. BellSouth argued in its Proposed Order that its switched access revenues are substantial and that it must rely on accurate information from CLPs such as Intermedia in order to accurately bill the

appropriate IXCs and vice-versa. BellSouth witness Varner stated on cross-examination that a Party would lose switched access revenues due to lost or damaged billing records when the data, for whatever reason, was not available for the Party to properly bill the customer. BellSouth stated in its Proposed Order that Intermedia's proposed cap of $10,000 is unreasonable since BellSouth's switched access revenues in North Carolina amount to millions of dollars annually. Therefore, BellSouth recommended that the Commission reject Intermedia's proposed cap of $10,000, as unreasonable.

Intermedia argued in its Proposed Order that this issue involves the general terms and conditions of the Parties' Interconnection Agreement. Intermedia stated that the losses at issue here would occur when one Party causes the other Party's billing data either to be lost or damaged, and the other Party is unaware of its customers having incurred the corresponding charges. Intermedia maintained in its Proposed Order that once the billing period has passed, the billing party generally cannot recover the lost charges from its customers. Intermedia stated that in this proceeding it has proposed a means for recovering at least a part of the estimated damages lost from the negligent party. Intermedia recommended that the Commission conclude that each Party should be liable to the other for losses it causes the other Party to incur by losing or damaging billing data but that liability for such losses under the Parties' Interconnection Agreement shall be capped at $10,000 per episode. Intermedia argued in its Proposed Order that although its choice for a cap of $10,000 per episode is somewhat arbitrary, BellSouth has not suggested a better one. Intermedia argued that its proposal would minimize both Parties' exposure to unlimited and unquantifiable losses. Intermedia witness Jackson stated on cross-examination that Intermedia has not been as wedded to the actual dollar amount of the cap as it was to coming up with a reasonable cap based on good business practice to ensure that no Party is overly damaged for issues that may be beyond the Party's control. Intermedia witness Jackson also clarified on cross-examination that the situation that is described in this issue is limited to situations where cooperative efforts between the Parties to reconstruct the billing data have failed for whatever reason.

The Public Staff argued in its Proposed Order that there is no need for a liability cap. The Public Staff argued that since the Parties must negotiate and settle the issue should it arise, there is already a mechanism in place to resolve disputes. The Public Staff maintained that it is equitable to require the liable party to provide adequate compensation for damages it has caused. The Public Staff recommended that the Commission decline to require the inclusion of a liability cap for lost or damaged switched access revenues.

The Commission notes that Intermedia witness Jackson testified that the situation that is described in this issue is limited to situations where cooperative efforts between the Parties to reconstruct the billing data have failed for whatever reason. Intermedia's proposed language as reflected in Exhibit 1 of BellSouth's Petition for Arbitration filed on December 7, 1999 reads:

> "In the event of a loss of data, both Parties shall cooperate to reconstruct the lost data and shall make best efforts to do so within 48 hours. If such reconstruction is not possible, the Parties shall use a reasonable estimate of the lost data, based on twelve (12) months of prior usage data; provided that if twelve (12) months of prior usage data is not available, the Parties shall base the estimate on as much prior usage data that is available; and further provided, however, that if reconstruction is required prior to the availability of at least three (3) months of prior usage data, the Parties shall defer such reconstruction until three (3) months of prior usage data is available. If the estimated billing is not accepted for payment by the affected Access Services Customer(s), the responsible Party shall be liable to the other Party for any resulting lost revenue up to a maximum of $10,000 in the aggregate in any one (1) month period. Lost revenue may be a combination of revenues that could not be billed to the End Users and associated Access Service revenues. Lost revenue will be calculated by subtracting the amount actually paid by the affected Access Services Customer(s) from the estimated billing derived pursuant to the process set forth in this section." (Proposed Interconnection Agreement, Attachment 3, Section 6.8.6, pages 18-19).

Also, the Commission notes that BellSouth's proposed Interconnection Agreement with Intermedia filed as Exhibit I to its December 7, 1999 Petition for Arbitration has a Liability and Indemnification section [See pages 5-6 of the General Terms and Conditions - Part A].

The Commission believes that it would be more appropriate to adopt Intermedia's proposed language outlined above, but removing the last three sentences referencing lost revenues or the liability cap of $10,000. The language to be included in the Agreement would require the Parties to make cooperative efforts to reconstruct billing data using their best efforts. Thus, the Commission declines to require the inclusion of a clause requiring liability for lost switched access revenues resulting from lost or damaged billing data.

CONCLUSIONS

The Commission finds it appropriate to adopt Intermedia's proposed language concerning lost switched access revenues due to lost or damaged billing data, but declines to require the inclusion of a clause requiring liability for lost switched access revenues resulting from lost or damaged billing data. Therefore, the Commission finds it appropriate

to require the Parties to delete the last three sentences of Intermedia's proposed language which reference lost revenues or a liability cap of $10,000.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7

MATRIX ISSUE NO. 37: Should all framed packet data transported within a VC that originates and terminates within a LATA be classified as local traffic?

POSITIONS OF PARTIES

BELLSOUTH: While BellSouth agrees that all framed packet data transported within a VC that originates and terminates within a LATA should be classified as local traffic for the purposes of establishing interconnection between the Parties, BellSouth contends that frame relay traffic originated and terminated in the LATA should not be subject to reciprocal compensation. BellSouth's rationale is that there is a need to distinguish between voice traffic and frame relay traffic. Voice traffic travels in a connection between at least two points and can be measured in minutes of use, while frame relay utilizes packet switching, where packets or "bursts" of information are sent in groups. Since there is no continuous connection, a minutes of use measurement is inappropriate.

INTERMEDIA: Frame relay and other data traffic originated and terminated within the same LATA should be considered local traffic. Thus, such traffic should be subject to reciprocal compensation. However, the underlying issue of the measurement of such traffic has not been addressed. Thus, the Parties should submit late-filed exhibits outlining their proposals for measurement and compensation of frame relay and other data traffic for reciprocal compensation purposes.

PUBLIC STAFF: The record indicates that both Parties recognize that reciprocal compensation would apply to this traffic. The FCC had clearly recognized that packet switching differs from traditional local circuit switching. See Third Report and Order and Fourth Further Notice of Proposed Rulemaking CC Docket No. 96-98, November 5, 1999, fn. 592. However, there is insufficient information in this record to establish an appropriate mechanism for reciprocal compensation. The Parties (preferably jointly) should be directed to prepare such a mechanism. The proposal(s) should include a description of and basis for the proposal and should reflect that, while intraLATA frame relay circuits can be considered local for the purpose of physical installation and interconnection, the traffic occurring over the facilities can and probably will be both local and intraLATA toll.

DISCUSSION

The Commission notes that Section 251(c) of TA96, which requires reciprocal compensation, does not differentiate between voice and data services. Indeed, the FCC in its August 7, 1998, Advanced Services Order rejected a BellSouth contention that

Section 251(c) does not apply to technology which was not deployed at the time of the enactment of TA96.

BellSouth had conceded that intraLATA traffic transported by frame relay should be classified as local for the purposes of establishing interconnections. BellSouth witness Varner appeared to recognize that local traffic transported via frame relay is subject to reciprocal compensation.

Nevertheless, BellSouth is surely right in its contention that not all such intraLATA traffic is in fact local and that the nature of packet switching is such that application of a straight minutes-of-use arrangement is questionable.

The Commission believes that it is clear that reciprocal compensation should be paid for the local portion of framed packet data transported within a VC that originates and terminates within a LATA. However, there is a dearth of evidence as to what the appropriate design and level for such compensation should be. BellSouth witness Varner speculated as to a "bill and keep" arrangement, but Intermedia made no firm proposal.

CONCLUSIONS

The Commission concludes that reciprocal compensation should be paid for the local portion of framed packet data transported within a VC that originates and terminates within a LATA. BellSouth and Intermedia are directed to propose a mechanism to provide for such compensation. Such proposal should be a joint proposal, if possible, and should include a description of and basis for the proposal. The proposal(s) should take into consideration that, while intraLATA frame relay circuits can be considered local for the purposes of physical installation and interconnection, the traffic occurring over the facilities can and probably will be local and intraLATA toll. Such proposal(s) is/are required to be filed with the Commission no later than July 13, 2000.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8

MATRIX ISSUE NO. 38: If there are no VCs on a frame relay interconnection facility when it is billed, should the Parties deem the PLCU to be zero?

POSITIONS OF PARTIES

BELLSOUTH: Yes. BellSouth proposes a PLCU of zero if there are no VCs on a frame relay interconnection facility when it is billed.

INTERMEDIA: No. Intermedia argued that the PLCU on newly installed frame relay interconnection trunks should be 100% until such time as traffic begins to flow over those

trunks (the point at which VCs are turned up on the trunks). Intermedia stated that after the trunks are turned up, the Parties' established cost allocation formula should apply.

PUBLIC STAFF: Yes. The Public Staff recommended that until Intermedia begins to use the frame relay trunks, the PLCU should be deemed to be 0%.

DISCUSSION

BellSouth stated in its Proposed Order that this issue concerns the cost of frame relay interconnection facilities after the facilities are ordered, but before a customer begins to utilize them. BellSouth stated that ordinarily, Intermedia would order facilities, BellSouth would then install the facilities, and then BellSouth would bill Intermedia for the facilities. BellSouth stated that at some future point, Intermedia would begin to use the facilities that it ordered. BellSouth maintained that after traffic begins to flow over the interconnection facilities, Intermedia then advises BellSouth what percentage of the traffic is expected to be local, and BellSouth reimburses Intermedia for a portion of the trunk charges based on the PLCU. BellSouth stated, however, that prior to traffic flowing over these trunks, there are two compelling reasons why the PLCU should be zero: (1) BellSouth's experience indicates that the predominant use of these types of facilities is for interLATA traffic since frame relay is generally used for high speed exchange of large amounts of data; and (2) Intermedia controls when traffic begins to flow over the facilities and BellSouth should not be forced to incur charges until Intermedia begins to flow traffic over the facilities. BellSouth argued in its Proposed Order that it is clear that the appropriate PLCU for frame relay interconnection facilities, where there are no VCs (i.e. there is no traffic flowing over the facilities), should be zero.

BellSouth witness Varner stated in his rebuttal testimony that BellSouth's position is that, if there are no VCs on a frame relay interconnection facility when it is billed, then the PLCU should be zero (and therefore BellSouth would not reimburse Intermedia for any trunk charges) and that Intermedia's position is that the PLCU should be 100% in this situation (and therefore BellSouth would have to reimburse Intermedia for half of the trunk charges). BellSouth witness Varner explained in his rebuttal testimony that once frame relay traffic is flowing over the trunks, Intermedia advises BellSouth of the PLCU (i.e., what percentage of that traffic is local) and BellSouth reimburses Intermedia for a portion of the interconnection trunk charges based on the PLCU. Witness Varner provided an example in his rebuttal testimony wherein if the PLCU is 10%, then BellSouth reimburses Intermedia for 5% of the charges (PLCU ÷ 2).

Intermedia stated in its Proposed Order that this issue involves the cost of interconnection trunks between the Parties' frame relay networks. Intermedia maintained that when it orders frame relay interconnection trunks from BellSouth, Intermedia pays a nonrecurring charge and a recurring charge. Intermedia stated that when traffic begins to flow over these trunks, Intermedia advises BellSouth of the percentage of the traffic which

is local (the PLCU). Intermedia stated that the Parties evenly split the recurring cost associated with local traffic over these trunks and if the PLCU is 100%, each Party is responsible for half the cost; BellSouth would reimburse Intermedia for half the recurring charge for these trunks. Intermedia maintained that there is no cost sharing for interLATA frame relay traffic over these trunks, and Intermedia bears all of this cost. Intermedia stated in its Proposed Order that BellSouth witness Varner's own testimony is that this issue arises under very limited circumstances. Intermedia argued that once traffic begins to flow over these trunks, there is an established formula for cost allocation that is not in dispute. Intermedia maintained that there is no evidence in the record about what percentage of frame relay traffic is local versus interLATA. Intermedia recommended in its Proposed Order that the Commission find that its proposal is the most reasonable resolution of the issues since presumably the period after the trunks are installed but before they are turned up is short and it is reasonable that during this period of time the equal cost sharing arrangement proposed by Intermedia is appropriate.

Intermedia argued in its Brief that it is asking this Commission to find that the Parties should equally share the cost of establishing and maintaining frame relay interconnection arrangements when there is no objective measure of how these expenses should be resolved. Intermedia stated that the frame relay interconnection arrangement benefits BellSouth's customers and Intermedia's customers that want to exchange data traffic. Intermedia maintained that this type of arrangement is made for the exchange of data traffic, and as BellSouth witness Varner conceded during cross-examination, there must be a BellSouth customer on the other end of the connection to make it sensible; therefore, Intermedia asserted that BellSouth, Intermedia, and both Parties' customers benefit from the service. Further, in its Brief, Intermedia argued that in the event an existing arrangement does not have any traffic for a given billing cycle, why should BellSouth be able to nearly double the charge to Intermedia when BellSouth's cost of providing the service to Intermedia remains constant. Intermedia stated that finding that the PLCU should be zero during this time of no traffic would be a windfall to BellSouth solely for maintaining a mutually beneficial interconnection arrangement.

Intermedia witness Jackson stated in his direct testimony that any other conclusion where the PLCU is not 100% could unreasonably impose higher rates on Intermedia, even though BellSouth was not incurring higher costs in providing the facility. During cross-examination, witness Jackson stated that he did not know what the percentages would be between local and interLATA traffic over frame relay but that he would assume that there would be both types of traffic. Further, witness Jackson admitted on cross-examination that it is up to Intermedia and its customer when the circuit is turned up.

The Public Staff argued in its Proposed Order that the uncontested evidence in this case is that most of the traffic carried over frame relay trunks is not local. The Public Staff maintained that it would, therefore, be unrealistic for the Commission to adopt the position advocated by Intermedia. The Public Staff stated that, in effect, Intermedia appears to be

seeking more favorable terms when no traffic is being carried over the trunks than when traffic does flow. The Public Staff argued that Intermedia controls the use of the trunks and can alleviate the situation. Therefore, the Public Staff recommended that the Commission conclude that until Intermedia begins to use the frame relay trunks, the PLCU should be deemed to be 0%.

Although there is no specific evidence in the record of the percentage of local traffic which typically flows over frame relay interconnection facilities, the Commission believes that the record of evidence generally supports BellSouth's contention that the predominant use of these types of facilities is for interLATA traffic since frame relay is generally used for high speed exchange of large amounts of data. Additionally, the Commission agrees with BellSouth that it is up to Intermedia when traffic begins to flow over these facilities. Based on this, the Commission believes that it is not reasonable for BellSouth to be expected to reimburse Intermedia during this time when no traffic is flowing over the facilities. Adopting Intermedia's position that the PLCU should be 100% during this time would obligate BellSouth to reimburse Intermedia for 50% of the facilities although there is no traffic flowing over the facilities. Therefore, the Commission finds that it is appropriate for the PLCU for frame relay interconnection facilities, where there are no VCs (i.e. there is no traffic flowing over the facilities), to be zero.

CONCLUSIONS

The Commission concludes that when there are no VCs on a frame relay interconnection facility when it is billed, the Parties should deem the PLCU to be zero.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

MATRIX ISSUE NO. 45: Should the Interconnection Agreement specifically state that the Agreement does not address or alter either Party's provision of Exchange Access Frame Relay Service or InterLATA Frame Relay Service?

DISCUSSION

Since the filing of Proposed Orders by BellSouth and Intermedia, BellSouth filed a letter with the Commission on May 2, 2000, stating that the Parties have resolved this issue. The Parties agreed that the language that had been suggested by BellSouth in the Proposed Interconnection Agreement, Attachment 3, Section 7.9.6, should be stricken. The Parties have requested that this issue be withdrawn from this arbitration.

CONCLUSIONS

The Commission acknowledges that this issue has been resolved by the Parties. Consequently, the Commission finds it appropriate to allow the Parties' request that the matter be withdrawn from arbitration.

IT IS, THEREFORE, ORDERED as follows:

1. That BellSouth and Intermedia shall prepare and file a Composite Agreement in conformity with the conclusions of this Order not later than July 28, 2000. Such Composite Agreement shall be in the form specified in paragraph 4 of Appendix A in the Commission's August 19, 1996 Order in Docket Nos. P-140, Sub 50, and P-100, Sub 133, concerning arbitration procedure (Arbitration Procedure Order).

2. That BellSouth and Intermedia shall file a proposed mechanism to provide that reciprocal compensation is paid for the local portion of framed packet data transported within a VC that originates and terminates within a LATA no later than July 13, 2000.

3. That, not later than July 13, 2000, a party to the arbitration may file objections to this Order consistent with paragraph 3 of the Arbitration Procedure Order.

4. That, not later than July 13, 2000, any interested person not a party to this proceeding may file comments concerning this Order consistent with paragraphs 5 and 6, as applicable, of the Arbitration Procedure Order.

5. That, with respect to objections or comments filed pursuant to decretal paragraphs 3 or 4 above, the party or interested person shall provide with its objections or comments an executive summary of no greater than one and one-half pages, single-spaced or three pages, double-spaced containing a clear and concise statement of all material objections or comments. The Commission will not consider the objections or comments of a party or person who has not submitted such executive summary or whose executive summary is not in substantial compliance with the requirements above.

6. That parties or interested persons submitting Composite Agreements, objections or comments shall also file those Composite Agreements, objections or comments, including the executive summary required in decretal paragraph 5 above, on an MS-DOS formatted 3.5-inch computer diskette containing noncompressed files created or saved in WordPerfect format.

7. That the exhibits filed by Intermedia on March 6, 2000, in response to the Commission's February 29, 2000 Order, and BellSouth's reply of March 10, 2000, to Intermedia's exhibits be, and the same are hereby, admitted in evidence as late-filed exhibits.

8. That the description of Switched Access Service and associated Feature Groups as defined in BellSouth's intrastate Access Services Tariff filed in a letter from BellSouth on April 27, 2000, and the response of Intermedia to this letter, be, and the same are hereby, admitted in evidence in this proceeding as late-filed exhibits.

ISSUED BY ORDER OF THE COMMISSION.

This the 13th day of June, 2000.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

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Appendix A

GLOSSARY OF ACRONYMS
Docket No. P-55, Sub 1178

Act	Telecommunications Act of 1996
ALTS	Association for Local Telecommunications Services
BellSouth	BellSouth Telecommunications, Inc.
CLP	Competing Local Provider
Commission	North Carolina Utilities Commission
DeltaCom	ITC^DeltaCom Communications, Inc
ESP	Enhanced Service Provider
FCC	Federal Communications Commission
GTE	GTE South Incorporated
ICG	ICG Telecom Group, Inc.
ILEC	Incumbent Local Exchange Company (Carrier)
Intermedia	Intermedia Communications, Inc.
IP	Internet Protocol
ISP	Internet Service Provider
IXC	Interexchange Carrier
LATA	Local Access and Transport Area
LEC	Local Exchange Company (Carrier)
PLCU	Percent Local Circuit Use
Public Staff	Public Staff-North Carolina Utilities Commission
Sprint	Sprint Communications Company, L.P.
TA96	Telecommunications Act of 1996
TELRIC	Total Element Long Run Incremental Cost
UNE	Unbundled Network Element
US LEC	US LEC of North Carolina Inc.
VC	Virtual Circuit