BellSouth Telecommunications, Inc
Legal Department
1521 BellSouth Plaza
P. O Box 30188
Charlotte, NC 28230

edward rankin@bellsouth com

Edward L. Rankin, III
General Counsel-North Carolina

704 417 8833
Fax 704 417 9389

December 6, 2004

Ms. Geneva S. Thigpen
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4325

Re: Docket Nos P-772, Sub 8; P-913, Sub 5,
P-989, Sub 3; P-824, Sub 6; P-1202, Sub 4

Dear Ms Thigpen:

I enclose for filing in the above-referenced docket the original and 31 copies of BellSouth Telecommunications, Inc.'s Second Supplemental Responses to Joint Petitioners' First Request for Production of Documents. Please stamp the extra copy of this letter "Filed" and return it to me in the usual manner.

Thank you for your assistance in this matter.

Sincerely,

Edward L Rankin III

Edward L. Rankin, III

ELR/db
Enclosures

cc Parties of record (By email)

BEFORE THE

NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	
	)	
Joint Petition for Arbitration of	)	
	)	
NewSouth Communications Corp.,	)	Docket No. P-772, Sub 8
NuVox Communications, Inc.	)	Docket No. P-913, Sub 5
KMC Telecom V, Inc., KMC Telecom III LLC, and	)	Docket No. P-989, Sub 3
Xspedius Communications, LLC on Behalf of its	)	Docket No. P-824, Sub 6
Operating Subsidiary Xspedius Management Co.	)	Docket No. P-1202, Sub 4
Switched Services, LLC	)	
	)	
Of an Interconnection Agreement with	)	
BellSouth Telecommunications, Inc.	)	
Pursuant to Section 252(b) of the	)	
Communications Act of 1934, as Amended	)	

BELLSOUTH TELECOMMUNICATIONS, INC.'S
SECOND SUPPLEMENTAL RESPONSES TO
THE JOINT PETITIONERS'
FIRST REQUESTS FOR PRODUCTION OF DOCUMENTS

BellSouth Telecommunications, Inc. ("BellSouth") hereby files the following Second Supplemental Responses to the First Requests for Production of Documents served by NewSouth Communications Corp, NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC's ("Joint Petitioners"), dated April 13, 2004.

BellSouth incorporates herein by reference all of its general and specific objections filed on April 27, 2004. Any responses provided by BellSouth in response to this discovery will be provided subject to and without waiving any of BellSouth's previously filed objections

SECOND SUPPLEMENTAL RESPONSES

ISSUE: Should a court of law be included among the venues at which a Party may seek dispute resolution under the Agreement?

REQUEST: Provide all documents that identify (by caption, forum, case number and filing date) and describe (including the nature of the claims, procedural status, and any resolution reached) any and all complaints filed in a court of law regarding the terms, performance or enforcement of an ICA between BellSouth and a CLP.

RESPONSE: BellSouth objects on the grounds that it is overly broad and unduly burdensome BellSouth has thousands of documents it would need to locate, search, and review in order to respond to this request. BellSouth further objects to this request on the grounds it potentially seeks information that is already a matter of public record before this or another state commission or is readily accessible to the Joint Petitioners through publicly available means; e.g., publicly accessible website. Particularly, in light of the voluminous nature of the Joint Petitioners' request, the Joint Petitioners are not entitled to require other parties to gather information that is equally available and accessible to the Joint Petitioners. Finally, BellSouth objects on the grounds that the information requested is irrelevant and not likely to lead to the discovery of admissible evidence. Complaints brought under the provisions of different ICAs involving different carriers and facts are not relevant to the specific arbitration herein.

SUPPLEMENTAL RESPONSE:

Subject to and without waiving the previously filed objections, responsive documents are attached.

SECOND SUPPLEMENTAL RESPONSE:

Subject to and without waiving the previously filed objections, additional responsive documents are attached. The Supra Second Amended Antitrust Complaint previously provided in response to this request was not complete (bates stamped pages 1210-1248). The complete complaint is provided herein.

ISSUE: What should BellSouth's obligations be with respect to line conditioning?

REQUEST: Provide all documents in which BellSouth discusses, explains, adopts or refers to a policy regarding the methods, procedures and functions that BellSouth is obligated to perform, or will perform, as part of line conditioning obligations under 47 C.F.R. 51.319(a)(1)(iii).

RESPONSE: BellSouth objects to this request on the grounds that it is overly broad and unduly burdensome. BellSouth has thousands of ICAs, legal pleadings, tariffs, and other documents that BellSouth would need to locate, search, and review in order to respond to this request. BellSouth further objects to this request on the grounds it potentially seeks information that is already a matter of public record before this or another state commission or is readily accessible to the Joint Petitioners through publicly available means; e.g., publicly accessible website (**http://cpr.bellsouth.com/clec/docs/all_states/index7.htm**). Particularly, in light of the voluminous nature of the Joint Petitioners' request, the Joint Petitioners are not entitled to require other parties to gather information that is equally available and accessible to the Joint Petitioners. Moreover, BellSouth objects on the ground that the information requested is irrelevant and not likely to lead to the discovery of admissible evidence. The language contained in other ICAs and documents involving different carriers and facts and which resulted either from negotiation or arbitration is not relevant to the specific arbitration herein.

Subject to and without waiving the foregoing objections, see BellSouth's standard interconnection agreement at http://www.interconnection.bellsouth.com/become_a_clec/docs/ics_agreement.pdf; BellSouth's Statement of Generally Available Terms; and the Carrier Notification Letter No. SN9108, which are attached.

SUPPLEMENTAL RESPONSE:

Subject to and without waiving the previously filed objections, additional responsive documents are attached. Attachment A contains the rates for time and materials for network construction which can be found in Section 5, Charges to Provide Permanent Facilities.

Respectfully submitted, this 6th day of December, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC

Edward L. Rankin, III
1521 BellSouth Plaza
P. O. Box 30188
Charlotte, NC 28230
(704) 417-8833

James Meza III
Robert Culpepper
Suite 4300, BellSouth Center
675 W. Peachtree St., NE
Atlanta, GA 30375
(404) 335-0841

COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all parties of record by email this 6th day of December, 2004.

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BellSouth Telecommunications, Inc.
North Carolina Utilities Commission
Docket Nos. P-772, Sub 8; P-913, Sub 5; P-989,
Sub 3; P-824, Sub 6; and P-1202, Sub 4
Joint Petitioners' 1st Request for Production
April 6, 2004
SUPPLEMENTAL RESPONSE Item No. G-9-2

ATTACHMENT TO REQUEST FOR PRODUCTION, SUPPLEMENTAL RESPONSE TO, ITEM NO. G-9-2

BEFORE THE CPR INSTITUTE FOR
DISPUTE RESOLUTION ARBITRAL TRIBUNAL

SUPRA TELECOMMUNICATIONS & INFORMATION SYSTEMS, INC., Claimant, V. BELLSOUTH TELECOMMUNICATIONS, INC., Respondent	Filed: September 20, 2002 Arbitration V

SECOND AMENDED ANTITRUST COMPLAINT

Claimant Supra Telecommunications & Information Systems, Inc. ("Supra"), in accordance with the Tribunal's Order of September 11, 2002, hereby files its Second Amended Complaint, and in support thereof states as follows:

I. GENERAL STATEMENT OF SUPRA'S CLAIMS

1. This is an arbitration seeking damages for violations of the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.* From the beginning of the parties' relationship, respondent BellSouth Telecommunications, Inc. ("BellSouth") has engaged in a pattern of anti-competitive practices and conduct designed to prevent Supra from acquiring customers, growing its business and implementing its business plan in order to preserve BellSouth's monopoly position in the wireline voice telecommunications market in Florida, without any legitimate business justification. As a result of BellSouth's actions, competition for local telephone services in the relevant market has been reduced, consumers have been

denied an effective choice of local telephone services provider, and Supra has been substantially injured in its business and property.

2. BellSouth holds a long-standing, well-recognized monopoly over local telecommunications in many geographic markets in various states, including Florida. The cornerstone of this monopoly is BellSouth's control over essential facilities for competition in local telecommunications – the comprehensive network of switches, lines and other telecommunications facilities that connect every telephone in its local service areas to all other served by BellSouth and other local telecommunications networks and telephones served by BellSouth and other local telecommunications facilities and networks.

3. Supra is a relatively new competitive entrant in the local telephone business, having begun service in Florida in response to the landmark Telecommunication Act of 1996 (the "1996 Act"), 47 U.S.C. § 151 *et seq.*, which for the first time removed all legal impediments to local telephone competition. It is BellSouth's response to Supra's competitive entry, and BellSouth's fear that Supra's success would erode BellSouth's monopoly power, that have given rise to the present dispute.

4. Because it is impossible economically to replicate the local networks controlled by BellSouth and other monopoly local telephone companies (referred as incumbent local exchange carriers, or "ILECs"), competitors such as Supra require access to the BellSouth local network in order to compete in the provision of local telephone services. BellSouth has used its monopoly control over the local telecommunications network to deny Supra access to facilities essential to competition, to raise Supra's costs and to increase barriers to entry in the market for local telephone services. BellSouth has also been able to use its market power in local telecommunications voice and non-voice

service to reacquire and retain customers in a way that competitors lacking such market power cannot do, for example, through monopolistic pricing parties and improper use of wholesale customer and carrier information that BellSouth has access to only because of its market dominance. BellSouth has taken these predatory and exclusionary actions in order to prevent Supra from successfully entering the market in BellSouth's territory, making it impossible for Supra to provide telephone services to consumers. BellSouth has delayed, impeded, and undermined Supra's efforts to utilize BellSouth's network, as permitted by and required under the Interconnection Agreement between the parties. BellSouth's actions were specifically intended to and have had the effect of substantially foreclosing Supra from competing for local telephone service in BellSouth's monopoly local service areas.

5. In addition to the specific statutory, decisional and contractual provisions set forth herein, BellSouth's willful and intentional faith violations of the requirements and purposes of Sections 251 and 252 of the 1996 Act, as well as the Good Faith Performance requirements of Section 4 of the General Terms and Conditions of the Interconnection Agreement 2, are applicable to every claim set forth herein.

6. BellSouth's exclusionary, anticompetitive and unlawful activities have had a substantial adverse effect on Supra's ability to compete in the relevant markets. Supra has proven its ability to gain customers in BellSouth's markets by implementing its Business Plan. Today, Supra has over 300,000 customers in BellSouth operating territories in Florida alone. But for BellSouth's actions/inactions as set forth herein, Supra would have experienced a more explosive growth in BellSouth's operating territories. As a result of its conduct, BellSouth has maintained its local telephone

monopoly, has foreclosed competition for local and intraLATA long-distance services in the relevant geographic markets and has substantially injured Supra in its business and property.

II. PARTIES AND JURISDICTION

7. Supra is a minority-owned alternative local exchange carrier incorporated in the state of Florida, lawfully doing business in 46 other states, with applications pending in 4 states. Supra is certified to provide telecommunications services in the state of Florida and 28 other states including Georgia, Kentucky and Mississippi with applications pending in 7 states. Supra's principal place of business in Florida is 2620 S.W. 27th Ave., Miami, Florida 33133.

8. BellSouth is an incumbent local exchange carrier as defined by Section 251(h) of the 1996 Act. BellSouth claims its principal place of business in the state of Florida to be 150 W. Flagler Street, Suite 1910, Miami, Florida 33130. BellSouth remains the monopoly provider of telecommunications services throughout its serving territory in Florida as well as in its serving territories of *Alabama, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.* Furthermore, BellSouth has maintained its relationship with other ILECs – SBC, Verizon and Qwest/US West. Sometime in 1999, BellSouth purchased a 10% stake in Interexchange Carrier (IXC) Qwest. Other ongoing relationships with these ILECs include joint purchasing arrangements and frequent meetings.

9. Pleadings and process to be served upon Supra in this matter shall be served upon the following:

Brian Chaiken
Adenet Medacier
Paul D. Turner

Supra Telecommunications and Information Services, Inc.
Legal Department
2620 S.W. 27th Ave.
Miami, Florida 33133
Telephone: 305/476-4248
Facsimile: 305/443-1078
Email: bchaiken@stis.com
Amedacier@stis.com
Pturner@stis.com

and the Law Firm of
Kelley Drye & Warren, LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036
Telephone: 202/955-9600
Facsimile: 202/955-9792
Email: cyorkgitis@kelleydrye.com
gmanishin@kelleydrye.com

10. Jurisdiction over this matter has already been decided and asserted by this Tribunal.

III. GEOGRAPHIC MARKETS, PRODUCTS AND SERVICES

11. Telephone services can be broken down into long-distance and local telephone service. Local telephone service is referred to as local exchange service and is provided by local exchange carriers, or "LECs." Local exchange service comprises telephone calls within local service areas that are served by one or more central offices that are interconnected and consist of one or more so-called "exchanges." In addition to providing local telephone service, facilities-based LECs also originate and terminate calls for long-distance telephone companies, a service known as "exchange access" or "access." Long distance service, also known as interexchange or toll service, consists of calls that originate and terminate in different local service areas. Companies that provide long-distance telephone service are referred to as Interexchange Carriers ("IXCs"). Long distance services are provided on an intraLATA and interLATA basis, where a LATA is a Local Access

Transport Area. LATAs are geographic areas created in response to the break up of the former American Telephone and Telegraph Company ("AT&T") and were used to define and enforce certain restrictions on the provision of long distance services by the Regional Bell Operating Companies that resulted from that break-up.

12. Historically, for nearly 100 years, local exchange service was provided by one company that had been granted a monopoly within a geographic area over the provisioning of such service. These "incumbent" LECs (ILECs) enjoyed legal and economic protections against the entry of competitors and benefited from favorable tax, depreciation and related laws that permitted them to construct ubiquitous networks for which they were guaranteed a profit by ratepayers. Under traditional public utility regulation, ILECs were guaranteed a reasonable return on their investment and protected against competition.

13. BellSouth Telecommunications, Inc. ("BellSouth") is a wholly owned subsidiary of BellSouth Corporation. BellSouth Corporation was incorporated on December 31, 1983 pursuant to the Modified Final Judgment. On January 1, 1984, AT&T transferred to BellSouth Corporation, all of the assets of two of its Regional Bell Operating Companies ("RBOCs"), South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company. BellSouth is the surviving corporation from a merger of those two RBOCs.

14. An ILEC's geographic area of responsibility and historic monopoly power is often referred to as the company's "service area." As part of the AT&T divestiture, BellSouth acquired monopoly service areas within the states of Florida, Georgia, Alabama, Mississippi, South Carolina, North Carolina, Tennessee, Kentucky and Louisiana. Within

BellSouth's service areas in Florida, BellSouth serves more than ninety percent (90%) of the total access lines.

15. Substantially all intraLATA and interLATA wireline telephone calls in BellSouth's Florida service areas are transmitted or handled by BellSouth using its local public switched network. Any competitor seeking to provide local wireline telecommunications services must have access to the local public switched network and its network elements in order to provide telecommunications service and compete in the local exchange market. No entrant can economically duplicate the ubiquitous local telephone network controlled by BellSouth, financed for years by captive utility ratepayers. BellSouth's local network and its network elements – the most significant of which are loops or access lines from subscribers' premises to the central offices, switching facilities located in the central offices, and BellSouth's interoffice transport trunks between central offices and space within those offices to access these elements ("co-location space") -- are therefore essential facilities to the provision of competitive local telecommunications services within BellSouth's monopoly service areas.

A. Relevant Products and Geographic Markets

1. Telephone Services

16. Wireline telecommunications service is separate and distinct from telegraph service; having different customers, different uses and different costs associated with these uses. Telegraph service is not a reasonable substitute for wireline telecommunications service. Furthermore, the bulk of transmissions carried by the public switched network are voice transmissions. Therefore, any wireline service, which only provides data transmission capability, is not a reasonable substitute for wireline telecommunications service, which has both voice and data capability. Likewise, wireline telecommunications service is separate

and distinct from wireless telephone service or other radio-based variants; having different uses and costs associated with these uses. Moreover, most wireless services do not provide the ability to transmit data over the connection, nor can wireless service provide multiple channels over the same connection as does digital wireline service. In short, wireless telecommunications service is not a reasonable substitute for wireline service. This is evident, because most wireless subscribers purchase wireline telecommunications service as well.

17. In addition to the above, wireline telecommunications end-users can be broken down into residential and business customers. This division of end-users is recognized by the industry, including BellSouth. In this regard, the industry generally recognizes differences in pricing between business and residential customers. Residential customers usually have fewer than five analog lines (usually one to three lines). Moreover, marketing strategies often differ between the two groups. Because of the differences in products, usage and/or pricing, a distinct separation in markets exists between residential and business end-users.

18. The business market can further be divided into small business and large business end-users. Small business generally orders analog lines (usually five or less), while large businesses usually have PBX systems and thus order digital lines. The cost difference between analog and digital lines is usually considerable. Small businesses using analog lines utilize standard telephone equipment, while large businesses using digital lines must purchase specialized telephone systems. Because of the differences in products, usage and/or pricing, a distinct separation in markets exists between small business and large business end-users.

19. LECs that provide these three products on a facilities-basis, residential retail service, small business service, and large business service, also offer exchange access service to interexchange carriers, as described above. Thus, the facilities used to provide these three sub-markets of local services are also used to provide a portion of intrastate and interstate long distance services.

20. Accordingly, the relevant product market is the provisioning and sale of wireline telecommunications service. This product market can further be broken down into three separate and distinct sub-markets: (a) residential; (b) small business; and (c) large business. As different customers, product offerings, prices and marketing strategies exist between these markets, these markets are and can be properly considered to be separate and distinct product sub-markets.

21. With respect to geographic markets, wireline telecommunications service traditionally developed around franchised territories in which one monopoly provider owned and operated the network. Although it was the intent of the Act to open up local markets to competition, minimal competition has emerged in territories serviced by the ILECs. Ownership of the local public switched network still rests in the hands of the ILECs. Because competition in one ILEC's service area does not bring competition or otherwise benefit consumers in the service area of another ILEC, it is proper and appropriate to define geographic market boundaries by ILEC service areas.

22. Moreover, state Commissions often regulate many aspects of the telecommunications industry within a particular state, thus creating differing market conditions within each state. Therefore consumers in each state are somewhat isolated from the market conditions in other states (irrespective of whether or not the same ILEC services

the same states). Accordingly, it is appropriate to further define geographic market boundaries along state lines.

23. For the reasons stated above, in this case, the relevant geographic market is the BellSouth services areas within Florida.

24. Within each of the above relevant geographic markets, BellSouth possesses both market-power and monopoly power in the market for wireline telecommunications service. At the end of 1998, BellSouth's statewide market share in Florida exceeded ninety-five percent (95%) of the total access lines. BellSouth possesses a dominant and controlling market share in its Florida service territory. Moreover, the local public switched networks in the relevant geographic area are primarily owned by BellSouth and are essential facilities necessary for the initiation and completion of telephone calls made from and to the relevant market (*i.e.*, BellSouth's service areas).

25. Notwithstanding the statutory right to resell telecommunications services, substantial barriers to entry exist in both the above referenced markets. Apart from the fact that the ILEC owns the local public switched network, other barriers to entry include, but are not limited to, the need to be certified in each state in which service will be provided, bonding and minimum capital requirements, and the need for considerable expertise in the fields of business, regulatory affairs and communications technology. Additionally, ILECs such as BellSouth had, and still have, inherent within the system, structural impediments which make it extremely difficult to compete effectively and at a profit.

26. In transmitting intraLATA or interLATA telephone calls in the relevant market, BellSouth engages in business that affects or is within the flow of interstate commerce, and the effect of that business on interstate commerce is substantial. BellSouth has operated and

continues to operate across state lines and so operated during the period of time relevant to this Counterclaim. The result of the market structure and the normal business activity of BellSouth is that: (a) telephone calls made from telephones in BellSouth's service area are processed by BellSouth and linked with IXCs for connection to recipients outside BellSouth's service area (and including outside the state of Florida); (b) data, information, correspondence and financial material are exchanged between BellSouth's operations in Florida and its principal offices in the State of Georgia; and (c) money flows to and from banks outside of the state of Florida and BellSouth's telephone operations and other business operations within the state of Florida.

2. Digital Subscriber Line ("DSL") Services

27. DSL is a family of data services that provide one way high-speed data and voice transport with access of fifty (50) times the speed provided by telephone wires. A variety of affordable DSL services have been made available in recent years to customers due to the deployment of Advanced Data Services provisioned upon the already deployed RBOC networks, which carry traditional voice services. Such include but are not limited to Asymmetrical Digital Subscriber Line ("ADSL"), High Bit Rate Digital Subscriber Line ("HDSL") and Single Pair Symmetrical Services.

28. DSL, also referred to as Broadband Technology, is mostly available to consumers in urban areas. In rural markets, satellite and fixed wireless technologies are providing high-speed access to consumers otherwise not serviced by the cable modem and DSL providers.

29. In 2001, BellSouth nearly tripled its DSL customer base with 620,500 retail and wholesale customers, an increase of 189% over 2000 – the fastest growth of any DSL or cable provider in the country. BellSouth added nearly 158,000 customers in the fourth

quarter, a 34% sequential quarter growth rate. In 2001, BellSouth increased its coverage from 45% to 70% of households in the markets BellSouth serves – covering over 15.5 million lines. BellSouth's market position is a result of BellSouth's targeted market-driven deployment of DSL in more than 1,000 central offices and 8,700 remote terminals (RTs) -- more RTs than any other DSL provider. BellSouth's network design provides broadband, at speeds of a megabit or more, to 90% of Supra's coverage area. The network design also enables BellSouth to deploy advanced equipment and services, achieving significant improvement in cost per line. For the second quarter of Year 2002, BellSouth boasts 803,000 customers, and is the leading DSL provider in its 9 state region

30. Cable Modem high-speed data is not a reasonable substitute for DSL for Supra as a CLEC, which provides local telephone service on an RBOC network that is ready and able to provide DSL service on 70% of its subscribers lines.

3. Operations Support Systems

31. Operations Support Systems ("OSS") are databases or facilities used in the provision of a telecommunications service and are necessary for the delivery and exchange of installation, billing and other customer information between ILECs and competitors. The OSS systems are used to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair and billing. The Federal Communications Commission ("FCC") has held that ILECs are obligated to provide nondiscriminatory OSS access to competitors through their interconnection agreements. BellSouth has failed to provide Supra with nondiscriminatory access to BellSouth's OSS and, as a result, has made it impossible for Supra to order, install and utilize UNEs and other elements of BellSouth's monopoly local network.

32. BellSouth has made available to Supra an OSS system called Local Exchange Navigation System ("LENS"). LENS and the other BellSouth OSS interfaces used by competitors such as Supra fail to provide Supra with nondiscriminatory access to BellSouth's OSS. The LENS system and other BellSouth OSS interfaces used by competitors only accept Local Service Requests ("LSRs") instead of the Service Orders ("SOs") input by BellSouth and other ILECs for their own customers and services. BellSouth does not use, nor has it ever used, LENS for its own operations but instead uses a proprietary OSS system that is far superior in performance in terms of both efficiency and quality.

33. As a direct result of the difference in the types of submissions for pre-ordering and ordering of services, LENS and other BellSouth OSS interfaces used for competitors constantly clarify and/or reject Supra's LSRs for no reason, as a result of a BellSouth error or by design. This frustrates Supra's access to essential network facilities, delays the initiation of service to Supra's customers, artificially increases Supra's administrative and overhead costs, and substantially impedes Supra's ability to enter the market in competition with BellSouth.

34. In or around 2000 and during the pendency of a good faith billing dispute, BellSouth disconnected Supra's access to LENS, thereby precluding Supra from conducting any pre-ordering and ordering of services, despite Supra's right to same. These disconnections have exacerbated Supra's inability to access essential network facilities, service delays, cost increases, and the adverse impacts on Supra's ability to compete described above. More recently, on September 9, 2002, BellSouth again discontinued Supra's access to LENS.

B. Interstate Commerce

35. In transmitting local or long distance telephone calls in the relevant markets, BellSouth engages in business that affects or is within the flow of interstate commerce, and the effect of that business on interstate commerce is substantial. BellSouth has operated and continues to operate across state lines and so operated during the period of time relevant to this Complaint. The result of the market structure and the normal business activity of BellSouth is that: (a) telephone calls made from telephones in BellSouth's service area are processed by BellSouth and linked with IXCs for connection to recipients outside BellSouth's service areas (including outside the state of Florida); (b) data, information, correspondence and financial material are exchanged between BellSouth's operations in Florida and its principal offices in the State of Georgia and (c) money flows to and from banks outside of the state of Florida and BellSouth's telephone operations and other business operations within the state of Florida.

IV. FACTUAL ALLEGATIONS

A. Predatory Pricing (Price Of Bellsouth Residential Basic Line Is Cheaper Than The Cost Of Elements)

36. BellSouth has priced its basic telephone service below the purported cost of the elements which make up that service. For example, basic telephone service requires at a minimum, a loop and port. Although the port contains all of the features of the switch, through software BellSouth disconnects these features. However, the cost of the switch port is still the same, irrespective of whether or not the services are connected.

37. In leasing UNE Combos to Supra and other CLECs, BellSouth purportedly prices the cost of the loop and switch port at cost. However, BellSouth's price of basic service to consumers is lower than the combined wholesale price of the loop and switch port elements

offered to Supra and other CLECs. The only conclusion to be drawn here is that BellSouth has priced its basic service below cost.

38. Supra and other CLECs cannot compete using UNEs or UNE Combinations when basic service is being requested by the consumer, since it costs more for Supra to purchase the loop and switch port than BellSouth charges the consumer for the basic service.

39. BellSouth's actions amount to predatory pricing in that BellSouth is charging consumers less than its costs for the purpose of retaining these customers and maintaining its market share.

40. The end result is that Supra is forced to primarily offer full-service packages, which include all of the switch port features in order to compete with BellSouth. Conversely, Supra can only compete for those customers that want all of these features.

41. Supra has and continues to suffer damages as a result of BellSouth's predatory pricing of basic services.

42. The actions described above were intentionally and willfully undertaken by BellSouth as a result of its own private and voluntary business judgments, and were not the result of any governmental action. Moreover, BellSouth has no legitimate business justification for its actions.

B. Bellsouth's Monopolistic Customer Reacquisition And Retention Programs ("Winback")

43. BellSouth has implemented programs designed to deplete Supra of its current and potential customers under the labels "Winback," "Full Circle," and other similar programs. Said programs are run by BellSouth's retail divisions and are also outsourced to independent agents and contractors. These programs violate the antitrust laws in at least four ways: (1) some of them employ targeted price discounts or other customer incentives

which create a price squeeze for BellSouth's competitors; (2) the programs make illegal use of confidential wholesale customer information; and (3) BellSouth uses these programs to illegally disparage and defame Supra and its products and services; and (4) BellSouth locks customers into multi-year agreements which include termination fees and penalties which create an overwhelming economic disincentive to these customers should they consider obtaining service from a competitor.

1. Price Squeeze

44. BellSouth market dominance is not only reflected in its monopoly of the products that it is able to offer to consumers, but also BellSouth plays a major role in determining the prices that CLECs pay for purchasing inputs to competing CLEC services. To Supra, BellSouth is not only its main competition but also the sole vendor/wholesaler of voice services in BellSouth's service areas. The prices at which Supra purchases voice services from BellSouth are determined by the State Public Service Commission. According to the Act of 1996, ILECs must make available services and elements subject to pricing standards which take into account the ILEC's costs of provisioning the same elements and services to itself and its own customers.

45. Starting in 2001, BellSouth was successful in offering various promotions which targeted the CLECs' customers. These promotions are believed to cover several segments of the consumer market, including residential, small, and large businesses. These targeted price discounts and other economic incentives are used in conjunction with BellSouth's reacquisition and retention programs. BellSouth offers telephone services to existing or potential Supra customers at effectively lower rates than Supra is permitted to purchase the same services to offer to Supra customers. Because of these

discounts or effective discounts on the cost of retail telephone services and the relative cost of BellSouth's wholesale products, Supra cannot compete effectively.

46. For example, while Supra existing or potential customers can obtain a 20% discount from BellSouth to purchase telephone services, when they return to or stay with BellSouth under one of its promotions, Supra can only obtain a discount of 16.81% from BellSouth to purchase the same services and offer them to its customers. Practically, in those circumstances, Supra and other CLECs cannot successfully retain these targeted customers.

47. BellSouth prices many of its wholesale elements and services above its retail services, which constitutes a *per se* price squeeze. Even where BellSouth prices its promotional discounts, rebates, or other offerings above wholesale costs, its pricing takes advantage of different regulatory pricing calculations in order to pare the promotions down to the price point where the CLECs cannot match such offerings without losing money themselves, thereby perpetuating a price squeeze.

48. In view of these promotional incentives, CLECs can hardly retain or obtain customers, especially when coupled with BellSouth advertising campaigns, which focus on the CLECs' reliability, their customer service, their experience in the market, their life expectancy and other intangibles.

49. As a result of the foregoing anticompetitive behavior Supra suffered extensive damages, including lost revenues, and lost goodwill.

2. Misuse of Wholesale Information

50. The key to BellSouth's promotions is its unique ability to utilize information acquired while the customer was a BellSouth customer or acquired due to BellSouth's singular position as a provider of vital wholesale imports to competitors services. A

customer who decides to switch from BellSouth to a CLEC will more than likely receive a Winback call or "we miss you" correspondence from, or on behalf of, BellSouth while the customer's order is being processed by BellSouth wholesale operations. It is not feasible for BellSouth to act so efficiently unless BellSouth uses the CLECs' LSRs as a trigger to initiate Winback and unless there is internal sharing of Customer Proprietary Network Information ("CPNI") and other competitor-specific information – obtained by BellSouth solely due to its role as an ILEC in providing loops and other essential facilities to CLEC competitors – between BellSouth's retail and wholesale divisions. All this is made possible because BellSouth also provisions CLECs' requests to convert BellSouth's customers.

51. The 1996 Act does not allow telecommunications carriers to use information obtained from another carrier for its own marketing purposes. 47 U.S.C. § 222(b) provides that:

> A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

52. On or about 2001, BellSouth created various Winback Centers, Operations Support Systems and supporting databases that generates reports for its reacquisition and Winback operations. CARE, SIW, SUNRISE, and other BellSouth OSS feed directly into systems that generate reacquisition letters and "leads" for BellSouth's and outbound telemarketers' uses.

53. BellSouth is only able to successfully create this Winback operation because of its monopoly position and its use of wholesale information to screen, qualify and target special promotions and marketing directed to end user who decide to subscribe to services

from Supra and other CLECs. As a result of BellSouth's misuses of wholesale information and abuse of its monopoly power, Supra lost a large number of customers, and suffered damages.

54. All of the BellSouth's unlawful acts described above are designed to delay, hinder, suppress and obstruct the development of competition in the telecommunications markets by making it impossible for Supra and other CLECs to operate profitably, and in turn denying telecommunications consumers the benefits of competition as conceived by the Act.

55. BellSouth's anticompetitive tactics have successfully caused the loss of customers to Supra. BellSouth's ultimate goal is to erode Supra's customer base and cause its exit from the local telecommunications market.

56. BellSouth has the specific intent to maintain its monopoly status in the markets serviced by Supra. BellSouth's illegal and anti-competitive conduct has seriously harmed the ability of Supra to compete or enter into service areas dominated by BellSouth. As a result, BellSouth has hindered overall competition and reduced consumer choice in the market for local telecommunication services, preventing the lower prices, superior service, and the deployment of advanced telecommunications services envisioned by Congress, and supported by the FCC.

3. Defamation and Trade Disparagement

57. BellSouth is using its monopoly power to disseminate disparaging statements about Supra. Despite BellSouth's unlawful and obstructive tactics, Supra has achieved some modest success in BellSouth South Florida territories. Supra has fought tooth and nail to gain 9.01% of the telephone markets from BellSouth in South Florida (area codes 305, 854, 786 and 561). BellSouth countered by engaging in a dilatory campaign de-

signed to defame Supra to its current and potential customers. Such activity in turn discourages customers from obtaining telephone and other services from Supra.

58. BellSouth's campaign has caused a large number of Supra. customers to return to the service offered by BellSouth. First, BellSouth waives a "switchback" fee of $40.00 to customers who agree to lodge a slamming complaint against Supra. Second, BellSouth's retail service representatives make disparaging statements about Supra to customers who call them to inquire about Supra or to complain about service outages or other problems, presumably caused by BellSouth's deceptive and under handed practices. Instead of accepting responsibility for BellSouth's bad acts, these BellSouth representatives and/or agents tell the customers that "Supra is going out of business," "Supra is filing for bankruptcy," "Supra is illegal," or by making other similar statements.

59. Even BellSouth's repairmen and maintenance personnel have engaged in the unlawful practices of making disparaging statements about Supra. Upon contact with Supra's customers, they introduce BellSouth's incentive programs and make similar defamatory statements. Such statements made by BellSouth are false, defamatory, disparaging, denigrating, and have caused many customers to return to BellSouth.

60. To make matters worse, BellSouth has commenced a marketing campaign targeted at the reliability and dependability of Supra.

61. As a result of BellSouth's unlawful and willful defamatory remarks, Supra has suffered damages and lost numerous former and potential customers.

C. DSL Tying and Exclusionary Practices

62. BellSouth willfully and intentionally ties its DSL service to its own wireline services. BellSouth has the economic power to force customers in the relevant market to

purchase BellSouth voice services, in lieu of Supra voice services, if the customers want, to maintain their BellSouth DSL service.

63. BellSouth enjoys a monopoly in the provision of DSL services in its service area in Florida. In Florida, BellSouth controls more than 75% of the DSL market. It markets its DSL services under the name FastAccess®. No other carrier owns data facilities or xDSL capable loops in locations where BellSouth provides telephone services. While there are various carriers that offer xDSL services in BellSouth's service area, they are for the most part reselling BellSouth's DSL services from BellSouth tariff. The reason is that the voice facilities owned by BellSouth are also able to provide xDSL services without the need for additional equipment or facilities. BellSouth seeks to maintain and increase its monopoly in this market by hindering the ability of carriers such as Supra to provide xDSL service, an advanced service, or to serve voice customers that desire DSL service. Specifically, BellSouth will not provide DSL service to CLECs' UNE or UNE platform (UNE-P) voice customers. BellSouth also strips DSL services from CLEC resale customers.

64. BellSouth's refusal to provide DSL to UNE-based Supra customers is in addition an exclusionary practice that artificially maintains BellSouth's voice monopoly by impeding the ability of voice CLECs to compete. BellSouth represents that it will permit CLECs to serve Bellsouth DSL customers if the CLECs utilize resale, but not UNE or UNE-P elements, to serve the end users. Despite repeated requests by Supra, BellSouth has steadfastly refused, without economic justification or regulatory compulsion, to provide UNE-based Supra customers with DSL service.

65. The only rationale for this refusal, and its intended and actual effect, is to raise Supra's costs for entry into, and competition within, the voice services market. Since BellSouth illegally refuses to provide Supra's customers with DSL service, Supra must attempt to provide its customers with costlier alternatives, or lose customers in the voice services market.

66. Both BellSouth and Supra are involved in a "not insubstantial" amount of inter-state commerce in the market of DSL service. Both BellSouth and Supra have an economic interest in DSL and voice services.

67. As a direct and proximate result of BellSouth's illegal arrangement, Supra has and will continue to suffer monetary damages and loss of goodwill.

D. Over-Billing and Sham Litigation

68. From the inception of the parties' relationship, BellSouth has continuously over-billed Supra. Supra has memorialized this pattern in various documents and has regularly contested BellSouth's bills. BellSouth's patented response is to deny Supra's request to lower the bills and unilaterally declare the invoices due without further investigation. It remains difficult to conceive why BellSouth is not able to issue an accurate invoice to Supra considering that BellSouth is at the cutting edge of technological advances and possesses the resources to man and equip its billing organization. Over the years BellSouth has not denied that it possesses the capacities to issue an accurate bill. However, BellSouth continues to insist that its inflated bills reflect the charges Supra agreed to in the interconnection Agreement, and in the different rates ordered by the FPSC. Because of BellSouth's position, Supra had to initiate and defend various lawsuits and arbitration proceedings involving BellSouth.

69. The major components of the judicial battles between Supra and BellSouth are BellSouth's refusal to bill Supra's for lease facilities at UNE rates, and BellSouth's refusal to provide the data necessary to collect revenues for BellSouth and Interexchange Carriers. On some occasions, BellSouth unreasonably insisted on invoicing Supra as a reseller even when the lines were provisioned as UNEs. This Tribunal previously found that BellSouth's bills and invoices from October 1999 cannot be trusted as BellSouth failed to apply the lower UNE rates, failed to provide Supra with Interexchange data that would allow Supra to bill and receive exchange revenues from Long Distance Carriers, failed to provide Supra with Operator Services / Directory Assistance and other branding functions, and failed to pay Supra reciprocal compensation for traffic exchanged with BellSouth. All of the foregoing actions are designed to increase Supra's costs of doing business.

70. In addition to BellSouth's unreasonable refusal to bill at UNE rates, BellSouth initiated various other baseless lawsuits against Supra. For instance, BellSouth's sister corporation, BellSouth Intellectual Property Corporation ("BIPCO"), initiated a lawsuit against Supra for violation of Trademark laws, over Supra's alleged misuse of BellSouth marks. BellSouth even requested that the Court enjoin Supra from any use of the BellSouth mark even in truthful comparative advertising. After initiation of the lawsuit, Supra offered to settle the case. Although BellSouth knew that it would not obtain more than Supra offered, BellSouth insisted on proceeding with the costly and time consuming litigation.

71. BellSouth further initiated a proceeding before the FPSC against Supra for Supra's alleged failure to properly report taxable revenues before the State of Florida. Un-

beknownst to BellSouth, Supra reported access revenues, which data BellSouth never provided, on an accrual basis and overpaid its taxes with the State of Florida. BellSouth later dismissed the case.

72. Most recently, BellSouth has filed two additional baseless proceedings. First, a contempt action against Supra for Supra's alleged use of confidential information in judicial proceedings. The second matter alleged Supra's unlawful use of LENS. Neither claim has any merit.

73. BellSouth's resolve is to keep Supra entangled in legal battles, which BellSouth knows will tremendously raise Supra's costs of doing business. While BellSouth has the resources to waste revenues on legal fees and take legal risks, Supra cannot absolve these costs and take such risks. So far, Supra and BellSouth have arbitrated seven (7) claims before this Tribunal and have five (5) claims pending in Federal Court; Supra has spent approximately $1.5 million in legal fees due to BellSouth's unreasonable business practices toward Supra.

E. Denial of Access to UNEs and UNE Combinations

74. BellSouth has failed to provide Supra with access to UNEs and UNE Combinations. Consistent with Section 153(29) of the Communications Act of 1934, as amended by the Act, 47 U.S.C. § 153(29), the Agreement (Part B, page 33) defines "Network Element" as

> a facility or equipment used in the provision of a Telecommunications Service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a Telecommunications Service.

75. The FCC's Rules specifically provide that, except upon request, an ILEC shall not separate requested network elements that the ILEC currently combines. 47 C.F.R. §

51.315(b). The Supreme Court has twice affirmed the legality of these regulations, most recently on May 13, 2002.

76. Since inception of the Agreement, Supra has sought to lease UNEs and UNE Combinations from BellSouth. Supra has made several written requests to BellSouth for the provision of UNEs, including access to loop qualification information. On or about December 12, 2000, BellSouth informed Supra by letter that, in its view, BellSouth had no contractual or statutory obligation to provide Supra with UNEs. Moreover, BellSouth stated that any future agreement to combine such elements would include additional charges. Such charges to combine elements are not authorized by the Agreement or by any FCC or FPSC regulation.

77. Despite Supra's efforts and intent to order UNEs and UNE Combinations, BellSouth has classified all of Supra's orders as resale and has refused to provide Supra the ability to submit orders for UNEs. BellSouth has taken the position that under the Agreement, UNEs are only available in a collocation environment. The FCC rejected this position in ¶ 329 of its First Report and Order (adopted August 1, 1996) on the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, (FCC Competition Order). BellSouth requested that Supra amend the Agreement, although the Agreement itself provides Supra the right to order UNEs and UNE Combinations. BellSouth refused this request.

78. Instead of supplying Supra with UNEs and UNE Combinations, BellSouth has provisioned Supra customers as "resale" customers. Under this arrangement, BellSouth is able to retain for itself substantial, competitively significant revenues from features and services that are only available to competitors providing service via UNEs or their own

network facilities. BellSouth's intentional refusal to provide Supra with UNEs was undertaken with the purpose and effect of (a) delaying Supra's ability to provision telecommunication services through the use of UNEs; (b) subverting the FPSC's ruling on non-recurring conversion costs, thereby charging ALECs additional, unwarranted amounts and creating an unnecessary barrier to entry; and (c) preventing Supra from being classified as a facilities-based provider via UNEs, entitled to, *inter alia*, access charges from long distance companies and other revenues not available to local service resellers.

79. Starting September 9, 1997 and June 22, 1998, Supra made several written requests to BellSouth for the provision of UNE Combos, including access to loop qualification information, pursuant to Section 1 and Part II of the General Terms and Conditions, Attachment 2 of the Interconnection Agreement 2, and 47 CFR Section 51.307. Supra renewed these requests during the contractual period of the 1999 Agreement pursuant to 47 CFR Section 51.307(a), entitled "Duty to provide access on an unbundled basis to network elements." That section provides:

> An incumbent LEC shall provide, to a 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 terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules.

80. In addition, the Act, the FCC rules, and the Interconnection Agreement 2 all require BellSouth to provide UNEs as discussed in greater detail herein below.

81. On or about June 25, 1998 and July 2, 1998, Mr. Marcus Cathey, as Senior Assistant Vice President of BellSouth, replied to Supra stating that BellSouth had no con-

tractual or statutory obligation to provide Supra with UNE Combos. Moreover, Mr. Cathey's letters stated that any future agreement to combine such elements would include charges not authorized by either the FCC or the FPSC. On August 3, 1998, Mr. David Nilson of Supra responded to Mr. Cathey's letter detailing specific contract language from section 2 of Supra's signed copy of the Interconnection agreement and to Florida Public Service Commission Order PSC-98-0810-FOF-TP which ordered that the UNE combinations must be provided, set modified rates for the non-recurring charges, and required BellSouth to perform the re-combinations. Telephone calls with Mr. Cathey at or around that time indicated that his section 2 was different than Supra's section 2. After requesting a copy of the agreement BellSouth filed, the alterations were suddenly obvious to Supra.

82. When confronted with the evidence of alteration and fraud, BellSouth admitted that the agreement filed did not reflect the parties' agreement. BellSouth further stated that *even if* the provisions providing access to recombined UNEs were restored, it would not provide such UNEs without payment of certain fees which the FCC and the FPSC had ruled could not be charged, such ruling having been recently affirmed by the United States Supreme Court, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). Despite BellSouth's claim that the switching of agreements was inadvertent and unintentional, Supra contends that the switching of agreements was intentional and for the purpose of (1) delaying Supra's ability to provision telecommunication services through the use of UNEs and UNE Combos pursuant to the parties' Interconnection Agreement, specifically Section 1 and Part II of the General Terms and Conditions as well as Attachment 2; (2) subverting the FPSC's ruling on non-recurring conversion costs, thereby charging

CLECs additional, unwarranted amounts and creating an unnecessary barrier to entry; and (3) preventing Supra from being classified as a facilities-based provider entitled to cost based products, access line charges from long distance companies, and EUCL charges, each one a substantial revenue source that Supra has been illegally deprived of. BellSouth was aware of the loss of this revenue to CLECs and fought a losing battle to retain these revenues from CLECs purchasing UNE combinations.

83. With respect to Supra's request for UNEs, Section 30.1 of the General Terms and Conditions requires BellSouth to " . . . offer Network Elements to [Supra] on an unbundled basis . . ." additionally, Section 30.9 of the General Terms and Conditions not only indicates that the parties " . . . agree that the Network Elements identified in Attachment 2 are not exclusive . . ." but also indicates that if " . . . BellSouth provides any Network Element that is not identified in this Agreement, to itself, to its own Customers, to a BellSouth affiliate or to any other entity, BellSouth will provide the same Network Element to [Supra]. . . " and pursuant to Section 30.10.4,

> Unless otherwise designated by [Supra], each Network Element and the interconnections between Network Elements provided by BellSouth to [Supra] shall be made available to [Supra] on a priority basis that is equal to or better than the priorities that BellSouth provides to itself, BellSouth's own Customers, to a BellSouth affiliate or to any other entity for the same Network Element.

84. As such, BellSouth's refusal to provide UNEs that are specifically identified or currently available or provided to any other entity on a priority basis that is *equal to or better than* the priority to any other entity is a violation of not only the parties' Interconnection Agreements 1 and 2, but also the Communications Act as amended by the 1996 Act (as interpreted by the FCC, the FPSC and Supreme Court). Meanwhile, BellSouth continues to represent to the FCC that it provides UNEs and UNE Combos contained in

its contracts. In response to the FCC DA 99-532 released on March 17, 1999, BellSouth stated in part that:

> Until such time that as the FCC adopts new definitions of unbundled network elements, BellSouth will continue to provide every unbundled network element in its contracts, which affords access to all those currently listed in Section 51.319 of the Commission's Rules.

85. Instead, BellSouth, until ordered to bill on a UNE basis by the Tribunal in a contract enforcement action, would only "provide" Supra wholesale services on a resale basis. It should be noted that the difference between a CLEC providing services via resale versus providing services via UNEs is merely a billing difference. Absolutely no physical changes are required to be made to the network in order to switch from resale to UNEs.

86. Loop qualification information allows a telephone service provider to know what types of services and features may be made available to a customer at a certain location. It is necessary in order to easily determine availability of advanced services, such as xDSL. Supra has made several written requests to BellSouth for loop qualification information as well as other information pertaining to central office records.

87. BellSouth's response to this request was to inform Supra that it has no statutory or contractual obligation to provide such information to Supra. With respect to BellSouth's position, Section 30.10.3.2 of the General Terms and Conditions requires BellSouth " . . . to work cooperatively with [Supra] to provide Network Elements that will meet [Supra's] needs in providing services to its Customers[,]" and 47 CFR Section 51.307(e) requires that ". . . BellSouth shall provide to a requesting telecommunications carrier technical information about . . . [BellSouth's] network facilities sufficient to allow the requesting carrier to achieve access to [UNEs]. . ." As such, Supra has requested certain information

from BellSouth that will help Supra in identifying UNEs with respect to providing services to its customers, and BellSouth has refused to assist. Additionally, should these Network Elements be new or revised Network Elements, Section 30.9 requires BellSouth to ". . . notify [Supra] of the existence of and the technical characteristics of the new or revised Network Element." In either event, BellSouth's actions are violations of the Good Faith requirements of the Act and FCC rules as well as the Good Faith Performance requirements of Section 4 of the General Terms and Conditions.

88. BellSouth's actions violate Section 2 of the Sherman Act. BellSouth's refusal to allow Supra to provide UNE-P based services can only, and does have, the effect of raising Supra's costs as a competitor of BellSouth's, as well as slowing Supra's expansion into the voice services market. In making this claim, Supra does not seek to duplicate *contract* damages recovered in prior arbitrations against BellSouth. Rather, Supra seeks those *antitrust* damages which are the result of BellSouth's anticompetitive practices.

F. Denial of Access to Other Essential Facilities (OSS and LENS)

89. After passage of the Act of 1996, BellSouth created a business organization that dealt specifically with CLECs. That organization, the Local Carrier Service Center, was purportedly created to process CLECs' service requests into BellSouth's back-end Operation Systems. Under the disguise of helping the CLECs, BellSouth through the LCSC successfully denied the CLECs access to facilities necessary to enter and success in the provision of local telecommunications service.

90. BellSouth has consistently denied Supra access to essential facilities by its failure to provide Supra with access to BellSouth' networks and network elements, including but not limited to unbundled network elements, OSS, access to BellSouth Central Offices,

transport services, inter-exchange billing data and billing OSS, refusal to collocate Supra's switches and communication platforms. The foregoing systems, networks, elements, services and facilities are central to Supra's ability to provide local telecommunications and exchange services effectively, competitively and at a profit. The regulatory scheme of the telecommunications industry makes it incumbent upon the RBOCs to provide these elements and facilities on a non-discriminatory basis to Supra. The FCC made subsequent finding that denying CLECs, such as Supra, access to these essential functions constitutes barrier to entry, and hindrance to competition.

91. This Tribunal previously found that BellSouth was in violation of its obligations to provide such elements and facilities to Supra. As a direct result of BellSouth's anti-competitive refusal to allow Supra to operate as a facilities-based carrier and to provide Supra with non-discriminatory direct access to its OSS, inter alia, the Tribunal held that:

> The evidence shows that BellSouth breached the Interconnection Agreement in material ways and did so with the tortious intent to harm Supra, an upstart and litigious competitor. The evidence of such tortious intent was extensive, including BellSouth's deliberate delay and lack of cooperation regarding UNE Combos, switching Attachment 2 to the Interconnection Agreement before it was filed with the FPSC, denying access to BellSouth's OSS and related databases, refusals to collocate any Supra equipment, and deliberately cutting-off LENS for three days in May 2000. (Emphasis added.) Please see page 40 of the June 5, 2001 Award.

92. From the inception of the parties' Agreement, Supra has and continues using LENS as the OSS to convert customers from BellSouth, and at the same time has requested other types of services from BellSouth, such as changes in features, addition to current account, and disconnection of features of services on the customers' account. LENS is not a true provisioning OSS, but is only a gateway to BellSouth's wholesale

OSS. BellSouth in turn provisions Supra's requests through its OSS and other legacy systems. As such, LENS is essential to Supra's ability to conduct business.

93. Starting in 1998 and continuing through the present, BellSouth regularly used LENS as an anticompetitive tool against Supra. Not only has BellSouth unreasonably denied Supra access to LENS without notice, in violation of the parties' agreement, BellSouth has also shut down LENS whenever there is a dispute between the parties over payment of invoices. BellSouth has shut down Supra's access to LENS on May 2000, and again on September and October 2000.

94. During the pendency of the parties' current billing dispute, BellSouth's Pat Finlen wrote a letter to Supra dated May 16, 2000 where BellSouth informed Supra that "as of May 16th BellSouth will no longer accept any orders for telecommunications services from Supra." That same day, BellSouth disconnected Supra's access to LENS in violation of Section 1.2 of the General Terms and Conditions which specifically states that "BellSouth shall not discontinue any Network Element, Ancillary Function, or Combination provided hereunder without the prior written consent of [Supra,]" and Section 16.1 of the General Terms and Conditions which specifically states that "[i]n no event shall the Parties permit the pendency of a Dispute to disrupt service to any [Supra] Customer contemplated by this Agreement[,]"as well as Attachment 1, Section 2.1 of the Interconnection Agreement 2 which specifically states that "[n]egotiation and arbitration under the procedures provided herein shall be the exclusive remedy for all disputes between BellSouth and [Supra] arising under or related to this Agreement including its breach. . .", and Attachment 6, Section 14.1.3 which specifically states that "[i]f the [billing] dispute is not resolved within one hundred and fifty (150) days of the Bill Date, the dispute will

be resolved in accordance with the procedures set forth in the Section 16 of the General Terms and Conditions of this Agreement and Attachment 1."

95. In response, Supra wrote to BellSouth a letter dated May 17, 2000. Thereafter, the parties held a conference call on May 18, 2000 to discuss the issues. BellSouth agreed that it was wrong and restored Supra's access to LENS by the evening of that day. BellSouth's willful disconnection of Supra's OSS was not implemented for any legal reason, but to deny Supra access to the essential tool of providing telecommunications services.

96. That disconnection caused turmoil among Supra's customers and seriously damaged Supra's reputation for reliable service. As a direct and proximate result, Supra was irreparably damaged by BellSouth during that three-day ordeal and experienced lost profits and loss of goodwill.

G. Denial of Access to Central Office Collocation

97. In order to bring down its operational costs, reduce its over-dependence on BellSouth's network and provide advanced telecommunications services, utilize cost-based elements Supra has attempted to deploy a facilities-based network for over three years by collocating its equipment in BellSouth Central Offices ("COs"). Supra applied and secured space in approximately 23 of BellSouth's COs, but has been unable to proceed with the collocation arrangement because of BellSouth's unreasonable and anti-competitive charges, terms and conditions.

98. Pursuant to Sections 1, 32, 32.2, 33.2, 33.3.1, 33.4, 38.1 of the General Terms and Conditions; Attachment 3, Sections 2.2.1 and 2.2.6 of the Interconnection Agreement 2; 47 CFR Section 51.323; FPSC Order Nos. PSC-98-1417-PCO-TP and PSC-99-0060-FOF-TP in CC Docket No. 980800-TP (issued on January 6, 1999); and other applicable

Federal and State law, Supra has the right to collocate its equipment in BellSouth's Central Offices.

99. In or about April 1998, Supra submitted its first requests to collocate equipment in BellSouth's Central Offices pursuant to Section 1 of the General Terms and Conditions which states that ". . . BellSouth agrees to provide . . . Ancillary Functions to [Supra]. . ." with Ancillary Functions defined in Section 32.1 of the General Terms and Conditions to include Collocation, and 47 CFR Section 51.323(a) which requires that "[a]n incumbent LEC shall provide physical collocation and virtual collocation to requesting telecommunications carriers." Since that date, BellSouth has engaged in a pattern of unwarranted and unexplained rejections, excuses including space exhaustion, claimed FPSC exemptions which never existed, over-pricing, and undue delay, all aimed at preventing Supra from collocating its equipment. Supra has been forced to expend its limited resources to litigate virtually every issue against BellSouth regarding collocation beginning with space exhaustion, priority issue and provisioning timeline. Eventually Supra was able to obtain Commission Orders granting it the right to collocate equipment in various BellSouth Central Offices. See FPSC Docket No. 98-0800, Order Nos. PSC-98-1417-PCO-TP (Priority Order) and PSC-99-0060-FOF-TP issued on January 6, 1999 (space availability Order).

100. Supra has nothing to show for its work but a trail of excuses and abusive practices employed by BellSouth which have effectively precluded Supra from becoming a facilities-based carrier, either by collocation or by UNEs as set forth above. During that time period, Supra has been forced to delay its business plans as BellSouth refused collocation based upon obstructive practices relating to "caged" collocation, that have

since been struck down by the FCC. BellSouth, not to be deterred, has turned its focus to other discriminatory practices relating to "cageless" collocation and the imposition of unreasonably high collocation costs in violation of both the contract and the newly released collocation Tariff, which are greatly in excess of prices quoted pursuant to Section 38.1 and Table 2 of the General Terms and Conditions. As a result of BellSouth's practices, Supra has lost credibility with suppliers and has had to endure three very expensive and morale-shattering employee layoffs.

101. Time and delay only benefited BellSouth since vendors eventually lost their patience wondering why equipment, which has already been shipped, cannot be installed, while the company cannot generate sufficient revenue to continue its operations. Supra's business plan has been set back several years as a result of BellSouth's tactics, and threatens to be set back even more as a result of BellSouth's current obstructive and discriminatory practices.

102. Pursuant to 47 CFR § 51.323(j), Supra has requested that BellSouth allow Supra to subcontract the construction of collocation arrangements with contractors approved by BellSouth. Although BellSouth did provide Supra with a list of its approved subcontractors, BellSouth has steadfastly refused to allow Supra to subcontract the construction of such collocation arrangements, absent an additional separate contract which would impose additional liability upon Supra.

103. As a direct and proximate result of BellSouth's willful and intentional actions, Supra has been denied the opportunity to (1) implement its business plan, (2) provide services and elements to itself and its customers via Supra's own facilities, and (3)

provide Supra branded services and elements to its customers and carriers. Further, BellSouth's actions have raised Supra's costs.

104. As a direct and proximate result of BellSouth's violation of refusal to provide collocation to Supra, Supra has suffered damages as follows:

a. Supra has been billed at BellSouth's unreasonably high resale rates, instead of at the more competitive UNE (or UNE combination) rates, as set forth above.

b. Supra has been unable to receive revenues in the form set forth in Part IV of the General Terms and Conditions and Attachments 6 and 7 of the agreement. BellSouth is liable for the payment of lost revenues to Supra. Indeed, Interconnection Agreement 1 makes this specific point in its General Terms and Conditions, Section 7.1, which provides:

> BellSouth Liability. BellSouth shall take financial responsibility for its own actions in causing, or its lack of action in preventing, unbillable or uncollectible Supra Telecommunications and Information Systems, Inc. revenues.

c. Supra has not been able to provide advanced and enhanced telecommunications services, including, but not limited to, fast access to the Internet – xDSL, and is placed at a competitive disadvantage.

d. Supra has been forced to pay higher than necessary operational costs, has been unable to provide services and elements to itself and its customers, and has been unable to provide Supra branded services and elements to its customers and carriers as a result of BellSouth's refusal to permit Supra to collocate its equipment at BellSouth Central Offices.

e. Supra has not been able to deploy its business plan.

f. BellSouth owes Supra several millions of dollars in unbillable and uncollectible revenues, access charges collected by BellSouth from interexchange carriers, and reciprocal compensation.

g. Supra has lost goodwill.

V. LEGAL CLAIMS

COUNT I – VIOLATION OF FEDERAL ANTITRUST LAW

A. VIOLATION OF SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. § 1 (CONTRACTS IN UNREASONABLE RESTRAINT OF TRADE)

105. Supra re-alleges paragraphs 1 through 104 as if fully set forth herein.

106. Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, or with foreign nations."

107. No reasonable substitute exists at this time for the provision of local voice telecommunications services to residents and to businesses. The telecommunications industry, both residential and business consumers, and the public at large recognize local voice telecommunication services as a discrete product. BellSouth's local exchange service areas within the State of Florida constitute a distinct geographic market in which consumers in Florida may turn for both local telecommunications and DSL services.

108. During the course of the parties' relationship since October 5, 1999, BellSouth has entered into contracts and engaged in practices that under the circumstances are unreasonably restrictive of competitive conditions within the relevant geographic and product markets. As described earlier, BellSouth has conditioned the purchase of its DSL services in the relevant product markets on the purchase of BellSouth's local voice exchange services with the intent of frustrating Supra's successful entry into the local voice

telecommunications market. BellSouth lacks any economic or competitive justification for such practices. BellSouth has sufficient market power in DSL services in the relevant geographic market to appreciably restrain competition in the local voice market. BellSouth's tying activities achieve their intended purpose, which is to weaken Supra's ability to compete in the local exchange service market. BellSouth's activities restrain trade and commerce by both raising Supra's and BellSouth's other rivals costs and forcing them to enter into a second tier market – the provision of DSL services – in which BellSouth has market power, should they seek to offset BellSouth's anticompetitive practices.

109. BellSouth has also entered into long-term exclusive contracts with local voice customers locking them into arrangements that have the effect of substantially lessening both Supra's ability to compete and competition in general. These contracts have substantial early termination penalties and rates that are so low that customers would have no economic justification switching to a competitor. These exclusive contracts, given BellSouth's overwhelming market power in the relevant market for wireline voice telecommunications tend to create or maintain a monopoly in such services. BellSouth lacks any competitive justification for these long term deals that would offset the harm to competition. BellSouth's purpose, rather, is to restrain trade and commerce.

110. As a direct and proximate result of BellSouth's tying of local exchange voice and DSL services together and its exclusive dealing with local exchange customers, Supra has been effectively denied the benefits of competing within the framework of free market and has suffered damages in an amount to be determined at hearing, including, but not necessarily limited to, increased costs, loss of customers, lost profits and injury to Supra's business reputation and good will. As a direct and proximate result of BellSouth's

conduct, consumers in the relevant market have been harmed because they have been deprived of the benefits of meaningful competition, including lower prices and better services.

B. VIOLATION OF SECTION 2 OF THE SHERMAN ACT, 15 U.S.C. § 2 - (MONOPOLIZATION)

111. Supra re-alleges paragraphs 1 through 110 as if fully set forth herein.

112. It is a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, for any person to "monopolize . . . any part of the trade or commerce among the several States, or with foreign nations."

113. During the course of the parties' relationship since October 5, 1999, BellSouth has engaged in a pattern of anticompetitive practices and conduct designed to prevent Supra from acquiring customers, growing its business, and implementing its business plan. BellSouth has engaged in these practices and conduct in order to preserve and maintain BellSouth's monopoly power in the wireline voice telecommunications market in Florida. BellSouth's conduct is exclusionary and has no business justification other than to harm Supra and other competitors, raise Supra costs and those costs of other competitors and maintain the barriers to entry protecting BellSouth's monopoly. BellSouth's conduct has harmed consumers by reducing choices for local telecommunications services, preventing meaningful price competition for such services, and retarding innovation in the provision of such services.

114. BellSouth uses its monopoly position to exclude Supra and competition in general in the relevant product and geographic markets. Specifically, as explained above, BellSouth has engaged in predatory pricing of its retail local exchange voice services. BellSouth has denied Supra access to essential facilities, including UNEs, OSS, and co-

location space. BellSouth has prevented Supra from obtaining UNE-Ps and, as a result, over billed Supra. BellSouth has disconnected DSL services from Supra's voice customers (or threatened to do the same, for example, upon conversion of those customers from resale to UNE-P). BellSouth has engaged in anticompetitive customer reacquisition and retention campaigns by setting wholesale prices for its competitors relative to retail prices made available in such campaigns in an anticompetitive manner (*i.e.*, price squeezes), through disparagement of competitors, and through improper use by BellSouth's retail operations of customer information obtained as a result of BellSouth's position as a provider of wholesale services. BellSouth has engaged in sham litigation against its rivals, including Supra. In each instance, BellSouth's conduct has had the purpose and effect of impeding competition and artificially maintaining BellSouth's monopoly power.

115. Despite recent statutory and regulatory efforts to loosen the grip of BellSouth's monopoly, barriers to entry continue to remain extremely high for competitors such as Supra desiring to provide local telecommunications services in the relevant geographic market. BellSouth controls the necessary and essential networks, equipment, facilities, services and information for any competitor to provide local telecommunications services. BellSouth's failure to provide essential facilities necessary to operate and be profitable in the provision of local telecommunication services serves as a barrier to entry and competition in the relevant markets. BellSouth's refusal to deal with Supra by denying it meaningful access to these essential facilities and information is an exclusionary and anticompetitive act designed to, and having the effect of, maintaining BellSouth's monopoly power.

116. BellSouth has been successful in maintaining and in fact growing its monopoly, not because of market skills or intelligent and/or efficient business decisions, but by erecting anticompetitive barriers and raising its rivals costs through the acts such as those described above. BellSouth has willfully maintained its monopoly power by exclusionary, predatory and anticompetitive conduct as previously described.

117. As a direct and proximate result of BellSouth's monopolization, Supra has been effectively denied the benefits of competing within the framework of free market and has suffered damages in an amount to be determined at hearing, including, but not necessarily limited to, increased costs, loss of customers, lost profits and injury to Supra's business reputation and good will. As a direct and proximate result of BellSouth's conduct, consumers in the relevant market have been harmed because they have been deprived of the benefits of meaningful competition, including lower prices and better services.

C. VIOLATION OF SECTION 2 OF THE SHERMAN ACT, 15 U.S.C. § 2 – (ATTEMPTED MONOPOLIZATION)

118. Supra re-alleges paragraphs 1 through 117 as if fully set forth herein.

119. It is a violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, for any person to "attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations."

120. BellSouth has attempted to monopolize the market for provision of wireline telecommunications services in its service areas in Florida. BellSouth has engaged in the anticompetitive conduct herein alleged for the purpose of, and with the specific intent of, securing for itself a monopoly over this market. Unless BellSouth's anticompetitive

conduct as alleged herein is discontinued, there is a dangerous probability that BellSouth will succeed in monopolizing the relevant markets.

121. Through its attempt to monopolize, BellSouth has used its market power to prevent effective competition by Supra as well other potential competitors in the relevant market. BellSouth has artificially raised Supra's costs of doing business in the relevant markets and has prevented Supra from competing within the aforementioned geographic market, thereby assuring its dominance within the telecommunications industry. BellSouth's conduct is exclusionary and has no business justification other than to harm Supra and other competitors, raise the costs of Supra, and erect barriers to entry to support BellSouth's attempted monopolization.

122. As a direct and proximate result of BellSouth's attempted monopolization, Supra has been effectively denied participation in the relevant market and has been damaged in an amount to be determined at hearing including, but not necessarily limited to, increased costs, loss of customers, lost profits and injury to Supra's business reputation and good will. Moreover, and as a further direct and proximate result of BellSouth's conduct, consumers in the relevant market have been harmed because they have been deprived of the benefits of meaningful competition for the provision of telecommunications services, including lower prices and improved service for those consumers.

SPECIFIC RELIEF

WHEREFORE, Supra seeks a judgment awarding damages in an amount to be determined at hearing against BellSouth for its Sherman Act violations, including compensatory, incidental, consequential and punitive damages and such other and further relief as is supported by the law and evidence, including without limitation, the trebling of

Supra's damages, costs of suit, including a reasonable attorney's fee, and pre-judgment interest and such other damages as the Tribunal deems just and proper.

COUNT II - VIOLATION OF FLORIDA ANTITRUST LAW

A. VIOLATION OF FLORIDA STATUTE § 542.19 (MONOPOLIZATION)

123. Supra re-alleges paragraphs 1 through 122 as if fully set forth herein.

124. BellSouth has willfully maintained its monopoly power by exclusionary, predatory and anticompetitive conduct as previously described.

125. BellSouth's conduct is and continues to be an unreasonable restraints of trade and commerce in violation of Fla. Stat. § 542.19 whereby, and as a direct and proximate result, Supra has and continues to suffer damages.

126. As a direct and proximate result of BellSouth's monopolization and/or conduct, Supra has been and continues to suffer actual damages in an amount to be determined at hearing, including, but not necessarily limited to, increased costs, loss of customers, lost profits and injury to Supra's business reputation and good will as it has effectively been denied the benefits of competing within the framework of free markets and providing lower prices to telecommunications consumers. Moreover, consumers in the relevant market have been harmed because they have been deprived of the benefits of meaningful competition, which in turn assures lower prices and better services.

B. VIOLATION OF FLORIDA STATUTE § 542.19 (ATTEMPTED MONOPOLIZATION)

127. Supra re-alleges reference paragraphs 1 through 126 as if fully set forth herein.

128. BellSouth has willfully attempted to obtain monopoly power by exclusionary, predatory and anticompetitive conduct as previously described.

129. BellSouth's conduct is and continues to be an unreasonable restraints of trade and commerce in violation of Fla. Stat. § 542.19 whereby, and as a direct and proximate result, Supra Telecom has and continues to suffer damages in an amount to be determined at hearing, including, but not necessarily limited to, increased costs, loss of customers, lost profits and injury to Supra's business reputation and good will as it has effectively been denied the benefits of competing within the framework of free markets and providing lower prices to telecommunications consumers. Moreover, consumers in the relevant market have been harmed because they have been deprived of the benefits of meaningful competition, which in turn assures lower prices and better services.

FILED

FOR FILES

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

INTERMEDIA COMMUNICATIONS, INC.,

Plaintiff,

Case No. 8:00-Civ-1410-T-24 (C)

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,

Defendant.

/

ORDER

This cause comes before the Court on Defendant BellSouth's Motion to Dismiss (Doc. No. 10, 17). Plaintiff opposes this motion (Doc. No. 14, 29).

I. Background

This case involves antitrust, fraud, and contract actions, as well as claims for alleged violations of the Telecommunications Act of 1996. Specifically, Plaintiff alleges that Defendant undertook premeditated and deliberate acts to illegally retain its monopoly over the market for local telecommunications services throughout the Southeastern United States.

A. Telecommunications Act of 1996 ("TCA")[1]

The TCA was created to promote competition in the communications industry. To reach this end, Congress imposed obligations on companies who had historically provided local

[1]Pub. L. No. 104-104, 110 Stat. 56.

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telephone service (referred to as "incumbent local exchange companies" or "ILECs"), such as Defendant, to permit new entrants (referred to as "competitive local exchange companies" or "CLECs"), such as Plaintiff, access to their telecommunications networks in order to afford CLECs the opportunity to provide local telephone service in competition with ILECs. 47 U.S.C. § 251.

To this end, the two carriers would develop an interconnection agreement outlining the substantive terms of access, either through voluntary negotiation or arbitration. 47 U.S.C. § 252. Congress directed that the parties must negotiate the terms of the agreement in good faith. 47 U.S.C. § 251(c)(1). The resulting agreement must be submitted to the state public service commission ("PSC") for approval. Id. at § 252(e).

B. Interconnection Requirements

In order for Plaintiff to compete in the market, Plaintiff must be able to interconnect and exchange traffic with Defendant. Therefore, both parties must forecast call volumes and provide these forecasts to the other party, order a sufficient quantity of high capacity copper or fiberoptic cables (referred to as "trunks," which connect the parties' networks so that traffic can be exchanged), and then install the trunks in a timely manner.

Each party bears the cost of supplying the trunk that brings its traffic to the other carrier. Plaintiff orders trunks from Defendant, so that Plaintiff's customers can call Defendant's customers. Defendant usually provides its own trunks. If trunks are not installed in a timely manner, the calls between the parties' networks will not go through.

To order a trunk, Plaintiff sends Defendant an Access Service Request ("ASR"). Following the submission of an ASR, Defendant must issue a Firm Order Confirmation ("FOC"),

acknowledging receipt of the ASR and providing a date for the installation of the trunk.

Additionally, each party must compensate the other for the cost of delivering local traffic to the other party. This compensation is referred to as "reciprocal compensation."

C. Plaintiff's Complaint

On June 21, 1996, Plaintiff and Defendant entered into an interconnection agreement, as required by the TCA, covering nine state telecommunications markets.[2] The agreement was approved by each state's PSC. In 1998, the parties amended their interconnection agreement.

However, the relationship between the parties failed. Plaintiff alleges that Defendant intentionally and consistently failed to process Plaintiff's ASRs, provide trunks for Plaintiff, and install sufficient trunking capacity, thereby denying Plaintiff interconnection with Defendant's network, and thus limiting Plaintiff's ability to provide service to its customers. Furthermore, Plaintiff alleges that Defendant has taken an unfounded position that calls to internet service providers ("ISPs") are not local traffic, in order for Defendant to refuse to pay Plaintiff over $100 million in reciprocal compensation, which deprives Plaintiff of substantial revenue that it needs in order to compete in the local telecommunications market. Additionally, Plaintiff alleges that Defendant fraudulently procured the 1998 amendment to their interconnection agreement in an attempt to lower the reciprocal compensation rates paid by Defendant to Plaintiff. Plaintiff contends that all of the above actions contravene the plain language of the parties' interconnection agreement and the TCA, and that these actions are calculated to drive Plaintiff from the marketplace in order eliminate competition.

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[2]The nine states are: Florida, Georgia, North Carolina, Alabama, Kentucky, Louisiana, Mississippi, South Carolina, and Tennessee.

Plaintiff filed an eleven count complaint alleging the following:

- Count I: fraudulent inducement regarding the interconnection agreement;
- Count II: violation of the TCA by failing to negotiate in good faith (47 U.S.C. § 251);
- Count III: breach of contract due to the failure to interconnect;
- Count IV: violation of the TCA due to the failure to interconnect (47 U.S.C. § 251);
- Count V: fraudulent inducement regarding the 1998 amendment to the interconnection agreement;
- Count VI: violation of the TCA due to the failure to negotiate the 1998 amendment in good faith (47 U.S.C. § 251);
- Count VII: tortious interference with contractual relations;
- Count VIII: tortious interference with prospective economic advantage;
- Count IX: monopolization (15 U.S.C. § 2)
- Count X: monopolization due to the refusal to deal under the essential facilities doctrine (15 U.S.C. § 2)
- Count XI: attempted monopolization (15 U.S.C. § 2)

D. Defendant's Motion to Dismiss

Defendant filed a motion to dismiss Plaintiff's entire complaint on several grounds, two of which the Court will address. First, Defendant contends that Counts IX though XI (monopolization and attempted monopolization) are legally deficient, because no antitrust action exists for Defendant's alleged conduct. Second, Defendant contends that the remaining claims

(Counts I through XIII) are subject to the exclusive jurisdiction of the state PSCs. Accordingly, the Court will address each argument separately.

II. Antitrust Claims

Defendant first contends that Counts IX though XI (monopolization and attempted monopolization under 15 U.S.C. § 2) are legally deficient, and therefore, should be dismissed, because no antitrust action exists for Defendant's alleged conduct. Defendant argues that the TCA does not provide a basis for antitrust claims and cites Goldwasser v. Ameritech Corp., 222 F.3d 390 (7th Cir. 2000), for this proposition.

Plaintiff, however, counters that § 601(b) of the TCA explicitly states that with limited exceptions (which do not apply to this case), nothing in the TCA "shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 110 Stat. 56. Therefore, Plaintiff contends that a violation of the TCA can be the basis for an antitrust claim.

In Goldwasser, the court rejected the argument that a violation of the TCA could automatically be the basis for an antitrust claim. See Goldwasser, 222 F.3d at 399-401. In reaching this conclusion, the court reasoned that since antitrust laws do not impose the kind of affirmative duty to help one's competitors that the TCA imposes, a violation of the TCA's obligations to help one's competitors cannot be the basis for an antitrust claim. See id. at 400. However, the court went on to state that the TCA did not "confer[] implied immunity on behavior that would otherwise violate the antitrust law." See id. at 401.

Plaintiff asks this Court not to follow the Goldwasser case, and cites AT&T Wireless PCS, Inc. v. City of Atlanta, 210 F.3d 1322 (11th Cir. 2000), vacated on other grounds, 223 F.3d 1324 (11th Cir. 2000), as supporting its contention that an antitrust claim can be based on a

violation of the TCA. In AT&T Wireless, the issue before the court was whether compensatory damages are available under §§ 1983 and 1988 for a violation of the TCA. See id. at 1325. In finding that § 1983 remedies were available, the Court looked to Congressional intent expressed in the TCA.

In looking at the history of the TCA, the Court noted that Congress created an antitrust savings clause in § 601(b), which mandates that "except where noted, nothing in the TCA modifies, impairs, or supersedes antitrust laws." Id. at 1329 The court stated that § 601(b) was created due to the TCA's "potentially confusing statutory overlap with antitrust laws." Id. The court noted that as a result of the antitrust savings clause in § 601(b), 47 U.S.C. § 221(a) was eliminated, which meant that the FCC's power to confer antitrust immunity on mergers of telephone companies was taken away. See id. (citation omitted).

In analyzing both Goldwasser and AT&T Wireless, the Court finds that the two cases can be read together. Goldwasser stands for the proposition that a violation of the TCA cannot automatically be the basis for an antitrust claim, since there would be no antitrust claim in the absence of the TCA (because without the TCA, there is no obligation to help one's competitors). However, other behavior that could be the basis for an antitrust claim, regardless of whether the TCA existed, is not immune from antitrust liability even though it also violates the TCA. This contention is consistent with AT&T Wireless, which notes that nothing in the TCA modifies or impairs antitrust liability. Thus, any behavior that can be the basis for an antitrust claim before the creation of the TCA still can be the basis of an antitrust claim after the creation of the TCA.

In the case at bar, most of the allegations that serve as a basis for the antitrust claims involve violations of the TCA, but as discussed above, violations of the TCA do not

automatically serve as a basis for an antitrust claim. However, Plaintiff's claim that Defendant did not pay Plaintiff reciprocal compensation for ISP-bound calls should be analyzed further.

Plaintiff alleges that Defendant intentionally refused to pay Plaintiff for calls made by Plaintiff's customers to ISPs. Further, Plaintiff alleges that the reason that Defendant refused to pay for these calls was because Defendant contended that these calls were interstate calls, and thus did not constitute local traffic subject to the reciprocal compensation arrangement under the parties' interconnection agreement.

Plaintiff then alleges that it filed complaints with the state commissions of Florida, Georgia, and North Carolina, and Defendant was ordered to pay for ISP-bound calls. Further, Defendant appealed these decisions and lost. Plaintiff contends that Defendant's choice to appeal these decisions is evidence of Defendant's intent to exclude Plaintiff from the local market by withholding the reciprocal compensation (which served as Plaintiff's principal source of revenue necessary in order to reach new customers and build new facilities).

Defendant contends that its actions in appealing the decisions cannot be the basis for an antitrust claim In support of this contention, Defendant points out that a Louisiana PSC ruled in favor of Defendant on the issue of reciprocal compensation for ISP-bound traffic. Therefore, Defendant cites California Motor Transportation Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972), for its contention that antitrust immunity applies to litigation before courts and administrative agencies, unless the litigation is a sham. Further, "[i]f an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, . . . an antitrust claim premised on the sham exception must fail." Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60 (1993). Therefore, Defendant argues that the Louisiana

PSC ruling in its favor is evidence that Defendant could conclude that its appeals could elicit a favorable outcome, and thus, were not a sham. The Court agrees with this contention and finds that an antitrust claim based on Defendant's failure to pay for ISP-bound traffic while it was appealing the commissions' orders to pay cannot stand.

Accordingly, all of Plaintiff's antitrust claims must fail because they are either based on Defendant's alleged violations of the TCA or immunized from antitrust liability. Therefore, Plaintiff's antitrust claims (Counts IX, X, and XI) must be dismissed.

III. Jurisdiction of the state PSCs

Defendant also argues that the remaining claims in Plaintiff's complaint involving allegations that Defendant violated § 251 of the TCA and various state law claims based on the same behavior (Counts I through XIII) must be dismissed, since they are subject to the exclusive jurisdiction of the state PSCs. To support its exclusive jurisdiction contention, Defendant cites 47 U.S.C. § 256(e)(6), which states in part: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement . . . meets the requirements of section 251 of this title and this section." Thus, Defendant argues that Plaintiff must first bring its claims that Defendant violated § 251 to the state PSC, because a federal court only has jurisdiction to review a PSC's determination.

The cases cited by Defendant appear to support this contention. See e.g. Southwestern Bell Telephone Co. v. Public Utility Comm'n of Texas, 208 F.3d 475, 479-80 (5th Cir. 2000)(citations omitted)(stating that "the FCC plainly expects state commissions to decide intermediation and enforcement disputes that arise after the approval procedures are complete");

AT&T Communications of Illinois, Inc. v. Illinois Bell Telephone Co., No. 97 C 0886, 1998 WL 525437, *5 (N.D. Ill. Aug. 18,1998)(refusing to review issues that were not first submitted to the state commission for a determination); Indiana Bell Telephone Co., Inc. v. McCarty, 30 F. Supp.2d 1100, 1104 (S.D. Ind.1998)(stating that the TCA "was designed to allow the state commission to make the first determination on issues prior to judicial review").

Plaintiff's main argument in opposition is that 47 U.S.C. § 207 [3] provides federal courts with jurisdiction to hear claims involving violations of § 251 of the TCA. However, Plaintiff has failed to cite any cases to support this proposition. In fact, the Court has only found one case which found that a plaintiff has a private right of action under § 207 for violations of § 251 of the TCA. See Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp., No. 00 Civ. 1910 (SHS), 2000 WL 1800653, (S.D.N.Y. Dec. 6, 2000).

In Bell Atlantic, however, the plaintiffs were customers of the phone companies, not the phone companies themselves. See id. Furthermore, the Court in Bell Atlantic noted that the plaintiffs' claim was inapposite of the situations where potential competitors attempt to circumvent Congress's regulatory scheme in 47 U.S.C. § 252 by filing suit in federal court. See id. at *5.

Therefore, this Court finds that Bell Atlantic does not conflict with the cases cited by

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[3] 47 U.S.C. § 207 provides that

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission, . . . or may bring suit for recovery of damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

Defendant for the proposition that phone companies must first bring their claims of violations of § 251 to the state PSC before a federal court has jurisdiction over the matter. Accordingly, this Court agrees with Defendant that Plaintiff's claims involving alleged violations of § 251 (Counts II, IV, and VI) must be dismissed, as this Court lacks jurisdiction to hear these claims at this time.[4]

IV. Remaining State Law Claims

The remaining claims (Counts I, III, V, VII, VIII) are all based on state law. Plaintiff alleges that this Court has supplemental jurisdiction over those claims based on 28 U.S.C. § 1367. However, since this Court has dismissed the related federal claims, this Court will decline to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367(c)(3). While it appears that there may be diversity jurisdiction, such was not alleged. Accordingly, the parties are hereby requested to file with the Court their positions as to whether this Court has subject matter jurisdiction over the state law claims on or before December 29, 2000. This Court will defer ruling on Defendant's motion to dismiss as it relates to the state law claims until this Court's subject matter jurisdiction has been established.

Accordingly, it is ORDERED AND ADJUDGED that

(1) Defendant BellSouth's Motion to Dismiss (Doc. No. 10) is **GRANTED** to the extent that Defendant seeks to dismiss Counts II, IV, VI, IX, X, and XI of Plaintiff's complaint;

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[4]The Court notes that Defendant argued that all of Plaintiff's remaining claims, including the state law claims, were subject to the exclusive jurisdiction of the PSCs. However, Defendant has not provided any authority for its contention that the state law claims are subject to the exclusive jurisdiction of the PSCs.

(2) Defendant BellSouth's Motion to Dismiss (Doc. No. 10) is **DEFERRED** to the extent it relates to Counts I, III, V, VII, and VIII of Plaintiff's complaint; and

(3) The parties are directed to file with the Court their positions as to whether this Court has subject matter jurisdiction over Counts I, III, V, VII, and VIII on or before December 29, 2000.

DONE AND ORDERED at Tampa, Florida, this 15th day of December, 2000.

SUSAN C. BUCKLEW
United States District Judge

Copies to:
Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

00-2808

MGC COMMUNICATIONS, INC. d/b/a MPOWER COMMUNICATIONS CORP., a Nevada corporation,	Case No.
Plaintiff,	MAGISTRATE JUDGE SIMONTON
v.	
BELLSOUTH TELECOMMUNICATIONS, INC., a Georgia corporation,	**COMPLAINT FOR MONOPOLIZATION (15 U.S.C. § 2), INJUNCTIVE AND DECLARATORY RELIEF AND DAMAGES (15 U.S.C. §§4, 15, 26; 47 U.S.C. §401(b); 28 U.S.C. §2201)**
Defendant.	**JURY TRIAL DEMANDED**

CIV - GOLD

As its complaint against defendant BellSouth Telecommunications, Inc. ("Defendant" or "BellSouth"), plaintiff MGC Communications, Inc. d/b/a/ Mpower Communications Corp. ("Plaintiff" or "Mpower") alleges:

GENERAL NATURE OF THE ACTION

1. This is an action against BellSouth for violation of the United States antitrust laws and the Telecommunications Act of 1996. BellSouth holds a monopoly in the market for high-speed internet access in the southern Florida area. Mpower seeks to enter the market for high-speed internet access in the southern Florida area. As is traditionally the case with monopolists, BellSouth has imposed artificial barriers to entry and imposed costs on Mpower, its smaller rival, to impede Mpower from taking market share from BellSouth. BellSouth has sought to leverage its monopoly

power obtained through its ubiquitous local telecommunications network into artificially enhanced market power. BellSouth has engaged in extensive and continuing anticompetitive conduct to preserve its monopolistic market share, despite the intent of the Telecommunications Act of 1996 and recent orders of the Federal Communications Commission ("FCC") to level the playing field and encourage new entrants in the market for high-speed internet access around this country.

THE PARTIES

2. Mpower is a corporation duly organized and existing under the laws of the State of Nevada, with its principal place of business at 171 Sully's Trail, Pittsford, New York. Mpower is a competitive local exchange carrier ("Competitive LEC"); that is, it provides facilities-based switched local and long distance voice and data services to small business and residential users. Specifically, Mpower is engaged in, among other things, the business of providing local and long distance voice and data service in Florida, as well as to selected metropolitan areas throughout the country.

3. On information and belief, defendant BellSouth is a corporation duly organized and existing under the laws of the State of Georgia, with its principal place of business at 675 West Peachtree Street, NE, Atlanta, Georgia. On information and belief, Mpower alleges that BellSouth is engaged in the business of providing local voice and data communications throughout Florida and the southeastern United States. BellSouth is engaged in the business of providing voice and data services in southern Florida as the incumbent local exchange carrier ("Incumbent LEC").

JURISDICTION

4. This is a suit pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. §§15 and 26) for private enforcement of Section 2 of the Sherman Act (15 U.S.C. §2), and for injunctive and declaratory relief (47 U.S.C. §401(b) and 28 U.S.C. §2201). BellSouth's services affect interstate telecommunications, the Defendant's antitrust violations described in this Complaint have had, and are having, a substantial effect on interstate commerce. This Court has jurisdiction under 28 U.S.C. §§1331 and 1337 and under 47 U.S.C. §§207, 251, 252 and 401(b). This Court has personal jurisdiction over BellSouth by virtue of Defendant's transacting and doing business in the State of Florida.

VENUE

5. Venue is proper under 28 U.S.C. §1391(b) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this District. Venue is also proper under 15 U.S.C. §§15 and 22 because BellSouth conducts business in this District.

6. On information and belief, BellSouth is a corporation that resides, is found and transacts business in the Southern District of Florida. Therefore, venue in the Southern District of Florida is proper under 15 U.S.C. §§15, 22 and 26, and 28 U.S.C. §§1391(b) and (c).

FACTUAL ALLEGATIONS

The Telecommunications Act of 1996

7. BellSouth is not a state-sanctioned or protected telecommunications service monopolist. Among other developments, in 1996, Congress passed the Telecommunications Act of 1996, 47 U.S.C. §§251 et seq. (the "Act"), to promote competition in all telecommunications

service markets. In particular, several provisions of the Act are intended to break the monopoly hold of Incumbent LECs, such as BellSouth, over local telecommunications services.

8. The Act created several different methods of local market entry. These methods include the interconnection and purchase (or lease) of individual pieces of the Incumbent LEC network, known as unbundled network elements ("UNEs"), which is the method used by "facilities-based" Competitive LECs like Mpower. In other words, Mpower builds and operates its own switching and other telecommunications equipment and leases from the Incumbent LEC the copper wire or "loop" that runs from a customer premises to the point of connection of the Incumbent LEC's Central Office. Section 251(c)(3) of the Act requires Incumbent LECs to provide Competitive LECs the UNEs on a nondiscriminatory basis. A Central Office typically serves approximately 35,000 end-users of telecommunications service. In the Incumbent LEC Central Office, the Competitive LEC, such as Mpower, collocates equipment that recognizes the source of the incoming call, identifies where it needs to go, and sends it to its ultimate destination, be it local or long distance. Equipment records the source, nature and destination of each call for purposes of permitting the Incumbent LECs, Competitive LECs and long-distance carriers to charge the customer, and in certain circumstances the other carrier, for providing the various originating, transport and terminating functions of the call.

9. Section 252 of the Act required BellSouth and Mpower to enter into an interconnection agreement to govern interconnection and collocation, as well as pricing the UNEs Mpower and BellSouth first entered into an interconnection agreement in 1998. Upon expiration of this agreement, a second interconnection agreement was entered on June 21, 2000.

High-Speed Internet Access Or Digital Subscriber Line Services

10. Plaintiff is informed and believes that in the past, BellSouth has provided high-speed data services to its business customers through the provisioning of T-1 dedicated lines. T-1s are a high cost product for the customer, frequently running as high as $1,000 per month, and a high margin product for BellSouth.

11. Mpower purchases transmission facilities, which are called "unbundled loops," from BellSouth for the purpose of providing high-speed internet access through a Digital Subscriber Line ("DSL"). The placement of a special DSL modem on each end of a copper loop allows the transmission and receipt of information over that loop at a much higher rate of speed. For example, a copper loop typically transmits information at the rate of 28,000 – 56,000 bits per second ("BPS"). DSL allows a customer to send or receive information at rates as high as 1.5 million BPS. This type of service is highly desired by business and residential customers alike. While DSL technology is at least fifteen years old, deployment of DSL on the Publicly Switched Telephone Network gained momentum with the development and emergence of the Competitive LEC industry. The innovation of introducing DSL to the marketplace is analogous to the introduction of fiber optic lines for telecommunications, which did not occur until MCI won the right to compete with AT&T.

12. DSL, which can match the speed and capacity of T-1s, are presently marketed at a variety of costs, and in some instances as low as $49.95 per month. Mpower's DSL competes directly with BellSouth's T-1 business. Plaintiff is informed and believes that in response to Mpower's roll-out of DSL services, BellSouth also began to provide the DSL alternative to its T-1

business. Bellsouth now competes directly with Mpower and other Competitive LECs for the provision of DSL to business and residential customers in the southern Florida area.

13. Since the inception of local competition, the FCC has mandated Competitive LEC's access to DSL-capable loops. The FCC stated in the *First Report and Order* that incumbent local exchange carriers (Incumbent LECs) must provide loop transmission facilities "to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL and DS1-level signals." (*First Report and Order*, Section 380.) The FCC recently reaffirmed this obligation in the *UNE Remand Order*, stating "[w]ithout access to these [DSL-capable loops], competitors would be at a significant disadvantage, and the incumbent LEC, rather than the marketplace, would dictate the pace of deployment of advanced services." (*UNE Remand Order*, Section 191.) Thus, under the FCC's *UNE Remand Order*, BellSouth must provide not only the loops themselves, but also any DSL-capable loop that a Competitive LEC requires to provide whichever flavor of DSL that best suits the Competitive LEC's customers. (*UNE Remand Order*, Section 191.)

14. In addition, BellSouth must provide Competitive LECs such as Mpower nondiscriminatory access to the underlying loop qualification information. The FCC has specifically ordered that Incumbent LECs such as BellSouth may not filter or digest such information to provide only that information that is useful in the provision of a particular type of DSL that the Incumbent LEC chooses to offer. (*UNE Remand Order*, Section 428.)

15. The need for non-discriminatory access for Competitive LECs is especially acute, since BellSouth markets, sells and provisions its own DSL to Florida consumers. BellSouth accomplishes this through an affiliate, BellSouth.net

16. To provision DSL, Mpower must obtain "clean" or "conditioned" copper loops from BellSouth. Items such as bridge taps and load coils, which interfere with the transmission of digital signals, must first be removed from the copper loop before the DSL signal can properly transmit. Mpower pays BellSouth a fee to remove these items from its loops.

17. One of the first steps in this process is to obtain loop make-up information that details the technical characteristics of a particular loop. Currently, BellSouth does not provide Mpower any automated system to obtain this information. Instead, to obtain the technical characteristics of a particular loop, Mpower is required to send a Service Inquiry to BellSouth's Complex Resale Support Group to assess the availability of DSL facilities. BellSouth obtains this information from a computerized database maintained by BellSouth, called "LFACS," that contains all of the Loop Facility Assignment Information for every cable pair in a wire center.

18. An engineering response to the Service Inquiry is provided by the Service Advocate Center. When Mpower requests loop make up information for a customer's address, BellSouth interprets the LFACS data to provide information "for the best available loop." However, this response is not sent back directly to Mpower. Rather, the Service Advocate Center sends the response back to the Complex Retail Support Group. The Complex Retail Support Group representative then sends an e-mail to Mpower advising of the loop make up of the loop they decide is DSL capable. This process is entirely manual and takes seven business days. If conditioning is required, additional costs and provisioning delays are imposed on Mpower. Moreover, the manual nature of the process has resulted in numerous errors and delays in order processing, especially when

the response is simply that the facilities are "not available." With every error, Mpower faces the possibility of lost customers and a diminished reputation.

19. In contrast to the Service Inquiry process described above, BellSouth's retail affiliate, BellSouth.net, as well as other Competitive LECs that sign contracts with BellSouth to resell BellSouth facilities, are able to obtain loop make-up information *electronically* and *instantaneously* for orders of their DSL products. BellSouth.net and Competitive LEC resellers are allowed access to the Science & Technology Loop Qualification System (the "Loop Qualification System"), which is basically a "mechanized Service Inquiry for ADSL loops." The Loop Qualification System accepts a potential customer's existing telephone number as input, and outputs formatted detail regarding the status of the loop supporting DSL service. By using the Loop Qualification System, BellSouth can immediately advise its customers whether they are eligible for DSL service While the Loop Qualification System does not guarantee that a particular loop will support DSL service, it provides an accuracy rate of approximately 90% on positive responses

20. BellSouth has denied Mpower access to the Loop Qualification System, unless it agrees to resell BellSouth's facilities and execute a long term agreement to that effect.

21. BellSouth's actions as described above discriminate against Mpower in two significant ways:

A) *First*, Mpower does not have access to the same Operational Support System that BellSouth utilizes for its retail operations. As a result, Mpower customers must wait seven business days to learn whether they are eligible for DSL services. BellSouth customers, on the other hand, can obtain an instantaneous response to the question of whether the loop that services their premise is DSL compatible. This

unequal treatment places Mpower at a competitive disadvantage in the south Florida market, and constitutes a violation of the 1996 Act and the *UNE Remand Order* which perpetuates BellSouth's monopoly power.

B) *Second*, BellSouth's development and deployment of the Loop Qualification System perpetuates BellSouth's monopoly because the Loop Qualification System was designed to support only BellSouth's Retail (BellSouth.net) and Resale services. As noted above, Mpower is a facilities-based Competitive LEC, with its own switches and network equipment. Mpower has no need to, and does not, resell BellSouth's facilities and network equipment. Accordingly, even if Mpower had access to the Loop Qualification System, little benefit would be provided, since the Loop Qualification System cannot screen Mpower network facilities and equipment. In short, the Loop Qualification System would not be able to provide the same DSL pre-qualification information to Mpower that is provided to BellSouth.net or other Competitive LECs willing to resell BellSouth's facilities. This discriminatory treatment allows BellSouth to keep control of telecommunications facilities and the customer, and places Mpower at a competitive disadvantage.

22. BellSouth has represented to Mpower that it is in the process of developing a new computerized pre-ordering system that will allow Mpower to obtain loop make-up information electronically through BellSouth's LFACS database. Further, BellSouth represented that this new pre-ordering system was targeted for implementation in July 2000. On August 1, 2000, BellSouth apparently posted on its website certain information concerning this new pre-ordering system.

However, BellSouth has yet to deliver to Mpower an operational pre-ordering system, or the business rules and specifications required to support such a system. While it is possible that additional information about the new pre-ordering system may be released by BellSouth in the near future, Mpower expects that – based upon its previous business dealings with BellSouth – both Mpower and BellSouth will be required to devote substantial time and resources to test and modify the program before it can be placed into production to process Mpower's customer orders. As a result, Mpower is informed and believes that it will not be able to utilize this yet to be released pre-ordering system for a substantial time period. In the meantime, BellSouth will continue to discriminate against Mpower and increase its installed base of customers for its high-speed internet access products and services. Mpower and other facilities-based providers of high-speed internet access will find it difficult, if not impossible, to dislodge BellSouth from this installed base of customers once these customers have subscribed to BellSouth's competing products and services.

BellSouth Has Failed To Provide Mpower Electronic Ordering Functionality

23. DSL loop orders are not supported by any electronic Operational Support System offered by BellSouth. As a result, Mpower must manually complete a multi-page order form and fax it to BellSouth for processing, thereby increasing ordering costs, time, and the probability of human error. Yet despite BellSouth's failure to provide an electronic interface for DSL orders, it charges a manual service order charge for DSL orders, at an additional cost to Mpower.

24. BellSouth has represented to Mpower that it is in the process of developing a new computerized ordering system that will allow Mpower to order DSL capable loops electronically. Further, BellSouth represented that this new ordering system was targeted for implementation in July 2000. On Agust 1, 2000, BellSouth apparently posted on its website certain information concerning

this new ordering system. However, BellSouth has yet to deliver to Mpower an operational electronic ordering system, or the business rules and specifications required to support such a system. While it is possible that additional information about the new ordering system may be released by BellSouth in the near future, Mpower expects – based upon its previous business experience with BellSouth - that Mpower and BellSouth will be required to devote substantial time and resources to test and modify the program before it can be used for Mpower's customer orders. As a result, Mpower is informed and believes that it will not be able to utilize this yet to be released ordering system for a substantial period of time after its release.

25. BellSouth's failure to provide Mpower with electronic ordering functionality damages Mpower's ability to compete in the high-speed internet access market and threatens Mpower's business reputation in southern Florida.

26. The provision of high-speed internet access is a distinct product market ("the High-Speed Internet Access Market"). The geographic market for this product is the southern Florida area.

27. Mpower is in direct competition with BellSouth with respect to providing high-speed internet access through the deployment of DSL in the High-Speed Internet Access Market.

28. On information and belief, BellSouth currently controls a monopoly market share of the High-Speed Internet Access Market.

29. Because Mpower's market entry into the High-Speed Internet Access Market through deployment of DSL poses a real threat to BellSouth's monopoly power in the High-Speed Internet Access Market, BellSouth has engaged in a pattern of anticompetitive conduct generally designed to leverage BellSouth's monopoly power obtained through its ubiquitous local telecommunications

network into artificially enhanced market power in the High-Speed Internet Access Market. BellSouth has engaged in exclusionary and anticompetitive acts with the intent and inevitable effect of injuring, thwarting or eliminating Mpower as an actual or potential competitor.

30. BellSouth's conduct inhibits facilities-based high-speed internet access competition in the relevant market, creates substantial disruption to Mpower's business, forces Mpower to delay operations, and results in Mpower failing to meet its obligations to its customers, causing irreparable injury to Mpower's goodwill and business reputation.

31. Because Mpower's market entry and DSL service offerings pose a significant competitive threat to BellSouth's monopoly power in the High-Speed Internet Access Market, BellSouth has engaged in a pattern of anticompetitive conduct generally designed to leverage BellSouth's monopoly power obtained through its ubiquitous local telecommunications network into artificially enhanced market power in the High-Speed Internet Access Market. BellSouth has engaged in exclusionary and anticompetitive acts with the intent and inevitable effect of injuring, thwarting or eliminating Mpower as an actual or potential competitor.

32. BellSouth's conduct inhibits facilities-based high-speed internet access competition, creates substantial disruption to Mpower's business, forces Mpower to delay operations, and results in Mpower failing to meet its obligations to its customers, causing irreparable injury to Mpower's goodwill and business reputation.

33. As a direct and proximate result of BellSouth's unlawful conduct, Mpower's market entry has been impeded and frustrated, and Mpower has been foreclosed from markets and has lost sales, profits, and the value of its business. Mpower has suffered and will continue to suffer irreparable harm through loss of and injury to its trade and business in that (a) Mpower has been and

will be precluded from provisioning its customers on time and without trouble; (b) Mpower has been and will continue to be irreparably harmed in its reputation and goodwill; and (c) Mpower and other high-speed internet access providers will be hampered in marketing, selling and providing their services.

34. BellSouth's conduct is harmful to competition and consumers in that it has had and will continue to have the effects of: (a) denying Mpower access to the High-Speed Internet Access Market; (b) denying the public free choice in high-speed internet access providers; (c) creating higher prices for high-speed internet access; (d) forcing consumers to use inferior high-speed internet access products or services; and (e) stifling the development of new and better local telecommunications services.

FIRST CLAIM FOR RELIEF

(Monopolization Of High-Speed Internet Access – Sherman Act Section 2)

35. Plaintiff realleges and incorporates herein by reference all of the allegations contained in Paragraphs 1 through 33 of this Complaint.

36. There is a relevant market consisting of the market for High-Speed Internet Access in the southern Florida area.

37. On information and belief, BellSouth possesses a monopoly share of the relevant market, and has the ability to exclude competition and raise prices above a competitive level.

38. BellSouth has engaged in the conduct described herein in order to maintain its monopoly position without any legitimate business justification for doing so.

39. BellSouth's predatory conduct violates Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. As a result of such unlawful conduct, competition in the relevant market has been suppressed.

40. Mpower has sustained the type of injury that the antitrust laws were intended to prevent and that flows from the anticompetitive and exclusionary characteristics which make BellSouth's conduct unlawful.

41. As a result of BellSouth's unlawful and predatory conduct, Mpower has incurred or will incur injury and damages, including unnecessary expense in entering and competing in the relevant market, all in an amount to be determined at trial. Moreover, BellSouth's actions have caused, and unless enjoined will continue to cause, irreparable injury and damage to Mpower for which Mpower has no adequate remedy at law, therefore entitling Mpower to injunctive relief.

SECOND CLAIM FOR RELIEF

(Attempted Monopolization Of High-Speed Internet Access – Sherman Act Section 2)

42. Mpower realleges and incorporates herein by reference all of the allegations contained in Paragraphs 1 through 33 of this Complaint.

43. There is a relevant market consisting of the market for High-Speed Internet Access in the southern Florida area.

44. BellSouth has engaged in the conduct described above with the specific intent to monopolize the relevant market.

45. There is a dangerous probability that BellSouth will succeed in its attempts to monopolize the relevant market.

46. BellSouth's conduct violates Section 2 of the Sherman Antitrust Act, 15 U.S.C. §2 As a result of such unlawful conduct, competition in the relevant market has been suppressed.

47. Mpower has sustained the type of injury that the antitrust laws were intended to prevent and that flows from the anticompetitive and exclusionary characteristics which make BellSouth's conduct unlawful.

48. As a result of BellSouth's unlawful conduct, Mpower has incurred or will incur injury and damages, including without limitation lost revenues and otherwise unnecessary expense in entering and competing in the relevant market, all in an amount to be determined at trial. Moreover, BellSouth's actions have caused, and unless enjoined will continue to cause, irreparable injury and damage to Mpower for which Mpower has no adequate remedy at law, therefore entitling Mpower to injunctive relief.

THIRD CLAIM FOR RELIEF

(Violation of FCC Order – 47 U.S.C. §401(b))

49. Mpower realleges and incorporates herein by reference all of the allegations contained in Paragraphs 1 through 33 of this Complaint.

50. Defendant is subject to, and bound by, the terms of the *UNE Remand Order*. The *UNE Remand Order* was regularly made and duly served. By engaging in conduct set forth in this Complaint, Defendant has failed or neglected to obey the *UNE Remand Order*; it is therefore in disobedience of the same; and Plaintiff Mpower is a party who has been injured thereby.

51. Mpower is entitled enforcement, by this Court, by a writ of injunction or other proper process to enforce Defendant's obedience to the *UNE Remand Order*.

PRAYER

WHEREFORE, Plaintiff Mpower respectfully requests:

A. That the Court declare and adjudge the conduct of BellSouth unlawful under Section 2 of the Sherman Act (15 U.S. C. §2);

B. That the Court award Mpower threefold its actual antitrust damages sustained by virtue of the alleged violations of the United States antitrust laws;

C. That BellSouth and its parents, affiliates, subsidiaries, officers, agents, servants, employees, attorneys, successors and assigns, and all those persons in active concert or participation with it, be restrained and preliminarily and permanently enjoined from (a) continuing to sell its high-speed internet access products and services until it provides Plaintiff and other high-speed internet access providers with nondiscriminatory access to the high-speed internet access market, including residential and business customers for Plaintiff's and Defendant's high-speed internet access products and services; and (b) denying Plaintiff access to BellSouth's Loop Qualification System, unless Plaintiff agrees to resell BellSouth's facilities and execute a long term agreement to that effect, or otherwise engaging in the conduct alleged in this complaint;

D. That pursuant to 47 U.S.C. Section 401(b), BellSouth and its parents, affiliates, subsidiaries, officers, agents, servants, employees, attorneys, successors and assigns be restrained and preliminarily and permanently enjoined from failing, neglecting to obey and disobeying the orders of the FCC, including without limitation the *UNE Remand Order*, that require BellSouth to provide Competitive

LECs such as Plaintiff Mpower nondiscriminatory access to the underlying loop qualification information without filtering or digesting such information to provide only that information that is useful in the provision of a particular type of DSL that BellSouth chooses to offer;

E. For a judicial determination and declaration pursuant to 28 U.S.C. Sections 2201 and 2202 that Defendant has, by its conduct alleged in this complaint, violated the *UNE Remand Order*;

F. That the Court award Mpower its costs and reasonable attorneys' fees as provided by Section 4 of the Clayton Act (15 U.S.C. §15);

G. That the Court award Mpower post-judgment interest; and

H. That the Court grant Mpower such other and further relief as this Court deems just and proper.

JURY TRIAL DEMAND

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, plaintiff hereby demands a trial by jury of any issue triable of right by jury.

DATED: August 2, 2000

HARLEY S. TROPIN
ADAM M. MOSKOWITZ
KOZYAK TROPIN & THROCKMORTON, P.A.
2800 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 372-1800
Facsimile: (305) 372-3508

RONALD S. KATZ
VICTORIA E. BRIEANT
WILLIAM N. HEBERT
COUDERT BROTHERS
Four Embarcadero Center, Suite 3300
San Francisco, California 94111
Telephone: (415) 986-1300
Facsimile: (415) 986-0320

KENT HEYMAN
JOHN G. KERKORIAN
MPOWER COMMUNICATIONS, INC.
5607 Glenridge Drive, Suite 300
Atlanta, Georgia 30342
Telephone: (404) 554-1217
Facsimile: (404) 554-2429

Attorneys for Plaintiff
MGC COMMUNICATIONS, INC. d/b/a
MPOWER COMMUNICATIONS CORP

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
Tampa Division

INTERMEDIA COMMUNICATIONS INC.,
3625 Queen Palm Drive
Tampa, FL 33619

Plaintiff,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,
675 West Peachtree Street
Atlanta, GA 30375

Serve: The Prentice-Hall Corporation System, Inc.
1201 Hays Street
Tallahassee, Florida 32301
Registered Agent

Defendant.

Civil Action No. 8:00-CV-1410-T-

JURY TRIAL DEMANDED

COMPLAINT

OVERVIEW

1. This antitrust, fraud and contract action for damages and equitable relief arises out of Defendant BellSouth Telecommunications, Inc.'s ("BellSouth") blatant refusal to accept the mandate of the United States Congress that the market for local telecommunications services be opened to competition. Specifically, BellSouth has undertaken premeditated and concerted efforts to illegally retain its historic monopoly over the market for local telecommunications services throughout the Southeastern United States. As a remedy for

BellSouth's conduct, plaintiff Intermedia Communications Inc. ("Intermedia") seeks among other things, treble damages and appointment of a special master to oversee BellSouth's interconnection activities.

2. As part of its premeditated and concerted course of conduct to eliminate its competitors, BellSouth has attempted to drive Intermedia from the relevant markets by (1) willfully refusing to devote adequate and sufficient resources to interconnect its network and facilities with Intermedia's network and facilities, as required by federal law and an agreement between the parties; (2) fraudulently inducing Intermedia to sign an amendment to an Interconnection Agreement between the parties in an effort to unilaterally reduce its payment obligations to Intermedia by over 60% in ***all nine states*** where the parties compete, and (3) refusing to pay Intermedia ***over $100 million*** in required compensation for calls to Internet Service Providers, based on a tortured interpretation of the parties' contract that has been rejected by virtually ***every*** court and state agency that has considered it. In taking these actions, BellSouth has thwarted Congressional will and violated numerous federal regulations in furtherance of its improper goal.

3. BellSouth, a Regional Bell Operating Company ("RBOC") and an Incumbent Local Exchange Carrier ("ILEC"), has long sought an opportunity to enter the coveted long distance market from which it had been previously barred by law. Congress, realizing that a historical monopolist such as BellSouth would respond only to a "carrot and stick" approach, afforded BellSouth (along with other RBOCs) just such an opportunity in 1996. In passing the landmark Telecommunication Act of 1996 (the "1996 Act"), Congress gave BellSouth the opportunity to enter the long-distance market within the nine-state region it has

dominated, but only *after* it opened its local market to competition from "new entrants" such as Intermedia.

4. The 1996 Act was intended to create competition in both the local telecommunications market and the long-distance market by facilitating competitive entry. The 1996 Act made extraordinary changes by removing the historic franchise protections of ILECs. BellSouth attempted to seize the opportunity Congress granted it to enter the long-distance market, but intentionally failed to open the local telecommunications markets it wholly dominates to new entrants like Intermedia.

5. The specific manner through which BellSouth was supposed to relinquish its hegemony in the local market was by granting Competitive Local Exchange Carriers ("CLECs"), including new entrants such as Intermedia, interconnection to its local exchange networks, the ability to resell its local exchange services, and access to each of the elements of its local exchange network. Pursuant to the terms of the 1996 Act, these requirements are implemented through the execution, among other things, of interconnection agreements ("Interconnection Agreements"). These agreements represent the primary means by which Congress ordered the local telecommunications markets opened to competition. Simply put, an interconnection agreement provides the terms under which an ILEC, in this case BellSouth, allows a new entrant, in this case Intermedia, access to BellSouth's network, so that Intermedia can provide local telecommunications services to its customers. BellSouth's Interconnection Agreement with Intermedia is attached hereto as Exhibit 1.

6. As has become unfortunately apparent, new entrants are at the mercy of the ILECs for performance under these Interconnection Agreements. If a new entrant, such as Intermedia, promises service to a customer based in part upon BellSouth's performance under an

Interconnection Agreement, and BellSouth refuses to perform as required, the new entrant is the primary party damaged.

7. Although BellSouth entered into an Interconnection Agreement with Intermedia as required under the Telecommunications Act, BellSouth had no intention of honoring that Agreement. In fact, contrary to the intent of Congress, BellSouth has used the Agreement as a means of (1) disabling Intermedia as a competitor in the local telecommunications market, and (2) removing Intermedia as a threat to BellSouth's dominance in the relevant geographic markets – Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

8. BellSouth's anti-competitive conduct, fraud, violation of applicable laws and regulations, and breach of contractual duties are all calculated to prevent Intermedia from providing local telecommunication services in the nine markets where BellSouth has a stranglehold on the provision of such services.

9. Moreover, BellSouth has willfully violated the 1996 Act's requirement that BellSouth negotiate agreements with new entrants in good faith. As explained below, BellSouth fraudulently induced Intermedia to enter into an Interconnection Agreement knowing at the time of formation that BellSouth did not intend and could not satisfy its obligation to interconnect with Intermedia under the Agreement. Two years later, BellSouth fraudulently procured Intermedia's agreement to an amendment to the Interconnection Agreement in an effort to unilaterally reduce its payment obligations to Intermedia by over 60%.

10. In short, BellSouth has attempted through illegal means to retain control of markets Congress specifically ordered opened, by asphyxiating new entrants with false promises,

abusive tactics, and a flagrant disregard for Congressional intent and accompanying federal regulations.

JURISDICTION & VENUE

11. This Court has federal question jurisdiction over all claims because the subject agreements were created under the federal Telecommunications Act of 1996. 28 U.S.C. § 1331; 47 U.S.C. §§ 207, 251 & 252. Moreover, this Court has exclusive jurisdiction over this action pursuant to 28 U.S.C. § 1367(a) and under the Clayton Act, 15 U.S.C. § 15.

12. This Court also has federal question jurisdiction because Intermedia's harm results from BellSouth's violation of its duties under the Communications Act of 1934, as amended by the Telecommunications Act of 1996. 28 U.S.C. § 1331; 47 U.S.C. §§ 151 *et seq.*

13. This Court also has supplemental jurisdiction over Intermedia's breach of contract and fraud claims pursuant to 28 U.S.C. § 1367.

14. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to this suit occurred in this District. Venue is also proper under 15 U.S.C. §§ 15 & 22 because BellSouth conducts business in this District.

THE PARTIES

15. Plaintiff Intermedia Communications Inc. is a Delaware corporation with its principal place of business at 3626 Queen Palm Drive, Tampa, Florida 33619. Intermedia provides inter- and intrastate telecommunications services.

16. Defendant BellSouth Telecommunications, Inc. is a Georgia corporation with its principal place of business at 675 West Peachtree Street, Atlanta GA 30375.

17. BellSouth provides inter- and intrastate telecommunications services and is subject to the obligations mandated by the 1996 Act, 47 U.S.C. §§ 251 & 252 *et seq.*, and related rules, regulations and orders promulgated by the Federal Communication Commission ("FCC").

GENERAL ALLEGATIONS

A. BellSouth's Obligations Under The 1996 Telecommunications Act

18. The 1996 Act eliminated the historic regional monopolies held by providers of local exchange telecommunication services. The 1996 Act required the current providers of local telephone service (that is, "ILECs") to facilitate the entry of competing companies, like Intermedia, into local telecommunications service markets.

19. The 1996 Act created three distinct mechanisms by which new entrants such as Intermedia could enter the local telephone marketplace. First, new entrants that had built their own telecommunications networks could interconnect these networks with those of the ILECs, so customers on each company's network could call one another. These new entrants are known as "facilities-based CLECs," because they are relying primarily on their own facilities and rely on the ILECs mainly for interconnection.

20. Congress recognized that, although facilities-based competition is preferred as a matter of public policy, it is not always feasible for new entrants to duplicate the embedded physical plant of the incumbent monopoly ILECs. Congress, wanting local telephone competition as soon as possible, created two additional methods of local market entry: (1) the resale of ILEC services; and (2) the interconnection and purchase (or lease) of individual pieces of the ILEC network, known as unbundled network elements ("UNEs" or "network elements").

These UNEs include, among others, the wire, or "loop," that runs from the phone company's office to the customer's premises, the switch that directs each phone call, and the trunk that carries traffic between phone company offices.

21. Congress and the President enacted the Federal Telecommunications Act of 1996 (Telecommunications Act") with the stated intent of facilitating the growth of competition in the local exchange marketplace. Although Congress stuck down all *de jure* barriers to entry, they recognized that it also would be necessary to overcome certain formidable *de facto* entry barriers. One of the key problems that needed to be addressed was the fact that customers of new CLECs, such as Intermedia, would need to place and receive calls from customers of the ILECs.

22. Since CLECs enter the market with very few customers, no one would subscribe to CLEC local exchange services if they could only communicate with other customers of the CLEC. Potential CLEC customers require the ability to place calls to – and receive calls from – all local exchange customers of the ILEC as well.

23. The Telecommunications Act requires ILECs to "interconnect" their local networks with those of their new CLEC competitors. 47 U.S.C. § 251(c)(2). Thus, when a CLEC customer called an ILEC customer, the CLEC would deliver the call to the ILEC for termination to its customer – and *vice versa*. By this means, CLEC customers could call ILEC customers, and ILEC customers could call CLEC customers.

24. Congress recognized that the physical interconnection of competing local exchange carrier ("LEC") networks was only half of the equation. In order for local competition to flourish, it also was necessary to ensure that LECs compensate one another equally for

performing such interconnection services. Without such a requirement, ILECs would have been able to utilize their superior bargaining position to demand disproportionate compensation.

25. Congress required that ILECs and CLECs compensate each other in an equal and reciprocal manner for completing the local traffic exchanged between them for completion. 47 U.S.C. §§ 251(b)(5) and 252(d)(2).

26. To facilitate CLEC to ILEC interconnection, Congress also required that ILECs lease UNEs to CLECs for integration and use in the CLEC network - - and interconnection of the CLEC networks with the ILEC networks. New entrants can lease these network elements from an ILEC at cost-based rates, either in total or by combining such UNEs with portions of their own network (*e.g.*, a new entrant can lease an ILEC's unbundled loop and combine that loop with its own switch). Alternatively, under total service resale, a new entrant can purchase all ILEC retail telecommunications services at a discount, and resell such services to its end-user customers.

27. The terms upon which an ILEC resells its telecommunications services, leases UNEs to a new entrant, and/or interconnects its network, are set forth in Resale or Interconnection Agreements. Wholesale rates for UNEs must be priced based on forward looking costs, with a reasonable profit, so that new entrants can economically purchase UNEs for providing service to their own customers. Wholesale rates for resold services are to be established by subtracting the costs avoided by ILECs when serving carrier customers from the retail rates established for use when serving those end users directly. Both the use of resale and UNEs are supposed to make local entry viable, while encouraging new entrants to deploy their own network infrastructure.

28. Congress' stated purpose in enacting this elaborate framework was "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the ***rapid*** deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub.L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996) (emphasis added). Thus, Congress, by the 1996 Act, intended to eliminate local monopolies and to introduce sustainable competition in the local exchange market without state protection, supervision or action, other than that required to assure that competitive entry is fostered successfully and universal service is preserved.

29. To encourage local competition, and to facilitate the implementation of Resale and Interconnection Agreements, Congress developed an encompassing two-step process: First, Congress directed that each ILEC such as BellSouth negotiate in "good faith" with requesting telecommunications carriers the terms and conditions that would allow them to interconnect, either directly or indirectly, with the ILEC's networks, facilities and equipment. 47 U.S.C. §§ 251(a) & (c)(1). Thus, the 1996 Act allows for the *possibility* that the ILEC and the requesting telecommunications carrier would agree on all terms and conditions regarding interconnection.

30. Second, realizing that the ILECs' superior bargaining power would make it difficult for a CLEC to resolve all issues through voluntary negotiation with the ILEC, Congress also provided for "compulsory arbitration." Pursuant to the 1996 Act, Congress decreed that the state public utility commissions ("PUCs") were the appropriate bodies to decide, through arbitration, any "open issues," (*i.e.*, those issues which could not be resolved through voluntary negotiation). *Id.* at § 252(b).

31. Pursuant to the 1996 Act, once the first step of negotiation and the second step of arbitration are completed, the terms and conditions for interconnection are set forth in a final Resale or Interconnection Agreement. Such Resale and Interconnection Agreements then are submitted for approval to the PUCs. *Id.* at § 252(e)(1).

B. Intermedia Seeks Entry Into BellSouth's Market

(1) The Interconnection Agreement

32. Intermedia began providing service in Florida in the mid-1980s, primarily over networks it built itself. In 1996, following passage of the 1996 Act, Intermedia attempted to use the new rights given to competitive carriers by the Act to expand its presence throughout the nine telecommunications markets wholly dominated by BellSouth. Currently, Intermedia maintains its largest networks in Florida, Georgia and North Carolina, and maintains lesser operations in Alabama, Kentucky, Louisiana, Mississippi, South Carolina and Tennessee.

33. Intermedia decided that its interests were best served by negotiating a comprehensive Interconnection Agreement with BellSouth, rather than pursuing adversarial arbitration against BellSouth before the various state PUCs. Intermedia and BellSouth initiated extensive negotiations over a period of several months to establish the terms and conditions for the interconnection of Intermedia's and BellSouth's networks, the exchange of traffic and the purchase of UNEs, among other items.

34. On June 21, 1996, Intermedia and BellSouth executed a formal, negotiated Interconnection Agreement covering BellSouth's nine-state telecommunications market: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. The Agreement was submitted for and received PUC approval in each of these

states. The Agreement imposes reciprocal obligations on both carriers to plan, coordinate and implement interconnection with each other's networks.

35. To date, BellSouth has willfully and intentionally violated the terms of the Interconnection Agreement to the great detriment of Intermedia and the public.

(2) **Interconnection Requirements**

36. In order for Intermedia to compete in the market, it must be able to interconnect and exchange traffic with BellSouth. To effect the physical interconnection, Intermedia and BellSouth must each monitor their networks, forecast call volumes, provide timely forecasts to the other, order a sufficient quantity of trunks from the other, and then install the trunks ordered by the other in a timely manner. As traffic is exchanged, each side must then compensate the other for the cost of terminating each call (on a per-minute basis).

37. In order for facilities-based carriers – whether new entrants such as Intermedia, or incumbent carriers – to provide service, they must connect their networks, so that calls from telephone users on one carrier's network can be passed on to reach users on the other carrier's network. To exchange traffic, CLECs and ILECs install high-capacity copper or fiber-optic cables (known as trunks) to connect their networks.

38. Intermedia and BellSouth typically install three types of trunks between offices on each of their networks: Incoming and outgoing one-way trunks, and two-way trunks. For local and long-distance traffic that originates on Intermedia's network that is bound for callers on BellSouth's network (outgoing traffic), Intermedia has the obligation to build or purchase one-way trunks to carry its traffic to BellSouth. In most cases, Intermedia purchases these trunks from BellSouth.

39. Conversely, for local and long-distance traffic that originates with callers on BellSouth's network and is destined for callers on Intermedia's networks (incoming traffic), BellSouth is obligated to establish the one-way trunks that carry its traffic to the Intermedia network. BellSouth almost always uses its own facilities to establish these trunks. For these one-way trunks, each carrier bears the cost of supplying the trunk that brings its traffic to the other carrier, although each carrier's mutual cooperation is required in order to install and activate each trunk.

40. In addition, certain types of traffic, such as toll free calls, are carried over two-way trunks between Intermedia and BellSouth. Typically, BellSouth provides these trunks, and Intermedia pays for half, so that each carrier bears part of the cost of these two-way trunks.

41. Carriers must coordinate between each other to make sure they have adequate trunk capacity in place to handle the traffic flowing between them. Intermedia, for example, orders one- and two-way trunks from BellSouth, so that its customers can complete their calls to BellSouth's customers. As Intermedia obtains additional customers, it will order more trunks from BellSouth to handle the increase in call volume. Similarly, BellSouth must provide matching trunks to handle the increased Intermedia call traffic. If additional trunks are not installed in a timely manner, calls from or to customers will not go through.

42. All facilities-based carriers have an obligation to provide adequate trunk connections between their networks. To meet this obligation, carriers establish forecasts of traffic loads that they anticipate on their networks over time, and share these with the carriers with which they interconnect, so that the carriers may plan ahead and establish the trunks necessary to handle the actual call volumes. Mr. W. Keith Milner, Senior Director of Interconnection Services for BellSouth, has stated this obligation clearly:

> The prevention or minimization of traffic blockages to acceptable levels is a mutual responsibility of both BellSouth and any [CLEC] who wishes to interconnect with BellSouth. Both parties bear a responsibility to accurately forecast traffic and then to engineer and install appropriate quantities of interconnection trunks.

Rebuttal Testimony of W. Keith Milner before the Florida Public Service Commission, April 21, 2000, Tr. Page 333. Attached hereto as Exhibit 2.

43. To order a trunk, the requesting carrier sends to the other carrier an Access Service Request ("ASR"). The ASR is submitted electronically, according to accepted industry standards. Following submission of the ASR, the receiving carrier must issue a Firm Order Confirmation ("FOC" or Order Confirmation), acknowledging receipt of the order and providing a firm date for the installation of the trunk. Since the interconnection trunks run between the two carriers' networks, each step in the process is essential to enable the appropriate coordination between the two companies. If BellSouth fails to provide a timely Firm Order Confirmation, for example, Intermedia's engineers will not be able to plan for installation of the trunk. In recognition of the importance of each of these steps, many state regulatory commissions have established specific deadlines by which ILECs must respond to Access Service Requests by issuing a Firm Order Confirmation.

44. The interconnection process that BellSouth is required to use with Intermedia is generally the same as that used when BellSouth interconnects with inter-exchange carriers, such as AT&T and MCI WorldCom. Inter-exchange carriers also order interconnection trunks to exchange traffic, but then those carriers pay BellSouth access charges for handling the local portion of each long distance call (on a per-minute basis) whenever traffic is exchanged. Inter-exchange carriers also submit ASRs, based on the same industry standards, when additional

trunks are necessary to handle traffic, and those carriers also expect to receive Firm Order Confirmations once an order is submitted.

45. Once the physical interconnection is complete, BellSouth and Intermedia have an obligation to exchange traffic and to terminate calls destined for their customers that originate on the other's network. The carrier that receives calls from the other carrier receives compensation for transporting the traffic over its network and delivering (or terminating) it to the receiving telephone customer. For long distance calls, the terminating carrier is paid "access charges" that are listed in its federal or state tariff. For local calls, the terminating carrier receives a charge that is prescribed by the relevant state PUC or otherwise agreed to by the parties. This compensation for local traffic is commonly referred to as "reciprocal compensation."

46. Each company also has an obligation to handle each call with the same quality and to comply with the same industry standards as if it was both beginning and ending on its own network. American consumers expect that all telephone calls will be completed, and to ensure that this expectation is met, companies such as BellSouth are required to install a sufficient number of trunks to handle the call traffic generated by its customers and destined for the customer of an inter-exchange carrier or competitor. When that obligation is not met, the company to whom the call was destined may lose business. Measurements have therefore been created by industry groups and by some state PUCs to measure how often calls are unsuccessful, or "blocked."

(3) <u>The Relevant Markets</u>

47. Intermedia's customer base currently is comprised principally of mid- and large-sized business customers, including Internet Service Providers ("ISPs"). Intermedia has

been unable to expand this customer base because of BellSouth's anti-competitive conduct outlined herein. Moreover, BellSouth's anti-competitive conduct has continually eroded Intermedia's existing customer base for the provision of local telecommunications services.

48. Intermedia currently competes with BellSouth in several major metropolitan areas, including Atlanta, Georgia; Orlando and Miami, Florida; and Raleigh/Durham, North Carolina. In offering local telecommunication services in those areas, Intermedia is a direct competitor with BellSouth for all local services Intermedia offers.

49. BellSouth possesses monopoly power over the market for the provision of local telecommunications services in all of the areas where Intermedia seeks to compete with it. Indeed, BellSouth controls the vast majority of the multi-billion-dollar local telephone network that extends across the entire Southeastern United States. In particular, BellSouth possesses monopoly power in the metropolitan areas of Orlando and Miami, Florida; Atlanta, Georgia; and Raleigh/Durham, North Carolina.

50. BellSouth correctly identified Intermedia as a serious competitive threat to BellSouth's monopoly in the relevant geographic markets where Intermedia was present. Accordingly, BellSouth engaged in significant unlawful, anti-competitive, fraudulent and improper conduct towards Intermedia, with the intent of eliminating Intermedia as a competitor, and destroying competition for the provision of local telecommunications services in BellSouth dominated markets. BellSouth's actions have harmed both Intermedia and the public.

51. BellSouth took deliberate and unlawful actions to create insurmountable barriers to Intermedia's entry and sustainability in markets Congress ordered BellSouth to open to new entrants like Intermedia. In so doing, BellSouth violated federal antitrust laws,

unambiguous Congressional intent, the federal Communications Act, and the duties imposed by its Interconnection Agreement with Intermedia.

52. BellSouth's persistent, unlawful, improper and anti-competitive conduct has seriously harmed Intermedia's ability to compete in service areas currently dominated by BellSouth. Moreover, this same conduct has harmed overall competition and reduced consumer choice in the market for local telecommunication services, preventing the lower prices and superior service envisioned by Congress in passing the Telecommunications Act of 1996.

(4) BellSouth's Improper, Unlawful And Anti-Competitive Conduct

53. BellSouth's misconduct is willful, widespread, serious and recurring. In summary: (a) BellSouth has intentionally and consistently failed to devote adequate resources to interconnect with Intermedia, by willfully refusing to install sufficient trunking capacity and refusing to provision trunks for Intermedia, thereby denying Intermedia interconnection with BellSouth's telecommunications network and severely limiting Intermedia's ability to provide service to its customers; (b) BellSouth has taken the baseless position -- repeatedly rejected by PUCs and courts -- that calls to ISPs are not "local traffic" and has on that basis intentionally refused to pay ***over $100 million*** in reciprocal compensation to Intermedia, depriving Intermedia of substantial revenue at a time critical to its attempts to compete in the local telecommunications markets; and (c) BellSouth fraudulently procured Intermedia's agreement to an amendment to the Interconnection Agreement in an apparent effort to lower the reciprocal compensation rates paid by BellSouth to Intermedia, and BellSouth is now using the fraudulent amendment as the basis for continuing to withhold ***tens of millions*** of dollars of revenue from Intermedia. All of this conduct, discussed in more detail below, contravenes the plain language

of the parties' Interconnection Agreement and the Telecommunications Act, is calculated to drive Intermedia from the marketplace, hinders competition, and harms the public.

(a) BellSouth's Intentional Refusal To Dedicate Adequate Resources To Allow Intermedia To Interconnect With BellSouth's Network

54. As described above, one of the major purposes of the Telecommunications Act of 1996 was to ensure that CLECs such as Intermedia be allowed to interconnect with the networks of ILECs such as BellSouth. To that end, Sections 251(a), 251(c)(2), and 252(d)(1) of the Act, 47 U.S.C. §§ 251(a), 251(c)(2), and 252(d)(1), impose an affirmative duty upon BellSouth to interconnect its network and facilities with Intermedia.

55. BellSouth also contractually agreed (1) to "work cooperatively to install and maintain reliable interconnected telecommunications networks;" (2) that "[t]he interconnection of all networks will be based upon accepted industry/national guidelines for transmission standards and traffic blocking criteria"; and (3) that it would "work cooperatively to apply sound network management principles by invoking appropriate network management controls, e.g., call gapping, to alleviate or prevent network congestion." Interconnection Agreement, Sections XVI.A, XVI.B & XVI.C. In addition, the agreement stated that "For network expansion, the parties agree to review engineering requirements on a quarterly basis and establish forecasts for trunk utilization as required by Section V of this Agreement. New trunk groups will be implemented as state[d] by engineering requirements for both parties." *Id.* At Section F. Finally, BellSouth is also obligated to provision trunks for Intermedia upon request, pursuant to the Interconnection Agreement, BellSouth's filed Tariffs and state and federal requirements.

56. Critical to the interconnection duty placed on incumbents like BellSouth is devotion of sufficient resources to interconnection matters. A failure by BellSouth to provide the

necessary manpower, facilities and other resources to interconnection means that CLECs like Intermedia are, as a practical matter, precluded from interconnecting with the network and facilities of ILECs like BellSouth in an efficient and reliable manner. This failure results in poor service to customers of CLECs like Intermedia, significantly impairing the CLECs' ability to compete in the marketplace.

57. Despite its clearly stated obligations, BellSouth has ignored Congress's statutory mandate and its contractual obligations and has failed to provide sufficient manpower and resources to ensure appropriate interconnection of its and Intermedia's networks and facilities.

58. Specifically, Intermedia is informed and believes, and on that basis alleges, that BellSouth has deliberately refused to provide sufficient ports on BellSouth switches (*i.e.*, sockets where trunk lines are plugged into the switch) to accept Intermedia traffic, to make available transport facilities needed by Intermedia to interconnect with BellSouth's network, and to provide adequate manpower and/or appropriate guidelines to properly process Intermedia's ASRs. In short, BellSouth has acted deliberately to keep its markets closed and to prevent Intermedia from accessing its markets. *See MCI Communications Corporation v. American Telephone and Telegraph Company*, 708 F.2d 1081, 1133 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 234 (1983) ("it was technically feasible for AT&T to have provided the requested interconnections, and AT&T's refusal to do so constituted an act of monopolization").

BellSouth's Failure to Install Adequate Trunking

59. BellSouth has failed to install sufficient trunking capacity between the carriers' networks to ensure the exchange of calls between BellSouth's and Intermedia's customers. In addition, BellSouth has refused and failed to provide trunks to Intermedia on a

timely basis, despite Intermedia's timely forecasts showing increased Intermedia call traffic. Moreover, when Intermedia has submitted ASRs to BellSouth to add additional trunking capacity, BellSouth has deliberately refused to process the ASRs in a timely fashion, and has also returned the vast majority of ASRs to Intermedia with unfounded requests for additional information, thereby substantially delaying even further the date by which Intermedia would be able to service its customers.

60. BellSouth is completely failing to met its trunk provisioning obligations to Intermedia – as its own data demonstrates. During May, 2000, BellSouth took more than 30 business days to provision **50%** of the trunks it provisioned to Intermedia in Tennessee, **60%** of the trunks it provisioned in Florida and **100%** of the trunks it provisioned in Georgia, despite a stated interval of less than 22 business days. In fact, the average intervals reported by BellSouth for Tennessee, Florida and Georgia for May 2000 were 54 business days, 74 business days, and 41 business days, respectively. Making matters worse, 2% of the trunks installed in Florida during this time, for example, failed with 30 days of installation. BellSouth's refusal and failure to provide sufficient trunk capacity has caused circuit blockages in several tandem offices, including those in Atlanta, Georgia; Orlando and Miami, Florida; and Raleigh/Durham, North Carolina. Circuit blockages prevent calls from being completed, generally resulting in the caller receiving a "fast busy signal" or a message stating that "all circuits are busy."

61. As a direct result of BellSouth's conduct relating to trunking, Intermedia's customers in those areas experience excessive levels of call blocking and poor levels of service that do not meet Intermedia's high standards of service. In Florida, for example, BellSouth is required to provide sufficient trunking so that no more than 3% of calls on terminating trunk groups are blocked, while in Georgia the standard is "parity plus 0.5%." (In other words,

BellSouth should not block more than .5% more calls on CLEC trunks than are blocked for InterLATA carriers, such as AT&T, based on any two hours in a given 24 hour period.) Despite these standards (which are themselves fairly lenient), BellSouth has failed miserably in providing this mandatory level of service to Intermedia.

62. In fact, BellSouth's own data reveals that BellSouth's failure to provision trunks to Intermedia in the volumes, and at the times, that Intermedia has requested has resulted in extraordinarily high levels of service blockage of Intermedia's traffic. Attached as Exhibit 3 is data obtained from a website that BellSouth maintains, and shows the level of service blockage on trunks carrying calls between Intermedia and BellSouth during May 2000. As BellSouth's own data show, Intermedia experienced levels of call blocking exceeding **28%** on particular trunks in Florida, and **17%** for certain trunks in Georgia during that month. BellSouth's data reveals that its interconnection trunks with Intermedia suffered ***continuous*** blockages during busy hour for the following periods of this year alone: January 10th – March 27th (Miami, FL, tandem); January 31st – May 8th (Ft. Lauderdale, FL, tandem); February 7th – April 11th (West Palm Beach, FL, tandem); January 17th – May 1st (Buckhead, GA, tandem); March 17th – April 17th (East Point, GA, tandem); January 17th – April 10th (Norcross, GA, tandem); January 24th – March 13th (Raleigh, NC, tandem). This level of call blocking is, of course, unacceptable to any customer.

63. Intermedia has repeatedly complained to BellSouth about these serious problems in numerous telephone conversations and in written correspondence. Nonetheless, BellSouth's refusal and failure to monitor traffic between the two networks and to install and provide to Intermedia adequate trunking capacity has persisted unabated for at least a full ***three years***.

64. Over the past two years, Intermedia has consistently lived up to its obligations under its Interconnection Agreement and provided BellSouth with forecasts of expected traffic between the networks as well as studies of the actual call traffic. BellSouth simply ignored Intermedia's forecasts and studies, and thus its actions in not providing trunking capacity were willful and deliberate.

Effect of BellSouth's Willful Conduct in South Florida

65. Intermedia's recent attempt to compete in the Miami/Ft. Lauderdale/West Palm Beach, Florida metroplex provides an excellent example of BellSouth's intentional refusal to adhere to its statutory and contractual obligations.

66. On or about November 19, 1999, Intermedia provided to BellSouth that company's "Local Interconnect Pre-Planning Checklist" and a circuit forecast, for a planned expansion of its service in the Miami area. On January 13, 2000, almost two months later, BellSouth demanded an alternate network configuration, due to capacity constraints within its network. Intermedia obliged, and promptly revised its plans and submitted a new forecast one week later. Unable to obtain an adequate response or even an update from BellSouth, Intermedia dispatched a letter to BellSouth management on February 16, 2000, outlining problems in both the Miami and Atlanta areas and identifying crisis-level blockages caused by BellSouth's failure to fulfill its responsibilities. Attached hereto as Exhibit 4. Following several conference calls during which BellSouth repeatedly postponed the in-service date for several trunks, BellSouth sent a letter on March 14, 2000, attempting to blame the delays on Intermedia by claiming that Intermedia was slow to provide Firm Order Confirmations. In a letter dated March 24, 2000, Intermedia clarified for BellSouth that the Miami area delays were a result of BellSouth's failure

to heed the forecasts that Intermedia had fastidiously provided, outlined the correct facts, and provided a voluminous study analyzing Intermedia's timeliness in responding to BellSouth's orders. Letter attached hereto as Exhibit 5. That same day, BellSouth advised of additional capacity constraints it was placing on each of the tandem switches in Miami, and Intermedia was again forced to revise its forecast.

67. On March 23, 2000, BellSouth advised, for the first time, that facilities needed by Intermedia in the nearby Ft. Lauderdale and West Palm Beach areas would not be ready until third-quarter 2000 due to BellSouth construction in those areas. On March 28, 2000, BellSouth agreed to install twelve of the Miami area trunks by April 20, 2000, and committed to provide orders (ASRs) for these trunks that same day (the other trunks were to be installed in May). BellSouth, however, missed this commitment. Following daily attempts by Intermedia to get the ASRs, BellSouth finally submitted the orders on April 10, 2000, and Intermedia provided firm order confirmations within two days. BellSouth finally installed twelve of the trunks that were first requested in November of 1999, on May 2, 2000.

68. During this nearly six-month period, many of Intermedia's customers (and, in turn, other callers trying to reach them) received unacceptable service, with call blockage rates as high as ***28%*** during the month of May 2000. A report generated by BellSouth confirms this extraordinary level of call blockage. That same report – in BellSouth's own words – notes that a relevant factor in the blockage rates is the fact that "Numerous end office trunk orders [were] past due." See Exhibit 3. As a direct result of BellSouth's misconduct, two major Intermedia customers cancelled their pending orders, and Intermedia was left with no choice but to postpone the rollout of its Miami area expansion. BellSouth's objective to impair Intermedia's ability to compete had been met.

BellSouth's Refusal To Heed Traffic Forecasts

69. Forecasts of call traffic are commonly exchanged by telecommunications companies to permit each firm to determine the size and location of facilities that each company needs to build in order to properly interconnect their networks and manage the public telephone network. In this respect, it is analogous to the management of a highway system, which must also be sized to handle the anticipated amount of vehicular traffic. Each telephone company has a responsibility to estimate how much of the call traffic generated by its customers is destined for customers served by the other, so that the other company will be prepared to accept the interconnection of new facilities to hand off that traffic. In order to prepare for additional interconnection, a company may need to, for example, install additional switch capacity, or install additional transport to carry the increased load after it is handed off. In other words, new interchanges and highways must be built, or traffic will come to a halt whenever traffic seeks to pass from one to the other.

70. If each company provides forecasts, and heeds the forecasts provided by others, the public network will have appropriate capacity and call traffic will flow smoothly. When these responsibilities are ignored, calls will not be completed and new service will not be possible. When this happens, of course, it is the new entrants such as Intermedia that are disproportionately harmed, since it is they who rely so heavily on providing new service and do not have the monopoly-sized customer base that BellSouth enjoys.

71. Intermedia attaches as Exhibit 6 a graph showing how forecasts should work. The graph contains horizontal lines, which show the amount of trunking capacity that BellSouth has made available to Intermedia. The actual levels of traffic carried on the Intermedia network are represented by the lines forming peaks and valleys along the chart. This

chart illustrates what happens when an incumbent responds properly to CLECs' projections and increases in call volume – the vertical lines showing total available trunking capacity step up in response to the need for additional capacity. The actual traffic increases as forecast, but never exceeds the available trunk capacity. This chart shows that adequate capacity has been provided in this area, and that no call blocking is experienced.

72. In engineering terms, a crisis situation exists any time that actual call volumes exceed 80% of circuit capacity. In the Atlanta, Georgia area, for example, BellSouth had only 360 interconnection circuits available in the Buckhead switch during January and February, 1999, despite Intermedia forecasts indicating that many more were necessary. BellSouth failed to heed the forecasts, and its installed capacity, as expected, was totally insufficient, as actual peak volumes exceeded 95% of capacity for eight consecutive weeks at that time. At that ratio of volume-to-capacity, extensive call blockages result.

73. Unfortunately for Intermedia, and its customers, BellSouth did not learn from its mistakes. One year later, BellSouth still had only 360 circuits available at the Buckhead switch, and, as forecasted, call volumes exceeded capacity between January 17 and May 1, 2000. The results of BellSouth's refusal to respond to Intermedia's forecast trunking requirements are illustrated in two attached Exhibits. Exhibit 7 provides a spreadsheet showing the amount of trunk demand that Intermedia forecast, and the amount of trunk capacity that BellSouth actually provided in the Atlanta area, while a separate spreadsheet sets forth the utilization rates for those trunks BellSouth provided. Exhibit 8 shows these results in graphical form. Unlike the graph in Exhibit 6, Exhibit 8 shows that Intermedia's traffic levels exceed appropriate trunking capacity repeatedly over a period in excess of seven months. Furthermore, the first chart in Exhibit 8 actually demonstrates that BellSouth intentionally took action that caused blocking to occur

almost immediately. This chart, depicting the EastPoint tandem ("ATLNGAEPO1IC"), shows that BellSouth reduced the number of circuits available on or about February 27, 2000, bringing the level of circuits available below the level at which call traffic had been flowing just several weeks prior. This unilateral action caused immediate blocking that lasted over one month.

74. Likewise, in the South Florida area, BellSouth failed to install sufficient capacity, and call volumes exceeded capacity between January 10 and May 8, 2000. Again, extensive call blockages resulted. Exhibit 9 shows the amount of trunks that Intermedia requested and that BellSouth provided in the Miami area, and the disparity between the two. Exhibit 10 shows these results in graphic form, and shows Intermedia's traffic levels exceed available trunking capacity repeatedly over a period of seven months. Exhibit 10 also shows a graph for the Orlando area.

75. Intermedia has endured, and continues to suffer, similar discrimination in the Raleigh/Durham, North Carolina market. Once again, Intermedia provided accurate and timely forecasts, but once again BellSouth failed to meet its obligations and properly manage its network. BellSouth's failure to provide adequate trunks to handle BellSouth-to-Intermedia calls again resulted in severe call blockages including, but not limited to, the period January 24 to March 13, 2000. In March of this year, BellSouth also failed to provide sufficient transport facilities, and asserted that none were available until an Intermedia customer registered a complaint with the Federal regulators. Immediately following that complaint, BellSouth admitted that it did in fact possess facilities, and augmented its trunk group by 672 circuits. Exhibit 11 shows Intermedia's traffic levels exceed available trunking capacity repeatedly over a period in excess of six months.

76. Had BellSouth built its network to accommodate the forecasts that Intermedia has consistently provided, the extreme blockage situations outlined herein would not have occurred. BellSouth has, in fact, frequently failed to provide even 50% of the circuits forecasted by Intermedia. Not only has BellSouth, by its actions, demonstrated that it has ignored Intermedia's forecasts, it has also failed and refused to provide its own traffic forecasts. In recent testimony before the Florida Public Service Commission on a reciprocal compensation issue, BellSouth's Senior Director of Interconnection Services testified that BellSouth never submitted traffic forecasts to Intermedia. Cross Examination of BellSouth witness W. Keith Milner before the Florida Public Service Commission, June 13, 2000, Tr. page 361, lines 19-23 (attached as Exhibit 12).

77. BellSouth failed to provide traffic forecasts even though it was well aware that it was obligated to do so. *See* Exhibit 2, Rebuttal Testimony of W. Keith Milner at page 333. Mr. Milner then confirmed that Intermedia has met its obligation to provide forecasts, while admitting that BellSouth has not. *See* Exhibit 12, Cross-Examination of W. Keith Milner, at page 361, lines 12-23.

78. BellSouth's Senior Director of Interconnection Services further testified that, while he knew that BellSouth had an obligation to forecast, BellSouth ignored its obligation. See Exhibit 12, Cross-Examination of W. Keith Milner, at page 362, line 25, through page 363, lines 1-2. Finally, Mr. Milner admits that BellSouth is not proactive, but rather simply reacts to "actual experienced loads." See Exhibit 12, at page 363, line 7. Thus, by the testimony of BellSouth's own witness in another proceeding, it is BellSouth's practice to disregard the forecasts submitted by Intermedia, and to refuse to produce its own traffic forecasts, in violation

of BellSouth's Interconnection Agreement with Intermedia and in blatant disregard of its obligations under the Act.

BellSouth's Failure to Respond Adequately to Intermedia's ASRs

79. As part of BellSouth's obligation to provide sufficient trunking, it is obligated to process Intermedia's Access Service Requests for trunks in a reasonably prompt manner. If BellSouth does not process the ASR in a timely manner, it cannot provide Intermedia with the trunks when Intermedia needs them.

80. Intermedia experiences extensive delays in the processing of virtually **all** of its ASRs for incoming trunks from BellSouth. Consistent with Intermedia's traffic forecasts, it submits ASRs for new one-way and two-way trunks to handle increased traffic between its network and BellSouth's. Intermedia maintains a large staff of personnel that identify when and where new trunks are needed to carry traffic from Intermedia to BellSouth, and from BellSouth to Intermedia. It is Intermedia's experience that, when it submits an ASR for incoming trunks from BellSouth, the vast majority of such ASRs are not processed, but are returned to Intermedia for additional information, or to make changes requested by BellSouth.

81. When an ASR is sent back to the issuing carrier, it is called a "contested ASR." Because ASRs are filled out by hand, there will invariably be some human error, and a certain amount of ASRs will contain mistakes that will require that they be contested and sent back. But in Intermedia's experience with BellSouth, virtually **all** ASRs are contested. BellSouth's level of ASR rejection is unprecedented – Intermedia sends ASRs to, and receives ASRs from, every major ILEC in the country, and none have a rejection rate anywhere near BellSouth's.

82. Intermedia is informed and believes, and on that basis alleges, that BellSouth has intentionally and deliberately rejected ASRs submitted by Intermedia at an inordinately high rate to harm Intermedia's business, and this intent is evident in many ways. First, Intermedia is informed and believes, and on that basis alleges, that BellSouth requires data in an ASR that is not required by other carriers, and is beyond established industry standards. Second, Intermedia is informed and believes, and on that basis alleges, that BellSouth has never offered training to Intermedia personnel on how to fill out its ASRs. Third, Intermedia is informed and believes, and on that basis alleges, that BellSouth delays processing ASRs more than any other carrier Intermedia works with – this delay requires extensions of the service date requested by Intermedia on the ASR, and requires a revision. Thus, Intermedia is informed and believes, and on that basis alleges that by delaying processing, BellSouth ensures that the ASR due date is no longer applicable, and uses this as a basis for contesting the ASR. Fourth, Intermedia is informed and believes, and on that basis alleges, that BellSouth refuses to correct obvious typos or omissions that other carriers routinely correct. Fifth, after Intermedia personnel ask BellSouth why an ASR is not being processed, BellSouth will only discuss one contestable issue at a time. For example, if an ASR has a typographical error, and needs an extension of a circuit due date, BellSouth personnel will only advise Intermedia of the typographical error. Intermedia then corrects the typographical error and resubmits the ASR. Intermedia must then wait to see if the ASR is not processed, and make a new inquiry before being advised that it must also request and extension of the due date.

83. This level of contested ASRs results in extensive delay in Intermedia's ability to obtain trunks from BellSouth. Intermedia is informed and believes, and on the basis alleges, that unlike the other ILECs with which Intermedia interconnects, BellSouth does not

contact Intermedia personnel when it contests an ASR. Rather, it simply refuses to process the ASR and waits for Intermedia personnel to make an inquiry before identifying any problem. This practice – in addition to those discussed above – routinely leads to excessive delays in trunk provisioning. In some cases, Intermedia must wait four-to-six months after it first issues an ASR to receive a Firm Order Confirmation date from BellSouth. BellSouth's refusal to process Intermedia's ASRs in a timely manner has profoundly harmed Intermedia's ability to provide service to its customers.

BellSouth Never Intended To Comply With The Interconnection Agreement And Applicable Law

84. Intermedia is informed and believes, and on that basis alleges, that BellSouth never intended to provide the requisite services consistent with the terms of the Interconnection Agreement, and applicable federal law, when it induced Intermedia to enter into the Interconnection Agreement. BellSouth, contrary to the requirements of the Telecommunications Act, did not negotiate in good faith with Intermedia.

85. At all times during the negotiation of the Interconnection Agreement, Intermedia acted in good faith and dealt fairly with BellSouth. Intermedia is informed and believes, and on that basis alleges, that, contrary to the Congressional mandate, BellSouth negotiated in bad faith, knowing, reckless or grossly negligent in the knowledge that it lacked the capacity, desire, resources and planning to fulfill the duty to interconnect with Intermedia that it undertook when it executed the Interconnection Agreement. Intermedia is further informed and believes, and on that basis alleges, that BellSouth executed the Interconnection Agreement with no intention of keeping its promises to Intermedia that it would devote adequate manpower, facilities and resources to interconnect with Intermedia, and with the intention that Intermedia detrimentally rely on that material promise. Intermedia did detrimentally rely on BellSouth's

material promise that BellSouth would devote sufficient resources and manpower when Intermedia ultimately entered into the Interconnection Agreement with BellSouth. Moreover, Intermedia suffered actual harm by entering into the Interconnection Agreement, as discussed more fully below.

86. As noted above, BellSouth must receive FCC approval prior to providing interLATA long distance telecommunications services to customers located within its monopoly region. The establishment of interconnection arrangements with competitors, and the fulfillment of those interconnection obligations, are preconditions to obtaining such regulatory approval. 47 U.S.C. § 271(c). Thus, BellSouth is strongly motivated to create an illusion of competition by executing interconnection agreements and asserting compliance, even though it lacks any serious intention to dedicate the resources required to fully implement the terms of such agreements or meet its obligations. BellSouth has, in fact, made three applications to the FCC for long distance authority, and it has the dubious distinction of having had the most long distance applications rejected of any Regional Bell Operating Company. In each instance, the Department of Justice and the FCC found that BellSouth had unquestionably failed to comply with the Act's requirements. However, two of BellSouth's siblings, BellAtlantic and Southwestern Bell, have in fact obtained InterLATA authority from the FCC, demonstrating that BellSouth's performance in opening its markets to competition is clearly sub-par.

87. Intermedia is informed and believes, and on that basis alleges, that BellSouth's deceit towards Intermedia was motivated by a desire to induce Intermedia to execute the Interconnection Agreement so that BellSouth could avoid FCC and state PUC scrutiny and pursue its regulatory agenda, while having no intention of complying with the provisions of the Interconnection Agreement, the Act, and applicable FCC regulations. Intermedia is further

informed and believes, and on that basis alleges, that BellSouth engaged in this tactic to delay the development of Intermedia's presence in the nine telecommunications markets, so BellSouth could maintain its monopoly for as long as possible, could reap unjustified profits, and could damage Intermedia to the point where Intermedia would no longer be a competitive threat, all to the ultimate detriment of consumers. This illegal conduct violates the Interconnection Agreement, the Act, and the nation's antitrust laws, and constitutes fraud.

(b) **BellSouth's Refusal to Pay Reciprocal Compensation**

88. In addition to its deliberate decision not to devote adequate resources to allowing Intermedia to interconnect with its network, BellSouth has also deprived Intermedia of money properly due and owing under the Interconnection Agreement by withholding millions of dollars of required reciprocal compensation payments to Intermedia.

89. "Reciprocal compensation" is a payment by one carrier to compensate another for completion of a local call originating on the other carrier's network. The revenue derived from these payments are essential to new entrants like Intermedia who face substantial start-up costs in seeking to compete with entrenched monopolists like BellSouth.

90. BellSouth and Intermedia agreed to pay reciprocal compensation to each other under Section IV.B of the Interconnection Agreement, which provides: "Each party will pay the other for terminating its local traffic on the other's network."

91. BellSouth intentionally refused to provide proper reciprocal compensation to Intermedia for local calls made by Intermedia customers to Internet Service Providers ("ISPs"). In August 1997, BellSouth announced that it would not pay ***any*** reciprocal compensation to Intermedia and other CLECs for these calls because it asserted that these calls

were jurisdictionally interstate and did not constitute "local traffic" under the CLECs' Interconnection Agreements.

92. As a result of this position, Intermedia was forced to file numerous complaints for past-due reciprocal compensation against BellSouth with state commissions in Florida, Georgia, and North Carolina. Each of these PUCs rejected BellSouth's position that it did not owe reciprocal compensation for calls to ISPs and ordered BellSouth to make appropriate payments to Intermedia. *See, e.g., In re Complaint of Intermedia Communications Inc.*, Docket No. 980495 (Florida Public Service Commission Sept. 15, 1998)

93. BellSouth was unwilling to accept these results and sought to delay even further the date by which it must pay reciprocal compensation to Intermedia. BellSouth appealed each PUC decision to federal courts in those states, and asked the courts to stay its duty to pay reciprocal compensation to Intermedia. Three courts denied BellSouth's stay requests, and ordered BellSouth to make required payments (either to Intermedia or into an the court registry pending review). *See, e.g., BellSouth Telecommunications, Inc. v. Intermedia Communications Inc. et al.*, No. 1:99-CV-0518-JOF (N.D. Ga. May 3, 1999)

94. BellSouth's fruitless litigation campaign is causing serious and substantial harm to Intermedia as it fights for market share against BellSouth. Regionwide, Intermedia's reciprocal compensation account receivable from BellSouth ***is over $100 million.*** It is clear that BellSouth hopes to crush Intermedia's ability to reach new customers and build new facilities by starving Intermedia of a principal source of revenue necessary for those critical ventures.

95. The willful nature of BellSouth's tactic is evident from the sheer size and scope of its litigation campaign against Intermedia. However, BellSouth is persisting in this endeavor in the face of a formidable wall of federal and state authority rejecting its position.

96. Over the past several years, federal courts and state PUCs have held – almost uniformly – that calls to ISPs constitute "local traffic" under interconnection agreements like the one between BellSouth and Intermedia, and that incumbents must pay reciprocal compensation to CLEC like Intermedia. A list of these decisions are attached hereto as Exhibit 13.

97. Only one motive explains why BellSouth continues with litigation in these circumstances: a desire to destroy Intermedia at all costs, no matter what that cost might be.

(3) BellSouth Fraudulently Procured An Amendment To The Interconnection Agreement In An Attempt To Reduce Its Reciprocal Compensation Obligations

98. BellSouth's determination not to pay reciprocal compensation was not limited to its blatant refusal to pay for ISP-bound calls. BellSouth also fraudulently induced Intermedia to enter into an amendment to the Interconnection Agreement to address a dispute about service in the Atlanta, Georgia metropolitan area that BellSouth now claims reduces its reciprocal compensation obligations to Intermedia by tens of millions of dollars ***in all nine markets where the parties compete.***

99. Tandems are central offices where an ILEC such as BellSouth receives calls from various locations and reroutes the calls for end-users located in the same geographic area as the tandem. BellSouth maintains several tandems in the Atlanta area, two of which are known as the "Buckhead tandem" and "Norcross tandem." BellSouth trunks connect the two tandems, allowing BellSouth end users served by one tandem to call BellSouth end users served by the other tandem.

100. In or about May 1997, Intermedia purchased trunk lines from BellSouth that connect its network to the Buckhead tandem. By doing this, Intermedia is said to have

established a "point of interconnection" at the Buckhead tandem. This point of interconnection allowed Intermedia's customers to place calls to end users served by the Buckhead tandem. However, in mid-1997, Intermedia had no point of interconnection at the Norcross tandem. Thus, Intermedia customers who wished to call end users served by the Norcross tandem had their calls first routed to the point of interconnection at the Buckhead tandem, after which they were routed over BellSouth trunks to the Norcross tandem serving the desired end user.

101. BellSouth carried calls from Intermedia's customers through the Buckhead tandem, and on to end users served by the Norcross tandem in this fashion until early 1998. At the time, BellSouth abruptly cut service to Intermedia customers seeking to route calls into the Buckhead tandem to reach end users served by the Norcross tandem, stating that it was no longer willing to allow its trunks to be used to connect the Buckhead and Norcross tandems for Intermedia's traffic. BellSouth cut off Intermedia's traffic with no prior notice to Intermedia. As a result, no Intermedia customer could place a local call to an end user served by the Norcross terminal – an act that prevented Intermedia's customers from making local telephone calls to ***tens of thousands*** of users in about one-quarter of the Atlanta metropolitan region.

102. Intermedia contacted BellSouth about this problem. BellSouth told Intermedia that it could restore service by constructing a point of interconnection at the Norcross tandem and sending calls destined for Norcross end users directly to that tandem, thereby bypassing the Buckhead tandem entirely. While Intermedia had no objection to procuring a trunk to the Norcross Tandem, this suggestion was unacceptable to Intermedia and not a practical solution to the crisis, since construction of such a point of interconnection would take substantial time, and Intermedia needed to restore service to its customers immediately.

103. BellSouth also said that it would restore service between the Buckhead and Norcross tandems if Intermedia switched from its then-current interconnection arrangement at the Buckhead tandem, known as "Single Tandem Architecture," to a different configuration known as "Multiple Tandem Architecture," or "MTA." BellSouth provided Intermedia with an amendment to the Interconnection Agreement and stated that the amendment would accomplish the switch to MTA and restore service to Norcross end users. A copy of the amendment, known as the "MTA Amendment," is attached as Exhibit 14.

104. The MTA Amendment proposed new reciprocal compensation rates for each of BellSouth's nine states. These rates were set at levels 60-80% below the rates that were currently in effect under the Interconnection Agreement. However, BellSouth stated that it would provide MTA to Intermedia under the MTA Amendment only if Intermedia specifically ordered MTA in a particular state, and only if Intermedia agreed to pay lower reciprocal compensation rates for MTA in areas where Intermedia ordered MTA. BellSouth's statement was consistent with paragraph 1 of the MTA Amendment, which states that "BellSouth will ***upon request***, provide, and [Intermedia] will accept and pay for, Multiple Tandem Access" (emphasis added). BellSouth's statement was also consistent with the attachment to the MTA Amendment, which states that "Multiple Tandem Access shall be ***available*** according to the following rates for local usage . . ." (emphasis added).

105. Based on BellSouth's representations that the MTA Amendment would restore service to the Norcross tandem, its representation that Intermedia would pay lower rates only if it ordered MTA in a specific area, and the plain language of the Interconnection Agreement, Intermedia executed the MTA Amendment on June 3, 1998.

106. Intermedia is informed and believes, and on that basis alleges, that BellSouth did not intend to use the MTA Amendment as a means of restoring service between the Buckhead and Norcross tandems. To the contrary, based on the recent testimony of BellSouth's Senior Director of Interconnection Services, Intermedia is informed and believes, and on that basis alleges, that BellSouth was in fact unable to provide MTA at the Buckhead tandem at the time the parties executed the MTA Amendment because BellSouth's switch in the Buckhead tandem was already at exhaust, with no additional capacity. *See* Exhibit 12, Cross-Examination of W. Keith Milner, at page 356, lines 5-17.

107. Moreover, Intermedia is informed and believes, and on that basis alleges, that BellSouth did not intend that Intermedia be allowed to request MTA in specific locations and receive lower reciprocal compensation in accordance with those specific requests. Rather, Intermedia is informed and believes, and on that basis alleges, that BellSouth contrived the MTA as a pretext to reduce its huge reciprocal compensation debt owed to Intermedia. Indeed, BellSouth has taken the position that the lower reciprocal compensation rates attached to the MTA became effective ***immediately*** in ***all*** nine states where Intermedia and BellSouth interconnect ***regardless*** of whether Intermedia made a request for MTA in a particular state or not. Since then, BellSouth has since unilaterally reduced its required payments to Intermedia by 60-80% in all nine states where the parties compete. The recent testimony of a high-ranking BellSouth employee makes clear BellSouth's intentions. *See* Testimony of Jerry Hendrix before the Florida Public Service Commission, June 13, 2000, Tr. page 180, line 6 – page 181, line 18; page 188, line 13 - page 190, line 3; page 231, lines 1-23; and page 327, lines 1-9, attached hereto as Exhibit 15.

108. Further evidence of BellSouth's fraud occurred several months after the MTA was executed. Employees of BellSouth contacted employees of Intermedia to request that Intermedia submit an ASR to provide MTA at the Buckhead tandem, stating that the ASR was needed as a "recordkeeping" matter. By this time, however, Intermedia had ***already*** constructed a point of interconnection at the Norcross tandem, and thus MTA was unnecessary at the Buckhead tandem. Intermedia is informed and believes, and on that basis alleges, that BellSouth's statement that an ASR was needed as a "recordkeeping" matter was a deliberate attempt by BellSouth to obtain a request by Intermedia to order MTA to bolster BellSouth's fraudulent scheme to lower its reciprocal compensation rates. (Intermedia employees, unaware of BellSouth's scheme, twice submitted an ASR as requested; BellSouth employees returned the ASR both times and never provided a firm order confirmation.)

109. Although the MTA Amendment was executed on June 3, 1998, BellSouth did not even hint that it believed the reciprocal compensation rates in the Interconnection Agreement had been superceded until December of 1998, and did not make any written assertion of that position until Spring 1999 – almost one year after the MTA Amendment was executed.

(4) **Harm Caused To Intermedia By BellSouth To Date**

110. BellSouth's intentional and willful actions and refusal to fulfill its obligations to Intermedia has caused substantial damage to Intermedia's business, its good will and reputation, and its relationship with its customers. Moreover, Intermedia suffered other damages and incurred other extraordinary costs as a result of BellSouth's illegal conduct. Intermedia is informed and believes, and on that basis alleges, that BellSouth reasonably or actually foresaw, or should have foreseen, at the time of formation of the Interconnection

Agreement and thereafter, that Intermedia would incur all of these damages and costs as a result of BellSouth's conduct.

COUNT I

(Fraudulent Inducement - Interconnection Agreement)

111. Intermedia incorporates paragraphs 1 through 110 as though set forth fully herein.

112. In June 1996, consistent with Congressional mandate, BellSouth and Intermedia negotiated a contract (the Interconnection Agreement) requiring BellSouth, *inter alia*, to "work cooperatively to install and maintain reliable interconnected telecommunications networks." Devotion of adequate manpower, facilities and resources is a critical aspect of that duty.

113. The 1996 Act also required BellSouth to negotiate in good faith. Intermedia is informed and believes, and on that basis alleges, that BellSouth negotiated in bad faith in order to fraudulently induce Intermedia to enter into the Interconnection Agreement to Intermedia's detriment. Intermedia is further informed and believes, and on that basis alleges, that at the time of the negotiations, BellSouth intended not to devote adequate manpower, facilities and resources to allow Intermedia to interconnect with its network and facilities under the Interconnection Agreement, including but not limited to sufficient switchports and transport facilities, and Intermedia, unaware of BellSouth's intent, reasonably relied to its detriment on BellSouth's misrepresentations that BellSouth would commit adequate manpower, facilities and resources to allow Intermedia to interconnect with BellSouth's network and facilities. Had Intermedia been aware of BellSouth's intent not to commit adequate manpower, facilities and

resources to assure proper interconnection between the parties' networks and facilities, Intermedia would not have entered into the Interconnection Agreement.

114. Specifically, during the negotiations, Intermedia is informed and believes, and on that basis alleges, that BellSouth made knowing, willful, reckless and maliciously false representations that BellSouth would devote sufficient manpower, facilities and resources to interconnecting the parties' networks and facilities if Intermedia contracted with BellSouth knowing that these representations were false. BellSouth made these false representations to induce Intermedia to contract with it.

115. Intermedia is further informed and believes, and on that basis alleges, that BellSouth intended that Intermedia rely to its detriment on BellSouth's false statements/promises that it would commit adequate manpower, facilities and resources to interconnect with Intermedia if Intermedia contracted with it.

116. Intermedia detrimentally relied on BellSouth's false representations by expending its resources in contracting with BellSouth in the relevant jurisdictions and in attempting to compete for customers in those areas.

117. As a result of BellSouth's fraud, Intermedia has suffered significant damages, forseeable in type and scope to BellSouth at the time of formation, in an amount to be proven at trial.

118. Intermedia is entitled to punitive damages, to be determined by the trier of facts, resulting from BellSouth's wanton, malicious, intentional misconduct.

WHEREFORE, Plaintiff Intermedia seeks a judgment awarding damages in an amount to be determined at trial against Defendant BellSouth for its fraud, including compensatory, incidental, consequential and punitive damages and such other and further relief

as is supported by the law and evidence, including without limitation, costs and pre-judgment interest.

COUNT II

(Violation of Telecommunications Act – Unjust and Unreasonable Practice – Failure to Negotiate Interconnection Agreement In Good Faith)

119. Intermedia incorporates paragraphs 1 through 118 as though set forth fully herein.

120. Section 201(b) of the Communications Act declares unlawful any practice by a common carrier that is "unjust or unreasonable." 47 U.S.C. § 201(b).

121. Section 251(c)(1) of the Act placed on BellSouth, as an incumbent LEC, the duty to negotiate an Interconnection Agreement with Intermedia in good faith. 47 U.S.C. § 251(c)(1). The FCC's rules place the same obligation on BellSouth. See 47 C.F.R. § 51.301(b)(5).

122. BellSouth violated its statutory and regulatory duty to negotiate in good faith the Interconnection Agreement with Intermedia. As set forth above, Intermedia is informed and believes, and on that basis alleges, that BellSouth entered into the Interconnection Agreement with Intermedia knowing that it would not provide adequate resources, facilities and manpower to allow Intermedia to interconnect with BellSouth's network and facilities. BellSouth therefore had no intention of performing under the Interconnection Agreement and/or no ability to perform its obligations thereunder.

123. BellSouth's conduct constitutes an unjust and unreasonable practice under Section 201(b), and violates Sections 251(a)-(c), 251(g) and 252(d) of the Telecommunications Act.

124. As a result of BellSouth's willful and intentional conduct, Intermedia suffered significant damages, forseeable in type and scope to BellSouth at the time of formation, in an amount to be proven at trial.

125. Intermedia is entitled to punitive damages, to be determined by the trier of facts, resulting from BellSouth's wanton, malicious, intentional misconduct.

WHEREFORE, Plaintiff Intermedia seeks a judgment awarding damages in an amount to be determined at trial against Defendant BellSouth for its actions, including compensatory, incidental, consequential and punitive damages and such other and further relief as is supported by the law and evidence, including without limitation, costs and pre-judgment interest. Intermedia also requests an award of attorney's fees pursuant to 47 U.S.C. § 206.

COUNT III

(Breach of Contract – Failure to Interconnect)

126. Intermedia incorporates paragraphs 1 through 125 as though set forth fully herein.

127. On June 21, 1996, BellSouth and Intermedia entered into a contract (the Interconnection Agreement) in which BellSouth agreed (1) to "work cooperatively to install and maintain reliable interconnected telecommunications networks"; (2) that "the interconnection of all networks will be based upon accepted industry/national guidelines for transmission standards and traffic blocking criteria"; and (3) that it would "work cooperatively to apply sound network management principles by invoking appropriate network management controls, e.g., call gapping, to alleviate or prevent network congestion." In addition, the contract stated that "For network expansion, the parties agree to review engineering requirements on a quarterly basis and

establish forecasts for trunk utilization as required by Section V of this Agreement New trunk groups will be implemented as state[d] by engineering requirements for both parties." Finally, BellSouth is also obligated to provision trunks for Intermedia, upon request, pursuant to the terms of the Interconnection Agreement and BellSouth's filed Tariffs, as referenced therein.

128. BellSouth breached the terms of the contract with Intermedia because BellSouth intentionally failed, and continues to fail, to perform its duties under the contract. Specifically, as set forth in paragraphs 54-87 above, Intermedia is informed and believes, and on that basis alleges, that BellSouth deliberately failed to provide and commit adequate and sufficient manpower, resources and facilities to assure that Intermedia could properly interconnect with BellSouth's network and facilities.

129. As a result of this willful conduct by BellSouth, Intermedia has suffered significant damages, foreseeable in type and scope to BellSouth at the time of formation, in an amount to be proven at trial.

130. All conditions precedent to the maintenance of this cause of action have occurred, been met, or were waived by BellSouth.

WHEREFORE, Plaintiff Intermedia seeks a judgment awarding damages in an amount to be determined at trial against Defendant BellSouth for breach of contract, including compensatory, incidental and consequential damages and such other and further relief as is supported by the law and evidence, including without limitation, costs and pre-judgment interest.

COUNT IV

(Violation of Telecommunications Act – Unjust and Unreasonable Practice – Failure to Interconnect)

131. Intermedia incorporates paragraphs 1 through 130 as though set forth fully herein.

132. Section 201(b) of the Communications Act declares unlawful any practice by a common carrier that is "unjust or unreasonable." 47 U.S.C. § 201(b).

133. Sections 251(a), (c) & (g), and 252(d) of the Telecommunications Act place on BellSouth, as a telecommunications carrier and an incumbent LEC, the duty to interconnect its network and facilities with those of Intermedia. 47 U.S.C. §§ 251(a), 251(c) 251(g) & 252(d).

134. BellSouth violated its statutory duty to interconnect its network and facilities with those of Intermedia. As set forth above, Intermedia is informed and believes, and on that basis alleges, that BellSouth deliberately refused to commit and devote adequate manpower, facilities and resources to assure that Intermedia could properly connect with BellSouth's network, as set forth above in paragraphs 32-97, above.

135. BellSouth's conduct constitutes an unjust and unreasonable practice under Section 201(b), and violates Sections 251(a), 251(c), 251(g) and 252(d) of the Telecommunications Act.

136. As a result of BellSouth's intentional and willful conduct, Intermedia suffered significant damages, foreseeable in type and scope to BellSouth at the time of formation, in an amount to be proven at trial.

137. Intermedia is entitled to punitive damages, to be determined by the trier of facts, resulting from BellSouth's wanton, malicious, intentional misconduct.

WHEREFORE, Plaintiff Intermedia seeks a judgment awarding damages in an amount to be determined at trial against Defendant BellSouth for its actions, including compensatory, incidental, consequential and punitive damages and such other and further relief as is supported by the law and evidence, including without limitation, costs and pre-judgment interest. Intermedia also requests an award of attorney's fees pursuant to 47 U.S.C. § 206.

COUNT V

(Fraudulent Inducement - MTA Amendment)

138. Intermedia incorporates paragraphs 1 through 137 as though set forth fully herein.

139. In 1998, BellSouth requested that Intermedia execute the MTA Amendment. BellSouth stated that execution of the MTA Amendment would restore service between the Buckhead tandem and Norcross tandem by installing MTA at the Buckhead tandem, and that Intermedia would receive MTA only if Intermedia made a request for MTA in a specific state and received lower reciprocal compensation rates in that state. Based on these statements, Intermedia executed the MTA Amendment.

140. The 1996 Act required BellSouth to negotiate in good faith. Intermedia is informed and believes, and on that basis alleges, that BellSouth negotiated in bad faith in order to fraudulently induce Intermedia to enter into the MTA Amendment to Intermedia's detriment. Intermedia, unaware of BellSouth's intent, reasonably relied to its detriment on BellSouth's misrepresentations. Had Intermedia been aware of BellSouth's intent and the true facts, it would not have entered into the contract.

141. Specifically, during the negotiations, Intermedia is informed and believes, and on that basis alleges, that BellSouth made knowing, willful, reckless and maliciously false representations regarding the MTA Amendment. Specifically, Intermedia is informed and believes, and on that basis alleges, that at the time of the negotiations, BellSouth knew that it lacked sufficient capacity at the Buckhead tandem to implement MTA there at the time it negotiated the MTA Amendment and therefore had no intention of providing MTA to Intermedia at the Buckhead tandem. Intermedia is further informed and believes, and on that basis alleges, that BellSouth designed the MTA Amendment as a means to attempt to reduce reciprocal compensation payments to Intermedia, and that BellSouth intended at the time that it negotiated the MTA Amendment that such Amendment would immediately reduce required reciprocal compensation payments by BellSouth in all nine states where the parties compete regardless of whether Intermedia ordered MTA or not.

142. BellSouth made these representations knowing that they were false, and with the intent that they induce Intermedia to enter into the MTA Amendment.

143. Intermedia is further informed and believes, and on that basis alleges, that BellSouth intended that Intermedia rely to its detriment on BellSouth's false statements/promises that the MTA Amendment would allow BellSouth to implement MTA at the Buckhead tandem and that the lower reciprocal compensation rates attached to the MTA Amendment would apply only if Intermedia specifically requested MTA in a particular state and only in those states where the MTA request was made.

144. Intermedia detrimentally relied on BellSouth's false representations by signing the MTA Amendment and expending substantial legal fees seeking to rectify BellSouth's

intentional fraud. BellSouth has now used the MTA Amendment to reduce required reciprocal compensation payments in all nine states where the parties compete.

145. As a result of BellSouth's intentional fraud, Intermedia suffered significant damages, forseeable in type and scope to BellSouth at the time of formation, in an amount to be proven at trial.

146. Intermedia is entitled to punitive damages, to be determined by the trier of facts, resulting from BellSouth's wanton, malicious, intentional misconduct.

WHEREFORE, Plaintiff Intermedia seeks (1) an order rescinding the MTA Amendment and declaring that it is and always was null, void and lacking any legal effect; and (2) a judgment awarding damages in an amount to be determined at trial against Defendant BellSouth for its fraud, including compensatory, incidental, consequential and punitive damages and such other and further relief as is supported by the law and evidence, including without limitation, costs and pre-judgment interest.

COUNT VI

(Violation of Telecommunications Act – Unjust and Unreasonable Practice – Failure to Negotiate MTA Amendment In Good Faith)

147. Intermedia incorporates paragraphs 1 through 146 as though set forth fully herein.

148. Section 201(b) of the Communications Act declares unlawful any practice by a common carrier that is "unjust or unreasonable." 47 U.S.C. § 201(b).

149. Section 251(c)(1) of the Act placed on BellSouth, as an incumbent LEC, the duty to negotiate the MTA Amendment to the Interconnection Agreement with Intermedia in

good faith. 47 U.S.C. § 251(c)(1). The FCC's rules place the same obligation on BellSouth. See 47 C.F.R. § 51.301(b)(5).

150. BellSouth violated its statutory and regulatory duty to negotiate the MTA Amendment in good faith with Intermedia because, as set forth in paragraphs 98-109 above, BellSouth fraudulently induced Intermedia to enter into the MTA Amendment by intentionally misrepresenting that Intermedia needed to execute the MTA Amendment in order to restore service at the Buckhead tandem.

151. BellSouth's conduct constitutes an unjust and unreasonable practice under Section 201(b), and violates Sections 251(a), 251(c) and 252(d) of the Telecommunications Act

152. As a result of BellSouth's willful and intentional conduct, Intermedia suffered significant damages, foreseeable in type and scope to BellSouth at the time of formation, in an amount to be proven at trial.

153. Intermedia is entitled to punitive damages, to be determined by the trier of facts, resulting from BellSouth's wanton, malicious, intentional misconduct.

WHEREFORE, Plaintiff Intermedia seeks a judgment awarding damages in an amount to be determined at trial against Defendant BellSouth for its actions, including compensatory, incidental, consequential and punitive damages and such other and further relief as is supported by the law and evidence, including without limitation, costs and pre-judgment interest. Intermedia also requests an award of attorney's fees pursuant to 47 U.S.C. § 206.

COUNT VII

(Tortious Interference With Contractual Relations)

154. Intermedia incorporates paragraphs 1 through 153 as though set forth fully herein.

155. During the life of the Interconnection Agreement, Intermedia entered into valid and enforceable contractual relations with end users or customers.

156. Intermedia is informed and believes, and on that basis alleges, that BellSouth knew of these contractual relationships because, among other things, it was obligated by contract with Intermedia and by statute to interconnect with Intermedia to allow for the facilitation of these same contractual relations.

157. With knowledge of Intermedia's contractual relations with its customers, BellSouth willfully, maliciously, and intentionally interfered with these relations by inducing and/or causing the breaches or terminations of the contracts by, among other things, intentionally refusing and failing to interconnect its network and facilities with those of Intermedia, by intentionally refusing and failing to provide sufficient network capacity, and by deliberately withholding reciprocal compensation payments properly due, with the intention that Intermedia's contractual relations with its customers be terminated. BellSouth was not justified or privileged to cause these contractual breaches.

158. As a result of BellSouth's tortious interference with Intermedia's contractual relations, Intermedia has suffered significant damages, forseeable in type and scope to BellSouth at the time of formation, in an amount to be proven at trial.

159. Intermedia is further informed and believes, and on that basis alleges, that BellSouth acted willfully, wantonly and outrageously to delay the development of Intermedia's presence in the nine telecommunications markets, so BellSouth could reap unjustified profits, and damage Intermedia to the point where Intermedia could not be a competitive threat. Accordingly, Intermedia is entitled to punitive damages, to be determined by the trier of facts, resulting from BellSouth's wanton, malicious and intentional misconduct.

WHEREFORE, Plaintiff Intermedia seeks a judgment awarding in an amount to be determined at trial against Defendant BellSouth for its tortious interference, including compensatory, incidental, consequential and punitive damages and such other and further relief as is supported by the law and evidence, including without limitation, costs and pre-judgment interest.

COUNT VIII

(Tortious Interference With Prospective Economic Advantage)

160. Intermedia incorporates paragraphs 1 through 159 as though set forth fully herein.

161. During the pendency of the Interconnection Agreement, Intermedia had strong business relationships as well as a valid, actual, and identifiable expectation of contractual relations with end users/consumers of telecommunications services.

162. Intermedia is informed and believes, and on that basis alleges, that BellSouth knew of these relationships because, among other things, it was obligated by contract with Intermedia and by statute to interconnect with Intermedia to allow for the facilitation of these same relations.

163. With knowledge of Intermedia's relations with its customers, BellSouth willfully, maliciously, and intentionally interfered with these relations by, among other things, intentionally refusing and failing to interconnect its network and facilities with those of Intermedia, by intentionally refusing and failing to provide sufficient network capacity, and by deliberately withholding reciprocal compensation payments properly due, with the intention that Intermedia's business relations and/or business expectancy with end users be terminated. BellSouth so acted in an improper effort to drive Intermedia from the marketplace.

164. As a result of BellSouth's tortious interference with Intermedia's business relations and/or business expectancy, Intermedia has suffered significant damages, foreseeable in type and scope to BellSouth at the time of formation, in an amount to be proven at trial.

165. Intermedia is further informed and believes, and on that basis alleges that BellSouth acted willfully, wantonly and outrageously to delay the development of Intermedia's presence in the nine telecommunications markets, so BellSouth could reap unjustified profits, and damage Intermedia to the point where Intermedia could not be a competitive threat. Accordingly, Intermedia is entitled to punitive damages, to be determined by the trier of facts, resulting from BellSouth's wanton, malicious and intentional misconduct.

WHEREFORE, Plaintiff Intermedia seeks a judgment awarding damages in an amount to be determined at trial against Defendant BellSouth for its tortious interference, including compensatory, incidental, consequential and punitive damages and such other and further relief as is supported by the law and evidence, including without limitation, costs and pre-judgment interest.

COUNT IX

(Monopolization – 15 U.S.C. § 2 – "Sherman Act")

166. Intermedia incorporates by reference paragraphs 1 through 165 as though set forth fully herein..

167. BellSouth possesses monopoly power within the relevant market, which is the provision of local telecommunications services in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. No reasonable substitute exists for the purposes for which local telecommunications services are provided. The telecommunications industry, BellSouth's consumers, and the public at large recognize local telecommunication services as a discrete product. The designated geographic market is the area in which BellSouth is the incumbent provider of local exchange service, and in which consumers in those states might practically turn for local telecommunications services.

168. By its monopoly power, BellSouth has the power to exclude competition in the relevant market. It has in fact already done so, as set forth above. In particular, BellSouth has exercised its power to preclude direct, competitive, and meaningful dealings by Intermedia and other would-be competitors with BellSouth's customers in the relevant market.

169. The source of BellSouth's power is at least two-fold. First, BellSouth possesses enormous market share. Intermedia is informed and believes, and on that basis alleges, that BellSouth dominates the market for local telecommunications services in each state within the relevant market.

170. Second, substantial barriers to entry into this market have insulated BellSouth from competition. As noted in paragraph 3, BellSouth enjoyed a historic and exclusive monopoly over the provision of local telecommunications within the relevant market.

Although the 1996 Act was designed to loosen the grip of BellSouth's unfettered monopoly, barriers to entry continue to remain extremely high for competitors like Intermedia desiring to provide local telecommunications services in the relevant markets identified above. BellSouth controls the necessary facilities and information for any new entrant to provide those services. BellSouth possess the only ubiquitous physical local telecommunications network within the relevant territory, with its accompanying customer information. The costs of replicating even the necessary portions of that comprehensive network are prohibitively high, and it would take an extremely long time to replicate even the essential portions of that comprehensive network. Alternative means of reaching local telecommunications customers either do not exist or are utterly impracticable. Congress so stated in passing the 1996 Act. Meaningful access to BellSouth's facilities at a fair cost is therefore essential to Intermedia and other would-be competitors.

171. BellSouth now maintains its monopoly power not by its skill, foresight and industry, but by intentionally engaging in the anti-competitive conduct described above, including, but not limited to: (1) willfully refusing to commit adequate resources and manpower to assure that Intermedia could interconnect with BellSouth's network and facilities; (2) refusing to make required reciprocal compensation payments to Intermedia for ISP–bound calls; and (3) fraudulently inducing Intermedia to enter into the MTA Amendment to drastically reduce BellSouth's reciprocal compensation obligations to Intermedia.

172. For these reasons, and others set forth above, BellSouth has committed the offense of monopolization in violation of Section 2 of the Sherman Act (15 U.S.C. § 2).

173. As a direct and proximate result of BellSouth's monopolization, Intermedia has been effectively denied participation in the relevant market and has been damaged in an amount to be determined at trial.

174. As a direct and proximate result of BellSouth's conduct, consumers in the relevant market have been harmed because they have been deprived of the benefits of meaningful competition for the provision of telecommunications services, which would produce lower prices and improve service for those consumers.

WHEREFORE, Plaintiff Intermedia seeks a judgment awarding damages in an amount to be determined at trial against Defendant BellSouth for its Sherman Act violations, including compensatory, incidental, consequential and punitive damages and such other and further relief as is supported by the law and evidence, including without limitation, the trebling of Intermedia's damages, costs of suit, including a reasonable attorney's fee, and pre-judgment interest.

COUNT X

(Monopolization – Refusal to Deal – Essential Facilities Doctrine 15 U.S.C. § 2 – "Sherman Act")

175. Intermedia incorporates paragraphs 1 through 174 as though set forth fully herein.

176. As noted in paragraph 170, barriers to entry are extremely high for competitors like Intermedia desiring to provide local telecommunications services in the relevant markets identified above.

177. BellSouth's refusal to deal with Intermedia by denying it meaningful access to these essential facilities and information, contrary to contract, statute, and federal

regulations, is an anti-competitive act calculated by BellSouth to harm competition in the relevant markets and retain its monopoly. BellSouth's cooperation is indispensable to effective competition. It is technically and economically feasible for BellSouth to provide access as evidenced by the Interconnection Agreement.

178. For these reasons, and others set forth above, BellSouth has committed the offense of monopolization in violation of Section 2 of the Sherman Act (15 U.S.C. § 2).

179. As a direct and proximate result of BellSouth's monopolization, Intermedia has been effectively denied participation in the relevant market and has been damaged in an amount to be determined at trial.

180. As a direct and proximate result of BellSouth's conduct, consumers in the relevant market have been harmed because they have been deprived of the benefits of meaningful competition for the provision of telecommunications services, which would produce lower prices and improve service for those consumers.

WHEREFORE, Plaintiff Intermedia seeks a judgment awarding damages in an amount to be determined at trial against Defendant BellSouth for its Sherman Act violations, including compensatory, incidental, consequential and punitive damages and such other and further relief as is supported by the law and evidence, including without limitation, the trebling of Intermedia's damages, costs of suit, including a reasonable attorney's fee, and pre-judgment interest.

COUNT XI

(Attempted Monopolization – 15 U.S.C. § 2 – "Sherman Act")

181. Intermedia incorporates paragraphs 1 through 180 as though set forth fully herein

182. In the alternative, if BellSouth does not possess a monopoly in the relevant markets alleged above, there is a dangerous probability it will obtain a monopoly as a result of the acts complained of here.

183. BellSouth has attempted to monopolize the market for provision of local telecommunication services in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. By its anti-competitive tactics, BellSouth has attempted to exclude competition in the local telecommunications market and, specifically, to attempt to preclude competitive, direct, and meaningful dealings (by entities such as Intermedia) with customers and/or potential customers.

184. BellSouth has engaged in this anti-competitive conduct for the purpose of securing for itself a monopoly over this market. Unless BellSouth's anti-competitive conduct as alleged herein is discontinued, there is a dangerous probability that BellSouth will succeed in monopolizing the relevant market.

185. For these reasons, and others set forth above, BellSouth has committed the offense of attempted monopolization in violation of Section 2 of the Sherman Act (15 U.S.C. § 2).

186. As a direct and proximate result of BellSouth's attempted monopolization, Intermedia has been effectively denied participation in the relevant market and has been damaged in an amount to be determined at trial.

187. As a direct and proximate result of BellSouth's conduct, consumers in the relevant market have been harmed because they have been deprived of the benefits of meaningful competition for the provision of telecommunications services, which would produce lower prices and improve service for those consumers.

WHEREFORE, Plaintiff Intermedia seeks a judgment awarding damages in an amount to be determined at trial against Defendant BellSouth for its Sherman Act violations, including compensatory, incidental, consequential and punitive damages and such other and further relief as is supported by the law and evidence, including without limitation, the trebling of Intermedia's damages, costs of suit, including a reasonable attorney's fee, and pre-judgment interest.

SUMMARY

WHEREFORE, Intermedia Communications Inc. demands judgment against BellSouth Telecommunications, Inc. for the following:

(1) compensatory damages in an amount to be proven at trial, including, but not limited to, actual damages and consequential damages;

(2) punitive damages as awarded at trial;

(3) an order rescinding the MTA Amendment and declaring that it is and always was null, void and lacking any legal effect;

(4) On Counts IV, V, VI:

(a) an award of treble damages;

(b) appointment by the Court of a Special Master to oversee BellSouth's interconnection activities and to assure compliance by BellSouth with the

existing and future Interconnection Agreement and its interconnection obligations to Intermedia under the Communications Act;

(c) entry of an order requiring BellSouth to immediately cease its illegal activities and enjoining BellSouth from violating the Interconnection Agreement and its existing and future interconnection obligations to Intermedia under the Communications Act;

(d) entry of an order enjoining BellSouth from submitting any applications under Section 271 of the 1996 Act until BellSouth demonstrates its compliance with its obligations under the Interconnection Agreements and the 1996 Act; and

(e) retention by the Court of jurisdiction over this matter to assure BellSouth's compliance with its obligations.

(5) Intermedia's costs and reasonable attorney's fees;

(6) such other relief as the Court deems just and proper.

JURY DEMAND

Pursuant to Fed. R. Civ. P. Rule 38, Intermedia requests a trial by jury of all its claims.

Respectfully submitted,

David T. Knight, Esq.
Fla. Bar No. 181830
Troy A. Fuhrman, Esq.
Fla. Bar No. 985211
HILL, WARD & HENDERSON
101 East Kennedy Boulevard
Suite 3700
P.O. Box 2231
Tampa, Florida 33601
(813) 221-3900

Attorneys for Plaintiff
Intermedia Communications Inc.

Of Counsel:

Jonathan Canis, Esq.
Douglas P. Lobel, Esq.
Joseph F. Yenouskas, Esq.
Andrew M. Klein, Esq.
KELLEY DRYE & WARREN, LLP
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600

Scott Sapperstein, Esq.
Senior Policy Counsel
Intermedia Communications Inc.
3625 Queen Palm Drive
Tampa, FL 33619
(813) 829-0011

Dated: July 11, 2000

BellSouth Telecommunications, Inc.
North Carolina Utilities Commission
Docket Nos. P-772, Sub 8; P-913,
Sub 5; P-989, Sub 3; P-824, Sub 6; and P-1202, Sub 4
Joint Petitioners' 1st Request for Production
April 6, 2003
SUPPLEMENTAL RESPONSE Item No 2-18(B)-1
Attachment A

ATTACHMENT A TO REQUEST FOR PRODUCTION, SUPPLEMENTAL RESPONSE TO, ITEM NO. 2-18(B)-1

SPECIAL CONSTRUCTION

CHECK SHEET

The Title Page and Pages 1 to 129, inclusive, of this tariff are effective as of the date shown.

Page	Number of Revision Except as Indicated	Page	Number of Revision Except as Indicated	Page	Number of Revision Except as Indicated
Title	1st	35	3rd	72	1st
1	110th*	36	2nd	73	3rd
1.1	45th*	37	3rd	74	2nd
2	1st	38	2nd	75	2nd
3	3rd	39	3rd	76	4th
4	1st	40	3rd	77	1st
5	1st	41	3rd	78	1st
6	1st	42	3rd	79	4th
7	1st	43	4th	80	3rd
8	1st	44	4th	81	2nd
9	2nd	45	2nd	82	3rd
10	3rd	46	3rd	83	2nd
11	3rd	47	2nd	84	3rd
12	3rd	48	4th	85	4th
13	2nd	49	4th	86	1st
14	2nd	50	3rd	87	4th
15	2nd	51	3rd	88	5th
16	2nd	52	5th	89	1st
17	2nd	53	2nd	90	5th
18	2nd	54	2nd	91	5th
19	3rd	55	3rd	92	2nd
20	2nd	56	3rd	93	1st
20.1	1st	57	2nd	94	1st
21	1st	58	3rd	95	1st
22	1st	59	3rd	96	3rd
23	2nd	60	4th	97	7th
24	2nd	61	3rd	98	4th
25	2nd	62	4th	99	1st
26	3rd	63	2nd	100	4th
27	2nd	64	4th	101	4th
28	3rd	65	2nd	102	5th
29	2nd	66	3rd	103	4th
30	2nd	67	3rd	104	3rd
31	2nd	68	3rd	105	4th
32	2nd	69	4th	106	5th
33	2nd	70	2nd		
34	3rd	71	2nd		

SPECIAL CONSTRUCTION

CHECK SHEET

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113	2nd
114	2nd
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116	4th
117	4th
118	4th
118.1	1st
118.2	3rd
118.3	2nd
118.4	Original
118.5	1st
119	3rd
120	4th
121	2nd
122	3rd
123	3rd
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SPECIAL CONSTRUCTION

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SPECIAL CONSTRUCTION

ISSUING CARRIERS

BellSouth Telecommunications, Inc.

CONCURRING CARRIERS

No Concurring Carriers

CONNECTING CARRIERS

No Connecting Carriers

OTHER PARTICIPATING CARRIERS

No Other Participating Carriers

TRADEMARKS AND SERVICEMARKS (N)

BellSouth Intellectual Property Corporation is the owner of all trademarks and servicemarks adopted and used in the United States by all BellSouth companies. Marks of other companies will be identified on the tariff page where the mark appears. (N)

SPECIAL CONSTRUCTION

EXPLANATION OF SYMBOLS

(C) - To signify changed regulation
(D) - To signify discontinued rate or regulation
(I) - To signify increase
(N) - To signify new rate or regulation
(M) - To signify matter relocated without change
(R) - To signify reduction
(S) - To signify reissued matter
(T) - To signify a change in text but no change in rate or regulation
(Z) - To signify a correction

EXPLANATION OF ABBREVIATIONS

AUL - Annual Underutilization Liability
Cont'd - Continued
E.C. - Expediting Charge
F.C.C. - Federal Communications Commission
ILP - Initial Liability Period
MTL - Maximum Termination Liability
NRC - Nonrecurring Charge
OCC - Other Common Carrier
RMC - Recurring Monthly Charge

REFERENCE TO OTHER TARIFFS

Whenever reference is made in this tariff to other tariffs of the Telephone Company, the reference is to the tariffs in force as of the effective date of this tariff, and to amendments thereto and successive issues thereof.

SPECIAL CONSTRUCTION

1. Application of Tariff

This tariff contains regulations, rates, charges and liabilities applicable for the special construction of interstate facilities provided by BellSouth Telecommunications, Inc. hereafter referred to as the Telephone Company.

When special construction of facilities is required, the provisions of this tariff apply in addition to all regulations, rates and charges set forth in the appropriate service tariff.

SPECIAL CONSTRUCTION

2. Regulations

2.1 Filing of Charges

Rates, charges and liabilities for special construction to provide facilities for use for one month or more are filed in Sections 3., 4., and 5. following, as appropriate.

Rates, charges and liabilities for the construction of facilities for use for less than one month are filed in supplements to this tariff.

2.2 Ownership of Facilities

The Telephone Company, providing specially constructed facilities under the provisions of this tariff, retains ownership of all such facilities.

2.3 Interval to Provide Facilities

Based on available information and the type of service ordered, the Telephone Company will establish a completion date for the specially constructed facilities. If the scheduled completion date cannot be met due to circumstances beyond the control of the Telephone Company, a new completion date will be established and the customer will be notified.

2.4 Special Construction Involving Both Interstate and Intrastate Facilities

When special construction involves facilities to be used to provide both interstate and intrastate services, charges for the portion of the construction to be used to provide interstate service shall be in accordance with this tariff. Charges for the portion of the construction to be used to provide intrastate service shall be in accordance with the appropriate intrastate tariff.

2.5 Payments for Special Construction

2.5.1 Payment of Charges

All bills associated with special construction charges are due in accordance with the appropriate regulations in the service tariff under which service is being provided.

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.5 Payments for Special Construction (Cont'd)

2.5.2 Credit Allowance for Service Interruptions

In the event of a service interruption involving a specially constructed facility, the customer shall receive a recurring monthly charge credit in accordance with the credit allowance provisions in the appropriate service tariff associated with the affected services.

2.6 Liabilities and Charges for Special Construction

2.6.1 General

This section describes the various charges and liabilities that may apply when the Telephone Company provides special construction of facilities in accordance with an order for service. Written approval of all liabilities and charges must be provided to the Telephone Company prior to the start of construction.

2.6.2 Conditions Requiring Special Construction

Special construction is required when 1) facilities are not available to meet an order for service, and 2) the Telephone Company constructs facilities, and 3) one or more of the following conditions exist:

(a) The Telephone Company has no other planned use for the facilities requested.

(b) It is requested that service be furnished using a type of facility, or via a route, other than that which the Telephone Company would normally utilize in furnishing the requested service.

(c) More facilities are requested than would normally be required to satisfy an order.

(d) It is requested that planned construction be advanced, resulting in added cost to the Telephone Company.

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.6 Liabilities and Charges for Special Construction (Cont'd)

2.6.3 Development of Liabilities and Charges

Special construction charges and liabilities will be developed based on estimated costs, except when actual costs are requested in writing prior to the start of special construction.

In order to meet a scheduled service date when actual costs are requested, an initial special construction filing may be made based on estimated costs. Such a filing will be revised when actual costs are available.

2.6.4 Types of Liabilities and Charges

Depending on the specifics associated with each individual case, one or more of the following special construction charges and/or liabilities may be applicable:

(A) Nonrecurring Charge for Special Construction of Facilities for Use for More Than One Month

Except as otherwise specified in 2.6.4.D. following, when special construction of a facility is requested for use for more than one month a nonrecurring charge will apply. This charge will be composed of several components as described below based on the criteria listed in 2.6.2 preceding.

(1) Case Preparation Charge Component - This component will always apply and covers the cost of administrative expenses associated with preparing a special construction case and the associated tariff filing.

(2) Nonrecoverable Cost Component - This component may apply to specially constructed facilities for use for more than one month, and is equal to the present worth of the capital costs of the nonrecoverable facilities installed to provide service and will be calculated based on the average life of the facility.

(3) Expediting Charge Component - This component may apply when the customer requests completion of the special construction on an expedited basis. The amount equals the difference in estimated cost between expedited and nonexpedited construction.

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.6 Liabilities and Charges for Special Construction (Cont'd)

2.6.4 Types of Liabilities and Charges (Cont'd)

(A) Nonrecurring Charge for Special Construction of Facilities for Use for More Than One Month (Cont'd)

(4) Lease Charge Component - This component may apply when the Telephone Company leases equipment in order to meet service requirements. The amount is equal to the net added cost to the Telephone Company caused by the lease.

(5) Advancement Charge Component - This component may apply when the customer requests that planned construction be started and completed earlier than scheduled. The charge equals the difference in estimated cost between advanced and planned construction.

An Optional Payment Arrangement may apply as specified in 2.6.6 following for specially constructed facilities placed for use for more than one month.

(B) Nonrecurring Charge for Special Construction of Facilities for Use for Less Than One Month

(1) In addition to the nonrecurring charge components listed in 2.6.4(A) preceding, all non-capital types of costs incurred to install the specially constructed facility will apply, i.e., circuit engineering, shipping of equipment, equipment installation, line-up, space rental, equipment removal, etc.

The Optional Payment Arrangement described in 2.6.6 following will not apply for specially constructed facilities placed for use for less than one month.

(C) Cancellation Charge

If a service order with which special construction is associated is cancelled prior to the start of service, a cancellation charge will apply. The charge will include all nonrecoverable costs incurred by the Telephone Company in association with the special construction up to and including the time of cancellation.

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.6 Liabilities and Charges for Special Construction (Cont'd)

2.6.4 Types of Liabilities and Charges (Cont'd)

(D) Maximum Termination and Annual Underutilization Liabilities

The Maximum Termination Liability and Termination Charge and Annual Underutilization Liability and Underutilization Charge will no longer be applied for new special construction cases filed on or after November 7, 1993. A nonrecurring charge as outlined in 2.6.4(A) and (B) preceding will be used in lieu of the Maximum Termination Liability and Termination Charge and the Annual Underutilization Liability and Underutilization Charge. For cases filed prior to November 7, 1993, for which Maximum Termination and Annual Underutilization Liabilities are applicable the following provisions continue to apply subject to 2.6.5 following.

(1) A Maximum Termination Liability is equal to the nonrecoverable costs associated with specially constructed facilities and is the maximum amount which could be applied as a Termination Charge if all specially constructed facilities were discontinued before the Maximum Termination Liability expires.

The liability period will not exceed 10 years, and is generally expressed in terms of an effective and expiration date.

A Termination Charge may apply when all services using specially constructed facilities which have a tariffed Maximum Termination Liability are discontinued prior to the expiration of the liability period. The charge reflects the unamortized portion of the nonrecoverable costs at the time of termination, adjusted for net salvage and possible reuse. Administrative costs associated with the specific case of special construction and any cost for restoring a location to its original condition are also included. A Termination Charge may never exceed the filed Maximum Termination Liability.

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.6 Liabilities and Charges for Special Construction (Cont'd)

2.6.4 Types of Liabilities and Charges (Cont'd)

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.6 Liabilities and Charges for Special Construction (Cont'd)

2.6.4 Types of Liabilities and Charges (Cont'd)

(D) Maximum Termination and Annual Underutilization Liabilities (Cont'd)

(1) A partial termination of specially constructed facilities will be provided, at the election of the customer. The amount of the Termination Charge associated with such partial termination is determined by multiplying the termination charge which would result if all services using the specially constructed facilities were discontinued, at the time partial termination is elected, by the percentage of specially constructed facilities to be partially terminated. A tariff filing will be made following a partial termination to list remaining Maximum Termination Liability amounts and the number of specially constructed facilities the customer will remain liable for.

Example

A customer with a filed Maximum Termination Liability of $100,000 for 3600 specially constructed facilities requests a partial termination of 900 facilities. The Termination Charge for all facilities, at the time of election, is $60,000. The partial termination charge, in this example, is $60,000 x 900/3600, or $15,000.

(2) The Annual Underutilization Liability will be determined prior to the start of special construction. The Telephone Company and the customer will agree on (1) the quantity of facilities and services to be provided, and (2) the length of the planning period during which the customer expects to place the facilities in service. The planning period is hereinafter referred to as the Initial Liability Period (ILP). The ILP is listed in the tariff with an effective and expiration date.

Underutilization occurs only if, at the expiration date of the ILP and annually thereafter, less than 70 percent of the specially constructed facilities are in service at filed tariff service rates.

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.6 Liabilities and Charges for Special Construction (Cont'd)

2.6.4 Types of Liabilities and Charges (Cont'd)

(D) Maximum Termination and Annual Underutilization Liability (Cont'd)

(2) An annual underutilization liability amount is filed on a per unit basis (e.g., per cable pair or per service) for each case of special construction. This amount is equal to the annual per unit cost and includes depreciation, maintenance, administration, return, taxes and any other costs identified in the supporting documentation provided at the time the special construction case is filed.

Upon the expiration of the ILP, the number of underutilized units, if any, are multiplied by the annual underutilization liability amount. This product is then multiplied by the number of years (including any fraction thereof) in the ILP to determine the underutilization charge.

Annually thereafter, the number of underutilized facilities, if any, existing on the anniversary of the ILP expiration date will be multiplied by the annual underutilization liability amount to determine the underutilization charge for the preceding 12 month period.

Example

A customer orders 100 services and the special construction of a 600 pair building riser cable is agreed to, based on the customer's 5 year facility requirements. The ILP, in this example, would be filed at 5 years. The annual underutilization liability is filed at $2.00 per pair. If 400 pairs were in service at the end of the ILP, there would be an underutilization of 20 pairs, i.e., 420 (70% of 600) - 400 = 20. The total underutilization charge for the first 5 years would be $200.00, or $2.00 per pair x 20 pairs x 5 years.

If 420 pairs are in service at the end of the 6th year, there is no underutilization, i.e., 420 - 420 = 0.

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.6 Liabilities and Charges for Special Construction (Cont'd)

2.6.4 Types of Liabilities and Charges (Cont'd)

(D) Maximum Termination and Annual Underutilization Liability (Cont'd)

(2) Pair Equivalents

Where the AUL for a specially constructed facility is stated on a "per pair" basis, and the facility has been designed to provide high capacity transmission, credit will be given as described below for pair equivalents when calculating utilization on that facility. If the AUL for the facility is stated on a "per pair equivalent" basis, the pair equivalents described below will also apply.

Pair Equivalents on Non-Leased High Capacity Transmission Systems

For non-leased high capacity transmission systems, i.e., where the Telephone Company has designed the specially constructed facility for high capacity transmission but the customer continues to pay for individual channels, pair equivalent credit will be given for each working channel. When calculating utilization, the Telephone Company will determine the number of two-wire equivalent and four-wire equivalent channels provided on the specially constructed facility. Two-wire equivalent channels will be credited toward the customer's utilization as one working pair, and four-wire equivalent channels will be credited toward the customer's utilization as two working pairs.

Pair Equivalents Example with Non-Leased High Capacity Transmission Systems

A customer agrees to the special construction of a 400 pair copper cable, based on the customer's five year facility requirements. The ILP would be filed at five years. The customer's utilization requirement is 280 pairs (70 percent of 400 = 280). The annual underutilization liability is filed at $2.00 per pair. At the end of the ILP, the customer has 230 pairs in service. Two of the working pairs have been conditioned for T-Carrier, and the customer is paying for individual voice grade channels being provided over

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.6 Liabilities and Charges for Special Construction (Cont'd)

2.6.4 Types of Liabilities and Charges (Cont'd)

(D) Maximum Termination and Annual Underutilization Liability Cont'd)

(2) Pair Equivalents Example with Non-Leased High Capacity Transmission Systems (Cont'd)

the conditioned pairs. The customer is paying for 6 two-wire circuits, and for 8 four-wire circuits being provided on the conditioned pairs. Counting the two-wire circuits as equivalent to one pair each, and the four wire circuits as equivalent to two pairs each, and subtracting the two pairs used to provide the high capacity transmission, the customer is utilizing the equivalent of 250 pairs, i.e. [230 + (6 X 1) + (8 X 2) - 2 = 250]. There is an underutilization of 30 pairs. The total underutilization charge for the first five years would be $300.00, or $2.00 per pair X 30 pairs X 5 years.

In this example, if 280 pairs (including pair equivalents) are in service at the end of the sixth year, there is no underutilization.

Pair Equivalents on Leased High Capacity Services

Where the customer leases a high capacity service provided on a specially constructed facility, and the AUL for that facility is stated on a "per pair" or "per pair equivalent" basis, utilization credit will be given based on the DS0 level channel capacity of the leased service. A DS1 service will be credited as 24 pair equivalents. A DS3 service will be credited as 672 pair equivalents.

Pair Equivalents Example with Leased High Capacity Service

A customer agrees to the special construction of a 400 pair copper cable, based on the customer's five year facility requirements. The ILP would be filed at five years. The customer's utilization requirement is 280 pairs (70 percent of 400 = 280). The annual underutilization liability is filed at $2.00 per pair. At the end of the ILP, the customer has 230 pairs in service. Two of the

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.6 Liabilities and Charges for Special Construction (Cont'd)

2.6.4 Types of Liabilities and Charges (Cont'd)

(D) Maximum Termination and Annual Underutilization Liability (Cont'd)

(2) Pair Equivalents Example with Leased High Capacity Service (Cont'd)

working pairs have been conditioned for T-Carrier, and the customer is leasing a DS1 high capacity service being provided over the conditioned pairs. Counting the DS1 high capacity service as 24 pair equivalents, and subtracting the two pairs used to provide the high capacity transmission, the customer receives utilization credit for 252 pairs, i.e., [230 + 24 - 2 = 252]. There is an underutilization of 28 pairs. The total underutilization charge for the first five years would be $280.00, or $2.00 per pair X 28 pairs X 5 years.

In this example, if 280 pairs (including pair equivalents) are in service at the end of the sixth year, there is no underutilization.

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.6 Liabilities and Charges for Special Construction (Cont'd)

2.6.4 Types of Liabilities and Charges (Cont'd)

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.6 Liabilities and Charges for Special Construction (Cont'd)

2.6.5 Waiver Condition for Maximum Termination Liability (MTL) and Annual Underutilization Liability (AUL)

The MTL/AUL will be waived when the Telephone Company deems it appropriate to replace specially constructed copper facilities with a fiber arrangement.

2.6.6 Optional Payment Arrangement for Nonrecurring Charge

As an alternative to a lump sum payment of the entire nonrecurring charge as specified in 2.6.4(A) preceding, an optional payment arrangement may be elected by the customer. This arrangement provides for amortizing all or a portion of the nonrecurring charge over a payment period, to be specified by the customer, not to exceed ten years, with any portion of the nonrecurring charge which is not amortized due and payable in an up-front lump sum amount. If the customer discontinues use of the specially constructed facilities prior to the end of the chosen payment period, the unpaid principle shall become due and payable in lump sum.

The Telephone Company may reasonably require that the customer provide security for payment of the amount amortized as a precondition to the customer's use of the Optional Payment Arrangement.

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.7 Deferral of Start of Service

The Telephone Company may be requested to defer the start of service which will use specially constructed facilities subject to the provisions set forth in the service tariff under which service is being provided. Requests for special construction deferral must be in writing and are subject to the following regulations:

2.7.1 Construction Has Not Begun

If the Telephone Company has not incurred any installation costs before receiving a request for deferral, no charge applies.

2.7.2 Construction Has Begun

If the construction of facilities has begun before the Telephone Company receives a request for deferral, charges will vary as follows:

(A) All Services Are Deferred

When all services which will use specially constructed facilities are deferred, a charge based on the costs incurred by the Telephone Company during each month of the deferral will apply. Those costs include the recurring costs for that portion of the facilities already completed and any other costs associated with the deferral. The cost of any components of the nonrecurring charge which have been completed at the time of deferral will also apply.

(B) Some Services Are Deferred

When some services which will use the specially constructed facilities are deferred, the construction case will be completed and all special construction charges will apply.

2.7.3 Construction Complete

If the construction of facilities has been completed before the Telephone Company receives a request for deferral, all special construction charges will apply.

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.8 Definitions

Actual Cost - The term "Actual Cost" denotes all costs charged against a specific case of special construction, including any appropriate taxes. (T)

Annual Underutilization Liability - The term "Annual Underutilization Liability" denotes a per unit amount which may be billed annually if fewer services are in use utilizing specially constructed facilities at filed tariff rates than were originally agreed upon by the Telephone Company and the customer.

Average Account Life - The term "Average Account Life" denotes the depreciation life prescribed by the Federal Communications Commission for each class of telephone plant.

Estimated Cost - The term "Estimated Cost" denotes all estimated costs that will be incurred in providing a specific case of special construction, including any appropriate taxes.

Facilities - The term "Facilities" denotes any cable, poles, conduit, microwave or carrier equipment, wire center distribution frames, central office switching equipment, etc., utilized to provide interstate services offered under the tariffs referenced by this tariff.

Initial Liability Period - The term "Initial Liability Period" denotes the initial planning period during which the customer expects to place specially constructed facilities in service.

Installed Cost - The term "Installed Cost" denotes the total investment (estimated or actual) required by the Telephone Company to provide specially constructed facilities.

Maximum Termination Liability - The term "Maximum Termination Liability" denotes the maximum amount which may be billed if all services using specially constructed facilities are terminated prior to the expiration of the Maximum Termination Liability Period.

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.8 Definitions (Cont'd)

Maximum Termination Liability Period - The term "Maximum Termination Liability Period" denotes the length of time for which a termination charge may apply if all services using specially constructed facilities are terminated. The liability period will not exceed ten years.

Net Salvage - The term "Net Salvage" denotes the estimated scrap, sale, or trade-in value, less the estimated cost of removal. Cost of removal includes the costs of demolishing, tearing down, or otherwise disposing of the material and any other applicable costs. Since the cost of removal may exceed salvage value, net salvage may be negative.

Nonrecoverable Cost - The term "Nonrecoverable Cost" denotes the cost of facilities specially constructed for an individual customer for which the Telephone Company has no other planned use should the service be terminated.

Normal Construction - The term "Normal Construction" denotes all facilities the Telephone Company would normally use to provide service in the absence of a requirement for special construction.

SPECIAL CONSTRUCTION

2. Regulations (Cont'd)

2.8 Definitions (Cont'd)

Normal Cost - The term "Normal Cost" denotes the estimated cost to provide services using normal construction.

Permanent Facilities - The term "Permanent Facilities" denotes facilities providing service for one month or more.

Termination Charge - The term "Termination Charge" denotes the portion of the Maximum Termination Liability that is applied as a nonrecurring charge when all services are discontinued prior to the expiration of the specified liability period.

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SPECIAL CONSTRUCTION

3. Special Construction Cases Transferred From South Central Bell Telephone Company Tariff F.C.C. No. 3 and Southern Bell Telephone and Telegraph Company Tariff F.C.C. NO. 55 (Cont'd)

3.5 Charges for the State of Tennessee (Cont'd)

OCC Name/ Effective Date	Description	Charge/ Liability	Expiration Date
TelaMarketing Communications, Inc. (TMC)	Place 897 feet of 1200 pair aerial and underground cable and twelve Cosmic Tie cables at 8 N. - Third St., Memphis, Tennessee	NRC $ 8,920.00 MTL $42,840.00 AUL $ 10.25 per pair	8/15/2014 ILP-8/15/89

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SPECIAL CONSTRUCTION

3. Special Construction Cases Transferred From South Central Bell Telephone Company Tariff F.C.C. No. 3 and Southern Bell Telephone and Telegraph Company Tariff F.C.C. NO. 55 (Cont'd)

3.5 Charges for the State of Tennessee (Cont'd)

OCC Name/ Effective Date	Description	Charge/ Liability	Expiration Date

SPECIAL CONSTRUCTION

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