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April 25, 1997

VIA FED EX

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

RE: BellSouth Telecommunications, Inc.'s Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996, Docket No. 97-00309

Dear Mr. Waddell:

This letter is sent for two purposes. First, Sprint Communications Company L.P. (Sprint) wishes to correct an erroneous citation in footnote 7 of its Brief filed with the Tennessee Regulatory Authority in this Docket on April 25, 1997. Secondly, Sprint wishes to provide the Hearing Officer in this Docket with copies of relevant portions of authority "not readily available to the agency" cited in its Brief as requested in the Report and Recommendation of Hearing Officer in the above-captioned case.

Footnote 7 in the Brief filed by Sprint cites the Conference Report at 148. The correct citation of authority is The Congressional Record, February 1, 1996, on page H1149 (debate commenced on H1145). A copy of the cited material is included with this letter. Please accept this letter as an Amendment to the Brief filed by Sprint in this case.

The filing of copies of the relevant portions of the cited authorities has been coordinated with Ron Jones, Legal Assistant to Director Melvin Malone. Guy Hicks, General Counsel for BellSouth Telecommunications, Inc. has authorized me to state that BellSouth has no objection to the date of the filing of these copies of cited authorities.

Please date stamp the attached extra copy of this letter as evidence of filing and return to me in the enclosed, self-addressed, stamped envelope.

Sincerely,

Carolyn Tatum Roddy

Carolyn Tatum Roddy

CTR:vw

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and exact copy of the within and foregoing Report and Recommendation of Hearing Officer, Docket No. 97-00309, on behalf of Sprint Communication Company, L.P., via United States Mail, first class postage paid and properly addressed to the following:

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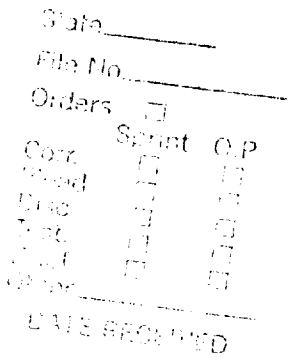
Vickie Wade



BEFORE THE
GEORGIA PUBLIC SERVICE COMMISSION

In Re: Consideration of BellSouth Telecommunications, Inc.'s Entry Into InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996	)))))	Docket No. 6863-U

JAN 23 '97

RESPONSE TO THE COMMISSION'S JANUARY 14, 1997 ORDER CLARIFYING REQUIREMENT OF NOTIFICATION OF INTENT TO FILE AN APPLICATION WITH THE FCC

On January 14, 1997, the Commission issued an Order seeking clarification from BellSouth Telecommunications, Inc. ("BST") regarding the route BellSouth intends to take to filing a Section 271 application with the FCC. Specifically, the Commission asked that that BST clarify whether it intends to proceed under Section 271(c)(1)(A)("Track A") or Section 271 (c)(1)(B)("Track B"). This response provides the clarification requested by the Commission. It explains Congress's intent in creating Section 271 and the interplay between Tracks A and B. This response also describes BellSouth's current assessment of its plans to file at the FCC based on the requirements of the Tracks and the current status of facilities-based competition in Georgia. Based on current conditions in Georgia, BellSouth believes that its filing with the FCC seeking authority to begin to compete for the long distance business of Georgia consumers will follow Track B. This response also explains the reasons for filing a Statement of Generally Available Terms and the purposes that Statement can serve in further opening local markets and meeting the elements of the Competitive Checklist.

I. Section 271

Section 271 is a critical part of Congress' "pro-competitive, de-regulatory national policy framework" that "open[s] all telecommunications markets to competition." S. Rep. No. 230, 104th Cong., 2d Sees. 1 (1996) ("Conference Report"). Congress meant through this section to end the old regime of the Modification of Final Judgment ("MFJ"), which had artificially divided local and long distance markets into two separate and independent spheres. It wanted head-to-head competition between long distance carriers, who would enter local markets, and the BOCs, who would enter the long distance business. By "allowing everyone to compete in each other's business," Congress created a situation that would allow this kind of competition to develop and that would bring consumers "low cost integrated service with the convenience of having only one vendor and one bill to deal with." 141 Cong. Rec. S713, S714 (daily ed. Feb. 1, 1996) (statement of Sen. Harkin).

The first step was opening local markets. See 142 Cong. Rec. S688 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings) (Bell companies must "open their networks to competition prior to their entry into long distance"). Congress set out specific requirements in Sections 251-253 of the 1996 Act, while establishing long distance entry via Section 271 as the "carrot" for compliance. 141 Cong. Rec. S8138 (daily ed. June 12, 1995) (statement of Sen. Kerrey); see 141 Cong. Rec. S18,152-53 (daily ed. June 12, 1995) (statement of Sen. Breaux) (BOCs allowed to sell long distance and required the opening of local exchange markets). Section 271 thus ensures that opening the BOCs' local markets will not only allow competition in local services, but also enhance competition in the "oligopolistic" long distance business through BOC entry. 141 Cong. Rec. S7881, S7889 (daily ed. June 7, 1995) (statement of Sen. Pressler); see 142 Cong. Rec. S686-87 (Feb. 1, 1996) (statement of Sen. Pressler) (Act "will lower prices on long-distance calls through competition"). This section was established not to give incumbent interexchange carriers ways of postponing competition from the BOCs, but to allow

BOCs to secure interLATA authority consistent with the public interest as soon as it has opened the local exchange to competition. And, nowhere did Congress establish that any particular type of local competition must exist as a prerequisite to BOC entry into the long distance business in its region.

II. Section 271(c)

Section 271(c) sets out the routes available for BOCs to seek authority from the FCC to begin to compete for long distance customers. These routes provide different ways for BOCs to put applications before the FCC to obtain entry into the long distance market if that entry is in the public interest and other statutory requirements are fulfilled, including consultation with the relevant state commission. Congress intended that these routes to seeking a public interest determination be generally open at all times, at least ten months after the Act was passed. Interpretations of Section 271 that would allow BOC competitors to game the application process and prevent any application for a long period of time conflict with Congress's statutory scheme and intent to open the long distance market. Such interpretations would serve to insulate long distance firms from BOC competition by preventing the FCC and state commissions from even considering the public interest in BOC entry. Interpretations of Section 271 that serve to insulate competition rather than encourage it are clearly to be avoided in light of the Congress's intent to open all telecommunications markets.

Under either Section 271 route BOCs may demonstrate that the relevant state is open to local competition by satisfying the 14-point competitive checklist set out in Section (c)(2). The assessment of the competitive checklist is the same under both Tracks A and B, as discussed below. However, unlike Subparagraph (A), which allows

BOCs to apply for long distance authority immediately, Subparagraph (B) requires BOCs to wait ten months from the enactment of the Act before applying.

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

A. The Subparagraph (A) Route

Subparagraph 271(c)(1) (A) is titled "Presence of a Facilities-Based Competitor." It creates an expedited route for BOC entry into the long distance business by allowing a BOC to seek immediate entry without the 10 month waiting period required under the Subparagraph (B) route. This route is open once the BOC signs one or more agreements to provide and begins providing access and interconnection to facilities-based competitors. By its own terms, Subparagraph (A)'s path is available if a BOC "is providing access and interconnection to its network facilities" to a "competing" carrier or carriers that are providing telephone exchange service to "residential and business subscribers" either "exclusively" or "predominately" over competitive facilities. Section 271(c)(1)(A).[1]

[1] The Act's definition of telephone exchange service excludes exchange access and restricted private line service. Section 3(47).

Subparagraph (A) creates an expedited route for BOCs to apply for entry into long distance, but, in exchange, requires actual facilities-based competition to be present. This route arose from Congress's perception that cable companies would quickly emerge as facilities-based competitors to telephone companies, justifying quicker BOC entry into the long distance business. The Conference Report explained that "large well established companies such as Time Warner and Jones Intercable are actively pursuing plans to offer local telephone service in significant markets" and observed that at least one cable company, Cablevision, already had entered into an interconnection agreement with an incumbent BOC so that it could offer telephone service to 650,000 subscribers. Conference Report at 148. Congressman Fields, one of the key authors of the Act likewise explained that:

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

142 Cong. Rec. H1152 (daily ed., February 1, 1996)(Statement of Congressman Fields). Thus, it was Congress's intention that a facilities-based competitor could "negotiate the loop for all within a State." Because this competitor would be a real, facilities-based competitor with investment in facilities and the right incentives to begin quickly providing service over its facilities, Congress believed that it would be a reliable negotiator for the market. This competitor's agreement, which would be available to

others within the State under Section 252(i), would then provide the basis for an immediate BOC application for long distance authority. See, e.g., 142 Cong. Rec. S713 (daily ed. Feb. 1, 1996)(statement of Senator Breaux)("[i]n those instances, we see no reason why the FCC should not act immediately and favorably on a Bell company's petition to compete").

The Conference Report supports and explains the language of Subparagraph (A) requiring an operational facilities-based competitor. The Conference Report points out that under Subparagraph (A) "[t]he requirement that the BOC 'is providing access and interconnection' means that the competitor has implemented the agreement and the competitor is operational." Conference Report at 148; see also Conference Report at 147("[t]he competitor must offer telephone exchange service") (emphasis added). The Conference Report explains that one point of requiring that the access and interconnection agreement be implemented is that "[t]his requirement is important because it will assist the appropriate State commission in providing its consultation...." Conf. Rep at 148. Without an operational requirement, state commissions could have been required to assess interconnection agreements that had not been subject to prior detailed assessment by them under Section 252. See Section 252(e)(2)(A)(limiting state commission review of voluntarily negotiated agreements).

B. The Subparagraph (B) Route

Section 271(c)(1)(B) describes the other route BOCs may follow to seek long distance authority. Subparagraph (B) supplies a date certain by which BOCs can submit Section 271 applications to the FCC if competing providers qualified under Subparagraph (A) have not emerged, but imposes a ten month waiting period the application can be submitted under this track. Unless a facilities-based competitor that meets the

requirements of Subparagraph (A) has emerged and sought access and interconnection under the Act, Subparagraph (B) is the only route available to a BOC. (Indeed, a BOC may file with the FCC under Subparagraph (B) up to three months after it receives a request for access and interconnection from a competitor that meets Subparagraph (A), which ensures that competitors cannot block an application for long distance authority by seeking interconnection after the BOC has started down the (B) route.)

By its own terms, Subparagraph (B) is available, after the ten month waiting period, if "no such provider has requested the access and interconnection described in subparagraph (A)." Section 271(c)(1)(B). The "no such provider" requirement refers to a provider described in the immediately preceding Subparagraph (A). That Subparagraph describes the provider as a "competing provider[] of telephone exchange service...to residential and business subscribers" exclusively or predominately over its own facilities. Thus, the "no such provider" language in Subparagraph (B) plainly states that Subparagraph (B) remains open until a facilities-based competitor begins actually providing telephone exchange service to residential and business competitors and seeks access and interconnection.[2]

The legislative history is clear that these requirements tying Subparagraphs (A) and (B) together serve Congress's goal of opening the long distance market to competition from BOCs by keeping a route open for BOCs to seek long distance authority. The Conference Report makes the point that Section 271(c)(1)(B) "is intended to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because *no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market.*" Conference Report at

[2] Subparagraph (A) also describes the required access and interconnection as involving "network facilities" of the competing provider, further that Tract B applies until a facilities -based competitor is present.

148 (emphasis added). That is, until a local competitor uses its own facilities for serving both business and residential competitors, and otherwise meets the requirements of Subparagraph (A), and thus became a reliable negotiator as described by Congressman Fields above, Congress believed that relying on a general statement subject to state review would be at least as reliable a guarantor of open markets.[3]

During the House debate, Congressman Tauzin similarly explained that "[s]ubparagraph (b) uses the words 'such provider' to refer back to the exclusively or predominantly facilities based provider described in subparagraph (A)." 141 Cong. Rec. H8457, H8458 (daily ed. Aug. 4, 1995). He gave several examples of how Subparagraph (B) would apply in practice. Congressman Tauzin explained that a BOC could file under Subparagraph (B) "[i]f no competing provider of telephone exchange service with its own facilities or predominantly its own facilities has requested access and interconnection." Id. (Example No. 1). The (B) route also would be available if the BOC had only received interconnection requests from carriers that do not use predominantly or exclusively competitive facilities. Id. (Example No. 4). So too, a BOC could file for interLATA relief under Subparagraph (B) if a facilities-based competitor had requested access, but it served only business customers. Id. (Example No. 6). In all these instances, the BOC would not have received an interconnection request that satisfies Track A's requirement of a request from a facilities-based "competing provide[r] of telephone exchange service . . . to residential and business subscribers."

[3] Even where an otherwise qualifying facilities-based competitor has emerged. Congress specifically required that the competitor negotiate an agreement and implement it in good faith to ensure that BOC entry would not be unfairly delayed. Section 27(c)(1)(B)(state commission may allow BOC to proceed under Track B where otherwise qualifying providers have not proceeded in good faith).

C. Application of Tracks A and B

Based largely on the cable industry's representations about their intended speedy entry into local telephony, Congress expected that Track A route would allow BOCs facing facilities-based competition to get into the interLATA market sooner than they could under Subparagraph (B). Track A's opportunity for an expedited application also benefits competitors by providing an additional incentive to BOCs to implement an agreement with a qualifying facilities-based carrier as soon as possible. Because the terms of that agreement will be available to all other local service providers under Section 252(i) the benefits of the agreement would be general.

As a practical matter, this alternative track will supersede the (B) route in three different situations where a facilities-based carrier described in Subparagraph A "has sought the interconnection and access described in [Subparagraph] (A)." The first is when a competing facilities-based carrier is already interconnected with the BOC but wishes to obtain interconnection and access pursuant to sections 251 and 252. The Conference Report mentions one example of a pre-existing interconnection agreement, between Cablevision and New York Telephone in Long Island. Conference Report at 148. Legislators knew that there were others. See, e.g., 142 Cong. Rec. S713 (daily ed. Feb. 1, 1996) (statement of Sen. Breaux) ("In some States these agreements have already been put in place with the approval of state public service commissions."). In such cases, Subparagraph (A) provides a way for the BOC to enter the long distance business ahead of the time-line set out in Subparagraph (B). All that would be necessary is to secure state approval of a revised agreement that complies with the 14-point checklist and implement it. As Senator Breaux explained, "[i]n those instances, we see no reason why the FCC should not act immediately and favorably on a Bell company's petition to compete...." 142 Cong. Rec. S713 (daily ed. Feb. 1, 1996).

A second possibility is that a facilities-based competitor, such as a cable company or a competitive access provider, might be providing business and residential service

among its own customers prior to interconnecting with the BOC. The FCC has taken the position that "[a]n entrant, such as a cable company, that constructs its own network will not necessarily need the services or facilities of an incumbent LEC to enable its own subscribers to communicate with each other." First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Dkt. No. 96-98, at ¶ 4 (rel. Aug. 8, 1996), appeal pending sub. nom. Iowa Utils. Bd. v. FCC, No. 96-3321 (8th Cir. arg. Jan. 17, 1997).

When such a carrier seeks interconnection with the BOC to expand its services, that request is a qualifying request for purposes of Subparagraph (B) and shifts the BOC to the (A) route. Representative Tauzin specifically noted, however, that an interconnection request from a facilities-based competitor serving only business customers -- such as a CAP that had just begun to expand its business offerings beyond exchange access -- would not qualify. 141 Cong. Rec. H8457, H8458 (Example 6). Moreover, .Congress added a safeguard to ensure that even a qualifying, facilities-based carrier could not keep the BOC out of the long distance business by dragging out negotiations or failing to implement a completed agreement on time. The BOC may obtain a state determination that the competitor has not negotiated in good faith or has not complied with the implementation schedule set forth in its agreement, which would allow it to file with the FCC under Subparagraph (B). § 271(c)(1)(B).

The final situation in which Subparagraph (B) might become inapplicable is where a carrier seeks interconnection with the BOC in order to commence facilities-based service to residential and business subscribers. While such a request would not be a qualifying request under Subparagraph (B) when made, it would become one as soon as the competitor began to provide the facilities-based service described in Subparagraph (A). At that point, there would be an operational, facilities-based provider that (1) fits the description of Subparagraph (A) and (2) "has requested the access and interconnection described in subparagraph (A)." § 271(c)(1)(B). Under Subparagraph (B) the BOC

would have at that point a window of just three months to file a Track B application with the FCC, although it could file under Subparagraph (A) as soon as it has implemented the interconnection agreement.

III. Alternative Interpretations of Section 271(c)(1)

Although the appropriate route to follow depends on the facts that exist at the time that a BOC submits its application, several parties advance an interpretation of Section 271 that seeks a premature decision aimed at delaying and/or preventing BOC entry. These parties seek to open a large gap between Subparagraphs (A) and (B) that would effectively put the ability of a BOC to file a Section 271 applications in the hands of its competitors. These parties argue that Subparagraph (B) is unavailable if a potential competitor simply requests negotiations for access and interconnection with the BOC, even if the competitor does not have the facilities or residential and business customers required by Track A. The argument continues that Subparagraph (A) also is closed until the potential competitor requesting negotiations actually signs and implements the agreement, invests in sufficient facilities to serve business and residential subscribers predominately over its own facilities, and decides actually to provide service to both subscriber groups. This interpretation opens a large gap between Subparagraphs (A) and (B) by mistakenly inflating a non-facilities based competitor into the clearly defined type of facilities-based provider that meets the requirements of Subparagraph (B).

Opening this gap clearly serves the interest of long distance firms that wish to delay BOC entry. However, this interpretation runs counter to the language and intent of Congress. Congress's overall intent in passing the Telecommunications Act was to establish rules to open markets, not keep them closed or allow them to be kept closed. Thus, Congress rejected in Subparagraph (B) any notion that a facilities-based competitor

had to be in place for a BOC to enter the long distance market.[4] Congress intended that Section 271 would provide a path for BOCs to seek authority from the FCC to enter the long distance market as soon as they can demonstrate that their local markets are open.

This gap-creating interpretation would allow a potential competitor to prevent a BOC from filing under Subparagraph (B) without having made the pro-competitive investment in local facilities that Congress thought necessary to invoke Subparagraph (A). It also would serve to take the decision on opening the long distance market to BOC competition out of the hands of the FCC, deny state commissions their role in the process, and put the timing of opening the long distance market into the hands of potential BOC competitors. These firms could exploit the artificial no-man's land this interpretation creates by simply making a request to negotiate for access and interconnection (thereby closing the Subparagraph (B) route under their reading), and then limiting facilities investments or limiting facilities-based service to only residential or business subscribers (thereby keeping Subparagraph (A) closed as well).

IV. Statement of Generally Available Terms and Conditions

BST seeks Commission approval of a Statement of Generally Available Terms and Conditions in order to further open the local market to competition and to aid in meeting the requirements of the Competitive Checklist. Under Section 252(f), the Act created a vehicle for BST to seek Commission approval of a general statement setting out BST's services and prices. Upon filing with the Commission, the Commission may approve the Statement if it meets the requirements of the Act. Section 252(f).

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[4] That any measure of local competition beyond compliance with the competitive checklist would contravene Congress's intent is confirmed not only by the existence of Section 271(c)(1)(B), but also by the Act's legislative history. For example, an attempt by Senator Kerrey to inject a measurement of competition into Section 271 beyond open markets was soundly rejected. 141 Cong. Rec. S8310, S8319-21 (June 14, 1995).

BST's Statement sets out a wide range of services and facilities that it offers to any firm interested in providing local telecommunications service in Georgia. The Statement is modeled on Commission orders resulting from the arbitration proceedings it has conducted under the Act. Thus, the services, and prices for those services, contained in the Statement meet the Act's requirements. By setting forth clearly and completely the wide range of BST services available to competitors and potential competitors, BST intends to encourage additional entry and further demonstrate that its markets are open to competition. Commission approval would further encourage firms to begin providing competitive local telecommunications services in Georgia.

A Section 252(f) statement can supply the basis for meeting elements of the Competitive Checklist set out in Section 271(c)(2)(B) regardless of whether Track A or Track B is followed. Under Track A, the Statement can be used in combination with an agreement or agreements with a Track A qualifying competitor to meet Section 271's requirements. Congress did not intend that the failure of a facilities-based competitor qualified under Track A to agree to take one or more checklist elements would bar a successful Section 271 application. Thus, at least where an agreement with a qualifying Track A competitor does not address a particular checklist element, a Statement of Generally Available Terms and Conditions may be used to show checklist compliance.

Under Track B, the Statement itself supplies all the elements of the Checklist. BST's Statement matches the structure of the Checklist, and meets or exceeds each of the Checklist requirements. Because it is based on this Commission's arbitration orders that directly address Checklist elements, as specifically detailed in testimony of BST witness Scheye, the Commission should approve the Statement as Checklist compliant.

V. Current Assessment Of Open Tracks

As set out in detail above, applications that seek long distance authority under Section 271(c)(1)(A) are appropriate only where a facilities-based competitor is providing telephone exchange service to residential and business competitors predominately over its own facilities. BST is not currently aware of any competing telecommunications firm in Georgia that meets these Track A requirements and that could consequently request access and interconnection that would prevent BellSouth from following Track B. Based on its belief that no such firm currently exists BellSouth intends, as of the date this response is filed, to file an application with the FCC seeking long distance authority in Georgia under Track B. Depending on when the application is actually filed at the FCC, the relevant facts may change and may indicate that Track A is appropriate, in which case the application would follow that Track.

VI. Conclusion

Section 271(c)(1) allows a BOC to demonstrate that its markets are open to competition and to seek a public interest determination on its entry into the long distance market under two routes. Until a facilities-based carrier providing telephone exchange service to both business and residential customers requests access and interconnection from a BOC, Section 271(c)(1)(B) provides an appropriate route for the BOC to seek to enter the long distance business in its region.

This 22nd day of January 1997.

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DOCKET# 15118
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DOCKET NO. 7253-U

ORDER REGARDING STATEMENT

IN RE: BellSouth Telecommunications, Inc.'s Statement of Generally Available Terms and Conditions Under Section 252 (f) of the Telecommunications Act of 1996

Statement Filed: January 22, 1997
Decision: March 20, 1997

APPEARANCES:

On Behalf of the Commission Staff:
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On Behalf of the Consumers' Utility Counsel:
Ken Woods

On Behalf of BellSouth Telecommunications, Inc:
Fred McCallum
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On Behalf of AT&T Communications of the Southern States, Inc.
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Martha P. McMillin

On Behalf of Intermedia Communications, Inc.:
Jonathan Canis

On Behalf of Sprint Communications Company, L.P.:
William Atkinson
Carolyn Roddy

BY THE COMMISSION:

The Commission by this Order issues its decision regarding the Statement of Generally Available Terms and Conditions ("Statement" or "SGAT") filed by BellSouth Telecommunications, Inc. ("BellSouth" or "BST") pursuant to Section 252(f) of the Telecommunications Act of 1996 ("Act"). BellSouth's Statement represents a substantial effort to document the interconnection, services, rates, and related items it has made or will make available, consistent with this Commission's previous orders and rulings in arbitration dockets under the Act and other proceedings (primarily Dockets No. 6352-U and 6415-U/6537-U) under both the Act and state law. As discussed herein, however, the Commission concludes that the Statement does not yet fully comply with all of the standards and requirements of Sections 251 and 252(d) of the Act, and therefore should be rejected. This docket shall remain open for review of any revised Statement that BellSouth may submit, in order to address the aspects of the Statement that are currently premature or deficient as discussed in this Order.

Contents

I. JURISDICTION AND PROCEEDINGS

A. Jurisdiction

The Commission opened this docket to review the Statement of Generally Available Terms and Conditions ("Statement" or "SGAT") submitted by BellSouth in connection with its expected application to provide in-region interLATA services pursuant to Section 271 of the Act. When BellSouth filed its Statement on January 22, 1997, it triggered a 60-day review process under Section 252(f) of the Act. The Commission may approve or reject the Statement, or simply allow it to take effect pursuant to Section 252(f).[1]

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[1] The Act also permits the Commission to continue review of a Statement if it takes effect following the initial 60-day review period. Section 252(f)(4). The 60-day review period on this Statement concludes March 23, 1997.

The Commission's review of the Statement is independent of whether BellSouth proceeds to seek in-region interLATA relief under Section 271 of the Act.[2] BellSouth's filing of the Statement is under a separate section of the 1996 Act, Section 252(f), which provides for Commission review within 60 days whether or not BellSouth even proceeds with any application for in-region interLATA entry. The Commission's decision on the Statement pursuant to Section 252(f) is an order by this Commission. By contrast, the Commission's action on BellSouth's application for interLATA entry will be a consultative recommendation to the FCC submitted 20 days after BellSouth's FCC filing, and will not be a "final" or appealable order of this Commission. The schedule for reviewing the Statement in this docket is thus also separate from proceedings related to Section 271.

In reviewing the Statement, the Commission shall apply the standards and requirements of Sections 251 and 252(d) of the Act. In addition, the Commission may apply other requirements of State law, including requiring compliance with intrastate telecommunications service quality standards or requirements, as recognized by Sections 252(e)(3) and (f)(2).

B. Procedural History

The Commission initially established a procedure and schedule for the general review of BellSouth's expected application to the Federal Communications Commission ("FCC") for authorization to provide in-region interLATA services pursuant to Section 271 of the Act. The Act directs the FCC to consult with the applicable State Commission before making a determination with respect to any Bell Operating Company's entry into the interLATA market within the region of its incumbent local exchange services.[3] According to those procedures, established in Docket No. 6863-U, the Commission instructed BST to prefile testimony that specifically addressed and responded to questions concerning competition in the local market raised in Section 271 (c)(2)(B) of the Act.

On January 3, 1997, BellSouth filed in response to the Commission's procedure in Docket No. 6863-U. In addition, BST submitted a preliminary Statement of General Terms and Conditions for this Commission's review pursuant to Section 252(f). BellSouth filed its final version of the Statement of General Terms and Conditions ("Statement" or "SGAT") pursuant to Section 252(f) of the Act on January 22, 1997. The Statement had been modified to conform with subsequent Commission decisions and revised certain rates contained in the preliminary statement.

Due to the substantive differences and independent timetables for the Statement compared with the original proceeding relating to the expected FCC Section 271 application, the Commission

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[2] Therefore, this review is also independent of whether BellSouth seeks Section 271 relief under "Track A" or "Track B" under Section 271(c)(1).

[3] 47 U.S.C. § 271(d)(2)(B).

divided the proceedings, assigning the new Docket No. 7253-U to this review of the Statement but allowing the two dockets to be heard concurrently.[4]

Notices of Intervention were filed by Access Network Services, Inc. ("ANSI"), AirTouch Cellular of Georgia ("AirTouch"), American Communications Services of Columbus, Inc. ("ACSI"), ATA Communications, LLC ("ATA"), AT&T Communications of the Southern States, Inc. ("AT&T"), BellSouth Long Distance, Inc. ("BSLD"), Cable Television Association of Georgia ("CTAG"), Competitive Telecommunications Association ("CompTel"), Consumers' Utility Counsel ("CUC"), Cox Enterprises ("Cox"), Georgia Public Communications Association, Inc. ("GPCA"), Intermedia Communications, Inc. ("ICI"), LCI International Telecom Corp. ("LCI"), MCI Telecommunications Corporation ("MCI"), MFS Intelenet of Georgia, Inc. ("MFS"), MultiTechnology Services, L.P. ("MTS"), and Sprint Communications Company, L.P. ("Sprint").

The Commission opened the hearings on January 28-31, 1997, taking the testimony of witnesses for BellSouth and BSLD (the latter pertaining to Docket No. 6863-U). On March 3-7 and 10, 1997, the Commission reconvened the hearings and took testimony from the intervening parties, including ANSI, ACSI, AT&T, ICI, MCI, MFS, and Sprint, and rebuttal testimony from BellSouth and BSLD (the latter again pertaining to Docket No. 6863-U).

Under the Act, BST may file a statement of the terms and conditions that are generally available in order to comply with the duties and obligations set forth in Section 251 of the Act. [5] This Commission may not approve the statement unless it complies with Section 251 and the pricing standards for interconnection, network elements, transport and termination of traffic, and wholesale prices set forth in Section 252(d).[6]

The Act also set a definite time frame for the State Commission analysis. Unless the BellSouth agrees to an extension, the Commission must complete review of the statement within 60 days after the date of submission.[7] The statutory deadline for this docket is March 23, 1997.

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[4] Docket No. 7253-U was assigned to this proceeding, In re: BellSouth Telecommunications, Inc.'s Statement of Generally Available Terms and Conditions under Section 252(f) of the Telecommunications Act of 1996, on March 5, 1997.

[5] 47 U.S.C. § 251.

[6] 47 U.S.C. § 252 (d).

[7] 47 U.S.C. § 252(f) (3).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Overview

Based on a thorough review of the entire body of evidence presented in the record and consideration of general regulatory policy issues, the Commission finds as a matter of fact and concludes as a matter of law that the Statement should not be approved for the reasons discussed in the following sections of this Order. This docket will be kept open for review of any revised Statement to address those aspects currently premature or deficient, as discussed in this Order.

BellSouth asked the Commission to approve the Statement, and asserted that the Statement would be useful to potential new entrants into the local exchange market who do not have the desire or resources to negotiate interconnection agreements, thereby eliminating this potential hurdle for new entrants. In addition, BST requested that the Commission certify that the access and interconnection generally offered within the Statement meets the requirements of the competitive checklist contained in Section 271(c)(2)(B). However, the Commission agrees with the Consumers' Utility Counsel ("CUC") that the Commission need not make any findings in this docket with respect to Section 271, including whether the SGAT would satisfy the competitive checklist of Section 271(c)(2)(B).

Most of the intervenors asked the Commission to reject the Statement. All of the intervenors asked, either as an alternative to requesting rejection or as their primary request, for the Commission not to approve the Statement but only permit it to take effect, so that the Commission can continue its review under Section 252(f) and modify or reject the Statement at a later date. AT&T and other intervenors countered BellSouth's asserted need for the SGAT by stating that potential new entrants, and the existing CLECs in Georgia, really need BellSouth's actual performance under existing agreements and the requirements of Sections 251 and 252(d). BellSouth did not identify any carrier which had requested that BellSouth file the Statement,[8] and no company lacking an agreement intervened to support BellSouth's proposed Statement.

Several intervenors including MFS and Sprint stated that their time for review of the SGAT was so limited that they were able only to address key issues. However, they added that the SGAT provisions on these key issues are so clearly inconsistent with the requirements of the Act that without more, they demonstrate that the Statement must be rejected.

The Commission finds that the Statement does not conform to pertinent provisions of the Act. The Act requires that a State Commission may not approve a statement unless such statement complies with subsection (d) of Section 252, and Section 251 and the regulations thereunder promulgated by the FCC. This signifies that the Commission's evaluation of the Statement must use a different approach from that used in conducting the arbitrations and approving the interconnection

[8] Tr. 2981 (BST witness Varner).

agreements (whether negotiated or arbitrated). Review of an arbitrated agreement merely calls for determining whether its provisions are inconsistent with Sections 251 and 252(d), not whether the agreement addresses every issue which is covered by those sections. In addition, an arbitrated agreement is to be approved if its provisions are not inconsistent with those sections. To approve the Statement, however, the Commission must affirmatively determine that each and every standard and requirement of Sections 251 and 252(d) is actually addressed and that the SGAT's provisions can actually be implemented in a realistic way.[9] This also does not mean that BellSouth must depend upon CLECs actually ordering each item that is "generally offered," in order to prove that each item is functionally available. Instead, if there are items that CLECs have not yet ordered, BellSouth should be able to demonstrate availability through testing procedures.

In other words, the Statement must be comprehensive in order to comply with Sections 251 and 252(d). The Commission's arbitration rulings were directed only to sets of issues as framed by individual parties in four cases (MFS, Docket No. 6759-U; AT&T, Docket No. 6801-U; MCI, Docket No. 6865-U; and Sprint, Docket No. 6958-U). Those issues did not encompass the totality of issues under Sections 251 and 252(d), and in ruling upon what was presented, the Commission did so as an arbitration panel responding within the framework and proposals presented by individual companies. The arbitration decisions also served the limited purpose of determining what the bilateral contracts between disputing parties should provide. Approval of a Statement under Section 252(f) involves much more; it essentially certifies that BellSouth's Statement represents a comprehensive offering that is available to CLECs in compliance with Sections 251 and 252(d).

Moreover, the Statement is not necessary to facilitate the entry of competitive local exchange carriers ("CLECs") into Georgia's local exchange markets. For example, new entrants could rapidly access the provisions of the large number of negotiated and arbitrated interconnection agreements between BellSouth and both large and small CLECs.[10] BellSouth remains free, of course, voluntarily to use its Statement as a representation of its standard offer to CLECs; but it would be premature for this Commission to allow the Statement to have the status of becoming effective under Section 252(f), for the reasons discussed in this Order.

Several CLECs presented evidence that they are proceeding to take steps to implement their interconnection agreements. The Statement also reflects rulings by the Commission in arbitration proceedings, notably those involving AT&T (Docket No. 6801-U) and MCI (Docket No. 6865-U). Portions of the Statement duplicate issues pending before the Commission in its proceeding to establish cost-based rates for interconnection and unbundled network elements (Docket No. 7061-U); as to these matters, the Statement is premature. In addition, the record shows that BellSouth has not

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[9] *Compare* Section 252(e)(2) (the commission "may only reject" an agreement upon certain findings), *with* Section 252(f)(2) (the commission "may not approve" the Statement unless it complies with the pertinent standards and requirements).

[10] *See, e.g.*, Statement at 1.

yet demonstrated that it is able to fulfill important aspects of the Statement's provisions on a nondiscriminatory basis that places CLECs at parity with BellSouth; as to these aspects, it again would be premature to allow the Statement to take effect. The Statement should not be approved so long as BellSouth has not demonstrated that it is able to actually provision the services of interconnection, access to unbundled elements, and other items listed in the Statement and required under Sections 251 and 252(d).[11]

As to the contention that the SGAT helps new entrants, what new entrants, smaller carriers, and all CLECs need is much less a standard offer that takes effect as a Statement under Section 252(f), and much more the actual ability of BellSouth to perform under its existing agreements or a Statement. This does not mean that a Statement is judged by the amount of CLEC activity, but by the ability of BellSouth to actually provide the items offered by the Statement, in compliance with the Act. Until BellSouth is actually able to provide interconnection, cost-based rates not subject to true-up, access to unbundled network elements, electronic interfaces for operational support systems, and the other items required under Sections 251 and 252(d), approval of the Statement would offer no benefit to other carriers. Instead, approval of the Statement under these conditions would be misleading by stating that BellSouth "generally offers" items that are not actually available.

BellSouth recognized that the overall purpose of the Act is to open telecommunications markets to competition. This purpose is served in pertinent part, BellSouth stated, by ensuring that potential entrants to the local exchange market have available to them the set of functions and capabilities to begin providing service, identified in Section 251 of the Act. (BellSouth Brief at 4.) The primary question in this case, however, is whether BellSouth has done its part in making such functions and capabilities available, to date.

BellSouth also argued that the Statement represents the Commission's rulings in arbitration dockets, and therefore meets the requirements of Sections 251 and 252(d). (BellSouth Brief at 5.) This argument overlooks significant differences between an arbitration, and the SGAT. To begin with, the arbitrations were conducted for the specific purpose of resolving disputes between parties over the meaning of provisions within Sections 251 and 252(d), and how they should be applied. The arbitrations did not address, for the most part, whether BellSouth was actually making available unbundled elements (for example) but instead whether certain items such as sub-loop unbundling,

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[11] Some intervenors advanced other objections to the Statement, based on opposition to portions of the Statement that reflect the Commission's decisions in arbitration cases. These include the Commission's ruling that the rebundling or recombination of unbundled network elements, without adding any CLEC facilities, functionalities or capabilities (other than operator services), should be priced and treated as resale under Section 251(c)(4) rather than unbundled elements under Section 251(c)(3); and Commission rulings involving the application of BellSouth tariff restrictions to resale, and resale of contract service arrangements ("CSAs"). These arguments would essentially ask the Commission to reconsider these previous rulings. In light of the Commission's disposition of the Statement on other grounds, the Commission does not engage in such a reconsideration.

network interface devices, mid-span meets, and dark fiber should be required, and what procedures should apply (for example, for accessing rights-of-way). Thus the arbitration rulings resolved disputes about terms and conditions. However, the arbitrations were for the most part not designed to inquire into whether BellSouth had actually made such items available.

For certain items, the arbitrations did inquire into whether BellSouth had made access actually available. The primary example of this is electronic interfaces as a part of operational support systems ("OSS"). There, it was quite clear that electronic interfaces had not yet been developed, and all the Commission could do was affirm its previous rulings in Docket No. 6352-U that BellSouth and the parties continue the development of such interfaces.

There are some aspects of the SGAT that were not addressed in the arbitrations. The major one, of course, is the pricing for unbundled network elements. The arbitrations did not establish rates for such elements pursuant to Section 252(d). The Commission was unable to determine in the arbitrations what rates would comply with Section 252(d), and therefore established Docket No. 7061-U and made the interim arbitrated rates subject to true-up using whatever rates are established in Docket No. 7061-U. A smaller aspect of the SGAT not addressed in the arbitrations, although not without significance for some CLECs, is the price for dark fiber when provisioned as an unbundled network element; the Commission did not adopt any interim rate for dark fiber in the arbitrations.

In offering a Statement of Generally Available Terms and Conditions, BellSouth is asking the Commission to do something else not addressed in the arbitrations: to approve a "statement of the terms and conditions that such company generally offers" to comply with the requirements of Section 251 and the regulations thereunder, and the standards under Section 252(d). "Generally offering" terms and conditions is meaningless if the offer is on paper only, without the capability to provide the actual service. This was not an issue in the arbitrations, but is an issue under Section 252(f).

The following points represent a summary of the major findings and conclusions in this Order:

- The Statement is not necessary to facilitate the entry of competitive local exchange carriers ("CLECs") into Georgia's local exchange markets.

- The Statement's pricing for interconnection, unbundled network elements, interim number portability, and reciprocal compensation represents interim rates subject to true-up. The cost-based prices for most or all of these items will be established by the Commission in Docket No. 7061-U. Such interim rates subject to true-up are not cost-based under Section 252(d), and as a matter of policy, if not law, should not be sanctioned in a Statement which results in retroactive ratemaking.

- The Statement's rates for dark fiber and for access to poles, ducts, conduits, and rights-of-way are also interim rates subject to true-up, and were not taken from the arbitration rulings so there is even less basis to find that such rates meet the cost-based requirements of the Act. Further, one of the unbundled items is directly contrary to a ruling by the Commission in the

AT&T arbitration, Docket No. 6801-U: the recurring (monthly) charge for end office switching of $0.0016 should include all features and functions of the switch, rather than impose additional prices for features and functions as the SGAT proposes.

- For unbundled access to network elements and for resale, BellSouth has not yet demonstrated that it is able to provide access to operational support systems ("OSS") on a nondiscriminatory basis that places CLECs at parity with BellSouth.

- The record shows that BellSouth is not yet able to fulfill important aspects of the Statement's provisions for interconnection and unbundled access to network elements on a nondiscriminatory basis that places CLECs at parity with BellSouth. The Commission is concerned that approval of the Statement under current conditions would be misleading, by stating that BellSouth "generally offers" items that are not actually available.

- The Statement does not meet the interconnection requirements of Section 251(c)(2), because BellSouth is not yet providing interconnection including full physical collocation to carriers on a basis (including standards and intervals) that is at least equal in quality to that provided to itself or to a subsidiary.

- BellSouth proposed that intervals and many other aspects of collocation be governed by its Negotiations Handbook. However, that handbook is not part of the SGAT, and it is subject to unilateral change. (Some other aspects of interconnection are to be governed by BellSouth manuals, which again are subject to unilateral change by BellSouth.) In addition, BellSouth is still developing its processes for physical collocation, so the Statement is incomplete as to those processes.

- BellSouth is not yet able to provide certain unbundled loops as requested by new CLECs and the underlying operations support and billing systems on a fully tested and nondiscriminatory basis that provides parity to CLECs.

- The Statement provides little information on how CLECs can actually order switching elements, on the time frames for ordering, or on billing and auditing. The SGAT refers to a document entitled "OLEC-to-BellSouth Ordering Guidelines (Facilities-based)" for information regarding ordering and delivery of unbundled switching. The latter document is not a part of the SGAT.

These points are discussed in further detail in the following sections of this Order.

B. Interconnection Requirements of Section 251(c)

Section 251(c)(2) of the Act provides that the duties of an incumbent LEC such as BellSouth include:

(2) INTERCONNECTION. -- The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

A closely related topic is collocation, as to which the Act at Section 251(c)(6) provides that BellSouth's duties include:

(6) COLLOCATION. -- The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

Georgia's Telecommunications and Competition Development Act of 1995 also contains provisions relating to interconnection. O.C.G.A. § 46-5-164(a) provides that all LECs shall permit reasonable interconnection with other certificated LECs, including all or portions of such services as needed to provide local exchange services.

1. Positions of the Parties

BellSouth argued that its Statement complies with the requirements of Section 251, including the Commission's arbitration decisions which applied Section 251 standards for interconnection. According to BellSouth, Section I of the Statement provides for complete and efficient interconnection of requesting telecommunications carriers' facilities and equipment with BellSouth's network. This involves the following components: (1) trunk termination points generally at BellSouth tandems or end offices for the reciprocal exchange of local traffic; (2) trunk directionality allowing the routing of traffic over a single one-way trunk group or a two-way trunk group depending upon the type of traffic; (3) trunk termination through virtual collocation, physical collocation, and interconnection via purchase of facilities from either company by the other company; (4) intermediary

local tandem switching and transport services for interconnection of CLECs to each other; and (5) interconnection billing.[12]

AT&T, MCI and other intervenors argued that the requirements of Section 251(c)(2) have not been met because, for example, BellSouth has not made physical collocation fully available and numerous technical requirements for physical collocation have not been established. BellSouth placed many of the terms and conditions for collocation in its "Negotiations Handbook," which is not a part of the SGAT and which BellSouth reserves the right to change unilaterally at any time. MCI argued that this is untenable, and further that even if the handbook contains reasonable intervals, no physical collocations have yet been completed so it is unknown whether BellSouth would be successful in meeting such intervals. (MCI Brief at 10.) MCI and Sprint pointed out that BellSouth's processes for implementation of physical collocation are still in a developmental phase.[13]

Many of the intervenors opposed Commission approval of the Statement stating that the evidence demonstrates that it does not comply with Section 251 and 252(d) of the Act. These intervenors added that approval of the Statement would significantly delay the development of local competition. This is because they are concerned that if the Statement is approved and BellSouth subsequently obtains approval from the FCC for in-region interLATA services, BellSouth will no longer have the incentive to do its best in meeting its obligations under Sections 251 and 252(d). The intervenors who advanced this argument included ACSI, ICI, MFS, and MCI.

ICI, MCI, MFS, and others asserted that approving or allowing the SGAT to go into effect is not necessary for new CLECs seeking to enter Georgia's local exchange market, because numerous other negotiated and arbitrated agreements exist from which new entrants can select provisions. Under their view, BellSouth can still offer and new entrants can still accept the rates, terms and conditions contained in BellSouth's Statement simply by voluntarily signing a contract with BellSouth. This would render the Statement essentially a "standardized contract" (ICI Brief at 6) offered by BellSouth, without the added status of "taking effect" under Section 252(f).

AT&T contended that there is insufficient evidence for the Commission to determine that the interconnection offered under the SGAT is at least at parity with the access BellSouth provides itself, as required under Section 251(c)(2). AT&T pointed to the fact that BellSouth has not filed its internal measures of quality, as it was requested to do on the last day of the hearings (March 10, 1997). If and when BST complies with that request, AT&T added, there is no way to determine whether the measures are complete or whether interconnection that is not yet available for use under the Statement will be provided at the same level of quality BellSouth provides itself. The SGAT does not contain quality standards, interval commitments, measures of quality, or incentives associated

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[12] BellSouth Brief at 6, citing Tr. 283-90 (BST witness Scheye).

[13] Tr. 2082-83 (AT&T witness Tamplin); Tr. 2427; MCI witness Agatston prefiled direct testimony at 13.

with such items. AT&T also argued that the Commission could not make a finding that the interconnection offered under the SGAT is nondiscriminatory, because BellSouth has yet to file the interconnection agreements it entered into with other incumbent local exchange carriers prior to the Act, and will not do so until June or July, 1997.[14]

With respect to collocation under Section 251(c)(6), AT&T objected that the Statement omits a price for an element which would allow collocated carriers to connect one cage to another. AT&T also objected that the rates for physical collocation are interim rates subject to true-up, and are not cost-based.[15] AT&T and MCI both pointed out that the Statement does not establish any time intervals for physical collocation; such intervals must be negotiated with BellSouth. For instance, physical collocation may take two to four months or longer to provide in some circumstances, but AT&T argued that there is no evidence that BellSouth experiences similar delays and thus that BellSouth has not shown that it can actually provide collocation on a nondiscriminatory basis.[16] AT&T and MCI concluded that for these and the other arguments they advanced, the Commission should reject BellSouth's Statement.

2. Commission Decision

The Commission finds and concludes that although BST has entered into numerous interconnection agreements with competing LECs, participated in arbitration proceedings with several carriers, developed ordering procedures for implementing other aspects of the agreements, BellSouth is not yet providing interconnection to carriers that is at least equal in quality to that provided to itself or to a subsidiary. While partial physical collocation has taken place, full physical collocation has not yet occurred and the record shows that BellSouth is still developing its procedures and may not be yet be able to make physical collocation available on a basis equal to the installation of BellSouth's own facilities. In reaching this conclusion, the Commission does not draw upon the problems cited by intervenors that have been experienced in other states. The Commission believes it is appropriate to confine its review only to what is demonstrated in Georgia.

BellSouth proposed that the intervals and many other aspects of collocation be governed by its Negotiations Handbook. However, that handbook is not part of the SGAT, and it is subject to unilateral change.[17] Given that BellSouth is still developing its processes for physical collocation,

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[14] Tr. 423 (BST witness Scheye). The Commission's September 27, 1996 Order in Docket No. 6703-U does not require such pre-Act agreements to be filed until such time.

[15] AT&T Brief at 24-25, citing Tr. 727, 730 (BST witness Scheye).

[16] AT&T Brief at 24-25, citing Tr. 731 (BST witness Scheye).

[17] Tr. 795 (BST witness Scheye).

BellSouth has not demonstrated that physical collocation is currently actually available as promised by the SGAT and required under Section 251(c)(2).

The record shows that some network elements are not yet available for interconnection, and that BellSouth's provisioning of interconnection under existing agreements has involved significant delays and problems.[18] As early as July, 1996, ICI requested connection to certain BellSouth subloops, and BellSouth had not fulfilled the request as of the time of the hearings in this docket.[19]

To show compliance with the interconnection requirements of Section 251(c)(2), the Statement must be more than a written outline of what BellSouth intends to offer. In order to generally offer interconnection, BellSouth must be able to make it actually available, both technically and operationally.

The reciprocal exchange aspect and other pricing aspects of interconnection are discussed separately in the following section of this Order. As for interconnection billing, there was testimony indicating that BellSouth may not have fully verified its billing systems for use in interconnection and other aspects of billing with CLECs, so it would be appropriate for BellSouth to provide some documentation of its billing system testing in connection with any revised Statement.

C. Pricing Standards of Sections 251 and 252(d)

Pricing standards are contained within Sections 252 and 252(d) of the Act. Perhaps the primary price-related sections are contained within Section 252(d) with respect to interconnection, unbundled elements, and resale. To begin with, Section 252(d)(1) provides:

> (1) INTERCONNECTION AND NETWORK ELEMENT CHARGES. — Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section --
>
> (A) shall be --
>
> (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and
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> (ii) nondiscriminatory, and
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> (B) may include a reasonable profit.

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[18] Tr. 745 (BST witness Scheye); Tr. 1773-74 (MFS witness Meade); Tr. 2270-89 (ICI witness Strow); see also prefiled direct testimony and cross-examination of ACSI witness Robertson.

[19] Tr. 2887 (ICI witness Strow).

Georgia's Telecommunications and Competition Development Act of 1995 at O.C.G.A. § 46-5-164(b) provides that the rates, terms, and conditions for interconnection services (which includes unbundled elements) shall not unreasonably discriminate between providers.

Section 251(b)(5) establishes that BellSouth's duties include the following with respect to reciprocal compensation:

> (5) RECIPROCAL COMPENSATION. — The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

The pricing standard for such reciprocal compensation is set forth in Section 252(d)(2), as follows:

> (2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC.-
> (A) IN GENERAL- For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--
> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
> (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

The pricing standard for resale of local exchange services is provided in Section 252(d)(3), as follows:

> (3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES- For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

1. Positions of the Parties

BellSouth argued that its Statement complies with the requirements of Section 252(d), in that the interim rates subject to true-up for unbundled elements are those applied by the Commission in arbitration dockets, and the true-up will be according to permanent cost-based rates to be established by the Commission in the cost proceeding, Docket No. 7061-U. BellSouth's Statement offers its tariffed retail telecommunications services for resale to other telecommunications carriers, and outlines specific limitations on resale generally (e.g., prohibition against cross-class selling) and on the resale of specific services (e.g., short-term promotions, grandfathered services, contract service arrangements, etc.). In the Statement, BellSouth offers a wholesale discount of 20.3 percent for residential customers, and 17.3 percent for business services. BellSouth stated that these discounts

as well as the resale limitations are consistent with the Commission's previous orders.[20] The interim wholesale pricing for resale of services was affirmed in the arbitration rulings, and established by the Commission in Docket No. 6352-U.

BellSouth stated that its reciprocal compensation arrangements are in compliance with Section 252(d)(2), and that the rates for reciprocal transport and termination of local calls are consistent with the requirements of the Act and the Commission's previous Orders.[21]

A primary objection by intervenors was that the interim rates for unbundled elements cannot by definition be cost-based, because the Commission has not yet undertaken its review in the cost study proceeding in Docket No. 7061-U. They pointed out that these rates are not only interim, but are also subject to true-up according to rates that are established in the cost proceeding (Docket No. 7061-U), which both adds to the uncertainty and business risk facing the CLECs, and also proves that the interim rates are not cost-based in compliance with Section 252(d).[22] The intervenors who put forward this argument included AT&T, ICI, MCI, MFS, and Sprint.

MCI argued that Section 252(d)(1) is clearly stated in terms that indicate the present, and are not anticipatory in any way - that the Act simply does not contemplate that its requirements can be met on the basis of future compliance, however near. (MCI Brief at 13.) MCI also objected to the rates, terms and conditions associated with reciprocal compensation for transport and termination, arguing that they must be set in a way that does not reward incumbent carriers for network inefficiencies that they may experience relative to new entrants or punish new entrants for network efficiencies that they may experience relative to the incumbent. MCI argued that the SGAT's reciprocal compensation process is not equitable because it permits BellSouth to bill CLECs for tandem switches used to terminate calls from CLEC customers, but does not permit CLECs to bill BellSouth for the use of CLECs' switches performing the same functionality and covering the same geographic scope as BellSouth's tandems.[23]

In addition, AT&T and ICI pointed out that the Statement's rates for dark fiber were not based upon the Commission's rulings in the arbitration dockets; this is because the parties in those dockets did not propose, and the Commission did not establish rates for dark fiber in those

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[20] BellSouth Brief at 11-12, citing Tr. 351-56 (BST witness Scheye).

[21] BellSouth Brief at 11, citing Tr. 350-51 (BST witness Scheye).

[22] MCI witness Wood, prefiled direct testimony at 14; AT&T witness Winegard, prefiled direct testimony at 20; AT&T witness Gillan, prefiled direct testimony ("[m]ost of the pricing provisions set forth in Attachment A [to the SGAT] have not yet been found by the Commission to satisfy Section 252(d), and therefore, cannot meet the checklist.").

[23] MCI Brief at 29-30, citing Tr. 2641-42, 2777-78, MCI witness Wood's prefiled direct testimony.

proceedings. AT&T objected that prices set at tariffed rates cannot be accepted as cost-based rates pursuant to Section 252(d). ICI contended that BellSouth has thus not attempted to make a showing that these rates meet the pricing standard under Section 252(d)(1) of the Act.

AT&T also objected to the monthly charge of $0.0016 for end office switching, which the SGAT states does not include retail services.[24] This qualification was not adopted by the Commission in the AT&T arbitration,[25] and AT&T also argued that it is contrary to FCC Rules which require that end office switching must include all features and functionality of the switch, including those needed to provide retail vertical service.

The Consumers' Utility Counsel argued that this docket is not the proper forum to revisit the Commission's arbitration rulings on the topics of geographic deaveraging, "rebundling" or "network platform" pricing issues, or whether contract service arrangements ("CSAs") should be sold at a discounted price to CLECs for resale. The CUC added that the Commission should not await access reform by the FCC or the reductions in intrastate access charges mandated by O.C.G.A. § 46-5-166(f) before reaching its decision regarding the Statement. (CUC Brief at 5.)

2. Commission Decision

With respect to the pricing of interconnection, unbundled network elements, reciprocal compensation, and access to poles, ducts, conduits, and rights-of-way, the Commission notes that it has initiated a docket for the purpose of establishing cost-based rates that will no longer be subject to true-up. That docket may also be used for establishing cost-based rates for interim number portability. The Commission has granted BellSouth's requests for an extension of time to file its proposed cost studies and rates in that docket.[26] It is unreasonable to expect that this Commission can approve the Statement and pricing arrangements as cost-based, as required by the Act, when the determinations as to a reasonable cost basis have yet to be made.[27] Accordingly, until the Commission has established the cost-based rates for interconnection including collocation, for unbundled elements, for reciprocal compensation, and for access to poles, ducts, conduits, and rights-of-way, pursuant to Sections 251 and 252(d), which can be used for BellSouth's SGAT, the Commission must reject the SGAT.

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[24] Tr. 826 (BST witness Scheye).

[25] Tr. 827 (BST witness Scheye).

[26] At the time of this Order, BellSouth had been granted its request for an additional 30-day extension of time in order to file its proposed cost studies and rates by April 30, 1997.

[27] The Commission also notes that the Eighth Circuit has not yet issued its decision regarding the pricing and other provisions of the FCC's First Report and Order. That decision could have a significant impact on the actual standards by which to judge a Statement.

The Commission does not make light of the interim rates established in the arbitrations. However, as the Commission expressed in its arbitration rulings, determining cost-based rates is not a light undertaking and neither the parties nor the Commission had the benefit in the arbitrations of a searching evaluation of the cost studies and methodologies underlying the parties' proposed rates. Therefore the Commission moved quickly to establish the cost study proceeding in Docket No. 7061-U, although the Commission has subsequently granted BellSouth's requests for extension of time to compile data and revise cost study models to use an open, non-proprietary format.

The Statement's interim prices for interconnection including collocation, for unbundled elements, and for reciprocal compensation for transport and termination are taken from the Commission's rulings in arbitration dockets involving MFS (Docket No. 6759-U), AT&T (Docket No. 6801-U), and MCI (Docket No. 6865-U). In those rulings, issued by the Commission acting as an arbitration panel under Section 252(e), the Commission refrained from adopting any particular methodology or approving any cost study. For those very reasons, the Commission initiated the cost proceeding in Docket No. 7061-U. Thus, the Commission did not adopt those rates as cost-based rates under Section 252(d), and so the Commission adopted the true-up mechanism linked to cost study proceeding in Docket No. 7061-U.[28]

The true-up mechanism was acceptable for the arbitration rulings because those rulings addressed contractual disputes between two private parties, with the Commission acting as the arbitration panel under Section 252(e). However, a true-up mechanism is not appropriate for a statement of generally available terms and conditions under Section 252(f). Approval in a Statement of generally available rates that are interim and subject to true-up based upon subsequent proceedings appears equivalent to retroactive ratemaking. As a matter of policy, if not law,[29] a Statement that takes effect with the imprimatur of state and federal law should not provide for generally available rates that change retroactively.

The Commission also agrees with ICI that the Statement's rates for dark fiber were not taken from the arbitration rulings, and thus there is even less reason to find that such rates meet the cost-based requirement of Section 252(d)(1). In addition, BellSouth's witness Mr. Scheye agreed that some of the rates for network elements listed in Tab 2 of the Statement do not represent any form

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[28] Thus the status of the interim rates for interconnection including collocation, for unbundled elements, and for transport and termination is different from that of the interim pricing for resale of BellSouth's retail services. While the wholesale discount was established for the interim and is intended to be reviewed in a subsequent proceeding for purposes of a permanent discount, at least the interim discount was intended to be consistent with the pricing standard of Section 252(d)(3). Furthermore, the interim wholesale discount is not subject to a true-up reconciling the interim with any permanent discount.

[29] *See* O.C.G.A. § 46-2-25(d); *see also* Commission Rule 515-2-1-.03.

of total element long-run incremental cost ("TELRIC") pricing;[30] thus it has not been established that such items have been priced in compliance with Section 252(d). Further, one of the unbundled items is directly contrary to a ruling by the Commission in the AT&T arbitration, Docket No. 6801-U: the recurring (monthly) charge for end office switching of $0.0016 should include all features and functions of the switch, rather than impose additional prices for features and functions as the SGAT proposes.[31]

D. Other Requirements of Sections 251(b) and (c)

Section 251 contains various requirements in addition to the interconnection requirements (discussed previously) under Section 251(c)(2). One of these is the requirement under Section 251(c)(3) that incumbent LECs provide unbundled access to network elements. Specifically, Section 251(c)(3) provides that the duties of incumbent LECs include:

> (3) UNBUNDLED ACCESS. -- The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

Georgia's Telecommunications and Competition Development Act of 1995 also contains provisions relating to unbundled network elements. O.C.G.A. § 46-5-164(d) provides:

> (d) Such interconnection services shall be provided for intrastate services on an unbundled basis similar to that required by the FCC for services under the FCC's jurisdiction.

All LECs have a duty to provide nondiscriminatory access to poles, ducts, conduits and rights of way, pursuant to Section 251(b)(4), as follows:

> (4) ACCESS TO RIGHTS-OF-WAY. – The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of

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[30] Tr. 720.

[31] This was discussed in the Commission's February 26, 1997 Order Denying Motion for Rehearing in the AT&T arbitration, Docket No. 6801-U.

telecommunications services on rates, terms, and conditions that are consistent with section 224.

Local exchange companies also have the duty to provide dialing parity under Section 251(b)(3), as follows:

> (3) DIALING PARITY. -- The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

Section 251(b)(2) describes BellSouth's duty with respect to number portability as:

> (2) NUMBER PORTABILITY. -- The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

Each LEC has the following duty with respect to resale of its services, under Section 251(b)(1):

> (1) RESALE. -- The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

In addition, incumbent LECs such as BellSouth have additional duties with respect to resale, pursuant to Section 251(c)(4), as follows:

> (4) RESALE. -- The duty --
>
> (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
>
> (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

Similarly, BellSouth as a company that has elected alternative regulation under Georgia's Telecommunications and Competition Development Act of 1995 has the obligation to allow resale of its services, under O.C.G.A. § 46-5-169(7).

1. Positions of the Parties

BellSouth argued that its Statement complies with the requirements of Section 251, including the Commission's arbitration decisions which applied Section 251 standards. According to BellSouth, its Statement provides nondiscriminatory access to network elements on an unbundled basis at any technically feasible point under just and reasonable rates, terms, and conditions, including: collocation, operations support systems ("OSS"), the provision of dark fiber, and other unbundled elements. The Statement also contains a Bona Fide Request process to facilitate requests by any new entrant for interconnection or unbundled capabilities not included in the Statement.[32]

As to operational support systems (OSS), BellSouth stated that it has already spent a considerable amount of time and resources developing interfaces and related systems, in compliance with the Commission's previous orders in Docket No. 6352-U and the arbitration decisions. BellSouth also contended that the "web" interface projected to be available on March 31, 1997 will provide sufficient functionality for CLECs to access the services they need.

BellSouth stated that Section III of the Statement offers access to poles, ducts, conduits, and rights-of-way via a standard license agreement, consistent with the Commission's previous orders.[33]

For local loops, BellSouth stated that Section IV offers several loop types: 2-wire, 4-wire voice grade analog, 2-wire ISDN, 2-wire and 4-wire Asymmetrical Digital Subscriber Line ("ADSL"), 4-wire High-bit-rate Digital Subscriber Line, and 4-wire DS1 digital grade. Other loop types not identified in the Statement may be obtained pursuant to the Bona Fide Request Process. In addition, the Statement provides for loop distribution, loop cross connects, loop concentration, and access to Network Interface Devices ("NIDs"). BellSouth asserted that its provisioning of unbundled loops and additional local loop transmission components, as well as the rates for these items, are consistent with the Commission's previous orders.[34]

Local transport from the trunk side of a wireline local exchange carrier switch, unbundled from switching or other services, is covered by Section V of the Statement. BellSouth stated that this offers unbundled local transport with optional channelization from the trunk side of its switch, and that it offers both dedicated and common transport including DS0 channels, DS1 channels in conjunction with central office multiplexing or concentration, and DS1 or DS3 transport. Again,

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[32] BellSouth Brief at 6-7, citing Tr. 290-302 (BST witness Scheye).

[33] BellSouth Brief at 7, citing Tr. 302-04 (BST witness Scheye).

[34] BellSouth Brief at 7, citing Tr. 304-10 (BST witness Scheye).

BellSouth stated that these items and their rates are consistent with the Commission's previous orders.[35]

Section VI of the Statement relates to unbundled local switching. BellSouth stated that it offers a variety of switching ports and associated usage unbundled from transport, local loop transmission and other services. These include a 2-wire and 4-wire analog port, 2-wire ISDN digital and 4-wire ISDN DS1 port, and 2-wire analog hunting. Additional port types are available under the Bona Fide Request process. Until a long-term solution is developed, BellSouth stated that it provides selecting routing on an interim basis to a CLEC's desired platform using line class codes (subject to availability).[36]

BellSouth asserted that the Statement offers nondiscriminatory access to 911 and E911 services, directory assistance, and operator call completion services, to both facilities-based providers and resellers. In Section VII of the Statement, BellSouth offers to perform directory assistance and other number services on behalf of facilities-based CLECs, which allow end user customers in exchanges served by BellSouth to access BellSouth's directory assistance service by dialing 411 or the appropriate area code and 555-1212. BellSouth asserted that it offers CLECs access to its Directory Assistance database under the same terms and conditions currently offered to other telecommunications providers. BellSouth makes available its operator services in the same manner that it provides operator services to its own customers. In addition, BellSouth stated that it offers Centralized Message Distribution System ("CMDS") - Hosting and Non-Sent Paid Report System processing. BellSouth asserted that its provision of 911, directory assistance, and operator call completion services, as well as the rates for these services, are consistent with the Commission's previous orders.[37]

According to BellSouth, its Statement provides nondiscriminatory access to databases and associated signaling necessary for call routing and completion, including Signaling Links, Signal Transfer Points, and Service Control Points ("SCPs") (databases). The SCPs/Databases to which CLECs have access include, but are not limited to, Line Information Database ("LIDB"), Toll Free Number Database, Automatic Location Identification and Data Management System, Advanced Intelligent Network, and Selecting Routing. BellSouth stated that its signaling/database offering for call routing and completion is consistent with the Commission's previous orders.[38]

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[35] BellSouth Brief at 8, citing Tr. 310-13 (BST witness Scheye).

[36] BellSouth Brief at 8, citing Tr. 313-18 (BST witness Scheye).

[37] BellSouth Brief at 9, citing Tr. 318-31 (BST witness Scheye).

[38] BellSouth Brief at 10, citing Tr. 335-43 (BST witness Scheye).

BellSouth added that it arranges with its directory publisher to make available White Pages directory listings to CLECs and their subscribers which include the subscriber's name, address, and telephone number. BellSouth asserted that CLEC subscribers receive no less favorable rates, terms, and conditions for directory listings than are provided to BellSouth's subscribers (e.g., the same information is included, the same type size is used, and the same geographic coverage is offered).[39] In addition, BellSouth asserted that it is providing nondiscriminatory access to telephone numbers. BellSouth serves as the North American Numbering Plan ("NANP") Administrator for its territory, and stated that it has established procedures to provide nondiscriminatory NXX code assignments to CLECs.[40]

BellSouth's Statement describes the interim number portability arrangements that are available, which include Remote Call Forwarding ("RCF") and Direct Inward Dialing ("DID"). BellSouth asserted that these arrangements comply with the FCC's regulations issued on July 2, 1996, in the First Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 95-116. BellSouth asserted that these arrangements, and the rates for RCF and DID, are consistent with this Commission's previous orders, and added that in conjunction with other industry participants BellSouth is pursuing an aggressive schedule to implement a long-term number portability solution as required by FCC orders.[41]

BellSouth stated that the local dialing parity requirement of Section 251(b)(3) is met because local service subscribers in BellSouth's region dial the same number of digits to place a local call, without the use of an access code, regardless of their choice of local service provider.[42]

A primary objection by intervenors was that nondiscriminatory operations support systems (OSS) have not yet been developed, tested, and implemented, and thus that CLECs do not have access to unbundled elements on the same basis that BellSouth has access to the same elements.[43] AT&T, MCI and others argued that before the Commission can approve any Statement, BellSouth must demonstrate that all the interfaces offered in the Statement for access to OSS for pre-ordering, ordering, provisioning, maintenance and repair, and billing are operationally ready for the purpose of providing service through resale and unbundled network elements. AT&T pointed out that BellSouth admitted that the interfaces to its OSS as described in Section 2 of the Statement are not

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[39] BellSouth Brief at 9-10, citing Tr. 331-34 (BST witness Scheye).

[40] BellSouth Brief at 10, citing Tr. 334-35 (BST witness Scheye).

[41] BellSouth Brief at 10-11, citing Tr. 343-48 (BST witness Scheye), Tr. 2195-96 (AT&T witness Danforth).

[42] BellSouth Brief at 11,citing Tr. 348-50 (BST witness Scheye).

[43] *See, e.g.*, Tr. 387-89 (BST witness Scheye); Tr. 2047, 2053 (AT&T witness Pfau); Tr. 3043-53, 3062, 2077 (BST witness Calhoun).

yet available for use by CLECs,[44] and AT&T asserted that the interfaces are not operationally ready.[45] AT&T argued that even if the interfaces were operational, there is no evidence before the Commission to indicate that the interfaces would be nondiscriminatory; it is not evident that the testing being done addresses whether the interfaces will provide an experience equivalent to the customer's experience in ordering and receiving BellSouth services. (AT&T Brief at 15-18.) MCI stated that it is undisputed that many of BellSouth's systems are still in development, some planned systems do not conform with industry standards, and none is fully tested and operational. (MCI Brief at 6.)

MCI argued that, to the extent new competitors must rely on the incumbent LEC's networks and OSS capabilities for a realistic opportunity to compete, it will be essential for the incumbent LEC to develop and implement OSS interfaces and downstream processes sufficient to ensure that they can provide unbundled network elements and resale in a timely, reliable, and nondiscriminatory fashion in volumes that realistically reflect market demand. MCI contended that paper promises are not enough to ensure effective real-world application, and that Act compliance calls for parity in at least three respects: the scope of information available, the accuracy of information supplied, and the timeliness of communications. After detailed criticism of the status of development, MCI concluded that BellSouth has not shown it is providing OSS that meets the Act's requirement that it can actually be used. (MCI Brief at 15-19.)

The Consumers' Utility Counsel, while recommending that the Statement be allowed to take effect, identified the operations support systems (OSS) as "one of the most troublesome issues confronting the Commission." (CUC Brief at 6.) OSS is evolving from a manual, carrier-specific process to electronic interfaces that require extensive industry development, communication and coordinated effort as between competing carriers. The CUC noted that there are difficult privacy issues that concern the pre-ordering phase. The CUC concluded that there does not appear to be any "final" or permanent method or methods by which it can be concluded that the OSS offered at a given time suffices for future interactions between BellSouth and CLECs. The relative scarcity of access lines provided presently by CLECs in Georgia, according to the CUC, underscores the testimony of CLEC witnesses that many of the OSS systems have not been implemented or tested under circumstances in which there are large volumes of orders.[46] The CUC recommended that the SGAT be allowed to take effect, and that the Commission keep the docket open under Section 252(f)(4) of the Act in order to address and review such issues that may arise.

ACSI's testimony documented significant problems that ACSI experienced in completing its initial unbundled loop cutovers from BellSouth and in providing quality service over BellSouth

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[44] Tr. 382 (BST witness Scheye).

[45] Tr. 2047 (AT&T witness Pfau).

[46] CUC Brief at 6, citing Tr. 1230 (ACSI witness Robertson).

unbundled loops. Specifically, Mr. Robertson testified to undue delays and serious customer service disruptions experienced by ACSI in the provisioning of unbundled loops and number portability. These are the subject of ACSI's complaints to the FCC and to this Commission in Docket No. 7212-U. ACSI also presented evidence and expressed concern as to whether BellSouth's building management preferred provider, exclusive sales agency, and contract sales arrangements are anticompetitive.[47]

In addition to difficulties experienced with on-net and off-net service for customers of ACSI and MFS (which have their own fiber loops), and the testing for provisioning unbundled loops, ICI has not been able to obtain local transport due to BellSouth delays in providing other elements ICI needed to enter the local exchange market as a facilities-based competitor.[48] Therefore, they argue, the terms and conditions for access to unbundled elements are not just, reasonable, or nondiscriminatory, as required by Section 251(c)(3). They also contended that the OSS interfaces must be proven to work under actual conditions before the Commission can determine whether they comport with the requirements of Section 251. These arguments were advanced by ACSI, AT&T, ICI, MCI, MFS, and Sprint.

MCI objected that the Statement does not make clear that BellSouth offers common (local) transport. According to MCI, BellSouth's first clear offer to provide common transport appeared in its rebuttal testimony, and should be clarified in the Statement.[49]

With respect to resale, MFS recounted problems such as disconnection of the customer during conversion of the customer's service over to MFS, although disconnection should never have occurred in the first place and the reconnection was not prompt.[50] AT&T argued that this example shows resale is not yet "available" under the Statement. (AT&T Brief at 23-24.) MCI also stated that the Statement is deficient because it does not provide for notification to resellers when their customers have migrated to another carrier. Prompt notification is important so that the reseller can adjust its billing system to stop billing its former customers. Further, MCI noted that the SGAT does not make Centrex services available for resale as grandfathered services, even though both the Commission and the FCC have required that such grandfathered services be available for resale.[51]

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[47] ACSI Brief at 4-5, citing its witness Robertson's prefiled direct testimony at 8-10, 16-19.

[48] Tr. 2292 (ICI witness Strow).

[49] MCI Brief at 22, citing Tr. 2438, 2466.

[50] Tr. 1772 (MFS witness Meade).

[51] MCI Brief at 34, citing Docket No. 6865-U Order at p. 47; 47 C.F.R. § 51.615.

In general, these intervenors also argued that BellSouth has not shown actual availability of access to unbundled elements, access to rights-of-way, and the other items required by Section 251. Instead, they argued, BellSouth's SGAT only provides promises to deliver at some future time, available on paper only, and in many cases not even available for testing, let alone actual use. They also argued that BellSouth has not yet received orders for some items, such as local transport and unbundled local switching,[52] so BST cannot verify that such items will be "available" if and when they are ordered.

MCI pointed out that BellSouth promises to provide unbundled loops to MCI and other competitors in a much longer time period than the 48 (or fewer) hours in which BellSouth establishes service to its own customers. MCI contended that such delays will greatly impede competition in local markets.[53]

AT&T and others pointed out that the problems experienced by ICI, MFS, and ACSI discussed during the hearings are likely to multiply as additional requests for unbundled loops are made in the future. Thus, AT&T asked that the Commission not endorse illusory promises relating to key elements of BellSouth's network, through approval of the Statement. (AT&T Brief at 12-13.)

Although the Statement says BellSouth will provide access to its operator services, AT&T objected that BST did not set forth how it would comply if any carrier requested access to operator services, or that such access actually could be provided. AT&T was also concerned that at the hearing, BellSouth could not confirm whether any carrier had requested access to operator services and whether such access had been provided.[54] AT&T and MCI both expressed concern that the Statement does not provide for immediate migration of "as-is" directory listings.[55]

AT&T also objected that BellSouth is not providing nondiscriminatory access to poles, ducts, conduits and rights-of-way in accordance with Section 251(b)(4). The Statement provides that CLECs must wait up to 20 days from submitting an order before BellSouth will confirm that space is available, and another 60 days before the CLEC will obtain a license from BellSouth (or other owner) of the pole or conduit. In contrast, BellSouth has access to the same information and use of the right-of-way, conduit or pole for itself immediately.[56] AT&T also expressed concern that it is

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[52] Tr. 409, 411 (BST witness Scheye); *see also* MCI Brief at 23, citing Tr. 2442, 2443 (MCI witness Agatston).

[53] MCI Brief at 20-21, citing Tr. 2436-37.

[54] AT&T Brief at 19, citing Tr. 412 (BST witness Scheye).

[55] AT&T Brief at 20; MCI Brief at 33; Tr. 2645, 2731 (MCI witness Martinez).

[56] AT&T Brief at 18-19, citing Tr. 403-05 (BST witness Scheye).

premature to evaluate whether the Statement fully complies with Section 251(b)(4) because additional problems with respect to such access may surface once other problems have been resolved which have delayed facilities-based competition.

MCI criticized Attachment D of the SGAT regarding nondiscriminatory access to poles, ducts, conduits and rights-of-way, because it does not discuss the "critical issue" of the compensation to CLECs who have improved BellSouth's structure when another carrier subsequently attaches to the structure. MCI cited the FCC's First Report and Order (at ¶ 1214) which stated that the modifying party should be allowed to recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification. (MCI Brief at 20.)

MCI also criticized the SGAT for not providing parity for such items as access to databases, and for not containing a commitment to supply information needed by CLECs to properly establish, implement and sustain their 911 networks.[57] According to MCI, BellSouth has not promised to provide critical network data, including rate center data and selective routing boundary information; and the SGAT does not establish procedures to reroute calls during times of network overload. Once again, the SGAT refers to an external handbook. (MCI Brief at 24, citing SGAT Art. VII, ¶ A.6, p. 14.) MCI also argued that the FCC has found access to incumbent LEC's Advanced Intelligent Network ("AIN") database and Service Creation Environment ("SCE")/Service Management System ("SMS") is required.

MCI charged that the SGAT is further deficient with respect to directory assistance services, in that it does not guarantee parity of features and performance for CLECs. (MCI Brief at 24, citing SGAT Art. VII, ¶ B.2, p. 14.)

As to number portability pursuant to Section 251(b)(2), AT&T objected that the SGAT makes no commitment for the delivery time on interim number portability, stating only that it will often be provided within 24 hours, and that BellSouth will commit only to discuss and agree on a time frame for each order upon receipt.[58] AT&T asserted that BST certainly can retain a number for a customer and route calls to a new location for its own purposes within a defined and much shorter period of time, and charged that BST proposes disparate treatment. (AT&T Brief at 21.)

MCI pointed out that the rates for interim local number portability were not reviewed or set by the Commission, and are proposed as interim, subject to true-up. MCI thus objected to the Statement's rates for interim local number portability. MCI also objected that the SGAT improperly allows carriers to block number portability when a customer has past due charges. Citing the FCC's Number Portability Order (*see* 47 C.F.R. Pt. 52, subpt. C), MCI argued that a carrier may not prevent a customer from porting its number to another carrier if the customer has unpaid charges. Further,

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[57] MCI Brief at 24, citing Tr. 2636 (MCI witness Martinez).

[58] Tr. 415, 417 (BST witness Scheye).

MCI contended that paragraph G of the SGAT's Attachment G is too vague in providing that number portability can be discontinued based upon BellSouth's determination as to whether another carrier is "impairing or interfering" its system. MCI's concern is that a vague standard could permit anticompetitive practices, and allow BellSouth to turn off number portability almost at will or at least during high traffic periods.[59]

With respect to the "change charge" in paragraph H of the SGAT's Article XIV, page 22, MCI argued that unilateral determinations and assessments by BellSouth without procedures to contest "slamming" allegations is inappropriate and unsuited to the newly competitive environment in local telephone services.[60]

ACSI noted that BellSouth testified that the SGAT does not include performance standards.[61] ACSI and others argued that such standards are necessary to ensure that CLECs are treated on a nondiscriminatory basis and to ensure that local markets are opened for competition as intended by the Act. (ACSI Brief at 6-7.)

2. Commission Decision

BellSouth's Statement represents a substantial effort to comply with the other requirements of Section 251 quoted above. However, these requirements require additional implementation by BellSouth in order to make elements, operations support systems, and billing and other systems actually available. In other words, those sections require more than a written statement with facial compliance. They require actions to be taken by the local exchange company or the incumbent LEC. Therefore, in order for the Commission to determine whether the Statement should be approved as complying with those sections, it is appropriate for the Commission to determine whether it reflects actual BellSouth compliance.

Nondiscriminatory access to operational support systems (OSS) is an integral part of providing access to unbundled network elements, as well as making services available for resale. The record shows that BellSouth has not yet demonstrated that it is able to fulfill these important aspects of the Statement's provisions on a nondiscriminatory basis that places CLECs at parity with BellSouth. In addition, the pre-ordering and ordering interim "web" interfaces, and the interfaces for maintenance and repair, are not projected to be fully operational for roughly two months.[62] BellSouth is still working on an interface for Customer Records Information System ("CRIS") billing and for

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[59] MCI Brief at 28, citing Tr. 2640 (MCI witness Martinez).

[60] MCI Brief at 34, citing Tr. 2647 (MCI witness Martinez).

[61] BST witness Scheye's prefiled rebuttal testimony at 67-68.

[62] Tr. 387-88, 802 (BST witness Scheye).

local usage data, both of which may not be ready for two months.[63] Before BellSouth can offer the interfaces for actual CLEC use, testing must be completed. However, internal testing has not begun for some of the interfaces; and it is not yet known what standards for reliability BellSouth uses for its internal testing,[64] although comparative standards must be evaluated to ensure that the interfaces provide nondiscriminatory access. Consumer resale ordering interfaces have not completed systems readiness testing, or subsequent market readiness testing.[65] Thus it would be premature to allow the Statement to take effect. The Statement should not be approved so long as BellSouth has not demonstrated that it is able to actually provision the services of interconnection and access to unbundled elements, make services available for resale (including OSS interfaces), and other items listed in the Statement and required under Sections 251 and 252(d).

BellSouth continues to be engaged in a substantial effort to develop electronic interfaces. Many of these, including pre-ordering, ordering, directory listing, trouble reporting, and maintenance and repair, are projected to be available in at least a limited form by March 31, 1997; BellSouth also projects that work will continue with further improvements planned by December 31, 1997. As these milestones are met, BellSouth may present the results to the Commission and show whether they meet appropriate requirements.

As to making elements available upon CLEC request, there was evidence that BellSouth has been unable to provide certain unbundled loops as requested by new CLECs, cannot yet provide an unbundled network interface device ("NID"), and has experienced significant problems in testing and providing other elements that the Statement describes as available.[66] The Commission recognizes that not all the problems have been caused by BellSouth, but it remains the case that BellSouth has not yet completed its part to ensure that the items required under Section 251 will be actually available upon request by CLECs. Certain loops that are supposed to be unbundled, such as ADSL and HDSL, likewise are not currently available. ACSI's testimony documented significant problems that ACSI experienced in completing its initial unbundled loop cutovers from BellSouth and in providing quality service over BellSouth unbundled loops. Specifically, Mr. Robertson testified to undue delays and serious customer service disruptions experienced by ACSI in the provisioning of unbundled loops

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[63] Tr. 389-90 (BST witness Scheye).

[64] Tr. 3037, 3056-57, 3077 (BST witness Calhoun). Requests were made at the hearings for BellSouth to provide information on its internal standards. Such information has not been provided as of the date of this decision (March 20, 1997).

[65] Tr. 3043 (BST witness Calhoun).

[66] Tr. 3081 (BST witness Calhoun), Tr. 817 (BST witness Scheye), Tr. 1773-74 (MFS witness Meade), Tr. 2273-2289 (ICI witness Strow). The Commission notes that its rulings in the AT&T and MCI arbitrations (Dockets No. 6801-U and 6865-U) provided that CLEC direct connection to BellSouth's NID is to be considered on a CLEC-by-CLEC basis to verify that the CLEC has the technical ability to maintain proper safety conditions.

and number portability. These are the subject of ACSI's complaints to the FCC and to this Commission in Docket No. 7212-U.[67]

BellSouth can improve the Statement by specifying the standards to which it can commit in providing interconnection and unbundled access to network elements. To demonstrate parity and nondiscriminatory interconnection and unbundled access, BellSouth may submit its internal standards for comparative purposes. BellSouth's internal standards need not be a part of the Statement, but will be relevant in documenting that CLECs are treated on a nondiscriminatory basis.

The Statement provides little information on how CLECs can actually order switching elements, on the time frames for ordering, or on billing and auditing. The SGAT refers to a document entitled "OLEC-to-BellSouth Ordering Guidelines (Facilities-based)" for information regarding ordering and delivery of unbundled switching. The latter document is not a part of the SGAT, but is a BellSouth document which could be revised unilaterally. In addition, the specifics are sketchy, which does not facilitate use by CLECs. The Statement should contain sufficient information to support the conclusion that CLECs have parity with BellSouth as to relevant functions including information for 911 networks, directory assistance services, operator call completion services, and access to databases including the call completion, call-routing and line information databases. The Statement should also clarify that customers can migrate their directory listings "as-is" when they change to a new local service provider. In addition, BellSouth has not yet provided an electronic interface for directory listings; the Commission required BST to set this up by April 1, 1997. The Statement should also provide for prompt notification to reseller CLECs if and when their customers switch to another provider, so the reseller can stop billing to former customers.

This is not to say that BellSouth will be unable to work through the development and testing necessary to verify that elements can actually be provisioned and billing systems will operate correctly. However, the impact of additional requests for unbundled loops and other items required by CLECs will place additional pressure on BellSouth's systems, both technological and personnel who need to be trained. In addition, the mere fact that some items have not been ordered by CLECs does not prove that BellSouth is unable to provide them; for such items, what is significant is whether BellSouth can verify availability through testing procedures. In other words, even if CLECs have not ordered a particular item, or if billing has not yet been initiated for a particular service, BellSouth should be able to demonstrate through testing that the item is functionally available or that the billing system will function accurately.

Given that BellSouth has not yet shown that it can reliably provide unbundled loops and other unbundled elements in the controlled environment of pilot tests, unbundled elements are not yet

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[67] ACSI Brief at 4, citing its witness Robertson's prefiled direct testimony at 8-10. ACSI also presented evidence regarding BellSouth's practices with respect to building management preferred provider, exclusive sales agency, and contract sales arrangements, which the Commission does not reach with respect to ruling on the Statement.

available as promised in the Statement and as required by Section 251.[68] In addition, the Statement's proposed interfaces are only interim solutions (*see* SGAT at 6). One example of an OSS interface that will not be fully operational for some time is on-line access to Customer Service Records ("CSRs").[69] Indeed, the Commission notes that in the arbitrations involving AT&T and MCI, BellSouth is required to develop such access in a manner that protects customer privacy, working with the CUC, and after developing such CSR access the parties must return to the Commission to demonstrate the appropriate privacy protections before the relevant interface is implemented.[70] Approval of the Statement under these conditions would be misleading by stating that BellSouth "generally offers" items that are not actually available.

With respect to interim number portability, the rates are interim, subject to true-up. As mentioned previously, establishing such interim number portability rates on a general basis as a part of a Statement may violate the law against retroactive ratemaking. Also, the Commission has not determined whether these interim rates are cost-based. Therefore as a matter of policy if not as a matter of law, an additional basis for rejecting the Statement is the interim nature of the interim number portability rates which are subject to true-up and which the Commission has not determined to be cost-based. In addition, if BellSouth submits a revised Statement that permits blocking of number portability when a customer has past due charges but has not been disconnected, BellSouth should also submit a supporting argument showing why BellSouth believes that number portability may be used as a method of enforcing the recovery of past due amounts. BellSouth should also attempt to revise the Statement's standard regarding shutting down of number portability to ensure that such shutting down occurs only during network emergencies or on the basis of other, specific technical requirements.

With respect to resale, the Commission notes that subsequent to BellSouth's January 22, 1997 filing of the Statement, the Commission undertook further review and action to approve BellSouth's resale tariff in Docket No. 6352-U. Therefore, revision of the SGAT should include any revisions necessary to conform to the resale tariff and related decisions in Docket No. 6352-U. With respect to charges for switching local exchange carriers or unauthorized transfers of customers, the Statement should be subject to any Commission rulings in current or future proceedings on these topics.

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[68] *See* Tr. 2010 (Sprint witness Burt), Tr. 1791 (MFS witness Meade), Tr. 2049 (AT&T witness Pfau); prefiled testimony of MCI witness Martinez at 15.

[69] Tr. 1979, 1986, 3128-30.

[70] This was ordered in the AT&T arbitration, Docket No. 6801-U, MCI arbitration, Docket No. 6865-U, and Sprint arbitration, Docket No. 6958-U.

E. Other Requirements of Sections 251(c), (d), (e) and (g)

Section 251 contains other requirements within subsections (c), (d), (e) and (g) as to which the Commission finds no deficiency in the Statement, or which are not directly applicable to the Statement.

251 (c)(1) relates to the duty to negotiate. It provides for:

> (1) DUTY TO NEGOTIATE. -- The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

Although ICI raised numerous questions at the hearing regarding BellSouth's negotiations, ICI did not appear to ask for rejection of the Statement upon those grounds. Many other companies have negotiated agreements, and the arbitrations to date have not proven bad faith on the part of BellSouth. Any confusion of the sort ICI may have experienced appear to have been resolved by the very submission of BellSouth's proposed Statement. The Commission does not find any deficiency with respect to BellSouth's negotiations, and therefore does not base its rejection decision upon any concern about BellSouth's good faith in negotiations.

Section 251(c)(5) relates to BellSouth's duty to give CLECs notice of certain changes. It provides:

> (5) NOTICE OF CHANGES. -- The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

The Statement reflects terms and conditions that were established pursuant to negotiation and arbitration in the AT&T and MCI arbitration cases, Dockets No. 6801-U and 6865-U. The Commission does not find any deficiency with respect to this portion of the Statement, and therefore does not base its rejection decision upon any concern about BellSouth's provision for notice to CLECs of changes.

Section 251(d)(2) involves directions to the FCC regarding its determinations for regulations implementing the requirements for unbundled access to network elements under Section 251(c)(3). It provides:

(2) ACCESS STANDARDS.-- In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether --

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

The Commission finds that no issue has been raised in this case involving this provision of the Act. In addition, this provision of the Act speaks to the FCC, not directly to the Georgia Commission. Therefore, the Commission concludes that this provision has no bearing on its decision in this Order as to whether to approve, reject, or allow the Statement to take effect.

Section 251(d)(3) also speaks to the FCC in its development of regulations implementing Section 251. It provides:

(3) PRESERVATION OF STATE ACCESS REGULATIONS.-- In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirement of this section and the purposes of this part.

The Commission finds that no issue has been raised in this case involving this provision of the Act. In addition, this provision of the Act speaks to the FCC, not directly to the Georgia Commission. Therefore, the Commission concludes that this provision has no bearing on its decision in this Order as to whether to approve, reject, or allow the Statement to take effect.

Section 251(e)(1) relates to the FCC's activities regarding telecommunications numbering. It provides:

(1) COMMISSION AUTHORITY AND JURISDICTION.-- The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

The Commission finds that no issue has been raised in this case involving this provision of the Act. In addition, this provision of the Act speaks to the FCC, not directly to the Georgia Commission. The only issues raised regarding access to telephone numbers were raised under separate provisions of the Act discussed previously in this Order. Therefore, the Commission concludes that this Section 251(e)(1) has no bearing on its decision in this Order as to whether to approve, reject, or allow the Statement to take effect.

Section 251(g) pertains to services provided to interexchange carriers ("IXCs") by local exchange carriers. It provides:

> (g) CONTINUED ENFORCEMENT OF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS.-- On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

The Commission finds that no issue has been raised in this case involving this provision of the Act. In addition, this provision of the Act speaks to the FCC, not directly to the Georgia Commission. Therefore, the Commission concludes that this provision of the Act has no bearing on its decision in this Order as to whether to approve, reject, or allow the Statement to take effect.

IV. ORDERING PARAGRAPHS

For the reasons discussed in the foregoing sections of this Order, the Commission finds and concludes that it would be premature to approve BellSouth's proposed Statement of Generally Available Terms and Conditions as it stands, or to allow the Statement to take effect, and that the Statement should be rejected pursuant to Section 252(f) of the Act. BellSouth clearly undertook a substantial effort in developing and supporting its Statement, however, and the Commission's decision is simply based on finding that various aspects of the Statement are premature, not fully developed, or require additional support.

The Commission further concludes that rejection of the Statement now, with the identification of premature and deficient aspects, is a better course than simply allowing the Statement to take effect and continuing to review it. This is because the latter course would place BellSouth in jeopardy of having an effective Statement that is subject to subsequent rejection. The approach the Commission adopts and applies in this Order provide BellSouth with more certainty, even though it also does not grant BellSouth the affirmative approval which BellSouth requested.

The Commission will keep this docket open for review of any revised Statement that BellSouth may choose to submit. Such Commission review will be for the purpose of addressing aspects of the Statement that are currently premature or deficient, as discussed in this Order.

WHEREFORE THE COMMISSION ORDERS that:

A. BellSouth's Statement of Generally Available Terms and Conditions is rejected as being a premature and incomplete Statement, for the reasons discussed in the preceding sections of this Order, pursuant to Section 252(f) of the Telecommunications Act of 1996.

B. This docket shall be kept open for Commission review of any revised Statement that BellSouth may choose to submit, in order to address the aspects of the Statement that are currently premature or deficient as discussed in this Order.

C. All statements of fact, law, and regulatory policy contained within the preceding sections of this Order are hereby adopted as findings of fact, conclusions of law, and conclusions of regulatory policy of this Commission.

D. A motion for reconsideration, rehearing or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

E. Jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 20th day of March, 1997.

Terri M. Lyndall
Executive Secretary

3/21/97
Date

Stan Wise
Chairman

3-21-97
Date

BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

In the matter of:		
BellSouth Telecommunications, Inc.'s Statement of Generally Available Terms and Conditions Under Section 252 (f) of the Telecommunications Act of 1996	)	**7253-U**

CERTIFICATE OF SERVICE

I hereby certify that the Order Regarding Statement dated March 21, 1997 in the above-referenced docket was filed with the Commission's Executive Secretary, and copies of same were served upon all parties and persons listed below or via hand-delivery where indicated by an asterisk, or by first-class mail addressed as follows:

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So certified this 24th day of March, 1997.

B. B. Knowles

B. B. Knowles
Director, Utilities Division

244 Washington Street S.W.
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and I urge my colleagues to support it. I have also signed a resolution asking our Republican leaders to let a clean debt ceiling bill come to the floor.

We must pass a clean debt ceiling bill to send a message to the world that we will keep our word and pay our bills. Do not default on America.

AMERICA'S LUMBER MARKET IS DYING

(Mr. TRAFICANT asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. TRAFICANT. Mr. Speaker, in very simple language, America's lumber market is getting killed. I think we understand that word. Canadian lumber is everywhere.

Now, check this out: Canadian provinces own the timber, so they sell the timber to the Canadian mills below market cost. Then the Canadian mills sell the timber in America below market value. As a result, Canada now owns 40 percent of America's lumber market.

America has lost 35,000 jobs and experts say, listen to this, America will continue to lose jobs in this industry. No kidding, Sherlock.

With a policy like this, how can American timber mills end up competing with Canadian timber that is subsidized and being sold in America, dumped in America? Beam me up. This is another fine NAFTA ploy.

BETRAYAL IN GEORGIA

(Ms. MCKINNEY asked and was given permission to address the House for 1 minute.)

Ms. MCKINNEY. Mr. Speaker, I rise today to call attention to a betrayal of Benedict Arnold proportions.

The Atlanta Journal and Constitution reported today that the Democratic leadership in the State of Georgia—that is, the vanguard of the Dixiecrats—is actively recruiting people of the right skin color to challenge our colleague and two-term Democratic Member of Congress, SANFORD BISHOP.

I want to say that again. The leadership of our party in the State of Georgia is recruiting white primary opponents to unseat a sitting Member of Congress of the same party. And why? Only because SANFORD BISHOP is black.

Georgia Democratic House Speaker Tom Murphy is reported to have said that he would support the candidacy of Ray Goff who happens to be white. In fact, Murphy is willing to support Goff against Bishop even though Goff has not declared whether he is a Democrat or Republican.

How's that for party loyalty, Mr. Speaker? Once again Tom Murphy and his fellow dinosaurs have demonstrated that black Democrats are no more than spare parts for their whites-only party machine.

LET LAW ENFORCEMENT OFFICIALS DO THEIR JOB

(Mr. LAZIO of New York asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. LAZIO of New York. Mr. Speaker, last week in New York, a Federal judge threw out key evidence that would prove a defendant guilty of Federal drug charges. The defendant had over 4 million dollars' worth of cocaine and heroine in her car, and voluntarily confessed on videotape that she had made the trip over 20 times to pick up drugs. The arresting officers witnessed four men putting duffle bags into the trunk of her car at 5 a.m. in the morning. They did not speak to her, and then fled the scene when spotted. Unbelievably however, the judge decided that the police had no cause to be suspicious. Even the New York Times called the judge's reasoning, tortured.

It is absolutely incredible that this case was dismissed, and the defendant will go unpunished due to a technicality, which would be corrected if the Exclusionary Rule Reform Act was in effect. Last February the House passed this bill, which extends the exclusionary rule's good faith exception to warrantless searches. If the police have a reasonable good faith belief that a drug crime is occurring, as in this case, common sense should dictate that they be allowed to act accordingly.

As a former Suffolk County assistant district attorney, I have seen firsthand the effects of drugs on our communities. It is about time we let our law enforcement officials do their job without tying their hands. We need this bill to become law so we can avoid such outrageous situations in the future.

MAJORITY PURSUING CONTRADICTORY STRATEGY

(Ms. NORTON asked and was given permission to address the House for 1 minute and to revise and extend her remarks.)

Ms. NORTON. Mr. Speaker, the majority is pursuing a contradictory strategy. Everything they have hinged on eliminating the deficit, but an increase in the deficit would be the first result of default. The official position of the United States of America today is under threat of default. Moody's has certainly recorded it that way, because it has returned the threat itself.

The shutdown strategy will not work this time. The only way to hang something on the debt limit bill is to get an agreement in advance from the President, yet I see no meetings occurring.

Moody's action shows that the delay alone can be costly, and worse, dangerous. If we mean to balance the budget, if your purpose is to eliminate the deficit, let us start by taking away the threat of default.

REMOVAL OF NAME OF MEMBER AS COSPONSOR OF H.R. 2745

Mr. KLINK. Mr. Speaker, I ask unanimous consent that my name be removed as a cosponsor of H.R. 2745.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

CONFERENCE REPORT ON S. 652, TELECOMMUNICATIONS ACT OF 1996

Mr. LINDER. Mr. Speaker, by direction of the Committee on Rules, I call up House Resolution 353 and ask for its immediate consideration.

The Clerk read the resolution, as follows:

H. RES. 353

Resolved, That upon adoption of this resolution it shall be in order to consider the conference report to accompany the bill (S. 652) to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes. All points of order against the conference report and against its consideration are waived. The conference report shall be considered as read.

The SPEAKER pro tempore. The gentleman from Georgia [Mr. LINDER] is recognized for 1 hour.

Mr. LINDER. Mr. Speaker, for the purpose of debate only, I yield the customary 30 minutes to the gentleman from California [Mr. BEILENSON], pending which I yield myself such time as I may consume. During consideration of this resolution, all time yielded is for the purpose of debate only.

(Mr. LINDER asked and was given permission to revise and extend his remarks and include extraneous material in the RECORD.)

Mr. LINDER. Mr. Speaker, House Resolution 353 provides for the consideration of the conference report for S. 652, the Telecommunications Act of 1996, and waives all points of order against the conference report and against its consideration. The House rules allow for 1 hour of general debate to be equally divided between the chairman and ranking minority member of the Commerce and Judiciary Committees.

In addition, the regular rules of the House provide for a motion to recommit with or without instructions as is the right of the minority.

Mr. Speaker, what we have before us is a complex piece of legislation that is the product of many long months of negotiation. I believe that the conferees have worked in good faith to create a balanced bill which equalizes the diverse competitive forces in the telecommunications industry.

This entire process has involved countless competing interests which include consumers long distance companies, regional Bell operating companies, cable, newspapers, broadcasters,

parents more control over the sex and the violence that is coming into our homes today. Most of the kids in our society will see 8,000 murders and over 100,000 acts of violence on television by the time they finish grade school. That is appalling. We need to do more to help those parents who do take responsibility for their kids.

Now, the V-chip, that is something that is part of this package. It was the gentleman from Massachusetts [Mr. MARKEY] and the gentleman from Michigan [Mr. DINGELL] and others who have been active on this issue. We have got that in here. The V-chip included in this bill will help parents let in Sesame Street and keep out programs like the Texas Chainsaw Massacre.

Mr. Speaker, it is parents who raise children, not government, not advertisers, not network executives, and parents who should be the ones who choose what kind of shows come into their homes for their kids.

It was a little more than a week ago when the President of the United States stood directly in back of me and spoke to the Nation, and the most memorable words from my standpoint in that speech were parents have the responsibility and the duty to raise their children. This bill will help immeasurably in that direction, so I urge my colleagues to be supportive of the conference report when it comes before us in the next few minutes.

Mr. LINDER. Mr. Speaker, I yield such time as he may consume to the gentleman from Texas [Mr. FIELDS], the chairman of the subcommittee that produced this bill.

(Mr. FIELDS of Texas asked and was given permission to revise and extend his remarks.)

Mr. FIELDS of Texas. Mr. Speaker, very seldom, if ever, in a legislative career, can we as legislators, can we as trustees for the American people, feel that we have made a significant contribution for the country's future—made a real difference. Well, today we can.

Mr. Speaker, this is a watershed moment—a day of history—and, not just because this is the first comprehensive reform of telecommunication policy in 62 years—not just because we have been able to accomplish what has eluded previous Congresses—which, in and of itself, is of particular pride to me and my fellow subcommittee members, on both sides of the aisle, because we have all worked many long hours to get to this watershed moment.

No, Mr. Speaker, this is a historic moment because we are decompartmentalizing segments of the telecommunications industry, opening the floodgates of competition through deregulation, and most importantly, giving consumers choice—in their basic telephone service, their basic cable service, and new broadcasting services as we begin the transition to digital and the age of compression—and from these choices, the benefits of competition flow to all of us as consumers—new and better technologies, new applications for existing technologies, and most importantly, to all of us, because of competition, lower consumer price.

For the last 3½ years this telecommunication reform package has been my life—I have lived with it, eaten with it, and not to sound weird, even dreamed of telecommunication reform while I'm asleep—so, believe me when I say that I am glad that we are bringing this important issue to closure. In fact, this closure reminds me of my newest daughter, Emily, born 14 days ago—the labor has been long, we've been through some painful contractions, but at the birth of something so magnificent, you're a proud father—and today, I am one of many proud fathers.

□ 1345

And, just as I cannot predict what Emily will be like as she grows up, few of us really understand what we are unleashing today. In my opinion, today is the dawn of the information age. This day will be remembered as the day that America began a new course—and none of us fully appreciate what we are unleashing. I do know that this is the greatest jobs bill passed during my service in Congress. I really believe that because of the opportunities afforded because of deregulation that there will be more technology developed and deployed between now and the year 2000 than we have seen this century. I believe that this legislation guarantees that American companies will dominate the global landscape in the field of telecommunication.

And, if asked what I am most proud of in this legislation—besides the fact that my subcommittee members on my side of the aisle have worked as a team in developing this legislation—is the approach that we initiated in January 1995, when we as Republicans assumed leadership on this issue and invited the leading CEO's of America's telecommunication companies to come and answer one question. That one question was, What should we do as the new majority in this dynamic age of telechnology to enhance competition and consumer choice? The telephone CEO's said that they didn't mind opening the local loop if they could compete for the long distance business that was denied to them by judicial and legislative decision. The long distance CEO's said that they didn't mind the Bell's competing for the long distance business if the local loop was truly open to competition and if they could compete for the intraLATA toll business which was denied to them. And, the biggest surprise to us was when Brian Roberts of Comcast Cable on behalf of the cable industry said that they wanted to be the competitors of the telephone companies in the residential marketplace. In fact, the next day, I called Brian and Jerry Levin of Time-Warner to have them reassure me that their intent was to be major players and competitors in the residential marketplace. After that discussion, I told my staff that we needed a checklist that would decompartmentalize cable and competition in a verifiable manner and move the deregulated framework even faster than ever imagined. And we came up with the concept of a facilities based competitor who was intended to negotiate the loop for all within a State and it has always been within our anticipation that a cable company would in most instances and in all likelihood be that facilities-based competitor in most States—even though our concept definition is more flexible and encompassing. It is this checklist which will be responsible for much of the new technologies, the major investments that will be flowing, and the tens of thousands that will be created because of this legislation.

And, in talking about opening the loop, I don't want to take away the other deregulatory aspects of our legislation such as the more deregulatory environment for the cable industry as they prepare to go head-to-head with the telephone companies. The streamlining of the license procedures for the broadcasting industry and the loosening of the ownership restrictions.

Mr. Speaker, I could go on and on and on and be excited about what this bill means to Americans, to our consumers.

Let me just end at this particular time in saying once again, I am a proud father, along with many others. There are many who have brought this day to us. It is a watershed moment, a historic moment, and it is a day that all of us can be extremely proud of.

Mr. BEILENSON. Mr. Speaker, I yield 3 minutes to the gentlewoman from New York [Ms. SLAUGHTER].

(Ms. SLAUGHTER asked and was given permission to revise and extend her remarks.)

Ms. SLAUGHTER. Mr. Speaker, I thank the gentleman for yielding me time.

Mr. Speaker, I agree with the previous speaker, we are not sure what we are unleashing here. But I am rising in objection today to at least another measure to restrict women's constitutional rights that has appeared in this bill. I am referring to section 507 of the Communications Act of 1995 that would prohibit the exchange of information regarding abortion over the Internet. I ask you, is the abortion issue going to be attached and is it at all germane to this bill?

This is the 22d vote of the 104th Congress on abortion-related legislation that has whittled away at the constitutional and legal rights of American women. Today we have the opportunity to pass a widely supported bipartisan telecommunications bill. Instead of focusing on the important issues at hand, we are being forced again for the 22d time during Congress to vote on a measure to further reduce women's constitutional rights.

Abortion is a legal procedure. To prohibit discussion of it on the Internet is

104TH CONGRESS
2d Session

SENATE

REPORT
104–230

TELECOMMUNICATIONS ACT OF 1996

FEBRUARY 1, 1996.—Ordered to be printed

Mr. PRESSLER, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 652]

The committee of conference on the disagreeing votes of the two Houses on the amendments of the House to the bill (S. 652), to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

SECTION 1. SHORT TITLE; REFERENCES.

(a) SHORT TITLE.—This Act may be cited as the "Telecommunications Act of 1996".

(b) REFERENCES.—Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.).

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

over its own facilities or predominantly over its own facilities in combination with the resale of another carrier's service.

This conference agreement recognizes that it is unlikely that competitors will have a fully redundant network in place when they initially offer local service, because the investment necessary is so significant. Some facilities and capabilities (*e.g.*, central office switching) will likely need to be obtained from the incumbent local exchange carrier as network elements pursuant to new section 251. Nonetheless, the conference agreement includes the "predominantly over their own telephone exchange service facilities" requirement to ensure a competitor offering service exclusively through the resale of the BOC's telephone exchange service does not qualify, and that an unaffiliated competing provider is present in the market.

The House has specifically considered how to describe the facilities-based competitor in new subsection 271(c)(1)(A). While the definition of facilities-based competition has evolved through the legislative process in the House, the Commerce Committee Report (House Report 104–204 Part I) that accompanied H.R. 1555 pointed out that meaningful facilities-based competition is possible, given that cable services are available to more than 95 percent of United States homes. Some of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated. For example, large, well established companies such as Time Warner and Jones Intercable are actively pursuing plans to offer local telephone service in significant markets. Similarly, Cablevision has recently entered into an interconnection agreement with New York Telephone with the goal of offering telephony on Long Island to its 650,000 cable subscribers.

For purposes of new section 271(c)(1)(A), the BOC must have entered into one or more binding agreements under which it is providing access and interconnection to one or more competitors providing telephone exchange service to residential and business subscribers. The requirement that the BOC "is providing access and interconnection" means that the competitor has implemented the agreement and the competitor is operational. This requirement is important because it will assist the appropriate State commission in providing its consultation and in the explicit factual determination by the Commission under new section 271(d)(2)(B) that the requesting BOC has fully implemented the interconnection agreement elements set out in the "checklist" under new section 271(c)(2).

New section 271(c)(1)(B) also is adopted from the House amendment, and it is intended to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market simply because no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market. The conference agreement stipulates that a BOC may seek entry under new section 271(c)(1)(B) at any time following 10 months after the date of enactment, provided no qualifying facilities-based competitor has requested access and interconnection under new section 251 by the date that is 3 months prior to the date that the BOC seeks interLATA authorization. Consequently, it is important that the Commission rules to implement new section 251 be promulgated within 6 months after the date of enactment, so that potential competitors will have the benefit of being informed of the Commission rules in requesting access and interconnection before the statutory window in new section 271(c)(1)(B) shuts.

New section 271(c)(2) sets out the specific interconnection requirements that comprise the "checklist" that a BOC must satisfy as part of its entry test.

In new section 271(d), the conference agreement adopts the basic structure of the Senate bill concerning authorization of BOC entry by the Commission, with a modification to permit the BOC to apply on a State-by-State basis.

New section 271(d) sets forth administrative provisions regarding applications for BOC entry under this section. In making an evaluation, the Attorney General may use any appropriate standard, including: (1) the standard included in the House amendment, whether there is a dangerous probability that the BOC or its affiliates would successfully use market power to substantially impede competition in the market such company seeks to enter; (2) the standard contained in section VIII(C) of the AT&T Consent Decree, whether there is no substantial possibility that the BOC or its affiliates could use monopoly power to impede competition in the market such company seeks to enter; or (3) any other standard the Attorney General deems appropriate.

New section 271(e)(1) prohibits joint marketing of local services obtained from the BOC under new section 251(c)(4) and long distance service within a State by telecommunications carriers with more than five percent of the Nation's presubscribed access lines for three years after the date of enactment, or until a BOC is authorized to offer interLATA services within that State, whichever is earlier.

New section 271(e)(2) requires any BOC authorized to offer interLATA services to provide intraLATA toll dialing parity coincident with its exercise of that interLATA authority. States may not order a BOC to implement toll dialing parity prior to its entry into interLATA service. Any single-LATA State or any State that has issued an order by December 19, 1995, requiring a BOC to implement intraLATA toll dialing parity is grandfathered under this Act. The prohibition against "non-grandfathered" States expires three years after the date of enactment.

The conference agreement in new section 271(f) adopts the House provision grandfathering activities under existing waivers. Both the House and Senate bill included separate grandfather provisions for manufacturing in the manufacturing section. The conference agreement combines these separate provisions into one provision covering both interLATA services and manufacturing, and that provision is included in the interLATA section. Because of the new approach to the supersession of the AT&T Consent Decree described below, this section was modified to clarify that requests for waivers pending with the court on the date of enactment are no longer included within this section. Instead, only those waiver requests that have been acted on before the date of enactment will be included. All conduct occurring after the date of enactment will no longer be subject to the AT&T Consent Decree and will be sub-

104TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPT. 104–204
Part 1

COMMUNICATIONS ACT OF 1995

JULY 24, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BLILEY, from the Committee on Commerce, submitted the following

REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 1555]

[Including cost estimate of the Congressional Budget Office]

The Committee on Commerce, to whom was referred the bill (H.R. 1555) 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, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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residential and business subscribers. This is the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed open to competition. In the Committee's view, the "openness and accessibility" requirements are truly validated only when an entity offers a competitive local service in reliance on those requirements.

The Committee requires that the service be made available to both residential and business subscribers, so that the service is, in fact, local telephone exchange service. It is not sufficient for a competitor to offer exchange access service to business customers only, as presently offered by competitive access providers (CAPs) in the business community. The Committee does not intend for cellular service to qualify, since the Commission has not determined that cellular is a substitute for local telephone service.

The Committee expects the Commission to determine that a competitive alternative is operational and offering a competitive service somewhere in the State prior to granting a BOC's petition for entry into long distance. The requirement of an operational competitor is crucial because, under the terms of section 244, whatever agreement the competitor is operating under must be made generally available throughout the State. Any carrier in another part of the State could immediately take advantage of the "agreement" and be operational fairly quickly. By creating this potential for competitive alternatives to flourish rapidly throughout a State, with an absolute minimum of lengthy and contentious negotiations once an initial agreement is entered into, the Committee is satisfied that the "openness and accessibility" requirements have been met.

It is also the Committee's intent that the competitor offer a true "dialtone" alternative within the State, and not merely offer service in one business location that has an incidental, insignificant residential presence. The Committee does not intend that the competitor should have to provide a fully redundant facilities-based network to the incumbent telephone company's network, yet it is expected that the facilities necessary for a competitive provider will be present. In this regard, the Committee notes that the cable industry, which is expected to provide meaningful facilities-based competition, has wired 95% of the local residences in the United States and thus has a network with the potential of offering this sort of competitive alternative. Conversely, resale, as described in section 242(a)(3), would not qualify because resellers would not have their own facilities in the local exchange over which they would provide service, thus failing the facilities-based test.

Section 245(a)(2)(B) is intended to ensure that a BOC is not effectively prevented from seeking entry into the long distance market simply because no facilities-based competitor which meets the criteria specified in the Act sought to enter the market. To the extent that a BOC does not receive a request from a competitor that comports with the criteria established by this section, it is not penalized in terms of its ability to obtain long distance relief. Because negotiating for access and interconnection may begin on the date of enactment, and in many of these States that have opened their local exchanges to competition, such negotiations have already begun, the Committee believes that it does not create an unreason-

GARCIA ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83–5061. Argued October 10, 1984—Decided December 10, 1984

For assaulting an undercover Secret Service agent with a loaded pistol, in an attempt to rob him of $1,800 of Government "flash money" that the agent was using to buy counterfeit currency from them, petitioners were convicted of violating 18 U. S. C. § 2114, which proscribes the assault and robbery of any custodian of "mail matter or of any money or other property of the United States." The Court of Appeals affirmed the convictions over petitioners' contention that § 2114 is limited to crimes involving the Postal Service.

Held: The language "any money or other property of the United States" in § 2114 includes the $1,800 belonging to the United States and entrusted to the Secret Service agent as "flash money," and thus by using a pistol in an effort to rob the agent petitioners fell squarely within the prohibitions of the statute. Pp. 73–80.

(a) "Mail matter," "money," and "other property" are separated from one another in § 2114 by use of the disjunctive "or." This means that the word "money" must be given its ordinary, separate meaning and does not mean "postal money" or "money in the custody of postal employees." P. 73.

(b) There is no ambiguity in the language of the statute. But even if there were, the particular language here does not lend itself to application of the *ejusdem generis* rule so as to require reading the general terms "money" and "other property" following "mail matter" in a specific, restricted postal context. The term "mail matter" is no more a specific term—and is probably less specific—than "money." Pp. 73–75.

(c) The legislative history shows no intent by Congress to limit the statute to postal crimes. Pp. 75–78.

(d) The fact that the Solicitor General in a prior case presenting the identical issue conceded that § 2114 only applied to postal crimes, a concession he now states was unwarranted, does not relieve this Court of its responsibility to interpret Congress' intent in enacting § 2114. Pp. 78–79.

718 F. 2d 1528, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined.

ticulars the text of the statute has remained unchanged since the 1935 amendment.

Petitioners contend that the 1935 amendment to § 320 was not intended to expand the reach of that statute beyond postal crimes. In support of this they rely on some short colloquies from the House floor which they describe as "snippets."

In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which "represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Zuber* v. *Allen*, 396 U. S. 168, 186 (1969). We have eschewed reliance on the passing comments of one Member, *Weinberger* v. *Rossi*, 456 U. S. 25, 35 (1982), and casual statements from the floor debates. *United States* v. *O'Brien*, 391 U. S. 367, 385 (1968); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). In *O'Brien*, *supra*, at 385, we stated that Committee Reports are "more authoritative" than comments from the floor, and we expressed a similar preference in *Zuber*, *supra*, at 187.[1]

The Committee Reports on this bill show no intent on the part of the 74th Congress to limit the amended § 320 to less than the normal reach of its words. The House Report on the bill to amend § 320 is entitled "SAFEGUARDING CUSTODIANS OF GOVERNMENT MONEYS AND PROPERTY" and states that "[t]he purpose of the pending

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[1] As Justice Jackson stated:

"Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. . . . [T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions." *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 395–396 (1951) (concurring).

ZUBER ET AL. *v.* ALLEN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 25. Argued October 16, 1969—
Decided December 9, 1969*

Respondent Vermont dairy farmers ("country" milk producers) brought this action to invalidate the so-called farm location differential provided for by order of the Secretary of Agriculture as contrary to the Agricultural Marketing Agreement Act of 1937. The effect of the order is to require milk distributors to pay milk producers situated close to milk marketing areas ("nearby" farmers) higher prices than are paid to producers located at greater distances from such areas. In the 1920's, prior to federal regulation, nearby farmers received higher prices for their milk in the Boston area than farmers at more distant points. The 1935 amendment to the Agricultural Adjustment Act, carried forward into § 8 (c) of the Agricultural Marketing Agreement Act of 1937, provides, in part, for the payment to all producers "delivering milk to all handlers of uniform prices for all milk . . . subject only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made." The Department of Agriculture regulations provide a price differential for "nearby" farmers, and a lesser differential for intermediate nearby zones. The District Court granted an injunction against further payments of the differentials, and the Court of Appeals affirmed. *Held:*

1. The statutory scheme, which was to provide uniform prices to all producers in the marketing area, subject only to specifically enumerated adjustments, contemplated that "market differentials . . . customarily applied" would be based on *cost* adjustments. Pp. 179–187.

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*Together with No. 52, *Hardin, Secretary of Agriculture* v. *Allen et al.*, also on certiorari to the same court.

We consider our conclusions in no way undermined by the colloquy on the floor between Senator Copeland and Senator Murphy upon which the dissent places such emphasis. A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. Floor debates reflect at best the understanding of individual Congressmen. It would take extensive and thoughtful debate to detract from the plain thrust of a committee report in this instance. There is no indication, however, that the question of nearby differentials and the meaning of "market . . . differentials customarily applied" were precisely considered in the floor dialogue. The exchange is not only brief but also inconclusive as to meaning.[22] Indeed, Senator Murphy apparently acqui-

betokens unawareness, preoccupation, or paralysis. "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard* v. *United States*, 328 U. S. 61, 69 (1946). Its significance is greatest when the area is one of traditional year-by-year supervision, like tax, where watchdog committees are considering and revising the statutory scheme. Even less deference is due silence in the wake of unsuccessful attempts to eliminate an offending interpretation by amendment. See, *e. g.*, *Girouard* v. *United States*, *supra*. Where, as in the case before us, there is no indication that a subsequent Congress has addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence, let alone the approval discerned by the dissent.

[22] The floor exchange is reported at 79 Cong. Rec. 11139–11140.

"Mr. COPELAND. What has the Senator to say to the suggestion that in a number of communities in up-State New York there is not a sufficient supply of milk surrounding the market to take care of the demand; therefore, milk must be brought into the market from more distant points? The provisions of the equalization which we are now discussing provide that a producer who is producing his milk on farms near to cities would receive the same price for his product as a farmer who produces his milk, say, 40 or 50 miles away from the same community.

"Mr. MURPHY. If they were embraced in the same marketing area, that would be true. Let us keep in mind what the situation is. There is a deficiency of consumer demand. There is a surplus of

PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE ET AL. *v.* DAVENPORT ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 89–156. Argued February 20, 1990—Decided May 29, 1990

Respondents pleaded guilty to welfare fraud and were ordered by a Pennsylvania court, as a condition of probation, to make monthly restitution payments to petitioner county probation department for petitioner state welfare department. Subsequently, respondents filed a petition under Chapter 13 of the Bankruptcy Code in the Bankruptcy Court, listing the restitution obligation as an unsecured debt. After the probation department commenced a probation violation proceeding in state court, alleging that respondents had failed to comply with the restitution order, respondents filed an adversary action in the Bankruptcy Court seeking both a declaration that the restitution obligation was a dischargeable debt and an injunction preventing the probation department from undertaking any further efforts to collect on the obligation. The Bankruptcy Court held that the obligation was an unsecured debt dischargeable under Chapter 13. The District Court reversed, relying on *Kelly* v. *Robinson*, 479 U. S. 36, which held that restitution obligations are nondischargeable in Chapter 7 proceedings because they fall within Code § 523(a)(7)'s exception to discharge for a debt that is a government "fine, penalty, or forfeiture . . . and is not compensation for actual pecuniary loss." The District Court emphasized the Court's dicta in *Kelly* that Congress did not intend to make criminal penalties "debts" under the Code. The court also emphasized the federalism concerns that are implicated when federal courts intrude on state criminal proceedings. The Court of Appeals reversed.

Held: The Code's language and structure demonstrate that restitution obligations constitute "debts" within the meaning of § 101(11) and are therefore dischargeable under Chapter 13. Pp. 557–564.

(a) Section 101(11)'s definition of "debt" as a "liability on a claim" reveals Congress' intent that the meanings of "debt" and "claim" be coextensive. Furthermore, § 101(4)(a)'s definition of a "claim" as a "right to payment" broadly contemplates any enforceable obligation of the debtor, including a restitution order. Petitioners' reliance on *Kelly*'s discussion emphasizing the special purposes of punishment and rehabilitation that underlie the imposition of restitution obligations is misplaced. Unlike § 523(a)(7), which explicitly ties its application to the purpose of the

or forfeiture" as it appears in § 726(a)(4) must have the same meaning as in § 523(a)(7). We are unwilling to revisit *Kelly*'s determination that § 523(a)(7) "protects traditional *criminal* fines [by] codif[ying] the judicially created exception to discharge for fines." *Ibid.* (emphasis added). Thus, we reject the view that §§ 523(a)(7) and 726(a)(4) implicitly refer only to *civil* fines and penalties.[4]

The United States' position here highlights the tension between *Kelly*'s interpretation of § 523(a)(7) and its dictum suggesting that restitution obligations are not "debts." See *supra*, at 557. As stated above, *Kelly* found explicitly that § 523(a)(7) "codifies the judicially created exception to discharge" for both civil and criminal fines. 479 U. S., at 51. Had Congress believed that restitution obligations were not "debts" giving rise to "claims," it would have had no reason to except such obligations from discharge in § 523(a)(7). Given *Kelly*'s interpretation of § 523(a)(7), then, it would be anomalous to construe "debt" narrowly so as to exclude criminal restitution orders. Such a narrow construction of "debt" necessarily renders § 523(a)(7)'s codification of the judicial exception for criminal restitution orders mere surplusage. Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment. See, *e. g.*, *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U. S. 825, 837 (1988).

Moreover, in locating Congress' policy choice regarding the dischargeability of restitution orders in § 523(a)(7), *Kelly* is faithful to the language and structure of the Code: Congress defined "debt" broadly and took care to except particular debts from discharge where policy considerations so war-

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[4] In any event, the Government's contention that Congress must have intended to favor criminal, as opposed to civil, claims held by the government is unsubstantiated. The United States' view about the wisdom of this policy choice, unsupported by any textual authority that Congress in fact adopted such a policy, is an inadequate basis for rejecting the statute's broad definition of "debt." See *supra*, at 557–558.

Syllabus

COLAUTTI, SECRETARY OF WELFARE OF PENNSYLVANIA, ET AL. v. FRANKLIN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 77-891. Argued October 3, 1978—Decided January 9, 1979

Section 5 (a) of the Pennsylvania Abortion Control Act requires every person who performs an abortion to make a determination, "based on his experience, judgment or professional competence," that the fetus is not viable. If such person determines that the fetus "is viable," or "if there is sufficient reason to believe that the fetus may be viable," then he must exercise the same care to preserve the fetus' life and health as would be required in the case of a fetus intended to be born alive, and must use the abortion technique providing the best opportunity for the fetus to be aborted alive, so long as a different technique is not necessary to preserve the mother's life or health. The Act, in § 5 (d), also imposes a penal sanction for a violation of § 5 (a). Appellees brought suit claiming, *inter alia*, that § 5 (a) is unconstitutionally vague, and a three-judge District Court upheld their claim. *Held:*

1. The viability-determination requirement of § 5 (a) is void for vagueness. Pp. 390–397.

(a) Though apparently the determination of whether the fetus "is viable" is to rest upon the basis of the attending physician's "experience, judgment or professional competence," it is ambiguous whether that subjective language applies to the second condition that activates the duty to the fetus, *viz.*, "sufficient reason to believe that the fetus may be viable." Pp. 391–392.

(b) The intended distinction between "is viable" and "may be viable" is elusive. Apparently those phrases refer to distinct conditions, one of which indeterminately differs from the definition of viability set forth in *Roe* v. *Wade*, 410 U. S. 113, and *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U. S. 52. Pp. 392–394.

(c) The vagueness of the viability-determination requirement is compounded by the fact that § 5 (d) subjects the physician to potential criminal liability without regard to fault. Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the Act is little more than "a trap for those who act in good faith," *United States* v. *Ragen*, 314 U. S. 513, 524, and the perils of strict criminal liability are particularly

have the skills and technology that are readily available at a teaching hospital or large medical center.

The intended distinction between the phrases "is viable" and "may be viable" is even more elusive. Appellants argue that no difference is intended, and that the use of the "may be viable" words, "simply incorporates the acknowledged medical fact that a fetus is 'viable' if it has that statistical 'chance' of survival recognized by the medical community." Brief for Appellants 28. The statute, however, does not support the contention that "may be viable" is synonymous with, or merely intended to explicate the meaning of, "viable."[9]

Section 5 (a) requires the physician to observe the prescribed standard of care if he determines "that the fetus is viable *or* if there is sufficient reason to believe that the fetus may be viable" (emphasis supplied). The syntax clearly implies that there are two distinct conditions under which the physician must conform to the standard of care. Appellants' argument that "may be viable" is synonymous with "viable" would make either the first or the second condition redundant or largely superfluous, in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative. See *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955).

Furthermore, the suggestion that "may be viable" is an explication of the meaning of "viable" flies in the face of the fact that the statute, in § 2, already defines "viable." This, presumably, was intended to be the exclusive definition of "viable" throughout the Act.[10] In this respect, it is significant

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[9] Appellants do not argue that federal-court abstention is required on this issue, nor is it appropriate, given the extent of the vagueness that afflicts § 5 (a), for this Court to abstain *sua sponte*. See *Bellotti* v. *Baird*, 428 U. S. 132, 143 n. 10 (1976).

[10] The statute says that viable "means," not "includes," the capability of a fetus "to live outside the mother's womb albeit with artificial aid." As a rule, "[a] definition which declares what a term 'means' . . . excludes

UNITED STATES *v.* MENASCHE.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 104. Argued March 1, 1955.—Decided April 4, 1955.

An alien who filed his declaration of intention to become an American citizen before the effective date of the Immigration and Nationality Act of 1952, and who otherwise complied with the naturalization laws then in effect, has a "status," "condition" or "right in process of acquisition" preserved by § 405 (a), the general savings clause of the 1952 Act, even though his petition for naturalization was filed after the effective date of that Act. Pp. 529–539.

(a) When subsection (a) of the savings clause was broadened in the 1952 Act, Congress manifested its intention that the Act should take effect prospectively where there was no specific provision to the contrary. Pp. 533–535.

(b) The 1952 extension of subsection (a) is not limited to situations concerning derivative citizenship. P. 535.

(c) The fact that, under the 1952 Act, declarations of intention are no longer prerequisite to naturalization is immaterial here, in view of the provision in § 405 (a) preserving the "validity" of declarations of intention "valid at the time this Act shall take effect." Pp. 535–536.

(d) In this case, the alien's inchoate right to citizenship is protected by § 405 (a) and is not defeated by any implication stemming from § 405 (b). Pp. 536–539.

(e) Section 316 (a) of the 1952 Act, which imposes a more stringent requirement as to residence than did the prior law, did not "otherwise specifically provide" that the 1952 Act rather than the prior law was to apply to the situation of the alien in this case. P. 539.

210 F. 2d 809, affirmed.

Gray Thoron argued the cause for the United States. With him on the brief were *Solicitor General Sobeloff*, *Assistant Attorney General Olney*, *L. Paul Winings* and *Lorraine Wall Hurney*.

Peyton Ford argued the cause and filed a brief for respondent.

of rights under the savings clause, and § 347 (b) merely a special limitation on these rights. Indeed, there were two cases in which petitions for naturalization filed *after* the effective date of the 1940 Act were considered solely in relation to § 347 (a). *In re Samowich*, 70 F. Supp. 273; *Petition of Rothschild*, 57 F. Supp. 814. These decisions ignored the supposedly obvious negative implications of § 347 (b), and cast considerable doubt on the Government's present view that § 347 (b) automatically removed from the coverage of prior law petitions filed after the effective date of the 1940 Act. Thus the construction advanced by the Government concerning the relation between § 405 (a) and § 405 (b) would not continue the relation between the predecessor provisions, but would actually be a marked departure. The only significant change made in subsection (b) by the 1952 Act was the deletion of the two-year time limit, and there is nothing to indicate that Congress, in making this change, intended to alter the entire structure of the savings clause by making § 405 (b) the exclusive provision for naturalization petitions. See Analysis of S. 3455, *supra*. The few decisions considering this problem under the 1952 Act accord with the decisions of the District Court and Court of Appeals in the instant case, holding that § 405 (a) preserves rights accruing in the pre-petition stages of the naturalization process. *United States* v. *Pringle*, 212 F. 2d 878, affirming 122 F. Supp. 90; *In re Jocson*, 117 F. Supp. 528. We believe that Congress so intended.

The Government's contention that § 405 (a) does not apply to any phase in the processing of naturalization petitions would defeat and destroy the plain meaning of that section. "The cardinal principle of statutory construction is to save and not to destroy." *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30. It is our duty "to give effect, if possible, to every

clause and word of a statute." *Montclair* v. *Ramsdell*, 107 U. S. 147, 152, rather than to emasculate an entire section, as the Government's interpretation requires. Accordingly, we hold that respondent's inchoate right to citizenship is protected by § 405 (a) and is not defeated by any implication stemming from § 405 (b). All that remains, therefore, is to look to § 316 (a), which imposes the new requirement of physical presence, to determine whether it "otherwise specifically provide[s]" that the new Act is to apply to respondent's situation. It is clear that it does not. Section 316 (a) merely says that, "except as otherwise provided," the stated degree of physical presence shall be required, and this may be viewed as a reference, *inter alia*, to § 405 (a), strengthening our conclusion that prior law applies.

The District Court and the Court of Appeals were correct in concluding that § 405 (a) preserved respondent's inchoate rights under the prior law, and their decisions are accordingly

Affirmed.

MR. JUSTICE HARLAN took no part in the consideration or decision of this case.

REITER *v.* SONOTONE CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78–690. Argued April 25, 1979—Decided June 11, 1979

Petitioner brought a class action on behalf of herself and all persons in the United States who purchased hearing aids manufactured by respondents, alleging that, because of antitrust violations committed by respondents, she and the class she seeks to represent have been forced to pay illegally fixed higher prices for the hearing aids and related services they purchased from respondents' retail dealers. Treble damages were sought under § 4 of the Clayton Act, which provides that "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may bring suit and recover treble damages. Respondents moved to dismiss the damages claim on the ground that petitioner had not been injured in her "business or property" within the meaning of § 4. The District Court held that under § 4 a retail purchaser is injured in "property" if it can be shown that antitrust violations caused an increase in the price paid for the article purchased; however, it certified the question to the Court of Appeals. The Court of Appeals reversed, holding that retail purchasers of consumer goods and services who allege no injury of a commercial or business nature are not injured in their "business or property" within the meaning of § 4, and that the phrase "business or property" was intended to limit standing to those engaged in commercial ventures.

Held: Consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations sustain an injury in their "property" within the meaning of § 4. Pp. 337–345.

(a) Statutory construction must begin with the language employed by Congress. The word "property" has a naturally broad and inclusive meaning comprehending, in common usage, anything of material value owned or possessed. Congress' use of the disjunctive "or" in the phrase "business or property" indicates "business" was not intended to modify "property," nor was "property" intended to modify "business." Giving the word "property" the independent significance to which it is entitled in this context does not destroy the restrictive significance of the phrase "business or property" as a whole. Pp. 337–339.

(b) Monetary injury, standing alone, may be injury in one's "property" within the meaning of § 4. *Chattanooga Foundry & Pipe Works*

and ordinary significance; moreover, it would convert the noun "business" into an adjective. In construing a statute we are obliged to give effect, if possible, to every word Congress used. *United States* v. *Menasche*, 348 U. S. 528, 538–539 (1955). Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not. See *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 739–740 (1978). Congress' use of the word "or" makes plain that "business" was not intended to modify "property," nor was "property" intended to modify "business."

When a commercial enterprise suffers a loss of money it suffers an injury in both its "business" and its "property." But neither term is rendered redundant by recognizing that a consumer not engaged in a "business" enterprise, but rather acquiring goods or services for personal use, is injured in "property" when the price of those goods or services is artificially inflated by reason of the anticompetitive conduct complained of. The phrase "business or property" also retains restrictive significance. It would, for example, exclude personal injuries suffered. *E. g., Hamman* v. *United States*, 267 F. Supp. 420, 432 (Mont. 1967). Congress must have intended to exclude some class of injuries by the phrase "business or property." But it taxes the ordinary meaning of common terms to argue, as respondents do, that a consumer's monetary injury arising directly out of a retail purchase is not comprehended by the natural and usual meaning of the phrase "business or property." We simply give the word "property" the independent significance to which it is entitled in this context. A consumer whose money has been diminished by reason of an antitrust violation has been injured "in his . . . property" within the meaning of § 4.

Indeed, this Court indicated as much in *Chattanooga Foundry & Pipe Works* v. *Atlanta*, 203 U. S. 390 (1960). There the city alleged that the anticompetitive conduct of the de-