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November 8, 2000

Via Hand Delivery

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

Re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996, Docket No. 99-00948

Dear Mr. Waddell:

Enclosed for filing are the original and 13 copies of the post-hearing brief of Intermedia in the above-referenced matter.

The parties have agreed, and the Hearing Officer has authorized, that briefs in this matter be filed by the close of business rather than 2:00 p.m.

Sincerely,

H. LaDon Baltimore

LDB/dcg
Enclosures
cc: Parties of record

BEFORE THE
TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In re:	)	
	)	
Petition for Arbitration of the Interconnection	)	
Agreement Between BellSouth	)	**Docket No. 99-00948**
Telecommunications, Inc. and Intermedia	)	
Communications Inc. Pursuant to Section 252(b)	)	
of the Telecommunications Act of 1996	)	

POST-HEARING BRIEF OF INTERMEDIA COMMUNICATIONS INC.

November 8, 2000

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of the Telecommunications Act of 1996	)	

POST-HEARING BRIEF OF INTERMEDIA COMMUNICATIONS INC.

INTERMEDIA COMMUNICATIONS INC. ("Intermedia"), by its undersigned counsel, hereby respectfully files its Post-Hearing Brief with the Tennessee Regulatory Authority (hereinafter, the "Authority") in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

A. OVERVIEW

Intermedia is an integrated telecommunications carrier that provides a wide variety of voice and data services, including circuit-switched and packet-switched telephone exchange, exchange access, and toll services. Since 1987, Intermedia has been engaged in the business of transforming complex communications technologies into integrated, easy-to-use voice and data

solutions. These services are made possible through Intermedia's advanced, state-of-the-art networks and facilities. Having built itself into one of the nation's largest and fastest-growing telecommunications companies, Intermedia offers a comprehensive portfolio of local, long distance, high-speed data, and Internet services.

In the State of Tennessee, Intermedia is a certificated provider of local exchange and toll services, doing business in and around the cities of Nashville and Memphis. Intermedia has deployed two multi-purpose Northern Telecom DMS-500 voice switches, one in Nashville and one in Memphis. In addition, Intermedia has five Frame Relay switches, located in Chattanooga, Knoxville and Memphis, and two Asynchronous Transfer Mode ("ATM") switches that Intermedia uses to provide high-speed data services to its customers in Tennessee.

B. HISTORY OF THE PARTIES' DEALINGS

Pursuant to the requirements of the Communications Act of 1934, as amended (the "Communications Act"), on or about July 1, 1996, Intermedia entered into a voluntarily negotiated interconnection agreement with BellSouth Telecommunications, Inc. ("BellSouth"). The two-year interconnection agreement expired on July 1, 1998, but was subsequently extended by mutual agreement between Intermedia and BellSouth (the "Parties") to December 31, 1999.

By letter dated June 28, 1999, BellSouth requested the negotiation of a new interconnection agreement, and proposed a starting point for negotiations between the Parties. The Parties agreed that these negotiations would be deemed to have started on July 1, 1999. The Parties have agreed to operate under the terms of their existing interconnection agreement until a new interconnection agreement is approved.

On December 7, 1999, BellSouth filed a petition for arbitration with the Authority, which initiated this proceeding. BellSouth's petition set forth only ten disputed issues, but indicated that Intermedia had raised several other issues prior to the expiration of the arbitration window. Intermedia filed its answer and new matter to BellSouth's petition on January 3, 2000, specifying the 38 additional issues that were in fact outstanding between the Parties at the time BellSouth filed its petition. Pre-filed testimony was filed, and discovery was permitted. A Prehearing Conference hearing was held at the Authority's offices on March 2, 2000, and a Prearbitration Conference Call was held on June 2, 2000. A hearing was held before Chairman Kyle, Director Greer and Director Malone on September 19 and 20, 2000.[1]

Prior to hearing, the Parties worked with the Authority to pare down the original list of issues, eliminating some, and recasting or consolidating others. As of July 18, 2000, when the final Arbitration Issues Matrix was filed with the Authority, the Parties had agreed to close the following 34 issues and subissues: 1, 2(b), 4, 5, 8, 9, 11, 13(b), 14, 15, 16, 17, 18(a), 18(b), 19, 20, 21, 22, 23, 27, 28, 34, 35, 36, 38, 39(e), 40, 41, 42, 43, 44, 45, 46 and 47. In addition, in response to the Authority's request at hearing that the Parties consider further "trimming," compromises were reached on issues 31, 32, 33 and 37. All of the foregoing issues have been put to rest, will not be briefed by the Parties, and need not be considered by the Authority.

In addition, by agreement, certain issues were not fully addressed by the Parties at hearing, but were reserved for briefing. These issues include issue 2(a) (reciprocal compensation payments for dial-up ISP traffic) and issue 48 (performance measures). In the former case, the Parties recognized that the ISP traffic/reciprocal compensation traffic issue has been addressed

[1] Also in attendance were Mr. Gary Hotvedt, the prearbitration officer for the proceeding, (continued...)

extensively by the Authority in prior cases, and it served no useful purpose to cross-examine witnesses at hearing in this proceeding. *See* Tr. Vol IA at 11. Intermedia also waived its right to cross-examine BellSouth's Performance Measures witness Mr. David. Coon on issue 48 (and BellSouth's witness Ms. Cynthia Cox on her portion of that issue) in the interest of expediting the proceeding. Tr. Vol IC at 3, 7.

Intermedia is also mindful of the fact that the Authority may consider that it has already made its intentions sufficiently clear with regard to certain of the other issues still outstanding between the Parties. *See* Tr. Vol IA at 9-19 (Questioning by Director Greer). Intermedia will therefore respectfully attempt, insofar as is possible, to refrain from going over old ground in this brief, paying particular attention to the Authority's prior orders as they apply to the issues still in controversy.

C. SUMMARY OF INTERMEDIA'S POSITIONS

As noted above, the Parties have resolved a substantial number of the original 48 issues presented to the Authority for arbitration. Consequently, at this time, only approximately fourteen issues (including sub-issues) remain open. These issues include most prominently the following:

- Payment of reciprocal compensation for dial-up ISP traffic.
- Applicable reciprocal compensation rate to be paid to Intermedia.
- Applicable collocation intervals.

(...continued)
and Mr. Jerry Bennett of the Authority's Staff.

- Virtual-to-physical collocation conversion.
- Access to combinations of unbundled network elements ("UNEs"), including Enhanced Extended Links ("EELs"), at cost-based rates, and conversion of special access service to EELs.
- Access to unbundled packet switching capabilities.
- Access to frame relay UNEs, including User-to-Network Interface ("UNI"), Network-to-Network Interface ("NNI"), and Data Link Control Identifiers ("DLCIs") at specified Committed Information Rates ("CIRs"), at cost-based rates.
- Assignment of numbering resources (*i.e.*, NPA (Numbering Plan Area)/NXXs).
- Establishment of Points of Interconnection ("POIs").
- "Homing" of NPA/NXXs and routing of traffic.
- Appropriate charges for frame relay interconnection trunks and frame relay UNEs, including but not limited to, NNI ports and DLCIs at CIRs.
- Appropriateness and enforceability of Performance Measures applicable to BellSouth

Intermedia respectfully submits that the evidence in this proceeding demonstrates that Intermedia is entitled to receive reciprocal compensation at the tandem interconnection rate for use of its Northern Telecom DMS-500 switches and glass fiber network in transporting and terminating local calls (including ISP-bound calls from BellSouth customers) to its customers. The record also shows that BellSouth's proposed collocation provision intervals, and policies with respect to the conversion of virtual collocation to physical collocation are inherently unreasonable, and should be reformed to comply with applicable law.

The evidence also reflects that BellSouth's refusal to provide access to packet switching capabilities (including frame relay elements) at cost-based rates, is inconsistent with its statutorily mandated obligations. Similarly, BellSouth's attempts to control the manner in which Intermedia assigns its numbering resources, establishes its calling areas, and interconnects with BellSouth for the purpose of sending and receiving traffic, are discriminatory in their application to Intermedia, and untenable.

Finally, BellSouth's proposal that the Authority adopt its proposed Performance Measures without meaningful enforcement mechanisms should be rejected outright in view of the Authority's experience and hard work in studying the Performance Measures issues in prior cases. Accordingly, the Authority should resolve each and every issue in this arbitration proceeding in favor of Intermedia.

Although this Authority is tasked with the resolution of a number of complex issues in this arbitration proceeding, the Authority is not without guidance from its prior rulings, as well as the rulings of the FCC, the courts, and other state regulatory commissions. Indeed, many of the issues in dispute in this proceeding have been directly addressed and resolved in favor of competitive carriers in other contexts or proceedings.

Separate and apart from the body of law that supports Intermedia's position on each disputed issue, the public interest in encouraging the development of the local exchange market in Tennessee also warrants a pro-competitive result. That principle is at the heart of the market-opening provisions of the Communications Act and should guide the Authority as it wrestles with the competing policy arguments presented by the Parties.

II. ARGUMENT

A. [ISSUE NO. 2(a)] RECIPROCAL COMPENSATION SHOULD APPLY TO CALLS ORIGINATED BY BELLSOUTH AND TRANSPORTED AND TERMINATED BY INTERMEDIA TO ITS ISP CUSTOMERS, AND VICE VERSA.

The issue here is whether calls that are originated by either Party and destined to the ISP customers of the other Party should be subject to reciprocal compensation. Applicable law, as well as public policy considerations, dictate that reciprocal compensation should be paid for such calls.

Sections 251(b)(5), 251(c)(2), and 252(d)(2) of the Communications Act establish the obligation of incumbent local exchange carriers to interconnect with competitive carriers and to provide reciprocal compensation for the exchange of local traffic. The Communications Act defines the interconnection obligations of incumbent local exchange carriers in very broad terms and does not exclude local calls to ISPs from interconnection and reciprocal compensation obligations. Calls to ISPs are typically local calls and, hence, are subject to reciprocal compensation.

From a public policy and equity standpoint, compensating Intermedia (and for that matter, BellSouth) for the transport and termination of ISP-bound calls makes eminent sense because Intermedia is providing a valuable service to BellSouth and its customers by completing their calls. Without Intermedia's participation, those BellSouth-originated calls will never reach their intended destination. *See* Jackson Direct Testimony at 11.

Moreover, reciprocal compensation for ISP-bound calls is appropriate because "a contrary determination would result in a class of calls for which no compensation is provided" to Intermedia. Jackson Direct Testimony at 14. This result is, of course, inconsistent with the

compensation scheme articulated in the Communications Act, which contemplates that carriers will receive compensation for the use of their respective networks through either access charges or reciprocal compensation. *Id.* In addition, without compensation for the use of their networks, competitive local exchange carriers ("CLECs") will be discouraged from serving ISPs as they begin to find that the cost of offering service to ISPs becomes increasingly prohibitive. *Id.* The potential anticompetitive impact of denying CLECs reciprocal compensation for the transport and termination of ISP-bound traffic has been recognized, time and again, by state commissions that have looked beyond the ILECs' self-serving arguments. The Maryland Public Service Commission's statements are particularly noteworthy:

> We are very concerned that the adoption of BA-MD's position will result in CLECs receiving no compensation for terminating ISP-bound traffic. Such an effect will be detrimental to our efforts to encourage competition in Maryland. No one disputes that local exchange carriers incur costs to terminate the traffic of other carriers over their network. In the absence of finding that reciprocal compensation applies, a class of calls (ISP traffic) will exist for which there is no compensation.[2]

Apart from the foregoing considerations, and perhaps most important in this proceeding is the fact that this question is not a case of first impression in Tennessee: the precise same issue has been examined in considerable detail by this Authority, and a decision has already been reached. Even BellSouth's witness agrees that this Authority has determined in prior arbitrations involving Nextlink, ICG, Time Warner and ITC^DeltaCom that in Tennessee, BellSouth is required to pay reciprocal compensation to CLECs for ISP-bound calls "on an interim basis until the FCC issues rules establishing an inter-carrier compensation mechanism for such traffic." *See*

Cox Direct Testimony at 11.

One might well question in these circumstances what the Parties are doing before this Authority attempting to litigate an issue that has already been definitively determined. In truth, Intermedia is an unwilling participant in this duplicative exercise: despite this Authority's clearly articulated position, the issue was raised by BellSouth in its Petition, and Intermedia has little choice but to mount an opposition. At least the Parties agreed not to address this issue at the hearing, saving it for their briefs.

Although BellSouth is aware that its arguments have already been rejected by the Authority, it "respectfully disagrees with the Authority's prior decisions on this issue," Cox Direct Testimony at 11, and insists on re-asserting in this proceeding the same old arguments it made – and lost – before. For example, BellSouth's witness Cox asserts that ISP traffic is "access service, which is clearly not local traffic." *Id.* at 7. BellSouth also contends that this issue may not be arbitrated by this Authority, since it is in the exclusive jurisdiction of the FCC. *Id.* This last revelation doubtless comes as some surprise to the Authority, which has already seen fit to arbitrate this issue on several occasions.

Although BellSouth grudgingly acknowledges the Authority's prior rulings on this issue, BellSouth seeks to undercut them to some degree by requesting that the Authority "clarify" its decisions to specify "that payments will be *trued-up on a retroactive basis* once the FCC establishes its mechanism." *Id.* (emphasis supplied). At the hearing, BellSouth's witness Cox admitted that the Authority did not include any such true-up requirement in its prior orders, Tr.

(...continued)
[2] *In the Matter of the Complaint of MFS Intelenet of Maryland, Inc. Against Bell Atlantic-Maryland, Inc. for Breach of Interconnection Terms and Request for Immediate Relief,* (continued...)

Vol IC at 22. When asked in cross-examination just exactly how the Authority could "clarify" something that was never included in its orders at all, Ms. Cox refused to admit that the true-up proposal is something new unilaterally urged by BellSouth. *Id.* Instead, Ms. Cox attempted to recast BellSouth's initiative by opining that the Authority probably *meant* to include a true-up requirement, but somehow *forgot* to do so. *Id.*

Intermedia, on the other hand, takes the Authority at its word, and considers that if the Authority has determined that reciprocal compensation must be paid by both Parties on ISP-bound traffic pending a ruling by the FCC, that is simply how it will be done in Tennessee. And if the Authority did not include a "retroactive true-up" mechanism, it was intentional and not accidental or neglectful. Although the Authority must of course be the final arbiter of what it *meant to say*, Intermedia does not see any evidence that a "clarification" along the lines proposed by BellSouth is warranted. In fact, a retroactive true-up does not make much sense in this case, because it implies that the compensation exchanged by the Parties is inappropriate and must be "recaptured." However, compensation for ISP-bound calls is entirely appropriate, since it is sanctioned by the Authority, is expressly allowed by the FCC, and is not prohibited by any binding court decision.

In fact, the most recent court decisions are supportive of payment of reciprocal compensation for ISP-bound traffic, underscoring the correctness of the approach taken by this Authority. On March 24, 2000, the United States Circuit Court of Appeals for the District of Columbia Circuit issued an order (the "*ISP Remand Order*") vacating the FCC's February 26,

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(...continued)
Case No. 8731, Order No. 75280, at 17 (rel. June 11, 1999).

1999 *Declaratory Ruling* in Common Carrier Docket No. 96-98.[3] The *Declaratory Ruling* was the only definitive FCC pronouncement on the question of whether dial-up calls to ISPs were local or interstate in jurisdiction. Without re-arguing the obvious at great length, suffice it to state that the *Declaratory Ruling* was the single most crucial underpinning to BellSouth's argument that it should not be compelled to pay reciprocal compensation for such calls (since, if they were mostly jurisdictionally interstate, they could not be local). In fact, there is little else available on which to hang BellSouth's argumentative hat, since historically both the FCC and the overwhelming number of states have always treated these calls as local, and subject to reciprocal compensation. The *Declaratory Ruling* was not perfect from the ILECs' point of view, however, since it also stated that, pending a federal rule setting compensation, the states were free to fashion compensation schemes for these calls. In fact, nearly all states, including Tennessee, took the FCC at its word, and, as authorized by the *Declaratory Ruling,* continued to treat dial-up ISP calls as local and subject to reciprocal compensation.

In the *ISP Remand Order*,[4] the Circuit Court remanded the *Declaratory Ruling* back to the FCC for its glaring lack of "reasoned decision-making." In deciding whether ISP-bound traffic is "local," the FCC looked at whether such traffic is jurisdictionally interstate or intrastate. The FCC applied the so-called "end-to-end" analysis, and found that most ISP-bound traffic is jurisdictionally interstate, on the theory that the termination points of Internet traffic are usually located in a different state or country from the end-user subscriber. The Circuit Court did not

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3 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, , Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689 (1999) (*Declaratory Ruling*).

reject this "end-to-end" analysis for purposes of establishing jurisdiction, but held that the analysis has no relevance to the question of whether ISP-bound traffic is "local" for reciprocal compensation purposes. Put another way, even if ISP-bound traffic is considered to be jurisdictionally interstate, the call from the end-user subscriber to the ISP still could be "local" traffic and thereby qualify for reciprocal compensation under Section 251(b)(5) of the Communications Act.

The Circuit Court's forceful vacation of the *Declaratory Ruling*, and its very persuasive rejection of the application of the "end-to-end" rationale underlying its conclusion, essentially kicks the chair out from under BellSouth's position. And, to add insult to injury, the *ISP Remand Order* was itself followed up in a matter of days by another significant federal decision, this one from the Fifth Circuit Court of Appeals,[5] affirming once again that the right thing to do, at least until the FCC says otherwise, is to treat dial-up ISP calls as local for reciprocal compensation purposes. As Intermedia's witness Carl Jackson notes in his Direct Testimony:

> Notably, the [Fifth Circuit] Court stated that even if the FCC, on remand from the Court of Appeals for the D.C. Circuit, concludes that ISP dial-up calls are jurisdictionally interstate, its analysis regarding the jurisdiction of a state commission to deem such calls "local" for reciprocal compensation purposes will not be affected.

Jackson Direct Testimony at 10-11.

In light of these recent developments, Intermedia requests that the Authority find, as it has in prior cases, that the Parties should pay reciprocal compensation to each other on ISP-

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[4] *See Bell Atlantic Cos. v. FCC*, Nos. 99-1094, *et al.* (decided Mar. 24, 2000) (*ISP Remand Order*).

[5] *See Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas,* No. 98-50787 (rel. March 30, 2000).

bound traffic on an interim basis, pending action by the FCC. No retroactive true-up mechanism should be included, however, for the reasons stated above, and because the inclusion of such a mechanism would essentially second-guess the FCC's approach before it is even revealed.

Finally, the Authority should be aware that, due to the way BellSouth deliberately structures its interconnection agreements, a call *must be defined as "Local Traffic"* if it is to receive reciprocal compensation. The *only way* to obtain reciprocal compensation for calls to ISPs given the structure of BellSouth's agreement is to include them explicitly in the *definition* of "Local Traffic." For this reason, neither the definition of "Local Traffic" contained in its proposed interconnection agreement, nor its "new" definition of "Local Traffic" appearing for the first time as part of Ms. Cox's direct testimony in this proceeding (*see* Cox Direct Testimony at 5-6) is congruent with the Authority's determinations on this issue. Intermedia expressly rejects both definitions and submits that, as part of its ruling on this issue, the Authority should require the Parties to arrive at a new definition of "Local Traffic" that allows for the payment of reciprocal compensation for ISP-bound traffic on an interim basis, pending an FCC ruling.

In sum, Intermedia's position on Issue No. 2(a) is simple: this issue has already been decided in Tennessee, and since the FCC has not determined otherwise, Intermedia is just as entitled to be compensated for ISP-bound calls as Nextlink, Time Warner, ICG, ITC^DeltaCom or any other CLEC in Tennessee. Intermedia is not looking for any special treatment, but resists BellSouth's attempts to deny Intermedia the same type of compensation that it pays to other competitive carriers in accordance with the Authority's rulings.

B. [ISSUE NO. 3] INTERMEDIA FULLY SATISFIES THE REQUIREMENTS OF FCC RULE 51.711(a)(3) AND IS THEREFORE ENTITLED TO RECEIVE RECIPROCAL COMPENSATION AT THE TANDEM INTERCONNECTION RATE.

This issue is at essence the issue of whether BellSouth will be allowed to pay Intermedia reciprocal compensation at the lower "end office" rate or required to pay the somewhat higher "tandem interconnection" rate. Because the Parties exchange a great deal of traffic, the outcome of this issue can have a significant financial effect on the Parties' dealings. If BellSouth prevails on this issue, it can compensate Intermedia at a lower, end office rate for BellSouth customer calls terminated on Intermedia's network, while claiming the higher, tandem interconnection rate for most if not all calls originated on Intermedia's network and terminated on BellSouth's network.[6] However, if Intermedia wins the issue, the Parties' reciprocal compensation levels will essentially be on par for most calls.

The outcome of this dispute is governed quite simply by a clearly-stated federal rule promulgated by the FCC. Pursuant to this rule, the *only* thing that Intermedia must do is demonstrate that each of its voice switches in Nashville and Memphis covers a geographic area *comparable to* (but not identical to) that covered by one of BellSouth's tandem switches. *See* 47

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[6] Although BellSouth's official position is that the tandem switching rate must only be paid on calls that actually use tandem switching, *see* Cox Direct Testimony at 13, this is in most cases a pointless distinction, because CLECs such as Intermedia typically interconnect at BellSouth's tandem, and are less likely to utilize direct end-office trunking. Accordingly, with very few exceptions, *every* call originated by Intermedia will traverse BellSouth's tandem, incurring the tandem switching charge. Tr. Vol. IC at 29-30. At base, BellSouth's strategic reason for proposing the so-called "elemental" approach, applying the tandem switching rate on a per call basis (only when the tandem switch is used) is that in doing so it will virtually always be paid at this rate, while a CLEC will virtually never be paid at this rate. But such an approach is inconsistent with the FCC's governing rule, which does not contemplate the payment of the tandem interconnection rate on a "per call" basis or an "elemental" basis, but rather compensates the CLEC at this rate for *all* of its local calls if a certain threshold criterion (*i.e.*, geographic comparability with an ILEC tandem's coverage) is met.

C.F.R. Section 51.711(a)(3). This is simply a factual showing: the Authority has maps submitted by Intermedia showing the actual coverage of its two switches – the area in which these switches actually serve customers at present – and the Authority also has maps of the wire centers served by BellSouth's tandems in Tennessee. Although the Parties were not able to make much headway in comparing their differently scaled and drawn maps with each other at hearing, the Authority is familiar with the geographic areas depicted on each of these maps, and, albeit with some effort, can compare them. Intermedia contends that its maps demonstrate conclusively that each of its two Nortel DMS-500 voice switches serves a geographic area comparable to that served by a single BellSouth tandem switch. The Authority must determine whether it agrees. If the Authority agrees, this is essentially the end of the story for this issue.

The Authority must bear in mind what does *not* need to be shown under law for Intermedia to be entitled to the tandem interconnection rate. First of all, Intermedia does *not* need to demonstrate that it has any particular number of customers in the coverage area. In fact, under cross-examination at the hearing, it is clear that BellSouth's witness had no idea how many customers BellSouth has in each of the geographic areas depicted as being "covered" by its tandems; where customers, if any, are located; what their concentration or dispersal is, or even if in fact there are any customers at all in a particular wire center. Tr. Vol. IB at 41-52; Tr. Vol IC at 6-30.

Perhaps most importantly, Intermedia does *not* need to demonstrate that its Northern Telecom DMS-500 switches perform *the same function* as BellSouth's tandems. FCC Rule 51.711(a)(3) makes no mention of the requirement that a CLEC's switch perform the same, or similar function, as BellSouth's tandem. In cross-examination, Ms. Cox brings in the argument that the so-called "second prong" that must be demonstrated in order to obtain the tandem

interconnection rate is contained in another subpart of Rule 51.711, in particular, 51.711(a)(1). Tr. Vol IC at 46. But the text of Rule 51.711(a)(1) does not in fact specify a "second prong" to the showing necessary to show entitlement to the tandem interconnection rate. In fact, it merely appears to be a definition of "symmetrical rates." That rule reads as follows:

> For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services.

47 C.F.R. Section 51.711(a)(1). BellSouth wants the Authority to "read into" this language the elusive "second prong," *viz.*, that switch functionality must be the same or similar in order for Intermedia to claim entitlement to the tandem interconnection rate. But this subpart says nothing of the sort.

Intermedia submits that it is clear from the way subpart 51.711(a)(3) is written that it is intended to be a "standalone" provision. BellSouth denies that this is the case, and insists that no single subpart of the rule may be read separately, and that all must apply. But this flawed assertion falls flat when the other subpart of Rule 51.711 – 51.711(a)(2) – is examined. This subpart, which deals with situations in which either both parties are incumbent LECs or neither party is an incumbent LEC, obviously *does not apply* to the case at hand. The fact is that the FCC obviously meant each subpart to cover different situations, including 51.711(a)(3), the rule subpart operative in this case. And there is no indication that the FCC intended to include anything other than what it actually included – geographic scope – as a prerequisite for a CLEC obtaining the tandem interconnection rate.

But even if we indulge, for the purpose of argument, BellSouth's assertion that there is a "second prong" to be considered – and Intermedia stresses that such an assertion is squarely

contrary to the plain language of the operative rule – Intermedia clearly satisfies this "second prong." As admitted by Ms. Cox at the hearing, if a second prong were to be considered, the operative question would not be whether Intermedia's switch performs *the precise same function* as BellSouth's tandem, but only whether it performs a *similar* function. Tr. Vol. IC at 48. The Authority can satisfy itself as to this issue simply by looking at Paragraph 1090 of the FCC's First Report and Order in Docket No. 96-98: it is clear that if Intermedia's switch functionality were to be taken into account, the only question would be whether it performs a *similar* function.

And this makes eminent sense, because if Intermedia's network were the same as BellSouth's, and if Intermedia's switching were laid out in precisely the same manner as BellSouth's, there would be no need for all of this verbiage in the FCC's order, or in its rules. Nor would the Parties be arguing this point before the Authority at all, because the correct compensation would be obvious. Taking a step back from the minutiae of this issue, it is manifest that the only reason a separate rule was needed in the first place was to address situations in which a CLEC's technology does not look the same as the incumbent's, but in which the CLEC should nevertheless be entitled to capture the tandem interconnection rate, because its technology – however it works – is performing a *similar* function. This is precisely the situation at hand in this proceeding. It is a matter of record that Intermedia's network is *intentionally different* from that of BellSouth: instead of having several tandem switches with subtending end office switches, Intermedia has a single switch that performs all the necessary functions to aggregate traffic from remote locations and route traffic from the originating caller to the recipient. *See* Jackson Direct Testimony at 18 and 22.

BellSouth also argues that Intermedia's switch cannot be performing a similar function because it does not switch trunk to trunk as do BellSouth's tandem switches. *See, e.g.*, Cox

Direct Testimony at 18. But this is a red herring. There is certainly nothing in any applicable rule or case law that states that a CLEC's switch must switch trunk to trunk in order to entitle the CLEC to obtain the tandem interconnection rate. So BellSouth "goes fishing" for a definition of tandem function that is consistent with the approach it wants to take in this proceeding, and ends up with an entirely inappropriate and inapplicable rule: FCC Rule 51.319. *See* Cox Direct Testimony at 17. As admitted by Ms. Cox, and as the Authority can plainly see for itself, this rule is part of Subpart D of the FCC's rules, entitled "Additional Obligations of Incumbent Local Exchange Carriers," and pertains only to the unbundling obligations of ILECs. *See* Tr. Vol. IC at 50. BellSouth is an ILEC, but Intermedia is not.

In fact, BellSouth's witness was unable to point to any authority in any jurisdiction to support her bare assertion that the definition of the tandem switching unbundled network element has anything whatsoever to do with the inquiry at hand, *viz.*, whether Intermedia is entitled to be paid the tandem interconnection rate under the FCC's rules. Tr. Vol IC at 53-55. Since there is no reason to believe that this provision, applicable only to ILEC unbundling obligations, is linked to a CLEC's reciprocal compensation entitlement, and every reason to think that it is not, BellSouth's improbable argument should be rejected out of hand. The idea that a CLEC must be able to click off all of the attributes of the ILEC's tandem switching capability network element in order to be eligible, under an entirely unrelated rule provision, for compensation at the tandem interconnection rate, is just downright wrong. What happened to the FCC's language about "function similar to" the ILEC tandem? The answer is that BellSouth is trying to replace it with "meeting the precise definition of an ILEC tandem."

The fact is that the FCC said exactly what it intended when it wrote rule 51.711(a)(3), no more, no less: trying to "rope in" all sorts of unrelated issues in an attempt to expand this clear rule beyond its stated bounds is inappropriate and unsupportable.

The Authority should be advised that other BellSouth jurisdictions, including North Carolina and Georgia, have determined that Intermedia's single Nortel DMS-500 voice switches in Raleigh, Charlotte and Atlanta are entitled to be compensated at the tandem interconnection rate under the FCC's rule. So if it were impossible for a CLEC to demonstrate entitlement to the tandem interconnection rate without clicking off all of the attributes of the tandem switching capability unbundled network element, it is somewhat difficult to explain away these decisions in neighboring jurisdictions – jurisdictions in which BellSouth made the same arguments it is making before this Authority. Importantly, the North Carolina Utilities Commission recently determined in an arbitration involving ICG Telecom Group that the so-called "second prong" of switch functionality was not mentioned in FCC Rule 51.711(a)(3) because it is subsumed in the geographic comparability showing, which serves as a proxy for such a showing. In other words, if a competitive carrier is serving a geographic area comparable to that served by an ILEC tandem, it obviously must be performing a similar function because otherwise calls could not be aggregated and directed to their ultimate destinations.

Thus, BellSouth's multifarious arguments are in essence just impermissible attempts to undermine and erode the plain language of the FCC's rule 51.711(a)(3), which requires only a showing of comparable geographic coverage to a single BellSouth tandem. The Authority must make that essential determination in this case based on the maps, and the testimony of the Parties. Even in this instance, however, BellSouth has tried to blur the issues: instead of producing a map of a single tandem that may be compared to Intermedia's switch coverage maps

in Nashville and Memphis, BellSouth has produced all of its local *and access* tandem maps for Tennessee. The only conceivable reason BellSouth would move into evidence map after map showing its local tandem and access tandem coverage areas in parts of Tennessee it knows are irrelevant to the issue at hand is to create confusion, and make it seem that Intermedia's switch coverage is not comparable.

The Authority, however, knows how to separate the wheat from the chaff. After the chaff is cast away, Intermedia contends that the Authority will see for itself that its switch coverage – the only issue properly before the Authority under applicable law – is indeed geographically comparable to that of *a single* BellSouth tandem switch. In addition, to the extent that the Authority considers it relevant, Intermedia's voice switches demonstrably perform functions similar to ILEC tandems – if they did not, calls could not be completed.

In sum, Intermedia has satisfactorily demonstrated that it is entitled to receive reciprocal compensation at the tandem interconnection rate for the use of its Nortel DMS-500 switches and network in Tennessee, and Intermedia respectfully requests that this Authority find in its favor with respect to Issue No. 3.

C. [ISSUES NO. 6, 8, 9] COLLOCATION PROVISION INTERVALS IN THE PARTIES' AGREEMENT SHOULD BE EXPRESSED IN CALENDAR DAYS RATHER THAN BUSINESS DAYS.

This is a straightforward issue. In its proposed language for the Parties' interconnection agreement, BellSouth attempts to stretch its time for performance of its collocation responsibilities (including provisioning of physical collocation, responding to *bona fide* collocation requests and other related transactions) by employing *business* days rather than calendar days, in the same way that a retailer of gasoline might (these days) price its gasoline at $1.99 to create the appearance that the customer isn't really paying two dollars. The use of

business days creates *the deceptive appearance* that BellSouth is responding in writing to collocation applications within 30 days: however, this seemingly innocuous period is really *six calendar weeks*, assuming that there are no intervening holidays. This situation balloons alarmingly with respect to longer periods. For example, the 90 business day turnaround BellSouth wants to feature in the Parties' agreement is really around *four calendar months*. And the 130 day interval for "extraordinary" requests is really *six calendar months.*

In its recent ITC^DeltaCom arbitration decision,[7] the Authority found that a 30-day turnaround for cageless collocation provisioning, and a 60 business day interval for extraordinary situations, was reasonable. Intermedia believes that it would be appropriate to include these intervals in the Parties' agreement as well. In addition, pursuant to the recent FCC Collocation Order,[8] establishing nationally applicable intervals for provisioning collocation, BellSouth should be required to notify Intermedia of space availability within 10 *calendar* days of inquiry, and to provision caged collocation to Intermedia in no more than 90 calendar days after receipt of Intermedia's order. In fact, consistent with the approach taken by the FCC, all of the other business day intervals proposed by BellSouth in the Parties' agreement (in particular, the 30 business day interval for issuance of a comprehensive written response to a bona fide firm order) should be changed to *calendar* day intervals.

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7 *In re: Petition for Arbitration of ITC^DeltaCom Telecommunications, Inc. with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996,* Second Interim Order of Arbitration Award, Docket No. 99-00430 (August 31, 2000).

8 *Order on Reconsideration and Second Further Notice of Proposed Rulemaking* in CC Docket No. 98-147 (August 10, 2000).

D. [ISSUE NO. 7] BELLSOUTH SHOULD BE REQUIRED TO SPECIFY COSTS FOR COLLOCATION SPACE PREPARATION INSTEAD OF USING "ICB" PRICING.

Intermedia has only a limited amount to say on this issue: the Authority should take a close look at the pricing practices of BellSouth in regard to space preparation for collocation. BellSouth's originally proposed language for the Parties' agreement included "ICB" or individual case basis pricing for a number of items associated with collocation space preparation, making it essentially impossible for Intermedia to understand what its costs of collocation are likely to be. In addition, BellSouth's language included seemingly duplicative charges, charges that seemed to have little or nothing to do with the actual cost of preparing the space, and unrealistic and inflexible minimum charges that were imposed regardless of a CLEC's actual usage.

In response to Intermedia's concerns about the use of ICB pricing for space preparation items, BellSouth has proposed that the Parties adopt an entirely new approach, employing space preparation charges based on TELRIC cost studies filed with, but not yet approved by, the Florida Public Service Commission, subject to retroactive true-up. *See* Cox Direct Testimony at 22. and Exhibit CKC-1. As evident from the discussion at hearing (*see* Tr. Vol. ID at 37-51), Intermedia is not able to compare BellSouth's new charges to the old schedule of prices for space preparation, because the discrete elements included in the original space preparation rate table were not present in the new table, or were somehow "blended into" differently-designated charges without explanation. Accordingly, Intermedia has no way of appraising whether this

new proposal is better or worse than the proposal originally offered by BellSouth.[9]

However, it is evident that this offer is better in at least one respect: it specifies prices that formerly were unspecified, and so allows Intermedia to plan its collocation expenses. And, if it turns out that the rates as proposed are too high, they can be trued-up retroactively when this Authority makes its own determination on collocation space preparation rates. In these circumstances, Intermedia is inclined to accept BellSouth's newly-proposed collocation space rate schedule on an interim basis, subject to retroactive true-up. Intermedia continues to believe, however, that specific, segregated TELRIC-based rates for each element of the space preparation should be required, based on Tennessee costs, and encourages the Authority to scrutinize the proposed rates carefully.

E. [ISSUE NO. 10] INTERMEDIA SHOULD BE ALLOWED TO CONVERT ITS VIRTUAL COLLOCATION ARRANGEMENTS TO PHYSICAL COLLOCATION ARRANGEMENTS WITHOUT REQUIRING THE RELOCATION OF ITS EQUIPMENT.

Conversion of virtual collocation arrangements to physical collocation arrangements should not give rise to additional costs, delays, and service interruptions. Intermedia posits that these concerns can be addressed by allowing "in place" conversions of virtually collocated equipment. This means that, when Intermedia elects to convert a virtual collocation arrangement, BellSouth need not move or relocate Intermedia's equipment; rather, BellSouth

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[9] Indeed, despite lengthy discussions at the hearing (*see* Tr. Vol. ID at 45 *et seq.*), the intent of BellSouth's proposed requirement that the rates in Exhibit CKC-1 are offered "in lieu of" ICB rates, and that Intermedia can't request ICB rates if CKC-1 is employed, still seems unclear. Since ICB rates are by their very nature unspecified, it is counter-intuitive to think that Intermedia would request ICB rates (which are potentially unrelated to actual costs) in preference to specified, TELRIC-based rates.

should simply convert it "in place," even if Intermedia's equipment is in the same line-up as BellSouth's equipment.

BellSouth states that it will authorize the conversion of virtual collocation arrangements to physical collocation arrangements "in place" and without requiring the relocation of the virtually collocated equipment, absent extenuating circumstances or technical reasons, where (a) there is no change to the arrangement, (b) the conversion would not cause the arrangement to be located in the area reserved for BellSouth's future use, and (c) the conversion would not affect BellSouth's ability to secure its own facilities. Milner Direct Testimony at 12.

Intermedia does not disagree with BellSouth that it should be able to reserve space for future use, so long as it is reasonable. Consequently, Intermedia is willing to accept the proposition that "in place" conversion of virtual collocation to physical collocation may not be permitted where the conversion would cause the arrangement to be located in the area served for BellSouth's future growth. Intermedia is willing to agree that "in place" conversion will be allowed if (a) Intermedia does not increase the amount of space it occupies, and (b) any changes to the arrangement can be accommodated by existing power, HVAC, and other requirements.

Intermedia disagrees with BellSouth on two things, however. First, BellSouth hinges its commitment to provide "in place" conversion on the absence of "extenuating circumstances" or "technical reasons." Milner Direct Testimony at 12. These conditions are ambiguous. It is not entirely clear what would constitute "extenuating circumstances" in BellSouth's view. Likewise, it is not clear what BellSouth would consider "technical reasons." Because these conditions lack specificity, BellSouth retains the flexibility of expanding the universe of potential "extenuating circumstances" and "technical reasons" to suit its needs. A better approach would be to specify exactly what "extenuating circumstances" and "technical reasons" consist of. Mr. Milner

seemed to have little difficulty doing this at hearing, *see* Tr. Vol IA at 50-53, so there is no apparent reason that it could not be spelled out in the Parties' agreement.

Second, BellSouth suggests in its testimony that a conversion in place of an existing virtual collocation arrangement to a cageless physical collocation should incur the same application fee, and take the same amount of time, as the processing of an entirely new request for physical collocation. Milner Direct at 13-14. This is obviously insupportable. Very few of the tasks associated with processing a physical collocation application apply to the situation in which BellSouth converts an existing virtual arrangement in place. In fact, Mr. Milner admits that only "a very minimal provisioning interval" should apply in such a case. Tr. Vol IA at 53. If the CLEC equipment does not have to be moved, no expenses would be incurred for any of the normal transactions associated with a new application, such as space allocation, HVAC, power feeder, distribution, grounding, and cable racking. All of those issues are already taken care of. In fact, there is very little work for BellSouth to do in the case of a conversion in place, essentially amounting to re-routing of an alarm monitoring circuit. Tr. Vol IA at 53. BellSouth should be required to prove up its costs of virtual conversion in place, and explain why it takes so long and is so unreasonably expensive when it essentially amounts to leaving CLEC equipment where it already is.

Intermedia submits that the Authority should not allow BellSouth to collect the same fees for virtual collocation conversion in place -- something that requires very little work -- as it does for the much more complicated delivery of a cageless collocation arrangement.

The "bottom line" for this issue is that the pricing of virtual conversion should relate logically to the cost of providing it. In most cases, Intermedia submits that virtual conversion may be had in place, without moving any equipment, and the cost associated should be minimal

– a paper change, for the most part. Likewise, it makes no sense for this minimal transaction to take 90 days, because it bears no relationship to the scope of the task required to provisioning a new cageless collocation arrangement. Even the 30 days accepted by the Authority for provisioning of cageless collocation in the ITC^DeltaCom case is too long an interval in these circumstances: Intermedia proposes 7 calendar days for virtual conversions in place.

Finally, the Authority should also examine closely the scope of BellSouth's discretion with regard to allowing virtual conversion in place: unless BellSouth can clearly demonstrate that moving a CLEC's equipment is necessary for safety reasons, the equipment should remain in place.[10] Otherwise, BellSouth has *carte blanche* to impose delays, unnecessary costs, and possible customer service disruption on CLECs attempting such conversions. This anti-competitive leverage should be tempered by Authority oversight.

F. [ISSUES NO. 12 and 13(a)] THE AUTHORITY SHOULD REQUIRE BELLSOUTH TO PROVIDE INTERMEDIA WITH ACCESS TO COMBINATIONS OF UNES, INCLUDING EELS, THAT ARE ALREADY PHYSICALLY COMBINED AND TYPICALLY COMBINED.

The dispute between BellSouth and Intermedia centers around the meaning of "currently combines" in FCC Rule 315(b). BellSouth argues that its obligation under the rule should be limited to providing combinations that currently exist to *serve a particular customer at a particular location*. Cox Direct Testimony at 26. Intermedia's position is that BellSouth should

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10 Frankly, even this "safety reasons" concept seems a little suspect, since in the case of a virtual conversion in place, nothing material has changed: the CLEC equipment is still exactly where it was, doing the same thing, with no additions or subtractions. The only difference that Mr. Milner could identify is that the alarm associated with the equipment will ring in a different place. This hardly seems like a situation in which a valid safety concern could suddenly arise, requiring the relocation of the CLEC equipment. The Authority should view such an assertion with some skepticism, in Intermedia's opinion.

make available combinations, including enhanced extended links, or "EELs," that it already "ordinarily combines" in providing service to the public.

The "equivalent service" to an EEL, combining loop and transport, would be BellSouth's special access tariffed offering. Accordingly, on a practical basis, this is a combination BellSouth routinely provides to customers, and Intermedia is not asking for anything really extraordinary when it seeks a UNE EEL. The only real issue is pricing. The tariffed price for special access is not based on TELRIC costs. If BellSouth were to provide this same combination as a UNE EEL, it would have to do so based on the TELRIC cost associated with that combination. The overwhelming likelihood is that the TELRIC-based pricing of such a combination would be far less than the pricing of BellSouth special access services. That is the crux of this situation: essentially BellSouth wants to preserve some very high, non-cost-based prices for its service offering rather than making it available to Intermedia at a price that is logically related to its cost of provision. The practical effect of this is that when Intermedia wants a UNE EEL to serve a given customer, Intermedia must first order special access for that customer at exorbitant rates, and then apply for conversion of that existing arrangement to a UNE EEL. This extra step is simply wasteful, unnecessary, and a drag on competition – if BellSouth prevails on Issues 12 and 13(a), this is what BellSouth will be protecting: its right to insert expensive, time-consuming and unnecessary steps in the process to hinder a CLEC's service to a customer.

Intermedia is mindful of the fact that the Authority has recently addressed this precise

issue in its arbitration orders issued in *ICG Telecom Group*[11] *and ITC^DeltaCom.*[12] Intermedia reads these orders to require BellSouth to provide combinations such as EELs at UNE prices without the requirement that the combinations already be in existence and in service to a particular customer at a particular location. As the Authority stated in *ITC^DeltaCom:*

> It is appropriate public policy to order BellSouth to provide EELs to DeltaCom based on past and prevailing experience in the telecommunications market. If DeltaCom is unable to get the EELs, it must either install its own switches, trunking and loops or collocate in central offices owned and operated by BellSouth. Either of these options demands that DeltaCom expend a substantial amount of money in the form of fixed or sunk costs. As a result, DeltaCom will be forced to incur a significantly higher cost of providing services per customer than BellSouth, which has a larger customer base over which to spread its fixed and sunk costs.
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> * * * * *
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> Retail customers of Tennessee will greatly benefit if DeltaCom is allowed to obtain combinations of loop and transport in BellSouth's network.
>
> * * * * *
>
> In summary, ordering BellSouth to offer DeltaCom combinations of loop and transport between BellSouth's wire center and the end user is not only within the scope of existing federal rulings but also appropriate public policy. BellSouth should not charge a monopoly price to combine these elements, but the sum of UNE prices.[13]

Despite this seemingly clear intent, BellSouth apparently interprets the Authority's orders as requiring BellSouth to provide UNE combinations and EELs only when they are already combined and in service to a particular customer at a particular location – even though neither

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11 *In re: Petition for Arbitration of ICG Telecom Group, Inc. with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996,* Final Order of Arbitration, Docket No. 99-00377 (August 4, 2000) (*"ICG Telecom Group Order"*).

12 *In re: Petition for Arbitration of ITC^DeltaCom Telecommunications, Inc. with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996,* Interim Order of Arbitration Award, Docket No. 99-0430 (August 11, 2000) (*"ITC^DeltaCom Order"*).

the *ITC^DeltaCom Order* nor the *ICG Telecom Group Order* says anything of the sort. *See* Tr. Vol ID at 52-54. This appears to Intermedia to be a strained and self-serving interpretation of the Authority's words.

Intermedia notes that Georgia Public Service Commission also requires BellSouth to provide UNE combinations, including EELs, to CLECs, that it "ordinarily combines" in its network. In doing so, the Georgia commission saw the wastefulness of allowing BellSouth to insert the aforementioned "extra step" into the process of a CLEC obtaining a UNE EEL, and instead determined that it was a better idea to "cut to the chase." Intermedia believes the interests of the Tennessee public as outlined in the Authority's own words set forth above support this result.

G. [ISSUE NOS. 18, 25, AND 39] THE AUTHORITY SHOULD REQUIRE BELLSOUTH TO PROVIDE ACCESS TO PACKET SWITCHING CAPABILITIES, INCLUDING FRAME RELAY ELEMENTS, AT UNE RATES.

BellSouth has claimed in its testimony that Intermedia and e.spire sought to have packet switching unbundled, but that this proposal was rejected by the FCC in the UNE Remand Order. Cox Direct Testimony at 31. However, at hearing, Ms. Cox admitted that the FCC's Order concerned the broader issue of whether packet switching should be federally mandated on a national basis. Tr. Vol. ID at 54. Ms. Cox was unable to state whether any information specific to Tennessee was considered by the FCC in making its ruling. Tr. Vol ID at 55. So the question of whether CLECs in Tennessee are impaired by BellSouth's refusal to offer packet switching on an unbundled basis is an open question.

(...continued)
[13] *ITC^DeltaCom Order* (slip op. at 29-30).

As admitted by Ms. Cox at the hearing, the FCC has explicitly found that an ILEC must provide nondiscriminatory access to unbundled packet switching capability where: (a) the ILEC has deployed digital loop carrier ("DLC") systems, including integrated digital loop carrier or universal digital loop carrier systems, or has developed any other system in which fiber optic facilities replace copper facilities in the distribution section; (b) there are no spare copper lops capable of supporting xDSL services the requesting carrier seeks to offer; (c) the ILEC has not permitted a requesting carrier to deploy a DSLAM in the remote terminal, pedestal or environmentally controlled vault of other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points; and (d) the ILEC has deployed packet switching capability for its own use. *See* Tr. Vol. ID at 55-58. *See also* 47 C.F.R. § 51.319(c)(5).

Ms. Cox agrees that, although BellSouth asserts in its testimony that it has taken the necessary steps to ensure that BellSouth is not required to unbundle packet switching, in fact probably *two or three out of four* of the aforementioned conditions ARE satisfied. Tr. Vol ID at 58. So, even by BellSouth's own admission, we are 50-75% of the way down the track towards mandatory unbundling of packet switching in Tennessee. The *principal thing* that stands in the way is BellSouth's assertion that it allows CLECs to deploy DSLAMs on request in remote terminals, pedestals or CEVs. *See* Tr. Vol ID at 58. If in fact BellSouth does not permit this, mandatory unbundling of packet switching would be required by the rules.

But on examination this so-called "third condition" is a very slim reed in application. For one thing, Ms. Cox could not testify that BellSouth has *ever* provided collocation of CLEC DSLAM at any remote terminal, pedestal, CEV or cabinet in Tennessee. *See* Tr. Vol ID at 58. It seems that BellSouth's compliance with the third condition that allows it to "opt out" of

providing packet switching on an unbundled basis in Tennessee is more theoretical than real. BellSouth apparently is "prepared to allow" CLECs to collocate DSLAMS in remote terminals, but there is absolutely no evidence to imply that such collocation is possible anywhere in Tennessee. So BellSouth's apparent position is that its *willingness alone* is sufficient to satisfy the third condition, and opt out of mandatory provision of unbundled packet switching, even if there is no way a CLEC can collocate its DSLAM anywhere in the state.

This is not a sensible reading of the FCC's rules. The FCC obviously had in mind that the ILEC would not have to offer packet switching on an unbundled basis if the CLEC had other alternatives. But if those other alternatives are entirely theoretical, but are absent practically, this would not seem to answer the FCC's concerns.

In addition to finding that BellSouth is obligated to provide packet switching on an unbundled basis in connection with the FCC's rules, this Authority also has the inherent power to order BellSouth to provide packet switching, including frame relay services, on an unbundled basis. Tr. Vol ID at 61. The FCC has expressly found that "section 251(d)(3) provides state commissions with the ability to establish additional unbundling obligations, as long as the obligations comply with subsections 251(d)(3)(B) and (C) of the Communications Act." *Third Report and Order*, at 73, ¶ 153. This applies to packet switching and frame relay network elements. *Id.* at 145, ¶ 312.

Specifically, BellSouth should be required to provide unbundled access, at cost-based rates, to the following frame relay UNEs: User-to-Network Interface,[14] Network-to-Network

[14] A UNI port provides connectivity between the end user and the frame relay network.

Interface,[15] and Data Link Control Identifiers at specified Committed Information Rates.[16] Likewise, consistent with its interconnection obligations under the Communications Act, BellSouth should be required to provide interconnection trunks between its frame relay network and Intermedia's frame relay network, at cost-based rates.

H. [ISSUE NO. 26] INTERMEDIA SHOULD BE ALLOWED TO ASSIGN ITS NUMBERING RESOURCES AND ESTABLISH ITS CALLING AREAS AS IT SEES FIT.

As established at hearing, this issue "boils down" to whether Intermedia can be compelled in the Parties' agreement to design its network and use its numbering resources so that BellSouth can always be provided information about whether a call from a BellSouth customer to an Intermedia customer is a toll call or a local call, based on the *physical location* of the Intermedia customer. *See* Cox Rebuttal Testimony at 29-30. BellSouth is essentially stating that it is unwilling to rate calls based on their NPA/NXX codes, but instead wants to know the physical location of the call recipient so that it can charge its customers a toll, even if the NPA/NXX is otherwise local to them.

BellSouth does not dispute that the language BellSouth seeks to impose on Intermedia pursuant to this issue 26 was not in the Parties' prior agreement. Tr. Vol. IB at 14. At base, this is language that BellSouth is seeking to impose that was not a part of the Parties' dealings before, and it is not supported by any identifiable precedent.

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15 An NNI port provides carrier-to-carrier connectivity to the frame relay network.

16 DLCIs at CIR define the path and capacity of virtual circuits over which frame relay frames travel across the frame relay network.

Intermedia's principal difficulty with the restrictive language that BellSouth seeks to impose in the Parties' agreement is that it is entirely one-sided. If adopted in the Parties' agreement, it would prevent Intermedia, *but not BellSouth*, from assigning NPA/NXXs both inside and outside of the BellSouth local calling area in which the NPA/NXXs are "homed." This would be particularly unfair in light of the fact that, for many years, BellSouth has been offering foreign exchange service –*precisely the same service* that BellSouth is attempting to make impossible for Intermedia by the imposition of the language it proposes for this issue. *See* Tr. Vol. IA at 66-69. Foreign exchange service is essentially defined by its ability to make a BellSouth customer "appear" to be located within a rate center, based on its NPA/NXX code, while residing elsewhere physically. *Id.* If an Intermedia caller makes a call to a BellSouth foreign exchange customer with an NPA/NXX in the same rate center, both the Intermedia customer and Intermedia itself are under the impression that the call is a local call, although that BellSouth foreign exchange customer may in fact be physically located far outside the local calling area.

Despite BellSouth's insistence that Intermedia provide BellSouth information concerning the ultimate destination of apparently local calls placed by BellSouth's customers, BellSouth's witness is unable to say whether BellSouth has ever given Intermedia any comparable information concerning whether a given NPA/NXX is held by a foreign exchange customer or a customer residing physically within the rate center to which its codes relate. Tr. Vol. IA at 74. In fact, neither Mr. Milner nor Ms. Cox was able to tell this Authority whether BellSouth has been charging Intermedia reciprocal compensation for calls to foreign exchange customers from Intermedia customers outside the rate center in which that customer physically resides. Tr. Vol. IA at 70-71 and Vol. ID at 65-66. Ms. Cox, however, maintained that this would be an improper

practice. Tr. Vol. ID at 67-68. Pursuant to an information request at hearing, however, BellSouth later submitted a writing to the Authority admitting that it has been charging Intermedia and other CLECs reciprocal compensation for calls made to BellSouth foreign exchange customers. Curiously, and despite all of BellSouth's rhetoric in this proceeding, BellSouth did not commit to ceasing this supposedly "inappropriate" practice unless ordered to do so by the Authority.[17]

At root, this is a case of "do what we say, not what we do." BellSouth's proposed language in the Parties' agreement demonstrates that it wants to be able to continue to offer Intermedia's customers toll-free calls to BellSouth's Internet Service Providers or other foreign exchange customers on BellSouth's network that would otherwise be considered toll calls if the physical location of the ISP were considered, probably collecting reciprocal compensation for such calls, while denying Intermedia the same right. When asked this question outright in cross-examination, however, Ms. Cox allowed that it would not be appropriate for BellSouth to restrict Intermedia from offering a type of service that BellSouth itself offers. Tr. Vol. ID at 75.

This is entirely unfair, but the solution is straightforward. The language proposed by BellSouth for the Parties' agreement, which is unsupported by any authority and, insofar as we know, not agreed to by anyone voluntarily, needs to be stricken in its entirety. The Parties did fine without this language in their first agreement, and nothing really has changed that would require such a modification. In fact, as noted by BellSouth witness Milner, BellSouth's switches are set up to distinguish between local and toll calls based on their NPA/NXXs, not on the geographical location of the recipient of the call. Tr. Vol. IA at 61. And from BellSouth's point

17 Letter from Guy Hicks, Esq. to David Waddell in TRA Docket No. 99-00948, dated
(continued...)

of view, when it hands a foreign exchange call off to Intermedia, it incurs the same cost whether the call is routed to someone in the same building, or to someone located on the fringe of civilization: BellSouth still simply takes the call to Intermedia's point of presence and hands it off, either way. Tr. Vol. IA at 64-65. If the ultimate recipient is next door, Intermedia hauls it there at Intermedia's expense. If the ultimate recipient is in a remote location, Intermedia hauls it there at Intermedia's expense. The same scenario applies when an Intermedia customer calls a BellSouth foreign exchange customer.

The Parties should simply continue the customary industry practice of rating calls based on their NPA/NXX, not on the physical location of the recipient. This is a practice both Parties have observed from the beginning, and for good reason. In the alternative, the Authority could consider banning BellSouth's foreign exchange service in Tennessee. Anything else would not produce a level playing field.

Allowing Intermedia to assign its NPA/NXXs across multiple rate centers is beneficial for another reason. It is beyond question that the United States is facing a major numbering exhaust problem. A contributing factor to this numbering resource exhaust is the fact that each carrier must be assigned an NPA/NXX in each rate center. Allowing Intermedia to assign its NPA/NXXs across multiple rate centers potentially could help alleviate numbering resource problems in the United States and, more particularly, in Tennessee. Jackson Direct Testimony at 60.

(...continued)
October 4, 2000.

I. [ISSUE NO. 29] INTERMEDIA SHOULD NOT BE REQUIRED TO ESTABLISH POINTS OF INTERCONNECTION AT EACH AND EVERY BELLSOUTH ACCESS TANDEM IN THE EVENT IT CHOOSES MULTIPLE TANDEM ACCESS.

At hearing, BellSouth's witness Milner clarified that the Parties' prior agreement did not contain the requirement that Intermedia establish a POI at each BellSouth access tandem in the event it chooses the MTA option. Tr. Vol IB at 14-16. No statute, rule or established industry practice requires BellSouth to insert this language. *Id.* at 20-21. In essence, the additional requirements for establishment of POIs is shifting the burden and expense of interconnection almost entirely to Intermedia, and overlooking the fact that BellSouth technically really only needs Intermedia to connect at one point in order to route Intermedia's traffic all over its network. The 1996 Act allows a CLEC to interconnect at any technically feasible point, and does not require a CLEC to interconnect "at all technically feasible points that are convenient for the ILEC." BellSouth's witness Milner indicated that he is not aware of any difficulty between the Parties in completing calls under the prior agreement (which did not contain this restrictive requirement, Tr. Vol IB at 18). Obviously such an interconnection scheme is not technically necessary; it is just a matter of BellSouth's convenience.

BellSouth's implication that Intermedia's calls cannot be completed properly without this requirement is entirely inaccurate: in fact, if Intermedia's calls are not completed, it is because BellSouth intentionally places obstacles in the way to avoid having to transport Intermedia's calls from point to point in BellSouth's network. Intermedia should be able to interconnect at ONE access tandem, and be able to route traffic to all access tandems and the end offices they subtend without extra charges.

But instead of carrying Intermedia's traffic from point to point on its network, BellSouth instead wants Intermedia to go to the extra trouble and expense of interconnecting at each of BellSouth's access tandems. In fact, Mr. Milner admitted that, in a situation such as Nashville, where BellSouth has two access tandems, if Intermedia interconnects at only one of the tandems, BellSouth would not (absent Intermedia's election of an expensive MTA option) carry traffic from one tandem to another. Tr. Vol IB at 16. Intermedia would be limited to serving customers assigned to end offices subtending that single tandem. *Id.* at 26. This is not required by, or supported by, applicable law: it is just a cost-shifting attempt on BellSouth's part, but it is squarely inconsistent with the language of the 1996 Act, and should be rejected by the Authority.

In sum, the Authority should ask itself whether, when the 1996 Act was written, was it the intention that a competitive carrier would only get access to a part of the incumbent's network when it interconnects at any technically feasible point, or is it more likely that the intent was that access to the entire network would be provided? BellSouth's tandems in Nashville are clearly connected to each other: why should it cost a CLEC extra to route traffic between them. Carried out to its most extreme manifestation, this would encourage ILECs to partition their networks in such a way that *everything* costs extra. Looking at the "flipside" of this coin, Intermedia is not aware of any competitive carrier partitioning its network and charging the incumbent extra fees for hauling traffic around its network. Traffic is simply handed off to the competitive carrier, and the expectation is that it will somehow get where it is supposed to go. Why should this not also be the case with BellSouth?

J. [ISSUE NO. 30] THERE IS NO NEED TO REQUIRE INTERMEDIA TO DESIGNATE A "HOME" LOCAL TANDEM FOR EACH ASSIGNED NPA/NXX AND TO ESTABLISH POINTS OF INTERCONNECTION TO EACH ACCESS TANDEM WHERE NPA/NXXs ARE HOMED.

This issue is at base very similar to the preceding one. Although BellSouth wants this Authority to believe that the Parties will not be able to complete their calls without the inclusion of this language in the Parties' agreement, nothing is further from the truth. In fact, the Parties have been operating in Tennessee for some time without including this language, and have not had problems completing calls. In fact, it is only BellSouth's *preference* that BellSouth is seeking to include as a mandatory requirement in the Parties' agreement.

There does not seem to be any disagreement on the fact that it is technically possible for Intermedia to interconnect only at one point, and yet route its calls throughout all of BellSouth's network – if and only if Intermedia elects BellSouth's multiple tandem access arrangement. Tr. Vol. IB at 22-23. But from Intermedia's point of view, BellSouth is merely attempting to restrict Intermedia's federally-mandated interconnection rights by denying full access to BellSouth's network, unless Intermedia additionally chooses to accept, and pay for, an expensive option. This is not consistent with the 1996 Act, and BellSouth should not be allowed to impose such conditions.

The solution to this problem is simple: the objectionable language in the Parties' agreement, which was not a part of the prior agreement, and has no support anywhere in law or sound policy, should be stricken in its entirety. This will not have any effect on the Parties' ability to complete calls – all it will do is prevent BellSouth from impermissibly shifting costs to Intermedia.

K. [ISSUE 48] THE AUTHORITY SHOULD CONSIDER ADOPTION OF ADDITIONAL MEASURES AND ENFORCEMENT PROVISIONS TO ENSURE BELLSOUTH'S PERFORMANCE.

This issue began its life as Intermedia's request that the Authority consider the adoption of the Texas Performance Measures Plan in whole or in part for the purpose of ensuring that BellSouth functions efficiently and in good faith in its transactions with CLECs. From at least Intermedia's point of view, the issue has mutated somewhat over time.

At this point, Intermedia wishes the Authority to consider only three things with respect to performance measures applicable to the Parties' interconnection agreement. First, no matter what measurements are adopted, Intermedia submits that they are essentially meaningless without a self-executing mechanism of enforcement that includes penalties that are sufficiently stringent to give BellSouth a genuine incentive to refrain from anticompetitive delays, and unacceptable performance. BellSouth's enforcement "solution" involving bringing complaints before this Authority for expedited resolution is not an effective approach, and it is one that is certain to clog the Authority's dockets with all manner of issues that could be resolved far more simply by built-in enforcement mechanisms.

Second, Intermedia generally concurs with the approach taken by the Authority in the recent DeltaCom case, which is essentially to pick the best ideas from competing sources, and synthesize a final result. Intermedia would be satisfied with taking this approach for the Parties' agreement in lieu of applying the separate Texas standards.

Third, and last, Intermedia would like to call this Authority's attention to the glaring lack of any performance measures relating directly to provisioning of frame relay interconnection trunks or other elements related to frame relay. To the extent that BellSouth's performance with respect to these transactions is measured at all, it is "buried" so deep in other measurements that

for all practical purposes there are no standards applicable to BellSouth's performance in this arena. Since Intermedia's business is so heavily dependent on frame relay, this has a particularly adverse impact on Intermedia. In addition, it should be noted that these types of data service offerings are really the wave of the future, and the importance of data service-specific performance measures to the development of robust competition cannot be overestimated.

III. CONCLUSION

Intermedia and BellSouth have negotiated in good faith to arrive at a mutually acceptable interconnection agreement. Yet, a number of issues remain unresolved. These issues involve BellSouth's fundamental obligations under the Communications Act. Intermedia requests only that BellSouth abide by its statutorily mandated duties. Because Intermedia's requests are properly and substantially grounded in law and sound public policy, the Authority should rule in favor of Intermedia on each and every open issue in this proceeding.

Respectfully submitted,

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ITS ATTORNEYS

Dated: November 8, 2000

Certificate of Service

The undersigned hereby certifiesthat on this the 8th day of November, 2000, a true and correct copy of the foregoing has been forwarded via U. S. Mail, first-class postage prepaid, to: Guy Hicks, Esq., counsel for BellSouth Telecommunications, Suite 2101, 333 Commerce Street, Nashville, TN 37201.

H. LaDon Baltimore