

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION CONCERNING THE PROPRIETY	)	
OF INTERLATA SERVICES BY BELLSOUTH	)	CASE NO.
TELECOMMUNICATIONS, INC., PURSUANT TO	)	2001-105
THE TELECOMMUNICATIONS ACT OF 1996	)	

**BELLSOUTH’S POST-HEARING BRIEF**

BellSouth Telecommunications, Inc. (“BellSouth”) respectfully submits its Post-Hearing Brief in this proceeding:

**I. INTRODUCTION**

Based on the substantial record developed in this proceeding, BellSouth urges the Commission to adopt:

- BellSouth’s proposed Service Quality Measurements (“SQM”) approved in Georgia for the purpose of determining BellSouth’s compliance with the Section 271 requirements (Exhibit AJV-1) and
- BellSouth’s Kentucky Self-Effectuating Enforcement Mechanism (“SEEM”) (Exhibit AJV-3) to assure the Commission that BellSouth will not “backslide” from its commitments after Section 271 authority is granted.

BellSouth’s SQM and SEEM presented to this Commission (collectively, BellSouth’s “Plan”) include all measures necessary to allow the Commission and the Competitive Local Exchange Carriers (“CLECs”) to monitor BellSouth’s performance and determine that BellSouth is providing nondiscriminatory access to its Operations Support Systems (“OSS”) and to its network.

*The SQM.* BellSouth's proposed SQM is identical to the SQM approved by the Georgia Public Service Commission, based on substantial input from CLECs. This comprehensive plan contains over 2200 measures, all of which have already been incorporated into BellSouth's computer systems, and BellSouth has been reporting Kentucky data using these measures for four months. As further evidence of its usefulness, in addition to Georgia, the Louisiana and Mississippi Commissions have agreed to use BellSouth's SQM to evaluate BellSouth's performance and have determined using those measurements that BellSouth is in compliance with its Section 271 obligations.

BellSouth requests that this Commission adopt these measures for the purpose of evaluating BellSouth's Section 271 application to avoid delay in BellSouth's entry into the long distance market. The changes proposed to the SQM by the CLECs are unnecessary and inappropriate for purposes of evaluating BellSouth's compliance with the Act. First, in most cases, the CLECs' requested measures are duplicative of existing SQM measures. Second, the CLECs seek to expand the performance plan to encompass an unworkable number of measures, which would be impossible to implement. Third, as Georgia, Louisiana, and Mississippi have determined, the SQM is appropriate for assessing compliance with the checklist.<sup>1</sup> Moreover, making the changes to the SQM suggested by the CLECs will cause undue delay of this Commission's consideration of BellSouth's Section 271 application.

*The SEEM.* BellSouth's SEEM is a voluntary, self-effectuating penalty plan similar to those proposed by Verizon and Southwestern Bell in the states where they have been granted Section 271 authority. The purpose of SEEM is to prevent any "backsliding" by BellSouth after it enters the long distance market – the Act does not require BellSouth to subject itself to penalty

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<sup>1</sup> BellSouth believes that the SQM can be improved and suggests that the Commission institute a docket at a later date to consider changes to the SQM on a going-forward basis after additional experience has been gained.

payments to CLECs for performance failures. BellSouth's proposed SEEM – a multi-tiered plan with escalating penalties for continued violations of the standards established by the SQM – is similar to the plan approved in Georgia, but has been improved to address some of the shortcomings identified by BellSouth, CLECs, and the Georgia Commission. SEEM, in contrast to the competing plan offered by the CLECs, recognizes that not all metrics should be treated the same. For example, it applies penalties to those measurements that are truly customer-affecting and offers greater remedies for some measurements than for others. In addition, the statistical methodology proposed by BellSouth is capable of identifying systematic disparate treatment, thereby ensuring that BellSouth provides nondiscriminatory service to all CLECs.

The Commission should reject the CLECs' plan, which provides for excessive payment of penalties from BellSouth to CLECs, even in those circumstances in which BellSouth is providing service at parity. Such a plan will not provide BellSouth with the proper incentives to perform. Moreover, because the purpose of the enforcement provisions of the Plan is to prevent "backsliding" after BellSouth obtains authority to provide interLATA service, the enforcement portion of the Plan should not go into effect until BellSouth obtains interLATA relief in Kentucky.

## **II. THE COMMISSION SHOULD ADOPT THE SERVICE QUALITY MEASUREMENTS, BUSINESS RULES, STANDARDS, AND LEVELS OF DISAGGREGATION PROPOSED BY BELL SOUTH**

### **A. BellSouth's SQM Should Be Used To Evaluate BellSouth's Compliance With Section 271**

BellSouth submits that the SQM set forth in Exhibit AJV-1 to the testimony of Mr. Varner should be approved by this Commission for the purpose of determining BellSouth's compliance with the Section 271 requirements in Kentucky. *See Testimony of Alphonso J. Varner* (May 18, 2001) ("*Varner*"), Exhibit AJV-1. This comprehensive SQM was adopted by

the Georgia Public Service Commission in Georgia Docket 7892-U and includes over 2,200 measurements. *Id.*, Exhibit AJV-1, ii. These measurements are, as Mr. Varner stated, “the result of several years of work with direction provided by state commissions, the FCC and DOJ (Department of Justice) plus input from various CLECs.” *Id.*, 54. This SQM is more than adequate to allow the Commission and the CLECs to monitor BellSouth’s performance and to determine that BellSouth is providing nondiscriminatory service to CLECs in Kentucky. *Id.* Moreover, the state commissions in Mississippi and Louisiana agreed to use the identical SQM for purposes of evaluating Section 271 performance in those states and Florida agreed to use a virtually identical SQM. Tr. Vol. 1, pp. 75-77 (*Varner*); *Final Order, In re: Consideration Of the Provision Of In-Region InterLATA Services By BellSouth Telecommunications, Inc. Pursuant To Section 271 Of TA 96*, Docket No. 97-AD-321, (MS P.S.C. Oct. 4, 2001), 46-47.

Finally, BellSouth already has incorporated Georgia performance measures into its computer systems and has been gathering performance data for Kentucky for 4 months. Tr. Vol. 1, pp. 14-15 (*Varner*). Any additions or modifications to the SQM would require corresponding enhancements to BellSouth’s PMAP data collection and reporting system, which would unnecessarily delay this Commission’s consideration of BellSouth’s Section 271 performance. *Varner*, 63-65. BellSouth, therefore, requests that this Commission follow the lead of the Georgia, Louisiana, and Mississippi Commissions and use BellSouth’s SQM for purposes of evaluating BellSouth’s performance in Kentucky.

**B. The Performance Measurements Proposed By The CLECs Are Unnecessary And Impractical**

The Commission should reject the performance measure changes that the CLECs have advocated in this proceeding. As Mr. Varner testified, “[t]he CLECs propose an absurd number of performance measurements and sub-metrics that go far beyond the most extreme definition of

what is necessary for this Commission to satisfy itself that BellSouth is providing nondiscriminatory performance to the CLECs.” *Rebuttal Testimony of Alphonso J. Varner*, July 30, 2001 (“*Varner Rebuttal*”), 2. Further, “[t]he CLECs’ proposals involve a level of complexity and volume of sub-metrics that would make it virtually impossible to implement in any reasonable timeframe.” *Id.* Ms. Kinard of WorldCom attempts to support the addition of a substantial number of measurements by claiming that they are part of SQMs or interconnection agreements in other states. *See Prefiled Testimony of Karen Kinard* (July 9, 2001) (“*Kinard*”), 18-25, 42. However, these additional measurements are unnecessary and inappropriate for purposes of assessing BellSouth’s compliance with Section 271, as a closer look at the actions of other commissions, and at BellSouth’s proposal, will demonstrate. So far, three commissions in BellSouth’s region, Georgia, Mississippi, and Louisiana, have ordered a set of performance measurements based upon a review of BellSouth’s systems and processes, and what they believe to be the specific parity requirements that apply to each. These commissions have done so in open proceedings with the participation of many of the same parties that are active in the instant proceeding. Ms. Kinard ignores the proceedings in these states, however, and instead commends to the Commission the performance measures adopted in Texas. These measures were developed for another carrier with different systems: the CLECs are simply advocating to this Commission the adoption of the action of whatever state commission they believe is most burdensome to BellSouth.

Ms. Kinard’s assertion that the Tennessee Regulatory Authority (“TRA”) directed BellSouth to incorporate some of the Texas metrics into the Interconnection Agreement between BellSouth and ITC<sup>DeltaCom</sup> in Tennessee, while technically correct, does not tell the full story. Although the TRA did direct BellSouth to incorporate some of these measures into the

interconnection agreement, it also opened a performance measurements docket (Docket No. 01-00193) in which it will set permanent performance measurements that will apply to all competitive carriers operating in Tennessee. The ITC^DeltaCom agreement contains only measurements that have been applied on a provisional basis to one carrier, and which are subject to change in the generic docket that is underway in Tennessee. Given this, the narrow action of the TRA provides no real support for any action by this Commission.

In addition, the measures Ms. Kinard proposes to add should not be adopted by this Commission because they are unneeded or inappropriate for the evaluation of checklist compliance or ongoing performance. Moreover, Ms. Kinard conceded that with a few exceptions, all of her suggested revisions could be addressed by this Commission at a later time. *Kinard*, Tr. Vol. 1, 231-2. Likewise, when asked if any immediate changes were necessary in the SQM or SEEM, Ms. Bursh replied that a software error correction measure, a change control measure and geographic disaggregation were required. *Bursh*, TR. Vol. 2, 187-9. As explained below, the software error correction and change control measures are unnecessary. Geographic disaggregation is addressed in a subsequent section herein.

- **Percent Software Certification Failures**

This CLEC-proposed measure would apply to software updates. This measurement is not necessary because the testing arrangements that BellSouth makes available with software updates are adequate to resolve certification issues before the CLEC even loads the software. *Varner Rebuttal*, 132. Should this issue need to be addressed, it would be more appropriately dealt with in the context of the change management process than through performance measurements.

- **Percent ILEC vs. CLEC Changes Made**

BellSouth's response: This proposed measurement would compare the percentage of BellSouth proposed changes that are accepted to the percentage of CLEC proposed changes. No useful information can be obtained through this measurement. The change control process has a method of escalating any disputes about whether a proposed change was properly rejected. This measurement would tell nothing about the relative merits or shortcomings of any proposal. Suppose the CLECs submitted a number of change requests that are technically infeasible to accomplish. This measurement would show a low percentage of CLEC requests implemented, but no problem is indicated. The purpose of change management is to work together as a team and prioritize the requirements for the good of all participants. With that in mind, measuring anything other than the process is unnecessary and would likely be counterproductive. For example, CLECs would be incented to make requested if this measure was adopted. The BellSouth measurements included with this filing are results focused and are the only ones necessary to provide a parity comparison of the change management process.

**C. The Commission Should Reject The CLECs' Request To Add Levels Of Disaggregation**

As Mr. Varner explained, arriving at an appropriate degree of disaggregation requires balancing the desire to "view specific types of performance with the need to keep the size of the plan manageable." *Varner Rebuttal*, 101. A fundamental question for this Commission to decide is whether, as Ms. Kinard suggests, having performance reports on over 380,000 sub-metrics each month is necessary in order to identify disparate treatment or whether this degree of granularity inhibits the Commission's ability to evaluate BellSouth's performance. *Varner Rebuttal*, 135-136. The excessive disaggregation proposed by the CLECs accounts for the difference between the 2,200 sub-metrics in the SQM and the 380,000 sub-metrics that the

CLECs propose. *Id.* 136. As Mr. Varner concluded, “proposing a plan with 380,000 measures is unreasonable.” *Id.* Although Ms. Kinard spends several pages of her testimony attempting to convince this Commission of the need for expanded levels of disaggregation, she provides no substantive evidence to support her proposal. *Id.* In fact, Ms. Kinard conceded that she has not given any specific explanation and that the explanation that she had previously offered had been withdrawn:

Q. (Mr. Carver) Okay. So, we have the general testimony that is in your rebuttal and beyond that there is no substantive explanation anymore why you want the disaggregation that you propose, is there?

A. (Ms. Kinard) Other than what is in my rebuttal, not in that KKE, that’s just a list of what we want. I am sure you describe why you are not doing those disaggregations either, in your statement.

Tr. Vol. 1, 205; *see generally id.*, 204-207.

Because the CLECs’ proposed disaggregation is excessive and unworkable – and the CLECs fail to provide any detailed support as to why further disaggregation is warranted – the Commission should use the level of disaggregation contained in the Georgia SQM for purposes of evaluating BellSouth’s Section 271 compliance. The Commission must also recognize that even without any additional metrics, geographic disaggregation at any level serves as a multiplier to the number of required measures and is not available for the Kentucky data submitted to this Commission. Therefore, changing the software to accommodate geographic disaggregation and then producing the relevant data introduces an unnecessary delay in this case. The disaggregation referred to by the CLECs in Louisiana is not a 271 requirement. The data relied on by the Georgia, Louisiana and Mississippi Commissions, and submitted to the FCC for Georgia and Louisiana, is not geographically disaggregated.



**D. The Commission Should Adopt BellSouth's Proposed Retail Analogs And Benchmarks**

BellSouth notes that it and the CLECs appear to agree on the circumstances in which either retail analogs or benchmarks should apply: If a measure requires a standard and a retail analog exists, the retail analog should apply; if there is no retail analog, then there should be a benchmark. As to the selection of the appropriate analogs and the level of the benchmarks (*e.g.*, 90%, 85%), BellSouth's proposal is set forth in its SQM. The particular retail analogs and benchmarks BellSouth proposes "are the result of several years work and have been conformed to the results reached in Georgia and Florida." *Varner Rebuttal*, 144. The CLECs have provided little in the way of substantive criticism of the BellSouth-proposed retail analogs. As to benchmarks, however, the dispute between the parties is more clearly drawn.

As noted above, BellSouth has chosen appropriate benchmarks based upon the proceedings in other states in BellSouth's region. In addition, these benchmarks are the same as the benchmarks approved by the Georgia Commission, *Varner Rebuttal*, 145, and the same benchmarks relied upon the Georgia, Mississippi, and Louisiana Commissions to find BellSouth in compliance with Section 271. In contrast, the CLEC-proposed benchmarks appear to be based on those selected in Texas and New York. However, in proposing those benchmarks for Kentucky, the CLECs ignore the fact that, in Texas and New York, the respective state commissions were considering different ILECs with different systems than those developed and used by BellSouth. The CLECs also disregard the decisions of the Georgia, Mississippi, and Louisiana Commissions, even though those state commissions were considering precisely the same issues, the same ILEC (BellSouth) and the same ILEC systems as this Commission is considering in this docket. The CLECs are simply seeking the highest benchmark levels possible, even in circumstances that may have no applicability to the systems of BellSouth.

The CLECs have failed to provide substantive support for their proposed benchmark levels. They have proposed benchmarks that range from 95% to 100% (*i.e.*, perfection), with almost no benchmarks below 95%. Tr. Vol. 1, pp. 194-197 (*Kinard*). However, Ms. Kinard admitted upon cross-examination that the CLECs have no analysis or study to support the conclusion that a 95% benchmark is the minimum “that the CLECs require to have a meaningful opportunity to compete.” *Id.*, 194.

Ms. Kinard also conceded on cross-examination that *no state* has set 30% of the benchmarks at 100%, absolute perfection, as WorldCom and other CLECs would have the Commission do in this proceeding. *Id.*, 199. The CLECs have not proposed benchmarks at reasonable, achievable levels. Instead, they have proposed unjustifiably high standards with full knowledge that BellSouth would have to pay penalties under their plan, even if BellSouth’s performance is nearly perfect. Accordingly, the Commission should reject the CLECs’ proposed benchmarks.

**E. The Commission Should Adopt The Business Rules Proposed By BellSouth**

The CLECs’ attack on BellSouth’s business rules is largely a rehashing of complaints that were raised in other states and discussed extensively during the last two years in the context of performance measurements dockets in Louisiana and Georgia. Tr. Vol. 1, pp. 155-157 (*Kinard*). In almost every instance, the CLECs’ proposals were not adopted.

The parties’ differing proposals on business rules are detailed in Exhibits AJV-11 and AJV-12 to Mr. Varner’s rebuttal testimony, which respond to the CLECs’ proposed business rule changes and explain why the CLECs’ criticisms of BellSouth’s business rules are unwarranted. Specifically, Mr. Varner shows that the CLECs’ proposals are unfounded for a number of reasons, including:

- They are based on an incorrect understanding of the manner in which BellSouth’s business rules work. In several instances, the CLECs’ requests are *already* accommodated by BellSouth’s rules. For example, in one of the few issues Ms. Kinard identified as critical, the CLECs have requested that BellSouth “start the clock” with respect to several interval measures when an order is received from a CLEC, rather than when BellSouth enters that order into its system and issues a Firm Order Confirmation (“FOC”). However, as explained in response to the CLECs’ issues relating to OP-11 Average Completion Interval (OCI) Distribution in the exhibits to Mr. Varner’s testimony, the Reject Interval, FOC Interval, Order Completion Interval, and the Completion Notice Interval Reports already capture all steps in the ordering process and therefore account for the time between when BellSouth receives an order or request and issues a FOC in response. AJV-11, 9-10.
- They are irrelevant. For example, Ms. Kinard argues that for OSS-2 Interface Availability (Pre-Ordering) BellSouth should be required to post its own scheduled hours of OSS availability on its website. However, because the OSS-2 measurement is a *benchmark* measurement (in this case 99.5%), no retail analog is required to calculate parity. Thus, BellSouth’s retail availability of OSS is irrelevant. Exhibit AJV-11, 1-2.
- They already have been addressed and rejected by the FCC and other Commissions. For example, for OP 1-3 Flow Through, Ms. Kinard claims that this measurement should not exclude orders that fall through to manual by no fault of the CLEC. However, the FCC has already stated that orders not designed

to flow through for retail should not be presumed to flow through for CLECs (“in principle, complex orders that are manually processed for BellSouth’s retail customers could be excluded from flow-through calculations.”). Moreover, the Georgia and Louisiana Commissions have found that BellSouth’s benchmarks for these measurements are consistent with their findings. Further, BellSouth’s proposed metrics include an additional flow-through metric that does not exclude orders designed for manual fallout. Exhibit AJV-11, 2.

For the reasons given in these exhibits, the Commission should adopt the business rules that BellSouth proposes in conjunction with its measures.

**F. Third-Party Audits Of Performance Assessment Plan Data Should Be Conducted Annually On A Regional Basis With The Costs Shared Between BellSouth And The CLECs**

Reasonable third-party audits of Performance Assessment Plan data and reports are appropriate. BellSouth has proposed a reasonable and workable audit policy that the Commission should adopt.

BellSouth and the CLECs appear to agree that there should be comprehensive annual audits and that the scope of the audit process should be determined by BellSouth, the CLECs, and the Commission. The only real dispute is whether the audits should be regional in scope. Because BellSouth’s measurement data are produced by a regional system and managed by a regional organization, audits should be conducted on a regional basis whenever possible.

*Varner*, 76-77. As BellSouth will demonstrate during Phase II of this proceeding, BellSouth’s methods, processes, and procedures for provisioning and maintenance and repair are regional – thus regional audits make sense.

The cost of comprehensive annual audits should be borne 50% by BellSouth and 50% by the CLECs. *Varner*, 77. The 50% to be paid by the CLECs would be divided among the various

CLECs, which will result in each paying a relatively small amount. This approach is appropriate because audits benefit the CLECs, and CLECs can effectively define the scope of the audits, which will determine the audit cost. *Id.* If CLECs bear none of the costs, they have no incentive to confine the scope of the audit to what is necessary to ensure BellSouth's compliance.

Finally, CLECs should not have the right to require BellSouth to undergo additional third party audits. Audits in excess of the annual audit are burdensome and unnecessary. Under the CLEC proposal, BellSouth's measurements could conceivably be in a constant state of audit. Moreover, BellSouth provides CLECs the opportunity to audit BellSouth's data on a monthly basis. As Mr. Varner explained, "BellSouth provides the CLECs with the raw data underlying many of the BellSouth SQM reports as well as a user manual on how [sic] manipulate the data into reports." *Varner*, 78. The CLECs can use these raw data to validate the results in the BellSouth SQM reports posted every month on the BellSouth website. *Id.*

**G. Availability And Format Of Performance Reports Should Be Posted On BellSouth's Website Within 30 Days After The End Of Each Month**

The parties appear to agree that performance reports for all BellSouth SQMs should be made available electronically on a monthly basis at BellSouth's website. BellSouth has done this, and will continue to do so by posting the data on its website (<https://pmap.bellsouth.com>) every month. *Varner*, 73.

However, the parties disagree regarding the timeframe for providing this information. BellSouth believes that the reports should be posted by the 30th day after the month in which the reported activity occurs. Although posting the data sooner than the 30th day has been achievable in the past, this was largely due to the relatively low volume of CLEC-specific data and performance measurement reports. Today, however, there are approximately 70 CLECs operating in Kentucky. *Varner*, 74. Further, there are 105 CLEC-specific reports included in the

BellSouth SQMs, and 129 reports that reflect BellSouth/CLEC aggregate reports. *Varner*, 74. Thus, to determine the maximum amount of reporting that might be due in any month would require multiplying the 70 CLECs times 105 reports (7,350 reports) and adding the 129 aggregate reports, which would total 7,479 reports. Further, raw data would have to be produced for many of the reports, as described previously. Given the magnitude of the reporting that must be done by BellSouth, combined with the fact that BellSouth makes every effort to validate the data before they are reported, BellSouth submits that posting a report by the 30th day of the following month is reasonable.

### **III. THE COMMISSION SHOULD ADOPT THE SELF-EFFECTUATING ENFORCEMENT MECHANISM PROPOSED BY BELLSOUTH IN KENTUCKY.**

BellSouth urges this Commission to adopt its proposed SEEM. This penalty plan, like the SQM, was developed in workshops involving CLECs, commission staffs, and BellSouth and in meetings with the FCC and DOJ. SEEM – along with several other existing economic and other incentives such as contractual remedies – is designed to guard against any BellSouth “backsliding” in parity of service after BellSouth begins to offer interLATA services in Kentucky and will help to ensure that competition continues to flourish in this state.

*BellSouth’s Plan.* SEEM is the appropriate plan for this Commission to adopt because:

- It meets the FCC’s criteria.
- It is a comprehensive plan created on sound principles.
- It offers greater remedies for certain measurements than others, properly recognizing that all metrics are not similarly important to CLECs or have equivalent impact on customers.
- Remedies escalate with increased disparity and the increased certainty of disparity.

- The statistical methodology adopted by BellSouth is very sensitive to identifying systemic disparate treatment, thereby insuring that BellSouth will provide nondiscriminatory performance.
- Adoption of the balancing critical value methodology makes remedies more available in emerging markets, thereby insuring that BellSouth will not ignore new entrants.
- BellSouth's systems are already set up to begin providing data required for SEEM.

*Varner Rebuttal*, 98.

*The CLECs' Plan*. In contrast to SEEM, the penalty plan proposed by AT&T ("the CLEC plan") is excessive in its measurements and too punitive in its remedies. It lacks the sophistication of SEEM in that it does not determine whether a sub-measure is likely to affect a customer's choice of carrier and does not escalate penalties based on transaction volumes. Rather, a penalty is assessed if BellSouth misses even one of more than 380,000 measurements. Moreover, the penalties escalate far too rapidly as a result of every measurement being assigned a penalty (even those that correlate with one another), and in any given month could amount to \$760 million. *Varner Rebuttal*, 77-78.

WorldCom concedes that no state – at least within BellSouth's operating region – has adopted the CLEC's penalty plan proposal, and only Florida appears to have adopted some modified form of the CLEC's measurement approach. Tr. Vol. 1, pp. 199-200; 219-223 (*Kinard*). Because the CLEC's plan has never been adopted in any significant form, the CLECs do not even know how long it would take to implement, or if implementation is even possible. Tr. Vol. 1, 178 (*Kinard*).

As explained in more detail below, the CLECs' proposed plan has several serious deficiencies:

- All measures carry equal weight despite the fact that all measures do not have the same impact on customers. As an example, the CLECs apparently believe missing a few seconds on the Average Response Interval – OSS is as important as missing the Install Appointment for a UNE Loop by several days.
- Penalty assessment does not compare “like-to-like” services.
- Flawed statistical and other methodologies unfairly exacerbate potential penalties.
- Fixed “consequence” dollars or a flat dollar amount per measurement missed do not increase if performance worsens, which could render the plan less effective.
- BellSouth could be subject to \$760 million to \$7.6 billion in penalties in a single month – 142% to 1,424% its annual revenues in Kentucky – even if it meets the standards for 90% of the 380,000 measurements.

*Varner Rebuttal, 98.*

The CLEC plan also fails to account for the fact that measures can be “correlated,” allowing multiple penalties for the same transaction. *Varner Rebuttal, p. 76.* Moreover, the CLECs’ plan assesses penalties in cases where performance results are inconclusive. One consequence of having hundreds of thousands of sub-metrics is that a much larger number of sub-metrics are evaluated based on a small number of transactions. Small numbers of transactions are less reliable indicators of performance. In fact, where the number of transactions is too small, the results are inconclusive. *Varner Rebuttal, 76-77.*

The CLECs’ failure to include a hard cap on damages is also problematic. The CLEC plan appears only to include a provision that would allow BellSouth to seek regulatory relief from excessive penalties, but does not propose a dollar cap and therefore implies that penalties should be imposed without limit. A voluntary penalty plan should not be so onerous as



potentially to cripple the ILEC economically. *Varner Rebuttal*, 101. As Dr. Taylor explained, “[w]ithout a cap on that liability, BellSouth would have to prepare for compensation claims almost without limit.... An excessive and unreasonable financial liability on one flank of its operations could jeopardize BellSouth’s ability to meet its goals elsewhere.” *Rebuttal Testimony of William E. Taylor, Ph.D.* (July 30, 2001), 65-66.

For all of these reasons, the CLEC plan should be rejected. It is too punitive, too complicated, and offers CLECs too great an opportunity to game the system. In contrast, SEEM is a sophisticated penalty plan, developed over years with the input of regulators, CLECs, and BellSouth. The plan is ready to be implemented and will serve as an achievable and sustainable safeguard of local competition in Kentucky.

**A. SEEM Meets The FCC’s Standards And Is An Achievable And Sustainable Penalty Solution**

BellSouth’s proposed SEEM is contained in Exhibit AJV-3, which includes: an overview of SEEM; Appendix A, the Fee Schedule; Appendix B, the SEEM Sub-metrics; Appendix C, the Statistical Methodology; Appendix D, the Technical Description; and Appendix E, the SEEM Remedy Procedure. Mr. Varner has also set forth a detailed explanation of the plan in his *Direct and Rebuttal Testimony* as well as in the hearing conducted on September 24-25, 2001. *See generally* Tr. Vols. 1-2 (*Varner*).

BellSouth’s SEEM is designed to meet the FCC’s standards. Unlike the CLECs’ plan, which assigns penalties to hundreds of thousands of measurements and generates huge penalties for relatively small performance disparities, BellSouth’s plan contains key performance measurements that the FCC has already recognized as the appropriate structure for a penalty plan. The plan provides penalties up to the level of 36% of one year of BellSouth’s annual net revenues, making its consequences meaningful and significant. SEEM is self-executing and does

not require litigation to assess penalties, unlike the CLEC plan, which could prompt litigation before implementation because of the extreme degree of penalties. Finally, the audit requirements of both the SQM and SEEM provide reasonable assurances that the data are accurate. *Varner Rebuttal*, 107.

BellSouth's SEEM was designed to work specifically in conjunction with BellSouth's mechanized SQM platform. It is unclear when the CLEC plan could be implemented, if ever. Tr. Vol. 1, pp. 170-178 (*Kinard*). To implement a new remedy plan now would nullify the years of effort and costs entailed by BellSouth to establish a SEEM and would therefore delay significantly BellSouth's ability to deliver performance remedies. *Varner Rebuttal*, 99.

The plan proposed by BellSouth in Kentucky does differ in some respects from SEEM plans that have been adopted in its other operating states. As the Commission requested during the September 24-25, 2001, BellSouth has submitted a comparison to the Commission as in its response to Informal Request 2 that details the differences between the SEEM plans in Kentucky and Georgia. Tr. Vol. 2, pp. 39-40 (*Varner*).

As Mr. Varner noted during his hearing testimony, there are reasons for the distinctions in the various plans. In large part, BellSouth's proposed Kentucky SEEM has been altered to avoid problems that have arisen in other states, particularly Georgia. *Id.*, p. 48. As BellSouth explained, one notable difference is the absence of a Local Number Portability ("LNP") measure for SEEM in Kentucky, given the significant number of problems that existed with that measurement in Georgia. BellSouth has proposed three new LNP measures in Georgia and that Commission will consider what penalties to associate with those measures in its six-month review. *Id.*, pp. 141-150.

In sum, SEEM both fulfills the FCC's standards and offers an achievable and manageable penalty plan for all interested parties. This ready-made solution will help to provide additional assurance for this Commission and CLECs that BellSouth will continue to meet its obligations following entry into the long distance market.

**B. BellSouth SEEM Plan Is A Voluntary Effort To Assure The Commission That BellSouth Will Maintain Its Level Of Performance**

Every grant of interLATA authority by the FCC to date has required an enforcement mechanism. *Varner* p. 80. The FCC has stated that such a plan would be an additional incentive to ensure that BellSouth *continues* to comply with the competitive checklist *after* interLATA relief is granted. *Id.*, p. 81. Accordingly, BellSouth is proposing such a plan for the state of Kentucky.

Importantly, however, the SEEM plan BellSouth has proposed in this proceeding, and any penalty plan that is ultimately adopted, is based on BellSouth's voluntary compliance with such a plan. *Varner*, 79; Tr. Vol. 2, p. 50 (*Varner*). Nothing in the Act requires a self-effectuating enforcement plan, and the FCC has acknowledged as much in its Section 271-related orders. Tr. Vol. 2, pp. 78-80. Contrary to WorldCom's view, it is not appropriate for either the FCC or a state commission to order BellSouth to implement a self-executing remedy plan without BellSouth's consent. *Kinard Rebuttal*, 40. Therefore, BellSouth reserves the right to alter SEEM or to approve revisions proposed by the Commission or CLECs prior to their entering into effect. *Varner Hearing*, Tr. Vol. 2, p. 50-51 (*Varner*).

Specifically, under Federal law, there is no Circuit Court case of which BellSouth is aware that has stated definitively whether the Federal Communications Act of 1934, as amended, gives the Commission the authority to order automatic penalties that would function in much the same manner as liquidated damages. Consistent with this, the FCC has specifically stated that

imposition of an enforcement plan (i.e., penalties) is not a prerequisite to Section 271 relief. Varner, p. 80. Accordingly, BellSouth is presenting its SEEM plan voluntarily in an effort to expedite its Section 271 approval and provide this Commission with assurance that BellSouth will not backslide in the quality of service it provides to its competitors in Kentucky after it enters the long distance market.

**C. SEEM Appropriately Provides Penalties Only For Measures That Affect Customers**

Under BellSouth's SEEM, penalties are paid only for the failure to achieve key measures in areas that affect customers, a plan patterned after those used in New York and Texas. As such, the SEEM measurements are a targeted subset of the SQMs.

BellSouth arrived at these measures by applying certain criteria to its SQMs. Specifically, SQMs were excluded if they met one or more of the following criteria.

1. *Aggregation of Measures.* Some measures should be aggregated because the measurements are similar and, because of the small number of transactions, aggregating the volumes allows for more accurate results. For example, xDSL, HDSL, ADSL, and UCL are all provided on a pair of copper wires and are distinguishable based on the electronics installed on the customer end by the CLEC and perhaps by the maximum length of the loop used for each service. Therefore, BellSouth aggregates performance in ordering, provisioning and maintaining all three of these loops for determining any degree of disparate treatment for the purpose of assessing remedies. Aggregation is also useful because it increases the volumes of the transactions that can be measured. Using the same example, volumes for HDSL, ADSL, and UCL individually may be too small to accurately measure disparate performance, but when aggregated there is sufficient activity to make a determination of disparate performance.

2. *Diagnostic Measurements.* There are a number of measurements included in the SQM, but excluded from SEEM, because they provide information to CLECs, but a failure to meet these measures really has no effect on the customer. An example of this type of measurement is Percent Rejected Service Requests. Because service requests are often rejected due to errors made by the CLEC, this measurement could help a CLEC determine whether its service representatives are completing and issuing local service requests properly, but it does not truly reflect BellSouth's performance.

3. *Method of Submission.* For some measurements (reject interval, for example), BellSouth's SQM disaggregates the measure by method of submission, in other words, fully mechanized, partially mechanized, and non-mechanized. In BellSouth's remedy plan, however, only the measurement for fully mechanized submissions has an attendant penalty, since this is the measurement category in which virtually all activity will occur. Contrary to the CLECs' view, partially- or non-mechanized orders should not be part of SEEM because it is too likely that penalties could be triggered through no fault of BellSouth. *Varner Rebuttal*, 100. Furthermore, since the complexity of manual and partially mechanized orders could vary widely from month to month, the time and effort required to fulfill them will vary. *Id.* As such, these types of orders should be subject to other available remedies if a problem exists with them; however, penalties should not be assessed automatically. *Id.* More importantly, relevant performance measures (Reject Interval and FOC timeliness) for the months of May through August indicate excellent performance in this area and so no penalties are necessary.

4. *Parity by Design Measures.* Certain measures are categorized as parity by design. An example of this would be the E911 measures in Exhibit AJV-1. A parity by design

measure occurs when BellSouth orders and CLEC orders are processed in a way that makes it impossible for BellSouth to distinguish between the two. In these instances, discrimination is not possible and thus no penalties are necessary.

5. *Correlated Measures.* In some instances, measurements are correlated so that the failure of one measure will also result in the failure of a second measure. Duplicative penalties should not be paid when this occurs.

6. *Regional Measures.* Some of BellSouth's measurements are regional in nature. Since BellSouth's OSS systems are regional, measurements such as OSS Average Response Time and Response Interval and OSS Interface Availability would apply regionally, i.e., to the CLEC industry as a whole. Since the point of Tier 1 penalties is to provide penalty payments to a particular affected CLEC, it makes no sense to have a Tier 1 penalty (payments made directly to CLECs) for a measurement that, if failed, will affect the entire CLEC industry. Instead, this would be a Tier II penalty (payments made to a state agency).

7. *Volume Categories.* SEEM addresses systemic functions so volume categories are not needed. *See Varner, 72-75.*

Using these criteria, BellSouth has removed measurements that are not appropriate for penalty assessment. As such, BellSouth's penalty measurements represent actual measures that affect customers, unlike the CLEC's plan, which attaches a penalty to each measurement, creating an excessive and unworkable plan.

**D. SEEM Penalties Serve As A Substantial Deterrent, Yet Are Reasonable And Are Governed By An Absolute Cap**

As discussed above, under SEEM, penalties are assessed for relevant measures that affect customers, not every possible measurement under the proposed SQM. Additionally, the two-

tiered structure, with Tier 1 payments made directly to CLECs and Tier 2 payments made to a state agency, and the escalating fee schedule under the SEEM serve to ensure that BellSouth will continue to provide service parity by increasing penalties for continued violations.

Another important feature of BellSouth's remedy plan is that penalties are paid on a transaction basis. In other words, there is a schedule of penalties set forth as an exhibit to Mr. Varner's testimony (AJV-3) that includes the amount that BellSouth proposes to pay in every instance in which BellSouth's performance falls short of parity. Unlike the CLECs' measurement-based plan, which does not take into account the number of violations, BellSouth's SEEM calculates the penalty by taking the dollar amount associated with any given failure and multiplying it by the number of failed transactions. Thus, the penalty payments of differing amounts reflected on AJV-3 are appropriate for measurements that, when failed, result in different degrees of impact. The FCC has granted interLATA authority in Texas, Kansas, and Oklahoma using SBC's transaction volume-based penalty plan. *Varner Rebuttal*, 108.

Furthermore, by offering greater remedies for certain measurements than others, the BellSouth plan recognizes that not all measurements are equally important to CLECs and their customers. From a common sense standpoint, it is difficult to believe that absolutely every measurement, if failed, would have precisely the same effect on a CLEC and its customers. BellSouth has varied the size of penalties associated with different measures in its plan to reflect this reality.

Nonetheless, SEEM will generate significant, automatic payments by BellSouth when discriminatory performance that materially affects a CLEC's ability to compete occurs (regardless of whether the CLEC can prove actual damages) and thus will serve as a real deterrent to backsliding. SEEM's absolute cap on damages (up to 36% of BellSouth's revenue in

Kentucky), should be set so that it can go into effect automatically, just as will every other aspect of the remedy plan.

Contrary to AT&T's claim, an absolute cap does not "send the signal that once the ILEC's performance deteriorates to a particular level, . . . then further deterioration in performance is irrelevant." *Bursh Rebuttal*, 38. Rather, under a voluntary plan (and for the reasons set forth below, the penalty plan must be voluntary), the cap is, in effect, the amount that BellSouth is willing to place at risk to provide assurances there will be no future backsliding. In each state where the FCC has imposed an enforcement plan, an absolute cap has been used. *Varner Rebuttal*, 102. The absolute cap, set at 36% of BellSouth's revenues in Kentucky, puts a great deal of revenue at stake, making the deterrent effect significant. As Mr. Varner testified:

Q. Ms. Foshee. Just to be clear, are the penalties proposed in Kentucky high enough to motivate BellSouth to improve its performance if its performance is deficient in some area.

A. Mr. Varner. Yes, absolutely they are. As I understood Mr. Prescott's question it was do the penalties have to be high enough in order to deter it. I don't believe that is the case because you have all of the other mechanisms in addition to that. But I can tell you that the cap that we have here in Kentucky is 70 million dollars. If you will look at the penalties that we are being assessed under this fee schedule, the same fee schedule we are proposing here, very similar type of plan that we are proposing here, the numbers are significant. And if we were not performing well in Kentucky the numbers are significant and it would have our attention and we would fix it.

Tr. Vol. 2, pp. 109-110 (*Varner*).

Further, as Dr. Taylor testified, it is unwise to sanction an unlimited revenue stream of penalty payments to the CLECs – as they propose – in a way that would encourage them to engage in improper behavior. Without question, a remedy plan can be gamed. One example of how a CLEC could game the system would be to hold orders, then submit them in such volume that they cannot be processed, and thereby create failures in the system. As Dr. Taylor explained:



When you make the plan to [sic.] punitive what you end up – what you do with the plan is then it becomes an attractive incentive for gaming, provides far more money to the CLECs without, I mean, way out of line with any damage or anything else – well, way out of line with any benefit that BS might have received. . . . But I can tell you, the plan that we have put out here with the dollars that's in it, it's significant. In contrast the CLEC plan proposes astronomical damages. The BellSouth proposal is more reasonable and still establishes a deterrent, as Ms. Bursh of AT&T concedes is the main goal of a penalty plan.

Tr. Vol. 2, p. 37 (*Taylor*). Accordingly, an absolute cap on damages helps to strike the appropriate balance between deterrence and excess.

**E. The SEEM Should Enter Into Effect Only After BellSouth Exercises Its Authority To Offer InterLATA Service In Kentucky**

Setting the effective date of the SEEM involves two distinct issues: (1) as a technical matter, when the plan can be implemented; and (2) as a policy matter, when the plan should be implemented in order to serve the purpose for which it is intended. From both a technical and policy perspective, SEEM should come into effect only after BellSouth receives authority and begins to offer interLATA services in Kentucky.

If the Commission adopts BellSouth's proposal, BellSouth would be prepared to implement SEEM as soon as it enters the long distance market. However, if the Commission approves some or all of the plan proposed by the CLECs, then the implementation date for the plan is unclear. The CLECs' proposal could be tremendously difficult, and perhaps impossible, to put into effect.

The question of when SEEM should be implemented is also straightforward. SEEM should not go into effect until BellSouth is granted authority and begins to offer interLATA service in Kentucky. The FCC has stated that the penalty plan is one way to satisfy the public interest requirements of Section 271 by ensuring that there will be no backsliding by the ILEC after Section 271 authority is granted. *See Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA*

*Service in the State of New York, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶¶ 429-430 (1999) (“BA-NY Order”); Application by SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, Memorandum Opinion and Order, 15 FCC Rcd 18354, ¶¶ 420-421 (2000); Joint Application by SBC Communications, Inc. Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Kansas and Oklahoma, Memorandum Opinion and Order, CC Docket No. 00-217, ¶ 269 (rel. Jan. 22, 2001).* In its public interest analysis in the Bell Atlantic, New York Order, the FCC stated that:

[O]ur examination of the New York monitoring and enforcement mechanisms is solely for the purpose of determining whether the risk of post-approval [271] non-compliance is sufficiently great that approval of its section 271 application would not be in the public interest.

*BA-NY Order*, 17.1326.

Further, referring to Bell Atlantic’s proposed plan, the FCC stated that,

[b]ecause this aspect of our public interest inquiry necessarily is forward-looking and requires a predictive judgment, this is a situation where it is appropriate to consider commitments made by the applicant to be subject to a framework *in the future*.

Id. (emphasis added).

Moreover, prior to the grant of interLATA authority, BellSouth’s pursuit of Section 271 authority provides sufficient motivation for the company to comply with its statutory and other obligations. *Varner Rebuttal*, 94. As Mr. Varner has stated: “It would unnecessarily penalize us while we are in the process of [preparing to offer long distance] . . ., because it is supposed to prevent backsliding, the incentive to not backslide before you get long distance relief is the fact that you want long distance relief.” Tr. Vol. 2, p. 55 (*Varner*).

In short, while the FCC has encouraged “state performance monitoring and post-entry level enforcement,” it has “never required BOC applicants to demonstrate that they are subject to such mechanisms as a condition of section 271 approval”. (*BA-NY Order*, ¶429). Accordingly, SEEM should be implemented only after BellSouth has received authority and has begun to offer interLATA services in Kentucky.

**F. The Commission Should Adopt SEEM’s Statistical And Other Methodologies Used To Calculate Parity And Penalties, Which Are Designed To Complement The Plan**

BellSouth also urges this Commission to adopt the statistical and other methodologies it proposed in the SEEM, which are designed to complement SEEM and will provide the tools needed to assess BellSouth’s performance and penalties under the plan. There are two sets of methodologies required to evaluate BellSouth’s performance and assess penalties under SEEM’s standards: (1) statistical methodologies where a retail analog exists; and (2) statistical and other methodologies where no retail analog exists.

**1. Statistical Issues Where A Retail Analog Exists**

Three principal issues remain unresolved regarding the statistical methodologies that will be used to calculate BellSouth’s parity where a retail analog exists: (1) whether BellSouth’s “modified and truncated Z test statistics” or only the CLECs’ “modified Z test statistic” should be used for determining penalties where a retail analog exists; (2) whether “error probability balancing” will be used; and (3) at what value the delta parameter will be set. The first issue largely will be resolved as a result of the penalty plan that the Commission elects to adopt, whether it be SEEM (as proposed by BellSouth) or another plan, such as that proposed by the CLECs. While there is little disagreement between the parties about the second issue, parties do not generally agree at what value the delta parameter should be set.

**a. Modified and truncated Z statistics**

With regard to the first issue, the plan that the Commission adopts will dictate whether the “modified  $Z$  and the truncated  $Z$  test statistics” will be used (for SEEM) or whether the “modified  $Z$  test statistic” alone will be used (for the CLEC plan).

To illustrate how BellSouth’s approach uses both test statistics, Dr. Mulrow explained that, under BellSouth’s plan, the first step in evaluating a measurement that involves retail analogs is to break the measurement down into appropriate “cells” in which “like-to-like” comparisons can be done between the services provided to the CLECs by BellSouth and the comparable services that BellSouth provides to itself. Direct Testimony of Edward J. Mulrow (May 18, 2001) (*Mulrow*), 15. For example, CLEC transactions that are “new” provisioning orders should be compared with “new” BellSouth provisioning orders. In the cell for these provisioning orders, BellSouth would include all of its orders that met this description, as well as all of the orders of the CLECs that met this description. Under BellSouth’s plan, once all of the data are collected, a modified  $Z$  score for that “cell” is determined. BellSouth, however, does not stop there. It then aggregates the test statistics for the “cells” and calculates a “truncated  $Z$  test statistic” for the aggregated group of cells. *Mulrow*, 8.

In contrast, under the CLECs’ plan, which consists of hundreds of thousands of individual measurements and sub-measurements, and attaches penalties indiscriminately to each of these measurements, the CLECs propose only to use the “modified  $Z$  statistic.” This is because there is no aggregation of data or measures, and therefore no need to use the more sophisticated truncated  $z$ . As such, if this Commission elects to adopt SEEM, it should adopt BellSouth’s modified and truncated  $Z$  statistics.

**b. Error probability balancing**

The second unresolved statistical issue involves the use of “error probability balancing.” In any statistical analysis, there is a possibility of making one of two types of errors in the

analysis. First, there is the possibility that the test statistics will suggest that there is a statistical difference in the observed data when, in fact, there is none. This is called a Type 1 error.

*Mulrow*, 10. There is also a second kind of possible error, where the test statistic suggests that there is no statistical difference in the observed data when, in fact, there is a real difference. This is called a Type 2 error. *Mulrow*, 12. Obviously, a Type 1 error would suggest that the service that BellSouth is providing is not in parity when it, in fact, is. A Type 2 error would suggest that BellSouth is providing service at parity when it, in fact, is not. One equitable way to account for such errors is to set the probability of each occurring at the same level, so that both BellSouth and the CLECs are equally exposed to the possibility of a statistical error. “Error probability balancing” does exactly that. *Id.*, 13.

In application, “error probability balancing” means that a formula is used to make a calculation that yields a single number that represents the “balancing critical value” where the probability of a Type 1 error and a Type 2 error are exactly the same. *Id.* Once that single number or “balancing critical value” is determined, the test statistic, whether it is the modified Z statistic or the truncated Z statistic, can be compared to the “balancing critical value” to determine whether there is a material statistical difference between the service BellSouth provides to the CLECs and the service it provides to itself.

Again, this particular aspect of the statistical methodology is not seriously in dispute. The issue of using “error probability balancing” is equally applicable irrespective of whether the Commission adopts a plan that requires the use of a truncated Z test statistic or the use of a modified Z test statistic. *See Rebuttal Testimony of Robert M. Bell* (July 9, 2001) (“*Bell*”), 32.

Consequently, the statistical methodology that the Commission should adopt in this proceeding largely will be determined by the Commission’s selection of a basic plan, either one

that aggregates measurement data or one that does not. Once that occurs, the proper test statistic will follow and most parties agree that using that test statistic together with “error probability balancing” is the proper statistical methodology to use in this proceeding.

**c. Appropriate value of the parameter “delta”**

Another important statistical issue relating to the assessment of BellSouth’s provisioning of retail analogs is the value at which the parameter delta should be set. The selection of the proper value for delta relies on business judgment. *Mulrow*, 17. Business judgment requires time and experience, and this process is so new that assumptions have to be made in selecting the value of “delta.” Therefore, BellSouth proposes that the Commission set a value for “delta” and revisit that decision six months after the Plan goes into effect in order to determine whether the value of “delta” was set appropriately. If the Commission elects that course, it still has to determine the initial value of “delta.” In this regard, BellSouth has proposed the values for “delta,” selected by the Louisiana Public Service Commission: 1.0 for Tier 1 measurements and .5 for Tier 2 measurements. *Varner*, 86-87. The CLECs, predictably, proposed a much lower value for “delta” of 0.25 for both Tiers. *Bell*, 34.

Under BellSouth’s proposal, BellSouth will begin paying penalties to the CLECs when the observed differences between BellSouth transactions and the CLECs transactions equal one-half of the value of “delta.” As a practical matter, this means that under BellSouth’s proposal, BellSouth would begin paying penalties when the difference in the observed means of the BellSouth and CLEC transactions was equal to one-half of a standard deviation. In contrast, under the CLECs’ proposal, the penalties would start when the discrepancy was equal to one-eighth of a standard deviation.

In order to resolve which value to use for “delta,” it is important to understand the purpose it serves. Basically, “delta” is a factor that is used to identify whether a meaningful

difference exists between the service that BellSouth offers to itself and that to which it offers to CLECs. *Mulrow*, 16. To use an example, assume that for a given month the average time that BellSouth took to provision a dispatched residential retail order was five days. Assume further that the standard deviation associated with that average was also five days. This means that about 68 percent of all of those services were provisioned to BellSouth customers within a period of 0 to 10 days. *Id.* If the threshold of materiality, as represented by “delta,” was set at a value of 1.0, as long as the average time to provision similar services to the CLECs did not take longer than one half of the standard deviation (or one-quarter of a day), the difference in the averages would not be material. Stated another way, if the average interval for BellSouth to provision services to its customers were five days and the average of the time to provision services to the CLECs was less than seven and one-half days, the difference, even though it exists, would not be material. *Id.*

The above discussion of the statistical issues addressed the issue of “error probability balancing” as a part of the appropriate statistical methodology for use in this proceeding. Essentially, “error probability balancing” involves the determination of a “balancing critical value,” a figure that represents the point at which, in a statistical analysis, the probability of Type 1 and Type 2 errors are exactly balanced. *Mulrow*, 13. As Dr. Mulrow discussed, there are formulas that are used to calculate this “balancing critical value.” *Id.*

Although there are complicated formulas that can be used to calculate the single value that represents a “balancing critical value,” a simple approximation of that figure can be determined that will facilitate the discussion of this issue. *Id.* This approximation is calculated by simply taking the negative of the square root of the number of CLEC transactions that have been observed, and multiplying that figure by a number that is derived by dividing “delta” by 2.

*Id.* To illustrate, if there were 25 CLEC transactions, and a “delta” of 1 is used, the resulting “critical balancing value” would be “-2.5.” Using “-2.5” as the balancing critical value, any test statistic smaller than “-2.5” (that is any number further from 0) would indicate the presence of a material statistical difference. Any number larger than “-2.5” would indicate the absence of a material statistically significant difference. *Id.*, 13-14. The value of “delta” thus has a significant impact on the single number that has been identified as the “balancing critical value.” The higher the value of “delta,” the higher the “balancing critical value,” all other things being equal. Therefore, it is not surprising that there was a dispute among the parties as to the appropriate value of “delta.”

Judgment must be exercised in determining whether a difference equal to half of a standard deviation is material, or whether materiality dictates that one-eighth of a standard deviation is appropriate. Because of this uncertainty, BellSouth urges the Commission to adopt the same standards that Louisiana adopted, and to plan to review that decision at six-month intervals until the Commission can be certain that it has found the correct value for “delta.”

## **2. Methodological Issues Where No Retail Analog Exists**

Where no retail analog exists, BellSouth’s SEEM evaluates the company’s performance using “benchmarks” and “affected volumes.” As detailed in AJV-3, SEEM sets the benchmarks at an appropriate minimum level, so that they permit an efficient competitor a meaningful opportunity to compete. *Varner*, 83.

The “affected volume” is determined by a simple comparison of the performance provided to the individual CLEC to the benchmark applicable to the SEEM measurement. If performance does not meet the benchmark, penalties would apply to the number of transactions by which BellSouth missed the benchmark. For example, assume BellSouth could be late in returning no more than 10 FOCs in a month to meet the material nondiscrimination benchmark.



*Id.*, 84. Further assume that BellSouth returned 13 FOCs late in that month. BellSouth would pay a penalty for 3 transactions, which is the number of missed FOCs in excess of the 10 defined as material nondiscriminatory performance. This number of transactions by which BellSouth missed the performance standard, 3 in the above example, is called the affected volume. *Id.*

AT&T appears not to question the soundness of SEEM's methodologies for calculating parity where no retail analog exists. Rather, AT&T argues only that the calculations should be done in a manner that would generate greater penalties for BellSouth. However, the objective here is not to maximize the level of penalty payments, but to make a reasonable adjustment for small volumes – as is also done where a retail analog exists – when conducting benchmarking. *Varner Rebuttal*, 109-10. Accordingly, BellSouth urges this Commission to adopt BellSouth's statistical and other methodologies, which are designed fairly to assess its performance and attach appropriate penalties.

#### **IV. CONCLUSION**

For the reasons set forth above, BellSouth respectfully requests that this Commission:

- Adopt the Georgia SQM for purposes of determining if BellSouth is in compliance with Section 271 and
- Adopt BellSouth's Kentucky SEEM, which provides for substantial penalties to ensure that BellSouth continues to meet its obligations after it has entered the long distance market.

Respectfully submitted,

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October 15, 2001

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