BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.	DOCKET NO. 001305-TP ORDER NO. PSC-02-0413-FOF-TP ISSUED: March 26, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
BRAULIO L. BAEZ
MICHAEL A. PALECKI

APPEARANCES:

NANCY B. WHITE, and MICHAEL TWOMEY, BellSouth Telecommunications, Inc., c/o Nancy Sims, 150 South Monroe Street, Suite 400, Tallahassee, Florida 32301
On behalf of BellSouth Telecommunications, Inc.

BRIAN CHAIKEN, PAUL TURNER, and ADENET MEDACIER, 2620 West 27th Avenue, Miami, Florida 33133.
On behalf of Supra Telecommunications and Information Systems, Inc.

WAYNE KNIGHT, Florida Public Service Commission, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission.

FINAL ORDER ON ARBITRATION

LIST OF ACRONYMS

1996 Act or the ACT	Telecommunications Act of 1996
ADSL	Asymmetric Digital Subscriber Line
ADUF	Access Daily Usage File
ALEC	Alternative Local Exchange Company
AT&T	AT&T Communications of the Southern States, Inc.
BellSouth	BellSouth Telecommunications, Inc
BBR	BellSouth Business Rules
CCP	Change Control Process
CLEC	Competitive Local Exchange Company
CPNI	Customer Proprietary Network Information
CSOTS	CLEC Service Order Tracking System
CSR	Customer Service Record
DAML	Digitally Added Main Line
DLC	Digital Loop Carrier
DSL	Digital Subscriber Line
DSLAM	Digital Subscriber Line Access Multiplexer
ECTA	Electronic Communications Trouble Administration
EDI	Electronic Data Interchange
EEL	Enhanced Extended Loop
EODUF	Enhanced Optional Daily Usage File
FCC	Federal Communications Commission
FOC	Firm Order Commitment
ILEC	Incumbent Local Exchange Company
ISP	Internet Service Provider

IVMS	Inter-Switch Voice Messaging Service
IXC	Interexchange Company
LATA	Local Access and Transport Area
LENS	Local Exchange Navigation System
LFACS	Loop Facility Assignment Control System
LOA	Letter of Authorization
LSR	Local Service Request
MSA	Metropolitan Statistical Area
NTW	Network Terminating Wire
ODUF	Optional Daily Usage File
OSS	Operational Support Systems
PIU	Percent Interstate Usage
PLU	Percent Local Usage
RSAG	Regional Service Address Guide
RT	Remote Terminal
SMDI-E	Standard Message Desk Interface-Enhanced
SOCS	Service Order Communications System
Supra	Supra Telecommunications and Information Systems, Inc.
TAFI	Trouble Analysis and Facilities Interface
TAG	Telecommunications Access Gateway
TELRIC	Total Element Long Run Incremental Cost
UNE	Unbundled Network Element
VMS	Voice Messaging Service

CASE BACKGROUND

On September 1, 2000, BellSouth Telecommunications, Inc. (BellSouth) filed a petition for arbitration of certain issues in a new interconnection agreement with Supra Telecommunications and Information Systems, Inc. (Supra). BellSouth's petition raised fifteen disputed issues. Supra filed its response, and this matter was set for hearing. In its response Supra raised an additional fifty-one issues. In an attempt to identify and clarify the issues in this docket, issue identification meetings were held on January 8, 2001, and January 23, 2001. At the conclusion of the January 23 meeting, the parties were asked by our staff to prepare a list with the final wording of the issues as they understood them. BellSouth submitted such a list, but Supra did not, choosing instead to file on January 29, 2001, a motion to dismiss the arbitration proceedings. On February 6, 2001, BellSouth filed its response. In Order No. PSC-01-1180-FOF-TI, issued May 23, 2001, we denied Supra's motion to dismiss, but on our own motion ordered the parties to comply with the terms of their prior agreement by holding an inter-company Review Board meeting. Such a meeting was to be held within 14 days of the issuance of our order, and a report on the outcome of the meeting was to be filed with us within 10 days after completion of the meeting. The parties were placed on notice that the meeting was to comply with Section 252(b)(5) of the Telecommunications Act of 1996 (Act).

Pursuant to our Order, the parties held meetings on May 29, 2001, June 4, 2001, and June 6, 2001. The parties then filed post-meeting reports. Thereafter, several of the original issues were withdrawn by the parties. An additional twenty issues were withdrawn or resolved by the parties either during mediation or the hearing, or in subsequent meetings. Although some additional issues were settled, thirty-seven disputed issues remained. We are hopeful that negotiations between these parties will be more successful in future arbitrations.

We have jurisdiction pursuant to Section 252 of the Act to arbitrate interconnection agreements, as well as Sections 364.161 and 364.162, Florida Statutes. Section 252 states that a State Commission shall resolve each issue set forth in the petition and response, if any, by imposing the appropriate conditions as required. Further, while Section 252(e) of the Act reserves the

state's authority to impose additional conditions and terms in an arbitration consistent with the Act and its interpretation by the FCC and the courts, we utilize discretion in the exercise of such authority. In addition, Section 120.80(13)(d), Florida Statutes, authorizes this Commission to employ procedures necessary to implement the Act.

We held an administrative hearing in this matter on September 26-27, 2001. On February 8, 2002, our staff filed its post-hearing recommendation for our consideration at our February 19, 2002, Agenda Conference. Prior to the Agenda Conference, the item was deferred.

On February 13, 2002, Supra filed a Motion asking that the item not be considered until additional legal briefing could be had addressing the impact of the decision of the United States Court of Appeals, Eleventh Circuit (hereinafter "11th Circuit"), Cir. Order Nos. 00-12809 and 00-12810, the consolidated appeals of BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc., D.C. Docket No. 99-00248-CV-JOF-1 and BellSouth Telecommunications, Inc. v. WorldCom Technologies, Inc. And E.spire Communications, Inc., D.C. Docket No. 99-00249-CV-JOF-1, respectively. In the alternative, Supra requested oral argument on the impact of that decision on Issue 1 of our staff's recommendation. By Order No. PSC-02-0202-PCO-TP, issued February 15, 2002, the request for additional briefing was granted. Parties were directed to file their supplemental briefs by February 19, 2002. We have considered the additional briefing in rendering our decision in this matter.

Also, on February 18, 2002, Supra filed a Motion for Rehearing, Motion for Appointment of a Special Master, Motion for Indefinite Deferral, and Motion for Oral Argument. BellSouth filed its response on February 21, 2002.

On February 21, 2002, Supra filed a Renewed Motion for Indefinite Stay of Docket No. 001305-TP, and an Alternative Renewed Motion for Oral Argument. On February 22, 2002, BellSouth filed its Response in opposition.

On February 27, 2002, Supra filed a Motion for Oral Arguments on Procedural Question Raised by Commission staff and Wrongful

Denial of Due Process. BellSouth filed its Response in opposition on March 1, 2002.

Herein, we address the February 18, 21, and 27 Motions filed by Supra, as well as the issues presented for arbitration. We note that at our March 5, 2002, Agenda Conference at which we considered these matters, we granted the requests for oral argument. We also allowed Supra to orally modify its Motion for Appointment of a Special Master to include the requested remedy of referring the case to the Division of Administrative Hearings.

I. Motions

A. Motion for Rehearing, Appointment of Special Master, and Indefinite Deferral

On February 18, 2002, Supra Telecommunications & Information Systems, Inc. (Supra) filed its Motion for Rehearing in Docket No. 001305-TP; Motion for the Appointment of a Special Master; Motion for an Indefinite Deferral. On February 20, 2002, BellSouth Telecommunications, Inc. filed its Response.

1. Arguments

a. Request for Rehearing

In support of its Motion for Rehearing, Supra states that pursuant to Rule 28-106.211, Florida Administrative Code, the presiding officer before whom a case is pending has the authority to grant a rehearing for appearance of impropriety. Supra notes that Order No. PSC-02-0143-PCO-TP, issued January 31, 2002, in Docket No. 001097-TP, addressed a situation in which one of our staff members was found to have provided cross-examination questions to BellSouth before the hearing scheduled for that docket. Supra further notes that the Order states "in order to remove any possible appearance of prejudice, I find that this matter should be afforded a rehearing."

Supra states that in Docket No. 001097-TP, on the eve of the evidentiary hearing in that docket, our staff member provided to a BellSouth employee a copy of draft cross-examination questions for BellSouth and Supra witnesses. Supra asserts that this staff

member requested that the BellSouth employee advise the staff member as to which witnesses the draft cross-examination questions should be directed. Supra contends that it is likely that the BellSouth employee contacted this staff member because the draft questions were not forwarded to staff legal counsel until two hours later. Supra asserts that although the staff member indicated that a copy was sent to Supra, that cannot be verified. Further, Supra asserts that it never received a copy of the draft cross-examination questions.

Supra notes that after an internal staff investigation regarding the situation, the Prehearing Officer issued Order No. PSC-02-0143-PCO-TP, which granted a rehearing in Docket No. 001097-TP. Supra cites the following findings from paragraph number 4 of the Order:

> Prior to the scheduled Agenda Conference, a **procedural irregularity** was brought to my attention, which prompted a deferral of the item . . . I directed further inquiry, and have since reviewed the findings of that inquiry. Although the inquiry has failed to disclose any prejudice to either party, **the Commission is sensitive to the mere appearance of impropriety. Accordingly, in order to remove any possible appearance of prejudice, I find that this matter should be afforded a rehearing.** (Emphasis in Motion)

Supra contends that although the Order did not find any prejudice to either party, it believes that this is contrary to the evidence and the circumstances surrounding the incident. Supra states that the staff member's misconduct was not disclosed to Supra until five months after the incident. Furthermore, Supra argues that this staff member had no reason to refrain from such behavior, which indicates a bias in favor of BellSouth. Supra maintains that a rehearing was the proper remedy because of the creation of the appearance of impropriety, even though the staff inquiry failed to disclose any prejudice.

Supra alleges that the same impropriety exists in Docket No. 001305-TP, which is Supra's only other case pending before us. Supra contends that it is undisputed that the same staff member who engaged in the aforementioned misconduct in Docket No. 001097-TP

also participated in the instant docket, Docket No. 001305-TP, and was present at the two-day hearing in this docket. Supra contends that in this docket the staff member had a second opportunity to prejudice Supra, and that we cannot affirmatively state that this staff member did not provide BellSouth with cross-examination questions, or any other untoward assistance, before the evidentiary hearing in this docket.

Supra asserts that the above situation raises serious questions about the conclusion of our internal investigation that Supra was not prejudiced as a result of the staff member's actions, as well as serious questions involving the conduct of BellSouth and its employees, and its failure to immediately disclose to us the "illicit" relationship between its employee and the staff member. Citing Hernandez v. State, 750 So. 2d 50 (Fla. 3rd DCA 1999), Supra asserts that there are a long line of cases involving the appearance of impropriety which arises when an illicit relationship develops between adversarial parties.

Supra contends that while our staff is not a party to the proceedings, it does engage in conduct which is adversarial, as evidenced by this staff member's preparation of draft cross-examination questions for BellSouth and Supra for use by staff legal counsel in preparation for the hearing. Supra asserts that whether or not questions were prepared by this staff member in this docket, the staff member had access to cross-examination questions, documents, and "other Commission Staff information" which could have been used to assist BellSouth in its litigation against Supra. Supra argues that "this access and [the staff member's] bias in favor of BellSouth by all standards of common sense creates an actual conflict of interest between two individuals and two entities, this Commission and BellSouth - with divided loyalties."

Citing People v. Singer, 226 Cal. App. 3d 23 (1990), Supra asserts that "[t]he validity of our adversarial system depends upon the guaranty of this 'undivided loyalty and effort . . . ." Supra cites to Cuyler v. Sullivan, 466 U.S. 335, 349-351 (1980), for the proposition that the courts are clear that once "having found an actual conflict of interest, the Court must presume prejudice resulting therefrom." Supra further cites Cuyler, stating that "[a] defendant who shows that a conflict of interest actually

affected the adequacy of representation need not demonstrate prejudice in order to obtain relief."

Supra argues that this legal conclusion by the courts raises serious and legitimate questions regarding the internal investigation's conclusion that the staff member's misconduct failed to disclose any prejudice in Docket No. 001097-TP. Supra further asserts that it need not demonstrate any prejudice in order to obtain relief but only that an actual conflict of interest exists. Supra contends that staff, in its recommendation to the Prehearing Officer, articulated the wrong standard regarding whether a rehearing was warranted in Docket No. 001097-TP, although Supra agrees with the Prehearing Officer's decision to require rehearing.

Supra contends that the cited cases are instructive because it shows the analysis a court would undertake in determining whether a new trial should be granted in a criminal context. Supra argues that if the standard is appropriate for a criminal context, then the standard should be sufficient in a civil proceeding such as the one in the instant case.

Citing Reynolds v. Chapman at page 1343 (full citation not provided by Supra), Supra contends that once it is determined that an actual conflict exists, the Court then asks whether "a plausible alternative strategy" could have been pursued during any portion of the proceeding. Supra suggests that we should ask whether it is plausible that the staff may have pursued an alternative strategy or course of action during the discovery phase of this proceeding or during the evidentiary hearing. Supra concludes that we must conclude that "the plausible course of action was not followed because it conflicted with [this staff member's] external loyalties."

Supra cites to Zuck v. Alabama, 588 F.2d 436 (5th Cir. 1979), for the proposition that an actual conflict of interest occurs when an attorney places himself in a situation inherently conducive to divided loyalties. Supra asserts that an actual conflict of interest occurs when staff members in a supervisory capacity place themselves in a situation inherently conducive to divided loyalties. Supra contends that in the present circumstance, there was a secret relationship between the staff member and the

BellSouth employee which benefitted BellSouth, as evidenced by the staff member sending BellSouth cross-examination questions in Docket No. 001097-TP. Supra further contends that it therefore follows that the same misconduct occurred in this docket, which presented BellSouth with the opportunity for pursuing a different strategy or course of action in this docket. Supra asserts that it need not prove that the same misconduct occurred in this docket to obtain the relief sought. Supra alleges that it is very reasonable to conclude that the staff member continued to have improper communications with BellSouth in this docket because so long as this staff member remained undetected, the staff member had no reason to refrain from engaging in the same conduct engaged in before the evidentiary hearing in Docket No. 001097-TP.

Supra further contends that if our staff had learned of the misconduct before the end of the hearing and the time Supra was notified of the misconduct in Docket No. 001097-TP, this would further substantiate the institutional bias Supra believes is already evident. Supra asserts that it is irrelevant whether this staff member worked on writing the staff recommendation in this docket because the bias and/or prejudice occurred during the entire proceeding, which includes discovery, depositions, as well as the evidentiary hearing. Supra asserts that we cannot state with certainty that this staff member "did not leave at night with documents that she later delivered to BellSouth employees" or "did not meet with BellSouth employees after work hours to inform them of information that would compromise Supra in its litigation before the Commission."

Supra concludes that this staff member engaged in misconduct in Docket No. 001097-TP, showed bias in favor of BellSouth, had the opportunity to continue to engage in misconduct in this docket, and that the misconduct was hidden from Supra until after the close of the evidentiary hearing in this docket. Supra asserts that based on these reasons, we should conclude that the actual conflict affected the adequacy of the staff's representation and impartiality in this proceeding and that Supra need not demonstrate prejudice in order to obtain relief. Supra states that it disagrees with the characterization of the misconduct as a "procedural irregularity" as well as the conclusion that the inquiry failed to disclose any prejudice. Supra agrees that we should be sensitive to the mere appearance of impropriety. Thus,

Supra concludes that a rehearing is in order based on precedent established in Docket No. 001097-TP.

Over and above the alleged bias of the staff member, Supra also alleges that there is an institutional bias in favor of BellSouth. Supra contends that there was a recent incident which transpired with respect to Supra's Motion for Supplemental Authority filed on January 30, 2002, regarding the 11th Circuit's decision in MCIMetro published on January 10, 2002. Supra asserts that BellSouth filed its response stating that Supra was incorrect in stating that the 11th Circuit's decision is controlling. Supra states that in Order No. PSC-02-0159-TP, issued February 1, 2002, granting in part and denying in part its Motion to File Supplemental Authority, the word "controlling" was struck from Supra's motion as improper argument. Supra further notes that the Order states that the 11th Circuit's decision shall be properly considered. Supra states that the Prehearing Officer "unfortunately" but "very likely" relied on staff's recommendation in rendering his decision on the Motion. Supra alleges that staff simply accepted BellSouth's assertion when drafting the recommendation regarding its Motion to File Supplemental Authority and its overall recommendation in this docket. Supra alleges that staff's legal conclusion regarding the precedential effect of the Eleventh Circuit's decision is "completely false as a matter of law" and thus indicative of the institutional bias in favor of BellSouth. Supra concludes that it must be granted a rehearing of the entire proceeding in this docket, lest it be prejudiced by the appearance of impropriety that exists in both dockets.

Finally, Supra contends that its Motion is timely filed because our General Counsel requested that it take no action until the investigation regarding the misconduct was complete. Supra states that the investigation was completed and the Order granting a rehearing in Docket No. 001097-TP was issued January 31, 2002. Supra asserts that it has only been fifteen days since the Order was issued directing a rehearing in Docket No. 001097-TP, and, as such, its Motion for Rehearing in this Docket is timely. Supra notes that its Motion for Rehearing was not filed in Docket No. 001097-TP because we ordered a rehearing in that docket.

b. Request for Appointment of a Special Master

With regard to its request for a Special Master, Supra states that the presiding officer may fashion an order to promote the just, speedy, and inexpensive determination of all aspects of a proceeding. Supra contends that ordering a rehearing is a two-part decision, with the first part requiring a determination of whether a rehearing should be granted and the second part requiring a determination as to whom will hear the case once rehearing is granted. Supra asserts that a fair, just, and inexpensive way to resolve this question is to order that a Special Master, consisting of a three member panel agreed to by both parties, be appointed to handle the entire rehearing.

Supra asserts that a good example of such a three member panel would be the arbitration panel presently hearing disputes between the parties pursuant to the parties' current interconnection agreement. Supra states that if the parties are unable to agree on the panel members, a list of qualified candidates could be submitted for our approval. Supra suggests that the Special Master would handle the case and prepare a recommendation for final disposition by a majority vote of this Commission or a Commission Panel. Supra states that it has no objection to the matter ultimately being decided by the us, after the completion of the hearing process before an independent body. Supra concludes that the answer is the appointment of a Special Master.

c. Request for Indefinite Deferral of Docket No. 001305-TP

In addition, Supra requests that Docket No. 001305-TP be indefinitely deferred from being considered at any Commission Agenda Conference until this Motion for Rehearing is ruled upon.

BellSouth contends that Supra's Motion is "replete with shrill and conclusory rhetoric" but "utterly devoid of any substance of legitimate analysis." BellSouth characterizes Supra's Motion as "nothing more than a desperate and baseless effort to postpone our vote on a Staff Recommendation with which Supra is apparently dissatisfied." BellSouth asks that we reject the Motion in its entirety.

BellSouth asserts that the primary basis for Supra's Motion is an "ad nauseam recital" of actions that allegedly occurred in Docket No. 001097-TP. BellSouth states that it addressed those matters in that docket and will not repeat its entire position in its Response to Supra's Motion.

BellSouth asserts that Supra's Motion fails to allege any improper actions in this docket. BellSouth states that Supra's Motion offers no evidence that any improper activities took place in this docket and alleges no specific conduct by BellSouth or our staff that affected either the hearing or the Staff Recommendation. Citing Supra's Motion, BellSouth states that Supra points to nothing more than an "opportunity to prejudice Supra." BellSouth asserts that such speculation is not grounds for rehearing. BellSouth asserts that there is no evidence that the staff member in question or any other staff member made any improper contacts with BellSouth in this docket. Further, BellSouth asserts that a review of the Staff Recommendation reveals that the staff member in question did not participate in staff's evaluation of the disputed issues.

BellSouth also asserts that Supra's allegations of improper conduct are false and based on nothing more than conjecture. BellSouth offers a sworn affidavit of Nancy Sims as evidence that there is no merit to Supra's allegations of cooperation between BellSouth and our staff in this docket. In her affidavit, Ms. Sims states, among other things, that she did not have any substantive discussions with the staff member in question concerning this docket, that the only documents she ever received from this staff member were the draft cross-examination questions in Docket No. 001097-TP, and that she neither met with this staff member after hours or outside of the Commission nor had anything but a professional relationship with this staff member. BellSouth contends that we should not delay action in this docket based on "unsupported claims of possible irregularities in this docket."

BellSouth contends that Supra has filed its Motion solely for purposes of harassment and delay. Citing Order No. PSC-98-1467-FOF-TP, issued October 28, 1998, BellSouth states that we have previously found that Supra made allegations of misconduct concerning a BellSouth employee without any factual or legal support. BellSouth notes that while we denied BellSouth's request

for sanctions in that case, we stated at page 10 of that order that "further pursuit by Supra of such legally and factually deficient theories shall not be considered lightly." BellSouth contends that "Supra's flagrant disregard of the Commission's previous order should not be tolerated."

BellSouth also rebuts Supra's claim that there is institutional bias against Supra. BellSouth asserts that staff's disagreement with Supra's interpretation of the Eleventh Circuit decision cited by Supra is not proof of bias. BellSouth asserts that if disagreement with a party constitutes bias, then the staff would be considered biased against every party in every proceeding where the staff disagrees with that party. BellSouth contends that because Supra cannot demonstrate any institutional bias, Supra's request for appointment of a special master is unnecessary.

BellSouth asserts that Supra has not offered a legitimate reason for us to depart from our normal practices and procedures by delegating our authority to third parties. BellSouth alleges that Supra has, throughout this proceeding, "attempted to manufacture disputes and delays that would postpone the parties' transition from their existing agreement to the follow-on agreement."

Finally, BellSouth argues that Supra's Motion is not timely. BellSouth states that Supra, by its own admission, was aware of the issues related to Docket No. 001097-TP no later than October 5, 2001. BellSouth further states that Supra was aware of the staff member's initial assignment to this docket because it was a matter of public record and could be readily observed that this staff member was present at the September 26-27, 2001, hearing in this docket. BellSouth asserts that despite this knowledge, "Supra deliberately waited until the very last minute to make its false and outrageous claims with the obvious intent to delay the vote in this case."

2. Decision

In its Motion, Supra asks us, on the eve of hearing our staff's post-hearing recommendation in this docket, to take the extraordinary step of appointing a special master to rehear this docket because of an event that took place, and was remedied by order of the Prehearing Officer, in a separate docket involving

these parties. Without seeking reconsideration of the Prehearing Officer's finding that an internal investigation disclosed no prejudice to either party, Supra asks us to ignore this finding and replace it with a finding that there was prejudice to Supra in that docket. After laying claim to prejudice which the prehearing officer in Docket No. 001097-TP expressly found to be absent, Supra bootstraps that "prejudice" across the divide between dockets into this arbitration docket. Absent evidence or even an allegation of any specific improper act by the our staff or BellSouth in this docket, Supra asks us to find that Supra was prejudiced in this docket based on (1) its belief that it was prejudiced in the separate docket and (2) on speculation that the individuals involved in the event in the separate docket could have conspired against Supra in this docket. Supra's Motion is procedurally improper and substantively flawed.

Most importantly, Supra does not allege and does not show that any bias which they say arose in the distant complaint docket, and which it now says affects this docket, will survive presentation of the staff recommendation to us at the Agenda Conference. Assuming arguendo that our staff's recommendation were flawed, we are the decision-makers in this case, and at the time Supra presented its motion, we had not yet rendered a decision, or even considered our staff's recommendation. Put simply, because at the time of the motion there was no agency action, Supra is not an aggrieved party. It is entirely improper to seek reconsideration of our staff's recommendation because we are free to accept staff's recommendations, to accept part of staff's recommendations, or to reject staff's recommendations entirely.

As noted above, Supra's Motion calls into question the results of the internal inquiry addressed by the Prehearing Officer's order setting Docket No. 001097-TP for rehearing. However, Supra has not asked for reconsideration of that Order. Further, Supra's Motion cannot be considered as a motion for reconsideration of that order for two reasons. First, Supra's Motion was not filed in the docket in which the order was issued. Second, Supra's Motion was filed eighteen days after issuance of the Prehearing Officer's order, well past the ten day deadline established in Rule 25-22.0376, Florida Administrative Code, for reconsideration of a non-final order.

In addition, Supra's Motion is procedurally improper because it asks for rehearing based on our staff's post-hearing recommendation, rather than rehearing of our order. The rules governing administrative proceedings before us do not provide for rehearing of staff recommendations prior to our decision. In this instance, we have not yet rendered a final decision in this docket.[1] Furthermore, although Supra questions portions of the Prehearing Officer's order in Docket No. 001097-TP and alleges "institutional bias" in its Motion, it does not imply any bias on behalf of the ourselves and agrees that it would be appropriate for us to make the final determination in this matter.

Supra also argues that its Motion is timely because it was filed fifteen days after the Prehearing Officer ordered a rehearing in Docket No. 001097-TP. Notwithstanding the fact that Supra's Motion was actually filed eighteen days after the Prehearing Officer's order was issued, the timeliness of Supra's Motion cannot be established by reference to an event which took place in a separate and discrete docket. Further, given that Supra was informed of the events that occurred in Docket No. 001097-TP over four months before its Motion was filed, the timing of Supra's motion -- one day prior to our scheduled vote in this docket -- is at least questionable.

The substantive basis for Supra's Motion is also flawed. Absent evidence or even an allegation of any specific improper act by our staff or BellSouth in this docket, Supra asks us to find that Supra was prejudiced in this docket based on (1) its belief that it was prejudiced in Docket No. 001097-TP and (2) on speculation that the individuals involved in the event in Docket 001097-TP could have conspired against Supra in this docket. As to Supra's first point, the question of whether Supra was prejudiced in Docket No. 001097-TP was appropriately addressed in that docket through an internal investigation and an order of the Prehearing Officer. Supra did not seek reconsideration of the Prehearing

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[1] We addressed a somewhat similar situation in Order No. PSC-99-0582-FOF-TP, issued March 29, 1999, in Docket No. 980800-TP. In that case, we struck Supra's Exceptions/Objections to staff's post-hearing recommendation as improper under the rules governing this Commission.

Office's decision. As to Supra's second point, mere speculation of prejudice, absent any evidence or allegation of a specific improper act in this docket, is not a proper basis for us to require a rehearing, particularly considering the timing of Supra's request. Supra has offered no proof or even allegations of any specific act that caused it to be prejudiced in this docket. The only evidence before us is Ms. Sims' affidavit, which at least supports a finding that Ms. Sims was not involved with the staff member in question in any of the activities that Supra suggests *could* have happened. Further, our staff has affirmatively stated that the staff member in question played no role in preparing the recommendation in this docket. Supra asserts only that there was an opportunity for improper acts to take place and invites us to infer that they did indeed take place. Absent proof or specific allegations of wrongdoing, however, we will not halt the processing of any of our dockets simply because those opportunities may exist.

Supra cites case law as support for its argument that the events in Docket No. 001097-TP necessarily taint the proceedings in this docket. As Supra notes in its Motion, the line of cases cited by Supra describe the analysis used in criminal cases to determine whether an attorney is ineffective due to a conflict of interest. Supra suggests that these cases are instructive. However, these cases are clearly not controlling in this administrative setting and are not on point with the facts before us. Even stretching to apply the standard set forth in the cited cases to the situation before us, Supra's Motion must fail. Reynolds v. Chapman, 253 F.3d 1337, 1342-43 (11th Cir. 2001) identifies the standard used by the courts as a two-part test under which the petitioner/defendant must demonstrate: (a) that his defense attorney had an actual conflict of interest; and (b) that this conflict adversely affected the attorney's performance. To satisfy the first part of the test, "a defendant must show something more than 'a possible, speculative, or merely hypothetical conflict." Id. Even if Supra could satisfy this part of the test using its strained analogy of staff to the defense attorney and Supra to the defendant, it has not demonstrated in any way that it can satisfy the second part of the test - that any conflict of interest adversely affected staff's performance in this docket.

Perhaps the weakest leg upon which Supra elects to stand is the notion that because our staff does not embrace Supra's analysis

of the 11th Circuit's decision in MCIMetro, there must be "institutional bias" against Supra. Neither Supra, nor BellSouth, nor our staff can advance an infallible legal argument. The affect of the 11th Circuit's decision is debatable as is evidenced by the prehearing officer's decision permitting briefs on that specific issue. Disagreement as to the interpretation and application of the case is, however, not proof of bias.

Finally, although Supra seeks a rehearing before some entity other than staff, the hearing which has already been afforded the parties was before us, the Commission. We are the same entity before which Supra says it is content submitting the results of a special master or the like for final decision. Again, it serves to note that the Commission before whom the hearing was had -- before whom witnesses were sworn and before whom evidence was presented -- is the decision-maker in this case.

In summary, Supra has bootstrapped imagined bias into this record upon pure speculation devoid of any alleged overt or covert act; it has failed to associate that imagined bias in any way to the only decision-makers in this case - us, the Commission; and it has set upon this course prior to any decision affecting its substantial interests.

For the reasons stated above, Supra's Motion for Rehearing, Appointment of a Special Master, and Indefinite Deferral, is hereby denied.

B. Renewed Motion for Indefinite Stay and In the Alternative Renewed Motion for Oral Argument/Motion for Oral Argument on Procedural Question

1. Arguments

On February 21, 2002, Supra filed a Motion again requesting oral argument on staff's recommendation originally filed on February 7, 2002, in this Docket. Supra contends that it filed the request for oral argument pursuant to Rule 25-22.058, Florida Administrative Code.

In its Motion, Supra also responds to BellSouth's brief filed in accordance with Order No. PSC-02-0202-PCO-TP. Therein, Supra

disputes BellSouth's contention that Section 364.162(1), Florida Statutes, is applicable to this case and, instead, contends that our proper role is merely that of a rate regulator.

On February 27, 2002, Supra filed a Motion for Oral Arguments on the Procedural Question Raised by the Commission Staff and the Wrongful Denial of Due Process. Therein, it again argued that this Docket should be set for re-hearing.

In its response, BellSouth contends that Supra's February 21, 2002, Motion is, in its entirety, an improper pleading in that it is a response to BellSouth's brief filed in accordance with Order No. PSC-02-0202-PCO-TP. BellSouth contends that Order No. PSC-02-0202-PCO-TP did not contemplate reply briefs. Furthermore, BellSouth contends that even if the motion could possibly be considered proper, it is nevertheless untimely, because it was not submitted with the original pleadings upon which oral argument is now requested. Finally, BellSouth notes that it cannot understand how the motion can be "renewed," when the original motions had yet to be fully addressed by us. For these reasons, BellSouth believes the motion should be rejected as an improper pleading designed "for the purposes of delay and harassment." Opposition at 3.

In response to Supra's February 27, 2002 Motion, BellSouth argues that rehearing of this matter is not proper and that Supra's constitutional due process rights have not been violated.

2. Decision

Supra's February 21, 2002, Motion, including its alternative request for relief, is not only premature, in that we have yet to rule on the original requests for relief, it is also an improper pleading not contemplated by Order No. PSC-02-0202-PCO-TP, our rules, or the Rules of Civil Procedure.

Even if we were to accept the pleading, the arguments raised therein merely restate previous arguments regarding the effect of the 11th Circuit's decision in MCIMetro, with the added claim that, contrary to BellSouth's assertions, Section 364.162(1), Florida Statutes, does not authorize us to act with regard to disputes arising out of approved interconnection agreements. The plain

language of Section 364.162(1), Florida Statutes, states, in pertinent part, that:

> The Commission shall have the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions.

The Legislature did not differentiate between disputes arising before an agreement has been approved and those arising out of an approved agreement. The specific language says "any" dispute. Furthermore, we weigh heavily the use of the term "interpretation" in this provision. Were we constrained only to resolving disputes prior to the parties entering into an agreement, there would be little opportunity for "interpretation" of any rates, terms, and conditions; rather, we would be charged with establishing and defining the initial rates, terms, and conditions. As set forth in Webster's II New Riverside University Dictionary, the term "interpret" means to explain the meaning of something. In establishing a new agreement between carriers through arbitration, we do not "explain" new terms for the parties--we set them.[2]

As for Supra's February 27, 2002, Motion, that request is granted to the extent that oral argument was allowed. Otherwise, it is denied based on similar rationale set forth in Section I.A. of this Order. In addition, we reject Supra's contention that its due process rights will be abrogated if we take action at this time.

II. ARBITRATED ISSUES

A. Agreement Template

The issue before us is to determine which agreement template shall be used as the base agreement into which our decisions on the

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[2]See Verizon v. Jacobs, Case No. SC01-323 (Fla. 2002)(*subject to motions for rehearing*), wherein the Court emphasized that under Florida rules of statutory construction, the language of the statute must be given its plain and ordinary meaning, and there is no need to resort to other rules of statutory construction when the language is clear and unambiguous.

disputed issues will be incorporated. The dispute is whether BellSouth's most current agreement template, or the parties' existing agreement, should be the basis for the follow-on agreement.

1. Arguments

BellSouth witness Hendrix asserts that the BellSouth standard template agreement is the proper place to start the parties' negotiations. He states, "many ALECs, including AT&T, realized that their existing Interconnection Agreement was out of date and agreed to use the BellSouth standard template as a blue print for beginning negotiations for their new agreements." Witness Hendrix also states that "BellSouth believed that using the AT&T Agreement as the base agreement or template would be difficult at best." He goes on to state that:

> In general, the law has changed substantially since the passage of the 1996 Act. FCC and state Commission orders have clarified the rights and obligations of the parties. Based upon these changes and upon the experience BellSouth has gained in implementing the 1996 Act over the last five years, BellSouth's internal processes have been modified substantially as well. Supra intends to require BellSouth to maintain the outdated processes simply to support Supra's agreement, when such processes have been updated for all other CLECs. While it is impossible to list all the changes that BellSouth has made to its agreement since the AT&T Agreement was negotiated, below are some of the more prominent changes.

Witness Hendrix speaks to some of these changes in the same exhibit. In that exhibit, witness Hendrix notes changes to the following sections or attachments to the agreement: General Terms and Conditions, Resale, UNEs, Collocation, Local Interconnection, Billing, Disaster Recovery Plan, and Number Portability.

Witness Hendrix explains that BellSouth was aware that Supra wished to use the parties' existing agreement as a starting point for negotiations. However, witness Hendrix states, ". . . we explained to Supra that there were many changes that had taken place in the agreement, there were many rulings that had been

issued." BellSouth asserts that the existing agreement does not reflect the changes that have taken place in the industry based on various arbitrations and rulings. Witness Hendrix then states, "to go on and use an agreement that is outdated that is reflective of the time that the parties negotiated that agreement is, in BellSouth's mind, not appropriate."

Witness Hendrix believes that even though Supra witness Ramos identifies eight reasons to use the current agreement, "he fails to identify any reason not to use the two templates that BellSouth offered to Supra as the basis for beginning negotiations." Witness Hendrix contends that BellSouth offered to begin negotiations with Supra using either the standard interconnection agreement or the current working draft of the agreement BellSouth was using in negotiations with AT&T. Those agreement templates were offered to Supra in March 2000 and July 2000, respectively. Witness Hendrix states that the BellSouth/AT&T working draft is the agreement that was filed with BellSouth's Petition for Arbitration on September 1, 2000, in accordance with Section 252(b)(2)(A). He also states that:

> It was not until June 18, 2001, that Supra proposed any contract language to this Commission, and what Supra then proposed was simply a redline of the General Terms and Conditions of its existing Agreement. It has yet to propose language for the Commission to consider for the 14 attachments associated with its proposed agreement.

Furthermore, BellSouth witness Hendrix contends that "Supra has refused to specify what in the BellSouth proposed Interconnection Agreement it does not agree with, nor has Supra proposed an Interconnection Agreement to us clearly showing the Parties' unresolved issues." He asserts that:

> BellSouth is the only party to this proceeding that has filed an Interconnection Agreement for approval by the Commission. This was done when BellSouth filed its Petition for Arbitration.

BellSouth witness Hendrix believes that by not identifying the specific terms of BellSouth's proposed Interconnection Agreement that it disputes, "Supra failed . . . to cooperate with the State commission in carrying out its function as an arbitrator." Witness

Hendrix contends that Supra has failed to provide information that is necessary for us to resolve this issue. As such, he believes that BellSouth's proposed Interconnection Agreement should be approved as the baseline for the BellSouth/Supra Interconnection Agreement.

Supra witness Ramos asserts that the parties' negotiations of a follow-on agreement should begin with the current agreement. As such, witness Ramos offers several reasons why the current agreement is the proper base for negotiation. Witness Ramos contends that "Supra has commenced the implementation of its Business Plan based on the Current Agreement, and should be entitled some continuity, particularly where the vast majority of the terms and conditions remain unchanged by any subsequent order or rule." In addition, witness Ramos argues that the follow-on agreement should promote continuity with regard to the types of service and cost of those services to Supra's customers. Witness Ramos offers several additional reasons in support of this position which appear in a June 7, 2000, letter, in which Supra's counsel stated that:

> As stated above, Supra Telecom wishes to execute an agreement which, except for expiration date, would retain the exact terms as our current interconnection Agreement. The time period for this new agreement can be three years. However, after negotiations between AT&T and BellSouth have concluded, Supra Telecom may then choose to opt into that agreement. We do not see why this request should create any problems for BellSouth since the current agreement was obviously acceptable to BellSouth when originally negotiated with BellSouth. Moreover, the current Agreement has already "passed muster" with the Florida Public Service Commission ("FPSC") and has been the subject of various FPSC rulings that clarify various provisions and memorialize current Florida law on the various subject.[sic] Moreover, incorporating the terms of the prior agreement into a new agreement will make negotiation of a new agreement quick and simple; thereby creating [a] "win-win" situation for everyone. Although Supra Telecom would prefer entering into the same agreement again, if you believe that there are some terms in the current agreement which require

> modification or updating to bring the agreement in line with recent regulatory and industry changes, we would be happy to consider any proposed revisions. In any event, to avoid any delay, we can agree to negotiate such revisions by way of an amendment at a later date. (emphasis added)

Supra witness Ramos believes that because BellSouth wants to begin from an entirely new agreement, Supra has been placed in an unfavorable bargaining position. Furthermore, witness Ramos contends that there have been other follow-on agreements in which the parties used the current agreement as a starting point or simply extended the term of the agreement. He argues that BellSouth and MCI used their existing agreement as a starting point for negotiations when drafting the parties' follow-on agreement. Witness Ramos also suggests that "BellSouth's argument that 'practices have changed, the controlling law has changed, and the interconnection offerings, terms and conditions that are available have changed' is without merit." In support, witness Ramos asserts that "[t]he Act, which is the controlling law in this instance, has neither been changed nor amended since its passage in 1996." Furthermore, witness Ramos asserts that BellSouth's reasoning is "flawed, and disingenuous" as the parties existing Agreement has been amended to reflect changes in the law. He also argues that "it would simply be a matter of inserting or deleting provisions in that agreement to make it reflect the current state of the industry."

Supra argues that the parties' existing agreement should be the basis for the follow-on agreement. However, Supra witness Ramos confirms that Supra did not attach a competing version of the existing agreement with modifications, or any other agreement, with its response to BellSouth's petition for arbitration. He also confirms that Supra has not filed a complete proposed agreement in the proceeding. All Supra has provided is an attachment containing a redlined version of the general terms and conditions.

Supra witness Ramos asserts that "Supra is eager to enter into a Follow-On Agreement . . . ." In fact, witness Ramos goes so far as to state, "Supra does not wish to continue operating under an agreement that has been the subject of a number of disputes between Supra and BellSouth . . . ." He then states:

> What Supra seeks in the follow-on agreement is clarity as well [as] parity and to be able to incorporate whatever new FCC rules that are out there that need to be filed in the agreement as well as FPSC orders that go to be [sic] with that agreement. Supra seeks to have all that there.

2. Decision

We believe that any agreement should represent the current state of the industry and reflect any changes in the law. This is especially true when the parties' existing agreement has expired and a follow-on agreement is being contemplated. Supra wants to use the parties' existing agreement, but on the other hand, does not want to operate under an agreement that in the past has created disputes between these parties. Supra witness Ramos contends that the Act "has neither been changed or amended since its passage . . . ." However, throughout his testimony he clearly contemplates that change in one form or another has taken place since 1996.

The record indicates that BellSouth presented Supra with several options as negotiations between the parties began. BellSouth offered to begin negotiations from the standard template or use the most recent version of the working draft of the BellSouth/AT&T agreement which was still being negotiated. Based on the record, we believe that BellSouth never intended to exclude the parties' existing agreement as an option. Instead, it appears that given changes in the law and the difficulties created in other recent follow-on agreement negotiations, BellSouth offered what it did to alleviate some of the same problems when negotiating the Supra agreement. Moreover, it appears from the testimony that BellSouth believed that Supra would adopt the AT&T agreement once it was final. This very possibility was alluded to in the June 7, 2000, letter from Supra's counsel to BellSouth.

Of significance here is that BellSouth is the only party that produced a complete agreement in this record -- in other words, an agreement which represents the current state of the industry and interpretation of the Act. The record reflects that BellSouth offered Supra several options as a starting point for negotiations and filed a complete, updated version with its petition. Apparently the options proposed by BellSouth were unacceptable to Supra. Even though Supra witness Ramos stated that Supra was

"eager" to finalize a follow-on agreement and that his company did not want to operate under an agreement that had created many disputes between the parties, Supra did not produce an alternative agreement until after the hearing began. That agreement was the parties' existing agreement, the BellSouth/AT&T agreement, which was adopted by Supra on October 5, 1999, without any updates.

The parties have been given ample opportunity to either reach a decision on which of the proposed agreements to use as the basis for the follow-on agreement or to make the necessary changes to the existing agreement. To our dismay, they have been unable to accomplish either.

BellSouth's most current template agreement, filed with their petition for arbitration, is the only interconnection agreement produced in its entirety as part of this arbitration. Supra has not produced a complete, alternative interconnection agreement in this proceeding for our consideration. The record in this docket does not support using the parties' existing agreement as a basis for the follow-on agreement. As such, BellSouth's most current template agreement shall be used as the base agreement of the follow-on agreement, and into which our decisions on the disputed issues will be incorporated.

B. Appropriate Forum for the Submission of Disputes Under the New Agreement

1. Arguments

BellSouth witness Cox, in adopting the testimony originally filed by BellSouth's John Ruscilli, asserts that the appropriate regulatory authority should resolve disputes, and that BellSouth should not be precluded from petitioning this Commission for resolution of disputes under the interconnection agreement. She believes that commercial arbitration has proven to be an impractical, time-consuming and costly way to resolve interconnection disputes. In her estimation, this Commission is more capable of handling disputes between telecommunications carriers than are commercial arbitrators. She believes this stems from the difficulty in finding arbitrators that are sufficiently experienced in the telecommunications industry so that decisions

can be made expeditiously and without having to train the arbitrators on the very basics of the industry. Witness Cox is also concerned from a public policy perspective that it is critical that interconnection agreements be interpreted consistently. She believes this goal cannot be reached without a means to insure that similar disputes arising under different agreements are handled in a similar fashion. She states that our control of dispute resolution ensures that disputes between two carriers that potentially affect the entire industry are dealt with consistently.

In its brief BellSouth also claims that we lack the authority to compel it to go to a third party to resolve a dispute that falls within our jurisdiction. BellSouth cites our Order No. PSC-01-1402-FOF-TP, issued June 28, 2001, wherein we observed that "nothing in the law gives us explicit authority to require third party arbitration." Id. at p. 111. BellSouth asserts that it does not wish to waive its right to have us hear disputes.

In its supplemental brief filed February 19, 2002, BellSouth contends that the BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc., et al., 2002 U.S. App. Lexis 373 (11th Cir. 2002) (MCIMetro) decision is not "controlling" authority for the issues that have been presented to us for decision. At most, emphasizes BellSouth, the 11th Circuit's decision in MCIMetro stands for the proposition that, under that court's interpretation of federal law and Georgia law, the Georgia Public Service Commission (GPSC) has no authority to interpret or enforce the terms of the agreement between BellSouth and MCIMetro. BellSouth believes the Court did not consider the issue of whether we have jurisdiction, under Florida law, to resolve disputes arising out of an interconnection agreement. BellSouth also maintains that the 11th Circuit did not address, even indirectly, the issue of whether a state commission could compel parties to submit to binding commercial arbitration. Finally, BellSouth argues that we are not limited to choosing between the parties' proposed language for the new interconnection agreement, but may exercise our independent judgment to refrain from imposing either parties' proposed language addressing this issue.

Specifically, in arguing that the MCIMetro case did not address our authority under Florida law to resolve contract disputes, BellSouth concedes that the 11th Circuit concluded both

that the 1996 Act did not expressly provide for a state commission to resolve disputes arising after an interconnection agreement was approved and that no such authority should be implied from the federal Act:

> The plain meaning of [47 U.S.C. § 252(e)(1)], however, grants state commissions, like the GPSC, the power to approve or reject interconnection agreements, not to interpret or enforce them. It would seem, therefore, that the 1996 Act does not permit a State commission, like the GPSC, to revisit an interconnection agreement that it has already approved, like the ones in this case.

2002 WL 27099, slip op. at 6. BellSouth notes that the 11th Circuit's posture conflicts with that of six other Courts of Appeal, as well as the Federal Communications Commission.

However, states BellSouth, the 11th Circuit's analysis of the 1996 Act is not necessary to resolve Issue B of this docket, because the Court expressly found that a state commission's authority may be found in an analysis of state law. 2002 WL 27099, slip op. at 9 ("Having determined that the GPSC has no power under federal law to interpret the interconnection agreements, we must now consider whether there is some other appropriate basis for the GPSC to interpret these agreements.") BellSouth points to Section 364.162, Florida Statutes, as giving us express authority to interpret and enforce interconnection agreements between ILECs and ALECs. According to BellSouth, the statute specifically grants this Commission "the authority to arbitrate any disputes regarding interpretation of interconnection or resale prices and terms and conditions." Fla. Stat. § 364.162(1). BellSouth believes this grant of authority includes the authority to interpret such terms and conditions when they are included within an interconnection agreement.

BellSouth also notes that the 11th Circuit in MCIMetro based its decision on a finding that the Georgia Commission was merely a "quasi-legislative body" unsuited to hear contract disputes. 2002 WL 270999, slip op. at 9-11. BellSouth believes that under Florida law, however, we exercise quasi-judicial authority when such authority is delegated to us by the Florida legislature. As in Southern Bell Tel. and Tel. Co. v. Florida Pub Serv. Comm'n, 453

So.2d 780, 781 (Fla. 1984)(statute authorizing us to adjudicate contract disputes concerning toll revenue was a "proper assignment of quasi-judicial authority" pursuant to Fla. Const. art. V, 5 1), BellSouth asserts that the express authority under Section 364.162, Florida Statutes, to resolve "any dispute regarding interpretation" of the terms and conditions of interconnection or resale is also "a proper assignment of quasi-judicial authority" under the Florida Constitution.

In addition, BellSouth believes that Supra lacks legal support for its position that BellSouth could be compelled to submit to binding arbitration. BellSouth cites the U.S. Supreme Court holding that "[a]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L.Ed.2d 648 (1986) (emph. added by BellSouth). BellSouth asserts that we also addressed this issue in the recent AT&T/BellSouth arbitration, where we concluded that "nothing in the law gives [the Commission] explicit authority to require third party arbitration." Order No. PSC-01-1402-FOF-TP (June 28, 2001) at p. 111. Thus, says BellSouth, we cannot force BellSouth to give up legal rights and submit to binding commercial arbitration.

BellSouth further argues that we are not obligated to choose between the options presented to us by the parties. Rather, contends BellSouth, "the Florida Public Service Commission is required by Florida's statutes and case law to reach its own independent findings and conclusions based upon the record before it." *Citing* International Minerals & Chemical Corp. v. Mayo, 217 So.2d 563, 566 (Fla. 1969)[3]. On this point, BellSouth also

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[3]*Also citing* Kimball v. Hawkins, 264 So.2d 463, 465 (Fla. 1978)(noting "legislative intent to extend broad discretion to the Public Service Commission in making its decision"); Gulf Electric Cooperative, Inc. v. Johnson, 727 So.2d 259 (Fla. 1999)(affirming our decision not to impose territorial boundaries); and Fort Pierce Utilities Authority v. Beard, 626 So.2d 1356 (Fla. 1993)(Public Service Commission properly exercised independent judgment to reject parties' joint petition for approval of territorial agreement).

challenges Supra's reliance upon MCI Telecom. Corp. v. BellSouth Telecom., Inc., 112 F. Supp. 2d 1286 (N.D. Fla. 2000), for the proposition that we must adopt Supra's proposed language. BellSouth believes that case actually leads to the opposite conclusion. There, notes BellSouth, the court held that while we cannot refuse to consider an issue before it for arbitration, but did not conclude that the we are required to adopt the proposals of either party. "Had the Florida Commission decided, as a matter of discretion, not to adopt such a provision, MCI would bear a substantial burden in attempting to demonstrate that the determination was contrary to the Telecommunications Act or arbitrary and capricious." 112 F. Supp. 2d at 1297. Therefore, asserts BellSouth, we are entitled to take into consideration all of the evidence and applicable law and decide the manner as it sees fit, as long as our decision is neither arbitrary nor capricious.[4]

Supra's current agreement with BellSouth provides for commercial arbitration, and Supra believes that this method of resolving disputes has proven its worth by providing judicial economy, the ability to award damages, due deference to the precedence of our orders, and the speedy, efficient resolution of disputes. Supra witness Ramos argues that BellSouth's position is based on nothing more than the fact that BellSouth has received unfavorable results before commercial arbitrators. He points out that in order to resolve disputes, commercial arbitrators consider the terms and conditions of the parties' agreement in conjunction with all applicable federal and state rules, just as we would do. The difference, notes witness Ramos, is that commercial arbitrators have the ability to award damages, whereas we do not. Given the parties' tumultuous relationship, Supra believes that it is important to have a venue that provides for the quick and expeditious resolution of issues, without running to us at every turn. In the parties' current agreement the commercial arbitrators must resolve the complaint within 90 days unless there is an explicit agreement to waive the 90-day requirement. More importantly, says witness Ramos, the commercial arbitrator's award is final.

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[4] *Also Citing* Order No. PSC-01-0824-FOF-TP, issued in Docket No. 000649-TP, *MCI/BellSouth Arbitration Final Order*, wherein we declined to impose limited liability provisions.

The witness contends, however, that before the Public Service Commission, parties may litigate the issue, then seek reconsideration of the Final Order, and then avail themselves of the appellate process. Witness Ramos states that our procedure is a much longer process than a commercial arbitration proceeding as contained in Attachment 1 of the parties' current agreement. Witness Ramos also notes that in his testimony, BellSouth witness Ruscilli acknowledges that this Commissions decision would be appealable, and we could resolve the matter only by ordering remedies within our power. Finally, witness Ramos believes

> . . . public policy dictates that taxpayers money should not be used to finance a party's noncompliance with an agreement approved by the PSC based on the CPR rules and the parties' current agreement, the losing party pays the cost of the arbitration proceeding. Whereas, any proceeding before the FPSC, it is the taxpayers that have got to fund the bill.

In its supplemental brief, Supra first argues that as of January 10, 2002, the MCIMetro decision became binding authority in the 11th Circuit.[5] As such, Supra contends, the Court's determination that ". . . the 1996 Act does not permit a State commission, like the GPSC, to revisit an interconnection agreement that it has already approved . . . " is binding upon us and precludes Commission action on this matter. Id. at p. 26. (Emphasis added by Supra) Supra believes this clearly indicates that we cannot revisit interconnection agreements it has approved pursuant to the Act. Thus, Supra maintains, the only possible remaining jurisdictional authority upon which we could rely is Florida law.

Supra asserts that in construing statutory provisions, one must first look to the plain meaning of the language used.[6] Supra believes Florida law, in particular Chapter 364, Florida Statutes, is silent on whether we have the authority to adjudicate a dispute involving an interconnection agreement that has already been approved by this Commission. Thus, Supra maintains that consistent

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[5]*Citing* Martin v. Singletary, 965 F.2d 944,945 n.1 (11th Cir. 1992).

[6]*Citing* Harris v. Garner, 216 F.3d 970, 972 (11th Cir. 2000).

with the MCIMetro decision, no such authority exists. Supra notes that the 11th Circuit Court rejected any implication of "general authority" over all telecommunications providers in the state as a basis for our adjudication of disputes.

> Nothing in the Georgia Act gives the GPSC the right to interpret a contract between two parties, just because the two parties happen to be certified telecommunications carriers.

MCIMetro at p. 42. As such, Supra believes general authority is not a substitute for specific statutory authority to adjudicate disputes involving previously approved interconnection agreements. Supra also notes the Court's opinion that as a functional matter, judicial forums - and not quasi-legislative regulatory bodies - are better suited for the purely legal exercise of construing the terms of interconnection agreements. Id. at 42-43.

Supra further asserts that the 11th Circuit could find no provision in the Georgia statutes which provides support for any adjudicatory powers. Likewise, says Supra, each provision of Chapter 364, Florida Statutes, focuses this Commission's regulatory role, but nowhere are we given the power to adjudicate contractual disputes involving previously approved interconnection agreements. Supra contends that the Florida legislature "said what it meant" when it used the terms "regulatory" and "regulating," and as noted by the 11th Circuit, "given a straightforward statutory command, there is no reason to resort to legislative history."[7]

In addition, Supra argues that the 11th Circuit in MCIMetro also undertook a "functional" test, which the Court addressed as follows:

> Another section of the Georgia Act underscores this distinction. Section 46-5-168(f) . . . allows the GPSC to petition, intervene or otherwise commence proceedings

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[7]*Citing* United States v. Steele, 147 F.3d 1316, 1318 (11th Cir. 1998); and CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1222 (11th Cir. 2001).

> before the appropriate . . . courts . . . There would be no need for the GPSC to commence a proceeding in a court of law, however, if it had the authority to adjudicate those proceedings itself.

Id. at pg. 42. (Emphasis added). Supra argues that Section 364.015, Florida Statutes, imposes the same substantive restrictions on this Commission where it provides that:

> The legislature finds that violations of commission orders or rules in connection with the impairment of . . . service, constitutes irreparable harm for which there is no remedy at law. The Commission is authorized to seek relief in circuit court . . . .

According to Supra, application of the 11th Circuit's "functional" test to Section 364.015, Florida Statutes, clearly demonstrates that if we had the authority to enforce our orders or rules, then we would not need to seek relief in circuit court. Thus, under the "functional" test, this Commission must not have jurisdiction to do so. Supra contends, however, that we are confined in circuit court to matters involving the violation of a rule or statute, and that contractual disputes involve no such violations.

Supra further emphasizes that under the 11th Circuit's MCIMetro decision, it is clear that a state commission can only adjudicate those matters which it has the ability to enforce. Because we can only penalize a telecommunications company for violation of a statute, rule, or order, pursuant to Section 364.285, Florida Statutes, and must seek enforcement of our decision elsewhere, Supra believes it is clear that in this matter, we are without authority to adjudicate disputes arising out of the approved interconnection agreement. Supra also maintains that Rules 25-22.036 and 28-106.301, Florida Administrative Code, also do not authorize us to act because the breach of an interconnection agreement does not constitute the breach of a statute, rule, or order. Thus, Supra concludes that we cannot find authority to resolve complaint in Florida law.

Finally, Supra contends that Section 364.07, Florida Statutes, does not authorize us to adjudicate disputes, because this

provision only pertains to contracts involving the "joint provision of intrastate interexchange service." Supra argues that this provision further crystalizes our lack of authority to adjudicate interconnection disputes, because the Legislature saw fit to include adjudicatory authority in one provision, Section 364.07, Florida Statutes, and declined to do so in another provision more pertinent to the matter at issue here, Section 364.162, Florida Statutes.

2. Decision

Supra's current agreement with BellSouth provides for commercial arbitration, and Supra believes that this method of resolving disputes has proven its worth by providing judicial economy, the ability to award damages, due deference to the precedence of our orders, and the speedy and efficient resolution of disputes. BellSouth, however, views commercial arbitration as costly, time consuming, and impractical, and a process which may lead to decisions inconsistent with our orders.

The parties' current agreement requires that commercially arbitrated issues be resolved within 90 days of a complaint being raised. Supra compares the time consumed in its commercial arbitration, with the time it takes for us to resolve the issues raised in a complaint. We note, however, that in Supra's commercial arbitration, it was necessary for the parties to waive the 90-day requirement for the resolution of the disputed issues. Once waived, the commercial arbitration is open-ended, with resolution being determined by the complexity of the issues, the procedural motions raised by the parties, and the parties continued efforts to reach agreement on the issues outside the confines of the tribunal. Complaints brought before us are influenced by the same factors, and these are often the greatest determinants of the duration of a proceeding.

We also note that neither party quantified the issue of cost to any great extent. Proceedings before either a commercial arbitration panel or before us would follow many of the same steps in that parties would be faced with the costs of discovery, providing witnesses, attorneys' fees, etc. The prevailing party in a commercial arbitration may be able to recoup its expenses from the losing party, if the parties' contract provides for such.

Supra believes that this is as it should be, and Florida taxpayers money should not be used to finance parties' noncompliance with an agreement approved by the PSC.

However, as noted at the hearing, the regulatory assessment fees paid by the regulated utilities pay the salaries of our personnel. Therefore, it is the general body of the ratepayers of both Supra and BellSouth that pay for the litigation before us. Thus, the record indicates that it is equally likely that the ratepayers of both parties would bear the costs of either commercial arbitration or dispute resolution proceedings brought to us.

BellSouth is particularly concerned with the consistency in our approved agreements. It believes that we are clearly more capable to handle disputes between telecommunications carriers than are commercial arbitrators. Supra believes, however, that once the initial agreement is approved, the enforcement of the agreement itself should be left in the hands of commercial arbitrators who can deal with this in a commercial way.

As previously noted, on January 30, 2002, Supra filed a Motion for Leave to File Supplemental Authority. Supra sought to bring to our attention the 11th Circuit's decision in, Cir. Order Nos. 00-12809 and 00-12810, the consolidated appeals of BellSouth Telecommunications, inc. v. MCIMetro Access Transmission Services, Inc., D.C. Docket No. 99-00248-CV-JOF-1 and BellSouth Telecommunications, Inc. V. WorldCom Technologies, Inc. And E.spire Communications, Inc., Docket No. 99-00249-CV-JOF-1, respectively (MCIMetro). By Order No. PSC-02-0159-PCO-TP, issued February 1, 2002, the Motion was granted. Pursuant to Order No. PSC-02-0202-PCO-TP, BellSouth and Supra filed briefs on the impact of the 11th Circuit Court's decision in MCIMetro on Issue 1 of this Docket. The parties agree that MCIMetro clearly holds that the Telecommunications Act of 1996 does not authorize state commissions to interpret or enforce the terms of an interconnection agreement. Where they diverge is in their interpretation of MCIMetro's effect on our authority to resolve disputes arising under an interconnection agreement, pursuant to Florida state law.

Supra maintains that Florida law is silent with respect to whether we have the authority to adjudicate a dispute involving an

interconnection agreement that has already been approved by us. It believes the 11th Circuit has clearly stated that a state commission cannot glean such authority from general provisions such as Section 364.01, Florida Statutes, which focuses on our regulatory role.

BellSouth, to the contrary, argues that Section 364.162, Florida Statutes, does indeed grant us express authority to interpret and enforce interconnection agreements between ILECs and ALECs. BellSouth proffers Section 364.162(1), Florida Statutes, which provides:

> Whether set by negotiation or by the commission, interconnection and resale prices, rates, terms, and conditions shall be filed with the commission before their effective date. The commission shall have the authority to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions.

We do not agree with Supra's contention that the 11th Circuit's decision in MCIMetro is controlling at this time as applied to this issue. However, even if it is, we believe there is sufficient authority in state law for us to act.

Under the Act it is clear that parties have the ability to arrive at interconnection agreements either through negotiation or through arbitration before this Commission, as in the instant docket. Thereafter, we must approve such agreements accordance with Section 252(e) of the Act. Once approved, however, the 11th Circuit's MCIMetro decision is clear that state commissions are not authorized by the Act to resolve complaints arising out of that agreement, but may only do so pursuant to a grant of authority under state law. While the 11th Circuit Court found the Georgia Commission lacked an express grant of authority in Georgia statutes, the 11th Circuit has not made such a determination regarding Florida state law. Were the U.S. District Court for the Northern District of Florida given an opportunity for such consideration, we believe that the Court would find such authority for our jurisdiction in the language of Section 364.162(1), Florida Statutes, which expressly confers upon us the authority "to arbitrate any dispute regarding interpretation of interconnection or resale prices and terms and conditions." Moreover, we believe

the authority to resolve such disputes is clearly an assignment of quasi-judicial authority by the state legislature, a factor the 11th Circuit also found lacking in Georgia. Section 364.162, Florida Statutes does not limit or otherwise distinguish between our authority to resolve (1) disputes arising out of the initial establishment of an interconnection or resale agreement and (2) disputes arising out of previously approved agreements. Thus, the Florida Legislature apparently intended the action in this area to be within our jurisdiction.[8]

Supra also asserts that part of having the power to adjudicate a dispute is the power to enforce the findings at the conclusion of the hearing. We note that enforcement of agency action may be had by means other than seeking relief in court. In the case of telecommunications companies, we are authorized to fine any company that has "refused to comply or to have willfully violated any lawful rule or order," in accordance with Section 364.285, Florida Statutes. In that it allows penalties for refusal to comply, it is clearly a method of "enforcement."

Furthermore, we emphasize that Section 364.015, Florida Statutes, upon which Supra relies for the proposition that we cannot enforce our Orders, was developed to provide us with an avenue to address matters pertaining to the health, safety, and welfare of the public. The intent was to outline the means by which we can seek injunctive relief in court. It does not, however, lend any support to Supra's argument that we cannot enforce our Orders, because as set forth herein, we clearly have that authority, albeit by means other than issuance of injunctions. Thus, inability to enforce our decisions through injunctions does not serve as a basis for finding we are not authorized to resolve interconnection disputes.

Although both parties set forth persuasive arguments, we believe that consistent with our finding in Order No. PSC-01-1402-FOF-TP, we will not here prescribe that the parties enter into a provision outside the scope of the Act, and for which they have not duly bargained. Therefore, the parties shall not be required to utilize commercial arbitration as a method for resolving disputes

arising out of their new interconnection agreement. The appropriate forum for the resolution of such disputes is before us. Within the final arbitrated agreement submitted to us for approval the parties may either include a negotiated provision addressing this issue, or no provision at all.

C. Filing of Agreement for Non-Certificated ALECs

Here we consider whether the Interconnection Agreement should contain language to the effect that it will not be filed with this Commission for approval prior to an ALEC obtaining certification.

1. Arguments

BellSouth witness Cox adopted the prefiled direct testimony of witness Ruscilli. Witness Cox argues that because any ALEC, whether certificated or not, may adopt this agreement, we should require any adopting entity to be certificated prior to the filing of the agreement for our approval. In support of this position, witness Cox quotes from a letter dated April 25, 2000, from Walter D'Haeseleer, Director of our former Division of Telecommunications, to Nancy Sims of BellSouth: "BellSouth's caution in deciding to hold filing for non-certificated entities until they obtain certification is appropriate." Furthermore, witness Cox wonders why Supra has taken this position because it is a fully certificated ALEC in the state of Florida.

Supra witness Ramos claims BellSouth requests that an ALEC be certificated prior to submitting an adopted agreement for approval in order to delay entry of new carriers in its service territory. Witness Ramos claims that we only mandate that an ALEC be certificated before it begins providing telecommunications services in Florida. The witness quotes Rule 25-4.004, Florida Administrative Code, as stating:

> Except as provided in Chapter 364 of the Florida Statutes, no person shall begin the construction or operation of telephone lines, plant or systems or extension thereof, or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Florida Public Service Commission, a certificate that the present or future public convenience

and necessity require or will require such construction, operation or acquisition.

Witness Ramos claims non-certificated ALECs have the right to conduct test operations in Florida so long as they do not sell telecommunications services to consumers, and this right is consistent with Section 364.33, Florida Statutes. There are no laws or decisions that support BellSouth's position, according to witness Ramos. Witness Ramos states BellSouth's fear that a non-certificated ALEC will adopt an agreement and illegally provide telecommunications service to the public is unjustified. He points out that the agreement will require certification before service is provided and that the indemnification provisions contained in the follow-up agreement are more than adequate to address BellSouth's concerns regarding liability for service provided by a non-certificated entity.

2. Decision

Rule 25-4.004, Florida Administrative Code, in pertinent part provides :

> Except as provided in Chapter 364 of the Florida Statutes, no person shall begin the construction or operation of telephone lines, plant or systems or extension thereof, or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Florida Public Service Commission, a certificate that the present or future public convenience and necessity require or will require such construction, operation or acquisition.

While Supra believes this rule only requires certification for entities providing telecommunications services to the public, we note this specific rule is not applicable to ALECs, but the underlying statute, Section 364.33, Florida Statutes, contains substantially similar language and is applicable to all carriers.

Section 364.33, Florida Statutes, provides:

> A person may not begin construction or operation of any telecommunications facility, or any extension thereof for the purpose of providing telecommunications services to

> the public, or acquire ownership or control thereof, in whatever manner, including the acquisition, transfer, or assignment of majority organizational control or controlling stock ownership, without prior approval. This section does not require approval by the commission prior to the construction, operation, or extension of a facility by a certified company within its certificated area nor in any way limit the commission's ability to review the prudency of such construction programs for ratemaking as provided under this chapter.

While the statute does note that the acquisition, construction, and operation must be for the "purpose of providing telecommunication services to the public" it also is clear that entities may not even begin such activities with that purpose in mind before obtaining certification.

While we acknowledge that requiring ALECs to be certificated before they can conduct test operations under an adopted agreement may slow competitors from entering the local phone market as Supra has alleged, we believe that this approach is in the best interests of Florida consumers because it ensures that only certificated companies can provide telecommunications services to the public. Therefore, the final arbitrated agreement submitted to us for approval shall include language that it will not be filed with us for approval prior to an ALEC obtaining the appropriate certification from us. BellSouth shall hold adopted agreements from being submitted to us for approval until such time as the adopting ALEC obtains certification.

D. Customer Service Records Downloads

This issue considers whether BellSouth should be required to provide Supra with a download of its CSRs and whether such a download would violate the Customer Proprietary Network Information (CPNI) rights outlined in § 222 of the Act.

1. Arguments

BellSouth witness Pate contends that allowing Supra to download all CSRs would violate BellSouth's duty under the Act not to disclose CPNI without the permission of the individual user.

Witness Pate states that downloading CSRs would "constitute a breach of confidentiality and privacy for which Supra is not entitled." BellSouth offers both electronic and manual access to BellSouth's CSRs as a pre-ordering functionality and therefore a download is not necessary, according to witness Pate. He asserts that this electronic pre-ordering functionality is available to ALECs through Local Exchange Navigation System (LENS), and Telecommunications Access Gateway (TAG). Pre-ordering functionality, says witness Pate, is also available through RoboTAG, which offers real-time access to BellSouth's CSRs. Witness Pate describes the steps an ALEC has to take to access CSRs through BellSouth's LENS system. These steps include: 1) Signing a blanket letter of authorization (LOA) which states that an ALEC will obtain permission before accessing that end-user's CSRs; 2) logging onto LENS and selecting the "Inquiry Mode" and selecting the "view customer record option"; 3) having an employee populate the phone number and location where a customer resides; and 4) having an employee select the "proceed with inquiry" prompt and click ok, when prompted by the computer to answer, "are you authorized to view this CSR?"

BellSouth witness Pate contends that the 1996 Act and the FCC only require BellSouth to provide nondiscriminatory access to OSS, not identical access or interfaces as Supra has suggested. Witness Pate asserts the FCC has defined nondiscriminatory access as access to OSS that allows ALECs to perform the functions of pre-ordering, ordering and provisioning for resale services in substantially the same time and manner as BellSouth does for itself. In the case of unbundled network elements, the FCC requires that the OSS provide an efficient competitor with a meaningful opportunity to compete, according to witness Pate. Witness Pate asserts that BellSouth's OSS, which ALECs use to access CSRs, meets the requirements of both the Act and the FCC. In support of this conclusion, witness Pate submitted an exhibit of computer records showing LENS and TAG have unscheduled downtimes of less than 1 percent.

Supra witnesses Ramos and Zejinilovic contend that BellSouth's OSS systems for ALECs to access CSRs are subject to frequent outages and are inadequate. Witness Zejinilovic submitted an exhibit showing numerous outages of BellSouth's systems. Witness Zejinilovic asserts that these crashes were often accompanied with TAG error messages.

Witness Ramos contends that a download of CSRs would provide the best solution to BellSouth's chronically down OSS. A download of CSRs would put Supra at true parity with BellSouth and that is what is required by the Act, according to witness Ramos. Witness Ramos claims that "[w]ithout true parity in OSS, no competition can develop in the local exchange market." He claims downloading CSRs would not violate the Act because Supra would sign a blanket LOA agreeing that Supra would only access CSRs for those customers who have given permission. Supra witness Ramos claims this is not much different from the current system where Supra representatives are allowed to view any CSR as long as they certify they have the customer's permission and enter certain information from the customer as required by FPSC rules such as their social security number, date of birth, driver's license number, and mother's maiden name. Witness Ramos states if given permission to download CSRs, Supra representatives would only view CSRs for which they had permission; the only difference is that Supra representatives would be able to view CSRs even when BellSouth's systems are down.

2. Decision

Customer proprietary network information (CPNI) is addressed in Section 222 of the Telecommunications Act, which states:

> Except as required by law or with the approval of the customer, a telecommunications carrier that receives or obtains customer proprietary network information shall only use, disclose, or permit access to individually identifiable customer propriety network information in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories.

47 U.S.C. §222(c)(1)[9] (emphasis added) The Telecommunications Act of 1996, in pertinent part, defines "Customer Proprietary Network Information" as: "(a) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier solely by virtue of the carrier-customer relationship." 47 U.S.C. §222(f)(1)(A). Supra does not contest BellSouth's assertions that CSRs constitute CPNI and that CSRs contain exactly the type of sensitive, individually identifiable information described within the Act's definition. Therefore, the sole remaining issue related to §222 is whether a download of the records by Supra would constitute access or disclosure for which individual customer permission is required.

Witness Ramos asserts individual customer permission is not required to download CSRs because Supra would be willing to sign a blanket LOA agreeing to view only the CSRs for which they have permission. However, we believe that such a practice is not permissible under the Act. Downloading the CSRs would necessarily involve physical possession of those records by Supra, and this would constitute disclosure within the meaning of 47 U.S.C. § 222(c)(1). In such a case, the Act requires individual customer permission. The Act does not allow downloads of CSRs even though Supra promises to view only those CSRs for which it has permission, because Supra would still possess CSRs of customers who have not consented.

The Act specifically provides that CPNI can be accessed or disclosed without customer permission only to carriers "in its provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service, including the publishing of directories." 47 U.S.C. § 222(c)(1) Where Congress explicitly enumerates certain exceptions to a general prohibition,

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[9]For a similar statute predicated on Florida State law, see §364.24(2), Florida Statutes. §364.24(2), Florida Statutes, provides in pertinent part: "Any officer or person in the employ of any telecommunications company shall not intentionally disclose customer account records except as authorized by the customer or as necessary for billing purposes, or required by subpoena, court order, other process of the court, or otherwise by law."

additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent. See TRW, Inc. v. Andrews, 2001 U.S. Lexis 10306 (2001)(citations omitted). The download Supra proposes does not fall within these carefully tailored exceptions, because Supra will be able to download CSRs for customers for which it will not be providing service. We decline to create an additional exception to Congress' detailed listing of when CPNI can be used without customer permission, based on Supra's generalized notions of parity.

While downloading of CSRs has not been addressed explicitly by the FCC, the FCC in its Second Report and Order (CC Docket Nos. 96-115, 96-149) issued February 26, 1998, with regard to CPNI stated:

> In contrast to other provisions of the 1996 Act that seek to open all telecommunications markets to competition, and mandate competitive access to facilities and services, the CPNI regulations in section 222 are largely consumer protection provisions that establish restrictions on carrier use and disclosure of personal customer information. Congress expressly directs a balance of both competitive and consumer privacy interests with respect to CPNI. Congress' new balance, and privacy concern, are evidenced by the comprehensive statutory design, which expressly recognizes the duty of all carriers to protect customer information and embodies the principle that customers must be able to control information they view as sensitive and personal from use, disclosure, and access by carriers.

FCC 98-27 ¶ 1. Again, a download of CSRs would be in clear violation of §222 of the Act and the FCC's above statement.

Though in this instance Supra is requesting a remedy that cannot be granted, we believe Supra has expressed legitimate concerns regarding BellSouth's OSS for accessing CSRs. The testimony of Supra witnesses Ramos and Zejinilovic indicates that BellSouth's system is subject to frequent crashes and downtime, and they produced a detailed recording of each such crash. BellSouth, on the other hand, claims a downtime of only 1%, yet admits that this only accounts for outages of twenty minutes or more. Should these problems continue, Supra would be well advised to file a

complaint with us or avail itself of other appropriate dispute resolution to address system downtime.

Nevertheless, the final arbitrated agreement submitted to us for approval shall not require BellSouth to allow Supra to download all CSRs. This would be contrary to the Telecommunication Act's prohibitions against unauthorized access or disclosure of Customer Proprietary Network Information (CPNI).

E. Rate for a Loop Utilizing DAML Equipment

In this section, we address BellSouth's unbundled loop rate and whether that rate should be discounted when BellSouth provides loops to Supra via Digitally Added Main Line (DAML) equipment. Supra also asks that BellSouth be required to notify Supra periodically when DAML equipment is deployed.

1. Arguments

BellSouth witness Cox believes that we should affirm the rates for unbundled loops that we have recently been approved. She maintains that these rates are appropriate for those instances where DAML equipment is used. The witness states:

> The use of DAML equipment is a means to meet a request for service in a timely manner. It is not generally a more economic means of meeting demand on a broad basis than using individual loop pairs. Supra apparently believes that a loop utilizing DAML equipment should be offered at a lower cost than other loops. However, cost for unbundled loops have been calculated in compliance with Federal Communications Commission rules on a forward-looking basis without regard to the manner in which the customer is served (e.g., copper or digital loop carrier).

Witness Cox asserts that DAMLs are perfectly acceptable items of network equipment or BellSouth would not employ them for its customers. She concedes that use of DAML equipment has resulted in substandard modem performance, but contends that BellSouth has a

solution that the company implements whenever a complaint is logged. BellSouth witness Kephart states:

> It is true that the original Terayon DAML COT cards applied to some loops (all copper or integrated SLC96 circuits in particular) resulted in decreases in modem performance and risk for customer dissatisfaction and complaints. However, BellSouth has worked with Terayon to support a new card that will not produce a significant impairment to the signal. This card has undergone final testing and is currently being deployed in BellSouth.

Witness Kephart also emphasizes that BellSouth's loop costs are not based on actual cost, but on TELRIC cost, which is based on a forward-looking network design. Additionally, witness Kephart testifies:

> BellSouth deploys DAML equipment on a very limited basis to expand a single loop to derive additional digital channels, each of which may be used to provide voice grade service. The deployment is limited to those situations where loop facilities are not currently available for the additional voice grade loops(s). DAML systems are generally not an economical long-term facility relief alternative except possibly in slow growth areas.

As to notifying Supra when DAML is deployed, witness Kephart asserts that the current loop provisioning process is sufficient. During his cross-examination he stated, "In order to determine a loop's makeup, a CLEC who has access to a particular system, inputs a telephone number or circuit ID and gets back information about the cabling pair or pairs that serve the address location in question."

As previously noted, Supra believes that DAML is a line-sharing technology. When line-sharing technology is involved in the UNE environment, Supra contends it should only be obligated to

pay the prorated cost of the shared network elements. Supra witness Nilson states:

> BellSouth should be enjoined from deploying this technology on ALEC subscriber circuits. The potential for abuse and "bad acts" is just too high, because it is an anti-competitive tool for ILECs. Should an agreement be reached to deploy such equipment on specific ALEC lines, the ALEC should not be charged for two loops, when it is in fact utilizing just one, or in some cases, just half a loop.

Supra witness Nilson believes that DAML lines are less expensive and more technologically problematic than copper lines. He argues that this increases Supra's support cost. Therefore, witness Nilson claims that the rate for a UNE loop should be discounted when DAML equipment is used. Witness Nilson goes on to say:

> DAML served loops do not provide all the features, capabilities and functions of a copper loop. DAML electronics have higher failure rates than bare copper, high speed DSL services cannot be provisioned over customer lines served by DAML.

In its brief, Supra contends that, "BellSouth is being unduly enriched by providing 2:1, 4:1, 6:1, and even 8:1 DAML lines while charging Supra the full cost for each access line." Supra witness Nilson believes that BellSouth should only be allowed to charge Supra the relative portion or fraction of the 1:1 copper line (enhanced by the deployment of DAML equipment) Supra uses to provide service to its customer(s). According to Supra, it is "not equitable" for it to pay "full cost" for a line that previously served one customer, but is now capable of serving 2, 4, 6, or even 8 customers with the use of DAML equipment.

Supra witness Nilson believes that BellSouth should be required to periodically disclose the use of such equipment if we do not prohibit BellSouth from deploying DAML equipment on ALEC subscribed circuits. Currently, BellSouth does not notify Supra

when the technology has been deployed to a Supra customer, which Supra witness Nilson believes increases its troubleshooting cost. This cost increase is due to increased call volumes handled by Supra customer service representatives(CSRs) and the cost to identify and correct the problem, both caused by a lack of notification/authorization prior to a BellSouth action.

2. Decision

It appears that the situations in which DAML equipment is actually deployed are minuscule, according to Hearing Exhibit 17, a proprietary document in this proceeding. Because the question of what is the appropriate disclosure method when DAML equipment is deployed is addressed by the parties in their testimony, we recognize the issue as having been broadened to include notification/authorization. On numerous occasions in his testimony, Supra witness Nilson contends that BellSouth converts Supra customer lines to DAML with no prior warning to Supra. Though given the opportunity to rebut these allegations made by Supra witness Nilson, BellSouth witness Kephart's only response was that "the deployment(of DAML equipment) is limited to those situations where loop facilities are not currently available for the additional voice grade loop(s)" and "it is not BellSouth policy to utilize DAML equipment on CLEC customers in order to free up a loop for a BellSouth customer." Further, in his cross examination, BellSouth witness Kephart states that BellSouth does not currently have a process for "informing CLECs of the type of plant that we use to serve their customers." Therefore, it appears that there may be situations in which BellSouth does switch Supra end users from a standard copper loop to a loop supported by DAML equipment without notifying Supra. In cases where BellSouth makes changes to one of Supra's existing loops that may adversely affect a Supra end user, it is reasonable to require BellSouth to provide prior notification. Under cross examination BellSouth witness Kephart infers that there are "few cases" when a BellSouth engineer may resort to DAMLs. As such, notifying Supra will not be an overly burdensome task for BellSouth to complete.

There are two questions that must be answered in order to arrive at a decision on the remaining issue. First, is the use of DAML equipment an appropriate alternative for BellSouth to provide timely service to its customers and second, should loop rates be

discounted when DAML is utilized? Although Supra witness Nilson contends that BellSouth uses DAML "to provide additional loops where they have run out of loops" and as an "anti-competitive tool," there is credence to BellSouth witness Cox's statement that the use of DAML equipment is a means to meet a request for service in a timely manner. BellSouth deploys DAML equipment on a very limited basis, primarily to expand a single loop to derive additional channels, each of which may be used to provide voice grade service. The deployment is limited to those situations where loop facilities are not currently available for additional voice grade loops. DAML systems do not appear to be an economical long-term facility relief alternative, except possibly in slow growth areas.

Although BellSouth witness Cox argues that DAMLs are perfectly acceptable items of network equipment, she concedes that use of DAML lines can result in substandard modem performance. Supra witness Nilson claims that "DAML served loops do not provide all the features, capabilities and functions of a copper loop. DAML electronics have higher failure rates than bare copper, high speed DSL services cannot be provisioned over customer lines served by DAML." In response, BellSouth witness Kephart states that BellSouth has worked with Terayon to support a new card that will not result in a significant impairment to the signal. This card has undergone final testing and is currently being deployed by BellSouth whenever a complaint is logged. We believe that Supra and its end users will have fewer complaints if BellSouth provides Supra information in advance when Supra customer lines are switched to DAML-supported lines.

Supra witness Nilson claims that BellSouth should only be allowed to charge Supra the relative portion or fraction of the copper line (enhanced by the deployment of DAML equipment) Supra uses to provide service to its customers. The argument of Supra witness Nilson fails to consider that the price of BellSouth's UNE loops are not based on actual cost, but on a forward-looking, most efficient network design without regard to the manner in which the customer is actually served today (e.g., copper or digital loop carrier). According to BellSouth witnesses Cox and Kephart, the current BellSouth loop rates are those approved in Docket No. 990649-TP. In this proceeding we accepted the use of the BellSouth Loop Model (BSTLM) to yield loop costs. The BSTLM incorporates

what is often referred to as the "scorched node" assumption (Order No. PSC-01-1181-FOF-TP, p. 120), as required by 47 CFR Section 51.505(b)(1):

> The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers.

Under a scorched node analysis, total demand is to be met instantaneously using the least-cost, most efficient technology, constrained only by the location of existing wire centers. Consequently, the network facilities design is optimally sized to meet all demand, and a technology such as DAML would not be deployed; in fact, the BSTLM does not use this technology. Accordingly, since BellSouth's UNE loop rates are based on a least-cost technology, instead of DAML, it would not be appropriate to further discount them.

Based on these facts, it is clear that our approved rates for unbundled loops are appropriate and do not require any adjustment to recognize the use of DAML equipment. DAML equipment serves an intended purpose in the timely provisioning of service to end users.

Therefore, the final arbitrated agreement submitted to us for approval shall not reflect a reduced rate for a loop when the loop utilizes DAML equipment. The agreement shall reflect that when changes are to be made to an existing Supra loop that may adversely affect the end user, BellSouth should provide Supra with prior notification.

F. Withholding Payment of Disputed and Undisputed Charges/Disconnection

Herein, we consider the parties' abilities to withhold payment during the pendency of a billing dispute and whether the adversely affected party can disconnect the other one for such nonpayment. These issues address similar problems and involve substantial

overlapping testimony. It is, therefore, appropriate to address these issues together.

1. Arguments

BellSouth witness Cox asserts both parties should pay undisputed charges regardless of the amount of charges one party disputes from another. In regard to billing disputes, witness Cox states:

> BellSouth must be able to deny service in order to obtain payment for services rendered and/or prevent additional past due charges from accruing. It would not be a reasonable business practice for BellSouth to operate "on faith" that an ALEC will pay its bills. Indeed, a business could not remain viable if it were obligated to continue providing services to customers who refuse to pay lawful charges.

Witness Cox points out that BellSouth is seeking to compel the parties only to pay undisputed amounts. ALECs would have little incentive to pay their bills without the threat of disconnection for nonpayment, according to witness Cox. Allowing one party to withhold payment of all charges, not just those that are in dispute, would enable that party to "game" the billing system to delay paying bills. In support of this, BellSouth, refers to the testimony of Supra witness Ramos on cross-examination, where he states that Supra has not paid BellSouth for two years.

In addition, witness Cox claims BellSouth's position is consistent with our recent decision in the BellSouth/WorldCom arbitration proceeding in Docket No. 000649-TP. Witness Cox quotes us as finding that:

> BellSouth is within its rights to deny service to customers that fail to pay undisputed amounts within reasonable time frames. Therefore, absent a good faith billing dispute, if payment of account is not received in the applicable time frame, BellSouth shall be permitted to disconnect service to WorldCom for nonpayment.

Order No. PSC-01-0824-FOF-TP at pp. 155-156. As well as being consistent with our prior orders, witness Cox claims disconnection for nonpayment is the same policy BellSouth applies to its retail customers.

Finally, witness Cox requests that we consider that the terms and conditions of any agreement it reaches with one ALEC are subject to being adopted by another ALEC. She contends that the FCC's Rule 51.809 requires BellSouth, subject to certain conditions, to allow requesting ALECs to adopt agreements approved by us. Therefore, our decision in this matter has the possibility to govern more than just BellSouth's and Supra's relations. Witness Cox suggests the simple way to resolve this issue is for Supra to pay undisputed amounts within the applicable time frames, and this portion of the agreement will never become an issue.

Supra witness Ramos adopted the prefiled direct and rebuttal testimony of Supra witness Bentley. Witness Ramos argues that either party should be allowed to offset disputed charges. By offsetting, witness Ramos refers to the practice of withholding payment of undisputed charges in an amount equal to any charges disputed by the billing party during the pendency of a dispute. Offsetting is justified, according to witness Ramos, because the current interconnection agreement covers a business relationship whereby both parties bill and collect from each other, and therefore the billing, payment, collection and dispute processes must take into consideration all aspects of the billing process. He contends that we will benefit from reviewing billing, payment, and collections disputes as a whole, rather than on a piecemeal basis.

Witness Ramos cites BellSouth v. ITC Deltacom, 190 F.R.D. 693 (M.D. Ala., 1999) as illustrative of the dangers of viewing billing disputes piecemeal. In ITC DeltaCom, ITC DeltaCom, an ALEC, alleged BellSouth owed it reciprocal compensation for ISP-bound traffic and that it was not able to offset the monies owed against charges from BellSouth. Witness Ramos claims that while ITC Deltacom was able to prevail in the courts after several years of litigation, that was not before facing possible bankruptcy as a result of having to pay BellSouth its bills.

Since BellSouth has deeper pockets and significantly more resources, witness Ramos believes BellSouth is in a position to threaten Supra with a service disconnection during a billing dispute, absent contractual protection. Witness Ramos states that it is possible for BellSouth to force Supra to make payments to BellSouth, while BellSouth withholds Supra's monies, thereby draining Supra of its financial resources during the pendency of protracted litigation. Witness Ramos alleges that BellSouth should not be allowed to disconnect Supra because Supra cannot similarly threaten BellSouth, a former monopoly provider on which Supra must now rely.

Moreover, witness Ramos maintains it is never appropriate for BellSouth to disconnect service to Supra or Supra's customers at BellSouth's discretion. Such a remedy may only be used as one of last resort, to be granted by an impartial third party such as this Commission, a panel of arbitrators, or a judge. He contends that if an ALEC's lines are disconnected for more than a few minutes or hours, it could potentially be out of business permanently. Witness Ramos believes this looming and potential threat of disconnection is not good for Florida consumers. The citizens of Florida should not have to worry that their services may be disconnected because their carrier and BellSouth may be engaged in a billing dispute, according to witness Ramos.

Witness Ramos alleges that BellSouth's proposed language on this issue allows BellSouth to act first, then to defend its actions later. He states that the moment BellSouth denies Supra's billing disputes, BellSouth considers the amount no longer in dispute and begins steps to initiate disconnection. Witness Ramos alleges that BellSouth has disconnected Supra without carrying out the required dispute resolution steps outlined in the parties' current agreement. More specifically, witness Ramos refers to May 16, 2000, when BellSouth allegedly disconnected Supra's access to ALEC OSS, and LENS, thereby substantially impairing Supra's ability to provide service its customers. This disconnection lasted three days and nearly put Supra out of business, according to witness Ramos.

While Supra's own tariff permits it to disconnect retail customers for nonpayment, witness Ramos believes this is not relevant to the BellSouth/Supra relationship. He contends this is

because consumers throughout the state, rather than just one individual, would be unfairly affected if BellSouth were to wrongly disconnect Supra.

2. Decision

Supra witness Ramos alleges that BellSouth uses the threat of disconnection to force Supra to pay charges from BellSouth, all the while unreasonably disputing bills rendered by Supra. To make up for this alleged inequity, witness Ramos proposes that the interconnection agreement allow Supra to withhold paying BellSouth an amount equal to the charges from Supra which BellSouth chooses to dispute (offsetting) and require BellSouth to pursue dispute resolution before disconnecting Supra. However, we believe Supra's proposed remedies would provide little incentive for Supra to pay its bills and that other adequate remedies exist based on the record.

We agree with BellSouth witness Cox that "offsetting" could give ALECs too much of an incentive to delay paying legitimate charges. We also acknowledge Supra witness Ramos' concession that Supra has not paid BellSouth since January of 2000. We believe an ILEC's ability to receive timely payment for undisputed charges is important. We recognized as much when addressing the BellSouth/WorldCom arbitration, in Docket No. 000649, where we stated:

> BellSouth must be able to deny service in order to obtain payment for services rendered and/or prevent additional past due charges from accruing. It would not be a reasonable business practice for BellSouth to operate "on faith" that an ALEC will pay its bills. Indeed, a business could not remain viable if it were obligated to continue providing services to customers who refuse to pay lawful charges.

Order No. PSC-01-0824-FOF-TP at p. 162. Offsetting may also unduly confuse litigation by artificially switching the party seeking relief. Such actions would increase the amount of time required for dispute resolution, and would not be in the interest of ALECs, ILECs and, more importantly, Florida consumers.

Supra does not allow its retail customers to offset charges, nor does it require dispute resolution before disconnection of retail customers for nonpayment. We have found a company's policies towards its retail customers relevant when considering appropriate billing terms in the past. See Order No. PSC-01-0824-FOF-TP at p. 162. Supra's treatment of its retail customers provides additional justification for allowing BellSouth to disconnect Supra for nonpayment. Supra argues how it treats its retail customers should not be relevant because only one person could be affected unfairly in a billing dispute between a customer and Supra while a multitude of customers could be affected by a dispute between Supra and BellSouth. We disagree with Supra's claim that its billing practices toward retail customers are not relevant, because Supra's own practices directly contradict its claim that offsetting is a widely accepted business practice. Supra's treatment of its retail customers is yet another factor that supports requiring both parties to pay undisputed charges and not allow offsetting.

However, while we disagree with Supra about the relevance of its billing practices towards retail customers, we do agree that the effects of the billing disputes are likely to be different. More specifically, a billing dispute between BellSouth and Supra has the potential to unfairly affect customers throughout the state while a dispute with an individual customer does not. Disconnection could likely have devastating business consequences for Supra. This should serve as a significant incentive for Supra to avoid disconnection by paying legitimately undisputed bills. If BellSouth threatens Supra with disconnection for nonpayment of a bill Supra believes it has legitimate grounds to dispute, Supra may petition us to stay the disconnection on an interim basis. If BellSouth unreasonably threatens Supra with disconnection for nonpayment, we will take appropriate remedial actions to make sure such conduct does not recur.

Furthermore, we believe Supra has a meaningful remedy if BellSouth were to unfairly withhold payment of charges from Supra. If BellSouth were to dispute charges from Supra in bad faith, Supra may file a complaint with us. While Supra may suffer financial hardship during a dispute where Supra ultimately prevails and yet we find BellSouth had a good faith belief to dispute charges, this

is the same cost that BellSouth must bear when Supra exercises the same right under the same circumstances.

We find that Supra's proposed payment terms would provide little incentive for Supra to pay its bills and that other adequate remedies exist for billing disputes. Therefore, the final arbitrated agreement submitted to us for approval shall indicate that both parties are allowed to withhold payment of charges disputed in good faith during the pendency of the dispute. Neither party is allowed to withhold payment of undisputed charges. BellSouth shall be permitted to disconnect Supra for nonpayment of undisputed charges.

G. InterLATA Transport

In this section we address whether BellSouth should be required to provide interoffice transport, via UNEs leased to Supra, when that transport crosses LATA boundaries. The dispute as framed apparently to hinges on the parties' differing interpretations of Section 271(a) of the 1996 Act which specifically states:

> GENERAL LIMITATION - Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA service except as provided within this section.

1. Arguments

BellSouth witness Cox contends that Section 271 of the Act prohibits BellSouth or any of its affiliates from providing interLATA facilities or services to Supra or any other carrier prior to receiving authorization from the FCC. She explains that the only interLATA services BellSouth is authorized to provide without FCC approval are out-of-region services and incidental services, neither of which applies to the DS1 interoffice transport requested by Supra.

Supra witness Nilson argues that Section 271 of the Act does not prohibit Supra from providing interLATA services as it does BellSouth. As such, witness Nilson believes that Supra should be allowed to provide interLATA services through the use of UNEs.

Witness Nilson's claim is based upon his interpretation of Section 271(a) of the Act in which he argues that although BellSouth is itself precluded from providing services to its end users across LATA boundaries, it is not specifically precluded from "wholesaling such services to other carriers." He states that "the intent of the Act is clearly explained to give a CLEC access to local, intraLATA and interLATA interoffice facilities." (Emphasis in original) Moreover, witness Nilson reasons that interoffice transport is a UNE and that a CLEC's right to unbundled interoffice transport has been fully upheld. Accordingly, once that UNE is leased to Supra, Supra assumes exclusive rights to the use of that element. Thus, Supra, as a facilities-based provider, would be deemed as providing the transport across LATA boundaries, not BellSouth. Witness Nilson further propounds that "(B)ellSouth's only role would be providing wholesale elements to a carrier, not prohibited retail service to an end-user."

Witness Nilson maintains that this interpretation is consistent with FCC Order 96-325, ¶449, which states in part:

> ...the ability of a new entrant to obtain unbundled access to incumbent LECs' interoffice facilities, including those facilities that carry interLATA traffic, is essential to that competitor's ability to provide competing telephone service.

Further, 47 C.F.R. § 51.309(b) specifies:

> (b) telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers.

Additionally, witness Nilson explains that the FCC in FCC Order 96-325 at ¶356, concluded that Section §251(c)(3) permits all telecommunications carriers, including interexchange carriers, to purchase UNEs for the purpose of offering exchange access services or to provide exchange access services to themselves in order to provide interexchange services to consumers. Further, he states:

> In ¶440, the FCC concluded that ILECs must provide interoffice facilities between central offices, not limit facilities to which such interoffice facilities are connected, allow a competitor (ALEC) to use an interoffice facility to connect to an ILEC's switch, provide unbundled access to shared transmission facilities between end offices and the tandem switch, as well as transmission capabilities such as DS1.

Therefore, in witness Nilson's view, "BellSouth's refusal to provide Supra with interoffice transport, is a refusal to provide Supra with the Services and Elements contained in the Agreement and required by the FCC's First Report and Order, ¶¶342 to 365."

BellSouth witness Cox acknowledges that the interoffice transport requested by Supra is a UNE. However, she maintains that BellSouth is still prohibited from providing this transport across LATA boundaries. Moreover, witness Cox states, "[S]ection 271(a) of the Act provides no qualification of the nature of the service, whether retail or wholesale, in the phrase 'interLATA services'."

Both parties appear to agree that the DS1 interoffice transport that Supra requests is an unbundled network element (UNE). However, the parties disagree as to whether BellSouth is obligated to provide interoffice transport between BellSouth central offices, across LATA boundaries.

BellSouth witness Cox maintains that BellSouth is prohibited, pursuant to Section 271(a), from providing interLATA services to any carrier. On the other hand, Supra witness Nilson goes to great length to argue that the Act's intent is to give CLECs access to the incumbent's local, intraLATA and interLATA interoffice facilities. Supra contends that its request for interLATA interoffice transport is consistent with the Act and the FCC's First Report and Order, which states that "the ability of a new entrant to obtain unbundled access to incumbent LECs' interoffice facilities, including those facilities that carry interLATA traffic, is essential to that competitor's ability to provide competing telephone service."

2. Decision

DS1 interoffice transport is an unbundled network element that the incumbent is obligated to provide. However we are not persuaded that Supra's request for BellSouth to provide interoffice transport across LATA boundaries is consistent with Section 271 of the Act. In particular, we disagree with witness Nilson's argument that if DS1 interoffice transport were leased from BellSouth by Supra (as a facilities-based carrier) via UNEs, and provided across LATA boundaries, that Supra would be deemed as providing the interLATA service. We do agree with witness Cox's argument that BellSouth would still be providing interLATA transport to Supra, and hence an "interLATA service."

Furthermore, we are not convinced that BellSouth "terribly confuses its prohibition from offering interLATA services directly to end users, and leasing network facilities to another carrier." We do not share Supra's interpretation of BellSouth's obligations under Section 271(a) with regard to providing "interLATA services." Specifically, the Telecommunications Act of 1996 defines "interLATA services" in the following manner:

> InterLATA service: The term "interLATA service" means telecommunications between a point located in a local access and transport area and a point located outside such area.

Thus, no qualification of services, whether retail service to end users or wholesale service to other carriers, is provided for in the phrase "interLATA services." While the record supports BellSouth's position in the instant case, this issue may warrant further investigation. It is unclear as to whether or not the Telecommunications Act's definition of "telecommunications" differentiates between service to an end-user and service provided to a carrier. Nonetheless, based on the record, the plain language of Section 271(a) specifically precludes BellSouth from providing interLATA services to any carrier and, consequently, there is no basis for requiring BellSouth to provide interoffice transport to Supra across LATA boundaries.

Therefore, the final arbitrated agreement submitted to us for approval shall not require BellSouth to provide transport to Supra Telecom if that transport crosses LATA boundaries.

H. Performance Measures

Herein, we determine which performance measures shall be included in the parties' Interconnection Agreement.

1. Arguments

BellSouth witness Cox asserts that this issue should not be addressed in the current proceeding. Witness Cox believes that our generic Performance Measurements docket, Docket No. 000121-TP, addresses the very issues raised by Supra. As such, witness Cox contends that:

> [t]his generic docket is the appropriate vehicle for collaborating on the performance measures appropriate to the ALEC industry in Florida. Performance measures should not be decided in individual ALEC arbitration proceedings. Since all ALECs in Florida, including Supra, had the opportunity to participate in this docket, this Commission should require Supra to abide by the Commission's decision in the generic performance measurement docket.

In support of this assertion, witness Cox offers several issues from that docket that relate to Supra's concerns:

> Issues from Docket No. 000121-TP that pertain to measurements:
>
> Issue 1.a: What are the appropriate service quality measures to be reported by BellSouth?
>
> Issue 1.b: What are the appropriate business rules, exclusions, calculations, and levels of disaggregation and performance standards for each measurement?

Supra witness Ramos, however, contends that "Supra wants to have a clear performance measurement included in the parties'

agreement." In an effort to increase clarity, effectiveness, and parity, witness Ramos states:

> Supra proposes the establishment of Performance Measures for pre-ordering, ordering, provisioning, billing, maintenance, systems performance and quality of service provided. As a rule, all measures should be a comparison of like activities between the ILEC and ALEC.

In addition, "Supra further proposes that the Performance Measures should include standard and/or targeted achievement levels." He also asserts that:

> Supra's past experience with BellSouth on this matter is that BellSouth consistently and repeatedly acts in bad faith. The SQMs that are part of the parties' existing Agreement and the Interim Performance Metrics proposed by BellSouth are inadequate. At first glance, the metrics proposed seem quite extensive, however upon more thorough examination it is apparent that BellSouth has no intention of measuring the metrics that have the most bearing on ALECs.

In addressing our generic docket and BellSouth's assertions, Supra witness Ramos states that "Supra is unwilling to waive its rights by agreeing now, to comply with some unknown outcome of ongoing or future proceedings concerning Performance Measurements." Supra argues that many of the pre-ordering and ordering performance measures Supra is requesting would be unnecessary if BellSouth would simply provide direct access to its OSS. Furthermore, witness Ramos asserts "that the performance measurements should include standards and/or targeted achievement levels." He goes on to state that "to go through the exercise of measuring and reporting if there is no attempt to reach parity or agreed upon standards" would be pointless. In lieu of the generic docket's performance measurements, witness Ramos proposes nineteen performance measures that would apparently address Supra's concerns. Those measures would compare the performance of BellSouth's retail operations to BellSouth's performance when handling Supra's orders. Supra also requests that the related measurement reports be e-mailed to Supra on a monthly basis.

2. Decision

When addressing which performance measurements should be included in the agreement, Supra witness Ramos, adopting the testimony of Carol Bentley, asserts that performance measurements "are of an utmost concern to Supra." He goes on to state, "the fact that these dockets and/or proceedings are pending provides further weight to the importance of Performance Measurements." We do not dispute the importance of performance measurements and reiterate that:

> [p]erformance monitoring is necessary to ensure that ILECs are meeting their obligation to provide unbundled access, interconnection and resale to ALECs in a nondiscriminatory manner. Additionally, it establishes a standard against which ALECs and this Commission can measure performance over time to detect and correct any degradation of service provided to ALECs.

Order No. PSC-01-1819-FOF-TP, p.7. The measurement categories proposed by Supra are similar to those contained in our Order, which states:

> [t]he major measurement categories are preordering, ordering, provisioning, maintenance and repair, and billing. In addition, the following categories are also included: operator service and directory assistance, database information, E911, trunk group performance, collocation, and change management.

Order No. PSC-01-1819-FOF-TP, p.9.

Based on the record, Supra apparently did not review the metrics established in the generic docket, issued September 10, 2001, to determine whether the metrics specified therein satisfied any of Supra's demands.

The generic Performance Measurements Docket was designed "to develop permanent performance metrics for the ongoing evaluation of operational support systems (OSS). . . ." and includes a monitoring and enforcement program to eliminate concerns over nondiscriminatory access to the ILEC's OSS. See Order No. PSC-01-

1819-FOF-TP, p.7. That order also specifies that the measurement reports be posted to BellSouth's website by a specified due date. See Order No. PSC-01-1819-FOF-TP, p.130. Although the end results may differ somewhat from Supra's proposal, the conclusions reached in the generic docket adequately address Supra's concerns.

The generic Performance Measurements docket, Docket No. 000121-TP, established the appropriate performance measurements applicable to BellSouth. The resulting measurements, as approved by the FPSC in Order No. PSC-01-1819-FOF-TP, and BellSouth's forthcoming performance assessment plan, will apply to BellSouth only. BellSouth must abide by them and as such, we do not believe that it is necessary to specifically include those performance measurement metrics in the parties' interconnection agreement, although the parties may choose to do so.

I. Refusal to Provide Service

Here we consider the conditions under which BellSouth can refuse to provide services to Supra under the parties' interconnection agreement. Specifically, the dispute centers around whether or not BellSouth should be required to provide services to Supra when those services are not identified in the interconnection agreement.

1. Arguments

BellSouth witness Cox testifies that her company's position is that in order to incorporate new or different terms, conditions or rates into the parties' agreement, an amendment must be executed. She explains that "[W]hen an ALEC notifies BellSouth that it wishes to add something to or modify something in its Agreement, BellSouth negotiates an Amendment with that ALEC if the agreement has not expired." According to witness Cox, this is not only BellSouth's policy, but the Act requires that BellSouth and ALECs operate under filed and approved interconnection agreements.

Witness Cox believes that BellSouth's position, with regard to requiring amendments to agreements, is also supported by Order No. PSC-01-1181-FOF-TP, p. 473, issued May 25, 2001, in Docket No. 990649-TP, wherein we state:

> Therefore, upon consideration, we find that it is appropriate for the rates to become effective when the interconnection agreements are amended to reflect the approved UNE rates and the amended agreement is approved by us.

According to witness Cox, except in specific instances where we order otherwise (such as the Order in Docket 990649-TP), the Amendment becomes effective when it is signed by both parties, and thereby acts as BellSouth's authority to effectuate any required billing changes.

Moreover, witness Cox believes that given our order in Docket No. 990649-TP, "there will never be a case where BellSouth provides a service to Supra that is not part of its Interconnection Agreement." She further argues that not to include all of the services that BellSouth provides to Supra in its interconnection agreement, as Supra requests, circumvents the "pick and choose" opportunity of other ALECs. In addition she states, "if BellSouth did provide services to Supra not covered by the agreement, there would be no language to turn to in cases of a dispute over what was provided or how it was provided."

Supra witness Ramos argues that under the terms of an interconnection agreement, BellSouth should not, under any circumstance, refuse to provide any service requested by Supra, regardless of whether or not the service is addressed in the parties' agreement. He states that "such services should be provided at the time of the request and that for new items, elements or service [sic], upon Supra's acceptance of a relevant and reasonable cost study, the prices should be applied retroactively." Witness Ramos likens this scenario to that of the concept of "true-ups" as applied to ALECs seeking to collocate equipment in BellSouth central offices.

In his testimony, witness Ramos affirms that the Follow-On Agreement should be a substantially complete agreement, "subject only to amendments negotiated by the parties or mandated by law and regulatory authorities," and that Supra would do its best to identify all services and elements for which no rate has been established. However, he believes that to the extent that some rates are left out or not determined at the time the agreement is

executed, Supra's request is reasonable, and "would be in the best interests of Florida's consumers, as they would not have to wait for the parties to arbitrate additional rates before being provided with a competitive service." He further explains the procedure by which services should be provisioned when those services are not identified in the Agreement prior to execution:

> If a rate is not provided in the Follow-On Agreement for a service, item or element, and that service, item or element could not reasonably be identified prior to execution (of the Follow-On Agreement), then BellSouth must provide that service, item or element without any additional compensation. This includes components of any service, item or element for which there are cost studies or for which it can be reasonably concluded that BellSouth is compensated for the component within the cost of the entire service, item or element.
>
> If the Follow-On Agreement does not directly address a service, item or element, but that service, item or element is necessary to provide a service, item or element directly addressed by the Follow-On Agreement, then BellSouth must provide that service, item or element without additional compensation if cost studies show or one could reasonable [sic] conclude that the cost of the service, item or element not addressed is included in the cost of the service, item or element addressed in the Follow-On Agreement.
>
> Finally, if the Follow-On Agreement does not address a new service, item or element and new contract terms are necessary, then BellSouth must still provide that service, item or element; but, if the parties cannot expediently negotiate a new amendment, and must proceed according to the dispute resolution process in the Follow-On Agreement to resolve the terms of the new amendment [sic]. However, absent a Commission order, BellSouth should not be able to refuse to provide the service, item or element while the parties are resolving the new amendment. The new amendment should be applied retroactively to the date the service is first provisioned.

Witness Ramos believes that language must be included in the agreement to provide an incentive for BellSouth to provision services requested by Supra. Moreover, he contends that the need for language providing incentive for ILEC compliance is evidenced in FCC Order 01-204 in Docket No. 98-147. Witness Ramos states:

> With respect to collocation issues, the FCC affirmatively stated that "[they] recognize that an incumbent LEC has powerful incentives that, left unchecked, may influence it to allocate space in a manner inconsistent with [its] duty." Id. at paragraph 92, and, "...incumbents also have incentives to overstate security concerns so as to limit physical collocation arrangements and discourage competition." Id. at paragraph 102. This language properly reflects the FCC's conclusions that ILECs require incentives in order to ensure compliance with the Act."

Witness Ramos further alleges that BellSouth seeks to use the amendment process as a tactic to hinder and delay provisioning of services which Supra requests under the agreement. He believes that BellSouth's position that the "Amendment will become effective when signed by both parties" allows BellSouth to "put off the adoption of more favorable terms until the longest date possible." In his testimony, he explains the basis for his allegations:

> (U)nder the parties' various agreements, BellSouth would often refuse to provide Supra with requested services, claiming that the agreements did not provide for a certain rate, and therefore, until the parties agreed to a rate or the parties reached an arbitrated rate, BellSouth would continue to deny the requested services.

Further, with respect to Supra's attempts to adopt the "comparative advertising" provision contained in the Mpower Interconnection Agreement, witness Ramos testifies:

> Although Supra requested the right to adopt that provision via correspondence dated October 6, 2000 (Supra Exhibit OAR 41), BellSouth has never responded, and has instead chosen to ignore Supra's request. (Emphasis in original)

In response to BellSouth witness Cox's testimony that an amendment must be executed in order to incorporate new or different terms, conditions or rates into the parties' agreement, witness Ramos retorts that any time Supra would request an amendment to the current agreement, BellSouth insisted that before it (BellSouth) could agree to the amendment, Supra would have to delete an entire Attachment. According to witness Ramos, the most recent example of this practice was evidenced in Supra's request to amend the parties' agreement to incorporate rates pursuant to Order No. PSC-01-1181-FOF-TP, in Docket 990649-TP. Witness Ramos recounts:

> On July 12, 2001, I spoke with Mr. Greg Follensbee, BellSouth's lead negotiator who told me that "BellSouth objects strongly to Supra's amendment request" and "promised to send a formal response explaining BellSouth's objections." See Supra Exhibit OAR 76, letter dated July 23, 2001 to Mr. Follensbee. Mr. Follensbee replied to my letters dated July 11 and 23, 2001 via his misdated letter dated July 19, 2001. See attached Supra Exhibit OAR 77, In his response, Mr. Follensbee stated that:
>
> > In order to provide those rates, it will be necessary to replace the existing attachment 2 with a new attachment 2 that incorporates the terms and conditions that coincide with the new rates. (Emphasis in original)

Consequently, witness Ramos maintains that if BellSouth's position is accepted, then BellSouth would have no incentive to provide services requested by Supra, and could "delay executing an amendment indefinitely."

2. Decision

Supra witness Ramos makes several allegations involving what he believes to be BellSouth's use of its amendment process to delay and hinder the provisioning of services which Supra requests under the interconnection agreement or seeks to adopt under its right to "pick and choose" more favorable terms. He strongly believes that the language of the follow-on agreement must provide an incentive for BellSouth to comply with the terms of the agreement with

respect to amending the agreement and provisioning services requested by Supra. BellSouth did not respond in the record to any of the allegations made by Supra.

Although outside the record evidence of this issue, we note that, post-hearing, the Parties have agreed to BellSouth's proposed language with respect to Supra's adoption of rates, terms and conditions found in other agreements pursuant to 47 U.S.C.§ 252. The agreed upon language requires the parties to amend the current agreement within 30 days of Supra's request, or in the event of a dispute, within 30 days of any determination made through the Dispute Resolution Process as set forth in the agreement. This language appears to be responsive to Supra's concern in this regard.

In any event, the fundamental issue is whether or not BellSouth is legally bound by terms and conditions not specifically expressed or stated in the parties' interconnection agreement. Supra witness Ramos acknowledges that "the Follow-On Agreement should be a substantially complete agreement, subject only to amendments negotiated by the parties or mandated by law and regulatory authorities." At the same time, however, he contends that to the extent rates are left out or not identified at the time the agreement is implemented, BellSouth should provide those services at the time of request and then negotiate the amendment, applying the negotiated rates retroactively.

We are not persuaded by Supra witness Ramos' argument. Section 252 of the Act lays out the process by which parties are to negotiate interconnection agreements which govern the parties' relationship. In particular Section 252(a)(1) states in part:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. **The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement.** The agreement...shall

> be submitted to the State commission under subsection (e) of this section. (Emphasis added)

Further, Section 252(e)(1) states:

> **Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission.** A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies. (Emphasis added)

As such, we concur with BellSouth witness Cox that the 1996 federal Telecom Act requires BellSouth and ALECs to operate under approved interconnection agreements. Further, requiring amendments to agreements in order to effect changes or additions is consistent with Order No. PSC-01-1181-FOF-TP, in Docket No. 990649-TP, in which we found it to be "appropriate for the rates to become effective when the interconnection agreements are amended to reflect the approved UNE rates and the amended agreement is approved by us."

Moreover, as stated by both parties, ALECs are entitled to "pick and choose" more favorable terms from other interconnection agreements. To provide services to Supra when those services are not identified in the parties' interconnection agreement, circumvents the "pick and choose" entitlement due other ALECs, and constitutes a discriminatory practice. Witness Cox presents a valid argument that "if BellSouth did provide services to Supra not covered by the agreement, there would be no language to turn to in case of a dispute over what was provided or how it was provided." Given the parties' prior relationship and apparent inability to negotiate the most straightforward terms and conditions of the previous agreement(s), we believe that it is imperative that the rates, terms and conditions governing the parties' contractual relationship in the Follow-On Agreement be clearly and unambiguously defined.

In conclusion, we find the record does not reflect that BellSouth is legally obligated to provide services not agreed to in the parties' interconnection agreement without executing an amendment. Thus we find no basis upon which we should compel such a requirement. Given the evidence presented in the record of this

proceeding, BellSouth shall not be required to provision services for which rates, terms and conditions are not identified in the interconnection agreement, prior to negotiating and executing an amendment.

J. Rates

Originally, we were asked to consider what rates are appropriate for the following services, items, or elements to be set forth in the Interconnection Agreement: (A) Resale, (B) Network Elements, (C) Interconnection, (D) Collocation, (E) LNP/INP, (F) Billing Records, and (G) Other. Subsequent to the hearing, both sides settled on rates for (A)Resale and (D) Collocation rates. Accordingly, the rates addressed here are: (B) Network Elements, (C) Interconnection, (E) LNP/INP, (F) Billing Records, and (G) Other.

1. Arguments

BellSouth witness Cox adopted the direct testimony of BellSouth witness Ruscilli. Witness Cox believes that the rates we set in Docket No. 990649-TP and Docket No. 000649-TP (specifically for line-sharing) should be incorporated into the Agreement. For those rates not addressed in these dockets, the witness believes that BellSouth's tariffed rates should be incorporated into the Agreement. For line-sharing, witness Cox proposes that "the rates this Commission established in the MCI arbitration decisions [sic] be incorporated into Supra's Agreement."

Supra, on the other hand, proffered what apparently amounts to at least two different positions. First, in his direct testimony, Supra witness Ramos states the rates should be those set forth in the parties' current agreement. However, in his rebuttal testimony, witness Ramos states the parties should negotiate the rates for such items. In its post-hearing brief, Supra attempted to clarify this issue. Supra witness Ramos believes that the rates in the "follow-on agreement" should be those rates we established in recent or prior proceedings. In particular, the Florida generic UNE Docket, No. 990649-TP, provides Supra and all other ALECs with rates for most of the network elements identified in this issue. In its brief, Supra further adds that it wishes to opt into the terms and conditions associated with line sharing contained in the

MCI/BellSouth agreement which we approved in Docket No. 000649-TP. However, Supra contends all interim rates, until made permanent by us, should be subject to true-up. Accordingly, for the network elements where the generic UNE Docket did not establish a rate, Supra seeks to use BellSouth's proposed rates from the SGAT in BellSouth's 271 filing in Docket N0. 960786A-TL as interim rates.

2. Decision

Based on the testimony and post-hearing briefs of the parties it appears that BellSouth and Supra actually have similar views on the rates in this issue. The only exception is the rates which Supra wishes to designate as interim rates subject to true-up. This issue has been substantially narrowed to include the network elements for which we have established rates, and the network elements for which rates have not been established. Since the parties appear to agree on a majority of the "items" in this issue we believe that the rates we established in Docket Nos. 990649-TP and 000649-TP are the appropriate rates for (B) Network Elements, (C) Interconnection, (E) LNP/INP, (F) Billing Records[10], and (G) Other[11].

With regard to those elements for which rates have not been previously been established, we find that the rates proposed by BellSouth are reasonable. As suggested by BellSouth witness Cox, for those elements not addressed in the aforementioned dockets, BellSouth's tariffed rates should be incorporated into the agreement. Supra witness Ramos suggested that the rates for the unaddressed elements should be taken from an expired agreement, but also argued that the parties should negotiate the rates for such items. Due to the apparently conflicting testimony, we are unsure what specific items are being referenced and are, therefore, unable to determine why these items should be subject to true-up.

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[10] Although there is no discussion as to specific billing records, we presume the items intended to be addressed are Access Daily Usage File (ADUF), Optional Daily Usage File (ODUF), and Enhanced Optional Daily Usage File, for which we have established rates in Docket No. 990649-TP.

[11] Although there is no discussion as to a specific "other" network element(s) by either party, we presume the item intended to be addressed is line-sharing, for which we established rates in Docket No. 000649-TP.

While narrowing this issue, neither party specified which elements of concern were not addressed in Docket Nos. 000649-TP and 990649-TP. Due to the history of these parties' relationship as reflected in the record, we do not believe that a consensus is likely to be reached by them regarding network element rates not yet established. Accordingly, Supra is free to opt into the terms and conditions of an agreement or any portion of an agreement that may offer it more favorable rates, such as the line-sharing rates approved by us in the MCI/BellSouth arbitration in Docket No. 000649-TP.

Based on the foregoing, the appropriate rates to be set forth in the Interconnection Agreement for (B) Network Elements, (C) Interconnection, (E) LNP/INP, (F) Billing Records, and (G) Other shall be those established in Docket No 990649-TP, and in Docket No. 000649-TP (specifically for line-sharing). For the network elements for which rates have not been previously established by us, the rates shall be BellSouth's tariffed rates unless the parties agree otherwise. Such rates shall not be subject to true-up.

K. Reciprocal Compensation for Calls to Internet Service Providers

In this section, we address the treatment of calls to Internet Service Providers (ISPs) and whether such calls should be treated as local traffic for the purposes of reciprocal compensation.

1. Arguments

Supra witness Nilson asserts that the FCC's April 27, 2001 order, FCC 01-131, is significant to this issue, but also believes that BellSouth is acting in bad faith and misrepresenting the findings of FCC 01-131. The witness attests:

> BellSouth is expecting Supra to adopt language that would forgo the interim measures ordered by the FCC in favor of the language that represents where the FCC would like to be on this issue in the future. While we have guidance from the FCC on the future, we have clear and effective

> orders from the FCC that reciprocal compensation be paid for ISP-bound traffic in the interim.

In ¶82 of FCC 01-131, the witness believes that the FCC has exercised its right to set a national rate for this traffic while preventing state commissions from setting a different rate. Witness Nilson asserts, "[t]he FCC has done nothing that prevents a state commission from ordering the FCC rates into specific interconnection agreements." Paragraph 82 of FCC 01-131 states:

> 82. The interim compensation regime we establish here applies as carriers re-negotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. This order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here. Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue. For this reason, as of the date this Order is published in the Federal Register, carriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic. Section 252(i) applies only to agreements arbitrated or approved by state commissions pursuant to section 252; it has no application in the context of an intercarrier compensation regime set by this Commission pursuant to section 201. (Footnotes omitted)

The witness asserts that the specific rates that Supra is seeking are found in ¶98 of FCC 01-131. In part, ¶98 of FCC 01-131 states:

> The Commission exercises jurisdiction over ISP-bound traffic pursuant to section 201, and establishes a three-year interim intercarrier compensation mechanism for the exchange of ISP-bound traffic that applies if incumbent LECs offer to exchange section 251(b)(5) traffic at the same rates. During this interim period, intercarrier

> compensation for ISP-bound traffic is subject to a rate cap that declines over a three-year period, from $.0015/mou [minutes of use] to $.0007/mou.

In its Brief, Supra states that it "seeks that the follow-on agreement reflect current FCC rulings and Part 51, Subpart H of Title 47 of the Code of Federal Regulations (C.F.R.) as adopted on April 18, 2001."

BellSouth contends that the subject matter of this issue is one that we no longer have the authority to address. Witness Cox asserts that for all practical purposes, the FCC recently resolved this issue when it issued its Order on Remand and Report and Order, FCC 01-131. The witness states:

> In this Order [FCC 01-131], the FCC affirmed its earlier conclusion that ISP-bound traffic is predominantly interstate access traffic that is not subject to reciprocal compensation obligations of section 251(b)(5) but is within the jurisdiction of the FCC under section 201 of the Act. [FCC 01-131 at ¶1] The FCC made it clear that because it has now exercised its authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, state commissions no longer have the authority to address this issue. FCC 01-131 at ¶82

BellSouth concludes that we do not have jurisdiction to require payment of reciprocal compensation for ISP-bound traffic and believes that this issue cannot be arbitrated in this proceeding.

2. Decision

The core matter at issue hinges on the interpretation of FCC 01-131. The overall intent of FCC 01-131 was to establish a compensation regime for ISP-bound traffic. Supra, however, relies upon what FCC 01-131 did not say, while BellSouth points to what the FCC's order did say. For example, in his analysis of ¶82, Supra witness Nilson asserts that "[t]he FCC has done nothing that prevents a state commission from ordering the FCC rates into specific interconnection agreements." We would agree that FCC 01-131 does not explicitly state that the FCC allows - or restricts -

us from ordering the FCC rates into specific interconnection agreements. However, the FCC states in clear and unequivocal terms that "[b]ecause we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic...state commissions will no longer have authority to address this issue." (See FCC 01-131)

Supra's witness Nilson characterizes the FCC's action in this matter as "where the FCC would like to be on this issue in the future," yet he believes the interim compensation rates offered in ¶98 should be applicable now. He believes that the FCC's action sets a national rate for ISP traffic while simultaneously preventing state commissions from setting a different rate. Witness Nilson emphasizes the opening sentence demonstrates the applicability of FCC 01-131 to this arbitration:

> 82. The interim compensation regime we establish here applies as carriers re-negotiate expired or expiring interconnection agreements.

While we agree with the witness that FCC 01-131 sets the course for where the FCC, the applicability of the interim compensation rates is not a matter over which we can exert jurisdiction, since the FCC has deemed ISP traffic subject to its section 201 authority. See ¶98 of FCC 01-131. Of additional significance is ¶89 of FCC 01-131, which states in part:

> 89. The rate caps for ISP-bound traffic that we adopt here apply, therefore *only* if the incumbent LEC offers to exchange all traffic subject to section 251(b)(5) at the same rate . . . For those incumbent LECs that choose *not* to offer to exchange section 251(b)(5)traffic subject to the same rate caps we adopt for ISP-bound traffic, we order them to exchange ISP-bound traffic at the state-approved or state-arbitrated reciprocal compensation rates reflected in their contracts. This "mirroring" rule ensures that incumbent LECs will pay the same rates for ISP-bound traffic that they receive for section 251(b)(5) traffic. (Footnotes omitted)

The compensation arrangement hinges on how the ILEC - BellSouth in this case - offers to exchange ISP-bound traffic with the ALEC

(Supra). By virtue of FCC 01-131 and the jurisdictional considerations therein, we cannot order the ILEC to exchange such traffic in a specific manner.

As such, we find that we lack the jurisdiction to address the issue of whether calls to ISPs should be treated as local traffic for the purposes of reciprocal compensation.

L. Validation and Audit Requirements

The parties also asked us to determine whether the Interconnection Agreement should include validation and audit requirements which will enable Supra Telecom to assure the accuracy and reliability of the performance data BellSouth provides to Supra Telecom.

1. Arguments

BellSouth witness Cox contends that this issue is also among the issues included in our generic Performance Measurement Docket No. 000121-TP. Witness Cox believes that this issue is addressed in the generic docket, and the outcome of that docket will resolve this issue for the entire ALEC industry in Florida. Witness Cox provides the following issues from the generic docket to illustrate that the issue in this proceeding has already been addressed:

Issues from Docket No. 000121-TP that pertain to audits:

Issue 24.a: Should periodic third-party audits of performance assessment plan data and reports be required?

Issue 25: If periodic third-party audits are required, who should be required to pay the cost of the audits?

Issue 27.a: Should an ALEC have the right to audit or request a review by BellSouth for one or more selected measures when it has reason to believe the data collected for a measure is flawed or the report criteria for a measure is not being adhered to?

Issue 27.b: If so, should the audit be performed by an independent third party?

Witness Cox states that "[s]ince all ALECs in Florida, including Supra, had the opportunity to participate in this docket, we should require Supra to abide by our decision in the generic performance measurement docket."

Supra witness Ramos contends that BellSouth should be required to adopt validation and audit requirements. He believes that this requirement "would enable Supra and the FPSC to be assured of the accuracy and reliability of the performance data BellSouth provides." Witness Ramos goes on to state that "[i]t is essential that performance measurement standards are established, reported, and, more importantly, that they are accurate and can be relied upon." Witness Ramos argues that these very standards are used to determine ILEC §271 applications and are evaluated in the event of a dispute between the parties. Therefore, witness Ramos asserts, "there must be a method to validate the accuracy of the measurement and the performance against the standard."

2. Decision

The parties proffered very little support for their positions on this issue. Based on the evidence, we find that the validation and audit requirements set forth in Order No. PSC-01-1819-FOF-TP, in Docket No. 000121-TP, are the appropriate requirements. These requirements need not be included in the parties' Interconnection Agreement because they are already mandatory, but the parties may choose to do so.

The validation and audit requirements set forth in Order No. PSC-01-1819-FOF-TP satisfy both parties' needs. The generic docket addressed Supra's concerns for accuracy and reliability of the performance data, and BellSouth's preference to use the requirements set forth in the generic docket. BellSouth witness Cox affirms BellSouth's position and states, "it should be the plan that's been developed by this Commission and will be implemented as a result of their generic docket . . . . "

M. The Meaning of "Currently Combines" and Associated Charges

Herein, we decide when, if ever, BellSouth is obligated to combine unbundled network elements for Supra and if so, what price should apply.

1. Arguments

Witness Cox asserts that the interconnection agreement should only require BellSouth to provide cost-based combinations to Supra, if such elements are in fact already combined in BellSouth's network. This policy, witness Cox believes, is consistent with BellSouth's obligations under the 1996 Act and applicable FCC rules.

Witness Cox contends that we have consistently ruled that BellSouth is not required to combine UNEs for ALECs. She asserts that in the BellSouth/AT&T arbitration, Docket No. 000731-TP, we concluded that:

> Based on the foregoing, we find that it is not the duty of BellSouth to "perform the functions necessary to combine unbundled network elements in any manner." Rule 51.315(b) only requires BellSouth to make available at TELRIC rates those combinations requested by an ALEC that are, in fact, already combined and physically connected in its network at the time a requesting carrier places an order. Accordingly, we conclude that the phrase "currently combines" pursuant to FCC Rule 51.315(b) is limited to combinations of unbundled network elements that are, in fact, already combined and physically connected in BellSouth's network to serve a specific customer or location at the time the requesting carrier places an order. In other words, there is no physical work that BellSouth must complete in order to effect the combinations that the requesting telecommunications carrier requests.

Order No. PSC-01-1402-FOF-TP at p. 23. Similarly, witness Cox quotes from our order in the BellSouth/WorldCom arbitration, Docket No. 000649-TP, that "BellSouth is not required to combine unbundled network elements that are ordinarily combined in its network for ALECs at TELRIC rates." Order No. PSC-01-0824-FOF-TP at p. 35. Witness Cox contends that we relied on the Eighth Circuit Court's July 18, 2000 ruling in which it reaffirmed that the FCC's Rules 51.315(c)-(f), which required ILECs to combine UNEs on behalf of ALECs, were to remain vacated as inconsistent with the Act. Id. Finally, witness Cox cites the BellSouth/Sprint arbitration, Docket

No. 000828-TP, as yet another example of our ruling that BellSouth is not required to combine network elements for ALECs. See Order No. PSC-01-1095-FOF-TP at p. 23.

Witness Cox disagrees with Supra witness Nilson's assertion that FCC Rule 51.315(b) requires BellSouth to combine UNEs for Supra. Witness Cox asserts that the FCC in its UNE Remand Order[12] specifically declined to interpret "currently combines" to impose on BellSouth a duty to combine UNEs. More specifically, BellSouth, in its brief, quotes the UNE Remand Order as stating "to the extent an unbundled loop is in fact connected to unbundled dedicated transport, the statute and our rule 315(b) require the incumbent to provide such elements to requesting carriers in combined form." Witness Cox readily agrees that Rule 51.315(b) prevents BellSouth from separating network elements that are combined in the BellSouth network at the time an ALEC requests them. However, witness Cox steadfastly maintains that FCC Rule 51.315(b) does not require BellSouth to combine UNEs for ALECs such as Supra.

Supra witness Nilson first argues that FCC Rule 51.315(b) requires ILECs to combine UNEs for ALECs. Rule 51.315(b) provides that: "Except upon request, an incumbent LEC shall not separate requested elements that the incumbent LEC currently combines." The FCC would have used the past tense combined instead of the present and future tense combines if this rule was not meant to require ILECs to combine UNEs, according to witness Nilson. He contends that if Congress had intended to restrict the UNE entry strategy by compelling ALECs to combine UNEs, Congress would have used "combined" instead of "combines." Therefore, witness Nilson requests we find "currently combines" means the normal, expected, and possible future work done to establish a BellSouth tariffed telecommunications service and require BellSouth to combine UNEs on Supra's behalf to redress BellSouth's failure to combine UNEs under past agreements that allegedly required it to do so. Despite Supra's repeated attempts to order UNE combinations while operating under the first BellSouth/Supra agreement, witness Nilson contends BellSouth never provided Supra with a single UNE combination despite contractual language requiring BellSouth to do so. Witness

[12]In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order, CC Docket No. 96-98, FCC 99-238, released November 5, 1999 (UNE Remand Order).

Nilson asserts that to overcome BellSouth's refusal, Supra adopted the AT&T/BellSouth agreement in Florida on October 5, 1999.

According to witness Nilson, while resolving an interconnection dispute between BellSouth and AT&T in Docket No. 971140-TP, we required BellSouth to provide UNE combinations at TELRIC prices. Although this Order addressed the same AT&T/BellSouth agreement that Supra adopted, witness Nilson asserts that BellSouth still failed to provide Supra with UNE combinations. He states that BellSouth's claims regarding UNE combinations, must be viewed in light of BellSouth's continuous refusal to comply with our orders, its contractual obligations, and its "tortious [sic] intent to harm." Witness Nilson contends that we should require BellSouth to combine UNEs for Supra at cost-based rates to make up for what he believes is BellSouth's illegal refusal to do so under the two previous agreements.

Witness Nilson further contends that 47 C.F.R. §51.309 requires BellSouth to combine UNEs for Supra. He states that 47 C.F.R. §51.309 requires ILECs to provide unbundled network elements without:

> limitations, restrictions, or requirements on request for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner that the requesting telecommunications carrier intends.

BellSouth's refusal to combine UNEs, witness Nilson contends, denies Supra the right to provide telecommunications services as it intends and therefore violates 47 C.F.R. §51.309. Witness Nilson states that BellSouth cannot dictate uses of UNEs, or require collocation as a method to combine UNEs to provide services. To support this conclusion, witness Nilson notes the Supreme Court's ruling in AT&T v. Iowa Util. Bd., 525, U.S. 366, 392 (2000), which held that facilities ownership is not necessary to lease UNEs under the Act. According to witness Nilson, ALECs are nevertheless in a bind because the Supreme Court also ruled that a collocation requirement can be placed upon an ALEC in order to combine UNEs.

In addition, witness Nilson contends that BellSouth's refusal to combine UNEs is inconsistent with the Act and implementing FCC Orders. By not combining UNEs at cost-based rates, ILECs make leasing UNEs a less effective, less pervasive entry strategy, according to witness Nilson. Witness Nilson asserts this impediment to UNE entry violates the Act and ¶12 of the FCC's First Report and Order.[13] Further, witness Nilson alleges that ILECs have vigorously denied their obligation to provide UNE combinations and only just recently have begun to comply. To support this allegation, witness Nilson cites the FCC's UNE Remand Order, ¶12, where the FCC found ILECs only began providing UNE combinations in 1999, and only then had local competition for residential services begun to appear. Because the margins on resale are allegedly very thin, witness Nilson believes that if BellSouth can prevail on limiting the types of circuits provided as UNE combinations or UNE-P, BellSouth will win the battle for local competition.

As further support for his claim that BellSouth should be required to combine UNEs at cost based rates, witness Nilson adopts pages 5-9 of the testimony of Gregory Follensbee, formerly of AT&T and now the lead contract negotiator at BellSouth for Supra's interconnection agreement with BellSouth. This adopted testimony was originally presented in Docket No. 000731-TP, the AT&T/BellSouth arbitration. In that proceeding, Mr. Follensbee argued that ILECs should be required to combine UNEs at cost-based rates because to do otherwise penalizes ALECs for using UNEs as an entry strategy into the competitive market as compared to resale or facilities-based entry.

Should we impose the obligation upon Supra to combine UNEs, witness Nilson sees two unanswered questions:

1. Must an ALEC be allowed to combine UNEs without restriction, and

2. How can Supra combine UNEs without violating other provisions of the law?

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[13]In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325, issued August 8, 1996 (First Report and Order).

The Supreme Court in AT&T v. Iowa Util. Bd., 525 U.S. 366, 368 (1999), upheld UNE combinations and stated that UNEs provisioned by ILECs to ALECs must be in a form that allows them to be combined at the ALEC's request, according to witness Nelson. Witness Nelson asserts the Iowa Util. Bd. Court also held that the Act does not require an ALEC to perform the work itself. In fact, witness Nilson suggests some ILECs voluntarily offer to combine UNEs in order to have tighter control over who enters their facilities. Witness Nilson states the Supreme Court in Iowa Util Bd. affirmed that ALECs can lease an ILEC's entire preassembled network at cost-based rates, and he surmises that ALECs can only take advantage of this right if ILECs combine UNEs for the ALECs benefit.

Witness Nilson argues that if we do not find that BellSouth is obligated to combine UNEs on Supra's behalf, we must then grant Supra certain rights in order to ensure that Supra can combine UNEs for itself. At a minimum, witness Nilson contends Supra must be allowed to enter any BellSouth central office for the purpose of effecting its own cross-connects, facilities assignments, and switch translations. Furthermore, Supra will need full access to BellSouth's OSS including PREDICTOR, LFACS, COSMOS, ERMA, and all other provisioning interfaces that are currently restricted from ALEC access, according to witness Nilson. At the very least, witness Nilson contends, BellSouth should allow Supra this type of access if BellSouth refuses to combine any UNEs, given they agreed to do so for AT&T in 1996.

In response to BellSouth witness Cox's assertion that our previous rulings mandate that Supra's position be denied, witness Nilson states those rulings are erroneous and should not be binding on Supra. According to witness Nilson, Supra has presented new arguments that we have yet to consider. Furthermore, witness Nilson believes that Supra has not made the errors previous parties have, thereby negating any binding effect on Supra our prior rulings may have. Witness Nilson notes that on this issue in its own arbitration, AT&T failed to file a post hearing statement; thus, it waived its position. Should we seek to accommodate Supra's urging in this matter, witness Nilson believes we would be doing so where there is no prevailing law, definition or rule subsections that are currently vacated.

Witness Nilson also claims that our staff's recommendation in that proceeding was inconsistent with comments we filed with the FCC regarding its First Report and Order. There, according to witness Nilson, we requested the ability to adopt our own requirements for fostering competition. Witness Nilson contends that the FCC has recognized that state commissions "share a common commitment to creating opportunities for efficient new entry into the local market. And [sic] provide for state commissions to ensure that states can impose varying requirements."

According to witness Nilson, the Supreme Court ruled in AT&T v. Iowa Util Bd., that we are free to determine the resolution of any issue that the FCC failed to specifically address, and UNE combinations are such an issue. In other words, witness Nilson urges us to reconsider our prior position regarding these issues based on these new legal and factual arguments presented by Supra.

Witness Nilson contends that leasing a line for resale and then converting to UNEs is not a realistic option. Witness Nilson states Supra would need additional employee training, and a new CLEC OSS in order to be able to lease resale lines from BellSouth. He states the high costs associated with these improvements ensure that converting resale lines to UNE combinations is not a viable alternative to having BellSouth combine UNEs or leasing collocation space.

Supra, in its brief, argues that BellSouth should not be allowed to assess any additional charge on Supra for any combination of network elements above the TELRIC cost of the combination. To hold otherwise, Supra argues, would allow BellSouth to charge an unregulated, and likely exorbitant, amount in order to combine network elements that it ordinarily combines. Therefore, Supra requests that we limit BellSouth to charging cost-based rates for combining UNEs.

In his testimony, witness Nilson also addresses the decision we made in the AT&T/BellSouth arbitration, Docket No. 000731-TP, regarding whether BellSouth was required to provide unbundled local switching to customers that have a certain number of lines in the nation's top 50 Metropolitan Statistical Areas. He claims we erroneously determined that BellSouth is not required to provide unbundled local switching in such instances. Witness Nilson states

that we based our conclusion on the mistaken premise that alternative suppliers of local switching exist. He contends neither AT&T nor Sprint have been able to find such an alternative source, so it is therefore unreasonable to expect Supra to find such a source either. Furthermore, according to witness Nilson, the Supreme Court's decision in Iowa Util. Bd. prevents us from requiring Supra to provide its own local switching. As such, witness Nilson requests that we require BellSouth to sell unbundled local switching to Supra even when the unbundled local switching exception applies.

2. Decision

Supra's arguments cannot prevail in the face of federal case law stating that requiring ILECs to combine UNEs would be a violation of the Act. We have consistently followed the federal case law, holding that the Eighth Circuit Court of Appeal's decision in Iowa Util. Bd. v. F.C.C., 219 F. 3d 744 (8th Circuit, 2000), prohibits requiring ILECs to combine UNEs for ALECs. See e.g., Order Nos., PSC-01-1095-FOF-TP, PSC-01-1402-FOF-TP. Supra has failed to produce any new evidence that justifies reaching a different conclusion in this case.

In Iowa Util Bd., the Eighth Circuit reaffirmed its invalidation of FCC Rules 51.315 (c)-(f), which required ILECs to combine UNEs for ALECs, after the case was remanded from the Supreme Court. See Iowa Util Bd, 219 F.3d at 759. The Appeals Court also recognized that the Supreme Court reinstated Rule 51.315(b) which required ILECs not to separate UNEs that were currently combined unless requested by an ALEC, but the Court stated this did not affect its decision. Id. The Eighth Circuit explained these results were consistent, because the Supreme Court only found the Act was ambiguous on the issue of whether network elements had to be separated before being provided to ALECs, and it did not contradict the Eighth Circuit's earlier conclusion that the Act specifically forbids ILECs from being required to combine UNEs for ALECs. Id. Explaining its rationale, the Eighth Circuit stated:

> Unlike 51.315(b), subsections (c)-(f) pertain to the combination of network elements. Section 251(c)(3) specifically addresses the combination of network

> elements. It states, in part, "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunication service." Here Congress has directly spoken on the issue of who shall "combine such elements." It is not the duty of the ILECs to "perform the functions necessary to combine unbundled network elements in any manner" as required by the FCC's rule. See 47 C.F.R. § 51.315(c). We reiterate what we said in our prior opinion: "The Act does not require the incumbent LECs to do all the work." Iowa Utils. Bd., 120 F.3d at 813. Under the first prong of Chevron, subsections (c)-(f) violate the plain language of the statute. We are convinced that rules 51.315(c)-(f) must remain vacated.

Id. This decision only required ILECs to provide UNEs in combined form if the elements are already physically combined in the ILEC's network.

We also disagree with Supra's assertion that FCC Rule 51.315(b) requires ILECs to combine network elements for Supra. Rule 51.315(b) states: "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." Witness Nilson argues because the FCC used "combines" rather than "combined", it meant to impose a duty on ILECs to combine UNEs. However, the Supreme Court, in AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999), described the reach of this rule as being much more limited. The Supreme Court stated:

> As the Commission explains, it is aimed at preventing incumbent LECs from "disconnecting previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on the new entrants." It is true that Rule 315(b) could allow entrants access to an entire preassembled network. In the absence of Rule 315(b), however, incumbents could impose wasteful costs on even those carriers who requested less than the whole network.

AT&T Corp. at 395.

In addition, the FCC, in its UNE Remand Order, specifically declined to adopt the broad interpretation of Rule 51.315(b) that Supra is seeking. In paragraphs 479 and 480 of the UNE Remand Order, the FCC stated:

> A number of commentators argue that we should reaffirm the Commission's decision in the Local Competition First Report and Order. In that order the Commission concluded that the proper reading of "currently combines" in rule 51.315(b) means "ordinarily combined within their network, in a manner which they are typically combined." Incumbent LECs, on the other hand, argue that rule 51.315(b) only applies to unbundled network elements that are currently combined and not to elements that are "normally" combined. Again, because this matter is currently pending before the Eighth Circuit, we decline to address these arguments at this time

UNE Remand Order, ¶¶479, 480. This Order, combined with the Eighth Circuit's ruling in Iowa Util. Bd. v. AT&T where it stated that requiring ILECs to combine UNEs violates the 1996 Act, makes it clear that Rule 315(b) only requires ILECs not to separate UNEs that are currently combined.

In addition, we take exception to witness Nilson claim that BellSouth should be required to combine UNEs to make up for an alleged failure to do so under past agreements. Whatever obligations BellSouth had under those past agreements, expired with those agreements. Therefore, we find witness Nilson's claim that BellSouth be required to combine UNEs in this new agreement for failure to do so in past agreements unpersuasive.

Furthermore, we do not believe that FCC Rule 51.309 requires ILECs to combine network elements for ALECs when requested. Rule 51.309 states that BellSouth must provide without

> limitations, restrictions, or requirements on the request for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends. (emphasis added)

Supra witness Nilson argues BellSouth must combine network elements because to do otherwise would prevent Supra, the requesting carrier, from providing service as it intended. Supra's interpretation is too broad. The FCC specifically promulgated Rules 51.315(c)-(f) to require ILECs to combine UNEs. If the FCC meant for Rule 51.309 to require ILECs to combine network elements, there would have been no need for Rules 51.315(c)-(f), which specifically required ILECs to do so, and it is these subsections that have been vacated.

Based on the record, Supra has several viable options to combine UNEs other than requiring BellSouth to do so on its behalf. First, Supra can combine UNEs by obtaining collocation space. While witness Nilson argues that the Supreme Court in its Iowa Util. Bd. decision ruled that ALECs cannot be required to obtain collocation to combine UNEs, we disagree. The Supreme Court's decision determined that facilities ownership cannot be a pre-condition to leasing UNEs. The Court addressed ALECs that lease facilities for the purpose of combining UNEs. The Supreme Court specifically contemplated that ALECs would not be able to lease an ILEC's entire network and hence must combine UNEs on their own. See Iowa Util. Bd., 525 U.S. at 392. Therefore, we find that collocation presents a viable alternative to having BellSouth combine UNEs on Supra's behalf.

In addition to being able to combine UNEs through collocation, ALECs such as Supra can lease assembled lines for resale and then convert them to UNE-P to provide service without requiring ILECs to combine UNEs. When deciding the AT&T/BellSouth arbitration, Docket No. 000731-TP, we recognized that conversion from resold lines to UNE-P was a viable alternative to having ILECs combine UNEs or lease collocation space. Order No. PSC-01-1402-FOF-TP at p. 22. We recognize that this may not be as cost-effective for Supra as having BellSouth combine UNEs on Supra's behalf. However, there is no support based upon the record before us that it is not feasible. Furthermore, because of the alternatives to having an ILEC combine UNEs on an ALEC's behalf described above, Supra does not need extensive access to BellSouth's OSS to ensure that Supra can combine UNEs for itself.

While Supra has presented some valid policy arguments on why ILECs should combine network elements for ALECS, it has not shown

that such an action on our part would be consistent with Federal law. During the BellSouth/AT&T arbitration, we stated, "while we are free to impose additional requirements consistent with federal law, we should not impose requirements that conflict with federal law." Order No. PSC-01-1402-FOF-TP at p. 22. Furthermore, compliance with federal law is mandated by § 252(e)(6) of the Act which grants federal court review of state commission arbitration decisions. Regardless of how strong the policy arguments may be, the decisions by the Eighth Circuit Court and Supreme Court in Iowa Util Bd. are controlling in this instance. These decisions have the combined effect of invalidating FCC Rules 51.315(c)-(f) and reinstating Rule 51.315(b), which together merely require that ILECs not separate UNEs that are currently combined, but impose no obligation to combine UNEs that are currently separated. Therefore, BellSouth shall only be required to provide combined UNEs at cost-based rates when the network elements are physically combined at the time Supra requests them.

While we find that BellSouth has no duty to combine UNEs on Supra's behalf, we greatly encourage BellSouth to voluntarily combine UNEs at a mutually accepted price negotiated with Supra. BellSouth shall provide combined UNEs at TELRIC prices, if such elements are already physically combined in BellSouth's network.

As a final matter, we decline to address Supra witness Nilson's argument that BellSouth should be required to provide unbundled local switching to ALECs, in the top 50 metropolitan statistical areas, even if BellSouth offers enhanced extended links (EELs). This matter is goes beyond the issues addressed in the petition or response in this docket, and is therefore outside the scope of this proceeding

N. Rates, Terms, and Conditions for Access to Serve Multi-Tenant Environments

Herein, we address the terms, conditions, and rates for Supra to gain access to and use BellSouth's facilities to serve multi-tenant environments.

1. Arguments

BellSouth makes three points on this issue. First, BellSouth witness Kephart believes that we should affirm our prior decisions that the appropriate access method is for BellSouth to construct an access terminal for access to network terminating wire (NTW) or intra-building network cable (INC) pairs as may be requested by an ALEC, as set forth in Docket Nos. 000731-TP and 990149-TP. The charges for this provision should be the rates we adopted in our Final Order in Docket No. 990649-TP. Supra would interconnect its network to these constructed access terminals. BellSouth witness Kephart believes this method permits Supra appropriate access to end users, while providing both companies the ability to maintain appropriate records on an on-going basis. BellSouth witness Kephart states:

> BellSouth will provide access to INC and/or NTW wire pairs as requested by the Alternative Local Exchange Carrier (ALEC) by terminating such pairs on separate connecting blocks serving as an access terminal for the ALEC. BellSouth currently has its own terminal in each garden apartment arrangement or high rise building. BellSouth will create a separate access terminal for any building for which such service is requested.

Second, BellSouth witness Kephart believes that there are two types of multi-unit installations: 1) garden apartment arrangements and 2) high rise buildings. As a result, there are two separate procedures required for provisioning. Witness Kephart goes on to say:

> With regard to garden apartments, BellSouth will prewire the necessary pairs to serve each apartment on the access terminal BellSouth builds. For garden apartments, this means that each cable pair available to serve customers in that garden apartment building will appear on BellSouth's terminal and on the access terminal. An ALEC wanting to serve a customer in the garden apartment situation would build its terminal at that location and then wire its cable pair to the appropriate prewired location on the access terminal. The treatment for high rise buildings will be different. BellSouth will still

> build an access terminal to complement BellSouth's own terminal located in the high rise building. The ALEC wanting to access those facilities will still have to build its own terminal for its cable pairs. However, rather than prewiring the access terminal, BellSouth proposes that it will then receive orders from the ALEC and will wire the access terminal it has created as facilities are needed by the ALECs.
>
> BellSouth does not propose to prewire every pair to the access terminal in high rise buildings because it is simply impractical to do so. The garden apartment terminal might have 20 to 25 loops terminated on it, thus making prewiring the access terminal something that can be done with a reasonable effort. On the other hand, high rise buildings may have hundreds or even thousands of pairs, which would make prewiring the access terminal impractical.

Finally, BellSouth witness Kephart believes that our rulings in Docket Nos. 000731-TP and 990149-TP are consistent with all the FCC requirements outlined in witness Nilson's testimony. Witness Kephart further explains that it is BellSouth's intention to follow the law with regard to the issue of access to BellSouth facilities in multi-tenant environments. He continues that Supra offers no specific case in its testimony that attempts to show otherwise: "It is difficult to understand from Mr. Nilson's testimony what, if any, problem Supra has with BellSouth on this issue."

Conversely, Supra witness Nilson believes that BellSouth's current position on multi-unit environments raises the potential for anticompetitive behavior. Witness Nilson states:

> What BellSouth has proposed are a series of two or more points of interconnection, one reserved for BellSouth and another for the entire ALEC community. Mr. Kephart attempts to justify this position by claiming security and reliability issues will [sic] all ALECs having access to the BellSouth terminal. Surprisingly so, he fails to discuss how all his concerns aren't embodied in the second(ALEC) terminal as the rule is now proposed.

The Supra witness further argues that BellSouth's position is not in compliance with the FCC's order. He points to ¶226 of FCC 99-238 which states:

> Although we do not amend our rules governing the demarcation point in the context of this proceeding, we agree that the availability of a single point of interconnection will promote competition. To the extent there is not currently a single point of interconnection that can be feasibly accessed by a requesting carrier, we encourage parties to cooperate in any reconfiguration of the network necessary to create one. If parties are unable to negotiate a reconfigured single point of interconnection at multi-unit premises, we require the incumbent to construct a single point of interconnection that will be fully accessible and suitable for use by multiple carriers.

FCC 99-238, ¶226.

Finally, Supra witness Nilson believes that in those cases where Supra utilizes this proposed single point of interconnection, Supra should be charged no more than its fair share of the forward-looking price.

2. Decision

This issue has come before us in at least two prior dockets, Docket Nos. 000731-TP and 990149-TP. It does not appear that any new facts or arguments have been presented in this proceeding to merit a change from our prior decisions.

Although it is unclear, it appears that by referencing 47 C.F.R.§51.319(a)(2)(E) and ¶226 of FCC 99-238 (the UNE Remand Order), Supra seeks direct access to a single point of interconnection (access terminal) and that Supra witness Nilson believes an intermediate terminal potentially violates FCC rules. While these passages merit consideration, the proposed ALEC access terminal will provide the access that is the subject of the aforementioned FCC rules. Therefore, consistent with our prior decision, we find that the appropriate method is for BellSouth to construct an access terminal where an ALEC can obtain access to NTW

or INC pairs in both the garden apartment and the high rise building situations.

In any cross-connect setting, the potential exists for human error that could lead to unintended disruption of an existing customer's services, and that use of a terminal would add another layer of connection to a given circuit. However, we do not believe that this "raises potential for anticompetitive behavior". The use of an ALEC access terminal will reduce potential risks for both BellSouth and for Supra, because each company will have the ability to more adequately monitor the activities of their respective terminals and the benefit of this increased control would contribute to overall network reliability for all concerned, Supra included.

In the MediaOne Order, we stated:

> We also conclude that the BellSouth-installed access terminal should be reserved for exclusive use by MediaOne. If other ALECs are permitted access to the terminal installed for MediaOne, MediaOne would be subject to the same network security and control problems that BellSouth uses in its arguments. In addition, because MediaOne is required to pay BellSouth for the access terminal and the labor to install it, we believe it would be inappropriate for BellSouth to offer other ALECs a sharing arrangement on this terminal, without MediaOne's approval.

Order No. PSC-99-2009-FOF-TP, p.4. Finally, regarding the matter of proposed rates, we note that Supra did not propose any rates in this proceeding for us to consider, nor did Supra challenge the rates proposed by BellSouth witness Cox.[14]

Accordingly, upon consideration, the new interconnection agreement shall include the rates proposed by BellSouth as they are the only rates supported by the record. In order for Supra to gain access to and use BellSouth facilities to serve multi-tenant environments, an ALEC access terminal should be established to

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[14] The rates proposed by witness Cox are those rates approved by us in Docket No. 990649-TP.

accommodate the necessary connections. The appropriate rates for all of the addressed subloop elements shall be the BellSouth rates established in our Final Order in Docket No. 990649-TP.

O. Local Circuit Switching Rates

We addressed a similar issue in the recent AT&T/BellSouth arbitration in Docket No. 000731-TP. Our task here is to decide whether BellSouth is obligated to provide local circuit switching at UNE rates, irrespective of the line counts of a customer located in Density Zone 1. An underlying assumption is that alternative switching providers are likely to be located in the Density Zone 1 areas of Florida, which include the Miami, Orlando, and Ft. Lauderdale Metropolitan Statistical Areas (MSAs).

1. Arguments

Here, as in other issues, Supra alleges that BellSouth has conducted itself in bad faith throughout this arbitration process, contending that BellSouth has refused to provide Supra with network information that would have assisted Supra.

Supra states in its brief that BellSouth must provide the Enhanced Extended Loop (EEL) as a cost-based UNE if it intends to restrict the purchase of local circuit switching to serve a customer with four or more lines at one location. However, Supra's witness Nilson states that there is no evidence to confirm that BellSouth even provides the EEL UNE in the top 50 MSAs in its serving area. Supra believes that ¶¶241-300 of the FCC's Third Report and Order (FCC 99-238) clearly require that until the ILEC offers EELs throughout Density Zone 1, the ILEC must continue to sell the ALEC its local switching for all lines to the same customer at the same address.

Supra also questions the availability of unbundled local switching from sources other than BellSouth. The witness states that we assumed that unbundled local switching from sources other than BellSouth actually exists. He states that no evidence was presented in Docket No. 000731-TP or in this case to affirm that alternative providers of local switching in fact exist in the Orlando, Ft. Lauderdale, and Miami MSAs. He states:

> It is not merely enough to **assume** that there is local switching available to meet the FCC requirement [in FCC Rule 51.319(c)(2)], because there really isn't such a supply . . . **Both** AT&T and Sprint [in the recent arbitration dockets] . . . petitioned the FPSC to require BellSouth to sell Unbundled Local Switching. If these two behemoths are unable to (1) supply their own switching in the top 50 MSAs, and (2) have enough clout in the industry to identify suppliers of unbundled switching that can provide [the] same to customers of BellSouth's UNEs, then frankly, the supply doesn't actually exist. Supra maintains that the availability of Unbundled Local Switching in the Top 50 MSAs is an illusory issue. It should exist, but it doesn't. (emphasis in original)

The witness firmly believes that "BellSouth has the burden of proof on this issue," and asserts that it should be required to substantiate the existence of unbundled local switching options to allow customers of its EEL UNE to purchase the same without the need for facilities ownership by the ALEC. The witness contends that we should have a clear understanding of how the end use subscribers in Florida will be affected if BellSouth is allowed to discontinue offering unbundled local switching as a UNE. Witness Nilson believes the potential is great for BellSouth to engage in anti-competitive behavior, considering that Supra presently serves tens of thousands of customers via UNE combinations.

Supra advocates three things in this issue. First, Supra believes that BellSouth should be ordered to prove to us that an alternative supplier of unbundled local switching exists before relieving BellSouth of its obligation to provide the same at UNE rates. Second, Supra believes that BellSouth should demonstrate that the effects of such a discontinuance would not adversely affect Florida's telephone subscribers. Finally, Supra believes that we should require a liquidated damages provision to encourage BellSouth to comply with our rules and orders.

In response, BellSouth witness Cox explains that this issue concerns the application of FCC Rule 51.319(c)(2) regarding the exception for unbundling local circuit switching. The witness believes that when "a customer has four or more lines within a

specific geographic area, even if those lines are spread over multiple locations, BellSouth is not required to provide unbundled local circuit switching to ALECs, so long as the other criteria for FCC Rule 51.319(c)(2) are met." FCC Rule 51.319(c)(2) provides:

> Notwithstanding the incumbent LEC's general duty to unbundle local circuit switching, an incumbent LEC shall not be required to unbundle local circuit switching for requesting telecommunications carriers when the requesting telecommunications carrier serves end-users with four or more voice grade (DS0) equivalents or lines, provided that the incumbent LEC provides non-discriminatory access to combinations of unbundled loops and transport (also known as the "Enhanced Extended Link") throughout Density Zone 1, and the incumbent LEC's local circuit switches are located in:
>
> (i) The top 50 Metropolitan Statistical Areas as set forth in Appendix B of the Third Report and Order and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, and
>
> (ii) In Density Zone 1, as defined in §69.123 of this chapter on January 1, 1999.

The witness believes that ALECs are not impaired without access to unbundled local switching when serving customers with four or more lines in Density Zone 1 in the top 50 MSAs.

The BellSouth witness asserts that our Order No. PSC-01-1402-FOF-TL, sets a precedent in deciding this case. Therein, at ¶61, we found that "BellSouth will be allowed to aggregate lines provided to multiple locations of a single customer, within the same MSA to restrict AT&T's ability to purchase local circuit switching at UNE rates to serve any of the lines of that customer." The witness believes we should reach a similar finding here, and has offered Supra on behalf of BellSouth the same language BellSouth offered AT&T, consistent with our Order.

2. Decision

In the AT&T/BellSouth arbitration, we considered whether the FCC's intent behind Rule 51.319(c)(2) was that it be applied on a "per-account" basis, or on a "per-location-within-the-MSA" basis. In Order No. PSC-01-1402-FOF-TP, we favored the "per-location-within-the-MSA" basis. In our ultimate finding, we found "that BellSouth will not be allowed to aggregate lines provided to multiple locations of a single customer, within the same MSA, to restrict AT&T's ability to purchase local circuit switching at UNE rates to serve any of the lines of that customer." See Order No. PSC-01-1951-FOF-TP, p.7. We believe that the rational in the AT&T decision is applicable to this issue.

BellSouth's witness cited our ultimate finding from the AT&T/BellSouth arbitration erroneously when quoting text from Order No. PSC-01-1402-FOF-TL. Following the issuance of Order No. PSC-01-1402-FOF-TP, AT&T identified what it perceived as an inconsistency therein. We agreed, and the inconsistency was subsequently clarified and resolved in Order No. PSC-01-1951-FOF-TP, issued September 28, 2001. In relevant part, Order No. PSC-01-1951-FOF-TP states as follows:

> The quoted portion of the Order [Order No. PSC-01-1402-FOF-TP] referenced in the first paragraph of Section VI of the AT&T Motion is as follows: "While FCC Rule 51.319(c)(2) is silent on answering this specific concern in a direct fashion, we believe that the FCC's intent was to have the rule apply on the 'per-location-within the MSA' basis that AT&T supported." AT&T's Motion contends that the concluding paragraph in our Order contradicted the above-noted finding. We agree, and observe that text was inadvertently omitted from the concluding paragraph of the Order, either through scrivener's or electronic error, which may have contributed to this confusion. The incorrect text of the paragraph read "Therefore, we find that BellSouth will be allowed to aggregate lines provided to multiple locations of a single customer, within the same MSA, to restrict AT&T's ability to purchase local circuit switching at UNE rates to serve any of the lines of that customer." It should actually have read: "Therefore, we find that BellSouth will not

> be allowed to aggregate lines provided to multiple locations of a single customer, within the same MSA, to restrict AT&T's ability to purchase local circuit switching at UNE rates to serve any of the lines of that customer." Accordingly, Order No. PSC-01-1402-FOF-TP is corrected to reflect the above quote.

See Order No. PSC-01-1951, pp. 6-7. We acknowledge that the AT&T case and the Supra case each must stand on their own merits. However, BellSouth's witness Cox errs in citing the portions of Order No. PSC-01-1402-FOF-TP from the AT&T case as reasoning in the instant proceeding that we should reach a similar finding, because those portions were later clarified. Although Order No. PSC-01-1951-FOF-TP was issued on the day following the conclusion of the hearing in the instant docket, BellSouth made no effort to acknowledge the clarifying order or the contradictory testimony from witness Cox, though it could have done both in its post-hearing brief.

The instant issue considers two questions: (1) whether BellSouth is obligated to provide local circuit switching at UNE rates to Supra to serve the first three lines to a customer located in Density Zone 1; and (2) whether BellSouth is obligated to provide local circuit switching at UNE rates to Supra to serve four or more lines provided to a customer located in Density Zone 1. As with the argument in the AT&T/BellSouth arbitration, the sub-parts to this issue rely upon our interpretation of FCC Rule 51.319(c)(2).

According to Supra's interpretation of FCC Rule 51.319(c)(2), BellSouth must offer proof in two regards before it can overcome the presumption therein. First, BellSouth should prove that it offers EELs throughout the MSA; second, BellSouth should prove that unbundled local switching options exist in the MSA. Supra's witness Nilson contends that BellSouth must offer proof to us in each regard before it will have met the presumption of FCC Rule 51.319(c)(2), and thereby be permitted to discontinue offering its unbundled local switching at UNE rates. Overall, the Supra witness contends that "BellSouth has the burden of proof on this issue," and that BellSouth did not provide the conclusive proof to meet the presumption of FCC Rule 51.319.

While we agree with Supra that BellSouth did not offer specific proof for either of Supra's contentions, the plain language of the Rule does not require a showing. Witness Cox's conditional statement that "so long as the other criteria for FCC Rule 51.319(c)(2) are met" implies that BellSouth is cognizant of its general obligations to offer EELs throughout Density Zone 1 in the top 50 MSAs, we do not believe that BellSouth is obligated to offer specific proof to us regarding either of Supra's enumerated concerns. We are unaware of any such requirement of proof in the Act, the FCC's rules, the Florida Statutes, or our Rules.

BellSouth has no control over whether alternative switching providers exist throughout Density Zone 1 in the top 50 MSAs. We do not agree with the Supra witness' conclusion that since Sprint and AT&T petitioned us for relief on similar issues, that alternative switching providers do not exist. As with the prior decisions involving Sprint and AT&T, we believe that choices exist, and we do not believe that the FCC's Rule requires a showing. In addition, there is no specific data in the record of this proceeding evaluate whether alternative switching providers exist. Last, we note that the topic of liquidated damage provisions is addressed elsewhere in latter sections of this Order.

Based on the foregoing, we find that BellSouth is obligated to provide local circuit switching at UNE rates to Supra to serve the first three lines to a customer located in Density Zone 1. Additionally, we find that BellSouth is not obligated to provide local circuit switching at UNE rates to Supra to serve four or more lines provided to a customer located in Density Zone 1, as long as the other criteria for FCC Rule 51.319(c)(2) are met.

P. Tandem Switches

In this portion of our Order, we consider what criteria Supra Telecom must satisfy in order to charge the tandem switching rate. Based on that determination, we must then determine whether Supra Telecom's network configuration met those criteria as of January 31, 2001.

1. Arguments

BellSouth witness Cox argues that we should defer any decision in this docket until we reach a decision in Phase 2 of Docket No. 000075-TP. Witness Cox contends that "[w]hile the Commission has addressed this issue in previous arbitrations, the Commission is currently considering this issue in a generic docket to address all reciprocal compensation issues." BellSouth witness Cox also states that even if this issue was not addressed in the generic proceeding:

> . . . Supra does not utilize its own switch in Florida. The fact that Supra does not utilize its own switch to serve its customers, clearly demonstrates that Supra is unable to satisfy the criteria that its switch covers a geographic area comparable to that of BellSouth's tandem switch.

Supra argues that it only has to show that "its switches serve geographic areas comparable to those served by BellSouth in order to charge tandem rates." Supra witness Nilson states that "Supra is currently in the process of collocating a number of switches in BellSouth central offices throughout the state of Florida." He contends that once Supra has been able to collocate its switches, Supra's switches will be in the same location as BellSouth's switches. As such, Supra's switches will be able to serve geographic areas comparable to those served by BellSouth. Witness Nilson asserts that Supra will be entitled to charge the tandem switching rate, "once those switches are installed and operational." Witness Nilson contends that because Supra has been "unduly delayed" in its collocation efforts with BellSouth, he is unable to provide further evidence.

For guidance on this matter, it is necessary for us to look no further than FCC Rule 51.711(a)(3) which states:

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

Supra does not currently, nor did it as of January 31, 2001, have a switch that serves a geographic area comparable to any area served by a BellSouth switch. Supra witness Nilson testified that:

> 1. BellSouth operates a total of 9 tandem offices in the State of Florida.
>
> 2. These Tandem offices form the core point of interconnection for all ALECs and IXCs operating in BellSouth's Florida Region.
>
> 3. That an ALEC who were to collocate a telephone switch such as the Lucent 5ESS or Nortel DMS 500 in each of those 9 BellSouth Tandem offices would not only cover a comparable geographic area to BellSouth, but it would cover an area IDENTICAL to BellSouth, serve all customer [sic] over the SAME trunk facilities and end user loops as by BellSouth.
>
> 4. Supra has been granted collocation of either a Lucent 5ESS or Nortel DMS 500 switch in each of the BellSouth Tandem offices in the state of Florida, and the Miami Red Road and Fort Lauderdale Plantation Local Tandems as well.

We do not evaluate the validity of witness Nilson's forward-looking statements here. We do note that Supra has not deployed a single switch in any BellSouth office in Florida to date. In fact, witness Nilson admitted this when he stated, "we're entitled to charge the tandem switching rate once those switches are installed and operational." (emphasis added) Supra witness Ramos also conceded that Supra depends "solely on BellSouth's network" and that Supra did not have its own switch.

2. Decision

Based on the language contained in FCC Rule 51.711(a)(2), we acknowledge that "a carrier other than an incumbent LEC" must, at a minimum, have a switch. Based on the evidence of record, Supra has not deployed a switch in the state of Florida and does not meet that threshold requirement. We note Phase II of Docket No. 000075-TP will address this very issue in detail, and the criteria

developed in that docket will apply. However, the initial threshold, based on FCC Rule 51.711(a)(3), is that Supra's "switch" must serve a geographic area comparable to that served by BellSouth's tandem switch. The record indicates that Supra has not deployed a switch in the state of Florida; therefore, Supra does not meet the criteria for the tandem switching rate at this time.

Q. Provision of Unbundled Local Loops for DSL Service

Herein, we consider BellSouth's provision of unbundled local loops to Supra to support its DSL service when such loops are provisioned on BellSouth DLC facilities.

1. Arguments

Supra witness Nilson states that the FCC's First and Third interconnection Orders, FCC 96-325 and 99-238, respectively, factor into the consideration of this issue. The witness states that ¶12 of the FCC's First Report and Order (FCC 96-325), outlines the three market entry methods for ALECs. Witness Nilson believes that certain changes to FCC Rule 51.319 were a direct result of FCC 99-238, the Third Report and Order. Witness Nilson acknowledges that the changes to FCC Rule 51.319(c)(5) answer most of Supra's concerns surrounding this issue, but nonetheless believes the rule imposes a collocation requirement on ALECs that choose to provide facilities via UNE combinations, one of the three market entry methods for ALECs outlined in FCC 96-325. Section 47 C.F.R. §51.319(c)(5) states:

> An incumbent LEC shall be required to provide nondiscriminatory access to unbundled packet switching capacity only where each of the following conditions are satisfied:
>
> > (i) The incumbent LEC has deployed digital loop carrier systems, including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section (*e.g.*, end office to remote terminal, pedestal, or environmentally controlled vault);

> (ii) There are no spare copper loops capable of supporting the xDSL services the requesting carrier seeks to offer;
>
> (iii) The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Line Access Multiplexer at the remote terminal, pedestal, or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by § 51.319(b); and
>
> (iv) The incumbent has deployed packet switching capability for its own use.

Specifically, the witness believes that Rule 51.319(c)(5)(iii) imposes a collocation requirement on ALECs that choose to provide facilities exclusively via UNE combinations.

Witness Nilson contends that a collocation requirement would be an opportunity for BellSouth to delay Supra's market entry. He states:

> BellSouth is in a position to delay nearly forever collocation in a remote terminal for reasons associated with budget shortages, lack of sufficient setback or right of way to effect expansion, local zoning and permitting issues, in addition to outright refusal to implement effective Commission orders.

Supra believes its track record for collocation with BellSouth is not good, specifically mentioning the North Dade Golden Glades and West Palm Beach Gardens central offices, where collocation has been delayed pending litigation since December of 1998.

Witness Nilson asserts that BellSouth's position on this issue "flip-flopped" from what it had been before testimony was filed. The "flip-flop" resulted in Supra missing out on an opportunity to possibly close this issue prior to our consideration of it. Supra believes BellSouth's changed position is a prime example of BellSouth's bad-faith dealings with Supra.

Witness Nilson states that what Supra desires is "xDSL loop capability on the same terms it [BellSouth] supplies itself and its affiliates." Supra's witness states that BellSouth should be ordered to provide "unbundled packet switching to Supra, at Supra's option, not BellSouth's, whenever the end user is served via DLC and BellSouth has deployed its own DSLAMs in a given RT." Supra would like the ability to order from BellSouth the packet switching UNE and a collocated DSLAM at UNE rates, wherever BellSouth deploys local switching over DLC facilities. Without such capability, Supra believes that BellSouth can, in effect, deny Supra's entry into the packet switching market. Supra's witness believes ¶313 of the Third Report and Order (FCC 99-238) supports its request:

> 313. We agree that if a requesting carrier is unable to install its DSLAM at the remote terminal or obtain spare copper loops necessary to offer the same level of quality for advanced services, **the incumbent LEC can effectively deny competitors entry into the packet switching market. We find that in this limited situation, requesting carriers are impaired without access to unbundled packet switching. Accordingly, incumbent LECs must provide requesting carriers with access to unbundled packet switching in situations in which the incumbent has placed its DSLAM in a remote terminal** . . . .(emphasis added by witness)

Supra rejects BellSouth's proposed solutions, stating that BellSouth has omitted or failed to account for unbundled access to the packet switching UNE where an xDSL compatible loop cannot be provisioned over existing copper facilities in a normal time frame or at all. Supra believes that collocation introduces delays inherent in its provisioning, and that BellSouth could "use any and all means to exercise its monopoly powers to effectively deny competitors entry into the packet switching market," according to the witness. Through cross-examination of a BellSouth witness, Supra advocates that if it had to wait for an augment at a BellSouth RT, that it should be entitled to a packet switching UNE while waiting on the augment.

Witness Nilson believes that according to ¶135-137 of FCC 96-325, state commissions, including ourselves, can assert authority to compel BellSouth to unbundle its packet switching. In his concluding assertion, and quoting FCC Order 99-238, the witness offers that "Supra hopes this Commission will exercise its rights to foster local competition and grant Supra this protection from BellSouth's obvious and shameful attempts to '**effectively deny [Supra] entry into the packet switching market . . . .**'" (emphasis added by witness)

BellSouth witness Cox states that a "packet switching UNE" is not the sole means by which ALECs such as Supra can offer xDSL services via UNE-P. The BellSouth witness asserts that witness Nilson's argument was "without merit and misplaced." Witness Cox believes that Supra's market entry method is not significant, since "Supra has the ability to provide DSL service to its end users by UNE-P."

BellSouth is willing to provide Supra with two distinct methods that would allow Supra to offer xDSL services when such loops are provisioned on BellSouth's DLC facilities. Witness Kephart elaborates:

> The first solution is to move the end user to a loop that is suitable for xDSL service. For example, if the end user is served via DLC but a spare copper loop is available to the end user's premises, BellSouth agrees to move the end user to the copper loop that is capable of supporting xDSL services . . . The second solution is to allow Supra to collocate its DSLAM in the remote terminal housing the DLC and give Supra access to the unbundled network element referred to as loop distribution. BellSouth agrees that in any case where it has installed its own DSLAM in a given remote terminal, BellSouth will accommodate collocation requests from Supra or from any other ALEC even if it means that room inside the remote terminal must be augmented or that the remote terminal itself must be expanded or replaced to make room for Supra's or any other ALEC's DSLAM.

Witness Cox also claims that through the standard collocation process, an ALEC that wants to provide xDSL service where a

BellSouth DSLAM is deployed, can collocate its own DSLAM equipment at the very same BellSouth DLC RT site. Collocation at the RT "allows the ALEC to provide the high speed access in the same manner as BellSouth," according to witness Cox. She continues:

> BellSouth will attempt in good faith to accommodate any ALEC requesting such collocation access at a BellSouth DLC RT that contains a BellSouth DSLAM. In the very unlikely event that BellSouth cannot accommodate collocation at a particular RT, where a BellSouth DSLAM is located, BellSouth will unbundle the BellSouth packet switching functionality at that RT in accordance with FCC requirements.

BellSouth believes that its unbundling obligation is very limited. BellSouth witness Cox claims that only when all four of the subparts of FCC Rule 51.319(c)(5) are met, would an incumbent LEC be obligated to unbundle packet switching technologies deployed in its network. Witness Cox cites ¶311 of the Third Report and Order as support, stating the FCC expressly addressed incumbent LECs' unbundling obligations therein. The witness believes that since all four of the subparts of 47 C.F.R. §51.319(c)(5) have not been satisfied, BellSouth is not obligated to unbundle its packet switching.

The FCC's Rule 51.319(c)(5) is crucial to the resolution of this issue. As previously stated, this issue considers BellSouth's provision of unbundled local loops to Supra to support its DSL service when such loops are provisioned on BellSouth DLC facilities.

Most of Supra's case is built on the premise that BellSouth was not offering ALECs, including Supra, the opportunity to collocate in the RT. In effect, Supra argued that it was entitled to relief from us because of its perception that Rule §51.319(c)(5)(iii) imposes a collocation requirement. In relevant part, 47 C.F.R. §51.319(c)(5) states:

> An incumbent LEC shall be required to provide nondiscriminatory access to unbundled packet switching capacity only where each of the following conditions are satisfied:

> (iii) The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Access Line Multiplexer at the remote terminal, pedestal, or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by § 51.319(b);

FCC Rule 51.319(c)(5) requires that all four of its sub-parts must be satisfied in order for an ILEC to be obligated to unbundle packet switching. BellSouth and Supra appear to agree that all of the sub-parts (i) - (iv) of the Rule have to be satisfied before BellSouth would be required to unbundle its packet switching capability. Nonetheless, Supra witness Nilson believes that state commissions can assert authority to compel BellSouth to unbundle its packet switching. Supra hopes we will "exercise its rights to foster local competition and grant Supra this protection from BellSouth's obvious and shameful attempts to **effectively deny [Supra] entry into the packet switching market** . . . ." (emphasis added by witness)

With respect to this issue, Supra has three primary concerns: first, the imposition of a collocation requirement stemming from 47 C.F.R. §51.319(c)(5)(iii); second, the delays associated with obtaining collocation; and last, Supra's belief that BellSouth has omitted or failed to account for unbundled access to the packet switching UNE where an xDSL compatible loop cannot be provisioned over existing copper facilities in a normal time frame, or at all. Supra's arguments are largely mitigated by BellSouth's proposal to provide Supra with two distinct methods that would allow it to offer xDSL services when such loops are provisioned on BellSouth's DLC facilities. We believe that BellSouth's willingness to provide collocation for DSLAM equipment in the RT is in accordance with the FCC's Rule 47 C.F.R. §51.319(c)(5), because BellSouth's proposal and the FCC's rule essentially mirror one another.

2. Decision

Supra's first and second concerns are largely overcome by BellSouth's offer to permit requesting carriers, including Supra, to collocate DSLAM equipment at the RT. Although BellSouth

acknowledges that collocation in the RT may entail a time investment "in the neighborhood of 60 days," the time investment is necessary to effect the collocation in the RT.

The record is, however, unclear as to Supra's third concern. Supra's third concern is subject to two possible interpretations: first, whether there is a limiting factor in the physical plant or at the RT; or second, whether Supra would be "denied entry into the packet switching market" if we do not order BellSouth to unbundle its packet switching.

Specifically, Supra witness Nilson expresses concern about unbundled access to packet switching in cases where an xDSL compatible loop cannot be provisioned over existing copper facilities. Supra's witness does not offer any detail to support this assertion, though he may be referring to the unavailability of copper facilities in the feeder network or at an RT as the basis for his requested relief. This concern is, however, met by BellSouth's offer to unbundle the packet switching functionality under specific circumstances.

Supra witness Nilson states that BellSouth should be ordered to provide "unbundled packet switching to Supra, at Supra's option, not BellSouth's, whenever the end user is served via DLC and BellSouth has deployed its own DSLAMs in a given RT." We found no evidence that BellSouth would maliciously "deny entrance to a competitor," as witness Nilson fears. We note BellSouth witness Kephart's estimate that collocation in RTs should take "in the neighborhood of 60 days." This estimated interval does not exceed the provisioning interval for a conventional (e.g., central office) collocation.

Witness Nilson also believes that we have the latitude to order an unbundled packet switching UNE, based upon authority granted by the FCC in ¶135-136 of the First Report and Order (FCC 96-325). The witness also cites to ¶313 of the Third Report and Order (FCC 99-238) for support, although we do not believe the "impair" standard of FCC Rule 51.317(b)(1) was adequately addressed by Supra.

The "impair" standard of Rule 47 C.F.R. §51.317(b)(1) must be met if we are to mandate UNEs in addition to those established by the FCC. The Rule states:

> A requesting carrier's ability to provide service is "impaired" if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including self-provisioning by a requesting carrier or acquiring an alternative from a third-party supplier, lack of access to that element materially diminishes a requesting carrier's ability to provide the services it seeks to offer. . . . If the Commission determines that lack of access to an element impairs a requesting carrier's ability to provide service, it may require the unbundling of that element . . . .

Although Supra offers anecdotal evidence regarding its overall collocation experience with BellSouth, this evidence alone does not demonstrate that the "impair" standard has been met. We do not believe that any other evidence supports a showing regarding the "impair" standard. BellSouth's unbundling obligation is very limited and clear under Rule 51.319(c)(5).

Based on the foregoing, we find that the two solutions proposed by BellSouth should meet Supra's concerns, are in accordance with the FCC's Rule, and would permit Supra to provide unbundled local loops for the provision of DSL service when such loops are provisioned on DLC facilities. Either of BellSouth's two proposed solutions would permit Supra to provide unbundled local loops for the provision of DSL service when such loops are provisioned on DLC facilities. If BellSouth cannot accommodate collocation at a particular RT where a BellSouth DSLAM is located, BellSouth shall unbundle the BellSouth packet switching functionality at that RT in accordance with FCC requirements.

R. Coordinated Cut-Over Process

In this section, we address which parties' proposed coordinated cut-over process should be implemented in order to ensure accurate, timely, loop cut-overs when a BellSouth retail customer changes local service to Supra. Although the issue as stated embodies a process in which there is a manual transfer of

service (i.e. a physical disconnection of the loop or "hot-cut") from a BellSouth switch to a CLEC switch, a portion of Supra's testimony raises concerns regarding BellSouth's practice of issuing two orders, a "D" (Disconnect) order and an "N" (New) order, in lieu of a single "C" (Change) order when provisioning UNE-P conversions. Supra claims that this practice has resulted in an increase in customer service outages shortly after conversion and subsequent damage to Supra's reputation. Therefore, we have been asked to address two distinctly different issues: (1) which coordinated cut-over process should be followed in the transfer of live local service from a BellSouth switch to an ALEC switch, and (2) whether or not BellSouth should be required to discontinue its use of the "D" and "N" orders in place of a single "C" order when provisioning UNE-P conversions. Consequently, we will address both issues below.

1. Arguments

Regarding coordinated cut-overs, BellSouth witness Kephart testifies that this issue arose from the AT&T/BellSouth arbitration and specifically dealt with the case where AT&T wanted to use its own switch to serve the end user. He explains:

> In such a case a coordinated cutover process results in a transfer of service from a BellSouth switch to a CLEC switch and is much more than a simple billing change. It requires a disconnect from a BellSouth switch and a reconnect to a CLEC switch as discussed in my previous testimony.

In his testimony, the witness describes in detail the loop cut-over process that BellSouth uses to change a customer line from a BellSouth switch to an ALEC switch. He testifies that this procedure is used for all ALECs across the region with high levels of success.

According to witness Kephart, this procedure involves a high level of coordination between BellSouth and the ALEC in order to ensure timely, successful conversions. Consequently, the witness states that "[a]ny errors (both BellSouth's and the ALEC's errors) slow the process while corrections are identified and made." As such, he argues that while BellSouth should be responsible for its

own errors during the cut-over process, it should not be held responsible for delays resulting from errors caused by the ALEC. Moreover, witness Kephart explains:

> A customer may experience service outage if either service provider fails to follow a rational and consistent process for converting live service. However, this is not the norm nor has BellSouth exhibited a pattern of failure that has resulted in the level of service outage alleged to have been experienced by Supra end users.

Furthermore, witness Kephart affirms that the language proposed by BellSouth in resolution of this issue is supportive of its hot-cut process and its commitment to provide coordinated conversions to Supra which "afford a meaningful opportunity for Supra to compete for local service." Additionally, he states at the hearing that BellSouth's process "has evolved and been improved over the years in collaboration with the ALECs so that it now works quite effectively the vast majority of the times [sic]."

On the other hand, Supra witness Nilson characterizes witness Kephart's procedure as a "good starting point only." He believes that witness Kephart's proposal lacks the coordination necessary to ensure successful conversions without Supra customers experiencing service outages. In fact, witness Nilson asserts that "Mr. Kephart's proposed language allows and encourages such service outages by failing to actually maintain any coordination at all."

Witness Nilson contends that witness Kephart's proposal leaves serious omissions in the process, excluding steps which he claims were initially proposed to Supra by BellSouth's UNE loop product manager, Jerry Latham. Specifically, witness Nilson refers to a proposal to provide a link-up of the ALEC personnel (including various departments as necessary), the BellSouth frame technician and the BellSouth personnel effecting local switch translations and local number portability translations during the process. He explains:

> ...most of the time a BellSouth retail customer converts to an ALEC, they want to keep their existing number. Therefore, the number must be "ported" to the ALEC. This

> is effected through Global Title Translations at a national level such that **after** the conversion, the nationwide, multicarrier SS7 signaling network ubiquitously **knows** that the number no longer resides on the BellSouth switch with SS7 point code abcd, but that it resides on the ALEC switch with point code zxyw. Once that change is made, and it propagates through the SS7 network, the number is ported to the new switch. (Emphasis in original)

Witness Nilson continues, stressing the importance of coordinating the timing of LNP (Local Number Portability) translations with BellSouth and ALEC switch translations:

> If done early, the ALEC switch translation may not be in place to handle it and calls will, effectively, drop off into a black hole. If done early and the ALEC translations are in place, the switch will respond as it should and switch the call...into thin air.
>
> If done late, other strange things occur. If done late, and the BellSouth switch translations are not yet backed out (After all if the loop is moved no calls will be coming in...) the **BellSouth** switch will improperly and incorrectly handle the call and switch the call...into thin air. If done late and the BellSouth switch translation has already backed out the call will be routed to a **BellSouth** that has no clue what to do with it and the caller ends up in a black hole.
>
> The timing and propagation of LNP translations, if initiated at the same time as BellSouth and ALEC switch translations are changed, will result in undefined response for some period of time as perhaps both switches are correct, but there will be some uncertainty as to witch [sic] switch the incoming call will be routed to depending upon where the call originates from and LNP propagation delays to the SS7 STP/SCP serving that switch. (Emphasis in original)

Witness Nilson believes that the omission of this type of coordination in the coordinated hot-cut process will result in

numerous service outages by Supra end users during conversion. Supra concludes in its brief, that in order to prevent service outages as a result of the cut-over process, Supra must have proper coordination with the BellSouth frame technician and personnel effecting local switch translations and local number portability translations.

Additionally, Supra witness Nilson raises concerns over BellSouth's practice of submitting "D"and "N" (Disconnect and New) orders instead of a single "C" (Change) order when Supra converts a BellSouth retail customer using UNE-P. He states that "the effect of this is that a customer's service is actually disconnected during the conversion process. According to the witness, these service outages have resulted in numerous customer service complaints against Supra. At the hearing the witness states:

> Now, the fact of the matter is, Supra issued a conversion order. The fact that Supra's conversion order gets disassociated into a D and an N, which is a disconnect and a new order, oftentimes -- and I know those two orders are supposed to be tied together when they go through the system, but there have been numerous instances where the disconnect order would get worked, and then due to some other eligibility reason, like the customer had BellSouth paging service, BellSouth.net Internet service or something of the like, the new order couldn't get processed because there was a problem with the customer service record.

Witness Nilson testifies that the customer would be left with disconnected service until the "associated eligibility issues" were sorted out. The witness contends that BellSouth's process has caused "hundreds of cases of lost dialtone, BellSouth Winback, and Public Service Commission and Better Business Bureau complaints again [sic] Supra." Witness Nilson asserts that "no customer should ever go without service as a result of a conversion" as the conversion is only a "billing change."

BellSouth witness Kephart responds that the conversion of a customer from BellSouth to a CLEC via UNE-P is "not exactly a billing change." He admits that the conversion does not require a

physical disconnection of the line; however, he states that BellSouth issues the disconnect and reconnect orders as a means of accurately recording the conversion in its system. He explains:

> We are effectively turning over a portion of our plant on the UNE basis to another company, and there are billing issues that have to go with that, because that's a different price for doing that than it is for, say, resale, but - so we have to address that within our systems and make sure it's recorded correctly so that we can handle everything, but it is a case where now the CLEC has ownership of the physical plant through leasing it from us versus a resale situation, so there is a difference from a systems standpoint, in particular.

He further explains that BellSouth has looked at various methods of accomplishing UNE-P conversions and determined that the most effective method was to do the "D" and "N" order process. He testifies that BellSouth has completed studies in recent months showing the process to have an error rate of around 1%.

2. Decision

Regarding coordinated cut-overs from a BellSouth switch to a Supra switch, BellSouth witness Kephart contends that BellSouth provides a very detailed coordinated cutover process which ensures accurate and timely cutovers for conversion of service from BellSouth to Supra. Supra witness Nilson states that witness Kephart's procedure is a "good starting point only," and must include the proper coordination of LNP translations with both BellSouth and ALEC switch translations during customer conversions in order to prevent service outages. Supra failed, however, to document a procedure or propose contract language for us to consider in order to resolve this issue.[15]

The language proposed by BellSouth regarding this issue includes a provision for translations coordination, as noted by

[15]Although Supra asserts in its post-hearing statement that its (Supra's) proposed coordinated cut-over process should be implemented, we note that Supra fails to provide such process anywhere in the record evidence.

Supra in its brief. BellSouth's proposed language at Attachment 2, Section 3.8, reads in part:

> Supra Telecom shall order Services and Elements as set forth in this Attachment 2 and BellSouth shall provide a Firm Order Confirmation within the interval set forth in this Agreement. When Supra Telecom desires to dictate a specific time for the coordinated cutover of a local loop ordered, Supra Telecom shall do so by requesting on the Local Service Request, Order Coordination - Time Specific and paying the appropriate rate set forth in Exhibit A, incorporated herein by this reference. **Any coordinated conversion and associated translations requirements shall be performed so as to limit end user service outage.** In all other instances of coordination the procedures set forth in this section shall apply. (Emphasis added)

Additionally, this exact issue appeared in the AT&T/BellSouth arbitration and was resolved by the parties. BellSouth is willing to accept language agreed to with AT&T in settling this issue.

Consequently, based on the record, we find that BellSouth's coordinated cut-over process should be implemented when service is transferred from a BellSouth switch to a Supra switch. Alternatively, Supra may choose to adopt the provisions the language agreed to by BellSouth and AT&T regarding coordinated conversions, and approved by us in Order No. PSC-01-2357-FOF-TP in Docket No. 000731-TP, should be incorporated.

With respect to UNE-P conversions, BellSouth witness Kephart admits that no physical disconnection of service occurs during a UNE-P conversion. However, he explains that in a UNE-P conversion, BellSouth is "effectively turning over a portion of (its) plant on the UNE basis to another company." He contends that there are "billing issues" that are associated with the conversion and that BellSouth has to address those issues within its system. (TR 410) Witness Kephart states that the "D" and "N" order process is the most effective method BellSouth has come up with to accomplish UNE-P conversions, and that this process has an error rate of "somewhere around 1% or less."

While there is no evidence in the record disputing BellSouth's claim that the process results in an error rate of 1% or less, we note that when customers go without service as a result of this process, the customer will likely blame Supra, not BellSouth, for the problem. Furthermore, we agree with Supra witness Nilson that the conversion process is a "billing change" and consequently, a customer should not experience a disconnection of service during a conversion. As such, BellSouth shall be required to implement a single "C" (Change) order instead of two separate orders, a "D" (Disconnect) order and an "N" (New) order, when provisioning UNE-P conversions. BellSouth's coordinated cut-over process should be implemented when service is transferred from a BellSouth switch to a Supra switch. Alternatively, the language agreed to by BellSouth and AT&T, and approved by us in Order No. PSC-01-2357-FOF-TP, in resolution of this issue, should be incorporated.

S. Access to Databases

Here, we consider whether BellSouth should be required to provide Supra with nondiscriminatory access to the same OSS databases it uses to provision services for BellSouth end-use customers.

1. Arguments

Supra witness Ramos believes that Supra should be allowed direct access to the same OSS, databases, and legacy systems that BellSouth uses to provision service to its own customers. The witness asserts that FCC Rule 51.313 supports Supra's position. Rule 51.313(c) states:

> An incumbent LEC must provide a carrier purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the incumbent LEC's operations support systems.

Witness Ramos believes that Supra's current agreement with BellSouth contains provisions designed to ensure that BellSouth provides ALECs, including Supra, with nondiscriminatory access to its OSS at parity with what BellSouth provides itself. These "Parity Provisions" are relevant to this and several other issues,

according to the witness. With respect to this issue, witness Ramos believes that the terms and conditions of Section 28.6.12 of the agreement support his argument. Section 28.6.12 states:

> BellSouth will provide [Supra] with the capability to provide [Supra] customers the same ordering, provisioning intervals, and level of service experiences as BellSouth provides its own customers, in accordance with standards or other measurements that are at least equal to the level that BellSouth provides or is required to provide by law and its own internal procedures.

The witness believes that "[w]ithout true parity in OSS, no competition can develop in the local exchange market."

BellSouth offers two OSS platforms, one system for its own purposes, and a separate one for the ALEC community, according to witness Ramos. The videotape exhibit, "This Ol' Service Order," gives an overview of how BellSouth retail orders flow through the BellSouth OSS, but witness Ramos contends that the existence of separate OSS systems inherently makes the two OSS systems unequal. Supra seeks direct access to all of BellSouth's OSS systems.

BellSouth witness Pate believes that this issue hinges on the FCC's definition of "nondiscriminatory access to OSS systems." He believes BellSouth's obligation to offer nondiscriminatory access to OSS systems encompasses two components. First, such OSS access must be equal across all carriers, and also equal in quality to its own OSS, according to ¶312 of the FCC's First Report and Order(FCC 96-325). Second, the OSS should allow ALECs to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for resale services in substantially the same time and manner as BellSouth provides for itself, according to ¶518 of FCC 96-325. Continuing, the witness notes one exception -- OSS functions that do not have retail analogues. For the exception, witness Pate believes that BellSouth must offer OSS access "sufficient to allow an efficient competitor a meaningful opportunity to compete."

Witness Pate states that BellSouth has designed and implemented a variety of electronic interfaces to suit the business plans and entry methods of ALECs in the BellSouth region. "An

ALEC's selection of an interface depends on its business plan and entry strategy," states witness Pate. He offers:

> BellSouth provides access to its OSS via the following electronic interfaces: Electronic Data Interchange ("EDI") for ordering and provisioning; Local Exchange Navigation System ("LENS"), Telecommunications Access Gateway ("TAG"), and RoboTAG™ for pre-ordering, ordering and provisioning; Trouble Analysis and Facilities Interface ("TAFI") for maintenance and repair; Electronic Communications Trouble Administration ("ECTA") for maintenance and repair; and for the function of billing, Access Daily Usage File ("ADUF"), Enhanced Optional Daily Usage File ("EODUF") and Optional Daily Usage File ("ODUF"). In conformance with the FCC's requirements, these interfaces allow the ALECs to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for services in substantially the same time and manner as BellSouth does for itself; and, in the case of unbundled network elements, provide a reasonable competitor with a meaningful opportunity to compete, which is also in conformance with the FCC's requirements.

The witness believes that BellSouth provides to Supra and all ALECs nondiscriminatory access to its OSS by way of electronic and manual interfaces. "Direct access to BellSouth's databases is unnecessary and more importantly is not required by the Telecommunications Act of 1996," states BellSouth witness Pate. In conclusion, the witness states that providing Supra with direct access to its OSS would mean providing it with access no other ALEC has.

2. Decision

We disagree with Supra witness Ramos's strict interpretation of FCC Rule 51.313(c) as obligating BellSouth to provide Supra with direct access to its OSS. Rather, FCC Rule 51.313(c) obligates BellSouth to provide to ALECs and Supra nondiscriminatory access to the functionalities of pre-ordering, ordering, provisioning, maintenance and repair, and billing of the incumbent LEC's OSS, but not the direct access that Supra is seeking.

As stated by witness Pate, BellSouth developed its ALEC OSS interfaces to suit the business plans and entry methods of all ALECs in the BellSouth region. We note that ALECs, including Supra, may enter the market by means of resale, UNEs, or through the provision of their own facilities. According to BellSouth witness Pate, "ALECs can select . . . the interfaces . . . to match their particular mix of services, volume of orders, technical expertise, resources, and future plans." We do not agree with witness Ramos that the existence of separate OSS systems inherently makes the two OSS systems unequal, primarily because retail and wholesale provisioning can be dissimilar processes. Furthermore, we agree with witness Pate that "[a]n ALECs's selection of an interface depends on its business plan and entry strategy."

Although witness Ramos states that he has personally seen two of BellSouth's retail OSS systems and believes that Supra could readily make use of the identical OSS systems, we do not agree. While certain retail and wholesale provisioning processes may look similar, the products themselves are different. As a result, the support mechanisms and inter-related systems (e.g., the respective OSS platforms) would not be compatible, without considerable modification. While modification or integration is conceivable, we do not believe that BellSouth is specifically obligated to grant Supra direct access to its OSS.

Therefore, upon consideration we shall not require BellSouth to provide Supra with direct access to the same databases BellSouth uses to provision service to its retail customers. The ALEC OSS interfaces allow ALECs, including Supra, to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing in substantially the same time and manner as BellSouth provides for itself, as described in ¶518 of FCC 96-325. We note that OSS performance levels were not evaluated in the context of this issue, or in this docket. BellSouth is not required to provide Supra with direct access to the same databases BellSouth uses to provision its customers. BellSouth is only required to provide Supra with nondiscriminatory access to OSS functionality, and not to provide direct access to the BellSouth OSS.

T. Standard Message Desk Interface-Enhanced ("SMDI-E"), Inter-Switch Voice Messaging Service ("IVMS") and Corresponding Signaling Associated with Voice Mail Messaging

In this portion of our Order, we address whether Standard Message Desk Interface-Enhanced ("SMDI-E"), Inter-Switch Voice Messaging Service ("IVMS") and any other corresponding signaling associated with voice mail messaging should be included within the cost of the UNE switching port.

1. Arguments

According to BellSouth witness Kephart, Standard Message Desk Interface-Enhanced (SMDI-E) is the industry term for BellSouth's Simplified Message Desk Interface (SMDI) service. SMDI is a feature that provides the capability for sending call data to a voice messaging service (VMS) provider and allows the VMS provider to signal its end user. Data transmitted from a BellSouth switch to the VMS platform includes the calling telephone number, the called telephone number and the reason for the call being forwarded. Data transmitted from the VMS platform to the BellSouth switch includes the message waiting indication. The message waiting indication may be either audible (such as "stutter dialtone") or visual (such as a message waiting light on the telephone set).

IVMS (which is also referred to as Interoffice Simplified Message Desk Interface or "ISMDI") is the inter-switch version of SMDI. ISMDI takes advantage of the BellSouth CCS7 signaling network which allows a voice messaging provider to offer service to multiple switch locations using a single data facility interconnection.

According to BellSouth witness Kephart, he believes that Supra intends to use SMDI-E and ISMDI to provide an information service (a voice messaging service) rather than to provide a telecommunications service. The Act defines "information service" as:

> The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or

> making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service. Section 3(a)41.

The witness notes that he believes that Supra does not dispute that voice messaging service is an information service rather than a telecommunications service.

Witness Kephart argues that BellSouth's SMDI-E and IVMS both have capabilities that go beyond the functionality contained in an unbundled switch port. He notes that both features provide for data transmission to and from the customer's voice mail platform. As such, he maintains that BellSouth will provide these data transmission capabilities to Supra at the same tariffed rates that it provides SMDI-E and IVMS to other unaffiliated voice messaging providers. Moreover, he acknowledges that these are also the same tariffed rates BellSouth charges to its own affiliated voice messaging provider. As an alternative, witness Kephart believes that Supra may provide its own data transmission links or purchase such links from BellSouth at UNE prices.

BellSouth witness Kephart was asked what charges, if any, would apply if Supra provided its own transport via unbundled switching. The witness explained that:

> What we've tried to say here, because we're not really sure what Supra wants to do, but we have this service capability that is used by people that provide voice mail service which are information service providers by definition, and that includes BellSouth as well. We utilize the service as well.
>
> And what we have said is that [sic] sell that communication service to voice mail providers, information providers, out of the tariff. We use it for our own memory call service and purchase it from the tariff at the same rates as unaffiliated voice message providers would purchase it, and we would also offer to sell it to Supra for its voice mail service when it's

> acting as an information service provider at the same tariff rate. That's the first option.
>
> The second option is that Supra has indicated, from what I've been able to gather from some of the testimony, that they would like to provide some portion of that capability themselves, and we have said that's okay. As a CLEC they can do that, and we will sell them the remaining portion of the service at unbundled rates for the UNEs that are required to provide it, and that would take -- this is not something we've done in the past, so it would take an analysis of what it is that Supra wants to do, what portion they want to provide themselves, and then we're going to have to look at the rest of the service and the capability, break it down into the UNEs that are there, and say we'll charge you the UNE rates for these additional elements, and that's basically what our position -- I've tried to espouse on this issue, if that makes sense.

The BellSouth witness clarified that if Supra were providing its own link for SMDI, BellSouth would not charge Supra for that link. However, whether or not there are any other unbundled elements associated with completing that service is an analysis that BellSouth would have to undertake to determine whether or not there were any additional charges associated with that service. As an example, witness Kephart notes that if Supra were only interested in SMDI, it would have some kind of a link from the central office, the host office, over to a voice mailbox, and BellSouth would provide Supra a connection to the host switch at the demarcation point in the central office in order to complete that circuit. BellSouth would review whether or not there were any additional unbundled elements associated with that service. With ISMDI, as the witness explains, there are multiple offices involved and there are additional unbundled elements associated with signaling to get it to the different offices. Witness Kephart acknowledged that BellSouth would not expect Supra to pay for anything that it was providing itself.

According to Supra witness Nilson, unbundled local switching requires that the ALEC who leases a switching port be given all features and functionalities of the port. He argues that one such

feature is the ability of the port to produce stutter dialtone or to activate a light on the telephone set of a subscriber, in response to a signal from a voice mail system provider, to let the telephone subscriber know there is a message waiting. He notes that traditionally this task has been done via SMDI and enhancements to it such as IVMS which allow one switch to pass messaging requests across the SS7 network to other switches without the use of a dedicated network.

Witness Nilson maintains that while SMDI is clearly a function of the switch port, and the functionality of it comes with the switch port, in Florida there is no unbundled access to this "fundamentally important signaling network/switch port functionality." Therefore, he argues an ALEC is not in parity with the ILEC for the local switching UNE. Specifically, he argues that BellSouth does not provide unbundled access to this signaling network, but in its FCC #1 Access Tariff lists SMDI and something called ISMDI. He notes:

> The description of ISMDI is an SS7/TAP based network that through a convoluted conversion of conversion [sic] between SMDI, ISDN, and SS7/TAP messages provides a single connection to a signaling connection that is supposed to be able to activate a Message Waiting Indicator (MAI) on a Laded basis.

Witness Nilson believes that ISMDI is clearly not as cost effective as the IVMS approach. He argues that "The alternative an ALEC has would be to establish an SMDI connection to each and every BellSouth switch in Florida, a total of 206 individual connections at last count." He argues that this presents a substantial barrier to entry.

Furthermore, witness Nilson contends that there is no separate signaling network required to transmit messages from switch-to-switch. He argues that it is included in the basic switch port functionality, and network-wide signaling across the SS7 network. The witness bases this on information obtained during a meeting with Bell Labs personnel on this issue. Additionally, witness Nilson notes that the Bell Labs engineers confirmed that IVMS has been adopted as an industry standard for approximately seven years; this standard is also supported by Norte and Siemens. Accordingly,

the witness believes that all switches in BellSouth's network are compliant and that the required software is already loaded on BellSouth's switches. He argues that ALECs' access to the IVMS signaling network should be defined as a fundamental component of local switching line and trunk ports, and ALEC access to this network should be provided by all Florida ILECs as it is elsewhere in the country. He maintains the various message-signaling networks are necessary for an ALEC to compete with the ILEC, and failure to have access to such signaling impairs Supra Telecom's ability to acquire new customers who view such limitations as the mark of an inferior company.

Witness Nilson further argues that BellSouth witness Kephart began his testimony on this issue by making a "huge mistake." Specifically, he notes that witness Kephart testified that SMDI-E and SMDI are the same thing. Witness Nilson believes this is wrong and notes that "I would doubt every other word Mr. Kephart writes on this subject." In his own testimony witness Nilson attempts to explain what the differences are between SMDI-E and SMDI and what is incorrect in witness Kephart's testimony.

According to witness Nilson, SMDI is essentially called party/calling party ID service intended to support voice mail services that have calls forwarded to them. He believes that it provides calling party number and name (CAM) information in a digital format. Witness Nilson explains that since calls are forwarded into a hunt group at the voice mail system, that system needs to know on whose behalf to record the incoming message. He continues by noting:

> So SMDI also supplies the number of the called party and the CAM information as well. This enables the voice mail system to immediately determine for who the call was intended and transfer the recorded message into that subscribers voice mail box. It is this very requirement to know the called party that makes SMDI essential. Caller ID is just not enough to operate voice mail systems today.
>
> SMDI provides the reason the call was forwarded to voice mail (line busy, no answer, etc.) And can provide other

> information to the voice mail system, but these five items are the primary ones needed[16].

With regard to SMDI-E, witness Nilson notes:

> I believe what Mr. Kephart wanted to say in the first line of his testimony is that SMDI-E is BellSouth's term for the industry standard Inter-Switch Voice Messaging Service ("ISM") protocol jointly supported by Lucent Technologies, Norte Networks, and Siemens systems.
>
> ISM/SMDI-E uses the facilities and message sets of the SS7 network to transmit SMDI from one switch to another connected to the voice mail platform. This allows distributed networks to be built without having to tie a voice mail system to each and every switch.

Finally, with regard to BellSouth witness Kephart's testimony that SMDI is used to provide an information service, not a telecommunications service, Supra witness Nilson notes:

> First of all I'm not clear what this has to do with anything in this docket. I see it as another BellSouth attempt to obfuscate what should be a crystal clear issue.

However, witness Nilson does agree with witness Kephart that voice mail meets the statutory definition for an information (or advanced/enhanced) service as defined by the Act. However, he believes that there is no explicit rule that would require that it can only be an information service.

2. Decision

We are not persuaded by witness Nilson's argument that the signaling associated with voice mail messaging should be considered part of the UNE switch port. Voice mail messaging services are nonregulated, nontelecommunications information services and as such BellSouth is not required to offer the components as part of the switch port. As stated in Section 251(c)(3) of the

[16] Witness Nilson does not identify what the "five items" are.

Telecommunication Act of 1996, each telecommunications carrier has the duty to provide:

> . . . to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. (emphasis added)

Furthermore, in Docket No. 990649A-TP, Order No. PSC-01-1181-FOF-TP, issued May 25, 2001, we approved switch port charges that do not include the switch features and functions; a separate charge applies for switch features. As such, Supra should purchase these services out of BellSouth's FCC tariff, or as suggested by witness Kephart, Supra may provide its own data transmission links or purchase such links from BellSouth at UNE prices. SMDI-E, IVMS, and any other corresponding signaling associated with voice mail messaging should not be included within the cost of the UNE switching port. The appropriate rates are those found in BellSouth's FCC No. 1 tariff. In addition, if Supra chooses to provide its own link, it should notify BellSouth and BellSouth should determine within a reasonable time frame whether or not there are any other unbundled elements associated with completing that service and what, if any, additional charges are associated with that service. What constitutes a "reasonable time frame" is an issue to be determined by the parties through negotiation.

U. Time Frame for Rendering Bills

In this section, we consider what the proper time frame shall be for either party to render bills.

1. Arguments

BellSouth witness Greene contends that in most situations, "twelve months is more than sufficient time to bill Supra for the services that it has ordered from BellSouth." He notes, however, that there are cases where BellSouth relies on billing information from third parties or Supra to bill accurately. Witness Greene

purports that some of those situations might include a case where BellSouth was relying on usage records from a third party to bill Supra for services which are jointly provided by that third party (via meet point billing procedures). Still other cases might exist where Percent Interstate Usage (PIU) and Percent Local Usage (PLU) factors may have been misreported. In those instances, witness Greene states that, "BellSouth should be permitted to bill charges to the full extent allowed by law rather than artificial time limits proposed by Supra."

As stated above, BellSouth witness Greene contends that BellSouth should not be constrained by "artificial time limits." Instead, BellSouth believes that the applicable limiting factor should be "the applicable laws and commission rules set out in each state."

BellSouth witness Greene notes that this very issue has been resolved by other parties, specifically AT&T and MCI WorldCom. BellSouth's proposed language for this issue is the same as the language that was proposed between BellSouth and MCI WorldCom. In the current proceeding, BellSouth proposed the following language for the agreement:

> Bills shall not be rendered for any charges which are incurred after the applicable statute of limitations has run or as stated in any Access Billing Supplier Quality Certification Operating Agreement. Until an Access Billing Supplier Quality Certification Operating Agreement is developed, the statute of limitations applies.

Supra argues that it relies on BellSouth to provide the billing records and the bills to determine the billing amount. Supra witness Ramos, contends that Supra cannot record its cost of sales unless those charges are provided within a reasonable period of time. Additionally, witness Ramos asserts that Supra must be able to close its books once a year and provide a complete accounting to stockholders. He states, "It would never be possible to completely close a company's books if there were potentially unbilled charges."

Supra witness Ramos asserts that, "Supra is not asking any party to waive its statutory rights to collect charges for services provided, but simply suggesting that bills for those services must be rendered within a reasonable time frame." He contends that the interconnection agreement between the parties is "an all inclusive agreement." As such, witness Ramos believes that no side agreements should be required. He specifically requests that the length of time for billings be included in the agreement and that the proper time frame should be 180 days after services have been rendered. Additionally, witness Ramos notes that standard commercial practice is that bills are rendered within six months of providing the goods or services. Witness Ramos believes that even then, six months should be "the exception, not the rule."

Even though BellSouth has proposed some language, it would be helpful to have additional language included in the Agreement. Any additional language would specify any exceptions that might apply. In fact, the language that BellSouth has included in several recent agreements appears to be much more detailed and appropriate. The following language appears in the MCIm/BellSouth Interconnection Agreement, approved by us in Order No. PSC-01-2238-FOF-TP, issued November 16, 2001:

> 4.2.3.5 The Bill Date must be present on each bill transmitted by the Parties, and must be a valid calendar date and not more than ninety (90) days old. Bills should not be rendered for any charges which are incurred under this Agreement on or before one (1) year proceeding the bill date. However, both Parties recognize that situations exist that would necessitate billing beyond the one year limit as permitted by law. These exceptions include;
>
> > + charges connected with jointly provided services whereby meet point billing guidelines require either Party to rely on records provided by the other Party.
> >
> > + charges incorrectly billed due to an error or omission of customer provided data such as PLU or PIU factors or other ordering data.

> Both Parties agree that these limits will be superseded by any Bill Accuracy Certification Agreement that might be negotiated between the Parties.

Similar language can also be found in the agreement between BellSouth and AT&T which was recently approved by us in Order No. PSC-01-2357-FOF-TP, issued December 7, 2001.

Even though Supra argued that six months was an adequate amount of time to render bills, Supra's counsel proposed one year to BellSouth witness Greene during the hearing. Witness Greene agreed to the one year limit with certain exceptions as outlined during his testimony and his cross examination. Those conditions were that there might be certain situations that require billing beyond one year. In fact, witness Greene specifically addressed several situations in which there may be problems or errors in reporting PLU and PIU factors and obtaining meet point billing data. The proper time frame for either party to render bills is one year, unless the bill was in dispute, meet point billing guidelines require either Party to rely on records provided by the other Party, or customer provided data such as PLU or PIU factors or other ordering data is incorrect.

2. Decision

Upon consideration, we find that the proper time frame for either party to render bills is one year, unless the bill was in dispute, meet point billing guidelines require either party to rely on records provided by the other party, or customer provided data such as PLU or PIU factors or other ordering data is incorrect.

V. Capability to Submit Orders Electronically

Herein, we address whether BellSouth should be required to provide Supra with the capability to submit orders for all products and service via electronic means.

1. Arguments

Supra witness Ramos contends that BellSouth refused to provide information regarding its network, which resulted in Supra being restricted in developing its position on this issue through pre-

filed testimony. Supra's position, therefore, is based upon its understanding of and response to BellSouth's position, according to the witness.

As with numerous other issues, Supra witness Ramos believes that "Parity Provisions" should be a consideration in this issue. The parity argument for this issue, according to witness Ramos, is the same as that put forth in Section S, the BellSouth retail and CLEC OSS systems.

Witness Ramos believes that "the dual system of OSS (i.e., one system for the ILEC and another for the ALEC) which are common today are inherently unequal." The witness believes that BellSouth witness Pate has made false statements with respect to the capabilities of certain CLEC OSS platforms. He offers evidence in the form of select interrogatories from FPSC Docket No. 980119-TP to support his contentions. The interrogatories primarily focus on edit-checking capabilities, but the final one more directly addresses the specific issue of manual versus electronic ordering. Witness Ramos asserts that BellSouth's witness Pate contradicts prior testimony and that BellSouth can, in fact, process its complex service requests electronically. Though not explicitly stated, the Supra witness infers that a similar functionality (i.e., the ability to process complex orders via electronic means) is not offered to ALECs.

BellSouth witness Pate states that BellSouth's own retail operations make use of manual ordering processes. He states that the same manual processes that BellSouth employs for its retail services are also used for ALEC services. The witness offers:

> Many of BellSouth's retail services, primarily complex services, involve substantial manual handling by BellSouth account teams for BellSouth's own retail customers. Non-discriminatory access to certain functions for ALECs legitimately may involve manual processes for these same functions. Therefore, these processes are in compliance with the Act and the FCC's rules.

The witness asserts that complex services fall primarily into two categories, "Non-designed" and "Designed," with the latter

involving special engineering and provisioning. The witness states that BellSouth's MultiServ® service is an example of a "Designed" complex service. Witness Pate offers contrasting flow chart diagrams to demonstrate the manual handling necessary to process retail and wholesale orders for MultiServ® service. Witness Pate also contends that wholesale orders for certain UNEs and resold services also necessitate a degree of manual handling:

> Some Unbundled Network Elements ("UNEs") and complex resold services require manual handling. The manual processes used by BellSouth are accomplished in substantially the same time and manner as the processes used for BellSouth's complex retail services. The specialized and complicated nature of complex services, together with the relatively low volume for them relative to basic exchange services, renders them less suitable for mechanization, whether for resale or retail applications. Complex, variable processes are difficult to mechanize, and BellSouth has concluded that mechanizing many low volume complex retail services for its own retail operations would be an imprudent business decision, in that the benefits of mechanization would not justify the cost.

In concluding his argument, witness Pate states that our decision in the AT&T arbitration (Docket No. 000731-TP) suggests that the appropriate mechanism to address this issue is the Change Control Process (CCP). He asserts that this issue should first be addressed through the CCP . . . and "[i]t appears that no such change control request has been submitted to the CCP." He states that Supra is a registered member of the CCP, but has not participated or taken advantage of its membership by submitting change requests, for this or any other matter.

Supra offered limited testimony specific to this issue in the form of rebuttal to statements of the BellSouth witness. Supra witness Ramos asserts that BellSouth witness Pate was untruthful in making sworn statements regarding the capabilities of certain CLEC OSS platforms. He offers evidence in the form of select interrogatories from FPSC Docket No. 980119-TP to support his contentions. Docket No. 980119-TP was a complaint matter which involved Supra's prior interconnection agreement with BellSouth.

The interrogatories the witness offers are not responsive to the issue at hand, which pertains to whether BellSouth should be required to provide Supra with the capability to submit orders for all wholesale products and service via electronic means. Witness Ramos, however, interprets the final interrogatory offered to demonstrate that BellSouth processes its complex service requests electronically. The relevance of the referenced text to this current matter is, nevertheless, unclear. We are reluctant, therefore, to give significant credence to the excerpt.

Though BellSouth's MultiServ® service was the only specific example noted, witness Pate states that "BellSouth has concluded that mechanizing many low volume complex retail services for its own retail operations would be an imprudent business decision, in that the benefits of mechanization would not justify the cost." We agree. Witness Pate goes so far as to state that some UNE orders and complex services "require" manual handling. We believe that BellSouth will be involved in some degree of manual handling for complex orders regardless of whether the order is wholesale (e.g., to an ALEC) or retail.

2. Decision

Some level of manual processing is likely to exist for both wholesale and retail orders, simply because of the complexities of modern telecommunications. Witness Pate states that "[b]ecause the same manual processes are in place for both ALEC [wholesale] and BellSouth retail orders, the processes are non-discriminatory and competitively neutral." We agree. As long as BellSouth provisions orders for complex services for itself and ALECs in a like fashion and in substantially the same time and manner, it meets the non-discriminatory requirement of the Act. However, while noting BellSouth's concern over the suitability and the cost/benefit relationship of mechanization, we believe that a more comprehensive evaluation of electronic order submission may be helpful, perhaps in the context of a generic proceeding, which would enable us to more fully consider the policy implications for electronic order submission. Based on this record, however, BellSouth shall not be required to provide Supra with the capability to submit orders electronically for all wholesale services and elements, as long as BellSouth provisions orders for complex services for itself and

ALECs in a like fashion and in substantially the same time and manner.

W. Manual Intervention on Electronically Submitted Orders

In this section, we address under what circumstances, if any, should there be manual intervention on electronically submitted orders.

1. Arguments

Supra witness Ramos contends that BellSouth refused to provide information regarding its network, which resulted in Supra being restricted in developing its position on this issue through pre-filed testimony.

Witness Ramos believes that "BellSouth has an electronic interface for every occasion." He asserts that BellSouth does not submit manual orders for any of its own products.

BellSouth witness Pate is, however, uncertain what Supra hopes to achieve in this issue, since its position was not set forth through prior meetings or testimony. The witness offers two possibilities, as follows:

> [Either] (A) Supra is requesting that all complete and correct LSRs submitted electronically flow through BellSouth systems without manual intervention [; or] (B) Supra is asking that BellSouth relieve Supra of its responsibility to submit a complete and accurate LSR.

BellSouth's position on (A) is that it provides non-discriminatory access to OSS systems, but non-discriminatory access does not require that all LSRs be submitted electronically and not involve any manual handling. "BellSouth's own retail processes often involve manual processes," states the witness. According to witness Pate, the manual handling consideration is directly related to complex orders. He states:

> The orders at issue here are those that the ALEC may submit electronically, but fall out by design. In most cases, these orders are complex orders. For certain orders, BellSouth has, for the ease of the ALEC, allowed

> them to be submitted electronically even though such orders are then manually processed by BellSouth . . . Because the same manual processes are in place for both ALEC and BellSouth retail orders, the processes are competitively neutral, which is exactly what both the Act and the FCC require.

Witness Pate states that we have previously ruled on (A) in the recent AT&T arbitration. In that matter, we found that to accommodate the requested actions (i.e., allow additional order types to flow through without manual handling), BellSouth would be required to modify its systems, and that the proper mechanism to achieve this would be through the Change Control Process (CCP). Quoting the finding, witness Pate states, "the system in place does not create disparity for AT&T regarding order submission as stated earlier. Therefore this issue is currently best suited to be pursued through the CCP process." Finally, the witness states that BellSouth is willing to incorporate the same language in Supra's agreement as agreed to in the AT&T case.

With respect to (B), he states that Supra should not expect BellSouth to assume what is clearly Supra's obligation. Witness Pate stresses that "Supra must understand its obligation to provide a complete and accurate LSR." Witness Pate believes that the language BellSouth and WorldCom agreed to could be incorporated here to resolve (B).

2. Decision

Supra presented limited testimony on this matter. Nonetheless, we evaluated the available testimony to consider under what circumstances, if any, there should be manual intervention on electronically submitted orders.

Aspects of this issue are enveloped in the issues addressed in Sections S and V of this Order. Again, Supra witness Ramos states that "Parity Provisions" should be a consideration in this issue. We agree, but find that BellSouth is meeting its obligations set forth in the Act.

Supra is requesting that all complete and correct LSRs that it submits electronically flow through BellSouth systems without

manual intervention, based on its belief that BellSouth's own retail orders do this. Supra believes "parity" considerations of the Act obligate BellSouth to treat Supra in a like manner. However, not all complete and correct LSRs that are submitted electronically flow through without manual intervention, according to BellSouth's witness Pate.

Based on the testimony which affirms that the same manual processes are in place for both ALEC and BellSouth retail orders and that BellSouth processes the orders in a non-discriminatory manner, we agree with witness Pate's assertion that BellSouth's practices with respect to manual handling are competitively neutral. Unless or until such practices change for all ALECs, when processing Supra's complex orders, BellSouth should be permitted to manually process those orders that would be processed similarly for retail orders.

With regard to (B), asking BellSouth to relieve Supra of its responsibility to submit a complete and accurate LSR is unreasonable. Supra should be capable of fulfilling its obligation with respect to submitting complete and accurate LSRs to BellSouth. BellSouth shall be allowed to manually intervene on Supra's electronically submitted orders in the same manner as it does for its own retail orders.

X. Sharing of the Spectrum on a Local Loop

Here, we consider whether or not Supra should be allowed to share with a third party the spectrum on a local loop for voice and data when Supra Telecom purchases a loop/port combination and if so, under what rates, terms, and conditions. In addition, based on the testimony presented, we address whether or not BellSouth must provide its DSL service to Supra's voice customers served in a UNE-P arrangement.

1. Arguments

According to the testimony of Supra witness Nilson, Supra requests that BellSouth be required to 1) allow Supra access to the spectrum on a local loop for voice and data when Supra purchases loop/port combinations; and 2) continue to provide data services to

customers who currently have such services, after the customer decides to switch to Supra's voice services.

The testimony of BellSouth witness Cox leads us to believe that there is not a dispute regarding Supra's first request. Specifically, witness Cox notes that BellSouth's position on this issue does not prevent Supra from having access to the high frequency portion of the loop. She states:

> When Supra purchases UNE-P from BellSouth, it becomes the owner of all the features, functions and capabilities that the switch and loop is capable of providing. This includes calling features and capabilities, carrier pre-subscription, the ability to bill switched access charges associated with this service, and access to both the high and low frequency spectrums of the loop.

Based on this testimony, Supra is not precluded from accessing both the high and low frequency spectrum of the loop when it purchases UNE-P. Accordingly, this matter need not be further addressed.

With regard to Supra's second request, the parties do not agree. According to BellSouth witness Cox, BellSouth is not obligated to provide its DSL service on a line where it is not the voice provider. She notes that the FCC addressed this issue in its line sharing order and clearly stated that incumbent carriers are not required to provide line sharing to requesting carriers that are purchasing UNE-P combinations. Specifically, witness Cox points to the FCC's Line Sharing Reconsideration Order (FCC 01-26), where it stated:

> We deny, however, AT&T's request that the Commission clarify that incumbent LECs must continue to provide xDSL service in the event customers choose to obtain service from a competing carrier on the same line because we find that the Line Sharing Order contained no such requirement.

FCC Order No. 01-26, CC Docket Nos. 98-147, 96-98 at 126. Furthermore, she argues that the FCC expressly stated that the *Line Sharing Order* does not require that the LECs provide xDSL service when they are no longer the voice provider.

Witness Cox also notes that we previously ruled on this issue. In Order No. PSC-01-0824-FOF-TP, issued March 20, 2001, we stated:

> While we acknowledge WorldCom's concern regarding the status of the DSL service over a shared loop when WorldCom wins the voice service from BellSouth, we believe the FCC addressed this situation in its Line Sharing Order. . . . We believe the FCC requires BellSouth to provide line sharing only over loops where BellSouth is the voice provider. If WorldCom purchases the UNE-P, WorldCom becomes the voice provider over that loop/port combination. Therefore, BellSouth is no longer required to provide line sharing over that loop/port combination.

Order at p. 51. Witness Cox maintains that contrary to Supra's position, we should again find consistent with the FCC and its previous rulings, that BellSouth is not obligated to provide DSL services for customers who switch to Supra's voice services. She contends that nothing precludes Supra from entering into a line splitting arrangement with another carrier to provide DSL services to Supra's voice customers. As such, she believes that the language that BellSouth has proposed for inclusion in the new Agreement is consistent with the FCC's rules and this Commission's decisions.

With regard to this issue, Supra witness Nilson adopted the testimony of Gregory Follensbee, formerly of AT&T, filed in Docket No. 000731-TP. According to the direct testimony adopted by witness Nilson, Supra seeks to gain reasonable and nondiscriminatory access to the "high frequency spectrum" portion of the local loops that it leases from BellSouth to provide services to customers based upon the UNE-P architecture. As previously noted, based on the testimony of BellSouth witness Cox, Supra is permitted access to the loop spectrum when it purchases the UNE-P; therefore, this does not appear to be a disputed matter.

According to witness Nilson, BellSouth has stated in inter-company review board meetings that because of the final order in FPSC Docket No. 000731-TP, it will no longer be providing xDSL transport service to customers served by UNE combinations in

Florida. Furthermore, on July 11, 2001 BellSouth sent a letter to Supra Business Systems, Inc. announcing the unilateral disconnection of all xDSL services provided over UNE Combinations. Additionally, in his testimony, witness Nilson addresses why he believes it is essential that BellSouth provide line splitters and that the issue of the line splitter be investigated; he also provides several arguments as to why "line sharing between ALECs doesn't exist in Florida at all."

2. Decision

Supra is not precluded from sharing with a third party the spectrum on a local loop for voice and data when Supra Telecom purchases a loop/port combination. As stated by BellSouth witness Cox, when Supra purchases UNE-P from BellSouth, it becomes the owner of all the features, functions and capabilities that the switch and loop is capable of providing. This includes access to both the high and low frequency spectrum of the loop.

With regard to Supra's position that it must be compensated one half of the local loop cost when it utilizes the voice spectrum of the loop and another carrier utilizes the high frequency spectrum (or vice versa), Supra presented no evidence to support its position on this matter. Moreover, this would require Supra to contract with a third party, and as such we need not address this matter at this point.

With regard to the remaining issue, BellSouth asserts that it is not required to offer its tariffed xDSL service to Supra customers served via a UNE-P arrangement. We and the FCC have both concluded that BellSouth is only required to provide line sharing over loops where BellSouth is the voice provider. If Supra purchases UNE-P, it becomes the voice provider over that loop/port combination. Supra Telecom shall be allowed to share with a third party the spectrum on a local loop for voice and data when it purchases a loop/port combination (alternatively referred to as "line splitting"). In addition, BellSouth shall not be required to provide its DSL services to Supra's voice customers served via UNE-P.

Y. Downloads of RSAG, LFACS, PSIMS and PIC Databases

The issue before us in this section is to determine if BellSouth should be required to provide downloads of its RSAG (Regional Service Address Guide) and LFACS (Loop Facility Assignment Control System) databases. The scope of the issue has been narrowed since the filing of the petition as the parties have agreed to language regarding the PSIMS and PIC databases.

1. Arguments

BellSouth witness Pate testifies that BellSouth should not be required to provide downloads of RSAG because Supra already has real-time access to RSAG through BellSouth's "robust electronic interfaces." According to the witness, BellSouth makes available pre-ordering and ordering functionality which provides access to the necessary databases via LENS, TAG, RoboTAG, and EDI in a manner that is consistent with what the Act requires. Witness Pate contends that the Telecommunications Act does not require BellSouth to provide direct access to the same databases that it uses for its retail operations. However, the witness states that BellSouth is willing to resolve the issue by incorporating language agreed to with MCIm in which BellSouth will provide the RSAG data through a "mutually agreeable electronic means" once a "single mutually acceptable license agreement" has been executed.

In response to BellSouth's position, Supra witness Ramos asserts that Supra should be provided with "nondiscriminatory, direct access to these databases that BellSouth's retail departments enjoy." He contends that the ALEC interfaces provided by BellSouth to access its OSS are inadequate. Consequently, witness Ramos believes that anything less than direct access to these databases is discriminatory.

According to witness Ramos, there is no legitimate reason why Supra should have a different access than BellSouth's retail departments. He holds that "[W]hen BellSouth's internal OSS is malfunctioning, BellSouth retail departments have direct access to these databases." Conversely, the witness asserts that when CLEC pre-ordering interfaces are malfunctioning, Supra has no means of accessing the necessary databases. Witness Ramos contends that BellSouth is failing to provide parity in accordance with the Act

and "should be required to provide downloads of the relevant databases as this would allow Supra to operate, albeit in a limited fashion, when the interfaces are down."

2. Decision

We note witness Ramos's concerns that the ALEC interfaces provided by BellSouth to access its OSS, including the relevant databases, are inadequate, but we disagree that anything less than direct access to these databases is "discriminatory." To the contrary, BellSouth is not obligated by the Act to provide direct access to these databases. Specifically, FCC rule 47 C.F.R. § 51.319(g) states in part:

> An incumbent LEC shall provide nondiscriminatory access in accordance with §51.311 and section 251(c)(3) of the Act to operations support systems on an unbundled basis to any requesting telecommunications carrier for the provision of a telecommunications service.

Further, the FCC concludes in FCC 96-325, ¶312 that:

> ...the phrase "nondiscriminatory access" in section 251(c)(3) means at least two things: first, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element, must be equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself.

Additionally, FCC 96-325, ¶518, requires BellSouth to provide access to its OSS which allows ALECs to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for resale services in substantially the same time and manner as BellSouth does for itself. Thus, BellSouth is only required to provide non-discriminatory access to the databases that its retail departments use, and not direct access. Finally, we specifically concluded in Order No. PSC-98-1001-FOF-TP of Docket No. 980119-TP, in response to Supra's request for access to the very same interfaces that BellSouth uses for its retail service

(including RSAG), that "BellSouth is not required to provide Supra with the exact same interfaces that it uses for its retail operations."

BellSouth has made pre-ordering and ordering functionality available, as required by the Act, through the LENS, TAG, RoboTAG and EDI interfaces, which in turn provide access to the necessary databases. As such, we are not persuaded that BellSouth should be required to provide Supra with downloads of its RSAG database and should not be required to do so without license agreements or without charge. The parties may negotiate such an arrangement and any associated rates, terms, and conditions. The same analysis is applicable to requests made by Supra for download of BellSouth's LFACS database. BellSouth shall not be required to provide downloads of RSAG and LFACS databases without license agreements and without charge.

Z. Payment for Expedited Service

Here, we consider whether Supra Telecom should be required to pay for expedited service when BellSouth provides services after the offered expedited date, but prior to BellSouth's standard interval.

1. Arguments

BellSouth witness Cox adopted witness Ruscilli's prefiled direct testimony. Witness Cox contends that Supra should have to pay for expedited service as long as the order is completed before the standard interval. According to witness Cox, BellSouth is under no obligation to expedite service for Supra or any other ALEC. Since BellSouth charges its end users for expedited due dates, witness Cox believes Supra should pay these same expedite charges. Witness Cox observes that, "Supra does not want to pay the costs incurred by BellSouth to expedite due dates." According to witness Cox, BellSouth has offered to resolve this issue with the following language:

> Supra may request an expedited service interval on the local service request (LSR). BellSouth will advise Supra whether the requested expedited date can be met based on work load and resources available. For expedited

> requests for loop provisioning, Supra will pay the expedited charge set forth in this Agreement on a per loop basis for any loops provisioned in 4 days or less. Supra will not be charged an expedite charge for loops provisioned in five or more days, regardless of whether the loops were provisioned in less than the standard interval applicable for such loops.

Further, witness Cox questions why Supra is even raising this issue, since Supra does not purchase stand alone UNE loops, the only product that is expedited, according to witness Cox.

Supra witness Ramos contends that BellSouth provides expedited service to its retail customers at no charge while denying Supra the same capability. According to witness Ramos, there is nothing to suggest that BellSouth's "standard" orders cost more than BellSouth's "expedited" orders. As such, witness Ramos believes BellSouth should not be allowed to charge a premium fee for expedited service under any circumstances. Witness Ramos alleges that BellSouth is merely trying to increase Supra's cost of competing with BellSouth. Witness Ramos contends that BellSouth should not receive additional payment when it fails to perform in accordance with a specified expedited schedule, but rather should have to give Supra a credit in such instances to address the cost of customer complaints.

Also, witness Ramos asserts BellSouth has willfully and intentionally failed to provide Supra with the same quality of service because it has not provided Supra with BellSouth's Quickserve. Quickserve is used to provide customers with expedited service in circumstances where the phone line at the location is already connected for service (i.e., has a soft dial tone). Witness Ramos states it is BellSouth's position that, because the word Quickserve is not contained in the agreement, BellSouth is under no obligation to provide it to Supra. Witness Ramos alleges this violates the parity provisions of the 1996 Act. Supra is at a competitive disadvantage because BellSouth has refused to set up a system that would allow Supra to use Quickserve to provide one day service like BellSouth, according to witness Ramos. Witness Ramos contends that while Supra can submit local service requests (LSRs) for Quickserve manually (i.e., via fax), they are generally provisioned later than electronically submitted LSRs. While

BellSouth has developed a "workaround" that allows Supra to call in such orders, this workaround is unworkable, according to witness Ramos, because Supra customer service representatives have to hold as long as 45 minutes, trying to get a BellSouth representative to change a maximum of 3 orders per call. Witness Ramos views Quickserve as a competitive advantage for BellSouth, because it allows BellSouth to affirmatively state, where Quickserve is available, that a customer can receive service on the same day while Supra cannot. This practice is particularly vexing according to witness Ramos, in light of the fact that customers who convert from BellSouth to Supra must wait 5 to 12 days, even though the conversion is simply a billing change.

2. Decision

Based on a somewhat limited record on this issue, we find that denying BellSouth extra compensation for expedited orders not completed in a timely manner may encourage BellSouth to keep its promises that expedited orders will be completed by a certain date. The purpose for expedited service is so that service will be provisioned by a certain time, not merely to encourage BellSouth to try to do it a little quicker. If expedited service is not provisioned when promised, the ALEC loses the primary benefit of expedited service, i.e., the ability to affirmatively tell customers exactly when service will begin. We agree with Supra witness Ramos that ALECs may lose goodwill and customer confidence when they are unable to deliver expedited services on time because the ILEC was unable to meet the agreed upon date. Being able to provide timely expedited service more often may enable ALECs to more closely replicate the customer experience BellSouth provides. While BellSouth witness Cox states that expedite fees are pro-rated based on when the order is actually completed, this does not justify allowing BellSouth to charge a premium for failure to meet the expedited due date. Further, BellSouth failed to submit evidence in the record showing how expedited service increases BellSouth's costs of operation. This lack of justification for expedite charges provides further support for not allowing expedite charges when the service is not delivered as promised. Thus, Supra shall not be required to pay for expedited service when BellSouth provides the service after the promised expedited date, but prior to BellSouth's standard interval.

We do not believe that BellSouth should be required to create an electronic ordering system for Quickserve, or require BellSouth to provide free expedited service, as witness Ramos has requested. These requests exceed the scope of the issue. Further, Section 252 (b)(4)(A) requires, "The State commission to limit its consideration of any petition under paragraph(1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)." We note that these requests were not addressed in BellSouth's petition or Supra's response to BellSouth's petition. Therefore, we decline to grant Supra free expedited service or to require BellSouth to provide electronic ordering for Quickserve.

While we decline to grant Supra's request for electronic ordering of Quickserve in this docket, Supra raises meaningful points about the value of electronic ordering. We are concerned by the testimony of witness Ramos noting that electronic Quickserve orders are provisioned quicker than manual orders which Supra must use, and that Supra customer service representatives have wait times as long as 45 minutes when trying to phone in Quickserve orders. We believe the issue of whether BellSouth should have to create an electronic ordering interface for ALECs that use Quickserve could be explored more effectively in the context of a generic proceeding.

We disagree with Supra that this issue is controlled by the commercial arbitration decision. Whatever force that award had, expired with the term of the previous agreement. In choosing the appropriate terms for this new interconnection agreement, we are not bound by the terms of that commercial arbitration.

AA. Identification of Order Errors

Herein, we consider whether BellSouth should be required to identify and notify Supra of all errors in the order at the time of the rejection. In addressing this matter, an underlying assumption in this issue is that Supra has submitted a service order to BellSouth, and for some reason BellSouth has not accepted it (e.g., BellSouth "rejected" the Supra order).

1. Arguments

Supra witness Ramos contends that BellSouth refused to provide information regarding its network, which resulted in Supra being restricted in developing its position on this issue through pre-filed testimony. Supra's position, therefore, is based upon its understanding of and response to BellSouth's position, according to the witness.

As with numerous other issues, Supra witness Ramos believes that "Parity Provisions" should be a consideration in this issue. Parity, according to witness Ramos, becomes an issue because BellSouth does not provide to Supra a real-time edit checking capability. BellSouth's retail OSS identifies errors and provides notification in real-time through its edit-checking capabilities, claims witness Ramos.

BellSouth places the responsibility on the ALEC (e.g., Supra) to submit a complete and accurate LSR, and thus avoid the resubmission of an order, according to witness Ramos. The Supra witness states that "[i]dentifying all errors in the LSR or order will prevent the need for submitting the LSR or order multiple times." Witness Ramos claims that there have been numerous instances where Supra has had to track LSRs because BellSouth failed to notify Supra that the order was rejected. "Without first correcting the error in question and then resubmitting [the LSR] for further processing, other errors on the LSR cannot be identified," states witness Ramos. Through its proposed language, Supra believes that BellSouth should identify all reasons for a rejection in a single review of the LSR. Specifically, Supra has proposed the following language:

> BellSouth shall reject and return to Supra any service request or service order that BellSouth cannot provision, due to technical reasons, or for missing, inaccurate or illegible information. When a LSR or order is rejected, BellSouth shall, in its reject notification, specifically describe all of the reasons for which the LSR or order was rejected. BellSouth shall review the entire LSR or order, and shall identify all reasons for rejection in a single review of the current version (e.g., ver 00, 01, etc.) of the LSR.

BellSouth witness Pate acknowledges what Supra desires in this issue, but states that "the type and severity of certain errors may prevent some LSRs from being processed further once the error is discovered by BellSouth's system." The witness clarifies:

> An example of this type of error . . . is an invalid address. If the address is incorrect, the LSR cannot be processed further and will be returned to the ALEC [Supra]. This is because the address for a service request is a major determinate as to the services available from the central office serving switch. As a result, a LSR with an incorrect address must be returned to the ALEC [Supra] before additional edit checks are applied against the LSR for the specific services being requested.

Witness Pate believes that BellSouth's systems could not easily be modified to accomplish a comprehensive review of an ALEC's LSR. He states that "much work would be necessary to even evaluate what would be involved in modifying BellSouth's systems as proposed by Supra," and if so, any such modification could only be accomplished at "considerable time and expense." Witness Pate asserts that Supra can avoid the issue of repeated submissions by rendering a complete and accurate LSR to BellSouth, and concludes his argument by offering that BellSouth is willing to incorporate the same language it offered to WorldCom.

2. Decision

This issue has broad implications with respect to BellSouth's OSS, and whether or not BellSouth should be obligated to modify a component of its OSS to meet the individual needs of an ALEC such as Supra. The issue at hand considers whether BellSouth should be required to identify and notify Supra of all errors in the order at the time of the rejection. The record reflects that what Supra is seeking in this issue would involve modifications to one or more of BellSouth's OSS systems, which would be a significant undertaking. In addition, we infer from witness Pate's testimony that such an undertaking may not be technically feasible.

We do agree with witness Ramos that "[i]dentifying all errors in the LSR or order will prevent the need for submitting the LSR or

order multiple times," although we do not believe BellSouth is capable of accomplishing such a task without modifications to its systems, and even then, there is a question about the technical feasibility. Regarding the types and severity of errors in LSRs, BellSouth witness Pate asserts that "certain errors may prevent some LSRs from being processed further once the error is discovered by BellSouth's system." This is due to the fact that certain edit checks cannot be performed if an earlier, dependent edit check triggers a rejection.

If Supra is requesting that BellSouth modify its OSS to identify all errors in the order at the time of rejection, such a request would be better handled outside the confines of a §252 arbitration. Although concerned over the feasibility of modifying BellSouth's systems as proposed by Supra, a more comprehensive evaluation of electronic order processing may be helpful. Such an evaluation could be conducted in the context of a generic proceeding, which would enable us to more fully consider the technical feasibility and policy implications.

Supra can avoid the issue of repeated submissions by rendering a complete and accurate LSR to BellSouth; therefore, we decline to require BellSouth to modify its OSS to enable it to identify all errors in the LSR at the time of the rejection. BellSouth shall, however, be required to identify all readily apparent errors in the order at the time of rejection.

BB. Purging of Orders

In this section, we address whether BellSouth should be allowed to drop (i.e., purge) Supra's LSR after 10 days or some other time period if Supra does not respond to BellSouth's request for clarification. We also consider whether BellSouth should be required to notify Supra on the day the LSR is purged.

1. Arguments

As with other issues, Supra witness Ramos believes that "Parity Provisions" should be a consideration in this issue. Parity, according to witness Ramos, is an issue because BellSouth does not purge its own retail orders after 10 days. Witness Ramos believes that BellSouth should not be allowed to purge LSRs when

the LSR has passed the front-end ordering interface (such as LENS). He believes that if purged, BellSouth is skirting its responsibility to successfully complete the order. Witness Ramos states:

> Upon acceptance [of the front-end interface], completion of the LSR or order is the responsibility of BellSouth and such LSRs or orders should remain on BellSouth's system until their personnel resolve the clarification problems. Alternatively, if any LSRs or orders are dropped, BellSouth should be under an obligation to affirmatively notify Supra (electronically or in writing) within twenty-four (24) hours of the LSR or order being dropped.

The witness concludes that purging Supra's orders after 10 days is discriminatory, since BellSouth does not purge its own retail orders in a like manner. Further, witness Ramos advocates that this issue would be moot if Supra had direct access to BellSouth's OSS.

BellSouth witness Pate believes that Supra's own inefficiency is a factor in this issue. He asserts that the ALEC, not BellSouth, has the primary responsibility to its end-user with respect to ordering and tracking of service requests. He continues:

> BellSouth does not manage other ALEC's inefficiency and should not be expected to manage Supra's. Supra should be required to manage its ordering process and manage it in such a way that Supra has responsibility for ensuring that its representatives submit a complete and accurate LSR. Supra cannot and must not assume that BellSouth should handle this responsibility. Supra must take responsibility for managing its operation.

The witness states that when BellSouth returns a LSR to an ALEC for a clarification, it does so because the order is incomplete, incorrect, or has conflicting information. As a result, BellSouth is unable to issue the order(s) contained on the LSR.

Witness Pate offers that BellSouth provides complete ordering instructions for ALECs in a document titled the "BellSouth Business

Rules" (BBR). The BBR is available to all ALECs, including Supra, and "provides a common point of reference to simplify the manual and electronic ordering processes for ALECs that conduct business with BellSouth," states the witness. The BBR contains provisions that address clarifications, including the information about responding to a clarification request. Witness Pate states that an ALEC has a maximum of ten (10) business days to respond to a clarification request with a supplemental LSR, consistent with the BBR. If a response is not received on the 10th business day, BellSouth cancels the LSR on the 11th business day, without any further notice, again, as provided in the BBR. BellSouth believes that ten (10) business days is an ample period of time for an ALEC to respond, and further, believes that it is not obligated to issue "reminder" notices when a response is not forthcoming.

2. Decision

Though framed as an issue about LSRs and clarification notifications, we believe the fundamental consideration in this issue is which party has the responsibility to the end-use customer for ordering and the ultimate provisioning of service. We agree with witness Pate that the ALEC, not BellSouth, has the primary responsibility to its end-user with respect to ordering and tracking of service requests. In the final analysis, witness Pate offers that "Supra should be concerned with the end-user satisfaction level."

The responsibility for a complete and accurate LSR rests with the ALEC, Supra. As witness Pate elaborated, when BellSouth returns a LSR to an ALEC for a clarification, it does so because the order is incomplete, incorrect, or has conflicting information. BellSouth and the respective ALEC should be able to work through the clarification requests; an order that is incomplete, incorrect, or has conflicting information is of no use to BellSouth and cannot be provisioned until the clarification issue is resolved. The ALEC has a key role in this matter and, by implication, shares in the responsibility for the successful provisioning.

BellSouth provides complete ordering instructions for ALECs, including Supra, in the BBR. As previously stated, this set of instructions contains provisions that address BellSouth's requests for clarifications, including information about responding to these

requests. Witness Pate states that an ALEC should properly respond to a clarification request by submitting a supplemental LSR. We note that Supra did not offer any testimony to support whether or not a 10 business day clarification response period was adequate, so can only conclude that 10 days is a reasonable period for an ALEC to submit a supplemental LSR. Furthermore, 10 business days represents a maximum, and an ALEC is not precluded from responding in a more expeditious manner.

An ALEC that has pending service order activity with BellSouth should be responsible for monitoring the provisioning process for its end use customers. If an ALEC was duly notified about the clarification request and has not responded to BellSouth within the 10 business day period, BellSouth should be allowed to cancel the LSR on the 11th business day without further notification, because the specific parameters for this occurrence are detailed in the universally-available BBR.

BellSouth witness Pate believes that Supra is advocating that BellSouth issue a "reminder" notice for orders that are about to be purged. The witness believes that imposing such an obligation on BellSouth would mask an ALEC's inefficiency. We agree, and note that the universally-available BBR offers fair warning to motivate the ALEC to be responsive, notwithstanding the ALEC's own reputation with its end-use customers if it is not responsive. Therefore, BellSouth shall not required to issue "reminder" notices when a LSR is about to be purged.

In summary, BellSouth shall be allowed to "purge" orders on the 11th business day after a clarification request, if a supplemental LSR is not submitted by Supra that is responsive to the clarification request on the original LSR. Furthermore, no additional notification is necessary prior to the 11th business day when an LSR is about to be purged.

CC. Completion of Manual Orders

Here, we are being asked to determine if, for the purposes of the interconnection agreement between the parties, BellSouth should be required to provide completion notices for Local Service Requests submitted manually by Supra.

1. Arguments

BellSouth witness Pate contends that although BellSouth cannot provide the same kind of completion notification to Supra as when the order is submitted electronically, BellSouth does provide Supra with the "operational tools" necessary to determine the status of its orders on a daily basis, including manual orders. Witness Pate explains that BellSouth's CLEC Service Order Tracking System (CSOTS) provides ALECs with the capability to view service orders on-line, determine the status of their orders, including the status on manual orders, and track service orders.

Witness Pate states that "CSOTS interfaces with BellSouth's Service Order Communications System (SOCS) and provides service order information on a real-time basis for manually submitted and electronically submitted LSRs." According to witness Pate, CSOTS is available on BellSouth's website, and provides the ALEC community with access to the same service order information that is available to BellSouth's retail units, including the completion notification required by Supra. He states, "(R)egion wide, 320 ALECs are using CSOTS."

Supra witness Ramos contends that BellSouth should be required to provide completion notices to Supra for manual LSRs or orders. He testifies that a completion notice advises Supra that BellSouth has provisioned an LSR or order and that the customer has been switched over from BellSouth to Supra. Without this notice, witness Ramos asserts that Supra cannot accurately and efficiently determine if or when BellSouth has switched over service for a Supra customer. In order to properly bill its customer and provide maintenance and repair services, witness Ramos contends that Supra must have knowledge of the date that it actually began providing service to the customer. "[P]roviding Supra with a FOC (Firm Order Commitment)," witness Ramos states, "and failing to provide service on the date requested coupled with a lack of notice, can only lead to a number of billing issues, including the potential of double-billing customers." Witness Ramos claims that this "double billing" harms Supra's reputation and its ability to generate revenue.

According to witness Ramos, the CLEC Service Order Tracking System (CSOTS) provided by BellSouth, does not provide a

satisfactory alternative to an actual completion notice. He asserts that "[S]upra's representatives would be required to monitor CSOTs on a regular basis for completion indications (with the attendant errors that would flow from using such a process)." Although convenient for BellSouth, witness Ramos believes this system is "costly and inefficient" for Supra. He reasons that a system in which BellSouth provides Supra with an electronic or manual completion notice would be simpler and thus, "result in fewer errors and therefore fewer problems for Florida's consumers and both parties." Moreover, witness Ramos asserts that "since BellSouth service technicians report all completions to BellSouth for correct billing purposes, BellSouth is clearly failing to provide Supra with OSS parity on this issue."

2. Decision

We are not persuaded by the evidence presented in the record of this docket that BellSouth's CSOTS system is "costly and inefficient" for Supra. Although a process in which BellSouth provides an electronic or manual completion notice may be simpler for Supra, BellSouth is not obligated to provide completion notification to Supra that it does not provide to other ALECs or for its own retail service orders. Since information regarding the status of orders is made available to all ALECs on BellSouth's web-based CSOTS system, Supra is provided with sufficient real-time completion notification. As such, BellSouth shall not be required to provide completion notices for manual orders.

DD. Liability in Damages

In this portion of our Order, we consider whether the parties should be liable in damages, without a liability cap, to one another for their failure to honor in one or more material respects any one or more of the material provisions of the Agreement for purposes of this interconnection agreement.

1. Arguments

Supra's witness Ramos argues that a party that is found to be in breach must be liable to the other in damages, without a liability cap. His position is that there should be no limitation on liability for material breaches of the agreement. Witness Ramos

believes that absent significant penalties for intentional and willful noncompliance, or gross negligence, BellSouth will find it financially beneficial not to comply with the Act as well as its many contractual terms.

BellSouth witness Cox, contends that each party's liability arising from any breach of contract should be limited to a credit for the actual cost of the services or functions not performed or performed improperly. BellSouth states that limitations of liability clauses are standard practice in contracts, and can be found in BellSouth's tariffs for its retail and business customers. BellSouth does not believe Supra should be able to seek more damages as a result of a mistake by Supra than BellSouth's retail and wholesale access customers would have available to them.

2. Decision

The issue of our authority and obligations to arbitrate a damages liability provision must be determined in light of MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc., Order on the Merits, issued June 6, 2000, in Case No. 4:97cv141-RH, 112 F.Supp. 2d 1286. Prior to Order on the Merits issued in WorldCom Telecommunication Corp. v. BellSouth Telecommunications, Inc., we had declined to arbitrate damages liability or specific performance provisions.

In Order on the Merits, the Court rejected our two arguments. Id. at 1297. We argued that we did not have the authority to arbitrate the liquidated damages issue because the liquidated damages issue was not an enumerated item to be arbitrated under Sections 251 and 252 of the Act. Id. Second, we argued that under state law we did not have the authority to mandate a compensation mechanism of this type. Id. The Court rejected our "narrow reading" of the arbitration provisions of the Act. Id.

The Court stated that the Act sets forth two methods that an incumbent carrier and a competitive carrier use to determine the terms and conditions of an interconnection agreement. Id. The Court noted that the first and preferable method is through voluntary negotiation between the incumbent carrier and the competitive carrier. Id. The second method, applicable only to the extent voluntary negotiations fail, is arbitration of "any open

issue." Id. The Court held that the statutory terms "any open issues" make it clear that the freedom to arbitrate is as broad as the freedom to agree. Id. The Court also found that any issue on which a party seeks agreement and is unsuccessful, may then be submitted for arbitration. Id. The Court concluded that because nothing in the Act foreclosed the parties from voluntarily entering into a compensation mechanism for breaches of the agreement, the damages issue became an open issue which a party was entitled to submit for arbitration. Id. Thus, the Court found that we were obligated to arbitrate and resolve "any open issue." Id.

However, the Court distinguished between our obligation to arbitrate and our obligation to adopt a provision of this type. Id. at 1298. The Court stated that had we, as a matter of discretion, decided not to adopt this type of provision, that the complainant would bear a substantial burden attempting to demonstrate that the decision was contrary to the Act or arbitrary and capricious. Id. The Court further found that if this type of provision was truly required by the Act and could be adopted in a form that would not impose an unconstitutional burden, then any contrary Florida law would not preclude the adoption of such a provision. Id.

Pursuant to Section 252(c) of the Act, a State Commission in resolving any open issue and imposing conditions upon the parties to the agreement, shall ensure that the resolution and conditions meet the requirements of Section 251. In U.S. West Communications v. MFS Intelenet, Inc. et. al., 193 F. 3d 1112 (9th Cir. 1999), the Court stated:

> State Commissions impose "appropriate conditions as required" **only** to "ensure that such resolutions and conditions meet the requirements of section 251." 47 U.S.C. Sections 252 (b)(4)(c), 252 (c)(1). (emphasis added)

Id. at 1125. While "any open issue" may be arbitrated, we may only impose a condition or term required to ensure that such resolutions and conditions meet the requirements of Section 251.

We make our determination on whether or not to impose a condition or term based upon whether the term or condition is

required to ensure compliance with the requirements of Sections 251 or 252. Liability for damages is not an enumerated item under Sections 251 and 252 of the Act. The record does not support a finding that a liability for damages provision is required to implement an enumerated item under Sections 251 and 252 of the Act.

Based on the foregoing, we decline to impose the adoption of a liability in damages provision.

EE. Specific Performance

Here, we consider whether a specific performance provision should be included in the agreement.

1. Arguments

BellSouth witness Cox argues that specific performance is a remedy, not a requirement of Section 251 of the 1996 Act, nor is it an appropriate subject for arbitration under Section 252. Further, specific performance is either available (or not) as a matter of law. Witness Cox states that to the extent Supra can show that it is entitled to obtain specific performance under Florida law, Supra can make this showing without agreement from BellSouth.

Supra witness Ramos believes that the inclusion of specific performance provisions serve as a deterrent to BellSouth from failing to abide by the terms of the Follow-On Agreement or otherwise from committing egregious acts when the benefit to BellSouth exceeds its potential liability. Witness Ramos acknowledges that in Docket No. 000649-TP, we found, based upon record evidence, that a specific performance provision is not necessary to implement the requirements of Section 251 or 252 of the Act. He does believe that the record in this proceeding along with the findings of the commercial arbitration award should allow the language proposed by Supra to be included in this agreement. Witness Ramos further asks that if we find that such provisions do not meet the requirements of Sections 251 or 252 of the Act, that "there be no mention of any limitation of remedies."

2. Decision

As explained in the previous section, in its Order on the Merits, the federal Court made it clear we have the authority and the obligation pursuant to the Act to arbitrate "any open issue." MCI v. BellSouth, 112 F.Supp. 2d at 1297. However, the Court does make a distinction regarding whether we are obligated to adopt a specific performance provision. Pursuant to Section 252 (c) of the Act, a State Commission in resolving any open issue and imposing conditions upon the parties to the agreement, shall ensure that the resolution and conditions meet the requirements of Section 251. See also U.S. West Communications v. MFS Intelenet, Inc. et. al., 193 F. 3d 1112 (9th Cir. 1999). While "any open issue" may be arbitrated, we may only impose a condition or term required to ensure that such resolutions and conditions meet the requirements of Section 251. The record does not support a finding that a specific performance provision is required to implement an enumerated item under Sections 251 and 252 of the Act. As such, we decline to impose a specific performance provision when it is not required under Section 251 of the Act.

FF. CONCLUSION

We have conducted these proceedings pursuant to the directives and criteria of Sections 251 and 252 of the Act. We believe that our decisions are consistent with the terms of the Section 251, the provisions of FCC rules, applicable court orders and provision of Chapter 364, Florida Statutes.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the specific findings set forth in this Order are approved in every respect. It is further

ORDERED that Supra Telecommunications and Information Systems, Inc.'s Motion for Rehearing, Appointment of a Special Master, and Indefinite Deferral, filed on February 18, 2002, and orally modified at the March 5, 2002, Agenda Conference, is hereby denied. It is further

ORDERED that Supra Telecommunications and Information Systems, Inc.'s Motion for Indefinite Stay, filed February 21, 2002, is hereby denied. It is further

ORDERED that Supra Telecommunications and Information Systems, Inc.'s February 27, 2002, Motion for Oral Arguments on Procedural Question Raised by Commission Staff and Wrongful Denial of Due Process, is granted, in part, and denied in part, to the extent set forth in the body of this Order. It is further

ORDERED that the issues for arbitration identified in this docket are resolved as set forth with the body of this Order. It is further

ORDERED that the parties shall submit a signed agreement that complies with our decisions in this docket for approval within 30 days of issuance of this Order. It is further

ORDERED that this docket shall remain open pending our approval of the final arbitration agreement in accordance with Section 252 of the Telecommunications Act of 1996.

By ORDER of the Florida Public Service Commission this 26th day of March, 2002.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

WDK

DISSENT

Commissioner Palecki dissents from the Commission's decision on Issue B of the Arbitrated Issues in this Order.

COMMISSIONER PALECKI

I completely concur with my fellow Commissioners on all issues decided in this docket except for the single issue regarding whether this Commission should continue to be the forum for hearing disputes arising from Commission-approved interconnection agreements. I believe that refereeing these disputes between Florida's incumbent telephone companies and their competitors has been a poor use of Commission resources. Although I believe that our staff does an excellent job on these issues and that the Commission's decisions are well-supported and fair, Florida's ratepayers receive little value from these costly and inefficient exercises.

Section 364.337(5), Florida Statutes, grants the Commission continuing regulatory oversight over service provided by alternative local exchange companies for purposes of ensuring the fair treatment of all telecommunications providers in the marketplace. Section 364.162(2), Florida Statutes, authorizes (but does not require) the Commission to arbitrate disputes regarding interconnection agreements. Neither of these statutory provisions limit this Commission on how it shall arbitrate or ensure fair treatment. I believe these sections give the Commission adequate authority to require parties to engage in a two-part process that will conserve precious Commission resources, to include: (1) private arbitration to be paid for by the parties, followed by (2) a simple Commission review of the arbitrator's findings to ensure consistency with Commission policy and regulatory law.

At the March 5, 2002, agenda conference, Commissioner Baez suggested that this issue might be an appropriate matter to explore on a generic policy basis. I agree with my distinguished colleague.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.