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REDACTED

April 10, 2001

Mrs. Blanca Bayo, Director
Division of Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

RE: Notice of Confidential Filing - Docket No. 001305-TP – Supra's Motion For Reconsideration and Clarification of Commission Order No. PSC-02-0413-FOF-TP

Dear Mrs. Bayo:

Enclosed is the original and seven (7) redacted copies of Supra Telecommunications and Information Systems, Inc.'s (Supra) Notice of Service of its Motion For Reconsideration and Clarification of Commission Order No. PSC-02-0413-FOF-TP in the above captioned docket. Confidentiality is being claimed with respect to portions of the Motion For Reconsideration and Clarification.

We have enclosed a copy of this letter, and ask that you mark it to indicate that the original was filed, and thereupon return it to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Brian Chaiken

Brian Chaiken
General Counsel

DOCUMENT NUMBER-DATE
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FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE

Docket No. 001305-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Facsimile, Hand Delivery and/or Federal Express this 10th day of April, 2002 to the following:

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By: Brian Chaiken /AHS
BRIAN CHAIKEN, ESQ.

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 Filed on April 10, 2002

SUPRA'S MOTION FOR RECONSIDERATION AND CLARIFICATION

Pursuant to Rule 25-22.060, Florida Administrative Code, Supra Telecommunications & Information Systems, Inc. ("Supra") submits this Motion for Reconsideration and Clarification of Order No. PSC-02-0413-FOF-TP issued on March 26, 2002, by the Florida Public Service Commission ("Commission") in the above referenced docket.[1] Reconsideration and clarification are required because the Commission failed to consider evidence submitted into the record by Supra, misquoted and/or misapplied FCC Orders and other binding precedent, and, in many instances, simply adopted BellSouth's positions absent any record evidence in support thereof. In support of its Motion, Supra states as follows:

STANDARD OF REVIEW

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering an Order. See *Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So. 2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So. 2d 889 (Fla. 1962); *Pingree v. Quaintance*, 394 So. 2d 161 (Fla. 1st DCA 1981); and In re: Complaint of Supra Telecom, 98 FPSC 10, 497, at 510 (October 28, 1998) (Docket No. 980119-TP, Order No. PSC-98-1467-FOF-TP). This standard necessarily includes any mistakes of either fact or law made

by the Commission in its order. In re: Investigation of possible overearnings by Sanlando Utilities Corporation in Seminole County, 98 FPSC 9, 214, at 216 (September 1998) (Docket No. 980670-WS, Order No. PSC-98-1238-FOF-WS) ("It is well established in the law that the purpose of reconsideration is to bring to our attention some point that we overlooked or failed to consider or a mistake of fact or law"); see e.g. In re: Fuel and purchase power cost recovery clause and generating performance incentive factor, 98 FPSC 8, 146 at 147 (August 1998) (Docket No. 980001-EI, Order No. PSC-98-1080-FOF-EI) ("FPSC has met the standard for reconsideration by demonstrating that we may have made a mistake of fact or law when we rejected its request for jurisdiction separation of transmission revenues").

Furthermore, Supra seeks relief from this Order, pursuant to Rule 1.540(b) of the Florida Rules of Civil Procedure provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final . . . order . . . for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial or rehearing; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

In the course of this proceeding, Supra submitted approximately 404 pages of testimonies, as well as 115 exhibits containing thousands of additional pages. Despite its obligation to consider all of the evidence submitted by the parties, the Commission, in its Final Order, did not make one reference to a single exhibit submitted by Supra.

In this instance it is clear that the Commission relied exclusively upon the Staff Recommendation in drafting the Final Order On Arbitration. It is also quite apparent that the Commission Staff never considered Supra's testimonies, exhibits and post-hearing brief.

[1] Contemporaneous herewith, Supra is filing a Motion for Reconsideration on the portion of the Final Order denying Supra's Motion for Rehearing. Supra hereby incorporates that Motion as if fully set forth herein.

The Final Order On Arbitration never considered Supra's testimonies, exhibits or the factual and legal support substantiating Supra's positions. A reconsideration of the Final Order On Arbitration is not only warranted, but mandated by due process.

ARBITRATED ISSUES

A. Agreement Template.

> Issue: The issue before us is to determine which agreement template shall be used as the base agreement into which our decisions on the 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 final, arbitrated agreement.

Supra seeks to use the current agreement as the base agreement into which the Commission's decisions on the disputed issues will be incorporated. In support of its position, Supra provided evidence that the parties and the Commission are familiar with the current agreement[2], that BellSouth had accepted such requests from other ALECs in Florida[3], and that the Commission had approved such final, arbitrated agreements.[4]

As this Commission is undoubtedly aware, specific contract language changes can have far-reaching effects, effects that are arguably more pronounced upon the small competitor than upon a monopoly provider.

For instance, MCI Metro and AT&T were the first large CLECs to arbitrate interconnection agreements before this Commission following the Telecom Act of 1996. It is presumable that BellSouth offered them the same base contract to negotiate from. Yet, in arbitration order PSC-0810-FOF-TP, this very Commission held, "We believe that Section 36.1 read in conjunction with other provisions in the agreement related to pricing and BellSouth's obligation to provide AT&T with UNE combinations is plain and

[2] See Hearing Testimony of Ramos (TR 805-806). The current agreement has been approved for use in the state of Florida as well as having been the subject of various Commission proceedings and arbitrations.

unambiguous." While this language appears in MCI's interconnection agreement with BellSouth, its effect in that case is substantially modified by other language. No such modifying language appears in the AT&T agreement.

That is the exact point: slight language changes, which may not seem significant on their face, end up being extremely significant when a party seeks to enforce the other party's obligations. And that is why BellSouth has refused to allow Supra to negotiate from its current FPSC AT&T/BellSouth agreement. AT&T and MCI had the same language, yet MCI lost its position due to a slight modification of language.

Yet, BellSouth has now asked this Commission to throw out the parties' current agreement and arbitrate from a completely new agreement. This would extremely disadvantage Supra. Supra is familiar with its current agreement and has been trying to enforce that agreement for much of the last three years. Now, BellSouth would have Supra enter into an agreement that it is completely unfamiliar with. BellSouth, with its vast resources, is much more ready and able to negotiate from a completely new agreement than Supra is. In fact, while Supra had been engaged in intensive proceedings over the last several years merely to get BellSouth to comply with its current obligations, BellSouth had engaged Supra in this proceeding to arbitrate this new follow-on agreement, all the while refusing to negotiate from that current agreement. Start-up companies, such as Supra, barely have the resources to fight one battle at a time, much less two.

BellSouth, in arguing against the use of the parties' current agreement, argued that only BellSouth's template agreement that was attached to its complaint represents the

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[3] See Supra Exhibits OAR 68 and 69.
[4] See Commission's Order in Docket No. 000649-TP.

current state of the industry and changes in the law. However, a review of the record indicates that BellSouth failed to cite to any substantive changes in technology and law to support its argument. In fact, BellSouth's Hendrix, in response to questions by the Commission, testified that BellSouth did not identify the "massive changes" in law and technology[5]:

> COMMISSIONER PALECKI: I have just a couple. When you have massive changes such as those that you're referring to, basically, that requires that you **define what those massive changes are** with the other utility and then discuss what is acceptable to them and what is not acceptable; is that correct?
>
> THE WITNESS: That is correct.
>
> COMMISSIONER PALECKI: And is that something that you've attempted to do in this arbitration?
>
> THE WITNESS: **It is something that we attempted to do by way of finding out as to what their issues were. When we sent the initial agreement to Supra we sent them our standard.** And standard simply means that we have a -- we have an agreement where we include all of the major rulings, the change in law, and we keep it as an agreement, because there are many companies that will choose to use that as their starting point and not some of the older agreements. And we sent Supra a copy of our standard to include all of the changes that had taken place since and then, in a follow-up, redline of where we were with AT&T just to demonstrate as to what those changes were.
>
> COMMISSIONER PALECKI: You used the word massive changes a couple of times. And the way you get through a negotiation when you're talking massive is to break these massive things down into much smaller parts; is that not correct?
>
> THE WITNESS: Yes, sir, that is correct.
>
> COMMISSIONER PALECKI: **And by breaking them down into smaller parts, then it makes it so it's not so overwhelming for either party**, for BellSouth or for Supra. **It doesn't seem like that's occurred here, has it?**

[5] See Hearing Testimony of Hendrix (TR 140-143).

> THE WITNESS: **No. And it really hasn't**. We wanted very much for it to occur, because that is the way we do business with all of the other thousands of agreements that we have. In the segments that we will generally use are the administrators attachments. We will work through the general terms, we'll work through the resale attachment, we'll work through the collocation attachment, we'll work through the unbundled network attachment, we'll work through the billing attachment, and then we'll work through other attachments. There are about 15 different attachments, and those are the smaller parts that makes it very manageable. And usually, the section of the agreement that occupies a lot of the time is the UNE section, because in the UNE section there's just tons and tons of UNEs, and we need to ensure that we are sensitive and that we understand what the customer is asking for. We were not able to get there with Supra. We actually tried. Supra did not want to negotiate. They felt they needed network info before they could do that, and we were all baffled as to what that would actually add to the negotiation process, but breaking it down in smaller chunks is the appropriate way, and it is the way that we've done it since 1996. (Emphasis added.)

Hendrix admitted that BellSouth did not identify the "massive changes", as it simply provided Supra with its current template agreement and stated that it contained such changes; far from what was required by BellSouth to meet its burden of proof. Hendrix then goes on to try and blame BellSouth's failure in providing support for its allegations of substantial changes in law and technology on Supra.

BellSouth's lone attempt to actually identify changes in law came in the form of BellSouth's Supplemental Response to Supra's Interrogatory No. 5, dated August 10, 2001. In this Response, BellSouth once again stated that general changes had occurred and provided what BellSouth deemed to be examples of specific and prominent changes. It should be noted that these prominent changes failed to fill six pages and included duplicate cites as well as many items that were nothing more than changes in BellSouth's policy, items irrelevant to this Issue.

The prominent changes cited by BellSouth included such internal policy changes as:

- a refusal to agree to commercial arbitration[6],
- willingness to comply with the Commission's ruling on Performance Measurements[7],
- acceptance of amendments of new law or orders upon their effectiveness instead of when final and nonappealable[8],
- development of general procedures in accordance with a Disaster Recovery Plan[9], and
- BellSouth's desire to change the billing disputes process[10].

Prominent changes in technology included:

- BellSouth's cite to a new e-mail address for requests for Complex Resale and Switched Combination 319 Remand Products sent to the Complex Resale Support Group[11],
- opening of a new BellSouth Resale Service Center[12], and
- development of a Web site for the online posting of various BellSouth guides[13].

Prominent changes in law included:

- BellSouth's cite to the FCC's reaffirmation that enhanced services are not telecommunications services[14], and

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[6] See BellSouth's Supplemental Response to Supra Interrogatory No. 5, page 2.
[7] Id.
[8] Id.
[9] Id., at page 7.
[10] Id.
[11] Id., at page 3.
[12] Id.
[13] Id., at page 5.
[14] Id., at page 3.

- the FCC's clarification that ILECs must unbundle OSS throughout their service territory[15] (unsurprisingly, Section 10.2 of Attachment 15 of the parties' current agreement already provides that: "[Supra] and BellSouth agree that the same interfaces will be utilized for all states within the operating area of BellSouth unless the Parties mutually agree to do otherwise.").

As can be seen in the various examples provided by BellSouth in support of its argument, these are not prominent changes in law or in technology, they do not support BellSouth's argument and they are not sufficient to support the Commission's ruling. Furthermore, given the current state of word processing technology, Supra is at a loss as to why any "massive changes" in law and technology could not have simply been "red-lined" into the parties' current, FPSC approved agreement. Surely, if BellSouth's claim regarding "massive changes" in law and technology had any validity whatsoever, BellSouth would have had the technology allowing it to simply incorporate such changes into the base agreement the parties were, and still are, currently using.

Of course, this was not done because BellSouth's changes do not represent "massive changes" in law and technology, but instead represent a complete overhaul of what obligations BellSouth seeks to limit itself to.

The Commission, without pointing to any evidence in the record, simply accepted BellSouth's argument that there would need to be massive changes to the current agreement in order to reflect the changes in law and technology[16] and found that BellSouth's current template agreement already incorporated such massive changes and

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[15] Id., at page 4.
[16] See Hearing Testimony of Hendrix (TR 108-109).

ordered that BellSouth's most current template agreement serve as the parties' base agreement. Moreover, Commissioner Palecki, at the March 5, 2002 Hearing, stated:

> Well, my belief is that using Supra's existing agreement as a base agreement would not have been completely unreasonable, but I think it would have been highly inefficient to not recognize the updates that BellSouth has incorporated to reflect changes in the law and in the industry. And I believe that, comparing the two documents, that BellSouth's most current update as to the -- its most current interconnection agreement is the best template for a base agreement onto which our decisions today would be incorporated.[17]

Despite this Commissioner's belief that the use of the existing agreement as the base agreement was reasonable, the entire Commission held that BellSouth's proposed template reflected the changes in law and the industry. However, there is insufficient evidence, if any at all, in the record to support such a conclusion.

Moreover, the Commission, which erroneously held that BellSouth's most current template agreement, filed with its petition for arbitration, was the only interconnection agreement produced in its entirety in this arbitration[18], ordered that BellSouth's **most** current template agreement be used by the parties as the base agreement. BellSouth's most current template agreement is not in the record in this proceeding.

As it was BellSouth's claim that "massive changes" would be required to reflect the changes in law and technology, BellSouth had the burden to substantiate such a claim. Absent BellSouth meeting its burden, if it was the Commission's belief that there were, in fact, considerable changes in law and technology that would necessitate the use of an entirely new base agreement as a starting point for negotiations, the Commission could have used its ability to propound discovery on the parties to obtain evidence to submit

[17] See March 5, 2002 Hearing Transcript (TR 58-59).
[18] Supra's Hearing Exhibit 4 was a complete copy of the 1997 AT&T/BellSouth Florida Interconnection Agreement as adopted by Supra and approved by this Commission.

into the record. In this instance, the record is bare of any such evidence that can support the Commission's conclusion.

As a result of BellSouth's failure to meet its burden of proof as well as the lack of any competent and substantial evidence in the record to support the Commission's holding, Supra requests that this Commission reconsider its decision and require the parties use the AT&T agreement adopted by Supra as the base agreement.

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

Issue: What are the appropriate fora for the submission of disputes under the new agreement?

Supra seeks to keep the same alternative dispute resolution provisions contained in the parties' current, Commission-approved agreement: namely, to have all contractual disputes decided by private, commercial arbitrators. This would accomplish the following:

- unburden this Commission from having to adjudicate contractual disputes
- provide a speedy means of resolving disputes
- place the onus on the parties, as opposed to telecommunications rate-payers, to pay for the costs of such disputes
- allow the parties to recover damages should they be so entitled.

As commercial arbitration awards are subject to judicial review, and may only be enforced by the courts, there is no serious or legitimate threat of arbitration awards which would vary from existing law.

Despite previously approving this provision in the past, the Commission has now fallen in line with BellSouth's position, and held that 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 include a negotiated provision addressing this issue, or no provision at all."

Amazingly, the Commission actually cites to the testimony of BellSouth witness Cox, who testified as follows:

> 17 Q Ms. Cox, isn't it true that you've never had any
>
> 18 personal experience in commercial arbitration proceedings?
>
> 19 A Yes, that is correct. I personally have never been
>
> 20 involved in a commercial arbitration.
>
> 21 Q And you have no direct knowledge of any of
>
> 22 BellSouth's experiences in commercial arbitration proceedings?
>
> 23 A I have knowledge of BellSouth's experience. I have
>
> 24 not personally been in -- I'm not sure when you say direct
>
> 25 knowledge, but I have not been in a commercial arbitration.
>
> 248
>
> 1 Q Have you -- well, isn't it true that you've never
>
> 2 actually sought to choose commercial arbitrators for an
>
> 3 arbitration case?
>
> 4 A That's correct, I have not personally chosen
>
> 5 arbitrators for a commercial arbitration.

See Hr. Tr. Vol. II, pgs. 247-48. Nevertheless, the Commission cites to this witness for the proposition that commercial arbitration is time-consuming, costly and impractical, and that it is difficult to find knowledgeable commercial arbitrators.[19]

It is not disputed that this Commission has no authority to award a wronged party damages. Supra submitted substantial evidence of BellSouth's tortious intent to harm Supra. See Exhibit OAR-3. This Commission has completely ignored this evidence, and has failed to address Supra's significant and well-founded concerns regarding its ability, in the future, to seek redress for BellSouth's harmful actions.

Furthermore, in light of the recent case of *BellSouth Telecommunications Inc. v. MCImetro Access Transmission* Services, et al., 2002 U.S. App. Lexis 373 (11th Cir. 2002),[20] Supra is compelled to address this Commission's flawed interpretation of the resulting, binding precedent that removes jurisdiction from this Commission to resolve interconnection contractual disputes.

The Commission failed to cite any authority for two key legal conclusions.

The first unsubstantiated legal conclusion is that Section 364.162(1), Florida Statutes, "**expressly confers**" upon the Commission the authority to resolve disputes arising out of previously approved agreements. The Commission's Decision, contained on pages 35-39, simply quotes the language of Section 364.162(1), Florida Statutes, after making the legal conclusion that such language "expressly confers" the authority to resolve allegations of breach of contract involving previously approved interconnection agreements. The language in the Order failed to cite to any authority which substantiates its conclusion that the applicable language is in fact an express delegation of authority.

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[19] Final Order, pgs 28-9.

The Decision also failed to offer any "legal" analysis whatsoever on "how" Section 364.162(1), Florida Statutes, provides an "express" delegation of quasi-judicial authority to adjudicate breach of contract disputes.

The second unsubstantiated legal conclusion is simply a variation of the same issue above, regarding whether Section 364.162(1), Florida Statutes, is in fact an "express" delegation of "quasi-judicial" authority. The language in the Order makes the legal conclusion that Section 364.162(1), Florida Statutes, "**is clearly an assignment of quasi-judicial authority**." The Decision, however, failed to cite to any authority for this proposition. Moreover, the Decision is void of any "legal" analysis as to "how" this language is in fact a "clear assignment of quasi-judicial authority."

The above noted "legal conclusions" **require** that the Commission employ Florida case law as it relates to these legal conclusions.

No dispute regarding plain meaning of the language.

The Commission's Decision is void of any case law to substantiate a legal conclusion that Section 364.162(1), Florida Statutes, is clear and unambiguous on its face. In fact, the Decision does not even contain an assertion that Section 364.162(1), Florida Statutes, is clear and unambiguous on its face. The Commission's Decision only contains the two legal conclusions outlined above asserting that the provision (1) "expressly confers", (2) "quasi-judicial authority."

Notwithstanding this vacuum in the Order, Supra will note that the Commission Staff has on a previous occasion cited to *Verizon Florida, Inc. v. Jacobs, Jr.*, 27 Fla. L. Weekly S137 (Fla. 2002), for the proposition that "under Florida rules of statutory

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[20] This case was brought to the attention of this Commission by Supra, not BellSouth, despite the fact that BellSouth was a party to the decision.

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." *See footnote number 3, Commission Staff Recommendation, dated February 25, 2002.*

The first obstacle for the Commission is that this case and its proposition are not included in its Decision. The second obstacle for the Commission – in the event that the Commission seeks to incorporate this authority at a later point – is that the Staff failed to follow the rules of construction in determining the plain and ordinary meaning of the words used in Section 364.162(1), Florida Statutes. *See Rollins v. Pizzarelli*, 761 So.2d 294, 297 (Fla. 2000) (where the Court ruled that in the absence of statutory definition, the plain and ordinary meaning can be ascertained by reference to a dictionary or to definitions of the same term found in case law).

Provision confers quasi-legislative authority – at most.

There is no dispute that the "clear and unambiguous" legislative intent of Section 364.162(1), Florida Statutes, is to confer quasi-legislative power upon the Commission to revisit previously set rates or prices. This conclusion is consistent with the Staff's assertion that "there is no need to resort to other rules of statutory construction when the language of the statute is unambiguous and conveys a clear and ordinary meaning." *Verizon Florida, Inc. v. Jacobs, Jr.*, 27 Fla. L. Weekly S137 (Fla. 2002).

Section 364.162(1), Florida Statutes, reads in part:

> The Commission shall have the authority to **arbitrate** any dispute regarding interpretation of interconnection or resale **prices** and terms and conditions. (Bold and underline added for emphasis).

According to the American Heritage Dictionary, Third Edition, the term "arbitrate" means to settle a dispute. This resource also defines "price" to mean the cost

for which something is obtained. Accordingly, the plain and ordinary meaning of this statutory provision is that the Commission is authorized to "settle a dispute" regarding a previously approved "price" – whether that "price" was set by negotiation or by order of the Commission.

The conjunctive term "and" must also be given its plain and ordinary meaning. *See CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1224 (11th Cir. 2001) ("The 'plain' in 'plain meaning' requires that we look to the actual language used in a statute"). The American Heritage Dictionary, Third Edition, defines the word "and" to mean: "Together with or along with." Accordingly, the Commission is duty bound to interpret the word "and" as commonly defined in the dictionary or in case law. Therefore, the plain reading of the provision at issue before the Commission today must be as follows:

> The Commission shall have the authority to **arbitrate** any dispute regarding interpretation of interconnection or resale **prices [together with]** terms [**together with**] conditions. (Bold added for emphasis).

The use of the conjunctive "and" requires, at a minimum, that the Commission limit its dispute resolution authority to "terms and conditions" **related** to "prices," and "prices" only. This plain and ordinary meaning is consistent with the Commission's well-established, quasi-legislative ratemaking authority.

Statute to be read as a whole.

"Once the [legislative] intent is determined, the statute may then be read as a whole to properly construe its effect." *M. Joshua v. City of Gainesville*, 768 So.2d 432, 435 (Fla. 2000). When Section 364.162, Florida Statutes, is read as a whole it becomes evident that the provision at most involves the quasi-legislative ratemaking powers of the Commission.

Before examining Section 364.162, Florida Statutes, as a whole, it is important to review the legal precedent requiring the Commission to cite to statutory authority before the Commission may revisit a previously approved rate. *See Sunshine Utilities v. Florida Public Service Commission*, 577 So.2d 663 (Fla. 1st DCA 1991) (where the Court affirmed that the Commission, under "*pertinent statutes*," has the authority to modify previously approved "*final rate orders*.")

As outlined above, Supra does not dispute that the Commission has the authority, in its quasi-legislative capacity, to "revisit" previously approved rates or prices – irrespective of where those rates or prices are contained, be it contained in a Commission order or a previously approved interconnection or resale agreement. Supra's dispute involves the erroneous legal conclusion that the plain and ordinary language of Section 364.162(1), Florida Statutes, can be "interpreted" to confer upon the Commission the quasi-judicial power to adjudicate breach of contract disputes involving matters other than previously approved "rates" or "prices."

Under *Sunshine Utilities v. Florida Public Service Commission*, *supra*, the Commission must be able to cite to a *statute* before the Commission is permitted to "revisit" a previously approved rate. If the Commission is required to cite to a statute before it can revisit a previously approved "rate," then it only follows that the Commission must also be required to cite to a statute before it is permitted to revisit a previously approved "price." Accordingly, the last sentence of subsection (1) of Section 364.162(1), Florida Statutes, is the **"necessary statutory authority"** the Commission would be required to cite before the Commission engaged in its well established quasi-legislative authority or ratemaking that no one is disputing.

As an aside, the Court in *Sunshine Utilities v. Florida Public Service Commission, supra*, does describe an inherent power to modify previously approved "rates," but this power is "not without limitations." *Id.* at 666. The Commission's inherent power to alter a previously approved "rates," is limited to "extraordinary circumstances." *See Richter v. Florida Power Corporation*, 366 So.2d 798, 800 (Fla. 2nd DCA 1979) *cited* by *Sunshine Utilities v. Florida Public Service Commission*, 577 So.2d 663 (Fla. 1st DCA 1991). In the case before the Commission, at this time, this limited inherent power would <u>not</u> be <u>legally relevant</u> to the question regarding whether the Commission has the quasi-judicial authority to adjudicate a breach of contract dispute that does <u>not</u> involve a previously approved rate or price.

After having examined the legislative intent behind the language found within subsection 384.162(1), Florida Statutes - the statute may be read as a whole to properly construe its effect. *M. Joshua v. City of Gainesville*, 768 So.2d 432, 435 (Fla. 2000). Consistent with the foregoing, Section 364.162, Florida Statutes, **expressly** deals with the Commission's power **<u>to set prices and rates</u>** for interconnection and resale agreements.

Each and every subsection under Section 364.162, Florida Statutes, is consistent with the Commission's well-established quasi-legislative ratemaking authority. Section 364.162, Florida Statutes, uses phrases like:

> (1) . . . **if** a negotiated **price** is **not established**, . . . party may petition the commission to **establish** . . . **rates**, terms and conditions . . .
> (2) . . . **set** nondiscriminatory **rates**, terms and conditions, except that the rates shall not be below cost.
> (3) In **setting** the local **interconnection charge** . . . determine . . . charge is **sufficient to cover the cost** of furnishing interconnection.
> (4) **ensure** that . . . if the rate it sets for a service or facility to be resold **provides a discount below the tariff rate** for such service . . . The commission shall ensure that this **rate is not so high** that **it would serve as a barrier to competition**.

Consistent with the language utilized above, the Florida Supreme Court has repeatedly affirmed that the **Commission's essential function** is as a "**regulator of rates**." *Southern Bell Tel. And Tel. Co. v. Florida Pub. Serv. Comm'n*, at 783. Likewise, this recognition of the Commission's well-established ratemaking authority, is consistent with the 11th Circuit's decision in *BellSouth Telecommunications Inc. v. MCImetro Access Transmission* Services, et al., 2002 U.S. App. Lexis 373 (11th Cir. 2002) ("*BellSouth v. MCIMetro Access Transmission Services, Inc*") in which the court explained that lower courts should give deference to Commission orders on matters, **like rate-setting**, that fall within the Commission's **distinct area of expertise**. The 11th Circuit wrote:

> **Ratemaking is a legislative function** . . . delegated to the members of the Commission. To this extent, and to this extent only, the Commission is . . . charged as a lawmaking body, and so long as it does not itself act in an unconstitutional manner the courts do not have a right to interfere. [Citations omitted] (**The function of making . . . rates is legislative in nature, and such rates cannot be judicially fixed by the courts.**). (Emphasis added). *BellSouth Telecommunications Inc. v. MCIMetro Access Transmission Services, 00-12809 and 00-12810,* at page 46.

If such rates "cannot be judicially fixed," it only follows that such rates cannot also be judicially modified. Given this analysis by the Court of the 11th Circuit, it is evident that the clear and unambiguous language used in Section 364.162, Florida Statutes, is consistent with the 11th Circuit holding that ratemaking is a legislative function. Accordingly, at most, Section 364.162(1), Florida Statutes, simply allows the Commission **to review a price or rate**, within a resale or interconnection agreement, **to ensure that the price or rate is appropriately set**, in accordance with Commission rules, statutes, past orders and in particular the guidelines set out in s. 364.162, Florida

Statutes. Nothing more. Again, this interpretation is consistent with the well-established, quasi-legislative ratemaking authority conferred upon the Commission.

Section 364.162(1), Florida Statutes, is susceptible to more than one reasonable interpretation.

"Ambiguity suggests that reasonable persons can find different meanings in the same language." *Rollins v. Pizzarelli*, 761 So.2d 294 297 (Fla. 2000). (Underline added for emphasis). Consistent with this legal maxim, reasonable persons can differ regarding whether the language utilized by the Florida legislature in Section 364.162(1), Florida Statutes, is in fact an express delegation of quasi-judicial authority. When a provision "is susceptible to more than one reasonable interpretation, it is necessary to resort to principles of statutory construction to ascertain legislative intent." *Id. See* also *Streeter v. Sullivan*, 509 So.2d 268, 271 (Fla. 1987) (where the court held that where statutory provisions are "even slightly ambiguous, an examination of legislative history and statutory construction principles [is] necessary").

The Commission's Decision is void of any analysis as to "how" the language of Section 364.162(1), Florida Statutes, is an express delegation of quasi-judicial authority. Supra, on the other hand, has demonstrated in this document that the language at issue is consistent with the Commission's well-established, quasi-legislative ratemaking authority. Accordingly, it is fair to conclude that the language utilized in Section 364.162(1), Florida Statutes, is "ambiguous" as "reasonable persons can find different meanings in the same language." *Rollins v. Pizzarelli*, 761 So.2d 294 297 (Fla. 2000). As such, the language's ambiguity requires that the Commission resort to the rules of construction to discern whether the Florida legislature intended Section 364.162(1), Florida Statutes, to be an express delegation of quasi-judicial authority.

In this instance there is no need to resort to legislative history. The Commission "has tools at its disposal for elucidating the meaning of a statute without reverting to legislative history." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225 (11th Cir. 2001). "These tools are the canons of construction." *Id.* "The canons of construction are 'interpretive tools, . . . which are no more than rules of thumb that help courts determine the meaning of legislation.'" *Id.* "The canons assist the Court in determining the meaning of a particular statutory provision by focusing on the broader, statutory context." *Id.* The "canons allow courts to avoid look[ing] at one word or term in isolation, but instead [allows us to] look at the entire statutory context." *Id.*

"One benefit of applying canons of construction, rather than considering legislative history, is that their application does not require resort to extrinsic material." *Id.* "Instead, the canons of construction focus on the text actually approved by Congress and made a part of our country's laws." *Id.* "As the [United States] Supreme Court's recent opinion in *Circuit City* [citation omitted] confirms, where the meaning of a statute is discernible in light of canons of construction, we should not resort to legislative history or other extrinsic evidence." *Id.* "Canons of construction are essentially tools which help us to determine whether the meaning of a statutory provision is sufficiently plain, in light of the text of the statute as a whole, to avoid the need to consider extrinsic evidence of Congress' intent." *Id.* In our case, there is no need to resort to extrinsic evidence such as the legislative history.

Employing the canons of construction

As stated at the outset, the Commission's Decision includes a legal conclusion that Section 364.162(1), Florida Statutes, "**expressly confers**" upon the Commission

quasi-judicial authority to adjudicate a breach of contract dispute – arising out of a previously approved resale or interconnection agreement - that does not involve a previously approved rate or price. The language in the Order, however, failed to cite to any authority to substantiate the proposition that Section 364.162(1), Florida Statutes, is in fact an express delegation of authority. The conclusion is simply made in a vacuum. The Decision also failed to offer any "legal" analysis whatsoever on "how" Section 364.162(1), Florida Statutes, provides this "express" delegation of "quasi-judicial authority."

As reiterated at the outset, the second unsubstantiated legal conclusion is simply a variation of the same issue above. The language in the Order makes the legal conclusion that Section 364.162(1), Florida Statutes, "**is clearly an assignment of quasi-judicial authority**." The Decision, however, failed to cite to any authority for this proposition. Moreover, the Decision is void of any "legal" analysis as to "how" this language is in fact a "clear assignment of quasi-judicial authority."

In addition to the fact that the language utilized by the Florida legislature in Section 364.162(1), Florida Statutes, is susceptible to more than one interpretation (*Rollins v. Pizzarelli*, 761 So.2d 294 297 (Fla. 2000)), the above noted "legal conclusions" **require** that the Commission employ Florida case law as it relates to these legal conclusions.

Legislature presumed to know existing law.

The first legal maxim to be considered in the Commission's analysis is that the Florida "legislature is presumed to know the existing law when it enacts a statute." (Citation omitted). *M. Joshua v. City of Gainesville*, 768 So.2d 432, 438 (Fla. 2000). The

Florida legislature is presumed to know existing "judicial decisions on the subject" as well. *Id.* Accordingly, consistent with these canons of construction, the Commission must presume that the Florida legislature had knowledge of the following case law regarding the explicit delegation of quasi-judicial authority to regulatory agencies, at the time it enacted Section 364.162(1), Florida Statutes.

Legal Maxim: it must be "explicit."

"Where a . . . commission . . . or agency is lawfully given . . . quasi-judicial authority or duties, such authority or duties must not include any substantive . . . judicial powers that may not be delegated; and such authority must be **duly defined** and limited by laws . . . **in prescribing** delegated authority . . ." *Canney v. Board of Public Instruction of Alachua County*, 278 So.2d 260 (Fla. 1973). (Double emphasis added). Consistent with this principle, is the decision by the Florida Supreme Court in which the Court considered the validity of the authority delegated under Section 364.07(2), Florida Statutes, the Court wrote:

> Giving the Commission this authority did not offend against any principle proscribing the exercise of judicial authority by a quasi-judicial body. *See Southern Bell Telephone and Telegraph Company v. Florida Public Service Commission*, 453 So.2d 780, 783 (Fla. 1984).

In accordance with the foregoing, it is legally improper for the Commission to attempt to conclude that it has "implied" quasi-judicial authority to adjudicate disputes. All such authority must be explicitly delegated. The Court in *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services,* Inc., et al., 2002 U.S. App. Lexis 373 (11th Cir. 2002) ("*BellSouth v. MCIMetro Access Transmission Services, Inc*"), also addressed the issue of explicit delegation of authority. The Court stated:

> Without **explicit** statutory instructions to the contrary, it would be inappropriate for this court to find that the Georgia legislature intended that a question of law should be answered by an unqualified body like the GPSC and not by a court. (Double emphasis added). *Id.* at 43.

Consistent with the case law cited above, the Commission is required to identify an explicit delegation of quasi-judicial authority permitting the Commission to adjudicate breach of contract disputes regarding the entire previously approved interconnection agreement. As will be addressed below, pursuant to the statutory rules of construction, Section 364.162(1), Florida Statutes, cannot be considered an explicit delegation of quasi-judicial authority by any standard.

Moreover, BellSouth continues to argue that the Commission has "implied authority" to adjudicate disputes under Section 364.337, Florida Statutes. It should be noted that the issue of "implied authority" has already been rejected by the 11th Circuit Court of Appeals in *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.* The 11th Circuit Court noted that while it is true that the Georgia Public Service Commission does have a "general supervision of all" telecommunications companies in the State of Georgia, "there are limits to this power." *Id.*, at 44.

In addressing the Georgia Commission's limits, the Court added that "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." *Id.*, at page 42. The 11th Circuit Court found that a "general jurisdiction over telephone companies", is not a sufficient legal basis for the Commission to cite as authority to adjudicate breach of contract disputes involving previously approved interconnection agreements.

Legal Maxim: legislature acts "intentionally" and "purposely."

After understanding the legal maxim that quasi-judicial authority must be explicit and defined with particularity, the Commission must employ the next canon of construction; that the Florida legislature is presumed to "act intentionally and purposely" when it includes language in one statutory provision and then excludes that same language from a separate statutory provision. *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225-1226 (11th Cir. 2001). This above noted canon of construction must be employed because Chapter 364, Florida Statutes, already contains an example of an "express" delegation of quasi-judicial authority. The example of an express delegation of quasi-judicial authority to adjudicate disputes is Section 364.07(2), Florida Statutes.

Section 364.07(2), Florida Statutes, entitled "Joint contracts; intrastate interexchange service contracts," reads as follows: "The commission is also authorized to **adjudicate** disputes among telecommunications companies **regarding such contracts** or the **enforcement thereof**." (Bold added for emphasis).

First, this statutory provision does not provide the Commission with the authority to adjudicate disputes arising out of previously approved interconnection agreements. *Southern Bell Tel. And Tel. Co. v. Florida Pub. Serv. Comm'n*, 453 So.2d 780, 781 (Fla. 1984). This provision refers only to intrastate interexchange service contracts, and not interconnection agreements. *Id.* The Court in *Southern Bell Tel. And Tel. Co. v. Florida Pub. Serv. Comm'n*, determined that the use of the terms and phrases "**adjudicate** disputes . . . **regarding such contracts** or **the enforcement thereof** . . ." were sufficient for the Court to find that the use of this language was a proper assignment by the Florida

legislature of quasi-judicial authority, permitting the Commission to hear disputes with respect to interexchange service contracts. *Id.* at 781.

Second, the phrase "adjudicate" disputes is **very specific**; and that the phrase "regarding such contracts" is **purposely broad** – encompassing the entire interexchange agreement. Another rule of construction that must be noted here is that "we must presume that [the Florida legislature] said what it meant and meant what it said." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1223 (11th Cir. 2001).

The Court in *Southern Bell Tel. And Tel. Co. v. Florida Pub. Serv. Comm'n*, set the standard for what is an explicit delegation of quasi-judicial authority. The standard is defined by the terms and phrases "**adjudicate**" disputes and "**regarding such contracts**." Whenever the legislature utilizes these same terms, it is safe to assume that a proper delegation of quasi-judicial authority has occurred. This dovetails back to the legal maxim that where the Florida legislature "includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that [the Florida legislature] acts intentionally and purposely in the disparate inclusion and exclusion." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1226 (11th Cir. 2001).

Therefore, as the Supreme Court has already ruled upon the validity of the explicit, delegated authority under Section 364.07(2), Florida Statutes, the Commission is duty bound to evaluate Section 364.162(1), Florida Statutes, in light of the Court's analysis of Section 364.07(2), Florida Statutes.

The next rule of construction the Commission failed to employ was the maxim that the Florida legislature "includes particular language in one section of a statute, but

omits it in another section of the same Act, it is generally presumed that [the Florida legislature] acts intentionally and purposely in the disparate inclusion and exclusion." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1226 (11th Cir. 2001). The language utilized in Section 364.162(1), Florida Statutes, must be examined with this legal principle in mind. Section 364.162(1), Florida Statutes, reads in part: "The Commission shall have the authority to **arbitrate** any dispute regarding interpretation of interconnection or resale **prices** <u>and</u> terms <u>and</u> conditions." (Bold added for emphasis).

The Commission is duty bound to presume that the Florida legislature "intentionally and purposely" chose to use <u>different</u> language in the above-cited provision, than the language utilized in Section 364.07(2), Florida Statutes. *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225-1226 (11th Cir. 2001). The Florida legislature "well knows how to express itself." *Rollins v. Pizzarelli*, 761 So.2d 294, 298 (Fla. 2000).

Section 364.162(1), Florida Statutes, uses <u>none</u> of the language found in Section 364.07(2), Florida Statutes. There is <u>no</u> "adjudicate" disputes. There is <u>no</u> "regarding such contracts." There is <u>no</u> "enforcement thereof." As stated above, the Florida legislature is presumed to have "said what it meant and meant what it said." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1223 (11th Cir. 2001).

As such, the Commission must conclude that the Florida legislature intentionally and purposely intended that the language in Section 364.162(1), Florida Statutes, have a <u>different</u> and <u>more limiting meaning</u> than the language utilized in Section 364.07(2), Florida Statutes. *See Rollins v. Pizzarelli*, 761 So.2d 294, 299 (Fla. 2000) (where the

court affirmed that when the Florida legislature uses different terms in different portions of the same statute, the legislature intends different meanings).

Significantly, the Florida legislature used different terms in different portions of the same Chapter 364, Florida Statutes. As such, the Florida legislature is presumed to have intended a different and more limiting meaning.

Section 364.162(1), Florida Statutes, uses phrases like: (1) "arbitrate" a dispute, as opposed to "adjudicate" a dispute. The Florida legislature could have utilized the term "adjudicate" again. **It chose not to**. The word "adjudicate" has already been found to be an appropriate term, to be utilized by the Florida legislature, when the legislature wishes to delegate quasi-judicial authority. *See M. Joshua v. City of Gainesville*, 768 So.2d 432, 438 (Fla. 2000) ("noting Florida's well settled rule of statutory construction that the legislature is presumed to know the existing law where a statute is enacted, including 'judicial decisions on the subject concerning which it subsequently enacts a statute.'").

Accordingly, the Commission is duty bound to find that at the time the legislature adopted the language in Section 364.162(1), Florida Statutes, the legislature was well aware of the 1984 decision of the Florida Supreme Court in *Southern Bell Tel. And Tel. Co. v. Florida Pub. Serv. Comm'n*, 453 So.2d 780, 781 (Fla. 1984), *Canney v. Board of Public Instruction of Alachua County*, 278 So.2d 260 (Fla. 1973), and all other cases related to explicit delegation of quasi-judicial authority. Likewise, the Commission is duty bound to find that the legislature intended a different meaning when it chose to utilize language different than the language utilized in Section 364.07(2), Florida Statutes. *See Rollins v. Pizzarelli*, 761 So.2d 294, 299 (Fla. 2000).

As such, and in accordance with the rules of statutory construction, the use of the term "arbitrate" **requires a different and more limiting meaning** with respect to the power granted in this section. *See CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225-1226 (11th Cir. 2001).

The Florida legislature also expressly limited the scope of this provision by using the phrase: "**regarding** interpretation of . . . **prices**", as opposed to the much broader phrase "**regarding such contracts.**"

At this point it is necessary to employ the maxim that legislative intent is discernable from the plain meaning of the language. *See CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1224 (11th Cir. 2001) ("The 'plain' in 'plain meaning' requires that we look to the actual language used in a statute"). The actual language used by the legislature is clear and unambiguous: the Commission's authority is limited to "arbitrat[ing]" disputes regarding "prices." The legislature did not say to "arbitrate" disputes "regarding such contracts." The legislature knew how to express itself, but it chose to use different language.

Accordingly, the Commission is duty bound to attribute to the phrase "regarding interpretation of . . . prices" its plain and ordinary meaning. The Commission cannot conclude that the language utilized in Section 364.162(1), Florida Statutes – in particular "regarding interpretation of . . . prices" – confers the same authority as the phrase "regarding such contracts."

When read in conjunction with the phrase "arbitrate any dispute," the second phrase "regarding . . . prices" is strongly indicative that the Commission's role is

consistent and limited to reviewing and deciding disputes involving prices and rates **only**. This quasi-legislative power is well established and not in dispute.

It is evident that the phrase "prices and terms and conditions" **cannot** be interpreted to mean the "entire agreement." Again, and consistent with all of the legal maxims cited earlier herein, this is because the Florida legislature is presumed to act "intentionally and purposely" when it includes language in one provision and then excludes the same language in another. *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225-1226 (11th Cir. 2001). As such, Section 364.162(1), Florida Statutes, cannot be said to be an explicit delegation of quasi-judicial authority. At most, the Commission can conclude that the language regarding "disputes regarding interpretation of prices" is limited to reviewing previously approved rates and prices – consistent with its well-established quasi-legislative authority.

Conclusion

The language utilized by the Florida legislature in Section 364.162(1), Florida Statutes, is limiting in nature and does not utilize any of the same terms used in Section 364.07(2), Florida Statutes. As such, the different and much narrower language must be given different meaning. *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1225-1226 (11th Cir. 2001). *See also Rollins v. Pizarelli*, 761 So.2d 294, 299 (Fla. 2000). Accordingly, as Section 364.162(1), Florida Statutes, lacks the specific terms and phrases utilized in Section 364.07(2), Florida Statutes, as a matter of statutory construction, the Florida legislature intentionally and purposely intended that Section 364.162(1), Florida Statutes, must have a different and more limited meaning and scope.

As such, while Section 364.07(2), Florida Statutes, can be considered a proper delegation of quasi-judicial authority, the same cannot be said of Section 364.162(1), Florida Statutes. Accordingly, Section 364.162(1), Florida Statutes, cannot be relied upon as authority to adjudicate disputes arising out of previously approved interconnection agreements.

The Decision failed to acknowledge the binding and controlling nature of the 11th Circuit's Decision published on January 10, 2002.

The Commission's Decision gratuitously suggests that Supra's "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." *See Pg. 20, Commission Decision*. On the contrary, this is Supra's **strongest** leg.

The sole issue raised by Supra was that the 11th Circuit's decision was binding and controlling the day it was published on January 10, 2002. BellSouth argued that it was not because there was still time for reconsideration of the decision, and therefore the Commission could, and did, ignore the decision. The Commission Staff agreed with BellSouth's argument. The problem for the Staff was that the issue raised by Supra was not simply legal "argument", it was a recitation of law. There is no debate regarding the legal conclusion that the 11th Circuit's decision is binding and controlling, regardless whether any motions for reconsideration have been filed or ruled upon.

On January 10, 2002, the 11th Circuit Court published its decision in *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.* (00-12809) and *BellSouth Telecommunications, Inc. v. Worldcom Technologies, Inc.* (00-12810) (hereinafter "*BellSouth Telecommunications, Inc. v. MCIMetro*"). The Court held:

"Instead, we find that the GPSC had no jurisdiction to issue the orders in this case under federal or state statutory bases it cited in its orders." *Id.*at pg. 23. (Emphasis added). As of January 10, 2002, this published opinion became binding and controlling authority in the 11th Circuit. *See Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992). This legal conclusion is not debatable.

BellSouth filed its Response to Supra Motion for Supplemental Authority on February 1, 2002. In regards to whether the 11th Circuit's decision had the force of law, BellSouth stated the following:

> Supra is incorrect in stating that the Eleventh Circuit's decision is 'controlling.' That decision is a nonfinal order, involving a split panel. Reconsideration and even reconsideration en banc is still available. *See para 6 of BellSouth Response.*

The Staff filed a Recommendation on February 7, 2002, in which the Staff addressed the issue regarding the force of law. The Staff wrote:

> The ruling is not as yet final, as time for filing a motion for rehearing has not passed and a mandate has not been issued, and so it does not presently have the force of law.

The Staff ignored the opinion in *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992), in which the Court stated:

> The delay in issuing a mandate – as pointed out by Staff – 'in no way affects the duty of this panel and the courts in this circuit to apply now the binding precedent established by [in our case *BellSouth v. MCI* case] as binding authority.'

Supra cited this episode as indicative of Staff bias in favor of BellSouth, because the Staff **never** made any effort to verify whether the decision had the force of law. Staff blindly accepted BellSouth's position as the correct position.

As later pointed out by Supra, a simple telephone call to the Clerk's Office of the 11th Circuit would have confirmed for Staff that what BellSouth was suggesting was incorrect, as a matter of law.

Further evidence of Staff bias is Staff's decision to omit the above-cited legal conclusion from the Revised Staff Recommendation and then to pretend that Staff never made such a conclusion. Staff issued a Revised Staff Recommendation on February 25, 2002. The Staff completely deletes its legal conclusion that the 11th Circuit's decision does not have the force of law. Staff writes:

> The affect of the 11th Circuit's decision is debatable as is evidenced by the prehearing officer's decision permitting briefs on the specific issue.

Supra agrees with the Staff that the Commission decision ordering briefs only goes to whether this Commission can rely on State law in order to find jurisdiction to adjudicate disputes. There can be no debate that Florida is prohibited from relying on the Telecommunications Act of 1996 ("1996 Act") for such authority.

Staff's assertion, however, has nothing to do with the fact that the 11th Circuit's decision does have the force of law in Florida – which requires the Commission to go through an analysis with respect to whether Florida Statutes provide the Commission with authority to adjudicate disputes involving previously approved interconnection agreements. If the 11th Circuit's decision did not have the force of law, then the Commission would not be under any duty to make such an analysis regarding Florida law.

Notwithstanding all of the evidence to the contrary, the Commission's Decision inappropriately ignores Staff's obvious bias – in simply accepting BellSouth's incorrect assertion regarding a specific legal conclusion that has a specific answer – and suggests

that this is Supra's "weakest leg." Amazingly, not only is Supra legally correct, but Supra was chastised by this Commission for pointing out Staff's unflinching adoption of BellSouth's position, despite it being directly opposite that of established precedent. Supra submits that it has done this Commission, and Florida consumers, a tremendous service in pointing out a serious problem that permeates this Commission.

Further support for the legal conclusion that the 11th Circuit's decision was binding and controlling on the Commission as of January 10, 2002, comes from Commissioner Baez. At the March 5, 2002, Agenda Conference, Commissioner Baez stated, in response to a discussion with respect to the controlling impact of 11th Circuit's decision:

> But it is on some level acknowledgement that certainly the Act doesn't give us authority.[21]

Commissioner Baez could only have made this statement if the 11th Circuit's decision of January 10, 2002, was binding and controlling on the Commission. It is important to note, that the 11th Circuit only includes, Florida, Georgia and Alabama. In other words, any of the other 47 states in this country can still cite to Section 252 of the 1996 Act as authority to adjudicate disputes involving previously approved interconnection agreements.

Further support for the correct legal conclusion is the fact that at the time Commissioner Baez made his correct legal observation, the 11th Circuit's decision was on appeal to be heard en banc. Pursuant to *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992), the 11th Circuit's decision is still binding and controlling until reversed. Again, this is not debatable.

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[21] See March 5, 2002 Hearing Transcript (TR 70).

The Commission's Decision was subsequently issued, wherein the Commission again suggested that the 11th Circuit's decision was not binding and controlling in Florida, despite the 11th Circuit's decision in *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992). The Commission's Decision includes an odd statement that: "The affect of the 11th Circuit's decision is debatable . . . Disagreement as to the interpretation and application of the case is, however, not proof of bias." It is clear from this statement, that the Commissioner's have **<u>not</u>** reviewed the record, as outlined herein.

This is not a difficult concept to grasp. If the 11th Circuit's decision were "not" binding and controlling, then the Commission would not be prevented from relying on Section 252, and the Commission would not be under any duty to conduct a legal analysis of Florida law to determine if the Commission had authority to resolve contractual disputes.

Accordingly, any objective observer of the facts of this episode would conclude that the Staff's decision to blindly accept BellSouth's false assertion about a well-settled legal question (*See Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992)) is an act that demonstrates bias in favor of BellSouth.

For the foregoing reasons, Supra requests that the gratuitous language suggesting that the specific facts, outlined above, demonstrate Supra's "weakest leg" be stricken from the Commission's Decision as simply an unsubstantiated conclusion. The facts are to the contrary, this is Supra's strongest leg.

Supra requests that this Commission reconsider its finding, and find that the parties should include language in the follow-on agreement which is identical to that in

attachment 1 of the parties' current FPSC-approved agreement, mandating that the parties resolve contractual disputes in front of commercial arbitrators.

C. Filing of Agreement by Non-Certificated ALECs.

Issue: Should the Interconnection Agreement contain language to the effect that it will not be filed with the Commission for approval prior to an ALEC obtaining ALEC certification from the Commission?

The Commission adopted BellSouth's position that the final, arbitrated agreement shall include language that it will not be filed with the Commission for approval prior to an ALEC obtaining the appropriate certification. In support of its position, the Commission erroneously relied upon Section 364.33, Florida Statutes, which 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.

The Commission stated that "[w]hile 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."[22]

In so ruling, the Commission improperly read beyond the plain and unambiguous language of the statute, more specifically that carriers must obtain certification only if the purpose of that carrier's actions involves the provisioning of telecommunications services. "'When the import of words Congress has used is clear. . . [courts] need not

resort to legislative history, and [they] certainly should not do so to undermine the plain meaning of the statutory language." *CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001), citing *Harris v. Garner*, 216 F.3d 970, 976 (11th Cir. 2000). "In other words, '[w]hen the words of a statute are unambiguous, then, this first canon [of statutory construction] is also the last: judicial inquiry is complete.'" *PrimeTime* at 1222, citing *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997). "The rule is that '[courts] must presume that Congress said what it meant and meant what it said." *PrimeTime* at 1222, citing *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc) (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992)).

Based upon a plain reading of the statute any ALEC, whether certified or not, has the right to legally conduct test orders in Florida so long as the ALEC is not providing telecommunications services to consumers. Such a reading is consistent with Rule 25-4.004, Florida Administrative Code, which, in pertinent part provides:

> Except as provided in Chapter 364, Florida Statute, 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.

Additionally, Supra questions this Commission's authority to impose the condition that the final arbitrated agreement include language that it will not be filed with the Commission for approval prior to an ALEC obtaining the appropriate certification. In connection with Issues DD and EE, the Commission declined to impose the adoption of a liability in damages and specific performance provisions on the basis that such provisions

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[22] Final Order at page 41.

were not required to implement an enumerated item under Sections 251 and 252 of the 1996 Act. Specifically the Commission stated:

> As explained in the previous section[23], 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. (Final Order, p. 151)

As the 1996 Act fails to impose a requirement regarding certification of carriers, the Commission, pursuant to *MCI v. BellSouth*, 112 F.Supp. 2d at 1297, lacks authority to mandate the inclusion of such a provision within the final, arbitrated agreement. The mere belief espoused by this Commission that its adoption of BellSouth's position is in the best interests of Florida consumers because "it ensures that only certificated companies can provide telecommunications services to the public," fails to meet the conditions mandated by *MCI v. BellSouth*. Accordingly, Supra respectfully requests that this Commission reconsider its ruling and find that it is not required that the final, arbitrated agreement contain language that it will not be filed with the Commission for approval prior to an ALEC obtaining the appropriate certification.

D. Customer Service Records.

Issue: Should BellSouth be required to provide to Supra a download of all of BellSouth's Customer Service Records ("CSRs")?

As a result of the discriminatory nature of BellSouth's ALEC OSS interfaces, Supra seeks a contractual provision requiring BellSouth to provide Supra with a download of CSRs. In addition, Supra presented substantial evidence in support of its position that Supra only accesses and would only access CSRs upon proper end-user authorization.

Evidence in support of such access included, but was not limited to, BellSouth's requirement that ALECs execute a Blanket Letter of Authorization ("BLOA"), thereby agreeing to access CSRs only after obtaining the applicable customer's authorization;[24] Supra's execution of and operation pursuant to such a BLOA;[25] and, Supra's acquisition of customers' personal information as verification of proper authorization.[26]

BellSouth, in arguing against such a provision, claimed that a download of such would violate the Customer Proprietary Network Information ("CPNI") requirements outlined in the 1996 Act. CPNI is defined in 47 U.S.C. § 222(h)(1)[27] as:

> (a) information that relates to the quantity, technical configuration, type, destination, **location,** 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 by the customer solely by virtue of the carrier-customer relationship; and (b) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information. [28] (Emphasis added.)

[23] The "previous section" referred to pertains to the Commission's discussion of Issue DD.
[24] See Direct Testimony of Pate (DT 5).
[25] See Rebuttal Testimony of Ramos (RT 37).
[26] Id., at pages 37-38, and Supra Exhibit OAR 74.
[27] Incorrectly cited as 47 U.S.C. §222(f)(1)(A) in the Final Order at page 44.
[28] Item in bold was omitted from the actual text and items underlined complete the cite to 47 U.S.C. § 222(h)(1), in the Final Order at page 44.

The Commission, without pointing to any evidence in the record, simply accepted BellSouth's argument that a download of CSRs to Supra would be contrary to the 1996 Act's prohibitions[29] against unauthorized access or disclosure of CPNI. Furthermore, the Commission found that a download of CSRs would be in clear violation of § 222 of the 1996 Act and the FCC's Second Report and Order, 98-27 ¶ 3[30].

The FCC's ¶ 3 states in its entirety[31]:

> In contrast to other provisions of the 1996 Act that seek primarily 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. With section 222, 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. Where information is not sensitive, or where the customer so directs, the statute permits the free flow or dissemination of information beyond the existing customer-carrier relationship. **Indeed, in the provisions governing use of aggregate customer and subscriber list information, sections 222(c)(3) and 222(e) respectively, where privacy of sensitive information is by definition not at stake, Congress expressly required carriers to provide such information to third parties on nondiscriminatory terms and conditions.** Thus, although privacy and competitive concerns can be at odds, the balance struck by Congress aligns these interests for the benefit of the consumer. This is so because, where customer information is not sensitive, the customer's interest rests more in choosing service with respect to a variety of competitors, thus necessitating competitive access to the information, than in prohibiting the sharing of information. (Emphasis and Double Emphasis added.)

Even though the FCC clearly allows for the dissemination of aggregate customer and subscriber list information, the Commission made a broad-sweeping finding that a

[29] Specifically, 47 U.S.C. § 222(c)(1).
[30] A partial cite to FCC 98-27 ¶ 3 was incorrectly cited as FCC 98-27 ¶ 1 in the Final Order at page 45.
[31] Items underlined were omitted in the Final Order at page 45.

download of CSRs would be in violation of the 1996 Act and the above-stated FCC Order. Moreover, the Commission made such a finding without even reviewing a CSR. In order to make such a finding, the Commission should do a line-by-line review of the CSRs used by BellSouth and the more restrictive CSRs made available to ALECs to determine if either CSR even contains CPNI. Such a review, Supra submits, would also disclose the discriminatory nature of ALEC CSRs.

Interestingly enough, a BellSouth manual[32] states BellSouth's belief that: "[t]he ruling, while **not restricting access to** CPNI, sets forth very strict guidelines for the **use of** CPNI to market other products and services." (Emphasis added.) While this language clearly depicts BellSouth's policy and actual use of CPNI, such use may be in violation of the 1996 Act as 47 U.S.C. §222 (c)(1) clearly restricts the use, disclosure **and access** to CPNI. As such, this Commission should consider opening an investigative docket, on its own motion, into BellSouth's practices and use of CPNI. On the other hand, if the Commission determines that BellSouth's policy regarding access to such information is correct, then Supra requests nondiscriminatory access to same.

While the Commission found that Supra had presented evidence into the record which supported its legitimate concerns regarding BellSouth's OSS for accessing CSRs[33], the Commission refused to provide Supra with its requested remedy. A review of the record reveals that Supra presented extensive evidence regarding the downtime of BellSouth's ALEC OSS[34] as well as thousands-of-pages on the discriminatory nature of

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[32] See Supra Exhibit 81, BellSouth ROS Training Manual, Module 3: The Customer: The Customer on the Move PK433, (BSTII 000004825/6).

[33] Order No. PSC-02-0413-FOF-TP, pages 45-46.

[34] See, *inter alia*, the Hearing Testimony of Ramos (TR 632-33) and Zejnilovic (TR 1058), Rebuttal Testimony of Ramos and Zejnilovic, Supra Exhibits AZ 1 and OAR 32; and Hearing Testimony of Pate (TR 1232).

such OSS in general.[35] Moreover, the FCC, in the Third Report and Order at ¶¶ 433, 434 and 523 stated with respect to the detrimental impact of an ALECs inability to access ILECs' OSS:

> We conclude that the **lack of access** to the incumbent LEC's OSS impairs the ability of requesting carriers to provide access to key information that is unavailable outside the incumbents' networks and is critical to the ability of other carriers to provide local exchange and exchange access service. We therefore require incumbent LECs to offer unbundled access to their OSS nationwide. ¶ 433. (Emphasis added.)
>
> Commentators overwhelmingly agree that the unbundling of OSS satisfies the impair standard of Section 251 (d)(2). OSS is a precondition to accessing other unbundled network elements and resold services, because competitors must utilize the incumbent LEC's OSS to order all network elements and resold services. Thus, the success of local competition depends on the availability of access to the incumbent LEC's OSS. **Without unbundled access to the incumbent LEC's OSS, competitors would not be able to provide customers comparable competitive service, and hence would have to operate at a material disadvantage.** While we acknowledge that a competitive market is developing for OSS systems, these alternative providers do not provide substitutable alternatives to the incumbent LEC's OSS functionality. Alternative OSS vendors provide requesting carriers with an electronic interface that allow competitive LECs to access the incumbent LEC's OSS and internal customer care systems. These vendors cannot provide a sufficient substitute for the incumbent LEC's underlying OSS, because incumbent LECs have access to exclusive information and functionalities needed to provide service. ¶ 434. (Emphasis added.)
>
> We thus conclude that an incumbent LEC must provide nondiscriminatory access to their operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing available to the LEC itself.[36] **Such nondiscriminatory access necessarily includes access to the functionality of any internal gateway systems[37] the incumbent employs in performing the above functions for its own customers.** For example, to the extent that customer service

[35] See, *inter alia,* Rebuttal Testimony of Ramos (RT 48-55, 58-59, 61-65) and Zejnilovic (RT 1-15); Supra Exhibits AZ 1-7, and OAR 3, 30-38, 47, 62, 79-103; and Hearing Testimony of Ramos and Zejnilovic.

[36] We adopt the definition of these terms as set forth in the *AT&T-Bell Atlantic Joint Ex Parte* as the minimum necessary for our requirements. We note, however, that individual incumbent LEC's operations support systems may not clearly mirror these definitions. Nevertheless, incumbent LECs must provide nondiscriminatory access to the full range of functions within pre-ordering, ordering, provisioning, maintenance and repair and billing enjoyed by the incumbent LEC.

[37] A gateway system refers to any electronic interface the incumbent LEC has created for its own use in accessing support systems for providing pre-ordering, ordering, provisioning, repair and maintenance, and billing.

> representatives of the incumbent have access to available telephone numbers or service interval information during customer contacts, the incumbent must provide the same access to competing providers. Obviously, an incumbent that provisions network resources electronically does not discharge its obligation under section 251(c)(3) by offering competing providers access that involves human intervention, such as facsimile-based ordering.[38] ¶ 523. (Emphasis added.)

The FCC recognized the importance of nondiscriminatory, unbundled access to ILECs' OSS, such access including access to the functionality of any ILEC internal gateway system. By failing to unbundle its OSS and provide Supra with nondiscriminatory access to its OSS, BellSouth has forced Supra and all ALECs to use its ALEC OSS interfaces. These interfaces are subject to an inordinate amount of downtime, which deny ALECs unbundled access to BellSouth's OSS.

Notwithstanding Supra's "mountain of evidence" and the Commission's finding regarding the incessant downtime of BellSouth's ALEC OSS, the Commission ruled in favor of BellSouth. However, a review of the record reveals that there is no evidence, outside of BellSouth's mere allegations that CSRs contain CPNI, to support the Commission's denial of Supra's request for a download of CSRs. In fact, there is no evidence in the record that supports a finding that CSRs even contain CPNI. As it was BellSouth's claim that the CSRs did contain such information, surely BellSouth had the burden to substantiate such a claim. Absent BellSouth meeting its burden, if it was the Commission's belief that CSRs contain CPNI, the Commission could have used its ability to propound discovery on the parties to obtain evidence to submit into the record. Of course, the record is bare of any such evidence that can support the Commission's conclusion.

[38] Such access was all that Rochester Telephone provided to AT&T, when AT&T attempted to compete as a reseller of Rochester Telephone service. *See* Letter from Bruce Cox, Government Affairs Director, AT&T to William Caton, Acting Secretary, FCC, July 10, 1996 (AT&T July 10 *Ex Parte*).

As such, Supra requests that this Commission reconsider its decision and to require BellSouth to provide Supra with a download of CSRs as a result of the legitimate concerns regarding BellSouth's OSS for accessing CSRs.

E. Rate for a Loop utilizing Digitally Added Main Line (DAML).

Issue: Should the rate for a loop be reduced when the loop utilizes Digitally Added Main Line (DAML) equipment?

DAML is a line-sharing technology. Where line-sharing technology is involved in the UNE environment, Supra should only be obligated to pay the pro-rated cost of the shared network elements; such as the shared local loop. Contrary to BellSouth's contention neither the Commission[39] nor the FCC[40] has addressed the issue of DAML or other Pair-Gain technologies. Moreover, Supra must authorize DAML use on each customer line.

BellSouth has failed to present any evidence that DAML lines are more expensive than copper lines. In fact, the evidence shows that DAML is cost effective[41]. Furthermore, BellSouth has failed to present any evidence that the reduced expense of DAML has been considered in the TELRIC rates for loops.

Basis for the Commission's Decision

The Commission's decision is based upon an assessment, not founded in the record, but attributed to Hearing Exhibit 17, from which the Commission has concluded

[39] In Docket 990649-TP

[40] **Unspecified** FCC rule referencing **only copper or digital loop carrier,** not DAML or other Pair-Gain equipment. DT Ruscilli/Cox pg. 12 ln 24-25.

[41] See Supra Exhibit 16 – "Written Guidelines For Use of DAML Equipment in the Network," ¶¶ 2.1.1, 3.1.1, 3.3, and 3.3.1.

that "...situations in which DAML equipment is actually deployed are miniscule."[42] The Commission failed to provide a cite from which this conclusion is drawn. Supra believes that this is due to the fact that there are no deployment statistics, quantities or any other data that would lead to the finding that the deployment is "miniscule." Such evidence is not in the record.

As seen throughout the Commission's Order, Supra's documented testimony is referred to as "allegations"[43] and BellSouth's undocumented testimony are referred to as "responses"[44] further evidencing bias against Supra. The Commission's Order cited BellSouth witness Kephart's incorrect[45] and recanted testimony regarding OSS support for loop makeup without regard to conflicting testimony offered in Issue 28 (N):

> 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."[46]
>
> Which is sharply contracdicted by testimony in this issue and issue 28 (N):[47]
>
> Q Is that the same process a CLEC would use to determine if multiple customers' lines were served via the same DAML?
>
> A If multiple customer lines -- well, remember, a DAML is a device that's put on a single copper pair to provide multiple voice channels digitally derived for an individual customer, so because it's simply a piece of carrier equipment it would be part of the loop makeup information, and by doing a loop makeup, you could find that information out.
>
> Q You mentioned circuit IDs. What's a circuit ID?
>
> A Well, in cases where you would get unbundled loops from BellSouth, you can use them for whatever you want and youwould assign your own telephone number, so we would give you a circuit number associated with that particular loop.
>
> Q That's something that BellSouth assigns and provides to CLECs?

[42] Final Order at page 49.
[43] Id.
[44] Id.
[45] Final Order at page 47.
[46] Final Order at page 49.
[47] See Hearing Transcript (TR 430).

A In providing the loop, yes, you would get that information.

Q Is that information contained in a database similar to 70 or would it be LFACS?

A I believe, it's in LFACS, yes.

And in regard to Issue 28:[48]

Q Now, isn't it true that BellSouth believes keeping accurate inventory is especially critical regarding access terminals in multi-tenant buildings?

A Yes, particularly where it involves the intra building cable.

Q Now, isn't it true that BellSouth keeps these records in the LFACS, L-F-A-C-S, database?

A Yes.

Q Do you know if ALECs have access to that database?

A Well, that's an OSS issue. They can -- I know through doing loop makeup on particular loops that they get access to LFACS information via that method, so I guess the answer to the question is yes.

Q Do you think it's important that CLECs have access to that information?
Page 407

A Yes or we wouldn't be providing it.

Q Fair enough.

Despite all this, BellSouth has refused to provid LFACs to Supra, despite repeated requests. However, BellSouth is providing it ot other ALECs based upon language in the template agreement filed with this commision as BellSouth's proposed language for this arbitration. It is difficult to understand how, despite such clear testimony, the Commission came to the conclusion that BellSouth's Kephart was the more credible witness, in light of his incorrect and contradictory testimony that BellSouth did not possess an OSS system that contained loop makeup information. As a result of such clear error, Supra is entitled to reconsideration.

The Commission did correctly order that BellSouth must notify Supra in the event that DAML will be placed upon one of its customers lines. However, the Commission acknowleged, but failed to rule, on the requirment that BellSouth obtain such authorization before deploying DAML.

[48] See Hearing Transcript (TR 406-407).

Facts and/or legal argument which the Commission failed to consider:

Issue One

The Commission acknowledged that this is an issue broadened to include **both** notification and authorization requirements when BellSouth seeks to deploy DAML on an ALEC's lines:

> 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.[49]

> Despite this acknowledgemnt, the Commission is silent and offers no ruling or guidance on authorization.

Issue Two

> The Commision considered evidence not in the record regarding how much (or in this case how little) DAML is actually used. No record evidence supports this contention[50].

Issue Three

Further the Commission ignored the confidential Hearing Exhibits 16 and 17 altogether in arriving at its conclusion:

> 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.[51]

A plain understanding of the equipment or the problem at hand does not support such a conclusion. While BellSouth states it is not "its policy" to convert ALEC lines to DAML to provide a new line for BellSouth customers, BellSouth does not deny that it happens and BellSouth did **not** challenge Nilson's example in this regard. The simple fact is if there is a need to supply DAML for one line, then each additional line requested in a given area or building must be provisioned via DAML until facility relief is built.

[49] Final Order at page 49.
[50] Final Order at page 49.
[51] Final Order at page 50.

Furthermore, for each additional new line provisioned via DAML, one old line, served exclusively by copper must be degraded onto DAML service to allow the new line to be provisioned. Such is a simple fact that was ignored by the Commission.

Issue Four

The Commission concluded: "DAML systems **do not appear to be an economical long-term facility relief alternative**, except possibly in slow growth areas."[52] Not only is this finding not supported in the record, it is directly contradicted by the record. In live testimony, Supra's attorney impeached Kephart and caused him to recant previous testimony and concede[53] that there are multiple situations where DAML is **more cost effective** than alternative solutions.[54]

> Q Mr. Kephart, do you know if DAML is ever an economically-attractive model as compared to digital loop carrier?
>
> A I don't know that for sure. I would not think it would be generally, because it doesn't provide the same level of concentration.
>
> COMMISSIONER JABER: All right. Now, tell me about the exhibit that you want to cross Mr. Kephart on tomorrow. Is this the exhibit BellSouth said this morning they thought they gave you and did not?
>
> MR. CHAIKEN: No, ma'am, it's a different exhibit. It's late-filed Exhibit JK-2 to Mr. Kephart's deposition and it's entitled, "Written Guidelines for Use of DAML Equipment in the Network," consisting of 16 pages, and it's marked as proprietary.
>
> COMMISSIONER JABER: So, it's a late-filed exhibit that you asked for in deposing Mr. Kephart, and you didn't get it until when?
>
> MR. CHAIKEN: This afternoon.
>
> COMMISSIONER JABER: All right. And you'd like to use that exhibit to cross -- to, what, impeach Mr. Kephart?

[52] Final Order at page 50.
[53] Based upon Confidential hearing Exhibit 16.
[54] See Hearing Testimony of Kephart (TR 437-439).

MR. CHAIKEN: Well, we'd like to, A, make enough copies so that Staff and the Commission can have copies, so we could ask him questions regarding it as well as to impeach, and we would like to submit it into the record as well.

COMMISSIONER JABER: Mr. Chaiken, is it that you want the exhibit in the record or that you want to do cross examination?

MR. CHAIKEN: It's both. I think, we're going to be able to impeach the witness on some of the things he stated today.

The following morning witness Kephart admits to having had prior knowledge of Hearing Exhibit 17, having been on the original distribution list, and admits that the document identifies numerous situations where DAML is more cost effective than other loop technologies:[55]

Q Thanks for coming back this morning. I've given you Late-filed Exhibit JK-2. Are you familiar with that document?

A Yes.

Q Have you read this document prior to your deposition?

A Yes.

Q If you could, turn to I believe it is the fourth page, you will find a distribution list. Do you see the distribution list?

A Yes.

Q Mr. Kephart, did you receive this document as a part of a distribution list?

A Yeah. My name is on it.

Q Okay. When did you first receive this document?

A I really don't recall. Actually, I first pulled this document down from one of our -- no, I'm sorry. I received this document via e-mail sometime ago. I don't really recall the exact date. I get a lot of technical documents, and this was just one of them.

Q If you could, turn the page back a page, you will see, I think, a page identifying a date.

[55] See Hearing Testimony of Kephart (TR 453-454).

A April 24th?

Q Correct. Would that be on or around the time you received this?

A Probably, yes.

Then Mr. Chaiken goes on to impeach Kephart's testimony that DAML is cost effective technology:[56]

Q Mr. Kephart, if you could, turn to Page 3, and it's not the third page, but it's identified on the bottom right-hand corner as Page 3.

A Okay.

Q It's the sixth page in, sixth page in.

A Right.

Q And in that page, you will find Paragraph 2.1.1.

A Okay.

Q And I'd like you to read the first line under that.

MS. WHITE: To yourself; right?

MR. CHAIKEN: To yourself, exactly. Thank you, Ms. White.

A Yes.

Q Would you agree that DAML can be cost-effective?

A Yes. It's cost-effective in certain circumstances or we wouldn't be using it. But from a pure engineering standpoint, when you first design the plant, which is what our TELRIC costs are based on, DAML is not considered. However, after you've designed it and everything is there, if you run into a facility problem, DAML may be an alternative to resolve that problem, and it could be a more cost-effective alternative than, say, for example, placing a whole new piece of cable.

Q I'm going to ask you to turn to Page 5, and that's identified on the bottom right-hand corner as Page 5. And Paragraph 3.1.1, I'm going to ask you to read the first line under that.

[56] See Hearing Testimony of Kephart (TR 461-463).

A Right.

Q And you agree that DAML can be cost-effective in that circumstance; correct?

A In that particular circumstance, yes.

Q Ask you to turn to Page 7, identified in the bottom right-hand corner, and refer to Paragraph 3.3. And if you could, read the first three lines in that paragraph to yourself.

A Okay.

Q And you would agree under that situation DAML would be cost-effective as well; correct?

A In niche applications, that's true.

Q And if you could, turn to the following page, Page 8, and specifically Section 3.3.1. And if you could, read the entire first paragraph under that. Let me know when you're finished.

A Okay.

Q And under that situation it seems that DAML is cost-effective as well; correct?

A Yes. I don't dispute the fact that there are instances when DAMLs are cost-effective or else we would not be using them.

Q I want to turn your attention to Paragraph 3.3.2 on that same page --

A Uh-huh.

Q -- and particularly the second paragraph with the bullet points, and that goes all the way on to the next page. And if you could, just take a look at those sections, and let me know when you're finished.

A Okay.

Q Now, would you agree that the sections that I've pointed out contradict your testimony that DAML is more costly than copper loops?

A No, not at all. In fact, it reinforces what I said yesterday, is that in slow growth areas where additional lines are needed and we're short of facilities, up to a

certain point use of a DAML may be more economical than placing additional cable, and that's what this is really talking about.

Q So would you say that BellSouth's decision to use DAML lines has nothing to do with saving costs and increasing revenue?

(Emphasis added.)

Despite this overwhelming evidence to the contray, despite 5 seperate scenarios in Hearing Exhibit 16 where DAML is cost effective alternative to plant upgrades, paticularly Section 3.3.1, this Commission still makes their incredible statement.

Issue Five

The Commission takes the position that DAML is deployed on a "limited basis"[57], however, the record evidence shows that this less reliable equipment may well be deployed, and causing customer problems for well over a year. Witness Kephart speaks to the issue of the length of time that the equipment may be deployed for, based upon Hearing Exhibit 16.[58]

Q Would you agree that in slow growth areas BellSouth anticipates DAML deployment for periods of a year or more at a given location?

A I wouldn't be surprised, yes.

Q What's that?

A I wouldn't be surprised that we would use it as long as necessary as long as there was no growth in that area.

Supra, not BellSouth will be blamed for these problems. Surprisingly, this Commission dealt with that issue, and came to an opposite conclusion in resolving Issue 34(R), coordinated cutover.

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 <u>customer will likely blame Supra, not BellSouth, for the problem.</u> 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.

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[57] Final Order at page 50.

[58] See Hearing Testimony (TR 463).

Conclusion

The record is clear - DAML technology is less reliable than bare copper. Despite the new Terayon card, whose numerical impact on the installed base cannot be deduced from the record[59], and does not work in many DAML installations[60], DAML based circuits do and will continue to impact dial up modem users for some time to come. BellSouth's stated policies[61] of replacing cards in the face of customer complaints has a hollow ring. Supra's experience is if the line meets the performance specified by the parties' current, Commission-approved agreement, in this case 14.4 KBPS[62], then BellSouth will do nothing. In fact they often refuse to repair anything faster than 9.6kbs[63].

This Commission should rule that prior to the use of DAML, Pair-Gain and other line splitting technologies Supra must be both notified, and allowed to reject the use of such technologies on a customer line.

Finally, BellSouth claims it has a complaint resolution process and infers it is available to Supra. Therefore language allowing Supra the right to request that lines be brought up to the speeds defined by Table 1 of Hearing Exhibit 16, where technically feasible, or to have service rotated to a standard loop, should be ordered inserted in the Interconnection agreement.

F. Withholding Payment of Disputed and Undisputed Charges/Disconnection.

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[59] See Hearing Transcript (TR 457-458).
[60] See Hearing Exhibit 16, page one of document RL:01-04-004BT
[61] See Hearing Transcript (TR 430).
[62] October 5, 1999 Interconnection Agreement rate.
[63] BellSouth Florida GSST Tariff maximum rate.

Issue: Under what conditions, if any, should the Interconnection Agreement state that the parties may withhold payment of disputed charges?

Under what conditions, if any, should the Interconnection Agreement state that the parties may withhold payment of undisputed charges?

Under what circumstances, if any, would BellSouth be permitted to disconnect service to Supra for nonpayment?

Supra presented ample evidence of BellSouth's abuse of its ability to retain payments to ALECs and other parties while using its superior bargaining position[64] to threaten and strong-arm ALECs into paying all charges allegedly due to BellSouth.[65] Supra presented evidence on BellSouth's wrongful disconnection of Supra's service in prior "good faith" billing disputes. [66] Even when the amounts in question were disputed, BellSouth threatened to disconnect and in fact disconnected Supra.[67] In fact, the same illicit, anticompetitive tactics used against Supra were also alleged in the IDS Telecom complaint before this Commission.

A review of the Commission's Order revealed that the Commission failed to consider any of the evidence submitted by Supra. Indeed, the Commission never cited to any documents submitted by Supra in support of its position and the Commission only briefly cited to the hearing transcript. Moreover, even though Supra presented evidence

[64] See ¶15, First Report and Order, wherein the FCC stated, in pertinent part:

> Congress recognized that, because of the **incumbent LEC's incentives and superior bargaining power**, its negotiations with new entrants over the terms of such agreements would be quite different from typical commercial negotiations. As distinct from bilateral commercial negotiation, the new entrant comes to the table with little or nothing the incumbent LEC needs or wants. The statute addresses this problem by creating an arbitration proceeding in which the new entrant may assert certain rights, including that the incumbent's prices for unbundled network elements must be "just, reasonable and nondiscriminatory."[64] We adopt rules herein to implement these requirements of section 251(c)(3). (Emphasis added.)

[65] See Hearing Transcript (TR 671).

[66] See Supra Exhibit OAR 3.

[67] Id.

of the wrongful disconnection,[68] the Staff still believed that BellSouth's wrongful disruption of service for disputed payments was only an "alleged matter", as the Staff wrote: "...when **allegedly** BellSouth disconnected Supra's access to ALEC's OSS, and LENS..."[69] (Emphasis added.)

As Supra stated, BellSouth has disconnected Supra in prior "good faith" disputes[70]. According to the findings of the parties' Arbitral Tribunal:

(Emphasis added.)

The failure of the Commission to recognize this finding coupled with the blatant attempt by the Commission Staff to wrongfully depict Supra's evidence of wrongful disconnection as baseless allegations only serves to strengthen BellSouth's anticompetitive actions.

In addition, Supra also cited to *BellSouth v. ITC^Deltacom*, 190 F.R.D. 693 (M.D. Ala, 1999) and asserted that it is common business practice for parties to offset charges

[68] Id.
[69] See Staff recommendation at page 72.
[70] See Supra Exhibit OAR 3, at page 26.

while resolving disputes, as both parties reserve the right to obtain payment while going through a dispute resolution process.

While Supra is not opposed to paying undisputed charges during a billing dispute, the Commission's failure to delineate when and how a charge will be disputed leaves ALECs in a precarious position. In furtherance of ALECs' concerns over the Commission's placement of unilateral, decision-making authority in the hands of BellSouth, are the responses of BellSouth's Cox:[71]

> Q Ms. Cox, **who makes the determination as to whether a dispute is brought in good faith**?
>
> A **BellSouth would make that decision**. They would advise the, in this case, Supra of our belief about that. At that point we could receive additional information or Supra could come to the Commission, if they had an issue to the extent their dispute was good faith or not.
>
> Q Don't you think it would be appropriate for a mutual third party to make a determination as to when BellSouth could disconnect services to a competitive local exchange provider?
>
> A No. I think, the process that we have outlined, and it's a process that's used with all other ALECs with our end users, and that is, we render a bill for services that we provide.

(Citation omitted and Emphasis added.)

Historically, when Supra disputed the validity of a bill, BellSouth's first course of action was to unilaterally deny that its bill was wrong and then to unilaterally declare all charges undisputed and request payment. Of course, non-payment is grounds for termination of service. Supra cannot afford such a subjective approach.

Moreover, Supra has presented this Commission with direct evidence indicating that this is a practice that BellSouth has used with Supra in the past and that such practice

[71] See Hearing Transcript of Cox (TR 261).

resulted in an [73] The fact that a neutral Arbitral Tribunal can easily determine that this conduct is wrongful but that this Commission failed to even cite to this record evidence is troubling.

Currently, BellSouth and Supra are presently engaged in a billing dispute where Supra has claimed that BellSouth is wrongfully collecting and keeping access and other third-party revenues that rightfully belong to Supra. Although BellSouth is providing Supra with service, BellSouth has collected and is withholding millions-of-dollars in revenue from Supra that may very well exceed the amounts Supra would pay for the services provided by BellSouth. Yet, under the Commission's ruling, BellSouth could threaten Supra with disconnection, thereby forcing Supra to pay for the service provided by BellSouth, while forcing Supra to spend the time and money litigating the issue of the monies wrongfully retained by BellSouth. All the while, BellSouth sits in a position with little or no incentive to seek a resolution of such a case, as BellSouth does not want ALECs in Florida to know that the amount of revenue that BellSouth collects on its access lines and ALEC resale lines may be considerably higher than the amount that ALECs can collect as a result of certain anticompetitive and illegal acts by BellSouth.

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[72] See Supra Exhibit OAR 3.
[73] Id.

Furthermore, the Commission's inconsistent reasoning of similar issues troubles Supra. In connection with Issues DD and EE, the Commission declined to impose the adoption of a liability in damages and specific performance provisions on the basis that such provisions were not required to implement an enumerated item under Sections 251 and 252 of the 1996 Act. Specifically the Commission stated:

> As explained in the previous section[74], 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.[75]

As the 1996 Act fails to impose a requirement regarding billing dispute procedures, the Commission, pursuant to *MCI v. BellSouth*, 112 F.Supp. 2d at 1297, lacks authority to mandate the inclusion of such provisions within the parties' final arbitrated agreement.

Improper Conduct

As a result of Supra's public document request, this Commission, on March 29, 2002, produced certain emails to Supra. Supra, thereafter, learned of substantial and significant misstatements contained in the emails of both the Commission's General Counsel, Harold McLean, and Legal Division Chief, Beth Keating, directly relating to the underlying

[74] The "previous section" referred to pertains to the Commission's discussion of Issue DD.

issues in this proceeding. It appears that the Commission requested information about how much does Supra owe BellSouth versus how much does BellSouth owe Supra in anticipation of the Tuesday, March 5, 2002 Agenda Conference in this Docket. The first e-mail has a response from Ms. Keating which appears to have been sent at 9:25 a.m. on March 1, 2002, stating as follows:

> **The first one's easy – from the commercial arbitration, Supra owes BellSouth $3.5 million – none of which has been paid and BST has apparently not sought enforcement. (This amount does not include any amounts accrued since the commercial arbitration for service provided by BellSouth to Supra)**
>
> The second is somewhat less clear. . . Supra claims BST owes them $305,560.04 plus interest of approximately $150,000. . . Regardless, though, it doesn't appear to be enough to offset much of the amount owed under the commercial arbitration award.
> See Exhibit I. Emphasis added.

The e-mail from Beth Keating to Harold McLean was then forwarded to Commissioner Palecki by Harold McLean with the question: "**Commissioner, is this what you are asking for?**"

The first e-mail apparently did not answer Commissioner Palecki's question because at approximately 12:07 p.m. later that same day, Harold McLean sent another e-mail to Commissioner Palecki's assistant – Ms. Katrina Tew which stated as follows:

> **"Katrina, the answer is 'yes' -- $4.2 million. Bell claims a much higher amount due, however, 'between 50 and 70 million'. Lets talk this afternoon."**

Apparently the second e-mail answered Commissioner Palecki's question as Katrina Tew then responded back to Mr. McLean by stating: "**Sounds good. I'm here the rest of the day. Feel free to call or drop in whenever. Thanks again!**"

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[75] Final Order at page 151.

Supra is troubled with the false information contained in the bolded portion of Ms. Keating's and Mr. McLean's emails. First, the commercial arbitration proceedings between the parties are to be confidential. In fact, BellSouth has vigorously litigated this matter in order to keep such confidential. Although Supra disputes the fact that the Awards themselves are confidential, Supra is upset to learn that false results of the commercial arbitration proceedings between the parties was provided to these individuals by BellSouth, and that the Commission did not ask Supra for a response, either during the course of the proceedings or, as apparently they did with BellSouth, in an ex parte fashion. Although Supra has submitted, under confidential cover, the arbitration award in the commercial arbitrations I and II between the parties, in this proceeding (see **Exhibit OAR 3**), it has not submitted any other arbitration award to the Commission, as the record in this proceeding closed prior to the issuance of such awards, nor is it aware that BellSouth has submitted such. Supra is extremely concerned that BellSouth has violated the parties' agreement, not to mention reversing its own legal argument regarding the confidentiality of the commercial arbitration awards. BellSouth has waived its rights to confidentiality by making representations regarding the parties' commercial arbitration billing disputes that are in fact false. As such, Supra is compelled to respond to set the record straight.

Second, BellSouth has provided the Commission with misinformation aimed at prejudicing Supra – who could possibly rule in favor of Supra if it were wrongfully withholding $50-70 million owing to BellSouth? The questions and answers were obviously relevant and significant to the Commission's decision-making process on March 5th otherwise they would not have been important enough to discuss just prior to

the Agenda conference. Moreover, an underlying theme of BellSouth during the evidentiary hearing in Docket 00-1305 was that Supra was withholding payment under the current agreement and that BellSouth was allegedly not being paid. As a matter of fact, the Staff Recommendation stated that Supra has not paid BellSouth for two years. Additionally, Supra points to the comments of Chairman Jaber on September 27, 2001 during the evidentiary hearing in Docket No. 00-1305, wherein she stated as follows:

> **As a Commissioner, help me understand why I should be convinced that you are acting in --how is it that I'm convinced that you have an incentive to enter into negotiations for a follow-on agreement? It sounds like you're in a win-win situation. You're operating under an existing agreement that expired, but you can do that according to the Act, and you haven't paid BellSouth because you've got this billing dispute. What incentive do you have to negotiate a new agreement?** See Hearing Transcript of September 26 and 27, 2001 at page 764, line 22 to page 765, line 5.

Accordingly, prior to the March 5th Agenda, the Commission was under the impression (albeit it a false impression), that Supra purportedly owed BellSouth $4.2 million under an arbitration award and in total between $50 and $70 million.

Significantly, these false allegations have never been made a part of the record in Docket No. 00-1305. Moreover, the only record of any amounts claimed due between BellSouth and Supra exists in Docket No. 00-1097 wherein Supra has claimed amounts in the range of over $300,000. Supra is also troubled by the fact that BellSouth obviously provided substantive ex-parte information to the Commission Staff, General Counsel, and Commissioner, which is reflected in Harold McLean's statement that: "**Bell claims a much higher amount due, however, 'between 50 and 70 million'.**"

With the respect to the alleged "facts" set forth in the two above reference e-mails (which only reflect an ex-parte skewed view from BellSouth), the following is a factual answer to the question posed as to how much did Supra owe BellSouth on March 1, 2002.

Supra is now left to wonder how much undiscovered false information is floating about the Commission, damaging the reputation of Supra and favorable for BellSouth?[76]

As a result of the lack of any competent and substantial evidence in the record to support the Commission's holding, as well as the Commission's failure to address the substantial evidence put forth by Supra, Supra requests that this Commission reconsider its decision and require the parties offset disputed charges and complete a dispute resolution process prior to disconnection of service.

G. Interlata Transport.

Issue: Should BellSouth be required to provide transport to Supra if that transport crosses LATA boundaries?

The 1996 Act and the FCC's *First Report and Order on Local Competition,* envisioned the need of an ALEC to obtain Unbundled Access to Interoffice transport, including transport that crosses LATA boundaries.

This is clearly evidenced by 96-325 ¶449, which states such access is "essential":

> We also disagree with MECA, GTE, and Ameritech that we should consider "pricing distortions" in adopting rules for unbundled interoffice facilities. Section, (sic) below, addresses the pricing of unbundled network elements identified pursuant to section 251(c)(3) as it relates to our current access charge rules. Nor are we are persuaded by MECA's argument that incumbent LECs not subject to the MFJ[77] should not be required to unbundle transport facilities because, according to MECA, such facilities are unnecessary for local competition. As discussed above, the ability

[76] Supra recently was informed by a customer that she was told by an unnamed **FPSC employee** that the FPSC was allowing BellSouth to disconnect Supra's customer's DSL service because "Supra had not paid BellSouth's bill."

[77] MFJ -- Modified Final Judgement.

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."[78]

Basis for the Commission's Decision

The Commission takes the position that § 271 precludes BellSouth from offering in-region interLATA **services,** although the order clearly reflects that "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."[79]

Facts and/or legal argument which the Commission failed to consider:

The Final Order contained a dichotomous opinion in this regard:

> 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.[80]

While the record in this case is incredibly lopsided in Supra's favor, BellSouth offered little evidence as BellSouth's Cox[81] recited, verbatim, the direct testimony of BellSouth's Ruscilli[82] and offered no rebuttal to Supra's Nilson, nor did BellSouth ask Supra's Nilson any questions regarding this issue, except for the following[83]:

> Q Mr. Nilson, would you agree with me that on Issues 12, interLATA transport facilities; 13, reciprocal compensation for ISP-bound traffic; 14, which is –
>
> A Reciprocal comp to UNE -- for UNE provision circuits.

[78] CC Order 96-325 in Docket No. 96-98 -- Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 at ¶ 449.
[79] Final Order at page 60.
[80] Id.
[81] See Rebuttal Testimony of Cox (RT 10-11).
[82] See Direct Testimony of Ruscilli/Cox (DT 15-16).
[83] See Hearing Transcript of Nilson (TR 1023-1024).

Q Correct. Issue 19, ISP-bound traffic; Issue 21, 22, 23, and 24, which concern combinations of network elements, that the parties have a disagreement in those issues with the interpretation of various FCC orders?

A No, I would not.

Q Do you think the parties are in agreement on how those FCC orders ought to be interpreted?

A Well, per your suggestion, we met at 8:30 this morning, and I believe there's potential solutions on the table for Issues 13, 19, and 21, as we did not finally resolve those this morning. But again, as BellSouth indicated earlier, I am also hopeful.

Further, witness Cox made no statement regarding interLATA transport in her rebuttal testimony and only touches on this issue on cross-examination[84]:

Q Okay. I'm going to move on. We have an issue regarding interLATA transport; are you familiar with that issue?

A Yes, I am.

Q Now, if Supra is providing services to end users via the UNE-P platform, it is considered to be a facilities-based provider; would you agree with that?

A Yes, I would.

Q And you would agree that it's technically feasible for BellSouth to provide interoffice transport across LATA boundaries?

A Yes, I imagine it is.

Q But BellSouth claims that it's unable to do so as a result of Section 271 of the Act?

A Yes, we do claim that, and we certainly hope that will change in the near future, but the current state of the law is yes, we are precluded from providing interLATA services.

Q Now, if Supra is considered to be the facilities-based provider, if BellSouth provided the interoffice transport across LATA boundaries, it would be Supra deemed to be the provider, not BellSouth; would you agree with that?

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[84] See Hearing Transcript of Cox (TR 268-270).

A Not necessarily. BellSouth would still be providing a transport service to Supra, which we are, unfortunately, not permitted to do.

Q That's your interpretation?

A That's, I believe, a lot of people's interpretation, yes.

Q Have you ever seen any case authority or any cites, a court ruling or FCC or FPSC ruling which states that?

A That states we cannot provide interLATA services?

Q No, which states that Supra, acting as a UNE platform provider to end users can't purchase that interoffice interLATA transport from BellSouth to do so?

A I don't know that I've seen anything specifically on that point, no.

Q Do you know if BellSouth ever asked any authority for an opinion on that?

A Specifically, on the transport issue I don't know that we have.

Q Now, interoffice transport is a network element; is it not?

A Yes, it.

Q That's to be unbundled; is that correct?

A That's correct.

The direct testimony of Supra's Nilson, as to this issue alone, contains six (6) cites to the *First Report and Order,* four (4) cites to the Code of Federal Regulations (47 CFR), one (1) cite to the U.S. Supreme Court (*AT&T v. Iowa utilities Bd.*, 525 U.S. 366, 119 S.Ct 721), and includes Supra Exhibit DAN-2. The rebuttal testimony of Nilson again cites to the *First Report and Order,* and notes that BellSouth has neither denied the existence of the interLATA-Interoffice facilities, nor made a claim of technical unfeasibility.

Somehow amidst Supra's "mountain of evidence", the Commission found that "the record supports BellSouth's position in the instant case."[85] Supra submits that BellSouth submitted no record evidence on this issue, that the Commission ignored Supra's evidence on the issue, even refusing to acknowledge Cox's admission that she is not aware of any authority in support of either BellSouth's or this Commission's interpretation of § 271, and merely found in favor of BellSouth.

Conclusion

The Commission failed to consider the evidence presented by Supra and simply followed BellSouth's position without citing to any competent, supporting authority. Despite the weight of Supra's evidence and despite the Commission's conclusion that "this issue may warrant further investigation"[86] the Commission held:

> 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."

It is as if a different person with a different opinion wrote each paragraph. The Order is discontinuous, not in accord with the evidence in the record, and contradictory with respect to itself, FCC Order 96-325, 47 CFR and the U.S. Supreme Court. Absent a single authority in the record and armed only with the opinion of BellSouth's Cox, who herself could not point to a single authority, Supra is at a loss as to how this Commission

[85] Order at page 59.

could come to its conclusion. Supra requests that this Commission reconsider its position and find in favor of Supra and include a provision in the parties' final, arbitrated agreement that BellSouth is obligated to provide inter-office transport across LATA boundaries where technically feasible.

I. Refusal to Provide Service.

Issue: Under what conditions, if any, may BellSouth refuse to provide service under the terms of the interconnection agreement?

BellSouth cannot refuse to provide services ordered by Supra under any circumstances. If the services have not yet been priced under the agreement or by the Commission, BellSouth must provide the services at prices no less favorable than those it charges itself, an affiliate or another ALEC, and bill Supra retroactively for the difference once prices have been set by the Commission or negotiated by the parties. In fact, BellSouth, in the arena of collocation, uses this very practice to its advantage to "true-up" its costs. Yet, as the "true-up" in this case works to the ALECs' advantage, BellSouth now opposes it. Such a provision would hasten ALECs' entries into the markets, and would promote the ability of ALECs to quickly provide new and advanced services to consumers[87].

Furthermore, this is not a new concept, as the parties current, Commission-approved agreement already contains a well thought out and detailed set of terms and conditions to handle this in a manner that provides parity for all. BellSouth seeks to escape its current contractual obligations while further increasing its advantage over competitors.

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[86] Order at page 60.

Basis for the Commission's Decision

The Commission's treatment of each party's witnesses is indicative of bias. Where BellSouth witness Cox's testimony is described as "witness Cox testifies"[88], "witness Cox believes"[89], and "According to witness Cox"[90], the Supra witness is diminished by "Supra witness Ramos argues"[91](despite cites to FCC Rules), "Witness Ramos further alleges"[92] (despite heavy documentation), "witness Ramos retorts"[93] (despite letters and other documentation), and "witness Ramos makes several allegations"[94] (despite record evidence).

The basis for the Commission's finding appears to be that the Commission believes that "outside of record evidence of this issue"[95] that the parties have agreed that Supra's request for an amendment will be executed within 30 days. Despite the preponderance of evidence presented by Supra of BellSouth's consistent refusal and failure to make a single amendment to **two** consecutive interconnection agreements over a period of 5 years, that due to language agreed to outside this arbitration, BellSouth will suddenly honor such language and execute Supra amendments.

Furthermore, the Commission relied on its conclusion that 47 CFR § 251(e)(1) requires the parties to operate under an approved interconnection agreement.[96] By making such a point, it is clear that the Commission did not understand Supra's position and failed to address the testimony of Supra's Ramos, Supra's exhibits, or the parties'

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[87] See Direct Testimony of Ramos (DT 72).
[88] Final Order at page 64.
[89] Final Order at page 64.
[90] Id.
[91] Final Order at page 65.
[92] Final Order at page 66.
[93] Final Order at page 67.
[94] Final Order at page 68.
[95] Id.

current agreement, which contains precisely the language Supra seeks to assure it parity with BellSouth. This will be addressed below.

Facts and/or legal argument which the Commission failed to consider

The Commission should reconsider Supra's request for insertion of the existing language, set forth herein below, in the final, arbitrated agreement, as a manner of holding both sides to strict terms and conditions for the ordering and payment of new elements and services not invented or envisioned at the time such agreement becomes effective. Such language will reduce the workload of this commission, and provide a standard for each party to be held to, when a breach by either party leads to a lawsuit for damages. That language, previously agreed to by the parties and approved by this Commission is as follows:

> 30. Unbundled Network Elements
>
> 30.1 BellSouth shall offer Network Elements to AT&T on an unbundled basis on rates, terms and conditions that are just, reasonable, and non-discriminatory in accordance with the terms and conditions of this Agreement.
>
> 30.2 BellSouth will permit AT&T to interconnect AT&T's facilities or facilities provided by AT&T or by third Parties with each of BellSouth's unbundled Network Elements at any point designated by AT&T that is technically feasible.
>
> 30.3 BellSouth will deliver to AT&T's Served Premises any interface that is technically feasible. AT&T, at its option, may designate other interfaces through the Bona Fide Request process delineated in Attachment 14.
>
> 30.4 AT&T may use one or more Network Elements to provide any feature, function, or service option that such Network Element is capable of providing or any feature, function, or service option that is described in the technical references identified herein.
>
> 30.5 BellSouth shall offer each Network Element individually and in combination with any other Network Element or Network Elements in order

[96] Final Order at page 69.

to permit AT&T to provide Telecommunications Services to its Customers subject to the provisions of Section 1A of the General Terms and Conditions of this Agreement.

30.6 For each Network Element, BellSouth shall provide a demarcation point (e.g., an interconnection point at a Digital Signal Cross Connect or Light Guide Cross Connect panel or a Main Distribution Frame) and, if necessary, access to such demarcation point, which AT&T agrees is suitable. However, where BellSouth provides contiguous Network Elements to AT&T, BellSouth may provide the existing interconnections and no demarcation point shall exist between such contiguous Network Elements.

30.7 DELETED

30.8 The charge assessed to AT&T to interconnect any Network Element or Combination to any other Network Element or Combination provided by BellSouth to AT&T if BellSouth does not directly interconnect the same two Network Elements or Combinations in providing any service to its own Customers or a BellSouth affiliate (e.g., the interconnection required to connect the Loop Feeder to an ALEC's collocated equipment), shall be cost based.

30.9 Attachment 2 of this Agreement describes the Network Elements that AT&T and BellSouth have identified as of the Effective Date of this Agreement. AT&T and BellSouth agree that the Network Elements identified in Attachment 2 are not exclusive. Either Party may identify additional or revised Network Elements as necessary to improve services to Customers, to improve network or service efficiencies or to accommodate changing technologies, Customer demand, or regulatory requirements. Upon BellSouth's identification of a new or revised Network Element, BellSouth shall notify AT&T of the existence of and the technical characteristics of the new or revised Network Element.
AT&T shall make it's request for a new or revised Network Element pursuant to the Bona Fide Request Process identified in Section 1.1 of the General Terms and Conditions of this Agreement. Additionally, if BellSouth provides any Network Element that is not identified in this Agreement, to itself, to its own Customers, to a BellSouth affiliate or to any other entity, BellSouth will provide the same Network Element to AT&T on rates, terms and conditions no less favorable to AT&T than those provided to itself or to any other Party. Additional descriptions and requirements for each Network Element are set forth in Attachment 2.

30.9.1 DELETED

30.9.2 DELETED

30.9.3 DELETED

30.9.4 DELETED

30.9.5 DELETED

30.9.6 DELETED

30.9.7 DELETED

30.9.8 DELETED

30.9.9 DELETED

30.9.10 DELETED

30.9.11 DELETED

30.10 Standards for Network Elements

30.10.1 BellSouth shall comply with the requirements set forth in the technical references, as well as any performance or other requirements identified in this Agreement, to the extent that they are consistent with the greater of BellSouth's actual performance or applicable industry standards. If another Bell Communications Research, Inc. ("Bellcore"), or industry standard (e.g., American National Standards Institute ("ANSI")) technical reference or a more recent version of such reference sets forth a different requirement, AT&T may request, where technically feasible, that a different standard apply by making a request for such change pursuant to the Bona Fide Request Process identified in Section 1.1 of the General Terms and Conditions of this Agreement.

30.10.2 If one or more of the requirements set forth in this Agreement are in conflict, the parties shall mutually agree on which requirement shall apply. If the parties cannot reach agreement, the Alternative Dispute Resolution Process identified in Section 16 of the General Terms and Conditions of this Agreement shall apply.

30.10.3 Each Network Element provided by BellSouth to AT&T shall be at least equal in the quality of design, performance, features, functions and other characteristics, including but not limited to levels and types of redundant equipment and facilities for power, diversity and security, that BellSouth provides in the BellSouth network to itself, BellSouth's own Customers, to a BellSouth affiliate or to any other entity for the same Network Element.

30.10.3.1 DELETED

> 30.10.3.2 BellSouth agrees to work cooperatively with AT&T to provide Network Elements that will meet AT&T's needs in providing services to its Customers.
>
> 30.10.4 Unless otherwise designated by AT&T, each Network Element and the interconnections between Network Elements provided by BellSouth to AT&T shall be made available to AT&T on a priority basis that is equal to or better than the priorities that BellSouth provides to itself, BellSouth's own Customers, to a BellSouth affiliate or to any other entity for the same Network Element.

Conclusion

The Commission's Order failed to take into consideration the parties' existing language, despite Supra's concerted efforts to have the Commission consider same. As such, Supra requests that the Commission reconsider its holding and require that the final, arbitrated agreement include such existing language.

K. Reciprocal Compensation for calls to Internet Service Providers.

Issue: Should calls to Internet Service Providers be treated as local traffic for the purposes of reciprocal compensation?

The Commission failed to consider what the FCC actually ordered in 01-131. The Commission' Decision makes the following statement:

> "We would agree that FCC01-131 does not explicitly state that the FCC allows – or restricts – us from ordering the FCC rates into specific interconnection agreements."

Supra did not ask the Commission to "order" specific rates, or "set" specific rates in this arbitration. Supra asked the Commission to include the language setting forth the FCC's new interim recovery mechanism. This language does not in any way set or order a specific rate.

The Commission has specific authority to decide all open issues put before the Commission. *See MCI Telecommunications Corporation v. BellSouth Telecommunications, Inc.*, 112 F.Supp.2d 1286, 1297 (N.D. Fla. 2000). As such, the Commission has the jurisdiction to order that the parties include language identical to that adopted in the MCI/BellSouth agreement, in Section 9.4.7 of the MCI Agreement, regarding the interim recovery mechanism established by the FCC in Order 01-131.

The FCC states in the body of its Order that "the service provided by LECs to deliver traffic to an ISP constitutes, at a minimum, 'information access' under section 251(g), and, thus, compensation for this service is not governed by section 251(b)(5), but instead by the Commission's (FCC). . . section 201 authority." With this, the FCC under its section 201 authority established an "interim recovery mechanism" that gradually lowers payments and caps growth for 2001, 2002 and 2003. While the Order is voluminous and awkward at times, the Ordering paragraph for 01-131 is absolutely clear:

> "that the provision of this Order prohibiting carriers from invoking 252(i) of the Act to opt into an existing interconnection agreement **as it applies to rates paid** for the exchange of ISP-bound traffic will be effective immediately upon publication of this Order in the Federal Register." (Emphasis added).

The FCC's Order only preempts the "rates" in existing interconnection agreements. The Order does not preclude the Commission from allowing Supra to include the same "interim recovery mechanism" language already approved by BellSouth in Section 9.4.7 of the MCI/BellSouth Agreement.

The FCC Order simply means that if Supra chose to opt into an existing agreement that was negotiated in 2000, as opposed to continuing with this arbitration,

that Supra would be limited to the "interim recovery mechanism" established in Order 01-131 for purposes of compensation for ISP-bound traffic.

The Commission is wrong to suggest that this FCC Order *requires* BellSouth to remove Section 9.4.7 of the MCI Agreement involving compensation for ISP bound traffic.

FCC Order 01-131 creates an interim recovery mechanism that imposes caps on the amounts of traffic for which any compensation may be obtained. It is important to note that there is a huge distinction between legal entitlement and eligibility. Supra is clearly entitled, as a matter of law, to avail itself of the new FCC interim recovery mechanism and to receive compensation for ISP in-bound traffic. Whether Supra will actually receive compensation under the new interim recovery mechanism depends on the interim recovery mechanism language is subsequently interpreted. But, to deny Supra the right to include the new language setting out the FCC new recovery mechanism cannot be legally substantiated.

Accordingly, the MCI language with respect to ISP-bound traffic must <u>not</u> be removed. The FCC Order does not require its removal. The Commission is simply wrong to suggest that the Commission does not have the authority to order than the FCC's new interim recovery mechanism language be included.

Supra requests that the Commission reconsider its Final Order on this issue and order that the FCC's new interim recovery language be included in the parties' follow on agreement.

The FCC's Order only preempts the "rates" in existing interconnection agreements. The Order does not preclude compensation as suggested by BellSouth. The

Order simply means that if Supra chose to opt into an existing agreement that was negotiated in 2000, Supra would be limited to the "interim recovery mechanism" established in Order 01-131 for purposes of compensation for ISP-bound traffic.

The Commission is wrong to suggest that this FCC Order *requires* BellSouth to remove Section 9.4.7 of the MCI Agreement involving compensation for ISP bound traffic. The Commission's decision presupposes that the FCC Order 01-131 provides that an ALEC that has never exchanged traffic with an ILEC in a given state is not entitled to receive compensation for ISP-bound traffic in that state. This is false. The Order contains no such language.

As mentioned earlier herein, FCC Order 01-131 creates an interim recovery mechanism that imposes caps on the amounts of traffic for which any compensation may be obtained. It is important to note that there is a huge distinction between legal entitlement and eligibility. Supra is clearly entitled, as a matter of law, to avail itself of the new FCC interim recovery mechanism and to receive compensation for ISP in-bound traffic. Whether Supra will receive compensation under the new interim recovery mechanism depends on future litigation between the parties over the implementation of the FCC interim recovery mechanism and its applicability. But, to deny Supra the right to include the new language setting out the FCC new recovery mechanism cannot be legally

L. Validation and Audit Requirements.

Issue: Should the Interconnection Agreement include validation and audit requirements which will enable Supra to assure the accuracy and reliability of the performance data BellSouth provides to Supra?

The Commission adopted BellSouth's position that it is unnecessary to impose a condition that the final, arbitrated agreement include validation and audit requirements which will enable Supra to assure the accuracy and reliability of the performance data as provided by BellSouth. In support of its position the Commission erroneously relied upon BellSouth's contention that this issue is among the issues included in the Commission's Generic Performance Measurement Docket No. 000121-TP, more specifically Final Order No. PSC-01-1819-FOF-TP.

For instance, the audit recommended by Final Order PSC-01-1819-FOF-TP can only be performed at a regional level. (See Section XXXI of said Final Order). In addition, the audit is not OSS specific. It averages all data, and treats all ALECs as one. BellSouth will always be able to manipulate the data, as it is the one providing the data. If there is discriminatory access in Florida, BellSouth can beat the audit, by manipulating the data in other states. Since the Commission cannot affect BellSouth's behavior in other states, BellSouth is in a "win-win" situation.

Significantly, BellSouth has admitted to this panel that BellSouth's retail OSS and ALEC OSS are not at parity.[97] Therefore, the performance data applicable to Supra cannot be lumped together with other ALECs.

Accordingly, Supra requests that this Commission reconsider its ruling and find that the final arbitrated agreement must include validation and audit requirements which will enable Supra to assure the accuracy and reliability of the performance data provided by BellSouth. More specifically, the final arbitrated agreement should mandate that BellSouth have an independent audit conducted of its performance measurement systems,

[97] See Hearing Testimony of Pate (TR 1210).

annual audits, and, when requested by Supra, audits when performance measures are changed or added, and that such audits be paid for by BellSouth.

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

Issue: What does "currently combines" mean as that phrase is used in 47 C.F.R. §51.315(b)?

Under what conditions, if any, may BellSouth charge Supra a "non-recurring charge" for combining network elements on behalf of Supra?

Should BellSouth be directed to perform, upon request, the functions necessary to combine unbundled network elements that are ordinarily combined in its network? If so, what charges, if any, should apply?

Should BellSouth be required to combine network elements that are not ordinarily combined in its network? If so, what charges, if any, should apply?

(Issue 21 and 23) The Commission should allow Supra to provide telecommunications services to any customer using any combination of elements that BellSouth routinely combines in its own network and to purchase such combinations at TELRIC rates. This interpretation of the term "currently combines" is consistent with the nondiscrimination policy of the Act and 47 C.F.R.§51.315(b).

(Issue 22) BellSouth should be direct to combine elements at TELRIC cost.

(Issue 24) BellSouth should be directed to perform, upon request, the functions necessary to combine unbundled network elements that are not ordinarily combined in its network.[98]. Furthermore, C.F.R. 47 51.309 states that BellSouth must provide without:

> **limitations, restrictions, or requirements on request for, or the use of, unbundled network elements that that would impair the ability of a**

[98] First Report and Order, cc Docket 96-98, Order 96-325 at ¶¶ 294-296

requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.[99] (Emphasis added.)

The law does NOT say in the manner that BellSouth intends, nor does the Act provide for the ILEC to determine, limit, coerce, or mandate an ALEC to limit the uses it has for a UNE to anything other than **"a telecommunications service"**[100]

So as long as Supra is providing a telecommunications service, and not interfering with other users, BellSouth cannot dictate uses of UNEs. In considering any of BellSouth's claims regarding UNE combinations, it is imperative to at all times view such claims in the light of BellSouth's proven record of refusal to comply with this Commission's orders, its contractual obligations, and its tortious intent to harm. It is BellSouth's long standing policy, dating back prior to the Act, to avoid providing cost based UNE combinations to competitors that forms the basis for its position on these issues. This policy is anti-competitive and designed to appear to regulatory bodies as "responsive to Supra in a substantive manner, without actually being so."

To be perfectly clear, 47 CFR § 51.311 imposes a duty upon ILECs to provide unbundled network elements, as well as the quality of the access to such, at least at the level of quality equal or superior to that the ILEC provides to itself. At issue is who should be responsible for combining such network elements. Should the Commission impose the obligation upon Supra to combine such, Supra requests some guidance as to how the Commission proposes to allow Supra access to the requested network elements so as to be able to combine them. There are two unanswered questions in BellSouth's view of this issue:

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[99] C.F.R. 47 51.309

The labor to effect such combinations should be performed by BellSouth at TELRIC cost. This should be reflected as a one-time, non-recurring cost, constant with the manner in which it is performed and the number of carriers that will benefit (Supra alone). There shall be no monthly recurring costs charged for elements that do not have a physical representation (i.e. they don't exist). All elements shall be charged to Supra at TELRIC cost. Supra shall have rights to exclusive use of unbundled loop elements, regardless if the UNE is used alone, or in combination with other network elements provided by BellSouth or any other carrier.

Basis for the FPSC's Decision:

The FPSC cites to federal case law in supporting its position. Primary to its position, the Commission cites to the Rulings in the Eight Circuit[101] which invalidated FCC Rules 51.315 (c)-(f), but honored the Supreme Courts reinstatement of 51.315(b).[102]

The commission goes on to cite to the FCC in the *UNE Remand Order*[103] which bears repeating here:

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

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[100] ID
[101] 219 F. 3d 744
[102] Order at pg. 84 para 2.
[103] CC order 99-238 para 479 and 480.

> 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**

(Order at pg. 85, para 5 and 6 Emphasis Added)

Facts and/or legal argument which FPSC failed to consider:

The Commission's reliance on the fact that the FCC specifically declined to adopt the broad interpretation of Rule 51.315(b) that Supra is seeking[104] is misplaced. A plain reading of the FCC's finding reveals the reason the FCC "specifically declined" was that the entire matter was once again before the Eighth Circuit, and lacking a reversal at that level the FCC once again expects the matter to be appealed to the Supreme Court. It is for that reason that this Commission reliance on the Eight circuit is misplaced. We are currently operating during a time that specific rules have been vacated and the entire process is under appeal by a variety of parties. The FCC did **not** rule against the commentators, it merely **reserved** judgment until the pending appeals illuminated the law.

For the same reason the Commission's following paragraph should also be reconsidered as it too relies on an **old** Eighth Circuit ruling currently before the courts. Here the FPSC has ruled against maintaining the current state of rulemaking requiring ILECs to combine UNEs in Florida, thus taking an opposite view of the FCC, who chose to wait for the courts. While it is completely within the power of this Commission to do so, it is noted that in this case, in the absence of controlling law, and with decisions pending before the Eighth Circuit, this Commission chose to rule against supporting competition via UNE combinations rather than waiting for guidance form the courts while maintaining the status quo:

This Order [UNE Remand 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. (Order at pg. 86, para 2)

Supra notes that over the years since the passage of the Act, BellSouth has been slow to implement UNE-P during periods when the law favored ALECs and quick to refuse same when it thought that an appeal or other legal mechanism might remove its obligation to do so. In each case these actions have benefited BellSouth to the detriment of ALECs. As Nilson testified[105] the FCC has clearly recognized this impediment:

> 12. Only recently have incumbent LECs provided access to combinations of unbundled loops, switches, and transport elements, often referred to as "the platform." Since these combinations of unbundled network elements have become available in certain areas, competitive LECs have started offering service in the residential mass market in those areas. For example, in January of this year, Bell Atlantic, as part of an agreement with the New York Public Service Commission, began offering the unbundled network element platform out of particular end offices in New York City. As a result, MCI WorldCom had acquired upwards of 60,000 new local residential customers in New York as of June 1999.[106] AT&T also plans to serve local residential customers over the platform in Texas.[107] (*The UNE Remand Order* CC Order 99-238 at ¶ 12:, DT Nilson at pg 46-47)

Yet for some reason this commission "takes exception" to Supra's position that BellSouth's failure to honor its obligation under contract, in the face of pending appeals since 1996 should somehow be rewarded now that the past contract has expired and the law is in a state of flux.[108]

In taking this position, this Commission has also failed to anticipate that the FCC's words in the *UNE Remand Order* **clearly anticipate new rules based on the outcome of the pending appeals.**

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[104] Order at pg. 85 para 5

[105] DT Nilson pg. 46 ln 7 -47 ln 25

[106] CC Order 99-238 Footnote -- *Id.* at para. 17.

[107] CC Order 99-238 Footnote -- Letter from Frank S. Simone, Government Affairs Director, AT&T, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98, Attachment at 4-5 (filed June 25, 1999).

This Commission is chartered to foster competition **not** to protect BellSouth's market share. Yet in this uncertain legal arena, it appears as if that is exactly what this Commission has chosen to do, rule in favor of BellSouth's market share at the expense of competition.

Paragraphs 135-137 of the *First Report and Order* gives this commission broad powers to foster competition on a state by state basis outside of Federal regulations, including the right to order more complete rules, requirements, or elements as necessary to foster competition.

Issue Two

The entire issue of States' rights v. Federal rules was addressed in the Rebuttal testimony of Nilson. This Commission has failed to address a single assertion made in that testimony, while making the following statement:

> 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.

This Commission is silent on which "policy issues" were so valid, but not consistent with Federal law. Supra witness Nilson addressed this issue in Rebuttal testimony which

[108] Order at pg. 86, para 3.

is repeated verbatim below. Far from being merely "policy issues", Nilson's testimony addresses the comments of Justice Thomas footnote 10 in *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S. Ct. 721 (Iowa Utilities Board II), presenting a path, supported by the ruling in *AT&T v. Iowa Utilities*, (Clearly "consistent with Federal law")[109] where the Florida Commission is given the very leeway needed to resolve this issue in favor of fostering local competition. In fact the testimony also leverages FCC orders reflecting on the opinion of previous Florida Commissioners that seem markedly contrasted to the ruling of the current Commission and raises the question of "what has changed in Florida?"

The Rebuttal Testimony of Nilson is repeated herein:

Q ARE THERE ANY OTHER AREAS THAT SUPPORT RECONSIDERATION ON THIS MATTER?

A. Yes. Staff offered a recommendation to the Commission not consistent with prevailing law. Specifically at page 25:

> Staff does not believe this Commission's obligations under the law can accommodate the urging of AT&T in this regard. While the Commission may impose additional requirements consistent with federal law, the Commission should not impose requirements that conflict with federal law. Though staff recognizes that a higher level of efficiency may result from BellSouth combining UNEs, it is clearly not consistent with prevailing law to order such combining, absent agreement between the parties.

As well intentioned as it may be, staff does **not** cite specific federal law that would be violated if AT&T were to prevail. They cannot, because it does not exist. The FCC has specifically declined to offer definitions of "currently combines" as stated in the staff analysis. Indeed this area is fraught with undefined terms and vacated provisions. Should this Commission seek to accommodate Supra's urging in this matter, it would be doing so in areas **where there is no prevailing law, definition, or Rule subsections that**

[109] Order at pg. 87, para 3.

are currently vacated. The FCC empowered the state commissions in ¶ 22 of *The First Report and Order on Local Competition* CC Order 96-325.

> 22. In this regard, this Order sets minimum, uniform, national rules, but also relies heavily on states to apply these rules and to exercise their own discretion in implementing a pro-competitive regime in their local telephone markets.

In its recommendation staff erred in stating "the Commission should not impose requirements that conflict with federal law." The FCC has recognized that state commissions "share a common commitment to creating opportunities for efficient new entry into the local telephone market." And provide for state commissions to "ensure that states can impose varying requirements."

> 42. The decisions in this Report and Order, and in this Section in particular, benefit from valuable insights provided by states based on their experiences in establishing rules and taking other actions intended to foster local competition. Through formal comments, *ex parte* meetings, and open forums,[110] state commissioners and their staffs provided extensive, detailed information to us regarding difficult or complex issues that they have encountered, and the various approaches they have adopted to address those issues. Information from the states highlighted both differences among communities within states, as well as similarities among states. Recent state rules and orders that take into account the local competition provisions of the 1996 Act have been particularly helpful to our deliberations about the types of national rules that will best further the statute's goal of encouraging local telephone competition.[111] These state decisions also offered useful insights in determining the extent to which the Commission should set forth

[110] CC Order 96-325 Footnote -- Public forum held on March 15, 1996, by FCC's Office of General Counsel to discuss interpretation of sections 251 and 252 of the Telecommunications Act of 1996; public forum held on July 9, 1996, by FCC's Common Carrier Bureau and Office of General Counsel to discuss implementation of section 271 of the Telecommunications Act of 1996.

[111] CC Order 96-325 Footnote -- *See, e.g.*, Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms and Condition and the Initial Unbundling of Services, Docket No. 6352-U (Georgia Commission May 29, 1996); AT&T Communications of Illinois, Inc. *et al.*, Petition for a Total Local Exchange Wholesale Service Tariff from Illinois Bell Telephone Company, Nos. 95-0458 and 95-0531 (consol.) (Illinois Commission June 26, 1996); Hawaii Administrative Rules, Ch. 6-80, "Competition in Telecommunications Services," (Hawaii Commission May 17, 1996); Public Utilities Commission of Ohio Case No. 95-845-TP-COI (Local Competition) (Ohio Commission June 12, 1996) and Implementation of the Mediation and Arbitration Provisions of the Federal Telecommunications Act of 1996, Case No. 96-463-TP-UNC (Ohio Commission May 30, 1996); Proposed Rules regarding Implementation of §§ 40-15-101 *et seq.* Requirements relating to Interconnection and Unbundling, Docket No. 95R-556T (Colorado Commission April 25, 1996) (one of a series of Orders adopted by the Colorado Commission in response to the local competition provisions of the 1996 Act); Washington Utilities and Transportation Commission, Fifteenth Supplemental Order, Decision and Order Rejecting Tariff Revisions, Requiring Refiling, Docket No. UT-950200 (Washington Commission April 1996).

uniform national rules, and the extent to which we should ensure that states can impose varying requirements. Our contact with state commissioners and their staffs, as well as recent state actions, make clear that states and the FCC share a common commitment to creating opportunities for efficient new entry into the local telephone market. Our experience in working with state commissions since passage of the 1996 Act confirms that we will achieve that goal most effectively and quickly by working cooperatively with one another now and in the future as the country's emerging competition policy presents new difficulties and opportunities.

Indeed, in 1996 the Florida Public Service Commission filed comments quite contrary to staff's recommendation in 00-0731: (First Report and Order at ¶ 65):

> 65. Some state commissions recommend that, if the FCC does establish explicit requirements, states should be allowed to impose different requirements. For example, the Illinois Commission urges the FCC to adopt a process by which states may seek a waiver from the national regulations, upon a showing of need.[112] The Ohio and Florida Commissions recommend that the FCC adopt explicit requirements that states could choose to adopt, but that states would have the option of developing their own requirements.[113] Under the proposal recommended by the Ohio Commission, existing state regulations that are consistent with the 1996 Act would be "grandfathered."[114] In addition, if a state failed to adopt any rules regarding competitive entry into local markets within a specified time, the FCC rules would be binding.[115] (Emphasis Added)

In this light the Commission has the authority to set policy as defined by *United States* v. *Jones*, <u>109 U.S. 513</u> (1883), Supra urges this Commission to reconsider its prior position regarding these three crucial issues, in light of Supra's factual and legal arguments.

Finally the strongest arguments against the staff recommendation that this Commission **not** make findings that contradict or apply Federal law is found in Justice

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[112] CC Order 96-325 Footnote -- Illinois Commission comments at 13; *accord* AT&T comments at 11; ACTA comments at 2-4.

[113] CC Order 96-325 Footnote -- Florida Commission comments at 2-3; Ohio Commission comments at 4-5; *accord* NYNEX reply at 4.

[114] CC Order 96-325 Footnote -- Ohio Commission comments at 4-5; *accord* NARUC comments at 6-7.

[115] CC Order 96-325 Footnote -- Ohio Commission comments at 4-5.

Thomas footnote 10 in *AT&T v. Iowa Utilities Bd.,* 525 U.S. 366, 119 S. Ct. 721 (Iowa Utilities Board II). While the FCC has failed to specifically address the issue, it falls upon the state commissions to set specific rulemaking on it. Specifically, footnote 10 provides:

> Justice Thomas notes that it is well settled that state officers may interpret and apply federal law, see, *e.g., United States* v. *Jones,* 109 U.S. 513 (1883), which leads him to conclude that there is no constitutional impediment to the interpretation that would give the States general authority, uncontrolled by the FCC's general rulemaking authority, over the matters specified in the particular sections we have just discussed. *Post,* at 12—13. But constitutional impediments aside, we are aware of no similar instances in which federal policymaking has been turned over to state administrative agencies. The arguments we have been addressing in the last three paragraphs of our text assume a scheme in which Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions, which–within the broad range of lawful policymaking left open to administrative agencies–are beyond federal control. Such a scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well.[116] (Emphasis Added)

The Supreme Court has recognized no constitutional impediments to the States' rights to interpret and apply Federal law "...uncontrolled by the FCC's general rulemaking authority," thereby allowing this Commission to rule, under the interconnection agreement, in the absence of federal rules.
(RT Nilson pg. 16-21)

Conclusion:

This Commission must reconsider its ruling in this regard, and allow this case to stand on its own merits without any reliance on previous cases heard by this Commission. Supra cannot and must not be penalized for the failure of another ALEC to adequately prepare and argue its case before this Commission. The simple fact is that a legal vacuum exists and once again BellSouth ahs sought to capitalize on that vacuum to protect its market share. This Commission is empowered to foster competition in

Florida and given extraordinary powers to set local regulations that exceed the Federal regulation in order to do so.

This Commission must order that Unbundled network elements ordinarily combined in BellSouth's network continue to be combined at TELRIC cost to avoid the wasteful and potentially service disrupting process of first ordering the circuit as resale, and then ordering a conversion to UNE to overcome the legal impediments argued herein.

It is not as if BellSouth will not continue to combine UNE elements not currently combined, it is just that wasteful and unnecessary second conversion step.

The Florida Consumer deserves better than this.

N. Rates, Terms, and Conditions for access to serve multi-tenant Environments.

Issue: What terms and conditions and what separate rates, if any, should apply for Supra to gain access to and use BellSouth's facilities to serve multi-tenant environments?

Where single points of interconnection do not exist, BellSouth should construct such and Supra should be charged no more than its fair share of the forward-looking price. The single point of interconnection[117] should be fully accessible by Supra technicians without the necessity of having a BellSouth technician present.[118]

Basis for the FPSC's Decision:

Despite this commission's position in Issue 29 that each of the AT&T and Supra v. BellSouth cases should each stand on their own merits, the order, in this issue, leans

[116] CC Order 96-325 Footnote -- Note 10 of *AT&T v. Iowa Utilities Bd.* 525 US. 366 (1999).
[117] *UNE Remand Order* (CC order 99-238) ¶ 224 -- 226; 47 C.F.R. §51.317, 51.319 and 51.5.
[118] **DT of Nilson, pg. 71, ln. 6 - pg. 83, ln. 9.**

heavily on the Dockets 000731-TP and 990149-TP and the Media One arbitration. On the one hand this Commission states that

> "It does not appear that any new facts or arguments have been presented in this proceeding to merit a change from our prior decisions."[119]

However in he very next paragraph the Commission contradicts itself and finds merit in Supra new arguments:

> 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.

Facts and/or legal argument which FPSC failed to consider:

Issue One

After stating that Supra's arguments "merit consideration," this Commission neglects to offer such consideration, instead citing to conclusions arrived at in other proceedings and not in record evidence in this proceeding, rather than dealing with Supra's new arguments directly. The order even adopts the "although it is unclear" mantra used repeatedly by BellSouth witness Kephart whenever he is confused, just prior to accurately enunciating clearly and exactly what Supra witness Nilson proposed. Once again the Commission's order leans heavily on BellSouth witnesses verbal representations, and ignores the weight of Supra's evidence: namely, well-documented citations to FCC Rules in this regard. In doing so they contradict themselves in regard to Issue 29 (O).

Issue Two

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[119] Order at pg. 91, para 3.

Furthermore, the order fails to address the issue of the ALEC access terminal being in violation of the FCC *UNE Remand Order* (CC order 99-238) which clearly specifies a single point of interconnection[120]. This Commission even illuminates the basis for this decision in violation of the FCC order in stating:

> 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 at page 92, Emphaisis Added)

Contrary to Federal rules, and based upon evidence not in the record in this proceeding, this Commission has put BellSouth's arguments of network security and control ignored by the FCC, ahead of Supra's legitimate concerns.

Moreover, it has increased the cost and lead-time for installing such panels, put the full (not shared as the FCC envisioned) cost burden on each ALEC one at a time, and increased the time to provision new installations without properly defining all of the time intervals involved.

Issue Three

The timeframe and costs for the non-standard Florida ALEC access terminals is defined in the FPSC order PSC-99-2009-FOF-TP. While Supra does not dispute being made subject to the generic Florida rates for these items, this issue revealed a flaw in the Order regarding the timeframes to complete such work. The parties have heretofore been

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[120] CC Order 99-238 para 226.

unable to resolve the missing timeframes and look to this Commission to resolve this remaining issue.

Issue Four

A set of rules have been promulgated for both garden apartment and high rise buildings that present two different sets of operation rules, prices, terminal configurations, non-recurring costs, and install timeframes.

Strikingly, no rule has been developed to differentiate between the two type of installations that would let either party, or a neutral third party determine which is which. The result is a situation ripe for arbitrage and litigation that will have no clear method of determining the outcome or winner. This is bad contract language and will burden this Commission again in the future if not resolved now.

Conclusion:

This Commission should properly reconsider the record evidence in this issue to determine that its previous rulings, too heavily relied upon in this case, are in violation of FCC Rules[121]. Further, the non-standard method of access prescribed by this Commission is not at parity with BellSouth's own access to the same subloop elements, the costs are elevated for the ALEC, and the lead-time to provision a new terminal is **(1)** greater than BellSouth's own lead time to provision, and **(2)** some of the lead times that should have been specified in PSC-99-2009-FOF-TP are missing and need to be considered by this Commission as the parties cannot agree what time frame is appropriate for Supra to expect.

[121] FCC *UNE Remand Order.*

Further, in recognition of Kephart's "Garden apartment" and "high-rise" scenarios, this Commission **must** establish **clear and unequivocal** measurements that define how one will determine which is appropriate at a given location, or reconsider the entire two prong conclusion in favor of a single, properly specified standard that will prevent future argument and litigation.

O. Local Circuit Switching Rates.

Issue: Is BellSouth 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? Is BellSouth 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?

It is Supra's position that its customers should be allowed to freely choose their local service provider regardless of the number of lines that customer purchases. As such, BellSouth should be required to allow Supra to purchase local circuit switching at UNE rates to provide service to ALL customer lines in Density Zone 1, not just for the first, second, and third lines purchased by customers but also for customers with four lines or more.

Furthermore, this Commission has abrogated its responsibility to Florida consumers, particularly residential telephone customers, by incorrectly implementing the FCC's order in this regard. The issue of relieving BellSouth of its obligation to offer ULS and Loop combinations has been transformed into a special access issue. The existing implementation of EELs in Florida, in allowing EELs to only be used as a replacement for special access circuits ordered from BellSouth's FCC#1 tariff, is flawed. In no way has the implementation of EELs been crafted to make it possible for an ALEC

serving the estimated 85% share of residential telephone customers to use the EEL in combination with ULS outside Density zone 1 in the MSA, thereby alleviating the perceived overcrowding situation in downtown end offices that the FCC sought to address. This is due to the fact that such combinations will **never** be currently combined in the network and will have no resale equivalent, thus preventing their use by a UNE-P provider serving residential customers.

Instead, the Florida implementation of EELs is crafted to deal with UNE replacement of special access circuits (BellSouth FCC #1 tariff § 7) catering to the 10% business customers and allowing BellSouth to regain a virtual monopoly in the 85% residential market, based largely upon the special interest of one Florida ALEC - AT&T.

Basis for the Commission's Decision:

The Commission's decision is grounded in the erroneous finding that BellSouth does not bear the burden of proof to show that it offers EELs throughout Density 1 in the top 50 MSAs, and can simply claim that it does in order to deny ALECs local circuit switching at UNE rates.

Facts and/or legal argument which the Commission failed to consider:

Issue One

The Commission takes conflicting positions between this issue and Issue 32(B). Here, the Commission states that while 47 CFR § 51.319(c)(2) requires certain pre-conditions be met, BellSouth has no obligation to prove such before it denies ALECs local circuit switching at UNE rates. These pre-conditions are: **(1)** that the requesting carrier serves four or more voice grade lines (DS0) equivalents or lines (at the same

address[122]), **(2)** provided that the Incumbent LEC **provides** non-discriminatory access to combinations of unbundled loops and transport (also known as the "Enhanced Extended Link" (sic)) throughout Density Zone 1, **(3)** and the Incumbent LEC's local circuit switches are located in (i) the top 50 Metropolitan Statistical areas as set forth in Appendix B or the Third Report and Order and . . . in CC Docket No. 96-98, and (ii) In Density Zone 1 as defined in §69.123 of this chapter on January 1, 1999.

Incredibly, the Order represents that the FCC Order requiring that ILECs must "provide non-discriminatory access" to EELs "requires no showing" by BellSouth[123]. All that is apparently required of BellSouth is that " . . . BellSouth is cognizant of its general obligations to offer EELS throughout Density Zone 1 in the top 50 MSA's, we do not believe that BellSouth is obligated to offer specific proof to us . . . "[124]

This is an incredible conclusion in light of the fact that **BellSouth does not even make a representation** that is supplies non-discriminatory access to EELs throughout the MSAs of Miami, Ft. Lauderdale and Orlando in Florida. BellSouth's Cox merely stated that the Commission's May 25 order[125] "established cost based rates for new EELS"[126], and that "...BellSouth **will** provide the ALEC with EELS at UNE rates."[127] Nowhere does this Commission explain how BellSouth's assertion that it "will provide EELS at UNE rates" is equivalent to "provides non-discriminatory access to EELS throughout Density Zone 1". Indeed, there is a world of difference between the two. Apparently, this Commission is content to know that BellSouth knows it **should** provide

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[122] Commission Order PSC-01-1951-FOF-TP.
[123] Final Order at page 97.
[124] Final Order at pages 97-98
[125] Commission Order PSC-01-1181-FOF-TP in Docket 99-0649-TP
[126] See Rebuttal Testimony of Cox (RT 16).
[127] Id., at page 17.

EELs ubiquitously in order to grant BellSouth the right to stop selling local circuit switching at UNE rates.

Now, compare this reasoning to that applied in Issue 32(B), regarding Supra's ability to charge BellSouth tandem-switching rates. In Issue 32(B), this Commission takes the opposite position, requiring that Supra **prove** that its switches are installed and cover a comparable geographic area before the language authorizing Supra to charge Tandem rates can be inserted into the final, arbitrated agreement. This conclusion is made despite the fact that Supra is **cognizant** of its obligations to serve a comparable area, and Supra's **representation** that its switches are to be installed in BellSouth Tandem Offices right next to the BellSouth tandem switches. In one issue, BellSouth gets the benefit of the doubt, while in the next issue, Supra must prove its argument. Supra requests that this Commission reconcile these two positions.

Further discriminatory ruling takes place in Issue 33(Q) where BellSouth's representations that collocation in Remote terminals could happen in "60 days" is taken over Supra's evidence of three years of BellSouth's defiance to implement this Commission's Orders in Docket 980800-TP, FPSC Order PSC-99-0060-FOF-TP and the findings of the parties' commercial arbitrators[128], which are passed off as "anecdotal evidence"[129]. Once again this Commission applies a double standard in favor of BellSouth, evidencing clear examples of the bias that so permeates this case.

Issue Two

Supra has made good faith representations that there are no other providers of unbundled local switching in the MSAs of Miami, Ft. Lauderdale and Orlando. Supra

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[128] See Supra Exhibit OAR 3.

[129] Final Order at page 107.

should know, as this is a major component of Supra's service area in Florida. Supra continues to believe that the Commission assumed, but did not know for sure, that alternative providers actually existed in arriving at its order in Docket 000731-TP. Interestingly, this Commission has stated that " . . . the AT&T case and the Supra case **must each stand on their own merits.**"[130] Yet, on the following page the Commission states "**As with the prior decisions involving Sprint**[131] **and AT&T,** we believe that choices exist, and we do not believe that the FCC's Rule requires a showing."[132] Here in the span of one page the Commission contradicts itself on whether evidence from one case may reflect on the decision in this case. Make no mistake; **there is no evidence in the record that would support a conclusion that alternative providers of local circuit switching exist in Miami, Fort Lauderdale or Orlando.**

To the contrary, the recent interconnection agreements filed by MCI(m)[133] and AT&T both show that BellSouth's "Market Rate" for ULS is $14.00 per port compared to the Commission established TELRIC **cost** of $1.17 per two wire voice grade port. **This represents an incredible 1,196.6% increase above Commission established cost.** BellSouth intends to charge Supra this very "market rate" for 2 wire ULS. This is price gouging, the sole purpose of which is to destroy competition in these markets. Supra cannot imagine stronger evidence of a lack of competition or availability of ULS vendors in the three top MSAs in Florida. In the face of true competition, how does this Commission truly believe that BellSouth could charge a nearly 1200% mark-up **above cost** in its three largest markets in Florida?

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[130] Final Order at page 97.
[131] Supra believes the citations should correctly be MCI(m), not Sprint.
[132] Final Order at page 98.
[133] MCI(m) / BellSouth agreement Page 81 of 709.

Supra's contention in this regard is not relative to the FCC orders, but to the Florida consumers. By ignoring this situation and allowing BellSouth to have its way, this Commission has all but eliminated competition by resale (admittedly not profitable by all) and UNE combinations. For example, BellSouth's Basic Residential Plan, which by their tariff sells for $10.65[134] in many areas, will actually **cost** an ALEC $25.89, $30.03, and $43.33[135] depending upon the correlation between the Commission-established zones and Density Zone 1 of §69.123. Furthermore, the Commission ordered the switch-as-is charge of $0.92[136] increased to an incredible $41.50, a **4510.9% increase above the Commission ordered TELRIC cost.** By failing to address this issue, the Commission has assured that competition in Miami, Ft. Lauderdale and Orlando will cease to exist in the Resale and UNE, entry environments.

Issue Three

The Commission failed to consider the effect of UNE providers **if** EELs were ubiquitously available throughout these MSAs. That is:

1. There is no market based (or even cost based) combination of EEL and ULS provided so that a UNE-P provider may still be able to service voice customers. Neither 99-0649, the MCI(m) or AT&T agreements contain provisions to combine EELs with ULS in a manner that would allow basic residential or business service in the top 50 MSAs to be provisioned via UNE-P. ALECs **must** have a switch or a ULS switching vendor (which does not exist).

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[134] BellSouth Florida GSST Tariff
[135] MCI(m) / BellSouth agreement Page 81 of 709.
[136] FPSC order PSC-01-2051-FOF-TP in Docket 990649-TP

2. While BellSouth offers combinations of Loop and Interoffice Transport (EELs) that are not currently combined in the affected MSAs, no such agreement exists for EEL and port combinations. As such they must already be combined by Florida's definition of currently combined.[137]

It is obvious to Supra that the net effect of the piecemeal decisions in this case were arrived at without due deliberation and understanding of the facts.

Conclusion

The Commission must make a serious and deliberate effort to make certain that its actions do not eliminate UNE combinations as a market entry strategy in Miami, Ft. Lauderdale, and Orlando. The effect of this Commission's Order, as written, will allow BellSouth to gouge its competitors and effectively wipe out competition. As such, Supra requests that the Commission reconsider this issue and find that BellSouth shall **not** be allowed to charge so called "market rates" (a misnomer) until BellSouth makes a substantive showing that non-discriminatory access to EELs is available throughout Density Zone 1 in the three affected Florida MSAs; and that this Commission orders and BellSouth makes available combinations of EELs and ULS, whether or **not** currently combined in any and all end offices and tandems outside Density Zone 1 of the three affected MSA's, provided the customer premise to which EEL service is delivered is within Density Zone 1 of the three affected MSA's.

[137] From BellSouth's markups sent to Supra and dated 3/12/2002 " **For Georgia, Kentucky, Louisiana, MIssissippi (sic) and Tennessee, the recurring UNE Port and Loop charges listed apply to Currently Combined and Not Currently Combined Combos.** The the (sic) first and additional Port nonrecurring charges apply to Not Currently Combined Combos for all states. In GA, KY, LA, MS and TN these nonrecurring charges are commission ordered cost based rates and in AL, FL, NC and SC these nonrecurring charges are Market Rates and are listed in the Market Rate section. For Currently Combined

P. Tandem Switching.

Issue: Under what criteria may Supra charge the tandem switching rate?

Based on Supra's network configuration as of January 31, 2001, has Supra met these criteria?

Supra's position, as documented in its post-hearing brief, is when Supra's switches serve a geographic area comparable to that served by BellSouth's tandem switch, then Supra should be permitted to charge tandem rate elements as Supra has, as recently as June 2001, been denied the right to collocate a switch in each of the nine (9) BellSouth Tandem offices in Florida[138]. As the final, arbitrated agreement is to have a three-year term and as Supra has been granted the right to collocate[139], Supra seeks language assuring its right to charge the Tandem-switching rate upon installation of its switches.

As Supra has already suffered through years of delay and intentional misconduct by BellSouth on collocation, the last thing Supra desires is to get its switches installed and then endure **many more** years of legal challenges and arbitrations in order to be able to charge the Tandem-switching rate. As it is, BellSouth has **already** defied this Commission's December 1998 order to collocate switches in the North Dade Golden Glades (NDADFLGG) and Palm Beach Gardens (WPBHFLGR) central offices for over three (3) years, finally conducting space acceptance walkthroughs last week. If not for the actions of a [redacted]

[redacted]

[redacted], Supra may very well still be fighting to collocate in BellSouth's

Combos in all other states, the nonrecurring charges shall be those identified in the Nonrecurring - Currently Combined sections." (Emphasis Added)
[138] See Direct Testimony of Nilson (DT 91-93).

central offices. In light of BellSouth's tortious conduct, for BellSouth to now argue that because Supra has not yet collocated a switch it should be barred from receiving tandem-switch rates for the life of the final, arbitrated agreement, is indicative of the nature and anticompetitive practices of BellSouth.

Basis for the Commission's Decision

The entire basis for denying Supra's request for language in anticipation of collocation is, through no fault of Supra's[140], BellSouth's tortious conduct in defying Commission and FCC orders as well as the contractual provisions of the parties' current agreement.

Facts and/or legal argument which the Commission failed to consider

The Commission ignored Supra's request for language that once Supra had installed a switch in a BellSouth tandem office, that Supra was *ipso facto* entitled to charge the Tandem-switching rate. Not before. As such, if no switch were ever deployed, no Tandem rate may be charged.

> 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. [141] (Bold Emphasis added, Undelined Emphasis in the original.)

However, once a switch is deployed in a BellSouth Tandem office, this Commission is spared future arbitration and/or litigation in order for Supra to begin charging the same rate BellSouth charges.

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[139] See Supra Exhibit OAR 3.
[140] Id.
[141] Final Order at page 100.

Instead, the Commission completely disregarded the findings of an [redacted] [redacted] Supra from installing its switches by denying Supra language that would allow Supra to immediately charge tandem-switching rates upon deployment of a switch in a BellSouth Tandem office.

Conclusion

Given this Commission's position in the previous issue regarding local circuit switching in the top 50 MSAs, Supra is at a loss as to how the Commission can deny Supra its requested language on this issue. Surely, Supra is cognizant of its obligation to have its switch serve the same geographic area as BellSouth's tandem switches in order to be allowed to charge the tandem-switch rate. Supra readily admits that it cannot charge such until its switches are installed and serve the same geographic area. Supra simply requests that the parties' final, arbitrated agreement reflect such, so as to prevent future disputes and needless litigation.

Q. Provision of Unbundled Local Loops for DSL Service.

Issue: What are the appropriate means for BellSouth to provide unbundled local loops for provision of DSL service when such loops are provisioned on digital loop carrier facilities?

When existing loops are provisioned on digital loop carrier facilities, and Supra requests such loops in order to provide xDSL service, BellSouth should provide Supra with access to other loops or subloops so that Supra may provide xDSL service to a customer.

Per 47 C.F.R. § 51.319, an ILEC is required to provide nondiscriminatory access to unbundled packet switching capability only where each of the four stated conditions are satisfied and in this case BellSouth has steadfastly refused to allow Supra collocation in remote terminals. Furthermore, BellSouth has refused Supra the necessary network information to locate, identify existing remote terminals and even withholds necessary CLLI code information required to properly complete collocation applications.

BellSouth seeks to appear to be in compliance and cooperating by providing a method for collocation at remote terminals. In reality, BellSouth has within its control the ability to restrict just enough information that no Supra collocation application can be approved. At this point Supra is even stymied by not being able to **locate** the existing BellSouth remote terminals. The FCC spoke to this very issue in the Final order in the *UNE Remand Order* 99-0238 at ¶ 313 which held:

> 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.)

Although BellSouth witness Kephart states that Supra may collocate its own DSLAM "...even if that 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 another ALEC's DSLAM," BellSouth has heretofore refused Supra this ability. Kephart admits to these possibilities and more[142],[143].

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[142] **TR. pg. 408, ln. 2-12**

[143] TR., pg. 408, ln. 24 - pg. 409, ln. 15.

It is undisputed that despite orders to the contrary, BellSouth has continuously refused to allow Supra to collocate[144],[145]. As BellSouth is in a position to delay collocation in a remote terminal for various reasons[146], this Commission has the authority to provide, and should provide contractual support for the FCC's third prong on this issue, thereby assuring Supra of support in the implementation of the interconnection agreement in areas where the FPSC itself lacks that authority to effectively compel BellSouth to honor its responsibilities[147]. BellSouth should have no problem with this contractual support, since, according to Kephart, they will facilitate such collocation. Supra supports the commissions order in this regard that should this not occur, BellSouth must unbundle packet switching. Supra seeks reconsideration of the specific language to effect terms and conditions for invoking this. Accordingly, Supra asks that this Commission to order BellSouth to provide Supra, at Supra's option, the ability to order collocated DSLAM and unbundled access to packet switching as a UNE at TELRIC cost, wherever BellSouth deploys local switching over DLC facilities, **at Supra's request.**

Finally, in the course of this docket, Supra was denied discovery essential to its case. This Commission now comes forward with its opinion that Supra has failed to meet the "impair" standard of 47 C.F.R. Section 51.317(b)(1)[148], apparently failing to recognize that Supra was denied discovery of network information by this Commission. Some of this data was freely released to investors after December 31, 2001[149] and said

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[144] RT of Nilson, pg. 53, ln. 19-24
[145] **Supra Exhibit DAN-3 / OAR3** at pg. 40, para 5- pg. 41 para 1
[146] RT of Nilson, pg. 54, ln. 9-12
[147] *First Report and Order* cc Order 96-325 at ¶ 135-137
[148] Order at pg 107, para 4 and 5.
[149] SOURCE - BellSouth 4th quarter 2001 Investor news. (http://www.bellsouth.com/investor/it_busprofile_coredigital.html) and a linked document http://www.bellsouth.com/investor/xls/ir_businessprofile_statistics.xls shows an incredible 65.8% of all loop feeder in the nine state region now contain fiber

data clearly evidences how badly Supra's case was prejudiced in this regard. This information and its impact will be addressed below.

Basis for the FPSC's Decision:

Despite citing to witness Cox who believes "Supra has the ability to provide DSL service to its end users by UNE-P"[150], the basis for the FPSC's decision in this case is first based upon a collocation requirement.

> Per the Final Order, 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.[151]

This is intended to satisfy Supra's first and second concerns which it quite honestly does not do. That is due to the fact that Supra's first concern is that:

> 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.[152]

BellSouth, to date, has refused Supra the network information necessary to properly file a collocation application in a single RT anywhere in the nine state region.

Supra's second concern is, that as a UNE-P based provider, it should not be required to collocate in order to provide DSL service. Yet, due to BellSouth's market dominance -- over 70% of homes in its territories were DSL ready as of December 31, 2001, 8,700 RT's are DSL ready, and 65.8% of the loop feeder network are fiber based[153]

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[150] Order at pg. 104, ln 3

[151] Order at page 106 para 3.

[152] Order at pg. 102 para 5.

[153] SOURCE - BellSouth 4th quarter 2001 Investor news. (http://www.bellsouth.com/investor/it_busprofile_coredigital.html) and a linked document http://www.bellsouth.com/investor/xls/ir_businessprofile_statistics.xls shows an incredible 65.8% of all loop feeder in the nine state region now contain fiber

-- the availability of third party DSL service that does not use the BellSouth FCC #1 tariffed ADSL transport service is non-existent. And BellSouth has refused to allow this or any other BellSouth DSL component to be deployed over a Supra UNE-P line. Essentially there **is no third party market capable of supporting DSL over UNE-P lines except BellSouth and they have claimed a legal right not to serve that market.**

Thus, Supra is faced with no alternative as a UNE-P provider except to attempt to collocate in **at least 8,700 remote terminals** and as many as 12,500 to achieve ubiquitous coverage. It is not known exactly how many of these are in the state of Florida, but based upon central office figures, it can be estimated that more than 25% are Florida based, or a minimum estimate of 3,125. The data for this analysis was refused to Supra during discovery and only became available after December 31, 2001. It represents a strong argument against this Commission's concern that the "impair" standard of FCC Rule 51.317(b)(1) was not adequately addressed.[154] Had BellSouth been compelled by this Commission to supply even this minimal level of network information, requested by Supra, Supra could have properly addressed the "impair" standard. As such, the ruling of the hearing officer has unduly prejudiced Supra's case in this regard, yet the information is now freely disclosed to investors and the general public!

Furthermore, BellSouth's polices in this regard have undergone a dramatic change since the hearing in this regard. BellSouth is now clearly refusing to provide both its retail ADSL service (BellSouth FastAccess®) and its tariffed telecom service, the ADSL transport service offered through the FCC #1 tariff, on UNE-P lines at all. This, coupled with BellSouth's market dominance as a supplier to all third party ADSL providers has

[154] Order at page 107, para 4.

eliminated the possibility of "acquiring an alternative from a third party supplier" as put forth by This Commission in its opinion:

> 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 . . . .

(Order at page 107, para 4 and 5)

Supra's case was unduly prejudiced by the refusal of the Commission to order the requested discovery, and now this Commission takes the position that lacking that same information Supra has not met the "impair" standard! This catch-22 situation created by this Commission entitles Supra to reconsideration.

Finally the Commission once again shows its bias against Supra by referring to Supra's evidence regarding its overall collocation experience as "anecdotal". This statement is ludicrous and highly prejudicial against Supra's well-documented position that has kept Supra before this Commission, courts and other bodies since 1998 trying to assert its right to collocate, such right being first ordered by this very Commission in December 1998.

Supra Exhibit DAN-3 (same as OAR-3), the finding of a commercial arbitration panel, is truly responsible for this change, and the evidence presented therein is substantially more than "anecdotal". This Commission must never have even read the

supplied evidence that states clearly Supra's business plans that were thwarted by BellSouth's tactics:

(DAN-3/OAR-3 at pg. 12, para 2)

It further finds:

(DAN-3/OAR-3 at pg. 40, para 5- pg. 41 para 1)

Supra believes that in the light of this Award, which was confirmed by the Southern District Court of Florida, the description of Supra's evidence as merely "anecdotal" is further evidence of institutional bias against Supra and its case. BellSouth present no exhibits whatsoever in its defense of this matter and yet its spoken word was immediately accepted as truth. Meanwhile, Supra witnesses and evidence were shown little respect and given even less weight.

Facts and/or legal argument which FPSC failed to consider:

Issue One

The simple fact of the matter is that despite an obligation to provide collocation in remote terminals since the passage of the act, despite a renewed requirement to provide same since the FCC's *Advanced Services Order*[155], BellSouth has refused to allow Supra collocation in any RT, has refused to even supply Supra with sufficient network information to identify, locate, and properly file a collocation application for one of the over 8,700 remote terminals that are now DSL ready[156]. In fact, in this very case BellSouth refused to supply discovery of network information to the level of detail that was presented in their December 31, 2001, fourth quarter report to investors.[157] Supra reserved the right to supplement the record "...should Supra discover relevant information"[158]

This report shows an incredible 65.8% of all loop feeder circuits in the 9 state region are now fiber fed, and Supra believes a disproportionate amount of these exist in the Florida and particularly the South Florida area, home to the majority of Supra's nearly 300,000 customers. This loop feeder system is feeding over 8700 DSL ready RT's[159]. Despite BellSouth's assertion of a "standard collocation process"[160] BellSouth has heretofore refused Supra's request to collocate, refused sufficient information to locate such terminals, and even to supply sufficient information to properly identify such

[155] Order 99-048 in CC Docket 99-147.
[156] BellSouth Investor News, 4th quarter 2001.
[157] (http://www.bellsouth.com/investor/ it_busprofile_coredigital.html) and a linked document http://www.bellsouth.com/investor/xls/ir_businessprofile_statistics.xls shows an incredible 65.8% of all loop feeder in the nine state region now contain fiber
[158] DT Nilson pg. 101 ln 6-10, *et al.*
[159] BellSouth Investor News, 4th quarter 2001.
[160] BellSouth Investor News, 4th quarter 2001.

terminals on the BellSouth collocation applications. This "standard collocation process" is a sham and should be viewed as a red herring. And yet, somehow, in the face of all this the Commission asserts that Supra is unable to meet the "impair" standard. Notwithstanding the Commission's denial of the discovery of this relevant, and perhaps determinative evidence, This Commission has failed to cite to or even consider the evidence in the record.

BellSouth is attempting to corner the market on DSL, and as such has become a carrier's carrier, only to turn around and deny a UNE-P voice provider the ability to provide DSL service using **any** provider's product, forcing UNE-P providers to attempt to collocate (which BellSouth can then control and block by refusing information necessary to file collocation applications for Remote terminals).

It is no longer possible to be a central office-based DSL provider in Florida. It appears to be impossible for any carrier to sink the necessary investments into the 8700 (and growing) RT locations and 1000 central office locations[161] (and growing??) necessary to compete at BellSouth's level. Certainly, the Commission's endorsement of BellSouth's position creates a barrier to entry. In fact, the Commission recognized this very fact in cross-examining BellSouth witness Cox[162].

Issue Two

This Commission recognized, but did not take seriously its legal right to "define specific terms and conditions governing access to unbundled elements, interconnection, and resale of services beyond the rules the Commission establishes in this Report and

[161] BellSouth Investor News, 4th quarter 2001.
[162] See TR. Tr. Vol II., pgs. 272-276.

Order." These rights conveyed upon this Commission are so powerful, so necessary to ensure that local competition can be fostered irrespective of regional impediments, and were so clearly ignored by this Commission in trying to shoehorn a recommendation into existing FCC rules without regard to the misrepresentations of BellSouth, that they bear repeating once again:

> 135 Under the statutory scheme in sections 251 and 252, state commissions may be asked by parties to define specific terms and conditions governing access to unbundled elements, interconnection, and resale of services beyond the rules the Commission establishes in this Report and Order. Moreover, the state commissions are responsible for setting specific rates in arbitrated proceedings. For example, state commissions in an arbitration would likely designate the terms and conditions by which the competing carrier receives access to the incumbent's loops. The state commission might arbitrate a description or definition of the loop, the term for which the carrier commits to the purchase of rights to exclusive use of a specific network element, and the provisions under which the competing carrier will order loops from the incumbent and the incumbent will provision an order. The state commission may establish procedures that govern should the incumbent refurbish or replace the element during the agreement period, and the procedures that apply should an end user customer decide to switch from the competing carrier back to the incumbent or a different provider. In addition, the state will establish the rates an incumbent charges for loops, perhaps with volume and term discounts specified, as well as rates that carriers may charge to end users.
>
> 136 State commissions will have similar responsibilities with respect to other unbundled network elements such as the switch, interoffice transport, signalling and databases. State commissions may identify network elements to be unbundled, in addition to those elements identified by the Commission, and may identify additional points at which incumbent LECs must provide interconnection, where technically feasible. State commissions are responsible for determining when virtual collocation may be provided instead of physical collocation, pursuant to section 251(c)(6). States also will determine, in accordance with section 251(f)(1), whether and to what extent a rural incumbent LEC is entitled to continued exemption from the requirements of section 251(c) after a telecommunications carrier has made a bona fide request under section 251. Under section 251(f)(2), states will determine whether to grant petitions that may be filed by certain LECs for suspension or modification of the requirements in sections 251(b) or (c).
>
> 137 The foregoing is a representative sampling of the role that states will have in steering the course of local competition. State commissions will make critical decisions concerning a host of issues involving rates, terms, and conditions of interconnection and unbundling arrangements, and exemption, suspension, or

modification of the requirements in section 251. The actions taken by a state will significantly affect the development of local competition in that state. Moreover, actions in one state are likely to influence other states, and to have a substantial impact on steps the FCC takes in developing a pro-competitive national policy framework.

(FCC Order 96-325 *First Report and Order on Local Competition,* para 135-137)

The ability to resolve this problem by exercising this Commission rights was not seriously considered and is due reconsideration.

Conclusion:

BellSouth has constructed a situation where a UNE-P provider cannot supply DSL service to its customers without a collocation requirement of up to 9,700 locations to be able to serve customers as ubiquitously as BellSouth does. This is the "build it and hope they come" scenario that caused the bankruptcy and closing of so many carriers last year. The only other solution is to **not** be a UNE-P provider, but a reseller and lose money on every customer that desires DSL service.

Or one can choose not to compete at all.

These are the choices facing Supra, and indeed all other carriers without a serious reconsideration of this issue by this Commission. It is not an easy or simple issue. Certainly the FPSC this Commission will have to work harder, more diligently, and be more open minded than they have shown to date on this case. However this Commission has the ability to right the wrongs done to the people of Florida and should immediately commence a reconsideration of this issue, if not an full re-hearing with proper discovery allowed.

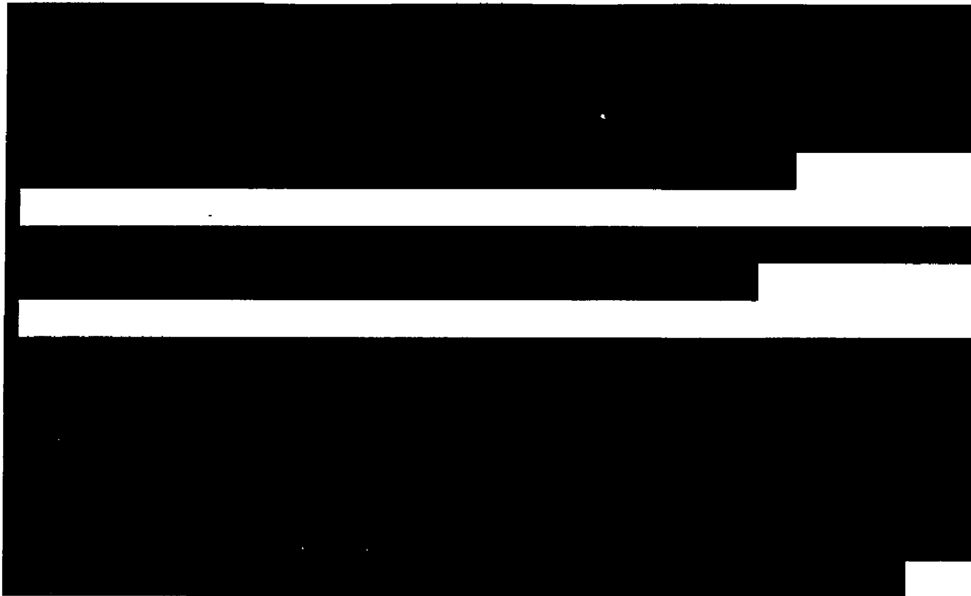
S. Access to Databases.

Issue: Is BellSouth required to provide Supra with nondiscriminatory access to the same databases BellSouth uses to provision its customers?

Supra argued that BellSouth's ALEC OSS interfaces provide discriminatory access and that pursuant to the 1996 Act and FCC rules and orders, Supra is entitled to nondiscriminatory access to BellSouth's OSS.

While it is undisputed that BellSouth has an obligation to provide Supra, and in fact, all ALECs, with nondiscriminatory access to the same databases BellSouth uses to provision customers. The issue is whether BellSouth's ALEC OSS interfaces provide, or will ever have the capability to provide, the same access as that afforded to BellSouth itself. Supra has presented a "mountain of evidence" that, absent direct access to BellSouth's own OSS, Supra will never be on equal-footing with BellSouth, and therefore will always be at a competitive disadvantage.

[163] See OAR 3 at pages 23-24.



This exhibit and its findings were virtually ignored by this Commission. Supra cannot fathom why, as BellSouth had every opportunity, and did in fact, present its best case in this proceeding.

There is no dispute that OSS is a UNE. **Section 153(29)** of the Communications Act, as amended by the 1996 Act, defines network element as:

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

The FCC at paragraph 262 of Local Competition Order defined the tern network element as follows:

> We conclude that the definition of the term "network element" broadly includes all "facilit[ies] or equipment used in the provision of a telecommunications service," and all "features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or

> other provision of a telecommunications service."[540] This definition thus includes, but is not limited to, transport trunks, call-related databases, software used in such databases, and all other unbundled elements that we identify in this proceeding.[541] The definition also includes information that incumbent LECs use to provide telecommunications functions commercially, such as information required for **pre-ordering,[542] ordering, provisioning,[543] billing, and maintenance and repair services.** This interpretation of the definition of the term "network element" will serve to guide both the Commission and the states in evaluating further unbundling requirements beyond those we identify in this proceeding. (Emphasis added.)

Section 251(c)(2) of the 1996 Act provides that BellSouth must provide service:

> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
>
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

The FCC, in its Local Competition Order defined "equal in quality" and "nondiscriminatory" as follows:

> **We conclude that the equal in quality standard of section 251(c)(2)(C) requires an incumbent LEC to provide interconnection between its network and that of a requesting carrier at a level of quality that is at least indistinguishable from that which the incumbent provides itself, a subsidiary, an affiliate, or any other party.** We agree with MFS that this duty requires incumbent LECs to design interconnection facilities to meet the same technical criteria and service standards, such as probability of blocking in peak hours and transmission standards, that are used within their own networks. Contrary to the view of some commenters, we further conclude that the equal in quality obligation imposed by section 251(c)(2) is not limited to the quality perceived by end users. The statutory language contains no such limitation, and creating such a limitation may

540 *Id.*

541 *See infra,* V.J.

542 *See infra,* Section V.J.5, for a definition of pre-ordering services.

543 The term "provisioning" includes installation.

allow incumbent LECs to discriminate against competitors in a manner imperceptible to end users, but which still provides incumbent LECs with advantages in the marketplace (*e.g.*, the imposition of disparate conditions between carriers on the pricing and ordering of services). ¶224. (Emphasis added.)

We also note that section 251(c)(2) requires interconnection that is "at least" equal in quality to that enjoyed by the incumbent LEC itself. This is a minimum requirement. Moreover, to the extent a carrier requests interconnection of superior or lesser quality than an incumbent LEC currently provides, the incumbent LEC is obligated to provide the requested interconnection arrangement if technically feasible. Requiring incumbent LECs to provide upon request higher quality interconnection than they provide themselves, subsidiaries, or affiliates will permit new entrants to compete with incumbent LECs by offering novel services that require superior interconnection quality. We also conclude that, as long as new entrants compensate incumbent LECs for the economic cost of the higher quality interconnection,[456] competition will be promoted.[457] ¶225. (Emphasis added.)

Section 251(c)(3) requires incumbent LECs to provide requesting carriers with "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point."[580] We find that this clause imposes on an incumbent LEC the duty to provide all network elements for which it is technically feasible to provide access on an unbundled basis. Because section 251(d)(1) requires us to "establish regulations to implement the requirements of" section 251(c)(3), we conclude that we have authority to establish regulations that are coextensive with the duty section 251(c)(3) imposes on incumbent LECs. ¶278. (Emphasis added.)

Section 251(d)(2)(A) requires the Commission and the states to consider whether access to proprietary elements is "necessary." "Necessary" means, in this context, that an element is a prerequisite for competition. We believe that, in some instances, it will be "necessary" for new entrants to obtain access to proprietary elements (*e.g.*, elements with proprietary protocols or elements containing proprietary information), because without such elements, their ability to compete would be significantly impaired or thwarted.[581] Thus, as an initial matter, we decline to adopt a

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456 *See infra*, Section VII.

457 *See also* Section VII.E. (discussion of accommodation of interconnection).

580 47 U.S.C. § 251(c)(3).

581 As noted *supra*, Section V.E.2, a number of commenters argue that section 251(d)(2)(A) requires us to protect proprietary information, such as CPNI information, contained in network elements. We intend to

general rule, as suggested by some incumbents, that would prohibit access to such elements, or make access available only upon a carrier demonstrating a heavy burden of need. We acknowledge that prohibiting incumbents from refusing access to proprietary elements could reduce their incentives to offer innovative services. We are not persuaded, however, that this is a sufficient reason to prohibit generally the unbundling of proprietary elements, because the threat to competition from any such prohibition would far exceed any costs to consumers resulting from reduced innovation by the incumbent LEC.[582] Moreover, the procompetitive effects of our conclusion generally will stimulate innovation in the market, offsetting any hypothetical reduction in innovation by the incumbent LECs. ¶282.

Section 251(d)(2)(B) requires us to consider whether the failure to provide access to an element would "impair" the ability of a new entrant to provide a service it seeks to offer. The term "impair" means "to make or cause to become worse; diminish in value."[583] We believe, generally, that an entrant's ability to offer a telecommunications service is "diminished in value" if the quality of the service the entrant can offer, absent access to the requested element, declines and/or the cost of providing the service rises. We believe we must consider this standard by evaluating whether a carrier could offer a service using other unbundled elements within an incumbent LEC's network. Accordingly, we interpret the "impairment" standard as requiring the Commission and the states, when evaluating unbundling requirements beyond those identified in our minimum list, to consider whether the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network. ¶285. Emphasis added.

We conclude that the obligation to provide "nondiscriminatory access to network elements on an unbundled basis"[651] refers to both the physical or logical connection to the element and the element itself. In considering how to implement this obligation in a manner that would achieve the 1996 Act's goal of promoting local exchange competition, we recognize that new entrants, including small entities, would be denied a meaningful

treat issues regarding CPNI in our rulemaking proceeding on CPNI information. *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information,* CC Docket No. 96-115, Notice of Proposed Rulemaking, FCC 96-221 (rel. May 17, 1996).

582 In this proceeding, for example, we are requiring incumbent LECs to provide the local switching element which includes vertical features that some carriers contend are proprietary. *See infra*, Section V.J.

583 *See* Random House College Dictionary 665 (rev. ed. 1984).

651 47 U.S.C. § 251(c)(3).

opportunity to compete if the quality of the access to unbundled elements provided by incumbent LECs, as well as the quality of the elements themselves, were lower than what the incumbent LECs provide to themselves. Thus, we conclude it would be insufficient to define the obligation of incumbent LECs to provide "nondiscriminatory access" to mean that the quality of the access and unbundled elements incumbent LECs provide to all requesting carriers is the same. As discussed above with respect to interconnection,[652] an incumbent LEC could potentially act in a nondiscriminatory manner in providing access or elements to all requesting carriers, while providing preferential access or elements to itself. Accordingly, we conclude 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.[653] ¶312 . Emphasis added.

We believe that Congress set forth a "nondiscriminatory access" requirement in section 251(c)(3), rather then an absolute equal-in-quality requirement, such as that set forth in section 251(c)(2)(C), because, in rare circumstances, it may be technically infeasible for incumbent LECs to provide requesting carriers with unbundled elements, and access to such elements, that are equal-in-quality to what the incumbent LECs provide themselves. According to some commenters, this problem arises in connection with one variant of one of the unbundled network elements we identify in this order. These commenters argue that a carrier purchasing access to a 1AESS local switch may not be able to receive, for example, the full measure of customized routing features that such a switch may afford the incumbent.[654] In the rare circumstances where it is technically infeasible for an incumbent LEC to provision access or elements that are equal-in-quality, we believe disparate access would not be inconsistent with the nondiscrimination requirement. Accordingly, we require incumbent LECs to provide access and unbundled elements that are at least equal-in-quality to what the incumbent LECs provide themselves, and allow for an exception to this requirement only where it is technically infeasible to

652 *See supra,* Sections IV.G, IV.H.

653 We note that providing access or elements of lesser quality than that enjoyed by the incumbent LEC would also constitute an "unjust" or "unreasonable" term or condition.

654 *See infra,* Section V.J, discussing commenters' arguments regarding the possible technical limitations of such switches.

meet.[655] We expect incumbent LECs to fulfill this requirement in nearly all instances where they provision unbundled elements because we believe the technical infeasibility problem will arise rarely. We further conclude, however, that the incumbent LEC must prove to a state commission that it is technically infeasible to provide access to unbundled elements, or the unbundled elements themselves, at the same level of quality that the incumbent LEC provides to itself. ¶313. Emphasis added.

The FCC therefore ordered that:

The duty to provide unbundled network elements on "terms, and conditions that are just, reasonable, and nondiscriminatory" means, at a minimum, that whatever those terms and conditions are, they must be offered equally to all requesting carriers, and where applicable, they must be equal to the terms and conditions under which the incumbent LEC provisions such elements to itself.[659] We also conclude that, because section 251(c)(3) includes the terms "just" and "reasonable," this duty encompasses more than the obligation to treat carriers equally. Interpreting these terms in light of the 1996 Act's goal of promoting local exchange competition, and the benefits inherent in such competition, we conclude that these terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete. Such terms and conditions should serve to promote fair and efficient competition. This means, for example, that incumbent LECs may not provision unbundled elements that are inferior in quality to what the incumbent provides itself because this would likely deny an efficient competitor a meaningful opportunity to compete. We reach this conclusion because providing new entrants, including small entities, with a meaningful opportunity to compete is a necessary precondition to obtaining the benefits that the opening of local exchange markets to competition is designed to achieve. ¶315. Emphasis added.

As is more fully discussed below,[660] to enable new entrants, including small entities, to share the economies of scale, scope, and density within the incumbent LECs' networks, we conclude that incumbent LECs must provide carriers purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning,[661] maintenance and repair, and

655 The exception described here does not excuse incumbent LECs from the obligation to modify elements within their networks to allow requesting carriers to obtain access to such elements where this is technically feasible. *See supra*, Section IV.D.

659 *See supras*, Sections IV.G, IV.H.

660 *See infra*, Section V.J.

661 The term "provisioning" includes installation.

billing functions of the incumbent LECs operations support systems. Moreover, the incumbent must provide access to these functions under the same terms and conditions that they provide these services to themselves or their customers. We discuss specific terms and conditions applicable to the unbundled elements identified in this order below, in Section V.J. ¶316

We conclude that operations support systems and the information they contain fall squarely within the definition of "network element" and must be unbundled upon request under section 251(c)(3), as discussed below. Congress **included in the definition of "network element" the terms "databases" and "information sufficient for billing and collection or used in the transmission, routing, *or other provision* of a telecommunications service."**[1225] We believe that the inclusion of these terms in the definition of "network element" is a recognition that the massive operations support systems employed by incumbent LECs, and the information such systems maintain and update to administer telecommunications networks and services, represent a significant potential barrier to entry. It is these systems that determine, in large part, the speed and efficiency with which incumbent LECs can market, order, provision, and maintain telecommunications services and facilities. Thus, we agree with Ameritech that "[o]perational interfaces are essential to promote viable competitive entry."[1226]
¶516 (Emphasis added.)

Nondiscriminatory access to operations support systems functions can be viewed in at least three ways. First, operations support systems themselves can be characterized as **"databases" or "facilit[ies] . . . used in the provision of a telecommunications service,"** and the functions performed by such systems can be characterized as **"features, functions, and capabilities that are provided by means of such facilit[ies]."**[1227] Second, the information contained in, and processed by operations support systems can be classified as **"information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."**[1228] Third, nondiscriminatory access to the functions of operations support systems, which would include access to the information they contain, could be viewed as a **"term or condition" of unbundling other network elements under section 251(c)(3), or resale under section 251(c)(4)**. Thus, we conclude that, under any of these interpretations, operations support systems functions are subject to the nondiscriminatory access duty imposed by section 251(c)(3), and the

1225 47 U.S.C. § 153(29) (emphasis added).

1226 Ameritech July 10 *Ex Parte* at 5.

1227 47 U.S.C. § 153(29).

1228 *Id.*

duty imposed by section 251(c)(4) to provide resale services under just, reasonable, and nondiscriminatory terms and conditions. ¶517. (Emphasis added.)

Much of the information maintained by these systems is critical to the ability of other carriers to compete with incumbent LECs using unbundled network elements or resold services. Without access to review, *inter alia*, available telephone numbers, service interval information, and maintenance histories, competing carriers would operate at a significant disadvantage with respect to the incumbent. Other information, such as the facilities and services assigned to a particular customer, is necessary to a competing carrier's ability to provision and offer competing services to incumbent LEC customers.[1229] **Finally, if competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing.** Thus providing nondiscriminatory access to these support systems functions, which would include access to the information such systems contain, is vital to creating opportunities for meaningful competition. ¶518. (Emphasis added.)

As noted in the comments above, several state commissions have ordered real-time access or have ongoing proceedings working to develop and implement it within their jurisdictions. The New York Commission, building on its pioneering experience with the Rochester Telephone "Open Market Plan," has facilitated a working group on electronic interfaces comprised of both incumbent LECs and potential competitors.[1230] The New York Commission focused on these issues in response to the frustrations and concerns of resellers in the Rochester market.[1231] In particular, AT&T alleged that it was "severely disadvantaged due to the fact that [Rochester Telephone] has failed to provide procedures for resellers to access [their] databases for on-line queries needed to perform basic service functions [such] as scheduling customer appointments."[1232] The New York Commission has concluded that wherever possible NYNEX will provide new entrants with real-time electronic access to its

1229 For these reasons, it is most important that incumbent LECs, which currently own the overwhelming majority of local facilities in any market, provide this information to those new entrants who initially will rely to varying degrees on incumbent LEC facilities. *See e.g.*, AT&T comments at 33-34.

1230 Order Declaring Resale Prohibitions Void and Establishing Tariff Terms, Case 94-C-0095, *et. al.* (New York Commission June 25, 1996).

1231 Order Declaring Resale Prohibitions Void and Establishing Tariff Terms, Case 94-C-0095, *et. al,* (New York Commission June 25, 1996). In New York proceeding, resellers argued that interfaces were as important to competition as the level of the wholesale discount. *Id.*

1232 AT&T Communications of New York, Inc. Complaint, Petition for Declaratory Judgement and for Reconsideration of Opinion No. 94-25 New York Commission, page 12.

systems.[1233] As another example, the Georgia Commission recently ordered BellSouth to provide electronic interfaces such that resellers have the same access to operations support systems and informational databases as BellSouth does, including interfaces for pre-ordering, ordering and provisioning, service trouble reporting, and customer daily usage.[1234] In testimony before the Georgia Commission, a BellSouth witness acknowledged that "[n]o one is happy, believe me, with a system that is not fully electronic."[1235] As noted above, Georgia ordered BellSouth to establish these interfaces within two months of its order (by July 15, 1996), but recently extended the deadline an additional month (to August 15th).[1236] Both the Illinois and Indiana Commissions ordered incumbent LECs immediately to provide to competitors access to operational interfaces at parity with those provided to their own retail customers, or submit plans with specific timetables for achieving such access.[1237] Several other states have passed laws or adopted rules ordering incumbent LECs to provide interfaces for access equal to that the incumbent provides itself.[1238] We recognize the lead taken by these states and others, and we generally rely upon their conclusions in this Order. ¶519

We conclude that providing nondiscriminatory access to operations support systems functions is technically feasible. Incumbent LECs today provide IXCs with different types of electronic ordering or trouble interfaces that demonstrate the feasibility of such access, and perhaps also provide a basis for adapting such interfaces for use between local service providers.[1239] Further, as discussed above, several incumbent LECs, including NYNEX and Bell Atlantic, are already testing and operating interfaces that support limited functions, and are developing the interfaces to support access to the remaining functions identified by most potential

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1233 *Id.* at 13-14. The New York Commission operations working group has focused on five areas for implementation: (1) service ordering, (2) trouble administration, (3) credit and collection, (4) billing and usage detail, (5) local exchange company requirements. *Id.* at 13-17.

1234 *See* In Re Petition of AT&T for the Commission to Establish Resale Rules, Rates, Terms and Conditions and the Initial Unbundling of Services, Docket 6352, (Georgia Commission May 29, 1996).

1235 *Id.*

1236 Motion for Reconsideration in Docket No. 6352-U (Georgia Commission July 2, 1996).

1237 In the Matter of the Investigation on the Commission's Own Motion into Any and All Matters Relating to Local Telephone Exchange Competition Within the State of Indiana, Cause No. 39983, Interim Order on Bundled Resale and Other Issues (Indiana Commissions July 1, 1996); *Illinois Wholesale Order.*

1238 *See e.g.*, Texas Commission comments at 19; In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues, Case No. 95-845-TP-COI (Ohio Commission June 12, 1996); Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service, R. 95-04-043 and I. 95-04-044 (California Commission April 26, 1995).

1239 *See, e.g.*, Bell Atlantic June 21 *Ex Parte*; NYNEX July 12 *Ex Parte*; NYNEX July 17 *Ex Parte*; U S West June 28 *Ex Parte*; U S West July 9 *Ex Parte.*

competitors.[1240] Some incumbent LECs acknowledge that nondiscriminatory access to operations support systems functions is technically feasible.[1241] Finally, several industry groups are actively establishing standards for inter-telecommunications company transactions.[1242]¶520. Emphasis added.

Section 251(d)(2)(A) requires the Commission to consider whether "access to such network elements as are proprietary in nature is necessary."[1243] Incumbent LECs argue that there are proprietary interfaces used to access these databases and information. Parties seeking to compete with incumbent LECs counter that access to such databases and information is vitally important to the ability to broadly compete with the incumbent. As discussed above, competitors also argue that such access is necessary to order, provision, and maintain unbundled network elements and resold services, and to market competing services effectively to an incumbent LEC's customers. **We find that it is absolutely necessary for competitive carriers to have access to operations support systems functions in order to successfully enter the local service market.** ¶521. (Emphasis added.)

We thus conclude that an incumbent LEC must provide nondiscriminatory access to their operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing available to the LEC itself.[1245] Such nondiscriminatory access necessarily includes access to the functionality of any internal gateway systems[1246] the incumbent employs in performing the above functions for its own customers. For example, to the extent that customer service representatives of the incumbent have access to available telephone numbers or service interval information during customer contacts, the incumbent must provide the same access to competing providers. Obviously, an incumbent that provisions network resources electronically does not discharge its

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1240 Bell Atlantic June 21 *Ex Parte*; NYNEX July 17 *Ex Parte.*

1241 *See* NYNEX reply at 33-34; GTE reply at 23 n.28; Bell Atlantic reply at 14.

1242 Industry standards committees include ECIC, EDI, OBF and T1M1. *See* Ameritech July 10 *Ex Parte*, Sprint June 25 *Ex Parte*, NYNEX July 17 *Ex Parte.*

1243 47 U.S.C. § 251(d)(2)(A).

1245 We adopt the definition of these terms as set forth in the *AT&T-Bell Atlantic Joint Ex Parte* as the minimum necessary for our requirements. We note, however, that individual incumbent LEC's operations support systems may not clearly mirror these definitions. Nevertheless, incumbent LECs must provide nondiscriminatory access to the full range of functions within pre-ordering, ordering, provisioning, maintenance and repair and billing enjoyed by the incumbent LEC.

1246 A gateway system refers to any electronic interface the incumbent LEC has created for its own use in accessing support systems for providing pre-ordering, ordering, provisioning, repair and maintenance, and billing.

> obligation under section 251(c)(3) by offering competing providers access that involves human intervention, such as facsimile-based ordering.[1247] ¶523. (Emphasis added.)
>
> **In all cases, however, we conclude that in order to comply fully with section 251(c)(3) an incumbent LEC must provide, upon request, nondiscriminatory access to operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing of unbundled network elements under section 251(c)(3) and resold services under section 251(c)(4).** Incumbent LECs that currently do not comply with this requirement of section 251(c)(3) must do so as expeditiously as possible, but in any event no later than January 1, 1997.[1249] We believe that the record demonstrates that incumbent LECs and several national standards-setting organizations have made significant progress in developing such access. This progress is also reflected in a number of states requiring competitor access to these transactional functions in the near term. Thus, we believe that it is reasonable to expect that by January 1, 1997, new entrants will be able to compete for end user customers by obtaining nondiscriminatory access to operations support systems functions. ¶525

In the UNE Remand Order, the FCC defined OSS as:

> In the *Local Competition First Report and Order*, the Commission defined OSS as consisting of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information.[164] OSS includes the manual, computerized, and automated systems, together with associated business processes and the up-to-date data maintained in those systems.[165] Because of the varied, and largely non-standardized, development of incumbent LECs' OSS, the Commission identified certain functions needed by competitive carriers to deliver local exchange and exchange access services at the level expected by customers and state commissions. Specifically, the Commission identified the five functions of OSS that incumbent LECs must make available to competitors on an unbundled basis: pre-ordering, ordering, provisioning, repair and maintenance, and billing.[166]

1247 Such access was all that Rochester Telephone provided to AT&T, when AT&T attempted to compete as a reseller of Rochester Telephone service. *See* Letter from Bruce Cox, Government Affairs Director, AT&T to William Caton, Acting Secretary, FCC, July 10, 1996 (AT&T July 10 *Ex Parte*).

1249 *See infra*, Section VII.B. for a discussion of exemptions and suspensions for small and rural incumbent LECs.

164 47 C.F.R. § 51.319(f)(1).

165 MCI WorldCom Comments at 67-68. *See also Local Competition First Report and Order*, 11 FCC Rcd at 15763-64, paras. 517-18.

166 *Local Competition First Report and Order*, 11 FCC Rcd at 15764-66, paras. 518, 523. OSS are composed of varied systems, databases and personnel that an incumbent LEC uses to commercially

See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996. CC Docket No. 96-98, Third Report and Order (adopted November 5, 1999) (UNE Remand Order) at ¶425.

In addition, the FCC, in the Third Report and Order at ¶¶ 433, 434 and 523 held:

> We conclude that the lack of access to the incumbent LEC's OSS impairs the ability of requesting carriers to provide access to key information that is unavailable outside the incumbents' networks and is critical to the ability of other carriers to provide local exchange and exchange access service. **We therefore require incumbent LECs to offer unbundled access to their OSS nationwide.** ¶ 433. (Emphasis added.)

> Commentators overwhelmingly agree that the unbundling of OSS satisfies the impair standard of Section 251 (d)(2). OSS is a precondition to accessing other unbundled network elements and resold services, because competitors must utilize the incumbent LEC's OSS to order all network elements and resold services. Thus, the success of local competition depends on the availability of access to the incumbent LEC's OSS. **Without unbundled access to the incumbent LEC's OSS, competitors would not be able to provide customers comparable competitive service, and hence would have to operate at a material disadvantage.** While we acknowledge that a competitive market is developing for OSS systems, these alternative providers do not provide substitutable alternatives to the incumbent LEC's OSS functionality. Alternative OSS vendors provide requesting carriers with an electronic interface that allow competitive LECs to access the incumbent LEC's OSS and internal customer care systems. These vendors cannot provide a sufficient substitute for the incumbent LEC's underlying OSS, because incumbent LECs have access to exclusive information and functionalities needed to provide service. ¶ 434. (Emphasis added.)

> We thus conclude that an incumbent LEC must provide nondiscriminatory access to their operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing available to the LEC itself.[167] Such nondiscriminatory access necessarily includes access to the functionality of any internal gateway systems[168] the incumbent

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provision telecommunications service to its customers, resellers and the purchasers of unbundled network elements.

[167] We adopt the definition of these terms as set forth in the *AT&T-Bell Atlantic Joint Ex Parte* as the minimum necessary for our requirements. We note, however, that individual incumbent LEC's operations support systems may not clearly mirror these definitions. Nevertheless, incumbent LECs must provide nondiscriminatory access to the full range of functions within pre-ordering, ordering, provisioning, maintenance and repair and billing enjoyed by the incumbent LEC.

[168] A gateway system refers to any electronic interface the incumbent LEC has created for its own use in accessing support systems for providing pre-ordering, ordering, provisioning, repair and maintenance, and billing.

employs in performing the above functions for its own customers. For example, to the extent that customer service representatives of the incumbent have access to available telephone numbers or service interval information during customer contacts, the incumbent must provide the same access to competing providers. Obviously, an incumbent that provisions network resources electronically does not discharge its obligation under section 251(c)(3) by offering competing providers access that involves human intervention, such as facsimile-based ordering.[169] ¶ 523.

Furthermore, the FCC's rules codified in 47 CFR provide:

§ 51.307 Duty to provide access on an unbundled basis to network elements.

(a) An incumbent LEC shall provide, to a requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of any agreement, the requirements of sections 251 and 252 of the Act, and the Commission's rules.

(b) The duty to provide access to unbundled network elements pursuant to section 251(c)(3) of the Act includes a duty to provide a connection to an unbundled network element independent of any duty to provide interconnection pursuant to this part and section 251(c)(2) of the Act.

(c) An incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled network element, along with all of the unbundled network element's features, functions, and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element.

(d) An incumbent LEC shall provide a requesting telecommunications carrier access to the facility or functionality of a requested network element separate from access to the facility or functionality of other network elements, for a separate charge.

§ 51.309 Use of unbundled network elements.

(a) An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements

[169] Such access was all that Rochester Telephone provided to AT&T, when AT&T attempted to compete as a reseller of Rochester Telephone service. *See* Letter from Bruce Cox, Government Affairs Director, AT&T to William Caton, Acting Secretary, FCC, July 10, 1996 (AT&T July 10 *Ex Parte*).

that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends.

(b) A 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.

(c) A telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time. A telecommunications carrier's purchase of access to an unbundled network element does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element.

Sec. 51.311 Nondiscriminatory access to unbundled network elements.

(a) **The quality of an unbundled network element, as well as the quality of the access to the unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be the same for all telecommunications carriers requesting access to that network element, except as provided in paragraph (c) of this section.**

(b) Except as provided in paragraph (c) of this section, to the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall be at least equal in quality to that which the incumbent LEC provides to itself. If an incumbent LEC fails to meet this requirement, the incumbent LEC must prove to the state commission that it is not technically feasible to provide the requested unbundled network element, or to provide access to the requested unbundled network element, at a level of quality that is equal to that which the incumbent LEC provides to itself.

(c) To the extent technically feasible, the quality of an unbundled network element, as well as the quality of the access to such unbundled network element, that an incumbent LEC provides to a requesting telecommunications carrier shall, upon request, be superior in quality to that which the incumbent LEC provides to itself. If an incumbent LEC fails to meet this requirement, the incumbent LEC must prove to the state commission that it is not technically feasible to provide the requested unbundled network element or access to such unbundled network element

at the requested level of quality that is superior to that which the incumbent LEC provides to itself. Nothing in this section prohibits an incumbent LEC from providing interconnection that is lesser in quality at the sole request of the requesting telecommunications carrier.

(d) Previous successful access to an unbundled element at a particular point in a network, using particular facilities, is substantial evidence that access is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities.

(e) Previous successful provision of access to an unbundled element at a particular point in a network at a particular level of quality is substantial evidence that access is technically feasible at that point, or at substantially similar points, at that level of quality.

(Emphasis added.)

Sec. 51.313 Just, reasonable and nondiscriminatory terms and conditions for the provision of unbundled network elements.

(a) The terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers.

(b) Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be **no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself**.

(c) 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.

(Emphasis added.)

In addition, this Commission in its Order PSC-96-1579-FOF-TP provides in pertinent part that:

We find that it is appropriate for us only to require that BellSouth provide to AT&T and MCI telecommunications services for resale and access to

> unbundled network elements at the same level of quality that it provides to itself and its affiliates.

The Commission ignored the substantial citations, Arbitral Tribunal's June Award, and the "mountain of evidence" put forth by Supra, and without pointing to any record evidence, simply accepted BellSouth's argument that BellSouth's ALEC OSS interfaces provide ALECs with nondiscriminatory access in accordance with FCC rules.

Moreover, **47 CFR §51.315(b)** provides that: "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." The Supreme Court of the United States held that BellSouth should not separate already-combined network elements before leasing such elements to CLECs. See *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 394 (1999). In that ruling, the Supreme Court stated that:

> Rule 315(b) forbids an incumbent to separate already-combined network elements before leasing them to a competitor. As they did in the Court of Appeals, the incumbent objects to the effect of this rule when it is combined with others before us today. TELRIC allows an entrant to lease network elements based on forward-looking costs, Rule 319 subjects virtually all network elements to the unbundling requirement, and the all-elements rule allows requesting carriers to rely on the incumbents network in providing service. When Rule 315(b) is added to these, a competitor can lease a complete, preassembled network at (allegedly very low) cost-based rates... The reality is that §251(c)(3) is ambiguous on whether leased network elements may or must be separated, and the rule the Commission has prescribed is entirely rational, finding its basis in §251(c)(3) nondiscrimination requirement. As the Commission explains, it is aimed at preventing incumbent LECs from "disconnect[ing] connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants." Reply Brief for Federal Petitioners 23. 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. It is well within the

bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice.[170]

What BellSouth has done with its OSS is to separate already-combined network elements before leasing such elements to Supra. Instead of providing Supra with the already-combined OSS requested by Supra, this Commission accepted BellSouth's argument and, through its Order, allows BellSouth to provide Supra with a degraded UNE, OSS.

While the Commission found that Supra had presented credible evidence into the record which supported legitimate concerns regarding BellSouth's OSS for accessing CSRs[171] in Issue D[172], the Commission failed to address its relevance in this issue and failed to address the thousands-of-pages in testimony and exhibits[173] presented by Supra as well as the findings of a **neutral** Arbitral Tribunal[174]. Even more disturbing is this Commission's complete failure to acknowledge BellSouth witness Pate's admission that BellSouth's Human-to-Machine ALEC OSS interfaces, including LENS, fail to provide nondiscriminatory access.

In addition to this outright admission, ALECs will never be able to receive nondiscriminatory access as ALECs must submit local service requests ("LSRs") while BellSouth, as well as all ILECs, submit service orders directly into the downstream OSS.[175] As admitted by BellSouth's Pate, ALECs' LSRs must go through, *inter alia*, the

[170] BellSouth's own training manuals evidence that BellSouth consistently violates Federal law and engages in this anticompetitive practice of disconnecting already connected network elements when CLECs submit conversion orders.
[171] See, *inter alia*, the Hearing Testimony of Ramos (TR 632-33) and Zejnilovic (TR 1058), Rebuttal Testimony of Ramos and Zejnilovic, and Supra Exhibits AZ 1 and OAR 32.
[172] Customer Service Records.
[173] See, *inter alia*, Rebuttal Testimony of Ramos (RT 48-55, 58-59, 61-65) and Zejnilovic (RT 1-15); Supra Exhibits AZ 1-7, OAR 3, 30-38, 47, 62, 79-103; and Hearing Testimony of Ramos and Zejnilovic.
[174] Supra Exhibit OAR 3.
[175] Id.

Local Exchange Ordering ("LEO") system and the Local Exchange Service Order Generator ("LESOG"). These two steps are necessary in order to provide edit formatting and translation of the ALEC LSR into that of a service order format that can be accepted by the Service Order Communications Systems ("SOCS") for further downstream provisioning by the BellSouth legacy OSS. This is not required of the BellSouth retail interfaces as they were designed to submit the service request in a SOCS compatible format at its initiation.[176] Furthermore, it is evident that BellSouth's service orders do not require additional systems in order to be edited and formatted.[177] Yet, ALEC LSRs, whether they are placed via LENS, EDI, TAG or RoboTAG do require these additional systems.

Notwithstanding BellSouth's admissions[178] and the Commission's finding in Issue D regarding accessing of CSRs, the record clearly indicates that 10.9% of ALEC LSRs that are electronically submitted through BellSouth's ALEC OSS fallout for manual/human intervention[179]. This fallout for human intervention occurs regardless of the electronic interface being used by the ALEC. While in comparison, BellSouth's documentation indicates that " . . . 'mechanized fallout' does not occur when [BellSouth] service representatives submit requests via RNS or ROS."[180] As such, BellSouth experiences 0% "mechanized fallout" while ALECs experience 10.9%. This 10.9% of electronically submitted LSRs that result in human intervention is in addition to the 11% of all ALEC submitted LSRs that must be manually submitted for human intervention to

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[176] See Direct Testimony of Ramos (DT 52).
[177] Id.
[178] See Hearing Testimony of Pate (TR 1185, 1188-1202, 1207-1208, 1210, 1220).
[179] See BellSouth Exhibit RMP 6 and Hearing Testimony of Pate (TR 1207 – 1208).
[180] See BellSouth Late-filed Exhibit 36.

begin with.[181] The Commission's failure to acknowledge this evidence and, thus, avoid the application of the FCC's nondiscriminatory standards, where such an application would clearly indicate that all ALEC OSS interfaces are discriminatory, is unacceptable.

Even more troubling is the Commission's findings of technical infeasibility in ALECs obtaining direct access to BellSouth's OSS interfaces. With a record bare of any evidence but for mere allegations by BellSouth and rhetoric by the Commission and Staff, this Commission found that direct access is not technically feasible as BellSouth's OSS is not compatible with an ALECs' needs without considerable modification[182]. As it is BellSouth's claim that such direct access is technically infeasible, BellSouth had the burden of proof to present credible evidence in support. As it is indisputable that a conversion from a BellSouth retail customer to an ALEC UNE customer is merely a billing change, see *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 394 (1999), and absent any record evidence to the contrary, how can it have been found that BellSouth's OSS cannot be used to order the very same services using the very same facilities to the very same customers already being served by BellSouth? Yet, this is what the Commission has concluded.

For guidance on the point of "technically feasible", Supra points the Commission to the FCC's Local Competition Order, which held that:

> We conclude that the term "technically feasible" refers solely to technical or operational concerns, rather than economic, space, or site considerations. **We further conclude that the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements.** Specific, significant, and demonstrable network reliability concerns associated with providing interconnection or access at a particular point, however, will be regarded as relevant evidence

[181] See Hearing Testimony of Pate (TR 1185).
[182] Order No. PSC-02-0413-FOF-TP, page 116.

> that interconnection or access at that point is technically infeasible. We also conclude that preexisting interconnection or access at a particular point evidences the technical feasibility of interconnection or access at substantially similar points. Finally, we conclude that incumbent LECs must prove to the appropriate state commission that a particular interconnection or access point is not technically feasible. ¶198. (Emphasis added.)
>
> **We find that the 1996 Act bars consideration of costs in determining "technically feasible" points of interconnection or access.** In the 1996 Act, Congress distinguished "technical" considerations from economic concerns. Section 251(f), for example, exempts certain rural LECs from "unduly economically burdensome" obligations imposed by section 251(c) even where satisfaction of such obligations is "technically feasible."[409] Similarly, section 254(h)(2)(A) treats "technically feasible" and "economically reasonable" as separate requirements.[410] Finally, we note that the House committee that considered H.R. 1555 (which was combined with Senate Bill S.652 to form the 1996 Act) dropped the term "economically reasonable" from its unbundling provision. The House committee explicitly addressed this substantive change, reporting that "this requirement could result in certain unbundled . . . elements . . . not being made available."[411] Thus, the deliberate and explained substantive omission of explicit economic requirements in sections 251(c)(2) and 251(c)(3) cannot be undone through an interpretation that such considerations are implicit in the term "technically feasible." Of course, a requesting carrier that wishes a "technically feasible" but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit.[412] ¶199. (Emphasis added.)

If it was the Commission's belief that direct access is not currently technically feasible, the Commission could have used its ability to propound discovery on the parties to resolve this matter. Unfortunately, the Commission failed to do so.

As Supra provided thousands-of-pages of evidence as well as the findings of a neutral Arbitral Tribunal regarding the discriminatory nature of BellSouth's OSS, and as

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409 47 U.S.C. § 251(f)(1)(A).

410 47 U.S.C. § 254(h)(2)(A).

411 H. Rep. 104-204, 71 (1995).

BellSouth's Pate proffered some exhibits that were found to be non-credible, in Issue D, as well as mere allegations of technical infeasibility, Supra requests that this Commission reconsider its decision and to require BellSouth to provide Supra with direct access to BellSouth's OSS.

As the record so clearly indicates that Supra presented thousands-of-pages of evidence into the record and that this Commission failed to acknowledge such, issues as to the level of institutional bias in favor of BellSouth has arisen and must be addressed.

T. Standard Message Desk Interface-Enhanced (SMDI-E) and Corresponding Signaling Associated with Voice Mail Messaging.

> Issue: Should Standard Message Desk Interface-Enhanced ("SMDI-E"), Inter-Switch Voice Messaging Service ("IVMS") and any other corresponding signaling associated with voice mail messaging be included within the cost of the UNE switching port? If not, what are the appropriate charges, if any?

Supra's position on this issue is that SMDI and ISVM Signaling provided to voicemail systems are comprised of core hardware and software components of the Class 5 end office switch combined with SS7 signaling. As such, both are already included in the cost models used to derive the UNE rate for Unbundled Local Switching (ULS). Supra does not maintain that the price / cost of SMDI / ISVM for customers of ULS includes the transport (i.e. modems and other electronics) used to convert SMDI to a form that may be transported to another building, nor the cost of the facilities that create that transport facility. Supra believes that BellSouth's own testimony on this matter is consistent with Supra's position. Supra further believes that testimony offered by BellSouth's Kephart, which focused largely on the transport facility used to carry the SMDI and not the signaling itself, was confused to be part of SMDI. Yet the "data link"

referred to by Kephart is **not** included in the BellSouth FCC#1 tariff for SMDI and even under the tariff must be ordered separately (or provisioned by a UNE or by Supra itself).

The fact that the SMDI, SMDI-E (I-SMDI) and ISVM are inseparable components of the switch that were **already** paid for when the capability to receive a telephone call is provided by ULS, was not considered. As such, the Commission's Order defies the testimony of **both** Supra's **and** BellSouth's witnesses in this regard.

Basis for the Commission's Decision

From its first sentence, the Commission's Order is flawed, evidencing a fundamental lack of comprehension for the technical details of this issue, which were clearly laid out in testimony from **both** parties. As such, it seems impossible that the Commission considered the testimony presented to it.

In the first paragraph following "arguments", the order reflects an error in Kephart's direct testimony[183] that was refuted by Nilson's rebuttal[184] and hearing[185] testimonies, yet the error in Mr. Kephart's direct testimony surfaced again in the Commission's Order.

In ¶ 2, Inter Switch Voice Messaging service (ISVM) is referred to as IVMS and called Interoffice Simplified Message Desk Interface of ISMDI. Supra's direct[186] and rebuttal[187] testimonies point out Kephart's error and correctly define the acronym and its abbreviation in accordance with the Lucent specification[188]. Yet despite the fact that BellSouth did not ask witness Nilson a single question under cross examination on any

[183] See Direct Testimony of Kephart (DT 29).
[184] See Rebuttal Testimony of Nilson.
[185] See Hearing Transcript of Kephart (TR 427-428).
[186] See Direct Testimony of Nilson (DT 101-104).
[187] See Rebuttal Testimony of Nilson (RT 61-63).
[188] See Supra Exhibit DAN 1, Lucent Document 235-190-104, Section 13.4.1.1 line 1.

aspect of this issue (Issue 40), the error in Mr. Kephart's direct testimony is reflected throughout the Commission Order, ignoring Supra's evidence.

Errors in the Commission's Decision

In making its decision, the Commission adopted its Staff's flawed analysis. That analysis is based upon Kephart's representation to the Commission that what he believed that Supra was trying to do was to provide an "Information Service", or a "non Telecommunications Service". Kephart ignored all other testimony in coming to this misleading conclusion. Supra never represented to this Commission what it intended to make with the unbundled SMDI, ISVM and its links, nor should such even be relevant to this issue.

In fact, 47 CFR Sec. 51.309(c), entitled, "Use of unbundled network elements," promises Supra protection from this very sort of discrimination:

> A telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time. A telecommunications carrier's purchase of access to an unbundled network element does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element.

Yet the Commission ignored evidence that such functionality was **already** part of the cost basis of ULS.

Reversing the Commission's earlier finding that voicemail **is** a telecommunications service[189] without any consideration of the legal issues involved[190], the Commission now declares that BellSouth is under no obligation to provide SMDI or SMDI-E (ISMDI) as a feature, function, and capability of the ULS UNE. The

[189] PSC-97-0294-FOF-TP.
[190] See Direct Testimony of Nilson (DT 64).

Commission does not explain the legal basis for this conclusion, nor does it address the fact that by this logic, the provision of ISDN PRI's on a UNE basis to Internet Service providers would not be legal, nor would be the use of UNE switched T1 circuits carrying the voice messages to Supra voicemail platform[191]. Yet while both examples are considered legitimate uses for UNE combinations (a.k.a. UNE-P), no legal basis for treating the SMDI signaling differently from the UNE voice circuits was ever put forward, nor could it have been.

Moreover, the Commission makes a representation that the recent generic UNE docket (99-0649-TP)[192] **"approved switch port charges that do not include features and functions; a separate charge applies for switch features."** Incredibly, rather than reaching the conclusion that Supra should merely pay the ULS port plus the features charge, (the equivalent of the port charge **before** the order in 990649-TP), the Commission then directs Supra to purchase a service from the FCC #1 access tariff without ever explaining this incredible leap of logic. The Order then repeats the baseless statement that " 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"[193], without **ever** dealing with the fact that 99-0649 and all previous ULS rate setting orders had **already included it in the cost basis**.

[191] See Supra Exhibit DAN 1: Figure 13-11, pg. 13-69 clearly shows both "voice Lines" (Switched UNE combination T1's) and "Data Link" facilities between the switch and the VMS. This commission has taken the inconsistent position that the voice lines (UNE ULS combined with UNE Loop) may be provisioned as UNE, the Data Link may be provisioned as a UNE, but the SMDI signaling may not, based on the fact it is used by a VMS system. There is no basis in law for this dichotomy.
[192] Order PSC-01-1181-FOF-TP issued May 25, 2001
[193] Final Order at page 124.

The one accurate statement in the final paragraph evidences that the Commission recognized that there is a fundamental difference between SMDI(-E) signaling and the transport that carries it to the locations where it is used:

> 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.

Clearly, the Commission reflected on the difference. That this decision was rendered in this fashion remains a mystery, particularly in light of the facts that were **not** considered by the Commission.

Facts and/or legal argument which the Commission failed to consider

Point One

The Commission erred in deciding that Supra must purchase its SMDI-E, Inter-Switch Voice Messaging Service and Corresponding Signaling Associated with Voice Mail Messaging from BellSouth's tariff. The Commission failed to take into consideration all the evidence provided by Supra that proved that SMDI-E, ISVM, excluding their corresponding "data links" (a.k.a. transport facilities) to Voice Mail Messaging, are core hardware and software features of the switch that are inseparable from the base purchase price of the switch, and as such must be unbundled along with the elements of that switch, as they are already included in the cost basis that was used to set rates for ULS.

The Commission failed to consider Supra's argument in Nilson's direct testimony:

> As shown in Figure 13-11, and 13-13[194] there is no separate signaling network required to transmit messages switch to switch. It is included in

[194] See Direct Testimony of Nilson (DT 103-104) and Supra Exhibit DAN 1.

> the basic switch port functionality, and network wide signaling across the SS7 network according to meetings Supra Telecom has held with Bell Labs personnel on this issue. Additionally the Bell Labs Engineers confirmed that this ISVM has been adopted as an industry standard for many years now (approx. 7 years). This industry standard is also supported by Nortel and Siemens, so that all switches in BellSouth's network are compliant. Figure 13-14 along with section 13.4.1.2[195] shows that the required software is part of the base generic software since, at least, the 5E8 generic. Since the current software release from Lucent is 5E15, and since Lucent does not support switches with software loads beyond two prior revisions, it is obvious that the required software is already loaded on BellSouth's switches.
>
> ALEC's access to the ISVM signaling "network" should be defined as a fundamental component of Local Switching line and trunk ports and ALEC access to this network required of and provided by all Florida ILECs as it is elsewhere in the country. The various message-signaling networks are necessary to 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 a limitation as the mark of an inferior carrier.

Here, Nilson cites from the Lucent documentation[196] showing that the core functionality has existed as a function of the "generic" or base software release (i.e. minimum software load needed to place and complete a call) for approximately the last seven (7) years[197]. This documentation unquestionably shows that the feature is activated on a per switch basis since **at least release 5E10** when the Phase 1 Line Blocking Enhancements were added on a per switch basis. If BellSouth provides the capability to itself, and BellSouth admits that it does[198,199], it is available to all users and lines on the switch:

> With the 99-5E-3270.A, Line Blocking Enhancements - Phase 1 feature the message service center (MSC) will deliver the calling party number to the VMS even if it is restricted. The CPN is delivered for both direct and forwarded calls. The

[195] Id.
[196] See Supra Exhibit DAN-1, Lucent Document 235-190-104.
[197] See Supra Exhibit DAN-1, Lucent Document 235-190-104, Section 13.4.1.2 line 1 "National ISDN - 5E8 and later, Custom ISDN - 5 E& and later software releases."
[198] See Direct Testimony of Kephart (DT 29).
[199] See Hearing Transcript of Kephart (TR 425).

> VMS can then allow users to retrieve messages from their VMS without having to reenter their directory number (DN). This 5E10 software update feature is activated on a per switch basis with an optioned feature identifier (OFID) for all MSC's. (Emphasis Added)

The Commission never addressed the issue of the software being a component of the base-switch software.

Furthermore, in the above-referenced citation, Nilson cites to the same Lucent documentation, Figures 13-11 and 13-13, which clearly show that there are no elements in Kephart's definition of SMDI-E that are not required to place a voice call between two switches except the data link **(4)** in his definition of SMDI or SMDI-E. That difference is perhaps the basis for all confusion in this issue and Supra does not dispute the Commission's findings (or BellSouth's[200,201]) in regard to **(4)** being a separately priced transport facility, rather than a UNE component of ULS.

> Q Would you agree that ISVN plus SS7 signaling equals SMDI-E?
>
> A I-SMDI, which is what I think you're talking about, involves (1) switches in the network plus (2) signaling transport, plus (3) switch software at the host switch, plus (4) a data link from there out to the voice mailbox, so there's a number of different elements involved in completing that entire service.
>
> Q Did you file an exhibit evidencing this?
>
> A Did I file an exhibit on this?
>
> Q Yes.
>
> A I don't think I did. There is a tariff on this that's accessible for the tariff service.
>
> (Emphasis and numbers added.)

[200] See Direct Testimony of Kephart (DT 29): "As an alternative Supra may provide its own data transmission links or purchase such links from Supra at UNE prices."
[201] See Rebuttal Testimony of Kephart (RT 9): "As an alternative, Supra may arrange to provide its own data transmission links and thus avoid the need to purchase BellSouth's Services."

The elements described by Kephart are cross-referenced to the Lucent documentation[202] below:

1. Switches in the network	Figure 13-11 "Far Switch"
2. Signaling Transport	Figure 13-11 "CCS7 Trunk"
3. Switch software at the host switch	Figure 13-11 "Near Switch"
4. Data link from there	Figure 13-11 "Data Link"

Items 1-3 on Kephart's list are intrinsically inseparable from the facilities that provide basic call origination and completion on an IntraLATA basis. As shown above, both the software **(3)**, and the "signaling transport" **(2)**, otherwise know as the SS7 network, already exist, and are used for call setup, completion and teardown. Their cost was already computed in arriving at the UNE rates for the 2 wire ULS port at the far switch and the 4 wire (T1) ULS port at the near switch, along with the cost of the SS7 signaling. As such the SMDI and SMDI-E (ISMDI) signaling are inseparable from the cost of providing basic local service.

Point Two

The second point that the Commission failed to consider was that Supra and BellSouth actually agreed that SMDI is a feature of the ULS. First, in his rebuttal testimony[203] Kephart writes, "As an alternative, Supra may arrange to provide its own data transmission links and thus avoid the need to purchase BellSouth's Services." If providing its own links eliminates the need for Supra to purchase BellSouth's services, clearly Kephart's rebuttal testimony reflects that SMDI, or SMDI-E, minus the data link is a no-additional-cost feature of ULS.

[202] See Supra Exhibit DAN 1: Lucent Document 235-190-104, page 13-69, Figure 13-11.

[203] See Rebuttal Testimony of Kephart (RT 9): "As an alternative, Supra may arrange to provide its own data transmission links and thus avoid the need to purchase BellSouth's Services"

Second, in his direct testimony, Kephart stated that the SMDI-E service "capability" beyond that of the ULS **is** the data link.

> Both SMDI-E and IVMS (sic) both have capabilities that go beyond the functionality contained in an unbundled switch port. Both features provide for data transmission to and from the customers voicemail platform.[204]

Finally, in sworn testimony in deposition and at the hearing, Kephart agreed with Supra's contention that there should be no additional charge for SMDI if Supra provided its own transport and purchased ULS[205]:

> Q Do you recall being deposed in this matter on September 17th?
>
> A Yes.
>
> Q And do you recall me asking you the following questions and you giving the following answers: "Question: Would BellSouth seek to charge Supra for the SMDI signaling where Supra provided the transport? Answer: If you were buying unbundled switching? Question: Sure, in that case. Answer: No, you would just provide your own link." Is your answer any different today to those questions?
>
> A No, I don't think so. What I said is if you're providing -- on SMDI, if you're providing your own link, we're not going to charge you for that link, that's correct.
>
> (Emphasis added.)

Instead of citing to this testimony, the Commission presented its analysis of BellSouth's arguments[206] focusing only on the data link itself, something that was **never** an issue between the parties, having a monthly rate of about $34. Despite the clear agreement between the parties on the matter that SMDI signaling **minus the data link** is a feature, function or capability of the Unbundled Local Switch port that serve the Caller and Voice lines in Figure 13-11 of Supra Exhibit DAN-1, the Commission invented its own finding, such being unsupported and unsupportable by anything in the record.

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[204] See Direct Testimony of Kephart (DT 29).
[205] See Hearing Transcript of Kephart (TR 426).

Conclusion

The BellSouth and Supra witnesses agreed that SMDI signaling was part of the Unbundled Local Switch port and that the data link was **not** part of the ULS and would need to be provisioned separately. The Commission actually found that SMDI is a feature of the switch. This is the only relevant finding and should be determinative of this issue. This is heavily supported by the testimony of Nilson, and by documentation from Lucent[207]. BellSouth produced no exhibits[208]. Yet the commission used terms such as "According to BellSouth witness Kephart"[209], "the witness explained that"[210], and "the BellSouth witness clarified" in regard to several Kephart errors, while Supra's testimony was characterized as "Witness Nilson maintains"[211], "witness Nilson contends"[212] despite the fact that Lucent documentation and BellSouth's own FCC #1 tariff agree with Nilson's statements. The Commission's pre-disposition in favor of BellSouth, again, is obvious.

The Commission relied on BellSouth's recanted testimony, disregarded much of witness Nilson's testimony that was supported by Lucent documentation, disagreed with **both** parties and offered a ruling not founded in law that because Supra was going to use SMDI for voicemail (a fact not in evidence) that Supra must order from the FCC #1 Tariff. Lacking a finding of outright malfeasance, one is only left to conclude that the Commission did not actually consider the testimony and exhibits of both sides with impartiality.

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[206] Final Order at pages 119-120.
[207] See Supra Exhibit DAN 1.
[208] See Hearing Transcript of Kephart (TR 428).
[209] Final Order at page 118.
[210] Final Order at page 119.
[211] Final Order at page 121.
[212] Id.

Supra requests that this Commission reconsider this issue and find in favor of Supra.

V. Capability to Submit Orders Electronically.

<u>Issue</u>: Is BellSouth required to provide Supra the capability to submit orders electronically for all wholesale services and elements?

Supra seeks a contractual provision requiring BellSouth to provide Supra with the capability to submit orders electronically for all wholesale services and elements. BellSouth, in arguing against such a provision, claimed that BellSouth's retail operations make use of the manual ordering process. BellSouth and this Commission completely miss the point. Currently, Supra does not submit service orders because BellSouth has refused to provide Supra with the ability to do so. Supra and other ALECs submit **<u>LSRs</u>**. BellSouth's systems and agents process the LSRs into service orders. However, BellSouth retail operations submit **<u>service orders</u>**. <u>See</u> Supra Exhibits OAR 30 and 31, including the video titled "**This Ol' Service Order**"). Supra hereby incorporates its legal and factual argument set forth in Issue S as if fully set forth herein.

The Commission, without pointing to any evidence in the record, simply accepted BellSouth's argument, while a review of the record reveals that Supra presented thousands-of-pages on the discriminatory nature of BellSouth's ALEC OSS.[213] Specifically, the evidence in the record shows that BellSouth has the capability to process all of its retail orders electronically. See the following Exhibits:

(a) **Pate's Late-Filed Exhibit RMP 2** filed September 21, 2002: RNS and ROS Electronic Ordering of Products and Services. This Exhibit consists of 5

pages. Significantly, BellSouth confirmed that its retail operations can process in ROS and RNS all its' end-user services, whereas, no ACLEC can process as service order in LENS, EDI and/or TAG;

(b) **Supra Exhibit OAR 87A**: particularly Regional Ordering System (ROS), SO[214] & CSR[215]Viewers Window Description

(c) **Supra Exhibit OAR 82**: Issuing a New Order CZ575, Participant Guide October 2000. Particularly see BSTII 000001493-000001497

(d) **Supra Exhibit OAR 83**: CV517: The New Order, Participant Guide November 1997.

The Commission's decision is grounded in the erroneous finding that BellSouth does not have to provide Supra nondiscriminatory access to OSS. Furthermore, the FPSC, ignoring evidence in the record, stated at page 128 of its Order that:

> 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. (Emphasis added.)

This conclusion flies in the face of the undisputed fact that ALECs submit LSRs while BellSouth submits service orders. The Commission does not cite to any evidence, and instead relies on BellSouth's statements that manual processing is "likely to exist" for

[213] See, *inter alia,* Rebuttal Testimony of Ramos (RT 48-55, 58-59, 61-65) and Zejnilovic (RT 1-15); Supra Exhibits AZ 1-7, and OAR 3, 30-38, 47, 62, 79-103; and Hearing Testimony of Ramos and Zejnilovic.
[214] SO means Service Order
[215] CSR means Customer Service Record

BellSouth's retail operations. Surely, there is no legal "likely to exist" standard which meets any level of proof.

As such, Supra requests that this Commission reconsider its decision and require BellSouth to provide Supra with the capability to submit orders electronically for all wholesale services and elements.

W. Manual Intervention on Electronically Submitted Orders.

Issue: When, if at all, should there be manual intervention on electronically submitted orders?

The Commission decided in its order in this docket to accept BellSouth's argument that BellSouth's practices with respect to manual handling are competitively neutral; thus, BellSouth should be permitted to manually process those orders that would be processed similarly for retail orders.

Although the Commission found that not all complete and correct LSRs that are submitted electronically flow through without manual intervention,[216] the Commission failed to address Supra's evidence in the record that indicated that 10.9% of LSRs that are electronically submitted through BellSouth's ALEC OSS fallout for manual/human intervention,[217] while in comparison, BellSouth's documentation indicates that " . . . 'mechanized fallout' does not occur when [BellSouth] service representatives submit requests via RNS or ROS."[218] As such, BellSouth experiences 0% "mechanized fallout" while ALECs experience 10.9% (as only ALECs submit LSRs as BellSouth submits Service Orders). Considering that 0% of BellSouth's requests submitted via RNS or

[216] Order No. PSC-02-0413-FOF-TP, page 131.
[217] See BellSouth Exhibit RMP 6 and Hearing Testimony of Pate (TR 1207 – 1208).
[218] See BellSouth Late-filed Exhibit 36.

ROS fallout and, as the Commission found, complete and correct LSRs submitted electronically by ALECs **do** fallout for manual intervention, the Commission's finding of competitively neutral fails to make sense.

A review of the Commission's Order indicates that the Commission may have been confused by BellSouth's red herring argument regarding manual handling of complex orders prior to their electronic submission. This Issue involves manual intervention **after** electronic submission. As the record indicates BellSouth has 0% fallout and ALECs have fallout for manual intervention after electronic submission; consequently, manual handling of BellSouth's complex orders prior to electronic submission is an attempt to mislead and confuse the Commission.

As this Issue relates to nondiscriminatory access to OSS, this Issue as well as all other OSS related issues are supported in the record by thousands-of-pages of testimony and exhibits[219]. As such, the Commission must base its findings on competent and substantial evidence and must address Supra's evidence in the record. A review of the Commission's Order reveals that this did not occur in this Issue, as well as in many others.

As such, Supra requests that this Commission reconsider its decision and require BellSouth to ensure that 0% of Supra's complete and correct LSRs submitted electronically flow through without manual intervention, in the same manner as BellSouth provides for itself.

X. Sharing of the Spectrum on a Local Loop.

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[219] See, *inter alia,* Rebuttal Testimony of Ramos (RT 48-55, 58-59, 61-65) and Zejnilovic (RT 1-15); Supra Exhibits AZ 1-7, OAR 3, 30-38, 47, 62, 79-103; and Hearing Testimony of Ramos and Zejnilovic.

Issue: Should Supra be allowed to share with a third party the spectrum on a local loop for voice and data when Supra purchases a loop/port combination and if so, under what rates, terms and conditions?

Supra's position:

When utilizing the voice spectrum of the loop and another carrier utilizes the high frequency spectrum (or vice versa), Supra must be compensated one half of the local loop cost.[220] BellSouth refuses to pay line-sharing charges for customers with BellSouth xDSL whether provisioned as the FastAccess®, or its ADSL Transport product a Telecommunications service tariffed under the FCC #1 access tariff (both of which are subject to review for state tariff in FPSC Docket 001332-TP). Since hearings in this matter, and absent any new law on the matter, BellSouth refuses to provide either product on UNE-P circuits. BellSouth proposes to disconnect the ADSL of any customer (regardless of provider) if provisioned by UNE-P, has done so, and has even disconnected those of customers served by resale causing numerous Public Service Commission complaints. When BellSouth provides xDSL service to an end user and the end user converts its voice services to Supra via UNE-Platform, it is undisputed that BellSouth intends to disconnect that customer's xDSL service[221]. Since the hearings in this matter, BellSouth has indeed done so, on lines served by both DSL and Resale, despite its stated policy that it would not do so on resold lines. xDSL, as acknowledged by BellSouth witness Cox, is a feature of the copper loop[222]. The term "network element" is defined in the Act as "a facility or equipment used in the provision of a telecommunications service. Such term also includes **features, functions and**

[220] FCC Advanced Services Order 98-147 in Docket 98-48.
[221] DAN-6 and HT, pg. 270, ln. 25 - pg. 271, ln. 21.
[222] RT of Cox, pg. 270, ln. 25 - pg. 271, ln. 21.

capabilities that are provided by means of such facility or equipment . . "[223],[224] Accordingly, and as a feature of the loop, BellSouth should not be allowed to disconnect any already combined facilities, as such would result in a disconnection of a customer's service, and be in violation of 47 U.S.C.A. § 251(c)(3), 47 C.F.R. § 51.315(b) and the Supreme Court's ruling in AT&T v. Iowa Utilities Bd., 525 U.S. 366, 119 S.Ct 721 (1999), which held:

> Rule 315(b) forbids an incumbent to separate already combined network elements before leasing them to a competitor... As the Commission explains, [§ 251(c)(3)] is aimed at preventing incumbent LECs from disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants" ... It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice." Id. at pg. 393-395 (Emphasis added)

Ms. Cox admitted that to the extent "BellSouth were actually physically disconnecting already-connected network elements, [that BellSouth] would be in violation of Supreme Court and FCC rules."[225] Ms. Cox also acknowledged that the more DSL that is deployed by BellSouth, the harder it could become for a CLEC, using the UNE-platform, to provide voice service to BellSouth customers.[226] Since any charges associated with disconnecting xDSL service in a UNE-P environment would be wasteful in nature[227], and there is no evidence that BellSouth would be unable to make a profit by continuing to provide such service, to allow BellSouth to carry out its stated policy would be anti-competitive and a violation of the aforementioned authorities.

These matters are not unique nationwide, but the impunity with which BellSouth is operating in Florida is. In a matter brought before the New Mexico Public Regulation

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[223] 47 U.S.C. § 153(29) (emphasis added);

[224] *Fourth Report and Order* (CC Order 01-204 in CC Docket 98-147 (*Deployment of Advanced Wireline Services)*) Released April 8, 2001 at ¶ 31

[225] TR., pg. 278, ln. 20-23.

Commission (Utility Case No. 3269), the Commission therein was faced with the same issue of Qwest Corporation's ("Qwest") policy to disconnect its high-speed data service (called "Megabit") from a customer deciding to change to a CLEC for local voice service. The Workshop Facilitator, in a Report on Emerging Services ("Report") released on June 11, 2001, found that the threatened loss of Megabit service from Qwest would not only affect customer decisions about taking voice service from others but their refusal to continue to provide Megabit services in these circumstances imposed "significant barriers to competition..."[228].

> "Qwest should not be considered to be in compliance with public interest requirements as long as it maintains a policy of denying its end users Qwest's own Megabit or xDSL services when it loses a voice customer to a CLEC through line sharing." Id. As set forth in the Commission's Proposed Recommendation on Emerging Services as affirmed on October 16, 2001 ("Recommendation"), Qwest "agreed to continue providing Megabit DSL service on a line-shared basis to current customers who switch to a CLEC providing voice service over UNE-P," undoubtedly because to disconnect such services would be anticompetitive.
> Recommendation at pg. 5.

The Nebraska Public Service Commission's Order on Emerging Services (Application No. C-2537) entered on October 16, 2001 ("NPSC Order"), wherein Qwest not only agreed to continue providing Megabit DSL service on a line-shared basis to current customers who switch to a CLEC providing voice service over UNE-P, but also agreed to "allow a UNE-P customer to request that Qwest provide them DSL Megabit data service only and Qwest [would] provide that service." [229]

In its generic 13 state agreement, SBC incorporated into its standard interconnection agreement language required by several state commissions, including

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[226] TR., pg. 276, ln. 10-19.
[227] DT of Nilson, pg. 112, ln. 18-25,
[228] Report at pg. 4
[229] NPSC Order at pg. 4.

Illinois. This language requires SBC to move an ISP providers service to a new loop within three days of losing the voice services on a line shared line to a CLEC. These states are also working compliance against FCC order 01-26, but are doing so without allowing the ILEC to run amuck, disrupting customer service, attempting winback, and blaming the whole mess on the CLEC as BellSouth has heretofore been allowed to do.

BellSouth relies on FCC Order No. 01-26[230] and this Commission's Order No. PSC-01-0824-FOF-TP issued March 20, 2001 at page 51 stating it is not required to provide service on a UNE-P circuit as its right to **disconnect, coerce, threaten and otherwise winback customers lost to Supra**.

However, BellSouth's reliance is misplaced since the issue of disconnecting already combined network elements, an anticompetitive action in violation of the Act, was not addressed in either of those cited matters. Specifically, the FCC stated: "To the extent that AT&T believes that specific incumbent behavior constrains competition in a manner inconsistent with the Commission's line sharing rules and/or the Act itself, **we encourage AT&T to pursue enforcement action.**"[231]

Any suggestion by BellSouth that Supra can enter into line-splitting agreements with other carriers for the provision of DSL can only be viewed as another example of BellSouth's anticompetitive behavior. Due to the recently disclosed information that BellSouth has over 9,700 DSL ready central offices and remote terminals, and that 65.8% of the loop feeder plant is now fiber based, Supra has discovered that there is no longer a viable third party market for DSL service in Florida that is not based upon BellSouth's

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[230] in CC Docket No. 98-147, 96-98 (Released January 19, 2001) at ¶ 26 regarding *Deployment of Wireline Services Offering Advanced Telecommunications Capability*
[231] FCC Order No. 01-26 at pg. 14, ¶ 26.

Wholesale product. Said wholesale product BellSouth is refusing to provide over UNE-P lines, refusing to move to a new loop as SBC does, and is daily in the process of disconnecting and coercing customers in a blatant win-back attempt. Hence, Supra requests that BellSouth be required to continue to provide data services to customers who currently have such services, after such customers decide to switch to Supra's voice services. To allow BellSouth to disconnect such customers' data services would be anti-competitive, discriminatory and a violation of 251(c)(3).

Basis for the FPSC's Decision:

This Commission first states:

> 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.
>
> However based upon information in BellSouth's possesion that was requested by Supra and denied by the hearing officer in this case, BellSouth has effectively rearranged its network in a fashion that precludes central office based DSL providers from competing against BellSouth without also shouldering the burden of collcoating in 8,700 remote terminals as well. As a result the industry as a whole has accepted BellSouth as a wholesale provider for its services.
>
> This Commission conclusion that line sharing with third party providers is an empty promise as BellSouth refuses to supply the wholesale product over UNE-P lines. This Commission has failed to realize this industry shift becuase Supra's discovery in this regard was denied, and they have not done their own research as previous Staff had done to asses the situation in other states Like Texas, Illinios, Nebraska and New Mexico. As a result, residnetial telephone customers in Florida (Supra's customer base) is being disrupted in Florida in manners not allowed in other states.

Facts and/or legal argument which FPSC failed to consider:

This Commission has not even addressed the issue of disconnection of **existing** services in its response. Instead of dealing with Supra's clearly stated issue that the

disconnection of existing services is illegal, all that is recited is the opening sentence of para 26 of 01-26:

> 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.
> (Order at pg. 135, Emphasis added)

In this finding, the Commission goes far beyond its authority or that of FCC Order 01-26 and wrote a flawed opinion since this Commission has stated, without reservation that BellSouth **"is not required to offer its tariffed xDSL service to Supra customers served via a UNE-P arrangement."** -- this can only refer to the wholesale telecommunications service since the FastAccess product is not tariffed. **"In addition, BellSouth shall not be required to provide its DSL services to Supra's voice customers served via UNE-P."** -- leading to a presumptively valid argument that BellSouth is allowed to disconnect DSL **existing** DSL service to customers when converted to UNE-P.

This is clearly in violation of the FCC intent at the bottom of paragraph 26 of FCC Order 01-26 ("... we encourage AT&T to bring enforcement action."). Yet BellSouth is doing this with impunity today to Supra customers despite the testimony of BellSouth's John Ruscilli in 00731-TP stating that had not and would not occur.

<u>Conclusion:</u>

This Commission must order BellSouth to cease and desist disconnection of **existing DSL service**, regardless of provider, when it loses the voice service to an ALEC

like Supra, regardless of whether service is provisioned as resale or UNE-P. No other solution is warranted.

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

Issue: Should BellSouth be required to provide downloads of RSAG, LFACS, PSIMS and PIC databases without license agreements and without charge?

The Commission decided in its order in this docket to accept BellSouth's argument that a download of the RSAG and LFACS databases is not necessary as well as that any such download shall not be required to be without license agreements and without charge.[232]

While the Commission found that Supra had presented evidence into the record that supported legitimate concerns regarding BellSouth's OSS for accessing CSRs[233], Issue D, the Commission's Order fails to address this finding in its Order relating to this Issue. A review of the record reveals that Supra presented extensive evidence regarding the downtime of BellSouth's ALEC OSS,[234] thousands-of-pages on the discriminatory nature of such OSS in general,[235] as well as that BellSouth's access to these databases provides it with additional information that is not available through the means of access provided to ALECs.[236]

Whereas in Issue D the Commission found that Supra had presented credible evidence regarding the incessant downtime and crashes of BellSouth's ALEC OSS but

[232] Order No. PSC-02-0413-FOF-TP, page 137.
[233] Order No. PSC-02-0413-FOF-TP, pages 45-46.
[234] See, *inter alia*, the Hearing Testimony of Ramos (TR 632-33) and Zejnilovic (TR 1058), Rebuttal Testimony of Ramos and Zejnilovic, and Supra Exhibits AZ 1 and OAR 32.
[235] See, *inter alia,* Rebuttal Testimony of Ramos (RT 48-55, 58-59, 61-65) and Zejnilovic (RT 1-15); Supra Exhibits AZ 1-7, and OAR 3, 30-38, 47, 62, 79-103; and Hearing Testimony of Ramos and Zejnilovic.
[236] See Hearing Testimony of Pate (TR 1234–1236).

that Supra's requested remedy was not proper,[237] this does not appear to be the case in this Issue as the Commission held that the parties were free to negotiate a download of the RSAG and LFACS databases.

As a review of the record reveals that BellSouth has failed to provide any evidence that could lead to a finding that a download of these databases is improper, as long as the record contains competent and substantial evidence in support of Supra's request, this Commission should find in favor of Supra. Considering that the Commission already found that Supra provided credible evidence regarding the incessant downtime of BellSouth's ALEC OSS, that Supra presented thousands-of-pages in testimony and exhibits[238] regarding the discriminatory nature of BellSouth's ALEC OSS, and as BellSouth failed to provide any evidence as to the downtime of BellSouth's OSS, the record clearly indicates that BellSouth is providing discriminatory access to its OSS as well as the RSAG and LFACS databases. As such, Supra's request for downloads of these databases is proper as is Supra's request that such downloads be provided at no charge and without licensing agreements, as this relief is necessary to alleviate the current discrimination experienced by Florida's ALECs.

As such, Supra requests that this Commission reconsider its decision and require BellSouth to provide Supra with a download of the RSAG and LFACS databases with no licensing agreements or charges.

AA. Identification of Order Errors.

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[237] This holding is one of the issues in this motion for Reconsideration.

[238] See, *inter alia,* Rebuttal Testimony of Ramos (RT 48-55, 58-59, 61-65) and Zejnilovic (RT 1-15); Supra Exhibits AZ 1-7, OAR 3, 30-38, 47, 62, 79-103; and Hearing Testimony of Ramos and Zejnilovic.

Issue: When BellSouth rejects or clarifies a Supra order, should BellSouth be required to identify all errors in the order that caused it to be rejected or clarified?

Supra seeks a contractual provision requiring BellSouth to identify all errors in a Supra order that caused it to be rejected or clarified. BellSouth, in arguing against such a provision, alluded to the fact that such action by BellSouth may be technically infeasible. Supra hereby incorporates its' argument regarding Issues S, V and W as if fully set forth herein.

Identifying all errors at once will prevent the need for submitting the order multiple times and reduce cost. Additionally, if any order has been clarified, BellSouth should be required to immediately notify Supra of such clarification in the same manner as BellSouth notifies itself.

The Commission, without pointing to any evidence in the record, simply accepted BellSouth's argument that such an identification is technically infeasible, while failing to respond to thousands-of-pages of testimony and exhibits presented by Supra on the discriminatory nature of BellSouth's ALEC OSS, whereby BellSouth's OSS notifies BellSouth of ordering errors, through its real-time, edit-checking capabilities and BellSouth's ALEC OSS does not do the same for ALECs.[239]

More problematic is the Commission's use of the industry term "service order" when the appropriate industry term should have been "local service request.[240]" As the

[239] See, *inter alia,* Rebuttal Testimony of Ramos (RT 48-55, 58-59, 61-65) and Zejnilovic (RT 1-15); Supra Exhibits AZ 1-7, and OAR 3, 30-38, 47, 62, 79-103; and Hearing Testimony of Ramos and Zejnilovic.

[240] ALECs must submit Local Service Requests ("LSR") that must be processed by the Local Exchange Ordering ("LEO") system and the Local Exchange Service Order Generator ("LESOG"). These two steps are necessary in order to provide edit formatting and translation of the industry standard LSR format into that of a service order format that can be accepted by the Service Order Communications Systems ("SOCS") for further downstream provisioning by the BellSouth legacy OSS. This is not required of the

difference between these two terms is considerable, as **only** ALECs submit LSRs, the Commission's substitution of service order calls into question the Commission's review of this Issue. This substitution changes this Issue from a review of any and all error identification at the ALEC's submission of its LSR into BellSouth's ALEC OSS to a review of the ALEC's service order submitted into BellSouth's OSS, SOCS. As an ALEC LSR must go through LEO and LESOG, whereby the majority of rejections and clarifications occur, a review of an ALEC service order would necessarily exclude this highly relevant and compelling evidence.

As it was BellSouth's claim that such an identification may be technically infeasible, surely BellSouth had the burden to substantiate such a claim. Absent BellSouth meeting its burden, if it was the Commission's belief that such an identification was technically infeasible, the Commission could have used its ability to propound discovery on the parties to obtain evidence to submit into the record. Of course, the record is bare of any such evidence that can support the Commission's conclusion.

As a result of BellSouth's failure to meet its burden of proof, the lack of any competent and substantial evidence in the record to support the Commission's holding, and the likelihood that the Commission reviewed this Issue under the mistaken view point of an ALEC's submission of a service order instead of a local service request, Supra requests that this Commission reconsider its decision and to require BellSouth to provide Supra with the capability to submit orders electronically for all wholesale services and elements.

BellSouth retail interfaces as they were designed to submit the service order in a SOCS compatible format at its initiation.

The Commission's decision is grounded in the erroneous finding that BellSouth does not have to provide Supra nondiscriminatory access to OSS. Furthermore, the Commission, ignoring evidence in the record, stated at page 142 of its' Order that:

> **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.

Again, the FPSC refused to acknowledge Supra's argument and FCC Rules. First, BellSouth did not make an argument regarding technical feasibility. Second, the Commission ignores paragraphs 198 and 199, of the Local Competition Order regarding "technical feasibility." Third, Supra have never made a request for modifications to BellSouth's OSS. As a matter of fact, it has been Supra's position that BellSouth provide direct access as is.

In fact, Supra's Ramos, in response to questions from BellSouth's attorney, testified that Supra wants direct access as is.

> A That's correct. And again, also let me tell you this, sir. In one of the interrogatories that Supra served on BellSouth, Supra asked the question, what systems, or something like that, that a BellSouth service rep uses to convert a Supra customer back to BellSouth, and it said RNS, ROS, DOE, and SONGS.

So if BellSouth is capable of using those systems to convert a Supra customer back to BellSouth, Supra also is capable of using those customers to convert a BellSouth customer. And not only that, we've seen -- I have seen RNS and ROS. I've seen the two systems, so I know how they operate. And I know for sure that to issue a service order is the same thing.

Q Well, Mr. Ramos, just to perhaps bring this line of questioning to an accelerated closure, would Supra be satisfied *780* with an order from this Commission ordering direct access to BellSouth's RNS system as is with no system modifications whatsoever?

A That's correct, and not only RNS. BellSouth has got several other interfaces. A lot of the documents that have been filed in this proceeding regarding BellSouth OSS demonstrate the fact that BellSouth has extensive OSS that it currently uses that Supra has got no access to at all. So my answer should not be limited just to RNS. I understand that "This Old Service Order," that video, is about RNS, but there are several other systems that BellSouth has today.

Q. Okay. All I'm trying to get to is that point that -- and you know, we've been talking about this for quite a while, that BellSouth believes that it understands the capabilities of its systems and that those systems cannot be used to order any unbundled products. But setting that disagreement aside, you would be satisfied with an order from this Commission that simply gave you access without BellSouth on its part having to do anything to change those systems; is that right?

A That's absolutely correct. And if BellSouth complies with that, Supra will be the happiest.

<u>See</u> Hr. Tr. at pg. 779 ln. 8 through pg. 780, ln. 21.

A review of the record reveals that Supra presented thousands-of-pages on the discriminatory nature of BellSouth's ALEC OSS.[241] Specifically, the evidence in the record shows that BellSouth has the capability to identify and correct all errors on its' service orders electronically whereas Supra cannot. See the following Exhibits contained in Supra **Exhibit OAR 86**, BellSouth Training Manual – Preparing to Take Customer Calls, CZ520, Participant Guide, June 2000:

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[241] See, *inter alia,* Rebuttal Testimony of Ramos (RT 48-55, 58-59, 61-65) and Zejnilovic (RT 1-15); Supra Exhibits AZ 1-7, and OAR 3, 30-38, 47, 62, 79-103; and Hearing Testimony of Ramos and Zejnilovic.

(a) How To Correct Service Order Errors, CZ600, Participant Guide, December 2000: **BSTII 000002569 to BSTII 000002585.**

Course Description:

The Purpose of this course is to provide participants with an overview of the various types service order errors, how they affect the provisioning of service and how to correct the errors.

Course Goals

Upon completion of this course, the participants will be able to:

- demonstrate proficiency identifying and accessing service order errors in DOE.
- access the service order error list
- identify the type of error on a service order.
- update an order to correct a service order error.

See **BSTII 000002572**

(b) How To Correct Service Order Errors, CZ600S, Participant Guide, December 2000: **BSTII 000002586 to BSTII 000002606.**

Lesson Overview:

Lesson Description

The Purpose of this course is to provide participants with an overview of the various types service order errors, how they affect the provisioning of service and how to correct the errors.

Upon completion of this course, the participants will be able to:

- demonstrate proficiency identifying and accessing service order errors in SONGS.
- access the service order error list
- identify the type of error on a service order.
- navigate through SOCS to update/correct an order
- update an order to correct a service order error.

See **BSTII 000002592**

None of the OSS provided by BellSouth to ALECs possess the capabilities contained in the Exhibits referenced above. As a matter of fact, ALECs are at the mercy of BellSouth to identify the errors on LSRs, much less service orders.

Supra requests that the Commission reconsider this issue based on the evidence in the record, and find in favor of Supra.

BB. Purging Orders.

Issue: Should BellSouth be allowed to drop or "purge" orders? If so, under what circumstances may BellSouth be allowed to drop or "purge" orders, and what notice should be given, if any?

Supra seeks a contractual provision requiring BellSouth to only drop or purge ALEC LSRs in the same manner in which BellSouth drops or purges its service orders. BellSouth, in arguing against such a provision, argued that any dropped or purged LSRs was the result of Supra's failure to submit complete and correct LSRs and that this Issue should focus on the determination of which party has responsibility to the end-user customer for ordering and the ultimate provisioning of service and not on the issue of discriminatory access.

The Commission, without pointing to any evidence in the record, simply accepted BellSouth's argument and modified this Issue so that the Commission failed to review Supra's Issue and its thousands-of-pages of testimony and exhibits[242] regarding the discriminatory nature of BellSouth's ALEC OSS. A review of the record indicates that BellSouth failed to produce any evidence contrary to Supra's. As Supra is seeking a provision that requires that ALECs' LSRs be treated in accordance with the FCC's standards on nondiscriminatory access, the Commission's failure to address Supra's evidence as well as the Commission's altering of the Issue in accordance with BellSouth's argument has resulted in an improper and unsubstantiated Order.

As it was BellSouth's claim that this Issue involves Supra's failure to submit complete and correct LSRs that results in dropped and purged LSRs, surely BellSouth had the burden to substantiate such a claim. Absent BellSouth meeting its burden, if it was the Commission's belief that this Issue involved the submission of incomplete and

[242] See, *inter alia,* Rebuttal Testimony of Ramos (RT 48-55, 58-59, 61-65) and Zejnilovic (RT 1-15); Supra Exhibits AZ 1-7, OAR 3, 30-38, 47, 62, 79-103; and Hearing Testimony of Ramos and Zejnilovic.

incorrect LSRs, the Commission could have used its ability to propound discovery on the parties to obtain evidence to submit into the record. Of course, the record is bare of any such evidence that can support the Commission's conclusion.

As a result of BellSouth's failure to meet its burden of proof as well as the lack of any competent and substantial evidence in the record to support the Commission's holding, Supra requests that this Commission reconsider its decision and require BellSouth to provide Supra with the capability to submit orders electronically for all wholesale services and elements.

CC. Completion Notices of Manual Orders.

Issue: Should BellSouth be required to provide completion notices for manual orders for the purposes of the interconnection agreement?

Supra seeks a contractual provision requiring BellSouth to provide completion notices for manual orders in the same manner as BellSouth provides itself with completion notices in all cases. BellSouth, in arguing against such a provision, argued that BellSouth could not provide the same kind of completion notification to Supra as when the order is submitted electronically and that BellSouth currently provides information regarding the status of such an order through its CLEC Service Order Tracking System ("CSOTS").

The Commission, without pointing to any evidence in the record, simply accepted BellSouth's argument of technical infeasibility and the availability of the CSOTS alternative. Moreover, the Commission failed to review Supra's argument and its

thousands-of-pages of testimony and exhibits[243] as to the discriminatory nature of BellSouth's ALEC OSS in general as well as with respect to completion notices.

As it was BellSouth's claim of technical infeasibility and acceptable alternative, surely BellSouth had the burden to substantiate such a claim. Absent BellSouth meeting its burden, if it was the Commission's belief that this Supra's request was technically infeasible or that an acceptable alternative was available, the Commission could have used its ability to propound discovery on the parties to obtain evidence to submit into the record. Of course, the record is bare of any such evidence that can support the Commission's conclusion.

As a result of BellSouth's failure to meet its burden of proof as well as the lack of any competent and substantial evidence in the record to support the Commission's holding, Supra requests that this Commission reconsider its decision and require BellSouth to provide Supra with completion notices on manual orders.

DD. Liability in Damages.

> Issue: Should the parties 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?

EE. Specific Performance.

> Issue: Should Supra be able to obtain specific performance as a remedy for BellSouth's breach of contract for purposes of this interconnection agreement?

As the Commission's ruling in Issues DD and EE are based upon the same reasoning, these two Issues will be addressed as together.

[243] See, *inter alia,* Rebuttal Testimony of Ramos (RT 48-55, 58-59, 61-65) and Zejnilovic (RT 1-15); Supra

The Commission adopted the Staff recommendation and used the same reasoning in finding that the Commission should "not impose adoption of such a provision." That finding is premised upon the Commission's belief that the imposition on the parties of these sections is not required to implement an enumerated item under Sections 251 and 252. This reasoning however is inconsistent with the Commission's decision of other issues, including, but not limited to, issues A, B and C. The aforementioned issues are not required by Sections 251 and 252 of the 1996 Act, however, the Commission had made such a ruling when it was convenient for BellSouth.

WHEREFORE, Supra moves for reconsideration of these issues as set forth above.

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Exhibits AZ 1-7, OAR 3, 30-38, 47, 62, 79-103; and Hearing Testimony of Ramos and Zejnilovic.